

## I. Intentional Torts

### A. Concept of Intent

1. Intentional torts share the requirement that the  $\Delta$  intentionally commit the elements that define the tort.
2. R2d/majority approach is to look for:
  - a) Specific intent:  $\Delta$ 's goal was to do the actions that constitute the tort, or
    - (1) Don't need knowledge that it will cause harm – just knowledge that you will commit a tort.
  - b) General intent:  $\Delta$  was substantially certain his actions would lead to the tort occurring.
    - (1) Must determine what the actor actually knew, not what a reasonable person would know.
  - c) Transferred intent: If  $\Delta$  intended to commit battery, assault, false imprisonment, trespass to chattel, or trespass to land against a party but instead commits a different one of these 5 torts or against a different party, the actor is considered to have requisite intent to be liable.
    - (1) R2d only recognizes transferred intent between battery and assault.
3. Mistake is not a defense.
  - a) If a  $\Delta$  intends to do acts which would constitute a tort, it is no defense that the  $\Delta$  mistakes, even reasonably, the identity of the property or person he acts upon or believes incorrectly there is a privilege.
    - (1) If A shoots B's dog reasonably believing it is a wolf, A is liable to B for trespass to chattel.
    - (2) However, self-defense privileges can protect  $\Delta$  from liability for reasonable mistakes.
4. Infancy is not a defense.
  - a) Children are not excused from liability for intentional torts.
    - (1) But it must be proved that the  $\Delta$  had the requisite intent to commit the harmful contact – not just the act (such as pulling a trigger).
    - (2) In *Garratt v. Dailey*, child Dailey was held liable for pulling the chair out from under Garratt.
  - b) Parents are generally not held liable for the torts of their children, but can be held liable for negligently failing to supervise their children and some statutes allow parents to be liable up to certain amounts for their children's torts.
5. Insanity is not a defense.
  - a) Insane person is liable as long as he intends the act.
  - b) In *Williams v. Kearbey*, the court held an insane person can be liable of a tort regardless of his reasons or motives.
  - c) Note that it might be a defense to punitive damages designed to punish malice.

- d) Policy:
  - (1) Someone must bear the loss, so it should be tortfeasor.
  - (2) Encourages relatives to supervise better.
  - (3) Prevents people from feigning insanity.

## **B. Battery**

- 1. Elements:
  - a) A harmful or offensive contact with Π's person.
  - b) Intent on part of Δ to bring about the contact – but not necessarily to cause harm.
- 2. Reasonable person
  - a) Whether the contact is harmful or offensive is judged on whether it would be harmful or offensive to a reasonable person of normal sensibilities.
  - b) This standard does not protect unreasonably sensitive persons.
    - (1) However, it is unclear whether it becomes a battery if you know the person is unusually sensitive.
    - (2) Also, it is more likely a tort if the person has hypersensitivity to physical injury.
  - c) The contact is offensive if the Π has not consented to it or it is not otherwise privileged.
    - (1) Would it offend the personal dignity of any ordinary person?
- 3. Contact
  - a) Anything connected to Π is part of the Π's person.
  - b) The Δ does not actually have to contact the victim – another item can be used.
    - (1) In *Leichtman v. WLW Jacor Communications*, cigar smoke was deemed an offensive contact.
  - c) No requirement that victim be conscious of the contact or its harmful nature at time of contact.
  - d) Don't need to prove actual damages.

## **C. Assault**

- 1. Elements:
  - a) An act creating a reasonable apprehension of immediate harmful or offensive contact to Π.
  - b) Intent on part of the actor to bring about apprehension of immediate harmful or offensive contact to Π.
    - (1) R2d also characterizes substantial certainty as sufficient.
    - (2) Accidental creation of apprehension could be NIED.
- 2. Apprehension
  - a) The victim must perceive that harmful or offensive contact is about to happen to him.
    - (1) Need not feel fear.
  - b) R2d deletes the reasonable requirement, but most courts do not.
  - c) Hypersensitive people are protected better than in battery.

d) The apprehension can be reasonable even if  $\Delta$  is not capable of causing the contact so long as it appears  $\Delta$  can – i.e. an unloaded gun.

(1) Past battery may indicate ability to inflict again, thereby causing immediate apprehension.

e) An overt act is required – words are not enough.

(1) But words accompanied by an overt act may be assault

(2) This could form a conditional threat (ex: Your money or your life), which is assault even though victim knows assault won't occur if he complies.

(3) Words can also negate assault by making apprehension unreasonable.

f) Can recover for emotional distress. See *I de S et Ux v. W de S* (hatchet in door).

### 3. Imminence

a) The apprehension must be of imminent harmful or offensive contact.

b) Actual attempt to inflict contact is not necessary, just intent to create apprehension.

c) Threats of future harm is not assault.

d) If actor is too far away to make contact, also no assault.

## D. False Imprisonment

### 1. Elements:

a) An act that confines or restrains the  $\Pi$  to a bounded area.

b) Intent on the part of the actor to confine or restrain  $\Pi$  to a bounded area.

c)  $\Pi$  is conscious of confinement or

(1) R2d allows recovery if  $\Pi$  is harmed by it.

(2) Some courts have made an exception when person cannot be conscious due to infancy or incompetency, if it is against will of person with legal custody.

### 2. Means of confinement

a) Physical Barriers

(1) Freedom to move in all directions must be limited.

(a) But area can be large – even whole state.

(2) If there is a reasonable means of escape, it is not false imprisonment. But not if victim is unaware of escape or escape requires  $\Delta$  to be heroic or endure excessive embarrassment or discomfort.

(3) Bounded area can be quite large - even an entire city.

b) Force or threat of immediate force

(1) Restraint by physical force directed at victim or his family or his property, or

(2) Threat of immediate (not moral pressure or future-looking threats) and physical (not economic or job) force.

- (a) Threat can be direct or indirect (reasonable to imply force will be used).
- c) Omissions where there is a duty to act.
  - (1) When  $\Delta$  owes  $\Pi$  a duty to be released, and  $\Delta$  breaches his duty, it results in false imprisonment. Ex: Leave on boat.
- d) Improper assertions of legal authority – false arrest.
  - (1) Occurs if an arrest is made without a warrant, unless there were reasonable grounds to believe the person committed the crime or is needed to prevent a crime in process.
  - (2) An arrest pursuant to lawful procedures cannot be false imprisonment, but could be malicious prosecution.
- 3. There is no minimal length required for false imprisonment.
  - a) Amount of compensation awarded reflects length of confinement.

#### **E. Malicious Prosecution (Malicious Institution of Civil Proceedings)**

1. Elements:
  - a) Institution of criminal (or civil) proceedings against  $\Pi$ .
    - (1)  $\Delta$  must have been responsible for initiating or in some way supporting the continuation of the legal proceedings against  $\Pi$ . Can be accomplished by asking another to bring or maintain a suit.
      - (a) Simple perjury is not sufficient.
      - (2) Prosecution must actually occur – simply filing a complaint is not sufficient.
  - b) Termination of proceedings favorable to  $\Pi$ .
    - (1) Must demonstrate innocence.
    - (2) Mere failure to continue to prosecute or proceed with case does not necessarily connote clear exoneration.
      - (a) If prosecution is stopped due to mercy, misconduct by accused, or a compromise, termination is not sufficient.
      - (b) However, some courts are becoming more flexible – will allow suit if proceedings are abandoned because accuser decides accused is not guilty.
  - c) Absence of probable cause for prosecution
    - (1) Exists if there was no reasonable basis to believe  $\Pi$  was guilty OR accuser did not subjectively believe  $\Pi$  was guilty.
  - d) Improper purpose of  $\Delta$  – acted with improper purpose (R2d does not require proof of malice).
    - (1) This is satisfied if can prove  $\Delta$ 's main purpose in bringing proceedings was for purpose other than bringing  $\Pi$  to justice – such as to harass or gain some advantage.

(2) Also satisfied if accuser did not believe accused was guilty.

(3) Proof only of dislike for accused is not sufficient.

e) Damages

(1) Must prove there are actual, emotional or reputational damages.

(2) Can include legal costs.

(3) Can also sometimes get punitive damages if prove malice.

2. Police and private parties can be subject to liability, but prosecutors and judges cannot.

3. Some jurisdictions include wrongful initiation of civil proceedings in same tort, others separate them.

## F. Abuse of Process

1. Elements:

a) Misuse of a criminal or civil legal process

(1) Focuses on misuse of subpoenas, attachments, and other legal processes. See *Maniaci v. Marquette*

(2) Courts have held that abuse of process can not be based on motive for commencement of cause of action – only overt misuse of processes once a proceeding has begun.

b) For an ulterior purpose,

c) Which results in damage to Π.

(1) A person who uses a legal process against another to accomplish a purpose for which it was not intended is liable to the other for harm caused by the abuse of process.

2. Distinguished from malicious prosecution

a) Because the legal proceedings do not have to have been terminated before bringing an action.

## G. Intentional Infliction of Emotional Distress

1. Elements:

a) An act by Δ that is extreme and outrageous conduct

(1) Behavior that transcends all bounds of decency tolerated by society and is regarded as atrocious and utterly intolerable in a civilized community.

(a) Mere rudeness is not sufficient.

(b) Most courts do not consider sexual and racial harassment extreme unless there is a constant pattern.

(2) Offensive and insulting language is generally not outrageous unless:

(a) There is a special hierarchical relationship between Π and Δ (like employer-employee or teacher-student), or

(i) Also includes public utilities, common carriers and sometimes innkeepers.

- (b)  $\Pi$  has a known sensitivity of which  $\Delta$  is aware.
      - (i) If  $\Delta$  knows  $\Pi$  is hypersensitive, and  $\Delta$  purposely picks at  $\Pi$ 's sensitivity,  $\Delta$  may be liable.
  - b) Intent on part of  $\Delta$  to cause  $\Pi$  to suffer severe emotional distress, or recklessness as to effect of  $\Delta$ 's conduct.
    - (1) IIED is only intentional tort where the typical standard of intent (purpose or substantial certainty) is relaxed.
    - (2) Recklessness is extreme form of negligence; it is a deliberate disregard of a high degree of probability.
  - c)  $\Pi$  suffers severe emotional distress
    - (1) No longer need to prove physical manifestations of distress.
- 2. Third Party
  - a) Third parties may recover for IIED if IIED is inflicted on someone they know. Must prove:
    - (1)  $\Pi$  was a close relative (family member or maybe a close friend) of the injured party and was present at the time, regardless of whether distress results in bodily harm, OR
    - (2)  $\Pi$  was present at time and the distress resulted in bodily harm.
- 3. Public figures must also prove NY Times malice
  - a) Must prove that statements were made with knowledge they were false or with reckless disregard of whether or not they were false.
  - b) Although some courts require private individuals in public controversies to prove negligence for defamation, there is no indication courts would also hold this true for IIED.

## **H. Intentional Interference with Contractual and Prospective Economic Relations**

- 1. Elements:
  - a) Existence of a valid contractual relationship between  $\Pi$  and a third party OR a valid business expectancy of  $\Pi$ .
    - (1) Mere hope for customers or profit is insufficient.
    - (2) Not liable if k was illegal or against public policy.
  - b)  $\Delta$ 's knowledge of relationship or expectancy.
    - (1) Knowing facts from which could conclude a valid k exists is sufficient.????
  - c) Intentional interference by  $\Delta$  that
  - d) Induces a breach or termination of the relationship or expectancy.
    - (1) Must be actual cause, not just beneficiary.
  - e) Damages  $\Pi$ .
    - (1) Must prove  $\Pi$  has a valid expectation of benefit.
    - (2) Compensation for emotional distress and punitive damages may be appropriate.

2. Not limited to existing contracts.
    - a) Applies to interference with probably future business relationships for which II has an expectation of financial benefit.
  3. Interference methods
    - a) Inducement
      - (1) Inducing a third party not to perform a contract with II.
    - b) Prevention
      - (1) Preventing or making it difficult for II to perform their contract.
  4. Competition
    - a) Preventing a third party from entering into a k or encouraging ???? breaking an at-will k with a competitor is not improper interference if:
      - (1) It concerns a matter involved in the competition,
      - (2) The actor does not employ wrongful means,
      - (3) The action does not create an unlawful restraint on trade, and
      - (4) The purpose is at least in part to advance interest in competing with the other.
  5. Responsible for third party
    - a) One who is responsible for a third party and prevents them from entering a k with another does not improperly interfere if:
      - (1) He does not employ wrongful means and
      - (2) Acts to protect the welfare of the third person.
  6. Influencing business policy
    - a) One who interferes with a k in order to influence the others' business policy does not improperly interfere if:
      - (1) The actor has an economic interest in the matter he wishes to influence,
      - (2) The desired policy does not violate an established public policy, and
      - (3) The actor does not employ wrongful means.
  7. Advice
    - a) One who causes a third party not to perform a contract does not interfere if he gives the person: DO YOU HAVE TO BE ASKED?
      - (1) Truthful information OR
      - (2) Honest advice within the scope of a request for advice.
  8. Burden of proof
    - a) Courts are split on who has burden of proof, but an increasing number place burden on II.
- I. Tortious Breach of Covenant of Good Faith and Fair Dealing
1. Every k has an implied covenant of good faith and fair dealing.
    - a) Requires parties to refrain from doing anything to injure the ability of the other party to comply with or gain benefit from k.
  2. Tort is generally limited to breaches by insurance companies.

- a) Occurs when insurance co. refuses in bad faith to pay the insured.
    - b) CA has rejected applying it to employment Ks or to bad faith denial of K.
  - 3. Tort allows recovery for emotional distress and punitive damages when malice is shown, in addition consequential economic loss.
  - 4. Reasoning:
    - a) Insurance companies could otherwise stonewall paying out claims.
    - b) Insurance companies are in a position of power and is in the public interest for them to guard the best interests of the insured.
- J. Intentional Misrepresentation
- 1. Elements:
    - a) A false representation
    - b) In reference to a material fact
      - (1) Material facts are those which a reasonable person would attach importance to, or those that could be expected to influence the conduct of a person with respect to the transaction in question.
      - (2) Only applies to misrepresentations of past or present facts – not future.
        - (a) However, misrepresentation of a present intention is considered a present fact.
    - c) Made with knowledge of its falsity
    - d) And with the intent to deceive and with an
      - (1) Actor must have intended to induce P to act in reliance on the misrepresentation.
    - e) Action taken in justifiable reliance on the misrepresentation.
  - 2. No duty to disclose unless
    - a) The actor knows the other is about to enter under a mistake as to the facts and
    - b) The other, because of their relationship, would expect a disclosure of those facts.
      - (1) This includes experts, fiduciaries, and Δs who misled a victim as to their objectivity.
  - 3. Justifiable reliance
    - a) Reliance on fact is justified but reliance on opinion is usually not.
      - (1) However, opinion is actionable if Δ implies opinion is based on access to information not available to recipient.
    - b) If victim is not deceived, and totally discounts the representation, there is no reliance.
      - (1) *Nader v. Allegheny Airlines*.
    - c) However, a foolish victim is not contributorily negligent. Can still recover.
  - 4. Damages

- a) Can recover for pure economic loss and for punitive damages if can prove malice.

## K. Defenses

1. Consent: Actor not liable for a tortious act if  $\Pi$  consented.
  - a) Express consent
    - (1)  $\Pi$  shows a willingness to submit to  $\Delta$ 's conduct.
    - (2) Invalid if obtained by fraud or duress.
    - (3) Children may consent to certain things depending on age.
    - (4) People suffering from insanity, retardation or intoxication may not legally consent.
    - (5) Majority of courts hold you cannot consent to illegal activities, like illegal boxing, but R2d says you can unless law is designed to protect members of victim's class.
  - b) Implied consent
    - (1) Apparent consent
      - (a) That which a reasonable person would infer from  $\Pi$ 's conduct.
      - (b) Ex: Snowball fight
    - (2) Consent implied by law.
      - (a) Where action is necessary to save a person's life or property.
      - (b) Ex: Unconscious during emergency.
2. Self-defense
  - a) Reasonable force can be used where one reasonably believes that such force is necessary to protect oneself from immediate harm.
  - b) Reasonable belief
    - (1) Actor must have a reasonable belief that they are the subject of an immediate threat.
      - (a) Some jxs relax immediacy to include 'present occasion.'
    - (2) A sincere but unreasonable belief is insufficient.
  - c) Retaliation not allowed
    - (1) Self defense is limited to using force to prevent a tort. If there is no longer a threat, cannot use force in retaliation.
  - d) Retreat not necessary
    - (1) One does not need to attempt to escape.
    - (2) But under R2d there is a duty to retreat, if possible, before using deadly force, unless you are in your own home.
  - e) Not available to aggressor
    - (1) Initial aggressor is not privileged to use self-defense against other person's use of force in self defense, unless the other person is using deadly force to respond to non-deadly force.

- f) Reasonable force
    - (1) Can use force that appears reasonably necessary to prevent harm.
    - (2) Cannot use deadly force unless aggressor used deadly force first or it is the only way to prevent serious harm or death.
    - (3) If use more force than is necessary, privilege of self defense is revoked.
  - g) Extends to 3<sup>rd</sup> party injuries
    - (1) If in the course of defending yourself, you accidentally injure a third party, a person defending themselves is privileged by the defense.
3. Defense of others
- a) There is a privilege of self-defense to defend others if the other person had the right to self-defense.
  - b) If the person aided had no privilege to use self-defense, the person who helped has no privilege.
    - (1) R2d makes an exception if you are mistaken in thinking the person has privilege.
  - c) Can use as much force as the one who has privilege.
4. Defense of property
- a) One may use reasonable force to prevent tort against property.
  - b) Can be used to either prevent commission of tort or if “in hot pursuit.”
  - c) You lose your privilege once you prevent the tort.
  - d) Must first request other party to desist, unless that is too late.
  - e) Can never use deadly force (unless intruder threatens the occupant’s safety).
    - (1) Although R2d allows it.
    - (2) Use of mechanical devices to inflict serious injury is severely discouraged by courts.
  - f) Cannot use force if other party is privileged to use property unless they negligently or intentionally made you think they did not have privilege.
5. Privilege of arrest
- a) Arrests pursuant to a valid warrant are privileged.
    - (1) A police officer under CL has privilege to arrest an individual when she has a reasonable basis to believe the person is guilty of a felony even if no felony actually in fact occurred.
  - b) Under CL, a private citizen has the right to use reasonable force to arrest an individual for a felony when either the individual is in fact guilty of the felony or the felony actually occurred and the citizen reasonably believes the person he arrests is guilty.

- c) A private citizen also has the right to use reasonable force to arrest someone she witnesses committing a misdemeanor when the misdemeanor constitutes a breach of the peace.
- 6. Necessity
  - a) People may interfere with an innocent party's property in an attempt to avoid greater injury.
    - (1) There must be a reasonable perception of immediate need.
  - b) Public necessity
    - (1) Defense allows appropriation of property to avoid a greater harm to the public.
    - (2) Does not require compensation of victim.
      - (a) Although some courts will order it.
  - c) Private necessity
    - (1) If act is solely to benefit a person or to protect property from destruction or injury, the defense is allowed, but must pay for damages caused by intrusion.

## II. Negligence

### A. Overview

- 1. Duty
  - a)  $\Delta$  must have owed a duty to  $\Pi$ .
- 2. Breach
  - a)  $\Delta$  must have breached that duty by failing to conform to a standard of conduct.
- 3. Causation
  - a) The breach of  $\Delta$ 's duty was the actual and proximate cause of  $\Pi$ 's injury.
- 4. Damages
  - a) There was damage to  $\Pi$ .

### B. Duty

- 1. General
  - a) There is a general duty of care on all human activity.
  - b) When a person engages in an activity, he has a legal duty to act as a reasonable person.
    - (1) It is presumed reasonable prudent people take precautions against creating unreasonable risks to others.
    - (2) Warning people of danger makes you less liable.
  - c) No duty is imposed on a person to take precautions against events that cannot be reasonably foreseeable. See *Carroll Towing*.
  - d) Hand Formula to determine reasonableness
    - (1) Actor is negligent if the burden of precautions (B) was less than the harm if the accident occurred (L), discounted by the probability of occurrence (P).
    - (2)  $B < PL$ ; The higher P and L are and the lower B is, the likelier is a finding of unreasonableness/negligence.
  - e) Duty is a question of law for the judge.

2. Duty is owed to:

a) Foreseeable Plaintiffs

(1) In *Palsgraf v. Long Island*, the court held that the  $\Pi$  must be foreseeable.

(a) But note Andrews' dissent, still a viable minority view, that everyone owes to the world at large the duty of refraining from those acts that may unreasonably threaten the safety of others.

(2) Unforeseeable Plaintiff Problem

(a) Problem arise when  $\Delta$  breaches a duty to one  $\Pi$  but also causes injury to another  $\Pi$  to whom a foreseeable risk of injury might or might not have been created by the negligent act.

(b) So most courts adopt the reasonably foreseeable rule.

(i) The 2<sup>nd</sup>  $\Pi$  can only recover if he can establish that a reasonable person would have foreseen a risk of injury to him in the circumstances.

b) Rescuers

(1) Are foreseeable  $\Pi$ s, because danger invites rescue.

(2)  $\Delta$  is liable if he negligently puts himself in danger and a  $\Pi$  is injured during a rescue attempt.

c) Unborn

(1) A duty of care is owed to a fetus, if they are viable (capable of surviving outside the womb) at the time of the injury.

3. Limitations on Duty

a) Failure to Act

(1) In general, there is no duty to rescue someone in peril.

(2) But there is a duty in certain circumstances:

(a) Voluntary Undertaking

(i) People who aid another have a duty to act reasonably and not put the victim in greater peril

(a) The rescuer may abandon efforts as long as he has not made the victim worse-off.

(ii) Liability exists if:

(a) The rescuer acts unreasonably, increasing the risk of harm.

(b) There is reliance on the rescuer's action, putting the victim in a worse position if rescuer abandons attempt.

(c) There is a statute requiring aid.  
Only in VT (easy rescue) and MN  
(assist at scene).

(iii) Several states have good Samaritan statutes freeing doctors and nurses from liability for ordinary negligence who voluntarily give emergency treatment.

(b) Special Relationships

(i) If a special relationship exists (parent-child, employer-employee), there is a duty to act.

(a) Teacher-student might be sufficient.

(ii) Common carriers have a duty to use reasonable care to help passengers in peril, and to aid and assist passengers and prevent injuries to them.

(iii) Places of public accommodation (innkeepers, stores, etc.) have a duty to use reasonable care to help patrons in peril and to aid patrons and prevent injuries to them.

(iv) One who voluntarily takes custody of another under circumstances as to deprive the other of his normal opportunities for protection is under a similar duty.

(c) Peril Created by  $\Delta$

(i) When  $\Delta$ 's conduct is responsible for harm to  $\Pi$  (even if not at fault),  $\Delta$  has a duty to take reasonable efforts to assist  $\Pi$  and avoid future harm.

(ii) Also has a duty to warn others of dangers created by her conduct.

(a) Even if  $\Pi$  was negligent and  $\Delta$  was not. See *Ayres v. Hicks* (escalator).

(d) Contract

(i) Some courts will enforce duty to rescue in situations like babysitter or lifeguard.

(ii) But not usually for gratuitous promise.

b) Duty to Control 3<sup>rd</sup> Persons

(1) In general, there is no duty to prevent a 3<sup>rd</sup> person from injuring another, nor is there a duty to warn those endangered by the conduct.

(2) But there is a duty if a special relationship exists with either the actor or the victim.

(a) Psychiatrists

(i) In *Tarasoff v. UC Regents*, court applied this to psychiatrists, which has been widely followed.

(ii) Some states have limited this to foreseeable victims, but others require the victim be readily identifiable (like CA).

(a) In CA *Tarasoff* has been limited to require only notification of a serious threat of physical violence against a reasonable identifiable victim.

(b) CA courts also said don't have to warn parents of possible suicide or danger from drugs, but other jxs have not.

(iii) Some jxs apply Tarasoff duty to property damage, others do not.

(b) Liquor Suppliers

(i) Some jxs say that business establishments (and in some jxs even social hosts) that serve alcohol have a duty to prevent intoxicated patrons from driving home drunk and injuring someone.

(c) Parents

(i) Under the common law, parents are not automatically liable for their children's torts. See *Wells v. Hickman* (child murder).

(a) But states are increasingly imposing limited vicarious liability up to a few thousand dollars by statute.

(ii) Parents can be held negligent in their supervision of their children – often restricted to failure to prevent same kind of harm as child had previously demonstrated a propensity to engage in.

(iii) In CA parents are liable for willful misconduct.

(3) Negligent Entrustment

(a) Δ can be liable for negligently entrusting someone with a potentially dangerous instrumentality, like a gun or car.

(b) Can even include lending money to purchase a gun.

(4) Duty to Protect

(a) Generally no duty to protect another from harm.

(b) But where  $\Pi$  has ceded ability for self-protection to  $\Delta$ ,  $\Delta$  does have duty to make reasonable efforts to protect the latter.

(i) Such relationships include parent-child, innkeeper-guest, common carrier-passenger, jailor-prisoner, school-student, hospital-patient, and employer-employee.

(c) A duty to protect may also arise where  $\Delta$  undertakes to protect the  $\Pi$  and the  $\Pi$  relies on that protection.

(d) Landlord

(i) Traditionally landlords are not liable to their tenants for third-party invasions.

(ii) But in *Kline v. 1500 Mass Ave.*, court imposed a duty to protect from assaults in common areas since  $\Delta$  created reliance by providing better security for  $\Pi$  and landlord was only party equipped to deal with threats in common areas.

(iii) It is unclear whether this duty would extend to tenant's own unit or to tenant's guests.

(iv) Note that  $\Pi$  must still prove  $\Delta$ 's security efforts were unreasonable and that  $\Pi$  would not have been hurt if  $\Delta$  had provided better security.

(e) Business

(i) Courts typically require a high degree of foreseeability to establish a duty.

(ii) Some require proof of prior, similar incidents, while others look at totality of circumstances.

(f) Police

(i) Most courts have consistently found that police officers are not deemed to have a sufficient relationship with the public to create an exception to the general rule and thus, police officials generally have no duty to the public. See *Davidson v. City of Westminster* (CA laundromat stabbing).

(ii) Liability usually only found where police undertook to act and created reliance, enlisted aid of  $\Pi$ , or increase risk of harm to  $\Pi$ .

c) Negligent Infliction of Emotional Distress

(1) Traditionally, courts only allowed recovery for NIED when  $\Pi$  was physically impacted – recover for pain and suffering. But virtually all courts have abandoned this.

(2) A slight majority of courts today limit recovery for NIED to  $\Pi$ s who either

(a) actually suffered impact or

(b) were in the zone of the physical risk of impact.

(i) Note: You can be present and not be in the zone of danger.

(ii) NY uses this.

(3) A substantial minority of states expand liability for NIED to include additionally bystanders who satisfy the *Dillon* requirements:

(a)  $\Pi$  was present at scene of accident,

(b)  $\Pi$ 's distress was caused by the sensory and contemporaneous observance of the accident,

(i) May be satisfied by non-visual perception of the accident.

(c)  $\Pi$  has a close relationship with the victim, and

(i) Usually includes married spouses, parents, children and siblings.

(d)  $\Pi$  suffered severe emotional distress beyond what one would expect of an uninvolved bystander.

(4) California strictly applies *Dillon*, but some states are more flexible and allow recovery for  $\Pi$ s who have witnessed the immediate aftermath of an accident.

(a) MA even allowed in hospital.

(5) Most states require that the mental distress be evidenced by physical manifestations – like a heart attack or stomach ache, but not necessarily crying or headache.

(a) But some states like CA do not require physical manifestation.

(6) There are a few contexts in which courts might allow recovery without satisfy zone of danger, *Dillon*, or physical manifestation tests, including handling of relative's corpse, mistakenly informing relative has died, or even damage to chattel with strong sentimental value.

(a) CA SC has allowed recovery when the  $\Pi$  is characterized as the direct victim (syphilis), but that is limited to situations where the  $\Delta$  had a significant pre-existing relationship with the  $\Pi$  or either assumed or had a legally imposed duty to the  $\Pi$ .

d) Wrongful Life, Birth and Conception

(1) Almost all states reject idea of child recovery damages for being born in *wrongful life* suits.

(a) But some courts do allow a child to recover for injuries suffered while a fetus. See *Turpin v. Sortini* (deaf child).

(2) Most courts do allow negligent actions for *wrongful conception* (when parent sues for birth of an unwanted but healthy child).

(a) But recovery is often limited to medical and other costs prompted by the pregnancy, although some courts allow more.

(b) Doctrine probably only applies to medical malpractice.

(3) Many courts recognize and allow limited recovery (costs of pregnancy and disability care and maybe ED) for *wrongful birth* (negligently causing birth of a child with a health disability).

e) Landowners and Occupiers

(1) **Trespassers** are visitors to the land who come without permission or privilege. You are not a trespasser if have implied permission – like a front yard path to door, or if permission is implied by owner's actions or community customs.

(a) Some jxs maintain traditional view and limit liability for only willful or wanton injury.

(b) But many substantially expand protection for anticipated trespassers. R2d imposes a complete reasonable person standard on landowners and occupiers when they are engaging in activities when it is known trespassers are present or in locations trespassers should reasonably be anticipated to be present.

(c) Also R2d requires landowners and occupiers to warn or make safe known concealed artificial conditions which involve the risk of death or serious injury.

(i) Note: CA says that trespassers attempting to commit enumerated felonies can only recover from landowners for willful and wanton injuries.

(2) **Licensees** are visitors who enter onto the land with permission or are otherwise privileged to enter but do not qualify as invitees – includes social guests, police, firefighters and salespeople on front walkway.

(a) Most courts expand protection. In addition to duty owed trespassers, must warn of both artificial and natural concealed conditions, like cracks on walkway, that pose an unreasonable risk of harm.

- (b) Land occupiers are not responsible for warning licensees of dangers which are obvious or apparent.
- (3) **Invitees** include those entering land for business interest of the landowner or as a member of the public when the land is open to the public – customer in store, garbage men, museum, library.
  - (a) There is no limit on duty to reasonably protect. Must act reasonably when engaging in activities like machinery.
  - (b) Also must insure conditions of land are reasonably safe – including inspection to discover hazards and reasonable repairs in addition to warning.
  - (c) But only have to behave like reasonable person – not eliminate all risks.
  - (d) Not responsible for warning of open and obvious dangers.
  - (e) For land held open to public, must actually desire them to come on land – not just acquiesce.
- (4) Attractive Nuisance
  - (a) Traditionally, court's imposed liability on landowner's for injuries to children trespassers if they were attracted by the harmful nuisance.
  - (b) But this is no longer widely followed. More likely court today would ask whether children were likely to be trespassers on the land and owner knew or should have known of condition that has unreasonable risk of death, and didn't exercise reasonable care. Also look at utility of maintaining the nuisance compared to danger.
- (5) CA law
  - (a) CA applies reasonable person standard to landowners instead of licensee/invitee distinction. See *Rowland v. Christian* (sink).
- f) Landowner's Liability Off Land
  - (1) Under CL, landowners or occupiers are not liable for most natural conditions on their land which can cause injury to those off the land.
    - (a) Natural conditions is land that was not changed by any acts of humans.
    - (b) In *Spears v. Blackwell*, court held that vegetation was not natural because only grew on plowed land.
  - (2) This rule limits the duty of landowners to act reasonably to protect those off the land from hazards, such

as mud or rocks, that could injure IIs on neighboring roads and property.

(3) Land owners and occupiers are fully liable for injuries to those off land caused by land owner's negligence regarding artificial conditions.

(4) Most courts require urban land owners and occupiers (and some rural) to reasonably inspect and care for tress that could endanger those off the land.

(5) Some courts (like CA) have imposed a full duty of reasonable care on landowners and occupiers for all natural conditions.

g) Economic Loss

(1) Economic loss is usually only awarded when it flows from a negligently inflicted personal injury or property damage – there is no legal duty under negligence to refrain from causing pure economic loss.

(2) However, a few jxs have held that Negligent Interference with Prospective Economic Advantage can be recovered when:

(a) Risk of harm is particularly foreseeable and closely related to  $\Delta$ 's conduct.

(b) Damages are not wholly speculative

(c) Injury is not part of II's ordinary business risk.

(i) In *J'Aire Corp. v. Gregory*, court held that a contractor owes a duty of care to the tenant of a building undergoing construction work to prosecute that work in a manner which does not cause undue injury to the tenant's business, where such injury is **reasonably foreseeable**.

(ii) See also *People's Express*.

(a) But still need to prove actual losses.

(3) In limited circumstances (like wills), attorneys have been held liable to non-client third parties.

h) Negligent Misrepresentation

(1) Courts have generally made an exception to the no recovery for economic loss rule when negligent misrepresentation is involved.

(2) Negligent misrepresentation occurs when a person who supplies false information for guidance of others in a business transaction if the supplier fails to exercise reasonable care in obtaining or communicating the information.

(3) R2d approach (adopted by 17 states)

(a) One who in the course of his business supplies false information for the guidance of others in their business transactions is subject to liability for pecuniary loss caused to them by their justifiable reliance on the info, if he fails to exercise reasonable care or competence in obtaining or communicating the info.

(b) Liability is limited to loss suffered:

(i) by persons whose benefit and guidance he intends to supply the info or knows the recipient intends to supply it, and

(a) See *Bily v. Young* (shareholders sued auditor)

(ii) that author intends the recipient to rely on the information or knows that the recipient intends to rely on it.

(c) Also, liability of those under public duty to give info extends to loss by any of class of persons whose benefit the duty is created.

(d) Although R2d requires info be supplied in a business, professional or employment relationship, not all courts do.

(4) Traditional Cardozo approach (adopted in 9 states)

(a) Deny recovery to third parties for auditor negligence in the absence of a third party relationship to the auditor that is akin to **privity**.

(i) Requires awareness of a particular purpose to a known party and intent that the party rely.

(b) This prevents liability for an indeterminate amount to an indeterminate class.

(5) Wiener approach (adopted in 3 states)

(a) Allow recovery to third parties whose reliance on the audit report was **foreseeable**.

(b) This serves dual functions of compensation for injury an deterrence but does not solve problem of indeterminate liability.

i) Sports

(1)  $\Delta$  has no duty to protect  $\Pi$  from risks inherent in the sport itself.

(2) However,  $\Delta$  has a duty not to increase risks to  $\Pi$  over and above those inherent in the sport.

(3) If  $\Delta$  intentionally injures another player or engages in reckless conduct,  $\Delta$  breaches his duty.

C. Breach

1. When  $\Delta$ 's conduct falls short of the level required by the applicable standard of conduct,  $\Delta$  has breached their duty.
  - a) Whether duty of care is breached is a question for the jury.
2. Proof
  - a) To prove a breach  $\Pi$  must show:
    - (1) What in fact happened
    - (2)  $\Delta$  acted unreasonably.
      - (a) This may be established by the standard of care by which  $\Delta$ 's conduct is to be measured.
3. Standard of Conduct
  - a) Basic Standard
    - (1) The basic standard is measured against the reasonable prudent person in similar circumstances.
      - (a) This is an objective standard.
    - (2) A reasonable person has the following:
      - (a) Physical characteristics the same as the  $\Delta$ .
        - (i) Physical disabilities are considered.
          - (a) Blindness, heart attack, etc. are considered when deciding whether  $\Delta$  acted reasonably.
          - (b) However, a person is expected to know his physical handicaps and is under a duty to exercise reasonable care of a person with such knowledge.
            - (i) So an epileptic shouldn't be driving a car.
        - (b) Average mental ability.
          - (i) Mental illness is irrelevant in majority of jxs. See *Breunig v. Amer. Fam. Insur.* (batmobile)
            - (a) Insanity, stupidity and senility are not excuses.
          - (ii) Mental retardation is relevant.
            - (a) Are usually held to child standard.
        - (c) Same knowledge as average member of the community.
          - (i) Beginners are not excused for acting below the standard of conduct.
    - b) Emergency Situations
      - (1) An emergency may be considered among the circumstances under which  $\Delta$  acted. See *Cordas v. Peerless Transp* (carjacked cab).
      - (2) Person must act as a reasonable person would in same emergency.

(3) However, this is no excuse if the emergency was caused by the Δ.

(4) Split on whether jury should be given special instructions for an emergency or whether it is redundant.

c) Child Standard

(1) Children are judged against the standard of care of a child of like age, intelligence and experience.

(2) Minimum ages to be negligent in most states:

(a) 0-7 cannot be negligent

(b) 7-14 sometimes found negligent

(c) 14 and over often found negligent.

(3) However, children engaged in adult activities can be held to the standard of care of an adult engaged in same activity, like driving or flying. See *Neumann v. Shlansky* (kid golfer)

d) Professionals

(1) A person who is a professional or has special skills is required to use knowledge and skill of a member of that profession in good standing in similar communities.

(a) Must have graduate degree.

(i) But can take other special skills into account in determining breach.

(b) Must use skill and knowledge that actually have, so a specialist may be held to a higher standard than a general practitioner.

(c) Likewise, a specialist might not know what a general practitioner should know. See *Melville v. Southward* (toe problem)

(d) General practitioner's are measured against general practitioner's in similar communities in state, but specialists are usually measured to other specialists nationwide.

(2) A doctor proposing treatment has a duty to provide patients with enough information about the risks to enable the patient to make an informed consent to the treatment.

(a) If an undisclosed risk was substantial enough or material such that a reasonable person in the patient's position would not have consented to the treatment, the doctor has breached his duty.

(b) If it is an emergency, the doctor does not have duty to disclose the risks of treatment.

(c) A doctor does not have a duty to disclose minor risks of common procedures.

(d) If a doctor breaches the standard of conduct by not disclosing a risk, but a patient would have

consented if the risk was disclosed, the doctor's nondisclosure does not matter.

(e) If a patient refuses treatment, in CA doctor has duty to disclose risks of not having treatment.

(f) Could be battery when if doctor touches without consent????

(g) Court's are split between "physician rule" (the medical professions in community determines what a competent physician should do) and the "patient rule" (jurors ask what a reasonable physician would do regardless of current medical practice.)

#### 4. Rules of Law

a) Occasionally judges enunciate rules that under certain circumstances a particular conduct is negligent or not negligent, which may establish a precedent for other cases where the facts are substantially the same. See *Adkins v. Glens Falls School Dist.* (baseball screen).

b) The rules are intended to avoid excessive litigation and provide society with an appropriate degree of certainty on what constitutes negligent conduct.

#### 5. Negligence Per Se

a) Most states consider violations of statutes or regulations to be negligence per se when it results in injury. See *Stachniewicz v. Mar-Cam Corp.* (bar serving to visibly intoxicated)

b) However, the harm must be to a member of the class of people intended to be protected by the statute and the harm must be of the kind which the statute was enacted to protect.

(1) See *Wawanesa Mutual Insurance Co. v. Matlock* (dropped cigarette).

(2) But most jxs don't apply for not having driver's license.

c) You can still be liable even if you obeyed statute.

(1) A license is designed to prevent incompetence, but it does not guarantee competence. You are still held to the standard of care of other licensed people doing the same activity.

d) Neg per se is apply instead of standard of conduct.

(1) But it is generally not applied in lieu of child standard.

#### 6. Custom

a) Is generally accepted as evidence of what constitutes reasonable conduct.

b) However, juries are free to determine if the custom is unreasonable and hence negligent.

### D. Causation

#### 1. Cause-In-Fact

a) For a  $\Delta$  to be liable,  $\Pi$  must prove beyond a preponderance of the evidence that  $\Delta$ 's actions (or inaction) was the **actual cause** of the injury. This can be proven through several methods:

(1) But For test: Injury would not have occurred but for the  $\Delta$ 's act.

(a) There must be a reasonable connection between  $\Delta$ 's act or failure to act and the injury.

(b) This is the traditional and still dominant test.

(c) There can be multiple "but for" causes.

(2) Substantial Factor Test (for Redundant Causes)

(a) When several causes occur to bring about an injury and either cause alone would have been sufficient to cause the injury,  $\Delta$ 's conduct was a substantial factor in the injury, and can still be liable

(i) Must consider how substantial a factor  $\Delta$ 's act was.

(b) Causes must be concurrent enough to both cause harm.

(i) If one act destroys something just before another act would have, the first one will try to argue that they only owe for short life expectancy, but second cause will owe nothing.

(a) Under *Dillon*, only liable for added pain of being electrocuted

(ii) But courts will probably not allow  $\Pi$  to not fully recover.

(c) Medical uncertainty

(i) When a patient with less than 50% chance of living is further harmed by malpractice, some courts allow  $\Pi$  to recover under substantial factor. See *Herskovitz v. Group Health* (cancer).

(a) Court left it unclear whether  $\Pi$  could recover full amount or not.

(ii) Other courts have allowed suit for "loss of opportunity to survive."

(d) Note that some jxs like CA always use substantial factor instead of but for.

(3) Burden Shifting

(a) A problem of causation arises where there are two or more actors, but uncertainty exists as to which  $\Delta$  caused  $\Pi$ 's injury.

(i) If there are a small number of  $\Delta$ s who engaged in simultaneous culpable conduct, then if  $\Pi$  can prove that at least one of the

Δs caused the injury, the burden of proof shifts to each Δ to show that their negligence was not the cause. See *Summers v. Tice* (hunting accident).

(b) Market share liability

(i) Under doctrine adopted in CA, FL, NY and WI, each DES Δ is liable for its % share of the market unless Δ could show it was not negligent. See *Sindell v. Abbott Labs* (DES).

(ii) How market share is determined has varied by jx.

(a) CA and NY use national market share.

(iii) It has rarely been used outside of DES litigation.

(a) CA declined to adopt for defective polio vaccine.

(4) Concerted Action

(a) If someone encourages another to engage in negligent conduct, both are liable for any resulting injury (like conspiracy).

(5) Toxic Tort Cases

(a) In *Ayers v. Jackson Township*, the court said that Ayers could not recover for the unknown enhanced risk of illness, but could recover for the cost of medical surveillance that is proved to be reasonable and necessary.

(b) It is difficult to prove causation and damages in toxic tort cases due to the long latency period.

2. Proximate Cause

a) Δ's conduct must also be the proximate (legal) cause of the injury.

(1) Δ is liable for all harmful results of his negligent actions that are reasonably foreseeable.

(a) Δ is liable only for the probable consequences, not all possible consequences.

(b) In *Palsgraf v. Long Island*, the court held that the Π must be foreseeable.

(i) But note Andrews' dissent, still a viable minority view, that everyone owes to the world at large the duty of refraining from those acts that may unreasonably threaten the safety of others.

(c) In *Wagon Mound*, the court held that the type of consequences must be reasonably foreseeable.

(i) This follows *Palsgraf* ruling that the  $\Pi$  must also be foreseeable.

(2) Type of Harm

(a) If the type of harm was at all foreseeable by  $\Delta$ 's negligent act, the unusual manner in which the injury occurred or the unusual timing of the cause and effect is irrelevant to  $\Delta$ 's liability.

(b)  $\Delta$  is liable for harm caused by negligence of third persons where such negligence is a foreseeable risk of  $\Delta$ 's conduct. See *Bigbee v. Pacific Telephone Co.* (phonebooth).

(c)  $\Delta$  is also liable when his negligence creates a foreseeable risk that a third person would commit a crime or an intentional tort (unlocked car).

(3) Eggshell  $\Pi$  Rule

(a) Take your victim as you find him.

(b) Liable even for highly unusual medical complications that arise because victim is extremely sensitive.

(c) However, most courts, unlike in *Steinhauser v. Hertz* (schizophrenic), do not apply this rule to mental harm.

(d) Award may be adjusted to reflect the pre-existing condition (life expectancy, etc.)

(4) Proximate cause is factual question for jury.

(5) Direct causation

(a) Under traditional direct causation test,  $\Pi$  only had to prove only absence of intervening forces – not foreseeability – if act was the direct cause of the harm.

(b) But this is now mostly irrelevant.

b) Superseding Intervening Forces

(1)  $\Delta$  is not liable if there was a superseding intervening force.

(a) Extraordinary unexpected and highly improbable intervening forces are not considered foreseeable and therefore preclude liability.

(b) They break the causal chain between  $\Delta$ 's negligence and the harm.

(2) Regular Intervening Forces:

(a) Subsequent medical malpractice.

(b) Subsequent disease due to weakened condition.

(c) Subsequent accident due to first injury.

(d) Negligence of rescuers.

(e) Anticipated acts of god.

(i) Lighting was held not superseding.

(3) Superseding Intervening Forces:

- (a) Criminal acts are not necessarily superseding, but may be considered that way. See *Hamilton v. Accu-Tek* (gun manufacturer liable).
- (b) Unanticipated Acts of god
- (c) Extreme medical malpractice is.

3. Res Ipsa Loquitur

- a) Circumstantial evidence allowing an inference of negligence.
  - (1) The thing speaks for itself
- b) Allows the burden to be shifted to  $\Delta$  to prove not negligent.
  - (1) See *Krebs v. Corrigan* (plexiglass sculptures).
- c) To establish res ipsa,  $\Pi$  must show:
  - (1) The accident would not usually occur in the absence of negligence.
    - (a) If there is cutting edge technology, this is harder to do. Like airplanes crashing.
  - (2) The instrumentality that caused the injury was under the  $\Delta$ 's exclusive control.
    - (a) It is enough to show that the power of control and opportunity to exercise that power were with the  $\Delta$ . Actual possession is not necessary.
  - (3) The  $\Pi$  was not at fault.
- d) Most courts will refuse to allow res ipsa when you someone was negligent but you don't know exactly who – when there were multiple parties in control.
  - (1) But court in *Ybarra v. Spangard* (CA) allowed it to be used to “smoke out” true negligent party. Very unusual decision.
- e) Most jxs adopts an “inference” approach, where there  $\Delta$  can ask jury not to infer negligence. But CA adopts “presumption” approach, in which  $\Delta$  must introduce evidence to rebut presumption.

E. Damages

1. What Damages are Recoverable?

- a) Compensatory
  - (1) Personal Injury
    - (a) Can recover all actual damages past, present and future.
      - (i) Pecuniary
        - (a) Medical expenses, lost wages, diminished earning capacity, and other econ. expenses incurred because of injury (travel, housekeeping, etc).
      - (ii) Other

- (a) Pain and suffering and other variations of mental distress.
      - (b) Foreseeability of extent of harm is unnecessary.
        - (i) If  $\Pi$  was foreseeable,  $\Delta$  takes  $\Pi$  as he finds him.
      - (c) But have duty to mitigate.
    - (2) Property Damage
      - (a) Compensable as the cost of repair, or (if destroyed) fair market value at time of accident.
    - (3) Loss of consortium
      - (a) Can recover for loss of companionship, comfort, sexual services, economic loss, etc.
    - (4) Wrongful death
      - (a) Many jxs have statutes allowing  $\Pi$  to recover for wrongful death of close relative.
      - (b) Can recover concrete monetary losses, replacement value of services and loss of consortium.
  - b) Punitive Damages
    - (1) Punish wanton, willful, reckless or malicious conduct.
  - c) Nominal
    - (1) Symbolic award (usually \$1) when no actual harm occurred or is not proven with sufficient certainty.
2. What Damages are not Recoverable?
  - a) Economic Loss
    - (1) Economic loss may be recoverable if there is also personal injury. (injured and can't work)
3. Duty to Mitigate
  - a)  $\Pi$  has a duty to take reasonable steps to mitigate damages (wear a seatbelt).
  - b) Failure to mitigate damages affects amount of damages.
  - c) However, failure to mitigate does not remove  $\Delta$  from liability.

## F. Defenses

- 1. Contributory Negligence
  - a) Is conduct on part of  $\Pi$  which falls below the standard to which he should conform for his own protection, and which is a legally contributing cause co-operating with the negligence of the  $\Delta$  in bringing about the  $\Pi$ 's harm.
  - b) It completely bars  $\Pi$ 's recovery.
    - (1) But 46 jxs have abolished this system for one of comparative negligence, which is only a partial defense.
    - (2) Can only be a defense to negligence – not intentional torts or recklessness.
  - c) To prove contributory negligence,  $\Delta$  must prove that  $\Pi$  owed a duty to himself, breached that duty, and that breach was an actual and proximate cause of the injury.

- (1) Is difficult to prove for children.
  - (2) Majority of courts make no dispensation for adult mental disability or insanity, but growing minority does.
  - d) What can't be contributory negligence?
    - (1) Rescuers
      - (a) Rescuing someone in danger is not CN unless the attempt is reckless.
    - (2) Failure to mitigate
      - (a) Failure to take precautions to avoid injury is not CN.
      - (b) But the failure to mitigate will preclude recovery for the aggravated injury caused by the absence of seat belt or other precaution.
      - (c) But remaining in danger may be CN.
  - e) Contributory Negligence Per se
    - (1) Is a defense to negligence when there is an existing statute intended to protect a particular class of II's from a particular kind of harm.
    - (2) But violation of statute not intended to protect that class or harm is not CN. See *Mark v. PG&E* (electrocution).
  - f) Last Clear Chance doctrine
    - (1) Person with last clear chance to avoid the accident who fails to do so is liable. See *Davies v. Mann* (ass)
    - (2) So whoever is negligent last is liable for 100% of damages.
2. Comparative Negligence
- a) This doctrine assigns liability in proportion to fault.
    - (1) See *Li v. Yellow Cab* (car accident)
  - b) Two systems:
    - (1) Pure Comp. Neg.
      - (a) Each person is liable in proportion to their amount of fault, no matter what the amount.
      - (b) So if person is 99% CN can still recover 1%.
      - (c) CA uses this system.
    - (2) Modified Comp. Neg.
      - (a) Will bar II's recovery if his negligence passes a threshold.
        - (i) Most states will allow II to recover if it is no more serious – 50% or less.
        - (ii) But 4 states allow II to recover only if his negligence was less serious – under 50%.
  - c) Willful, wanton or reckless conduct by the other party is no longer an escape from liability for the CN party, it is simply factored into the fault.
  - d) Last clear chance doctrine is not used on Comp. Neg. system.

- e) Failure to mitigate and assumption of risk is absorbed into general defense of comp. neg.
  - f) Appraisal of fault made by finder of fact.
3. Assumption of Risk
- a)  $\Pi$  may be denied recovery if he assumed the risk of any damage caused by  $\Delta$ 's acts.
  - b) Elements:  $\Pi$  must have
    - (1) Known of risk, and
      - (a) Subjective test
    - (2) Voluntarily assumed it.
      - (a) If  $\Pi$  had no available alternative/was acting out of necessity, then  $\Pi$  did not voluntarily assume the risk.
      - (b) Must have been that specific risk that was assumed.
  - c) Can be assumption of risk even if behavior was completely reasonable.
  - d) Assumption of risk may be express or implied.
    - (1) Express Assumption
      - (a) Is an all or nothing defense.
      - (b) Exculpatory clauses in ks, intended to insulate one from liability resulting from own negligence, are generally enforceable.
      - (c) However, if waiver appears coerced, it is invalid.
    - (2) Implied Assumption
      - (a) In most comparative negligence states now is only a partial defense.
        - (i) See *Murphy v. Steeplechase Amusement Co.* (Flopper)
        - (ii) But a minority of jxs say that while unreasonable assumption is a partial defense, reasonable assumption should be a complete defense.
        - (iii) A few jxs follow traditional rule that it is always a complete defense.
      - (b)  $\Pi$  must have known of risk.
        - (i) Knowledge may be implied where risk is one that the average person would clearly appreciate (like foul ball).
        - (c)  $\Pi$  must voluntarily face risk.
  - e) In *Wooddall v. Wayne Steffner Productions*, court held that if a  $\Pi$  surrenders his better judgment upon an assurance of safety or a promise of protection, he does not assume the risk, unless the danger is so obvious and so extreme that there can be no reasonable reliance upon the assurance.

- f) *Knight v. Jewett* (football) creates a new limited duty precluding participants from recovery for mere negligence against other participants in football and other similar sports – requires reckless conduct outside range of ordinary activity.
- g) Most jxs preclude firefighters and police from recovering for negligence ordinarily encountered in their jobs.
- h) Primary v. Secondary
  - (1) Primary Assumption
    - (a) Occurs when:
      - (i)  $\Delta$  has no legal duty to protect  $\Pi$  from harm.
      - (ii)  $\Pi$  knows of the risks.
    - (b) If  $\Pi$  gets injured,  $\Pi$  is barred from recovery because  $\Delta$  had no duty.
  - (2) Secondary Assumption
    - (a) Occurs when:
      - (i)  $\Delta$  has a limited duty to  $\Pi$ .
      - (ii)  $\Pi$  knowingly encountered risk.
    - (b)  $\Pi$  may recover damages even if they assumed the risk, whether they behaved reasonably or unreasonably, but with reduction for their share of damages.

## G. Immunities

### 1. Intra-Family

- a) Traditionally, one family member could not sue another family member for personal injury – only injury to property.
- b) But most states have abolished interspousal immunity.
  - (1) And most of those that retain it don't allow it for economic or intentional torts.
  - (2) Supporters: Suits disrupt family harmony and lead to high risk of conspiracy to defraud insurance.
  - (3) Critics say only occurs in already troubled families and conspiracy occurs in any context.
- c) Some states have also abolished parent-child immunity, but most have kept it at least for injuries caused by negligence and certain intentional torts, like assault and battery.
  - (1) Parents continue to have broad discretion in exercising parental authority or supervision, but they cannot willfully inflict personal injuries beyond the limits of reasonable discipline.
  - (2) Courts have split on whether foster and step parents have immunity.
  - (3) Critics of immunity say it gives inappropriate deference to the more powerful family member's wrongdoing, but supporters say liability will restrict culturally diverse styles

of parenting, and also allows parents to be impleaded by third party  $\Delta$ s, hurting child's recovery.

## 2. Governmental

a) Governmental units were traditionally immune from tort actions, but the federal and most state governments have waived their immunity for ministerial acts (but not discretionary acts).

(1) Discretionary acts take place at the planning or decision making level. Includes policy decisions.

(a) Ex: Decision on whether to recall a drug.

(2) Ministerial acts take place at the operational level.

(a) Ex: Forgetting to mail out recall notice.

(b) Ex: Driving a vehicle, repairing a traffic light, etc.

(c) Traditionally, courts said that when government is providing a proprietary function, like cable tv, they don't have immunity.

(3) In *Tarasoff v. U.C. Regents*, the court held that the therapists decision not to warn Tatina was not immune, but the decision by them and the police not to detain Poddar was.

b) Public officials like judges and elected representatives are generally immune from liability for injuries they cause while acting in their official capacities.

c) Federal govt. has specifically retained immunity for certain torts like assault, battery, false imprisonment, malicious prosecution, false arrest, slander, deceit, strict liability and misrepresentation, except for acts or omission of law enforcement.

## 3. Charitable

a) Most states have abolished charitable immunity.

b) Others have limited like by precluding beneficiaries of charities from suing the organization.

c) Supporters of immunity said disrupts services charity is providing, and uses donations for wrong purpose.

## H. Joint and Severally Liability

### 1. Classes of Joint Tortfeasors

a) Acting in Concert

(1) When one tortiously aids or encourages another to commit a tort, he is as liable as the tortfeasor.

b) Independent Acts causing Single Injury

(1) When two or more individuals who act independently but whose acts combine to cause a single, indivisible injury, both are liable.

(2) But when a  $\Pi$ 's injuries are divisible and can be attributed to individual  $\Delta$ s, then the indivisible injury theory of joint and several liability may not be used.

c) Vicarious

(1) An employer can be liable for the torts committed by its employees within scope of employment – respondeat superior.

(a) But not generally liable for independent contractors.

(2) Parents and car owners not traditionally liable, but many states have enacted statutes.

## 2. Liability

a) Each tortfeasor is fully responsible for the entire injury.

(1) But Π can only recover total of 100%.

b) Traditionally, each Δ paid a pro-rata (equal) share of the damages, based on number of Δs.

(1) If one tortfeasor didn't pay, other tortfeasor(s) had to pay the difference.

(a) Traditionally paying tortfeasor couldn't recover from non-paying one.

c) But now most states use a system of comparative contribution.

(1) Liability is divided by the proportion of responsibility each tortfeasor owes.

(a) If one Δ can't pay, other tortfeasors will divide up extra liability based on proportion of fault.

(i) In CA, unclean Π is not liable for his share of unpaid amount.

(ii) But Fleming argues unclean Π should be included.

(b) In *American Motorcycle*, CA SC said Δs could implead Π's parents.

(2) Most jxs now allow contribution, except for intentional torts.

(a) But not if party was immune from suit.

d) Settlement

(1) In CA, a tortfeasor who settles is discharged from liability and Π's claims against the other Δs is reduced only by amount of settlement – not by proportion of settling Δ's fault.

(2) But most states deduct the settling Δ's allocation

e) Damages

(1) In CA, joint and several liability only exists for economic damages, including medical expenses, lost income and damaged property.

(a) It is not available for pain and suffering, loss of consortium and other intangible damages – Δs are only responsible for their percentage share.

## III. Strict Liability and Products Liability

### A. Traditional Strict Liability

1. One who carries on an abnormally dangerous or ultrahazardous activity is subject to liability for harm to the person, land or chattels of another resulting from the activity, even though he exercised the utmost care to prevent the harm.
  - a) Applies when there was no fault – situations where the risk cannot be eliminated even by exercising due care.
    - (1) If risk is not eliminated due to carelessness, then a negligence standard applies.???
  - b)  $\Pi$  must still establish that  $\Delta$  owed a duty and activity was actual and proximate cause of damage.
    - (1) Traditionally only applicable if activity took place on own land.
  - c)  $\Pi$  must be foreseeable.
  - d) Strict liability is limited to the kind of harm that makes the activity abnormally dangerous.
  - e) Comparative negligence can be a partial defense in jxs that combine comp neg and assumption of risk.
2. An activity is abnormally dangerous or ultrahazardous if it involves a substantial risk of serious harm no matter how much care is exercised.
  - a) Traditionally, only applied to ultrahazardous activities.
  - b) But many courts follow R2d in expanding it to abnormally dangerous activities.
  - c) An activity is ultrahazardous if:
    - (1) it necessarily involves a risk of serious harm to the person, land or chattels of others which cannot be eliminated by the exercise of utmost care and is not a matter of common usage.
  - d) An activity is abnormally dangerous if:
    - (1) There is a high risk of harm,
    - (2) gravity of harm will be great,
    - (3) risk cannot be eliminated with reasonable care,
    - (4) activity is not a matter of common usage,
    - (5) activity is inappropriate to the place where it is carried on, and/or
    - (6) the danger outweighs the value of activity to community.
    - (7) NOTE: Not all these factors must be present.
3. Activities
  - a) Blasting is generally a strict liability activity.
    - (1) Some jxs limit SL to this.
  - b) Animals
    - (1) Possessor of wild animal is strictly liable for any harm that results from animal's dangerous propensity.
    - (2) Possessor of a domestic animal is strictly liable only if she knew or should have known of a dangerous propensity in the particular animal.

- (a) Otherwise, owner is subject to negligence standard.
      - (b) Dogs, cats and horses are domestic.
    - c) Other activities to which TSL has been applied:
      - (1) Trucking of oil.
      - (2) Fireworks show
      - (3) Explosives experimentation
      - (4) Radium processing
  - 4. Defenses
    - a) Contributory negligence is generally not a defense.
    - b) Comparative negligence is a partial defense – gets factored into proportion of fault.
    - c) Assumption of risk is a defense.
      - (1) If P knows of danger and his unreasonable conduct is the cause of the activity miscarrying, it is a defense.
      - (2) Ex: Passing dynamite truck on sharp curve.
  - 5. Policy
    - a) Posner argues that when the social benefits of allowing a harm exceed the social costs of avoiding it, the harm should be allowed. Also argues that will be more safe not to have it since the victims will finance research on how to be safer. And argues that certainty P will win encourages him to spend more money on trial.
    - b) Supporters of strict liability argue it will promote safety, and is simpler and fairer.
    - c) Borgo: When one man harms another the victim has a moral right to demand, and the injurer a moral duty to pay to him, compensation for the harm.”
    - d) Fletcher argues that strict liability for abnormally dangerous activities is appropriate since the actor is imposing unusual risks that are not normally imposed by others.
  - 6. Products
    - a) Traditional strict liability generally only applies to activities – not products. See *Kelley v. R.G. Industries* (gun manufacturer).
- B. Products Liability
- 1. Negligence
    - a) Must prove all elements of negligence.
    - b) Duty extends to all those foreseeably affected by a potentially dangerous product made by manufacturer.
      - (1) Originally, courts required privity – needed a direct relationship.
    - c) P must establish that the manufacturer or retailer did not behave like a reasonable person under the circumstances.
      - (1) Negligently designing product, negligently storing milk, etc.
    - d) To recover economic loss, it must derive from a personal injury or property damage.

- e) Under negligence, wholesaler and retailer rarely held negligent in absence of notice of potential defects.
2. Warranty
- a) General
    - (1) Controlled by K law.
    - (2) Liability is strict – Π need not prove negligence.
    - (3) Can also compensate for pure economic loss unaccompanied by personal injury or property damage.
    - (4) Privity between buyer and seller is required (could sue manufacturer).
      - (a) But depending on UCC adoption, sometimes only buyers household can recover, while in others warranty extends to all who might be reasonably expected to use goods. A minority also allows organizations to recover.
  - b) Express Warranty
    - (1) May be created when seller makes factual assertions about the characteristics of product by verbal promise, advertisement, or brochure.
      - (a) May raise consumer expectations about what a product can do.
      - (b) But “puffing” or opinion does not count.
      - (c) Applies when seller is a merchant.
    - (2) Manufacturer has absolute liability when he places a product on the market that he knows will be used without inspection.
  - c) Implied Warranty
    - (1) Implied warranty of merchantability is a guarantee by the seller that the goods sold reasonably conform to their description and are safe for their intended use.
      - (a) Applies when seller is merchant – sells that product professionally.
    - (2) Implied warrant of fitness for a particular purpose enters the parties’ agreement when the seller has reason to know that the buyer is purchasing goods for some special purpose and is relying on the seller’s knowledge or skill in furnishing the goods.
      - (a) Seller need not be a merchant.
    - (3) Both may be disclaimed.
3. Misrepresentation
- a) Elements:
    - (1) A person engaged in selling products makes a public misrepresentation of a material fact concerning the quality of the product.
      - (a) Through ads, labels, etc.

(2) Consumer justifiably relies on the misrepresentation and suffers harm to self or chattels.

(a) The fact the seller does not make a fraudulent or negligent misrepresentation is irrelevant.

(b) The fact that the consumer has not bought product or engaged into a contractual relation with the seller is irrelevant.

b) Is similar to warranty, but is a tort theory.

#### 4. Strict Products Liability

a) Imposes liability without proof of negligence or privity of contract upon a manufacturer, distributor or seller for injury caused by a dangerously defective product.

b) Must prove:

(1) Product was in a defective condition that was unreasonably dangerous for its intended use,

(2) Such defect existed when the product left  $\Delta$ 's control, and

(3) The defect was the proximate cause of the injury.

c) Applies even though seller has exercised all possible care, and user did not enter into contract with seller.

(1) Focus is not on negligence, but rather on whether or not the product was safe.

d) Courts limit strict liability to those merchants who sell new products (commercial suppliers of product in question).

(1) Does not apply to those merely providing a service (hotel – lounge chair incident).

(2) Does not apply to the casual seller.

(3) But can apply to the manufacturer, retailer, assembler or wholesaler.

(4) So SPL may extend to theaters who sell rotten candy and restaurants, but not to shoe factory for exploding boiler, airline for defective plane, or blood banks.

e) Defective

(1) Three types of defects:

(a) Manufacturing Defect

(i) Error in construction the particular product.

(b) Design Defect

(i) All products on line are identical, but have a dangerous propensity because of their features as designed.

(c) Warning Defect

(i) Product lacks adequate warnings or instructions.

(ii) Dangerous products should have warnings because they are cheap.

- (iii) Only have to be in English.
- (2) Two tests to determine if a product was defectively designed (or warned) because it was unreasonably dangerous:
  - (a) Consumer Expectation
    - (i) Liability attaches only where the product is, at the time it leaves the seller's hands, dangerous to an extent not contemplated by the ordinary consumer.
      - (a) Must prove that an ordinary consumer would not discover the unsafe characteristic of the product – objective test.
      - (b) SPL is not triggered if the danger inherent in the product is commonly known to the community (cigarettes).
    - (ii) Proponents say this test does not require PIs to necessarily hire experts and to technologically demonstrate a defect.
    - (iii) But critics say consumer expectations may be excessively low or inadequately informed (don't play with lighters).
  - (b) Risk-Utility
    - (i) Liability attaches if the  $\Delta$  fails to prove that on balance the benefits of the design outweigh the risk of danger inherent in such design.
    - (ii) Facts to consider to determine risk/utility:
      - (a) Usefulness and desirability of product – utility to user and to public as a whole.
      - (b) Safety aspects – likelihood that it will cause injury and probable seriousness of injury.
      - (c) Availability of a substitute product which would meet same need and not be unsafe.
      - (d) Manufacturer's ability to eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility.

(e) User's ability to avoid danger by the exercise of care in the use of the product.

(f) Users anticipated awareness of dangers inherent in product and their avoidability, because of general public knowledge of obvious condition or existence of suitable warnings.

(g) Feasibility on part of manufacturer of spreading loss by setting price of product or carrying liability insurance.

(iii) Rationale is that consumers do not know what to expect in terms of hazards associated with a product.

(iv) In fact, CA SC said where an evaluation of defectiveness involves complex technical info,  $\Pi$  must only use the risk/utility prong to establish defectiveness.

(c) Trend

(i) Consumer expectation is the traditional, widely-adopted approach, but the modern trend is the risk-utility test.

(ii) Some jurisdictions impose one test, some allow  $\Pi$  to choose. CA????

(3) Res ipsa may be used to prove that a product is somehow defective, even though the  $\Pi$  cannot prove what specifically was defective.

f) Misuse

(1) When a product is safe if used as intended but involves dangers if used differently, courts require suppliers to anticipate reasonably foreseeable uses.

(2) Ex: May have to design furniture polish that is safe when drunk or has a child-proof top.

(3) ??????????????????

(4)  $\Delta$  may defend use misuse of substantial or serious nature.

g) Scientifically-Unknowable risks

(1) Majority of courts will allow a state of the art defense when  $\Delta$  did not and could not have known of danger.

(a) New R3d requires there be a foreseeable risk of harm posed by the product that could have been reduced or avoided by the adoption of a reasonable alternative design.

(2) But a small number of courts will not.

- h) Unavoidably Unsafe
  - (1) Products that are necessarily dangerous and cannot be made safe are not liable under consumer expectation test.
  - (2) Are not liable under risk/utility test if the utility is high enough.
    - (a) Drugs and medical devices are not defective so long as they are sufficiently therapeutic.
  - (3) But do need to include an appropriate warning.
- i) Alterations
  - (1) To hold a supplier strictly liable, product must reach the consumer without substantial change in the condition in which it is supplied, otherwise can't tell what caused the defect.
- j) Damages
  - (1) Claims based on SPL allow recovery for economic loss only where there is an accompanying personal injury or property damage.
- k) Defenses
  - (1) Traditionally contributory negligence was not a defense to SPL
  - (2) But Comparative negligence may be a partial defense – reduce proportion of  $\Delta$ 's liability.
    - (a) But some courts have limited that when the negligence consisted merely of a failure to discover product defect or guard against its possibility.
  - (3) Assumption of risk is a defense.