

**TORTS OUTLINE**  
**Professor Martin**

**Primary concern of tort law:** whether one whose actions harm another should be required to pay compensation for injury.

**FORM 9 - Plaintiff can get into court showing nothing more than negligence, causation, injury**

**LITIGATION**

**PRE - TRIAL**

1. Plaintiff files complaint  
Complaint - document alleging facts of case that justify relief and relief sought.
2. Defendant responds to complaint  
Demurrer - motion to dismiss complaint for failure to state cause of action  
Answer - denies some/all facts in complaint, alleges new facts
3. If either party has conclusive evidence that it is telling the truth may make motion for summary judgment RARE IN TORTS CASES  
on appeal: look at evidence in light most favorable to the party with the burden of proof

**TRIAL**

4. Plaintiff must prove case by preponderance of the evidence (*more probable than not*)  
If jury in equipoise, must find for defendant
5. After plaintiff has presented case, defendant may move for a directed verdict  
Plaintiff's case is so lacking that no reasonable jury could find in his favor.  
insufficient proof of negligence, causation, or injury
6. After defendant's case, either side may move for a directed verdict
7. Judge instructs jury as to what legal rules apply
8. In light of unfavorable verdict, defendant may move for judgment n.o.v.  
granted very rarely
9. Judge enters judgment for successful party

**APPEAL**

10. Appellate ct. determines whether trial judge committed prejudicial error  
gives greater deference to jury's ruling on facts than to judge's decision on law

**DAMAGES**

11. Goal - to restore plaintiff to original condition prior to harm  
tangible - medical expenses, loss of salary  
intangible - pain and suffering, emotional harm
1. Plaintiff may receive injunction or retraction

Negligence	No negligence/no duty
Causation	No proximate cause
Injury	Not foreseeable type of harm

## WHEN SHOULD UNINTENDED INJURY RESULT IN LIABILITY?

Tension between two court fashioned principles: **strict liability** and **negligence**

Liability of a driver suddenly stricken a by an illness rendering unconscious for injury resulting from an accident occurring during that time rests upon principles of negligence

Refusal to apply s/1 to automobile drivers

Does not except from its scope driver who is suddenly stricken w/ unforeseeable illness

**Negligence** - the failure to employ reasonable care - the care which the law's reasonable prudent man should use under the circumstances of a particular case - the failure to act reasonably in the face of a foreseeable risk.

Fundamental issue addressed by a system of tort liability for unintended injury is when losses should be shifted from an injury victim to an injurer or some other source of compensation

## DETERMINING APPROPRIATE STANDARD OF CARE

### STANDARD OF CARE

Negligence is determined by a standard of care. There is a duty to adopt all reasonable precautions to minimize potential injury. An extraordinary event, one that is not reasonably foreseeable, cannot impute negligence.

1. ORDINARY CARE - even if more care takes no effort
2. FORESEEABLE RISK - actually so or should have been
3. SOCIAL UTILITY - how important is the activity? alternatives?

*NEGL  
DUTY  
BREACH  
CAUSE  
INJURY*

### ORDINARY CARE

In general, ordinary care is the kind and degree of care which prudent and cautious men would use such as is required by the exigency of the case, and such as is necessary to guard against probable danger

In the prosecution of a lawful act, an injury, purely accidental not as the result of negligence arises, no action can be supported from an injury arising therefrom

Generally, the standard to be observed is that of ORDINARY not EXTRAORDINARY care

In case of unintentional harm, rule of negligence applies plaintiff must prove defendant's lack of ordinary care

NOT

plaintiff's use of extraordinary care

### FORESEEABLE RISK

Foreseeability of harm influences standard of care

Reasonable care in the use of destructive agency imports a high degree of vigilance

Duty to adopt all reasonable precautions to minimize the resulting perils

When risk of injury is very small, the reasonable person may not take precautions

### SOCIAL UTILITY

If an activity has low or minimal social utility utility may outweigh the risk.

(ex. Cricket field)

US v. Carroll Towing (1947) - Hand Formula, Reasonable person standard

Probability x L (injury) > Burden to defendant

RISK > BURDEN

If risk exceeds burden, reasonable person will take precautions.

*Calculus based upon particular activity (not purpose)*

**Emergency doctrine** - when an actor is faced with a sudden and unexpected circumstance which leaves no time for thought, the actor may not be held negligent if the actions taken are reasonable under the circumstances.

### REASONABLE PERSON

The reasonable person is not infallible. He represents but does not excel the general average of the of the community. The general level of moral judgment of the community. The average man one of ordinary intelligence

#### 1. OBJECTIVE DEFINITION

- A. Community expectations
- B. Externalized from jury and defendant
- C. Focuses on defendant's CONDUCT and RISK created by that conduct
- D. Does not address state of MIND

#### 2. EXCEPTIONS

- A. When a man has a distinct defect of such a nature that all can recognize it as making certain precautions impossible, will not be held answerable for not taking them

#### B. NATURE OF THE DEFECT

must be clear and manifest (e.g. physical handicap)  
if still might and ought to have foreseen danger, may be held liable despite reduced capacity

infant not exempt from adult standard if engaged in adult activity (driving)

#### C. MENTAL INCAPACITY GUIDELINES

- 1. illness affects capacity to understand and appreciate the duty resting on him
- 2. illness does not affect understanding of duty but impairs ability to control instrumentalities in ordinarily prudent manner (car)

- 1. MUST be absence of notice or forewarning to person that he may suddenly be subject to such a type of insanity or mental illness

Restatement - mental incapacity held to reasonable standard

#### D. STUPIDITY

not a defense, stupid people must still be reasonable

#### E. IMPAIRED JUDGMENT

If defendant's awareness of surroundings is impaired, but he can still try to avoid harm by making deliberate and voluntary movements, he will still be held liable.

#### F. INSANITY

not a defense if defendant had forewarning of his tendencies

#### G. CHILDREN

have been held to the standard of conduct reasonable for persons of their age

### ROLES OF JUDGE AND JURY

Judge: decides the existence of duty/proper standard of care as a matter of law

Jury: if judge cannot establish standard of care, jury establishes due care under the circumstances and decides whether defendant exercised due care (determination of fact)

Clear standard of conduct to be laid down by courts as a matter of law

jury should decide reasonableness of non-customary conduct

QUESTION - every situation is unique... what is customary????

Standards established by the courts may be too inflexible and specified cautions must be taken in establishing standards of behaviour which are subject to the equities of every situation.

Negligence should never be taken out of the hands of the jury

however, when defendant fulfills its duty of reasonable care as a matter of law, no question of negligence remains for the jury

Plaintiff will receive summary judgment only in cases where there is no conflict at all in the

*SS - rare \*  
only when no Q. of  
fact - near failure to SDC -  
3*

*if insane/mentally  
deficient not relieved  
from liability under  
reasonable person.*

evidence, and defendant's conduct fell far below any permissible standard of due care.  
Plaintiff very rarely makes and succeeds in motion for summary judgment

### ROLE OF CUSTOM

The reason for the custom having been established must be directly related to preventing injury like P's  
For custom to be compelling test of negligence, jury must find:

1. custom was reasonable
2. adherence was reasonable, disregard unreasonable
3. successfully apply PL > B to the custom

heightened duty of common carriers, Hand formula,  
increases PL half of the equation  
common carriers in better position to spread the costs of injury  
not taking precaution against very small risk still results in the imposition of liability

Unreasonable custom does not preclude a finding of negligence on the part of  
the follower of that custom

industry may use other factors in its Hand formula equation  
may only take precautions based on the PL for which they feel they will be sued

A defendant who can prove that he adhered to a prevailing custom may eliminate what would otherwise be  
considered a jury question by alerting the court to three points

1. there is no alternative safer way
2. unreasonable to know of the existence of alternative
3. the social impact of an expensive alternative

three approaches

① neg. per se  
② presumption of neg. (if no cont. ev)  
③ evidence of neg. (may still find no neg.)

### ROLE OF STATUTES

Statutes dealing with safety give rise to both civil and criminal actions

WHETHER CIVIL PENALTY SHOULD FOLLOW VIOLATION OF FEDERAL CRIMINAL

1. whether plaintiff is one of the class for whose *especial* benefit the statute was enacted
2. whether there is any indication of legislative intent, explicit or implicit either to create such a remedy or to deny one
3. whether it is consistent with the underlying purposes of the legislative scheme to imply such a
4. whether the claim is one traditionally relegated to state law in an area basically the concern of the states

Generally, unexcused statutory violation is negligence per se (CARDOZO) (But this rule has exceptions)

Justification: mitigates damages, allows ct. to decide validity of excuse not jury  
In order to prove negligence per se:

1. Violation must be CAUSAL  
plaintiff must prove in addition to proving violation
2. RISK must be the risk the statute WAS INTENDED TO PREVENT  
(ex. Gorris v. Scott - sheep improperly penned for disease, washing overboard)  
statute must be designed to protect appropriate class of plaintiffs  
harm has to be harm statute was intended to prevent
3. LICENSING - unrelated to standard of care, irrelevant to tort claim  
unskilled practice of medicine = neg. with or without license

if statute intent then fails to est. SOC. allowan to circum

Compliance with the law does not preclude a finding of negligence

Hubbard-Hall - proper warning but migrant workers couldn't read it (class of plaintiffs)

In unusual circumstances, lack of obedience to general rule of conduct is not negligence per se  
Justification: don't want to discount specific excusatory circumstances

Restatement - unexcused violation of statute not neg. per se.

legislature gave criminal penalty b/c did not want victim to have civil redress

Viable excuses for statutory violation

4. emergency
5. greater risk of harm associated with compliance
6. lack of knowledge of violation (did not know headlight was out)
7. incapacity (children)
8. inability to comply with the statute (blizzard, RR can't keep tracks clear)

#### PROOF OF NEGLIGENCE

Major practical problem: many times we don't know exactly what happened  
in most instances, if plaintiff does not offer proof of negligence he suffers directed verdict  
doctrines constructed to combat this seeming unfairness

#### ACTUAL NOTICE

If plaintiff can show that defendant had actual notice of dangerous condition and failed to ameliorate it  
he can recover

#### CONSTRUCTIVE NOTICE

prima facie case of negligence by showing defendant had constructive notice of dangerous condition  
**Constructive notice** - defect must be visible and apparent and exist for a sufficient  
length of time prior to the accident

No negligence will be presumed if plaintiff cannot show defendant had either actual or constructive notice

#### RES IPSA LOQUITUR

Three conditions to apply res ipsa loquitur doctrine:

1. accident would not normally occur in the absence of negligence
2. accident caused by instrumentality in exclusive control of the defendant
3. accident not due to voluntary contributory act of plaintiff

NY - inference of negligence can be made from the facts

allows plaintiff w/o proof to get to the jury with only circumstantial evidence  
but plaintiff still has burden to show negligence

jury still find that defendant was NOT negligent even if he does not present his own evidence

CA - res ipsa = presumption of negligence

Shifts burden of proof to defendant to exonerate himself

impose burden on party who has access to information - equitable

Unconscious plaintiff - Ybarra v. Spangard (1944) - failure of unconscious plaintiff to identify exact  
defendant for condition 2. does not bar res ipsa action.

rely on fact that it is up to the defendant to exonerate himself, not up to the plaintiff to prove  
negligence

If plaintiff can not identify which defendant was responsible, must sue all of them to recover  
otherwise sued defendants will implicate defendants who are not sued  
mainly addressed in discovery - able to figure out who had exclusive control

#### DEFENSES

9. accident frequently happens without negligence
10. defendant did not have exclusive control over instrumentality
11. comparative negligence - use as % of fault  
(contradicts condition three of res ipsa)

#### MEDICAL MALPRACTICE - A SPECIAL CASE

Impossible to have both res ipsa and expert testimony

Medical Malpractice

#### STANDARD OF CARE

Nowadays statewide standard of care as opposed to local or national  
Governs standard by which 'expert testimony' will be allowed

#### RATIONALE

1. increased communication between localities  
publications  
conferences  
referrals
2. conspiracy of silence in small communities  
give plaintiff greater opportunity to make his case
3. not nationwide because of varying access to resources among states  
economic considerations
4. not nationwide because of varying types of injuries to be found in  
different areas of the country (frostbite in Alaska)

**Common knowledge exception** - if jury could understand facts and applicable  
standard w/o expert guidance, they ct. may waive the expert testimony requirement

#### PATIENT v. PROFESSIONAL RULE

**Patient rule** - MD's duty to disclose measured by pt's need to have access to all relevant  
info. to make truly informed decision concerning proposed procedure

#### PATIENT MUST PROVE

1. existence of risk unknown to pt.
2. MD's failure to disclose risk
3. disclosure would lead a reasonable person in the plaintiff's position  
to reject procedure
4. injury

#### EXCEPTIONS

disclosure has detrimental effect  
pt. incapable of consent (mental deficient, infant...)  
emergency situation makes obtaining consent impractical  
risk known to pt. or obvious  
procedure simple, risks remote  
MD unaware, should not have been aware of the risk

**objective test** - MAJORITY significance reasonable person would give to undisclosed  
information

may protect physicians who violate patient's rights under the rule  
takes away patient autonomy that was given by rule in the first place

**subjective test** - MINORITY whether particular patient would have considered undisclosed  
information relevant to the decision whether or not to pursue course of treatment  
hindsight is 20/20

**Professional rule** - MD's duty to disclose measured by whether MD thinks pt. should  
know of the risks - discretionary rule.

### THE DUTY REQUIREMENT - PHYSICAL INJURY

#### OBLIGATION TO OTHERS

Historically, special relationships were the basis for imposing duties of care  
failure to establish relationship was often fatal to plaintiff's case

1. common carriers to their patrons  
contractual obligation
2. employers to their employees  
issue of control - which deprives others of normal opportunity for protection
3. innkeepers to their patrons (restaurant owners)  
implied contract
4. jailers to their prisoners  
issue of control
5. (maritime law) masters to their crewmen
6. possessor of land open to the public  
issue of control
7. school to its pupils

#### DUTY TO RESCUE/PREVENT WRONG

**Restatement (second) - section 321**

One who has done an act and subsequently realizes or should realize that it has created an unreasonable risk of causing physical harm to another is under a duty to exercise due care to prevent the risk from occurring even though at the time the actor had no reason to believe that his act would create such a risk.

**Restatement (second) - section 322**

If the actor knows or has reason to know that by his conduct whether tortious or innocent, he has caused such bodily harm to another as to make him helpless and in danger of further harm the actor is under a duty to exercise reasonable care to prevent such further harm

**Restatement (second) - section 326**

One who intentionally prevents a third person from giving to another aid necessary to prevent physical harm to him is subject to liability

The law does not impose a duty to prevent wrong to another

#### ARGUMENT FOR IMPOSING LEGAL DUTY TO RESCUE

1. distinction between **allowing** people to act freely and **entitling** them to do so
2. Hand formula does not permit person to place special importance on the preservation of his own safety

Make it criminal

3. criminal legislation gives notice to public so that retroactive abolition of no-duty rule
4. criminal statute unlikely to interdict conduct which people cannot forego in everyday affairs

#### ARGUMENT AGAINST IMPOSING LEGAL DUTY TO RESCUE

1. Impossible to confine scope of duty to rescue rule  
not giving \$ to charity to feed starving children = breach of duty?
2. rule requires surgeon to travel at great personal expense to perform life-saving operation in India
3. allowing forced exchanges blurs the distinction btw liberty and morality  
no act is moral unless performed w/o external compulsion  
"legalizing" behaviour reduces morality  
undue emphasis on conformity to external standards = loss of liberty

In the absence of a special relationship, superior knowledge does not imply a duty to warn

Voluntary initiation of help implies duty to leave victim in no worse off position than he was prior to help.

*Once begin rescue, have a duty to use reasonable care.*

**Restatement (second) - section 324**

One who being under no duty to do so, takes charge of another who is helpless is subject to liability caused

- (a) by the failure of the actor to exercise reasonable care to secure the safety of the other while w/i the actor's charge
- (b) by the actor's discontinuing his aid or protection if by so doing he leaves the other in a worse position than when the actor took charge of him

**privity requirements** - ct has responsibility to fix orbit duty to limit legal consequences of wrongs to a controllable degree and protect against crushing exposure to liability

**time limitations**

- 12. closure to tort liability
- 13. lets people get on with their lives
- 14. prevents overwhelming number of lawsuits
- 15. proof problems as time passes

**OBLIGATIONS TO CONTROL THE CONDUCT OF OTHERS**

Leaving the keys in the car in a bad neighborhood

**Imposition of duty**

- 1. imposes burden on system to decide if it is reasonable
- 2. imposes proof problems on courts
- 3. significant new liability rules lead to higher insurance rates

Imposition of duty on social hosts

PROBLEM - judicial interference in private realm

Tarasoff v. Regents of U of CA (1976) - determining whether duty to third party exists:

- 1. foreseeability of harm to plaintiff  
(custom can help - w/r/t predictability)
- 2. degree of certainty that plaintiff suffered injury
- 3. closeness of connection btw defendant's conduct and plaintiff's injury
- 4. moral blame attached to the defendant's conduct
- 5. the policy of preventing future harm
- 6. extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach
- 7. availability, cost and prevalence of insurance for the risk involved

**Difference in imposition of duty on bartender or MD**

- 1. bartender has no special relationship
- 2. bartender probably less well able to predict harm
- 3. imposition of duty on therapists impairs the therapeutic relationship
- 4. importance of privacy to relationship

**TREND:** Therapists only liable when pt. communicates threat of physical violence against *reasonably identifiable* victim or victims

**Restatement (second) section 315** - a duty of care may arise from either

- a) a special relation between the actor and the third person which imposes a duty upon the actor to control the third person's conduct
- b) a special relation between the actor and the other which gives to the other a right of protection

**Restatement (second) section 390 - Tort of Negligent Entrustment** - One who supplies directly or





through a 3rd party a chattel for the use of another whom the supplier knows or has reason to know to be likely...to use it in a manner involving unreasonable risk of physical harm to himself and to others whom the supplier should expect to share in or be endangered by its use, is subject to liability for physical harm resulting to them

**comment A** - The rule stated applies to anyone who supplies a chattel for the use of another. It applies to sellers, lessors, donor, or lenders, and to all kinds of bailors, irrespective of whether bailment is gratuitous or for a consideration

Issue for jury: whether entrustor knew or should have known some reason why entrusting the item to another was foolish or negligent

Some courts - further redefinition of the tort of negligent entrustment to include provision of funds to purchase chattel.

## LANDOWNERS AND OCCUPIERS

Distinguish btw duty owed to licensee, invitee, and trespasser

**Restatement (second)** section 330 - **Licensee** - person who is privileged to enter or remain on land only by virtue of the possessor's consent

*Duty owed to a licensee -*

1. to avoid willfully, wantonly or intentionally injuring ,
2. to refrain from active or affirmative negligence and
3. to warn of any trap or pitfall actually known which might be expected to cause harm to licensee despite her exercise of reasonable care.

COURTS CLASSIFY SOCIAL GUESTS AS LICENSEES - guest expected to take the premises as the possessor himself uses them.

**Restatement (second)** section 332

- (1) **Invitee** - either a public invitee or a business visitor
- (2) **Public invitee** - person invited to enter or remain on land as a member of the public for a purpose for which the land is held open to the public.
- (1) **Business visitor** - person invited to enter or remain on land for a purpose directly or indirectly connected with business dealings with the possessor of the land.

*Duty owed to an invitee* - to exercise reasonable care to protect them against a danger which the occupier knows of or by the exercise of reasonable care would discover and should understand as involving an unreasonable risk of harm to invitees. The occupier is also liable to the invitee if the occupier should expect that they will not discover or realize the danger or will fail to protect themselves against it .

**Restatement (second)** section 329 - **Trespasser** - person who enters or remains upon land in the possession of another w/o privilege to do so created by the possessor's consent or otherwise

*Duty owed to trespasser* - owner not liable for physical harm caused by failure to exercise reasonable care

- (a) to put the land in a condition reasonably safe for their reception, or
- (b) to carry on his activities so as not to endanger them.

Very difficult to speak of wilfull or wanton conduct w/r/t trespasser you don't know is there

**Restatement (second)** section 339 - A possessor of land is subject to liability for physical harm to children trespassing thereon caused by an artificial condition upon the land if

- a) the place where the condition exists is one upon which the possessor knows or has reason to know that children are likely to trespass, and

- b) the condition is one of which the possessor knows or has reason to know and which he realizes or should realize will involve an unreasonable risk of death or serious bodily harm to such children, and
- c) the children b/c of their youth do not discover the condition or realize the risk involved in intermeddling with it or in coming w/i the area made dangerous by it, and
- a) the utility to the possessor of maintaining the condition and the burden of eliminating the danger are slight as compared with the risk to children involved, and
- e) the possessor fails to exercise reasonable care to eliminate the danger or otherwise protect kids

**attractive nuisance doctrine** - covers injuries to children who are unaware, b/c of their immaturity, of risks associated with a land occupier's property

**Plaintiff's argument when status works against him:**

Some courts - object to categorizations of injured party being relevant

**RATIONALE** - reasonable people don't vary conduct on this basis

propose new test: in management of property did the defendant act as a reasonable person in view of the probability of injuries to others?

**PROBLEM** - trespassers protected even though unauthorized to be on land

#### **CONTROLLING CONDUCT ON PREMISES**

**Operator's duty:** to use reasonable care to deter crime (PLB)

jury's job - weigh the likelihood of the risk against the financial and practical feasibility of the means to meet that risk. -- may involve making evaluative policy judgment instead of merely trying the facts

#### **LANDLORD TENANT**

**old rule** - a landlord was liable in tort only if the injury was attributable to

1. a hidden danger in the premises of which the landlord but not the tenant was aware
2. premises leased for public use
3. premises retained under the landlord's control, such as common stairways, or
4. premises negligently repaired by the landlord

**new rule** - a landlord must act as a reasonable person (PLB) under all of the circumstances including:

1. the likelihood of injury to others
2. the probable seriousness of such injuries, and
3. the burden of reducing or avoiding the risk

NOT 100% UNIVERSAL

#### **GOVERNMENTAL ENTITIES**

##### **LIABILITY FOR FAILURE TO PROVIDE ADEQUATE POLICE PROTECTION**

**fear of imposing liability**

1. limited municipal resources
2. unlimited liability

*when will the police be held liable for failure to protect?*

1. no reliance -- no duty to protect. For judiciary to create this duty, it would be dictating the allocation of public funds.
2. Reliance on police protection not enough to impose duty to protect - must be induced reliance. quid pro quo (order of protection, informant, witness protection)
3. **911 call** - to create special relationship requiring duty:
  1. direct communication btw operator and victim
  2. must be reliance

*imposing liability on schools*

Schools have duty to protect against physical harm but cannot be held liable for educational malpractice

1. courts unwilling to interfere with the administration of schools
2. cannot prove standard of care
3. difficult to measure injury
4. difficult to establish causation
5. imposes too great a burden on the school system

**Doctrine of qualified immunity** - (governmental planning commissions) reasonably review options, duty to follow through on judgments in timely fashion.

Court may find breach of duty if

1. studies plainly inadequate
2. no reasonable basis for plan
3. unjustifiable delays in implementing the plan
4. awareness of danger and failure to take action

**Federal Tort Claims Act** - The United States can be treated as a private person in negligence suits involving: section 2680 (a) Any claim based upon an act or omission of an employee of the Government, exercising due care in the execution of a statute or regulation, whether or not such statute or regulation be valid, or perform a *discretionary function* or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused

In order for discretionary function exception to apply:

1. conduct must involve an element of judgment or choice (no prescribed actions)
2. the judgment is of the kind the discretionary exception was meant to shield  
exception designed to protect only gov't decisions based on public policy  
risk-benefit analysis = discretionary function

## THE DUTY REQUIREMENT: NON-PHYSICAL HARM

**EMOTIONAL HARM - Judicially fashioned tests to limit liability**

To establish claims must show: (limit = 'fright cases')

1. plaintiff was within the *zone of danger* of physical impact
2. plaintiff reasonably feared for her own safety
3. plaintiff suffered severe emotional distress with physical manifestations

Only want to allow recovery for emotional injury including fear

Exceptions to zone of danger rule:

duty to transmit truthful information regarding death of a relative  
mishandling of corpse

takes plaintiff's susceptibility to traumatization into account

Policy considerations in granting relief under zone of danger rule:

1. magnitude of potential class of plaintiffs (floodgates)
2. compromise the availability of affordable med./dental insurance, care, prescription drugs
3. likely to reach inconsistent results
4. coffers of defendants and insurers would be emptied

possibility of leaving inadequate compensation for those actually in the zone of danger

Rationale for rejecting zone of danger limitation in favor of foreseeability

1. foreseeability provides adequate protection against floodgates  
emotional distress reasonably foreseeable to the ordinarily sensitive plaintiff
2. emotional vulnerability of class of plaintiffs in these cases makes emotional harm foreseeable
3. foreseeability effective limit b/c will not hold defendants liable for that which cannot foresee

Testing for foreseeability of emotional harm - Dillon v. Legg (CALIFORNIA)

1. plaintiff's physical proximity to scene of accident

2. whether the shock resulted from sensory and contemporaneous observance of the accident
  3. whether plaintiff and victim were closely related
- additional - (4. severe emotional harm must have been caused in actuality)

Boysun v. Sanperi - allows recovery for indirect psychic injuries when:

1. plaintiff in the zone of danger
2. injuries resulted from contemporaneous observance of serious phys. injuries or death

Over the years, slow phasing out of the requirement of physical consequences

### **WRONGFUL BIRTH**

Necessary for plaintiff to show that had the defendant not been negligent, the plaintiff would have been aware of the possibility that the child would have been defective and consequently, been conceived or the pregnancy have been terminated.

Obvious proof problem: easy to argue after the fact!!!

Arguments for disallowing cause of action

1. fraudulent claims - retrospective and subjective testimony
2. unfairly burdens OB/GYN's
  - results in increased abortions - risk management
  - increased costs of prenatal care - more testing will be done to obtain consent
  - COUNTER - encourages good medicine by denying immunity
3. negative impact action has on child who is subject of wrongful birth suit
4. negative impact on the disabled, physically impaired
5. speculative damages

Reasons for allowing the cause of action

1. Likening of cause to medical malpractice action
2. Basic rule of compensation to put plaintiff in same position as before the negligence
3. Failure to recognize claim impinges on abortion rights

### **ECONOMIC HARM**

1. Defendant negligently provides service
2. Defendant negligently causes physical harm to third party which causes plaintiff economic harm

Criteria for imposing liability on third party

1. awareness by maker of statement that it is to be used for a particular purpose
2. reliance by known party on the statement in furtherance of purpose
3. conduct by maker of statement linking it to relying party and evincing understanding of reliance

Protects against unlimited liability by defining narrow class of plaintiffs

NOT WIDELY HELD - trend is toward foreseeability

Defendant who has breached a duty of care to the risk of economic injury to particularly foreseeable plaintiffs may be held liable for actual economic losses that are proximately caused by this breach of duty. (To recover, plaintiff must show foreseeability of loss)

Courts may distinguish between generally foreseeable and particularly foreseeable class of plaintiffs remoteness of risk

Doesn't always work, but it is the only thing we have

### **CAUSATION**

#### **CAUSE IN FACT**

Courts have denied liability when it is clear that the connection btw neg. and harm missing

adoption of **more-probable-than-not** approach

if 2 or more causes exist and defendant only liable for one

injured must establish that one for which defendant is responsible more-probably-than-not is the cause in fact

not necessary to eliminate other causes with absolute certainty

PROBLEM: overdeterrence, overcompensation

60 injured, 15 would have been, liability for 60 not 45

plaintiff has burden of showing causation rule is otherwise in unexcused statutory violation

### LOSS OF OPPORTUNITY OF LIFE

Awards compensation to plaintiff who had less than a 50% chance of survival in proportion to the chance attacks more-probable-than-not standard

b/c grants 100% recovery to plaintiff who establishes more than 50% opportunity of not suffering harm

approach does not and cannot yield absolute truth

plaintiff w/ 99% chance still may die

Restatement 2d justifies recovery for less than 50%

courts have held that plaintiff may show that the defendant's conduct was a "substantial factor" in producing harm but not more probably than not and still recover

Fair to impose on physicians

patients pay for treatment whether 7 or 97% chance it will work

failure to preserve life = breach of understanding btw patient and physician

appropriate to subject to liability if fail to measure up to the standard of care for which they are paid to observe

Arguments against imposition

Unfair to impose on physicians

leads to overcompensation

leads to costly practice of defensive medicine - societal implications

this sort of liability is not imposed on any other profession

Impact on tort law

does not serve deterrence function - defensive medicine instead

transforms from compensatory system to payout scheme based on probability

does away with need for cause-in-fact showing by plaintiff

awards damages for speculative cause of injury

speculative b/c forces evaluation of what *would* have happened

Question of recovery has not been decided for non-fatal injuries (comatose)

### ENHANCED RISK

Elements of claim:

1. continued medical surveillance
2. emotional distress \*
3. enhanced risk

To recover for 1. or 2. only requires a showing that defendant reasonably probably caused the risk. Only 3. requires more-probable-than-not showing

Majority - In order for plaintiff to recover anything at all, must present evidence of physical manifestation of condition caused by defendant

some states go so far to allow chromosomal breakage as satisfactory

When plaintiff can recover for continued medical surveillance (must prove)

1. significance and extent of exposure
2. toxicity of chemical (asbestos)
3. seriousness of impending disease (cancer)
4. increased probability in contracting condition as a result of exposure
5. importance/value of early diagnosis

Recovery for emotional distress

1. plaintiff has current condition attributable to defendant's negligence  
does away with requirement to show that emotional distress resulted in phys. manifest.

2. reasonable medical probability that plaintiff will contract disease greater than 50%

Reasons for disallowing claims for emotional distress (in the absence of physical manifestations)

1. concern over fraudulent claims
2. likely to be evanescent, temporary and relatively harmless  
compensating would unduly burden both courts and defendants

Recovery for enhanced risk

Not allowing recovery for plaintiff who has less than 50% chance of contracting disease

1. when proof of likelihood of future disease is speculative, burden of calculating fair compensation is high
2. damages will be given for diseases that never occur (overcompensation)  
high social costs - insurance premiums, higher product costs
3. burden of litigating pending claims (presumably numerous) increased w/ introduction of damages for relatively unquantified risk of future disease
4. Removal of statute of limitations / single controversy doctrine as bar to future litigation
5. interference w/ administration of law by using conjecture as measure of damages

Allowing recovery for enhanced risk when plaintiff has less than 50% chance of contracting disease

1. deferral of claim leads to defense that injury due to later intervening cause  
longer time it takes to advance claim more likely to lose due to # intervening causes
2. enhances tort law capacity to deter improper use of toxic substances
3. rule of reasonable medical probability = artificial all-or-nothing rule  
rejects claims for those w/ 48% chance, honors for those w/ 51% chance
4. credits jury with ability to assess damages
5. necessitates that plaintiff sue once and for all and does not attempt to recover in the case contracts the disease  
judicial economy  
BUT plaintiff may find undercompensated when disease strikes

Injuries stemming from fear of contracting illness after exposure to disease-causing agent may present compensable damages

injuries stemming from fear of initial exposure do not

#### **JOINT AND SEVERAL LIABILITY**

**Restatement** section 431 - an action is a legal cause of harm if it is a *substantial factor* of the harm (using the "but for" test)

**Restatement** section 432 - when 2 sufficient forces involved in causing harm, each action may be a *substantial factor* despite the "but for" test

*Substantial factor* - either cause is sufficient to cause the same harm without the other

Usually plaintiff bears risk of harm caused by non-responsible parties

(three-year-old, lightning) except when multiple causes involved

**Restatement** - defendant will be held liable when other cause was non-negligent party (ex. defendant sets fire and lightning causes fire)

Plaintiff may sue multiple defendants together or separately and may recover the full extent of his harm against either one or both

does not matter if one defendant is insolvent  
perceived as unfair

has been abolished by some states entirely or just for non-economic harm

CA defendant less than 50% responsible liable for his share only of p&s

FIRE examples -

A and B independently negligently set fires which combine and burn C's house down

A and B will be held joint and severally liable

- Both A and B are held to be causes in fact of the resulting harm
- A negligently and B non-negligently set fires which combine and burn C's house down
  - A will be held liable for the entire amount
- A negligently sets a fire the other is started by lightening
  - A will be held liable for the entire amount

Joint and Several liability is imposed when:

1. multiple tortfeasors acting in concert
2. tortfeasors not acting in concert but no way to determine who caused what part of injury

Successive and Independent liability:

- imposed when multiple tortfeasors not acting in concert
  - initial tortfeasor may be held liable for ENTIRE damage proximately caused by his act
  - successive tortfeasor liable only for SEPARATE injury or AGGRAVATION

Joint and Several imposes burden of proof on the defendants to absolve themselves from liability

1. fair when # potential defendants is small
  - increased probability that one of them did it
  - they are in a better position than the plaintiff to know what happened
2. unfair when large # potential defendants
  - decreased probability that any one of them did it
  - they are in no better position than the plaintiff to know what happened
  - need to find alternative way to impose liability

**Market share apportionment**

Plaintiff cannot say more likely than not which defendant is responsible for their injuries, lg. # defendants

- DES cases - defendants = drug companies
  - theory that liability of defendant will work out roughly to = the injuries actually caused
  - measured by the amount of risk of injury each defendant created to the pub. at large
  - no exculpation for defendant who, apparently did not cause plaintiff's injuries if he is part of the market

Liability is several only and should not be inflated when all participants in the market are not before the court in a particular case.

Defendants do not pay 100% of the plaintiff's damages, only pay for their individual share as determined by the amount of DES they supplied in the market  
 \* Plaintiff always precluded from 100% recovery

Plaintiff may sue only one manufacturer if they can prove the manufacture put the pill causing their injuries on the market and recover 100% of their damages

DES standard not extended to asbestos cases

fungibility required - all manufacturers made similar products by the same formula

Most vaccine cases reject market share liability

1. defect related to manner in which vaccine was produced - not designed
2. do not have long latency periods
3. public policy goals would be subverted by imposing liability on vaccine manufacturers to escape liability might stop making vital vaccines

## **ENVIRONMENTAL HARM**

Three critical problems

1. Problem of identification
  - toxic substances tend to cause disease which has latency period rather than immediate consequences
  - hard to prove that exposure rather than everyday risks of living caused condition
  - ISSUE: cause-in-fact
2. Problem of boundaries
  - boundaries of area and time hard to determine
  - diseases to second and third generations of contaminated parents

in utero exposure  
extent of harm unpredictable b/c need for post-exposure treatment may be unpredictable  
need for post-exposure treatment is extensive  
wide-ranging array of disorders

3. Problem of source  
environmental harm is a consequence of an aggregate risk created by a considerable #

### PROXIMATE CAUSE

Legal causation - essential element of plaintiff's right to recover  
frequent charge in directed verdict motion that plaintiff has failed to show that defendant's actions were a proximate cause of his injuries  
Usually raised when something unusual has contributed either to

1. the occurrence of the harm
2. the severity of the harm

### TYPES OF PROXIMATE CAUSES

1. Thin-skulled plaintiff  
idiosyncratic reactions
2. "Add-on harms" - aggravation  
liability for actions of third party rendering aid  
defective crutch
3. Unexpected harm to fully expected victim
  - a) MINORITY - doesn't matter if type was expected as long as defendant's actions were direct cause of harm
  - b) MAJORITY - type of harm caused must be foreseeable
4. Intervening (usually wrong) behavior

### UNEXPECTED HARM

#### Type v. extent of harm

In general, defendants will be held liable for the entire EXTENT of harm he caused if it falls within a foreseeable TYPE of harm

Most cases are argued by stretching the boundaries within a given type of harm

Plaintiff will argue that harm caused was of a given type merely an extension of it

Defendant will argue that the harm caused was of a different type

types of harm: personal injury (broad) broken leg (narrow)  
property damage (broad) bent bulkheads (narrow)  
economic harm (broad) loss of a day's wages (narrow)  
Narrow type is an extent of broad

### THIN-SKULLED PLAINTIFF

If it is determined that the plaintiff's pre-existing condition is worsened or brought on by a precipitating factor caused by the defendant, plaintiff may recover.

Defendant must take his plaintiff as he finds her

If pre-existing condition was bound to worsen without the defendant's action, damages may be mitigated.

Arguments against thin-skull:

1. Defendant cannot take precautions to protect against the risk  
counter - defendant must take all precautions against all risks
2. Plaintiff is in the best position to protect against the risk



counter - defendant is negligent. He should not be excused from the consequences of his negligence, must take responsibility.

#### LIABILITY FOR THIRD PERSON RENDERING AID

Pridham - defendant liable for further injuries to plaintiff in the "normal efforts of third person in rendering aid... which the other's injury reasonably requires irrespective of whether such acts are done in a proper or negligent manner.

defendant's negligence is proximate cause for any injury plaintiff sustains even as a result of negligently rendered medical services

Special risk test (majority) - if defendant created the special risk responsible for plaintiff's further harm he will be held liable for that further harm

ex. if defendant so injured plaintiff that it was necessary for the ambulance taking him to the hospital to speed, he will be liable for accident caused as a result of that speeding

ex. if doctor performing plaintiff's operation is drunk, defendant not held liable

Place to cut off liability = where there is an intervening cause

#### DETERMINATION OF DEFENDANT'S LIABILITY FOR UNEXPECTED HARM

1. DIRECT CAUSES - (Polemis) Defendant will be held liable for all harm (expected or not) that his actions directly cause.  
Problem: does not take type of harm distinction into account
2. FORESEEABILITY - (Wagon Mound) Defendant will only held liable for the damage caused within a foreseeable type of harm. Any damage of a non-foreseeable type becomes a non-compensable loss to be borne by the plaintiff  
The essential factor in determining liability is whether the damage is of such a kind that a reasonable man should have foreseen  
Would be wrong to allow defendant to escape liability however indirect the damage if he foresaw or could reasonably foresee the intervening events which led to its being done.  
Key question - what makes us say defendant was negligent??

#### UNEXPECTED MANNER

Defendant's argument: although the harm that occurred was the sort that might have been expected, the manner of its occurrence justifies exculpating the defendant.

If the risk created by the defendant that makes us say that he was negligent and this risk happens, then the defendant may be held liable despite and intervening cause

If defendant should have foreseen the intervening cause or the type of harm, defendant's negligence is the proximate cause (Hoboes' Hollow, risk = criminal activity)

If the intervenor was grossly negligent (willful) and this was not reasonably foreseeable to the defendant, the intervenor's act supersedes the defendant's negligence and exempts him from

liability

Restatement section 435 - (1) If the actor's conduct is a substantial factor in bringing about harm to another, that fact that the actor neither foresaw nor should have foreseen the extent of the harm or the manner in which it occurred does not prevent him from being liable

(2) The actor's conduct may be held not to be a legal cause of harm to another where after the event and looking back from the harm to the actor's negligent conduct it appears to the court highly extraordinary that it should have brought about the harm.

#### UNEXPECTED VICTIM

(Palsgraf) The orbit of danger as disclosed to the eye of reasonable vigilance would be the orbit of duty  
Risk reasonably to be perceived defines the duty to be obeyed

Plaintiff must be within the zone-of-apprehension for defendant to be held liable  
Defendant only liable to plaintiff to whom conduct imposed foreseeable risk  
DISSENT - "Everyone owes to the world at large the duty of refraining from those acts that may unreasonably threaten the safety of others"  
negligence imports liability regardless of whether plaintiff is foreseeable  
recognition of remoteness considerations when determining proximate cause  
direct connection btw cause and effect w/o too many intervening causes  
remoteness in time and space

Some courts have extended the notion of zone-of-apprehension to include manner and extent of harm

#### RESCUE

Danger invites rescue. The cry of distress is the summons to relief.

Rescue is natural and probable

Defendant should be held liable for injury to victim's rescuer b/c nature of rescue makes him a foreseeable plaintiff

Rescue must be:

1. spontaneous - spur of the moment
2. instantaneous - no time to weigh risks, evaluate safety concerns

A deliberated, planned rescue will not result in defendant being liable for injuries therein

rescuer able to appreciate risks and runs them anyway - defendant not liable  
(ex. refusal to extend rescuer doctrine to son who is injured after donating kidney to his father)

#### FIRE RULE

If defendant negligently causes a fire he will not be held liable for damage caused by the spread of that fire if such spreading is due to "a concurrence of accidental circumstances, such as degree of heat, state of the atmosphere, condition and materials of the adjoining structures and the direction of the wind.

#### KINSMAN

NO reason why an actor engaging in conduct which entails a large risk of small damage and a small risk of to other and greater damage should be relieved b/c the chance of its occurrence may not have been large enough to require the exercise of care

Where the damages result from the same physical forces whose existence required the exercise of greater care than was displayed and were of the same general sort that was expectable unforeseeability of the exact developments and of the extent of the loss will not limit liability.

Court cut the chain of causation at economic harm

## DEFENSES

#### The plaintiff's fault

#### CONTRIBUTORY NEGLIGENCE

Elements of defense at common law parallel those of basic negligence claim

here, duty is owed to one's self

conduct must be actual cause of plaintiff's harm

conduct must be proximate cause of plaintiff's harm

Many states have switched burden of proof to defendant w/r/t contributory negligence

Brown v. Kendall - plaintiff had to prove freedom from contributory negligence

Cowan v. Doering - ct. refused to apply reasonable person standard to mental patient adhering to a reasonable person's standard of self-care, will hold plaintiff responsible for the consequences of conduct that is unreasonable in light of plaintiff's capacity

#### STATUTES

Small number of cases in which statutory command understood to be an effort to protect some group against its own inability to protect itself. In these cases, ct. has disregarded the contributory negligence of some member of that group.

Van Gaasbeck v. Webatuck Central School district - ct. interprets statute as designed to protect school children against their own negligence, refusal to consider contributory negligence defense

Feisthamel v. State - trial accepts contributory negligence defense

Appeal - majority concluded statute not enacted for protection of definite class of persons from hazard which they themselves are incapable of avoiding

Dissent - purpose = protection of glass door users from collision w/ glass

#### RECKLESSNESS

Virtually all courts have decided that contributory negligence should be defense ONLY in cases of neg.

Restatement (Second) section 500 - actor's conduct is reckless if he does an act knowing or having reason to know of facts which would lead reasonable men to realize not only that the conduct creates an unreasonable risk of physical harm but also that such risk is substantially greater than that which makes the conduct negligent

#### LAST CLEAR CHANCE

Plaintiff claims that even though he was careless, the defendant had, but failed to utilize, the "last clear chance" to avoid injury to the plaintiff (If proven, defendant held liable for entire amount)

1. plaintiff in position of "helpless peril" no longer able to take protective steps  
defendant either knew or should have known of plaintiff's plight  
NY - has the should have known standard  
some jurisdictions only invoke the bar to the defense if defendant actually knew
1. plaintiff oblivious to danger but could, if behaving reasonably, become aware of the danger and avoid harm up to the last minute

Similar situation: both plaintiff and defendant are inattentive  
somehow the doctrine was invoked in this situation in MO.

## IMPUTING CONTRIBUTORY NEGLIGENCE

Effect: to narrow liability

Two significant manifestations:

1. imputing neg. of driver or engineer to all passengers in the vehicle  
prevents suits against other driver whose neg. contributed to the collision  
by the passengers
2. imputing a parent's negligence in failure to protect to a child.

Virtually all imputed contributory negligence has been eliminated over the years

Generally, loss of consortium claims are reduced when victim has been negligent

## COMPARATIVE NEGLIGENCE

Negligent plaintiff's recovery dependent on how serious plaintiff's neg. was compared to defendant's

By 1991 nearly all states had adopted some version of comparative negligence

1. proceed by legislation

most adopted modified over pure

2. proceed by judicial opinion

most adopted pure b/c the choice between types of modified seemed arbitrary

**pure comparative negligence** - (NY) plaintiff may collect for his injuries less the percentage that he was at fault

**modified comparative negligence** - two versions (depends on jurisdiction)

1. plaintiff could recover under pure system as long as his neg. "not as great as"  
when jury apportions fault at 50/50 this plaintiff will recover nothing  
problem: jury frequently apportions fault at 50/50
2. plaintiff could recover under pure system as long as his neg. "no greater than"  
when jury apportions fault at 50/50 plaintiff can recover

most states with modified compare plaintiff's fault with the combined fault of the defendants

**Arguments against modified**

1. party more at fault has to bear his own losses and share other's  
worse off than would have been at common law
2. chaos created when multiple plaintiffs or defendants
3. plaintiff's fault > defendant's, relegated to common law - last clear chance  
might be better off - full recovery

## WHAT IS TO BE COMPARED IN CONSIDERATION OF DEGREE OF FAULT

1. conduct mere inadvertence or engaged in w/ awareness of danger involved
2. magnitude of risk created by the conduct  
number of persons endangered  
potential seriousness of injury
1. significance of what actor seeking to attain by his conduct
1. actor's superior or inferior capacities
2. particular circumstances (emergency requiring hasty decision)

Must also consider relative closeness of causal relationship of defendant's negligence and plaintiff's harm

In general, plaintiff's conduct will be overlooked when defendant has

3. acted recklessly - pure does compare these two, modified only if plaintiff has been negligent
4. when the defendant has committed an intentional tort

Generally, states allowing for joint and several allow for contribution based on pure comparative fault

Denial of set-offs (Uniform act) designed to cover situations in which insurance exists on both sides so that all injured will maximize their recoveries

It is the insurance companies and not the parties themselves who actually pay

## SETTLEMENT

1939 non-settling party could get contribution from settling party  
discouraged settlements

what is the point in settling when you are going to have to pay anyway?

1955 - non-settling party could not get contribution from settling unless release not given in good faith  
encouraged settlements but might be unfair to other defendants  
if good faith rigorously enforced, settlements might be discouraged

Section 6 Uniform Comparative Fault Act - thought to resolve both problems

Disagreement as to whether the jury should be told that if they find the plaintiff more than a certain %  
at fault recovery will be barred.

#### AVOIDABLE CONSEQUENCES

Doctrine existed during the era of contributory negligence

addressed measure of damages but not of liability

even if accident entirely defendant's fault, damages could be reduced by plaintiff's failure to  
exercise due care to mitigate the harm done

(ex. Failure to get medical attention, follow medical advice)

**anticipatory avoidable consequences** - heavily litigated issue

(ex. Failure to wear seat belt, failure to wear helmets)

some legislatures make it a crime not to wear seat belt or helmet but add provision that  
makes the violation inadmissible in a civil action

**RATIONALE** - if treated as 'fault' might completely bar recovery

others provided that violation, if causally related to the harm may affect civil damages  
but by no more than a small %

when statutes are silent as to implications of violation in civil proceeding, some courts  
have chose to treat violation as a species of fault

**ASSUMPTION OF RISK** - unpopular "all-or-nothing" recovery, efforts to abolish

Subset of contributory negligence:

**Assumption of the risk**

plaintiff has knowledge of the risk

plaintiff acted voluntarily

plaintiff acted unreasonably

**Contributory negligence**

plaintiff knew or *should have known* of risk

plaintiff acted voluntarily

plaintiff acted unreasonably

**Express agreements** - parties agree in advance that defendant need not exercise due care for the safety  
of the plaintiff

courts may choose not to enforce even the most clearly drafted contract if the activity  
involved is inappropriate for this release from liability

generally, these contracts are enforced w/r/t recreational activities

ambiguously written contracts always construed in plaintiff's favor

Invalid exculpatory clause may be found when activity:

5. concerns a business of type thought suitable for public regulation

6. party seeking exculpation is performing service of great importance  
generally a service of practical necessity

3. party holds out as willing to perform this service for any member of the  
public who seeks it

1. party invoking exculpation possesses a decisive advantage in bargaining strength  
against any member of public seeking service

1. exercising superior bargaining power - party confronts public w/ standardized  
adhesion contract of exculpation and makes no provision for purchaser to pay  
additional fees and obtain protection against negligence

1. as a result of the transaction, person or property of purchaser placed under control  
of the seller subject to the risk of carelessness of seller or his agents

Situations in which releases from negligence will not be enforced (NY)

1. lessors in connection with operation or maintenance of demised premises

2. caterers
3. building service or maintenance contractors
4. agreements by contractors to indemnify architects, engineers, and surveyors for liability resulting from defective maps, plans, designs, specifications
1. garage and parking lot owners
1. any agreement eliminating negligence as basis of liability in any contract, membership, application, ticket of admission ....(p. 404)

Courts generally agree that gross negligence or recklessness may never be disclaimed by agreement

Disclaimers kept in contracts to discourage litigation even though they are unenforceable by law  
 Those who cannot disclaim liability have higher prices (industry-wide) than those who can  
 NY requires that the agreement UNAMBIGUOUSLY state that it involves an exemption from liability for negligence

**implied assumption of the risk** - plaintiff acts (un)reasonably and voluntarily encountering a risk created by the defendant's negligence with the knowledge that the defendant will not protect him

#### **FIREMAN'S RULE**

Policy driven assumption of the risk

firefighters trained and compensated to assume risks of fighting fires

INITIAL RATIONALE - firefighters entering premises no more than licensees took the property as they found it

#### **DOCTRINE OF CHARITABLE IMMUNITY**

Application of doctrine requires balancing of two rights

2. right of organization to any benefit and assistance society can justly give it
3. right of individual injured by the negligence of another to seek compensation

Limited application of doctrine

4. no immunity for injured plaintiff who is not beneficiary of the charity
5. no immunity for injured plaintiff whose injury resulted from the charity's negligence in the selection/retention of an employee
1. no immunity where plaintiff pays for services rendered by the charity

Rationale for abolishing the doctrine

1. personal injury no less painful b/c inflicted by charitable institution
2. strong likelihood that individual injured by charity will become dependent on outside support if denied recovery - detrimental to society
1. doctrine forces injured to make contribution to charity in amount that would otherwise be due him in compensation
1. faulty reasoning to say that dispensing w/ immunity will discourage charities from existing - in states that have done away with the doctrine charities continue to operate

#### **DOCTRINE OF FAMILY IMMUNITY**

**Restatement (Second) section 895(g)**

- (1) A parent or child is not immune from tort liability to other solely by reason of relationship
- (2) Repudiation of general tort immunity does not establish liability for an act or omission that, because of the parent-child relationship is otherwise privileged or is not tortious

Cases where doctrine should probably exist

1. where the alleged negligent act involves an exercise of parental authority over the child
2. where the negligent act involves an exercise of parental discretion w/t/t provision of necessities

Arguments in favor of doctrine

2. preservation of family harmony  
 specious - family harmony will already be disrupted by fact of injurious conduct

more likely than not it will result in collusion of family members against insurance companies

1. financial consequences
  - problematic - concern over redistribution of assets *within* family unrealistic in situations with insurance, no real consequence
1. parent's awkward position in defending a claim against liability where child's injuries would be covered by insurance
1. concern for the scope of parental duties toward a child and discretion in making decisions and acting in the course of those duties (don't want state interference)

## STRICT LIABILITY

Plaintiff choosing between strict liability and *res ipsa loquitur* - choose s/l because don't have to contend with the rebuttable presumption of negligence. Under s/l, defendant can only invoke proximate cause defense.

To decide whether or not s/l should be attached to an activity

2. PLB calculation of utility of the activity
3. Restatement test as to abnormally dangerous activity

### Fletcher v. Rylands

The person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it at his peril, and, if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape

BLACKBURN - imposes s/l for all natural uses of the land and non-natural collections  
cattle, mining...

#### RATIONALE

4. but for defendant's act in bringing non-natural thing there, the mischief would not have occurred
2. plaintiff did not take any risk upon himself from the uses to which the defendant chooses to put his land

CAIRNS - imposes s/l for all non-natural uses of the land  
industry

#### RATIONALE

- If person brings accumulates on his land anything which if it should escape may cause damage to his neighbor, he does so at his peril
- If it does escape and cause damage, he is responsible however careful he may have been
- Only applied when land being uses for 'non-natural' purpose
- Does not apply for natural use b/c this gives benefit to society
- imposes liability for damage accruing from natural use ONLY upon showing that the defendant was negligent
- Typically, strict liability is imposed this way, the narrower of the two views

### BLACKBURN v. CAIRNS

- Obviously will invoke argument over what is and is not a "natural use" of land  
custom may be weighed in order to assess what is a natural use

### ABNORMALLY DANGEROUS ACTIVITY - keeping wild animals

Rationale for imposition on abnormally dangerous activity

1. uncommon non-natural activities

1. non-reciprocity of risk
1. happening of accident supports inference of negligence  
can infer defendant's conduct from event
1. defendant better able to protect against risks/accidents
1. low utility activities should be discouraged

Strict liability is imposed for the harm caused by keeping wild animals

PL > B calculation is performed w/r/t the activity itself

PL = the risk of keeping wild animals (always greater than the burden of not keeping them)

B = keeping wild animals has no social good  
NO BURDEN in not having activity

contrast with same assessment for domesticated animals

domestic animals can be controlled

no need to impose s/l b/c if domestic animal escapes presume negligence

in addition, burden of not having is huge, the risk in not having it is low  
thus, we have the activity

**Restatement (First)** - section 520 definition of ultra-hazardous activity (**per se rule**)

- (a) necessarily involves a risk of serious harm to the person, land or chattels of others which cannot be eliminated by the exercise of the utmost care, and
- (a) is not a matter of common usage

**Restatement (Second)** - six factors to determine whether or not activity is abnormally dangerous

- (a) existence of a high degree of risk of some harm to the person, land or chattels of others
- (b) likelihood that the harm that results from it will be great \*
- (c) inability to eliminate the risk by the exercise of reasonable care \*
- (d) extent to which the activity is not a matter of common usage (reciprocal risks)
- (e) inappropriateness of the activity to the place where it is carried on; and
- (f) extent to which its value to the community is outweighed by its dangerous attributes

*newly abnormally dangerous activity subj  
b liability for harm resulting from act - though exercised w care*

*unusual risks*

**BLASTING**

Blaster is better able to bear the risk of loss

blaster knows when he will be blasting

better able to assess the magnitude of the risk

person likely to be affected by the blast not as well able to prepare, anticipate, insure)

*\* reduce risk by extra precautions*

Blasting in the woods

rough equality btw blaster and potential victim in terms of ability to calculate the risk

less likely that victim will be present

In blasting, two types of damage may occur:

1. **concussive** - blast sends shock waves through the ground which can travel at a distance and result in property damage far away. There is no way to prevent this kind of damage.  
originally viewed as an escaping force damage resulting being unrecoverable  
NY - allows for recovery for concussive damages  
plaintiff should not bear the loss (chicken coop) due to the defendant's dangerous activity
2. **debris** - direct damage, can be controlled s/l is imposed

**FORESEEABILITY**

foreseeability - **inherent risk in activity**

but in abnormally dangerous activity risks are so apparent that it seems almost redundant to say



that they are foreseeable. The very reason an activity is labeled inherently dangerous is because of the risks associated with it.

**foreseeability - proximate cause**

defendant can raise defense of no proximate cause. If the particular type of harm, or the injury to the particular plaintiff is not a foreseeable risk involved in the activity defendant will not be held liable under s/l

*there is no proximate cause defense allowed when an intervenor is foreseeable*

**TRESPASS LIABILITY**

common law - trespasser liable for any damage he does to my property

later - requirement that the trespasser voluntarily came on to the land

current - unconsented entry, voluntary act, knowledge with substantial certainty of the consequence of the action

**SUMMARY**

1. whole activity not just particular conduct that is being judged (ex. flying, transporting gas)
2. Question of whether s/l is appropriate is a matter of law  
court sets standard society has for activity
3. 'strict liability' = cause of action in which p does NOT have to show a failure to use due care  
DEFENSES - no duty (not foreseeable plaintiff), no proximate cause
4. 'absolute liability' - no defenses permitted (quite rare)

**THEORETICAL PERSPECTIVES**

Principle function of accident law - reduce the sum of accident costs

**Primary** - reduction of the number and severity of accidents

1. seek to forbid specific acts
2. make activities more expensive  
inexorable link between the two

**Secondary** - reduction of societal costs resulting from accidents

only applicable when primary strategy fails

**Tertiary** - reduction of administration costs w/r/t primary and secondary treatment

whether attempt to reduce accidents costs will cost society more than it saves  
certain amount of reduction in one category necessitates forgoing reduction in other category

Discouraging accident prone activities

Attempt to decide costs of accidents and allow market to decide (GENERAL DETERRENCE)

allows for freedom of choice

forces people to pay accident costs

when accident costs influence choice, unsafe activities may be deterred

function of pricing = reflect relative costs to society of production

if activities reflect accident costs, individual able to choose for himself whether activity worth the accident costs it "causes"

**ALTERNATIVE METHODS**

1. failure to include accident costs in activities  
problem: people will choose more dangerous activities
1. forbidding activities that can "pay" for own costs  
problem: bad from *resource allocation* point of view

**both violate the postulate that individuals know what is best for themselves**

resource misallocation - goods produced that consumer would not want if he had to pay the full extent of their cost to society

in terms of physical components - subsidy of metal industry for car manufacture

in terms of accident costs - non-reflection in price, lack of private insurance, government insures

## COST REDUCTION BY GENERAL DETERRENCE

1. incentives to engage in safer activities (higher prices for unsafe)
2. encourages society to make activities safer
  - (a) if people forced to pay accident costs, more likely to take safety measures to reduce the number of accidents (ex. installing safer brakes)
  - (b) people who have to pay for accidents themselves will put pressure on industry to develop safety measures to relieve their burden

Michelson

Problem w/ Calabresi - not always apparent who the cheapest cost-avoiders are  
concerns with externalization

if costs of activities built into insurance premiums, people just accept the dangers  
because there is no incentive to avoid them

consequence: no behaviour modification

strict liability is deprived of its deterrent effect

liability should not be imposed by *retrospectively* determining the cheapest cost avoider

liability should be imposed based on *prospective rules* that define insurable classes of activity

Problem: what if burden put on the wrong party?

Answer: put the burden on the party which can cure a mistake most cheaply if one has  
been made, and thus help the market to operate as effectively as possible

## CALEBRESI'S GUIDELINES FOR ASSESSING CHEAPEST COST AVOIDERS

1. those with better access to information
    - underlying premise - individuals can never rationally estimate chances of suffering injury
  1. one activity may be better able to insure more cheaply than another
  1. efficient allocation of costs to subcategories
  2. concerns over externalization
- note: all elements treated as aspects of externalization

## CALABRESI AND THE HAND FORMULA

If applied perfectly, the Hand formula would put the costs of the accident on the injurer when and only when it was cheaper for him to avoid the accident costs by appropriate safety measures than to pay those costs

Problem: contributory neg. acts as total bar even if defendant could have avoided accident by spending less than plaintiff would have had to avoid accident

Solution: have contributory negligence, but apply it only where the cost of injurer avoidance exceeds the cost of victim avoidance

Issue then becomes which of the parties is more likely to find out whether avoidance is worth it

## CALABRESI AND ASSUMPTION OF THE RISK

Assumption of the risk = plaintiff's strict liability

conclusion as to whether an accident cost should be shifted depends not on whether a party was negligent, but rather on a judgment as to which party was in a better position to make the cost-benefit analysis irrespective of the other's negligence

analogous: blasting victim in remote area is better cost avoider - no strict liability

problem: tertiary costs of dealing with these instances

Schwartz - problem can be resolved through the use of a comparative negligence system in which, since liability is divided, there is an incentive for plaintiff and defendant to cooperate in avoiding the accident.

## POSNER

Under negligence, if  $B > PL$ , defendant will not have to pay for the harm caused

incentive: take all precautions until burden of precautions exceeds the risk

Under s/l, if the expected legal cost is less than the avoidance cost, avoidance doesn't pay

### problems with strict liability

1. does not encourage victims to alter their behaviour  
discounts good of contributory negligence doctrine  
strict liability encourages activity-level changes by potential injurers but discourages them by potential victims  
negligence liability encourages activity-level changes by potential victims but discourages them by potential injurers  
strict liability is rightly imposed on ultrahazardous b/c victim unable to avoid
1. increases number of damage claims, imposes greater cost to the legal system

### MORAL ARGUMENTS IN S/L

- against** (Fletcher) - imposition of s/l focuses on defendant's wealth and status  
using tort system to redistribute negative loss violates premise of corrective justice  
liability should turn on what defendant has done not who he is
- in favor** (Fletcher) - manufacturer creates non-reciprocal risks
- in favor** (Epstein) - If A caused B harm, it is wholly relevant to the notion of legal responsibility

## PRODUCTS LIABILITY

Landmark case = MacPherson (1916)

privity requirement undermined by cluster of exceptions  
courts begin to construct system of strict liability

"We have put the source of the obligation where it ought to be. We have put its source in the law"

Products liability - interplay btw contract and tort law

### Two separate developments

1. removal of privity requirement - does NOT limit defendants, can still sue immediate seller under breach of warranty
2. negligence - strict liability

Why have strict liability for products?

3. judicial economy - eliminates question of fact for the jury (negligence)
4. manufacturers have better knowledge of how careful plaintiffs will be than plaintiffs do of how careful manufacturers will be (negligence)
1. manufacturer has better knowledge of the frequency and severity of injury than plaintiff
1. happening of accident supports inference of negligence
2. non-reciprocity of risk
3. spreads costs - protects plaintiff from big losses
4. public policy demands that liability be placed on the manufacturer who put product on mkt.

Is it fair to impose the cost of one plaintiff's accident on a class of plaintiffs?

5. otherwise these purchasers indirectly benefit at plaintiff's expense
6. mass produced products are cheaper, so part of the cost should be insurance for the plaintiff
1. **corrective justice** - people paying for an injury they didn't cause are, in a sense, benefiting
1. **economic justice** - better to impose \$1 loss on 10,000 than \$10,000 on 1
1. increased products become more expensive thereby providing all consumers with more relevant information on which product to buy

*Theories w/ P/L .*  
*• s/l*  
*• negl.*  
*• warranty*  
*• express*  
*• implied*

1. plaintiff's vigilance against hazards is reduced by advertising

### **MANUFACTURER - WHOLESALER - RETAILER- CONSUMER- CONSUMER'S FAMILY**

Greater reason to impose liability on the manufacturer than on the retailer who is but a conduit of a product he himself is unable to test.

Imposing liability on the *wholesaler*

for: protects the plaintiff from a convoluted distributorship

against: probably the least negligent member of the chain, just pushing around closed boxes

Imposing liability on the *retailer*

for: implied warrant of merchantability

against: unable to test product

### **WHY PUT THE BURDEN ON THE MANUFACTURER?**

1. Manufacturer in better position to anticipate hazards
2. Manufacturer in better position to spread loss
3. Manufacturer responsible for the product being on the market in the first place, appropriate that he should insure safety
1. public policy requires buyer be insured at seller's expense:
1. Judicial economy: foolish to have A sue B who then sues C when A can sue C directly
- 6 Person to whom warranty of fitness (contract) is extended generally is not the intended user who, therefore, cannot recover under contract law
- 7 complexity of modern-day products - consumer no longer has wherewithal to inspect for himself

Some legislatures have held that plaintiffs cannot sue intermediaries in the chain under s/l out of concern that they will simply sue the nearest deep pocket in the chain

Liability extended to bystanders b/c they are unable to protect against the risk and they are subject to the same hazards .

bystanders entitled to the same s/l protection as passengers

bystanders greater protection

less able to self-protect than users

Some courts - no significant difference btw manufacturer or retailer who placed article on the mkt. by means of sale and lessor who placed article on mkt. by means of a lease

Courts are less willing to impose s/l on sellers of used goods

three factors for imposing s/l

1. loss spreading
2. satisfaction of reasonable buyer expectations
3. risk reduction

only the first is applicable - not enough

### **WARRANTIES**

Introduction of warranty turns tort claim in which plaintiff has to show negligence into contract claim in which no such showing is necessary

**express warranty** - claims based on express have two limitations

2. defendant must make a positive assertion

3. plaintiff must show reliance on that assertion

express may be accompanied by two things limiting liability

4. issuing party requires notice of breach within time limit

(may be trap for consumer who does not know of the requirement)

1. disclaimer of warranty

implied warranty of merchantability = strict liability rule (no need to show neg)

1. dispenses with privity requirements
2. began just applying to food, expanded to include products for intimate bodily use
3. UCC section 2-318 = extension of warranties
  - a. to purchasers and members of their immediate households
  - b. to any natural person injured
  - c. to any injured person

Restatement (second) - 402A tentative drafts 1,2, and 3.

under modern market, when manufacturer puts new auto into mkt and promotes purchase, implied warranty to consumer

### Privity requirement abolished by UCC 2-318

Why s/l and not res ipsa?

1. NY still retains rebuttable inference of negligence standard for res ipsa
2. more efficient to eradicate need for the search for negligence

### WHAT IS A DEFECT?

Three types of defects

1. manufacturing defect
2. design defect
3. defective warning

### Restatement (second) 402A

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

- (a) the seller is engaged in the business of selling such a product, and
- (b) it is expected to and does reach the user or consumer w/o substantial change in the condition in which it is sold

(1) The rule stated in (1) applies although

- (a) the seller has exercised all possible care in the preparation and sale of his product, and
- (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller

**comment I** - *Unreasonably dangerous*. The rule stated in this section applies only where the defective condition of the product makes it unreasonably dangerous to the user or consumer

**comment G** - defective condition = one not contemplated by the ultimate consumer which will be unreasonably dangerous to him

In strict liability we look from the pt. of view of the consumer as opposed to negligence which is evaluated from the standpoint of the manufacturer

**consumer expectations test** - *ex ante analysis* the article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to the characteristics

**risk benefit test** - *ex post analysis* (excessive preventable danger)

1. The usefulness and desirability of the product - its utility to the user and the public as a whole
2. The safety aspects of the product - the likelihood that it will cause injury and the probable seriousness of the injury
3. The availability of a substitute product which would meet the same need and not be as unsafe

4. The manufacturer's ability to eliminate the unsafe character of the product w/o impairing its usefulness or making it too expensive to maintain its utility
5. The user's ability to avoid danger by the exercise of care in the use of the product
6. The user's anticipated awareness of the dangers inherent in the product and their avoidability b/c of general public knowledge of the obvious condition of the product, or of the existence of suitable warnings or instructions

Tentative draft of the Third Restatement uses only the risk-benefit test.

Balancing test: notion of a reasonable design alternative (plaintiff's burden)

Design defect

→ **crashworthiness doctrine** - product is defective when fails to decrease the severity of foreseeable accidents

If danger is an obvious one, then consumer expectations are impacted

#### MANUFACTURING DEFECT

One product in an entire line is defective (deviation from design)

could be argued as design defect - lots of overlap between the two

makes much more sense to use *consumer expectations test*

#### DESIGN DEFECT - (Barker, Soule)

Entire product line is flawed

makes much more sense to use *risk-benefit analysis*

not really much sense in appealing to consumer expectations

consumers do not have expectations of safety associated with design

Factors considered in evaluation of design defects

7. gravity of the danger posed by the challenged design
8. likelihood that such danger would occur
9. mechanical feasibility of a safer alternative design
10. financial cost of the improved design
11. adverse consequences to the product and to the consumer that would result from an alternative design

result of unreasonably dangerous limitation

burden plaintiff w/ proof of element ringing of negligence

too burdensome for plaintiff

prevents seller from being treated as insurer

A manufacturer is s/l in tort when an article he places on the mkt. is to be used w/o inspection for defects, proves to have a defect that causes injury to a human being.

#### WARNINGS

If direct consequence reasonably foreseeable - duty to warn

More information given to the consumer, the better able she is to protect herself

Function is to

12. warn of unavoidable risks
13. reduce risks associated with using the product
  - must warn if removal of safety device is foreseeable
    - if alteration is foreseeable, manufacturer is strictly liable
    - may argue contributory negligence or assumption of the risk
    - if manufacturer's awareness is question of fact, jury question

What is an adequate warning?

1. Warning may be found defective if lacking in urgency
2. Disagreement as to whether question of fact or law normally, jury decides

LAW - whether a manufacturer has legal duty to warn users of dangers related to the use of its product w/o safety devices

FACT - specific dispute re: manufacturer's awareness of risk

No duty to warn of nonexistent or obvious dangers

Types of Warnings

1. intended to make product less dang. if instructions followed
2. notification of the existence of dangers w/o reduction of risks of dangers

Minimal cost of imposing safety warning - imposition of liability onto manufacturer's who do not

Warnings must be sufficient for intended users

engineers need less-detailed warnings than laymen

if foreseeable users not english speakers/ literate, must picture warn

When choose to give safety instructions instead of make product

more safe - cost-benefit analysis,  $PL > B$

"unintended" uses not a defense if foreseeable uses (standing on a chair to change a lightbulb)

If free of defect and safe with proper use, manufacturer not liable for improper unforeseeable use

no duty to warn of obvious or non-existing dangers

**WARNINGS OF INTRINSIC RISKS**

If state law has further requirements, pre-emptive of federal law

destroys uniformity

warning defects based on express warranty misrepresentation, intentional fraud or conspiracy

are NOT preempted b/c arise out of manufacturer's actions not state law

Compliance w/ FDA labeling requirements is no shield from liability

if does not adequately apprise consumers of the risk

Manufacturers immune from liability if consumer does not receive warning if intermediary's failure to

warn is a superseding cause of the consumer's injury

prescribing physician = "*learned intermediary*"

**UNAVOIDABLY UNSAFE PRODUCTS**

product is **unavoidably unsafe** - at the time of distribution no alternative less risky design existed

California has labeled all prescription drugs as unavoidably unsafe

do not want to discourage drug manufacturers by holding them s/l

**Comment K** - manufacturer of unavoidably unsafe may not be held strictly liable for injuries caused

thereby provided that the product was properly prepared, and accompanied by proper directions and warning

Manufacturer of unavoidably unsafe provides adequate warning when

reasonably discloses all risks inherent in the use of the

drug of which the manufact. being held to the standards of an expert in the field knew, or should have known to exist.

No liability under comment K if:

1. product incapable of being made safer
2. no alternative design exists which would effectively accomplish the same purpose or result
3. it is a useful and desirable product
4. manufacturer has adequately warned of unavoidable risk

Plaintiff may recover in s/l for injury due to unavoidably unsafe if:

1. there is negligence in marketing (inadequate warning)
2. the manufacturer could have made the product safer

#### UNEXPECTED DANGER

MINORITY - s/l for warning defects for harms not known at time product was manufactured

1. manufacturer better able to spread risk
2. cost of product = incentive to investigate unknown risks

MAJORITY - manufacturer only liable for risks that were known or reasonably knowable at time product marketed

1. other option unfair
2. impossible task (knowing unknown) will make products prohibitively expensive makes manufacturer into an insurer
3. plaintiff and manufacturer on equal footing w/r/t foreseeability of risk

Burden is on the defendant to prove that the risk was not known or reasonably knowable

**True state of the art defense** - defendant has use the technology of the time, new technology allowing for risk avoidance becomes available only after product is manufactured or designed

defendant: "I was following the custom of the time"

Jury may still find that the custom was unreasonable

**State of the art defense** - Defendant had no reason to anticipate the type of risks associated with the use of his product

Manufacturer held to a standard of an expert in the field and may be expected to be informed and affirmatively seek information re: the public's use of the product

#### S/L FOR SERVICES

Arguments against

1. do not want to discourage valuable services
2. difficult to measure the untoward results of a service
3. much more difficult to define defect

#### professional services (MD's)

*Greenfield* - measure should be the reasonable expectation of the consumer analyzed in 3 parts:

1. analysis to ascertain the cause of the problem
2. selection or fabrication of a solution
3. application of the solution

In favor of imposing strict liability

1. MD better able to determine and improve the quality of the services
2. pt. reliance on the MD's skill is greater than the reliance for consumer goods
3. hospital and MD in better position to spread loss

Against imposition of liability

1. Medical profession is experimental in nature - devoid of certainty of results
2. Medical services = societal necessity, must be readily available
3. s/l would increase the cost of medical services might hamper development of new techniques
4. very hard to determine what is defective  
patient did not recover fully  
patient did not recover fast enough  
patient's condition worsens

#### DEFENSES

**Restatement (second)** section 402A



**comment N-** 1) plaintiff's knowledge of the risk is a defense to a s/l claim

- 1) plaintiff should have known of the risk is not a defense to s/l claim

### **California approach**

Plaintiff's recovery will be reduced only to the extent that his own lack of reasonable care contributed to the accident

#### **ARGUMENTS AGAINST**

1. manufacturer's incentive to produce safe products will be reduced or removed
2. profits the manufacturer to make his product so defective that in the event of an injury he can argue that the use had to be aware of its patent defects
1. jurors would be incapable of making the comparison

### **New York approach**

Comparative negligence - plaintiff's conduct is a factor to take into account in s/l claim. If the danger is obvious and plaintiff knew of the risk plaintiff may be assumption of the risk. Assumption of the risk may mitigate damages

### **MISREPRESENTATION - Restatement (second) - section 402B**

Strict liability is imposed for express misrepresentation regardless of the absence of the intent to deceive

#### **Requirements**

1. misrepresentation of material fact
2. reasonable reliance (justifiable) by the plaintiff

The plaintiff will sue in contract law if the statute of limitations has run out on personal injury claim in tort

**UCC 2-313** - no reliance necessary for express warranty

**UCC 2-314** - implied warranty of merchantability

3. the product must conform to the promises or affirmations of fact made on the label; and
4. must be fit for the ordinary purposes for which such goods are used

**UCC 2-315** - implied warranty of fitness

**UCC 2-316** - disclaimers and modification of warranties "as is" can disclaim all implied warranties

**UCC 2- 719** - limitation of remedies - limitation of consequential damages is unconscionable

### **ECONOMIC HARM**

**MAJORITY** - preserving proper role for the law of warranty precludes tort liability for a defective product that causes purely economic loss

There can be recovery for economic loss if it is accompanied by personal injury or property damage

The contract regime is better suited for compensation of purely economic losses

**MINORITY** - a manufacturer's duty to make non-defective products encompassed injury to the product itself whether or not it created any unreasonable risk of harm

5. safety and insurance rationale of strict liability applies equally here
6. no inherent difference btw economic loss and personal injury or property damage
7. will not lead to unlimited liability

### **SUCCESSOR LIABILITY**

successor companies usually not held liable except:

1. express or implicit agreement to accept liability
2. if successor result from merger not sale of assets

3. if purchaser = continuation of seller's corporation
  4. transaction fraudulent in attempt to escape liability
- particularly acute problem in toxic, pollutants ...

**JUSTIFICATION**

1. purchase of original manufacturer's assets destroys plaintiff's chances for remedy
2. successor best able to spread risk
3. successor beneficiary of original's goodwill should bear liability burden

**REJECTED IN ALL BUT FEW STATES**

"product line" exception = LEGISLATIVE decision

**TRESPASS AND NUISANCE**

**EARLY DEFINITIONS**

8. **trespass** - physical intrusion upon another's land
  9. **nuisance** - obnoxious uses of neighbouring land
- Both provide the modern common-law foundation for analyzing environmental disputes

Early common law - every voluntary unauthorized entry  
 person who non-negligently believes it is his property is required for liability  
 "breaking of the close" harm not required for liability (nominal damages).

**DISTINGUISH BETWEEN DIRECT AND INDIRECT**

confusing - flying debris v. people

**MODERN - INTENTIONAL v. UNINTENTIONAL**

Restatement (second) section 165 - unintentional trespass (debris) resulting from reckless or negligent conduct or abnormally dangerous activity, subject to liability only if intrusion causes actual harm

Restatement (second) - one is liable to another in trespass for intentional intrusion irrespective of harm caused

**privileges** - shield activity otherwise trespass from liability

10. consent of possessor
11. consent may be afforded as matter of law given purpose for which actor enters

**Trespass** - actionable invasion of possessor's interest in *exclusive possession of land*

**Nuisance** - actionable invasion of possessor's interest in *use and enjoyment of land*

**TRESPASS**

Action created as means of discouraging disruptive influences in the community by compensating plaintiff  
 trespass likely to create conflict actionable in tort

Feeling that what one owns should not be subject to interference deserving of protection under the law  
 reasoning behind not requiring actual damage to raise a claim

Immaterial whether defendant's conduct is

12. careless or wanton or willful or
13. entirely free from fault

**DOES SIZE OF DEPOSITTED OBJECT MATTER?**

14. bullet = trespass

- 15. vibration of soil = trespass
  - 16. concussion of air = trespass
- Emphasis placed on force rather than size

## **NUISANCE**

### **Public nuisance -**

- common law - broad group of minor criminal offenses involving unreasonable interferences with right of the general public (ex. Keeping diseased animals interferes with public health)
- most states
- 17. broadly phrased statutes giving criminal penalties for public nuisance
  - 18. specific statutes declaring certain kinds of conduct to be public nuisance
- Traditionally, required element of criminality to justify public relief

**Restatement (second)** section 821B(1) - does away with criminality requirement  
public nuisance is defined as an unreasonable interference with a right common to the general public

**Restatement (second)** section 821B(2) circumstances making interference unreasonable

- a) significant interference with public health, safety, peace, comfort or convenience
- b) statute or ordinance proscribing conduct
- c) conduct of continuing nature/ long-lasting effect that actor knows or has reason to know will have a significant effect on a public right

Retains special harm as prerequisite to recovery for damages in individual action

Parties other than public officials must have standing to sue as

- 1. representatives of the general public
- 2. citizen in citizen's action
- 3. member of class in class action

**comment J** - relaxes special harm requirement as less applicable to injunctive actions

### **Private nuisance**

**Restatement** section 822 (general rule)

One is subject to liability for conduct that is a legal cause of an invasion of another's interest in the private use and enjoyment of land if the invasion is either

- a) intentional and unreasonable
- b) unintentional and arising out of negligent or reckless conduct or abnormally dangerous conditions or activities

**Restatement** section 826

An intentional invasion satisfies the unreasonableness requirement if

- c) the gravity of the harm outweighs the utility of the actor's conduct
- d) the harm caused by the conduct is serious and the financial burden of compensating for this and similar harm to others would not make the continuation of the conduct not feasible

**Restatement** section 827 GRAVITY OF HARM

In defining the gravity of the harm from an intentional invasion of another's interest in the use and enjoyment of land, the following factors are important:

- e) the extent of the harm involved;
- f) the character of the harm involved;
- g) the social value the law attaches to the type of use or enjoyment invaded;
- h) the suitability of the particular use or enjoyment invaded to the character of the locality;
- i) the burden on the person harmed of avoiding the harm

**Restatement** section 828 UTILITY OF CONDUCT

In determining the utility of conduct that causes an intentional invasion of another's interest in the use and enjoyment of land, the following factors are important:

## Utility of conduct:

- j) the social value that the law attaches to the primary purpose of the conduct
- k) the suitability of the conduct to the character of the locality; and
- l) the impracticability of preventing or avoiding the invasion

An intentional invasion may be unreasonable under 826B even though the utility of the conduct outweighs the gravity of the harm if the harm is serious and the defendant could afford to compensate the plaintiff and others similarly harmed while continuing to be engaged in its activity

### **Restatement** section 829A

The gravity of an invasion outweighs its utility (and hence is unreasonable under 826) whenever the harm caused is both substantial and greater than the plaintiff "should be able to bear w/o compensation"

### **Restatement** section 840D

If a plaintiff knowingly encounters the nuisance it is not itself sufficient bar to recover but it will be a factor in considering

Traditional NY rule - If nuisance is an intentional invasion, plaintiff gets injunctive relief  
defendant will then try to purchase a settlement from the plaintiff so as not to have to stop creating the nuisance

Nuisance law of limited utility for air pollution cases

1. no plaintiff is sufficiently injured to bring suit
2. tort law requires identifiable harms (may be long term)
3. requires an identifiable defendant - may be hard to trace source of pollution

**Coase** - in economically perfect world it would make no difference which liability theory were imposed

Example: If a factory were emitting smoke and it would cost them \$3000 to prevent it but it costs ten homeowners \$500 in damages each. If liability were imposed, the factory would buy the smoke-stopper. If no liability were imposed, the homeowners would "bribe" the factory and buy it for them.

*Economic analysis of private costs.*

In reality, however,

4. homeowners do not know of the option to prevent the smoke
5. no organization to pool homeowner's money
6. free-rider problem: some homeowners will refuse to contribute

Liability should be imposed to those who can create the least cost solution and the manufacturer may be in the best position b/c of the problems homeowners face

Difficult to assign liability b/c w/o either one of the activities, the harm would not be caused.

## DAMAGES AND INSURANCE

### DAMAGES

Three requirements effect damage decisions:

7. damages and liability must be decided in the same trial
8. requirement that entire loss is only recoverable in one lawsuit
9. requirement that damages recoverable in money

**Why do we want to take money from the defendant and give it to the plaintiff?**

10. What if we only want to take money from the defendant?
11. What if we only want to give money to the plaintiff?

Elements of damages in personal injury suit

12. medical expenses                      Pecuniary, special

- |                        |                       |
|------------------------|-----------------------|
| 13. lost earnings      | Pecuniary, special    |
| 14. pain and suffering | Compensatory, General |

Defense lawyers tend not to argue damages too fiercely b/c widely held that once you start arguing damages, you concede liability

### MEDICAL EXPENSES

Easily quantified

- past medical expenses - proven by submission of bills
- future medical expenses - proven by expert medical testimony

Recovery only available for *reasonable* medical expenses

- necessity question - was treatment really necessary given the injuries sustained by plaintiff at hands of the defendant?

Plaintiff may recover for enhancement (peculiar susceptibilities)

- plaintiff may not recover for pre-existing chronic conditions

Medical insurance covers the same costs that plaintiffs recover in a lawsuit

### LOST EARNINGS

15. plaintiff's normal earning power
16. expectancy of change (raise, promotion)
17. plaintiff's work life expectancy
18. modifications

#### plaintiff's normal earning power

19. generally derived from plaintiff's earning history
  - complications
    - a) people do not have earnings history
    - b) plaintiff owns own business
    - c) independently wealthy plaintiff
      - deprivation of work option, but probably will not recover
  - a) homemaker
    - recent trend - value of services of homemaker can be calculated
    - consideration of homemaker's work option
  - a) plaintiff earns more at time of trial than at time of injury

#### how long is plaintiff likely to be without earnings?

- Permanent total disability - work life expectancy calculation using tables
- gender specific work life expectancy
- complications
  - a) lessening of mandatory retirement age
  - b) increased early retirement

#### modifications

1. what is to be done about taxes?
  - All rewards are non-taxable but the interest earned on them is
1. problem of interest
  - interest will be earned in the time btw plaintiff's award and the end of calculated work life expectancy
1. reduction to present value
  - one million dollars today = how much 20 years from now
  - interest increases, inflation decreases
  - traditionally, theorists favor very small calculated interest rate

#### court asks jury to answer the following questions

1. total amount for lost earnings
2. how long will continue
3. breakdown amount in (1) according to years in (2)

4. rate of interest fixed for each year  
court makes calculations to arrive at damages figure

## PAIN AND SUFFERING

Most controversial element of damages

5. not easily quantifiable  
per diem calculations
6. uninsured loss
7. many jurisdictions have capped - usually around 250,000  
provides for consistency and predictability  
recognizes \$ = rough approximation of intangible loss

## LEGAL STANDARDS

Trial court - judge = 13<sup>th</sup> juror

8. damages so large as to indicate passion or prejudice on the part of the jury?
9. damages so out of line with reason that they shock the conscience?
10. examination of what awards were in other cases  
usually this is too varied to be of much help
1. examination of nature of injury  
judgment re: seriousness of the injury

**remittur** - judge rules that damages awarded by the jury are excessive  
new trial unless plaintiff agrees to settle on lower amount

**additur** - judge rules damages awarded by the jury are inadequate  
new trial unless defendant agrees to pay higher amount

## WRONGFUL DEATH ACTS/SURVIVAL STATUTES

Early common law

- no recovery for the tortious death of a human being
- no one entitled to claim someone else's death as an injury
- all causes of action abated at death

**Lord Campbell's Act (1846)**

- prototypical wrongful death act
- entitled designated beneficiaries to a claim for the injury done to them  
ex. Widow and children have claim for however much decedent would have  
contributed to them had he lived out his life (pecuniary benefits)
- person bringing suit = administrator, executrix

### Survival statutes

Whatever causes of action decedent had at time of death becomes an asset of the decedent's estate

Elements of decedent's claim

1. medical expenses (during life)
2. lost earnings (during life)
3. conscious pain and suffering up to the time of death  
PROBLEMATIC - p&s awards are supposed to compensate the sufferer  
there is no longer any sufferer ("economic cannibalism")  
person bringing suit for p&s = personal representative

Any claim against a person also survives his death

- most states allow claims against deceased tortfeasors
- may be time limit in which defendant must be sued

Generally, states have at least one of survival or wrongful death statutes. If only one, some characteristics of the other will be assigned to it.

## INSURANCE

### Concept of insurable interest

limits what may be insured and by whom  
eliminates "moral hazard" that might otherwise exist

Courts tend to construe ambiguities in insurance contracts against the insurer

**first party insurance** - protection of the insured or the insured's family from the direct adverse economic consequences of a particular event

**third party insurance** - protect the insured against damages owed to another person, activated by legal command that the insured pay a third person for a loss the insured has caused

## LIFE INSURANCE

**term life insurance** - for particular period, protection against financial consequences of premature death

**whole life insurance** - as long as policy kept in force, will be paid out

## AUTOMOBILE POLICY

**Insurance follows the car not the driver**

First party benefits (generally claims undisputed)

4. **Medical payments** - specific amounts of hospital medical costs for each person injured in the policyholder's vehicle
5. **Collision** - covers cost of repairs to policyholder's car after accident regardless of whether the policyholder is at fault
6. **Uninsured Motorists** - specified amounts of protection to policyholder and car occupants against bodily injury and property damage when other driver is uninsured and determined to be at fault
7. **Comprehensive** - protects car against fire, theft, flood, vandalism ...
8. **Personal injury protection** - only available in no-fault states

Third party benefits (litigation of claims)

9. **Bodily injury liability** - economic and non-economic losses of 3<sup>rd</sup> parties resulting from accidents in which the policyholder is determined to be at fault  
obligates insurer to defend policyholder against injury claims
1. **Property damage liability** - compensates 3<sup>rd</sup> party for injury to their property in accidents where the policyholder is determined to be at fault  
obligates insurer to defend policyholder

## COLLATERAL SOURCE RULE

Universal rule - treat first party benefits received by plaintiff as *collateral* to defendant's responsibility and irrelevant to tort law's determination of liability/damages

**in favor** - without rule, defendant gets the benefits of plaintiff's insurance

1. reduction of deterrent effect  
weak argument, ex ante defendant doesn't know if plaintiff is insured
1. generally, damages should be individualized
3. defendant will not suffer much injury (like hitting a poor man)

**concern** - holding defendant liable for insured items - plaintiff's windfall

traditional response, allowing collateral source not really double recovery for plaintiff

1. plaintiff should not be punished for prudence in having insurance
2. money will go to pay attorney's fees
3. helps to pay for non-compensable items

Whether accident loss absorbed by tortfeasor or collateral source

4. reprehensiveness of defendant's conduct
  5. desirability of attributing cost to loss-causing enterprise
  6. function/economic base of collateral compensation regime
- Primary response - tortfeasor = primary source of compensation

#### MORALISTIC CONCERNS

Axiomatic - injurer's conduct necessitates he relieve injured from loss  
should also relieve anyone else who might take on job of reparation

Reinforced - reduction of cost to community/plaintiff of maintaining collateral fund

Gradually, moralistic concerns are being replaced

7. trouble/ expense of shifting loss to tortfeasor when insurer has already paid
8. insurers generally in better position to spread loss
9. deterrence losing appeal as justification for tort liability  
confined - defendants guilty of serious misconduct

In future, tort liability may function to allot responsibility for compensation ONLY to the extent that cost of compensation cannot be met by another source

**SUBROGATION** - preserves deterrent effect, prevents windfall

Equitable adjustment of rights operates when victim of loss entitled to recover from two sources one of which bears primary responsibility

Insurer's right of subrogation may be

10. reserved in agreement between insurer and insured
11. by implication as a matter of law  
prevents unwarranted windfall to insured  
returns excess to insurer - lowers insurance costs

Courts readily imply rights of subrogation w/ policies of property damage

12. insurer's sole obligation = indemnification of victim's actual loss
13. losses generally liquidated  
tort recovery = insurance coverage

Subrogation rights not readily implied with personal insurance

14. insurance = investment (less of contract to indemnify)  
imposes absolute duty to pay if condition occurs
1. generally unliquidated in part  
pain and suffering, lost wages

NY - CPLR 4545 c) amended to provide that in all personal injury and wrongful death suits court shall reduce all awards for economic losses by the amt recoverable from insurance

#### ARGUMENT FOR PARTIAL SUBROGATION OF MEDICAL EXPENSES

1. keeps costs of health insurance down
2. liquidated loss
3. unfair to use this money to pay for uninsured losses (p&s, lost wages)

#### Argument against allowing subrogation

altogether too costly - must litigate to subrogate

#### Problem with disallowing subrogation

litigation will still happen btw plaintiff, defendant and defendant's insurance co.  
litigation costs will not disappear

#### TORT LAW v. FIRST PARTY INSURANCE

Tort law should take a back seat to first-party coverage

4. high costs of litigation
5. multiplicity of insurance available
6. plaintiffs better able to estimate how much insurance needed (lost wages etc.)



7. fault expanded to provide compensation
8. not much deterrence anyway, liability insurer pays out

**Payment of attorney's fees**

9. punitive damages
10. pain and suffering
11. refusal to tell jury about income tax aspects of damages
12. collateral source rule

**Development of automobile insurance**

- OLD - indemnity policy, if defendant was insolvent, insurance under no obligation to pay
- MODERN - liability policies, reflects concern for compensation of victims
  - insurance promises to pay on defendant's behalf amt for which he might become liable

**Expansion of liability**

13. originally only vicarious responsibility
  - no agency relationship btw driver and owner, no payment
1. development of family purpose doctrine
1. development of joint enterprise doctrine (people working together)
2. owner consent statute
  - owner's insurance accessible to all injured by car
1. financial responsibility laws
  - after accident had to obtain insurance before could drive again
1. compulsory insurance
  - need liability coverage to register car

**IMPACT OF INSURANCE ON TORT LITIGATION**

1. partial justification for abolition of charitable and family immunities
2. fire

**declaratory judgment** - declaration of rights and obligations  
 advises who is liable to pay what to whom

**SETTLEMENTS**

NY - Insurance co. may be held liable if it has "grossly disregarded" the interests of the insured in negotiating a settlement

- higher than a negligence standard
- necessitates showing of deliberate reckless failure to place interests of insured on an equal footing with its own interests in considering a settlement offer

**NEW YORK TORT REFORM PROVISIONS**

**CPLR 4545** - reduction of recovery for injuries paid by collateral sources

**CPLR 50a 50b** - judgments for personal injury to be paid periodically instead of one lump sum

**CPLR 1601** - defendant found less than 50% culpable only liable for that % of non-economic loss  
**exceptions -**

3. if accident arises out of the use of motor vehicle, joint and several for non-economic
4. product liability cases where manufacturer cannot be brought in
5. intentional tort cases

**Automobile no fault** supplants tort law with other ways of dealing with accidental injury  
 broad displacement of tort law for substantial category of accidents

deterrence is not lost under 1\* party system b/c criminal penalty for violation of traffic laws still operational

#### Adopting no-fault in favor of tort law

6. smaller damages (lower insurance premiums)
7. people get 1<sup>st</sup> party in private insurance market
8. benefits will be smaller - no pain and suffering recovery
1. No malapportionment in no-fault  
in tort, small claims were over compensated in order to get rid of them
1. No delay of rehabilitation in no-fault  
in tort, plaintiff would not start to rehabilitate until knew he could recover
1. Lower transaction costs  
in tort, b/c extensive litigation, lots of money went to lawyers
1. Eliminates the adversarial relationship btw plaintiff and insurance company

### INTENTIONAL HARM

"intent" - that the actor desires to cause the consequences of his act or believes that the consequences are substantially certain to result from it

To establish claim: a) protected interest was invaded  
b) defendant intended to invade the interest

#### Principal intentional torts

1. battery
2. assault
3. false imprisonment
4. intentional infliction of emotional distress

#### Principal defenses

5. consent
  6. self-defense
  7. defense of property
  8. necessity
- contributory recklessness or negligence  
is not a defense to an intentional tort

### MINORS

#### Minors liable for intentional torts

Generally children held to age-appropriate standard of reasonableness

parents usually not liable for tortious conduct of children

EXCEPTION - parents aware of child's tendencies have duty to watch

EXCEPTION - parents liable when put dangerous instrument in child's hands

### BATTERY

Intentional infliction of harmful bodily contact upon another

rude and inordinate contact with another's person

prohibition against touching

clothes, cane, horse upon which plaintiff is seated

hostile intent not always necessary

kissing a woman without her consent is a battery

rule of transferred intent is operational

aggressor meaning to strike one who strikes another

both civil and criminal action at law

Intent may be inferred from knowledge

knowledge that person would do X may imply intent to injure

knowledge is enough to establish battery absent purpose to injure/embarrass

### HARSH PENALTIES

9. Defendant will be held responsible for any harm that can be causally associated in any plausible way with the wrongdoing

10. Jury is allowed free range of speculation on the cause issue
11. Interest of the innocent victim in attaining compensation placed above the interest in protecting against speculative damage awards
12. Putative damages may be awarded at the discretion of the fact finder

#### **Restatement section 162**

Trespasser will be liable for acts done or activity on land harming possessor, others, property irrespective of whether the conduct would subject him to liability were he not a trespasser

#### **INSURANCE**

Policies try to exclude coverage for intentional torts but provisions very difficult to draft

“bodily injury... caused intentionally” held not caused intentionally, unintended result of intentional act

#### **VICTIM COMPENSATION STATUTES - NEW YORK**

Enacted to solve problem of insolvent defendant

##### **RATIONALE**

13. offender’s obligation = restitution, state’s = expedite relief or offer substitute
14. state liable - failed to fulfill duty to protect citizen
15. state should assume responsibility to aid unfortunates when aid serves compelling social policies

To qualify for compensation

16. crime must be reported to police within 7 days
17. victim must cooperate with police and prosecution
18. claim must be filed within one year

Eligible claimants

19. victims
20. “good Samaritans” injured attempting to prevent crime or apprehend criminal
21. former dependents of decedent victims/good Samaritans

Rejection of claims

22. assailant and victim blood relatives or in-laws
23. victim was participant in crime
24. claimant was unable to demonstrate financial need

Claims will be reduced if claimant contributed to own injuries

#### **ASSAULT**

Unjustifiable threat of force sufficient to arouse a well-founded apprehension of battery

not over the phone - need proximity to carry out threats  
not committed accidentally  
cannot escape liability by being *barely* out of striking distance

Traditionally, conditional phrases do not constitute assault

ex. “Were you not an old man I’d knock you down”

#### **DAMAGES**

Plaintiff rarely proves any damages

Authorities divided - should punitive damages be awarded when victim does not show need for compensation?

Very rare to litigate if no financial loss suffered (litigation costs)

#### **POLICY JUSTIFICATIONS FOR ASSAULT AND BATTERY LIABILITY**

25. seriously injured plaintiff = good candidate for reparation
26. liability of misbehaving defendant had deterrent effect  
punitive damages may increase this force

#### **MALICIOUS PROSECUTION**

bringing claim against party when you do not have a legal cause of action repeatedly suing someone just to "haul their ass into court"

### **FALSE IMPRISONMENT**

Unlawful restraint of individual's personal liberty or freedom of locomotion

"any unlawful exercise or show of force by which person is compelled to remain where she does not wish to remain or go where she does not wish to go"

must be actual/legal intent to restrain

27. may be effected by words alone
28. actual force is unnecessary

### **Restatement** section 38-41

How action = confinement = false imprisonment

29. actual or apparent physical barriers
30. overpowering physical force or by submission thereto
31. threats of physical force
32. asserted duress
33. asserted legal authority

NO false imprisonment claim if

34. person voluntarily consents to confinement
35. threats are of a future action

### **FALSE ARREST**

Intended to protect freedom of movement

36. detention - confinement within boundaries fixed by defendant
37. plaintiff must be either
  - a) conscious of the confinement
  - b) harmed by the confinement

1. confinement must be unjustified

If imprisonment follows arrest, defendant must have been legally entitled to make the arrest

*Shoplifting* - "citizen's arrest" two qualifications:

1. misdemeanor committed in citizen's presence
2. person arrested must be guilty (only for less-lenient states)

### **New York General Business Law** - section 218

It is a defense to an action of false arrest that a person was detained in a *reasonable manner* for *not more than a reasonable time* to permit such investigation or questioning by a peace officer

**reasonable grounds** - knowledge person concealed possession of unpurchased merchandise

**reasonable time** - necessary to permit

3. person to make a statement
4. person to decline to make a statement
5. examination of records relevant to ownership of merchandise

### **INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS**

Cause of action when X in absence of any privilege intentionally subjects another to the mental suffering incident to serious threats to his well-being whether or not threats technically = assault

**ARGUMENTS AGAINST**

6. anomalous to deny recovery for mental suffering in absence of physical harm
7. floodgates

**COUNTER:** jury in better position to determine whether conduct results in distress than whether distress results in physical injury

### **Restatement (second)** section 46

One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress and, if bodily harm results, for such bodily harm

*Wrongdoer's conduct is intentional or reckless*

8. wrongdoer had specific purpose of inflicting emotional distress
9. wrongdoer intended specific conduct and knew/should have known that emotional

- distress would likely result  
*Conduct is outrageous and intolerable*
10. offends against generally accepted standards of decency and morality
  11. when reasonable men differ as to outrageousness = jury question

#### CRITICISM OF ALLOWING CLAIMS UNDER RESTATEMENT

12. provides no clear definition of prohibited conduct
13. fails to provide guidance to those evaluating conduct
14. fails to provide guidance to those wishing to regulate their own conduct
15. AMBIGUITY

#### Statements appearing in magazines

'actual malice' requirement - knowing or reckless disregard of statement' veracity  
statement must be represented as factual

#### SEXUAL HARRASSMENT

16. quid pro quo - employment conditioned on sex
17. hostile environment (also for racial)
  - some courts require environment to be very hostile
  - a) objective test of hostile environment
    - something the reasonable person would find hostile
  - a) subjective showing that the plaintiff found it hostile
1. interference with work performance = non-required evidence of hostile environment
  - a) frequency of harassment
  - b) severity of harassment
  - c) word/acts were sufficiently hostile
  - d) impact on work performance

#### DEFENSES

1. Constitutional (First Amendment)
2. Consent - vitiates the tort

##### **Restatement (second) section 892(1)**

Consent indicates a willingness in fact for the conduct to occur. May be manifested by action, inaction and need not be communicated to the actor

##### **Restatement (second) section 892(2)**

Consent may be found in words or actions reasonably understood as intending consent

##### NOT ALWAYS A DEFENSE

- a) consent to mutual combat/ unlawful act is not consent
  - deters - defendant b/c liable for intentional tort
  - plaintiff b/c will get smaller recovery
- a) fraud
- a) duress
- b) mistake as to what is being consented to

##### BURDEN OF PROOF

Plaintiff has burden to show lack of consent to physical invasion

Defendant has burden to show consent w/r/t invasion of land or chattels

1. Self defense and defense of property
  - actor privileged to use *reasonable* force to prevent invasion
  - if plaintiff was at fault - NO recovery
  - reasonable force* - normally jury question
  - exceptions:
    1. peaceful invasion of property in owner's presence
      - any force unreasonable unless trespasser first asked to leave
    1. serious bodily harm in defense of property
      - spring guns, electric fences
    1. defense of a third person

MAJORITY - if 3<sup>rd</sup> party does not have privilege to self-defend, then defender is unreasonable

MINORITY - defendant has privilege even if based on reasonable mistake

1. Necessity

Defendant makes judgment and engages in self-help which may or not be reasonable  
If damage occurs as result of 'necessary trespass' defendant may be held liable

GOVERNMENT LIABILITY

1. Discretionary function
  2. Federal Tort Claims Act
  3. Title 42 section 1983 FEDERAL CIVIL RIGHTS ACT - applies to state agencies  
frequent litigation: always solvent defendant, plaintiff can recover atty's fees  
applies to actions of every person in agency  
no respondeat superior
1. BIVENS ACT

MUNICIPAL LIABILITY

1. policy which denies civil rights (most frequent)
2. failure to train/ supervise properly
3. dependent on general policy (can be unspoken)  
Deprivation must be under *color of state law*

Immunities of defendants

- pre-existing common law granting immunity was carried forward  
immunities not in statute
- a) unjust to subject to liability for exercising discretion when required to do so  
in absence of bad faith
  - a) threat of liability deters willingness to execute office with decisiveness and judgment  
required for the public good
  - b) executive officers have *qualified immunities* (required good faith showing)
  - c) prosecutors have *absolute immunity*
  - a) municipalities not immune

**DEFAMATION**

DAMAGES

Requirement of **special damages** offsets the rigor of defamation

special damages - proof that one lost business

once special damages are proven, **general damages** are presumed

general damages - award of \$ for "injury to reputation"

subjection to hatred, ridicule, contempt

**putative damages** - may also be available in defamation suits

LIBEL

Traditionally, anything written

Increasingly, radio and television broadcasts

**libel per se** - statement defamatory w/o reference to any extrinsic evidence (no special damages)

(ex. plaintiff is a bigamist)

**libel per quod** - need extrinsic evidence

(ex. Plaintiff is married to X - only defamatory if everyone knows plaintiff is married to Y)

if statement falls into 4 *slander per se* categories, no special damages

## SLANDER

Traditionally anything spoken

Ordinarily, requirement of showing special damages

Exception: **slander per se**

1. imputed crime to plaintiff
2. injurious to business or trade
3. to say plaintiff suffers from serious disease
4. alleging lack of chastity in a woman

## DEFENSES

Common law

5. consent
6. truth (quintessential defense, burden on defendant to establish)
  - a. came out of seditious libel
  - b. presumption of good character
  - c. easier to prove the affirmative than the negative

must be **substantial truth**

not good enough to say one accurately quoted someone else

ultimately not used that much (better defenses exist)

1. defense of absolute privilege
  - a. statements during judicial proceedings
  - b. statements made on the floor of congress
  
1. Qualified privileges
  - a. **privilege of fair comment**

past: the author has written the worst book I've ever read

**MAJORITY** - in order for fair comment on a political matter, underlying facts must be true... if not, people will not run for office

**MINORITY** - qualified privilege so long as underlying facts believed to be true
  - a. **fair and accurate reports w/r/t official proceedings**
    - i) *agency notion* - press = agent for people b/c not everyone can go watch
    - ii) *public supervision* - appropriate that people know what is going on in official proceedings to make judgmentsprivilege can be lost if report is unfair and inaccurate  
reports subject to somewhat lenient review  
privilege can be lost if sole purpose of the report is to cause harm  
almost never happens
  
1. Miscellaneous defenses
  - a. **retraction** - partial defense, allows for limitation of harm to plaintiff's reputation mitigates damages
  - a. **statute of limitations** - generally short, begins to run on first publication (3 years)  
harm and proof of defamation passes  
incremental harm of later sales is minimal
  - a. **disclaimer** - discourages lawsuits  
gives publisher evidentiary help that particular defendant not subject to defamation "Any resemblance to ..living or dead"

### New York Times v. Sullivan

Major purpose of the First Amendment protection is the preservation of public debate

substantial questions -

1. are statements substantially true
2. are statements of and concerning the plaintiff

even truth-telling defendants may have to pay

3. impossible to show truth
4. prohibitively expensive to prove truth

erroneous statements are inevitable - provision of breathing space for free debate

Public official cannot recover for statements relating to public conduct unless there is actual malice

5. knowledge that statement is false; or
6. reckless disregard w/r/t falsity of statement

actual malice must be proved with convincing clarity not preponderance standard

**Absolutionist view of the First Amendment** - no recovery is allowed for defamatory statements

#### DEFAMATION AND THE PRESS

Arguments supporting immunity for members of the press

7. public officials have thrust themselves into the spotlight
  - pseudo- assumption of the risk standard
  - not applicable to school teachers, policemen
1. plaintiffs have access to channels of communication - could call up reporters and deny veracity
1. NY - media defendant not liable unless acted in *grossly irresponsible* manner

#### CATEGORIES OF PUBLIC FIGURE

2. **general** - plaintiff is a "household word"
  - virtually anything the plaintiff does or says is subject to NY Times
1. **limited purpose** - plaintiff thrust self to the forefront of controversy, achieved prominence
  - protection applies if defendant's comment is germane to the controversy
1. **involuntary public plaintiff** - drawn into controversy (can be either 1 or 2)
  - (ex. Rosenberg children)

#### FACTORS TO DETERMINE WHETHER STATEMENT = FACT OR OPINION

1. analyze the common usage or meaning of the specific language in the challenged statement
2. consider the statement's verifiability
  - is the statement capable of being objectively characterized as true or false?
1. consider the full context of the statement
  - does unchallenged language surrounding the statement influence the reader's readiness to infer that the statement has factual content?
1. examine the broader context of the setting in which the statement appears

**Publishing an opinion almost always is protected by the First Amendment**

**EXCEPTION** - a statement in the form of an opinion may be actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion.