

## **DUTY**

Generally, ppl have duty ex rsbl care in the circumstances (RPP)

- ❑ **Mis/nonfeasance, relationship triangle, emotional distress, land conditions**

### **Landlord/Occupier Duty**

- ❑ Majority: **RPP**
- ❑ Minority
  - **Invitee**: RPP duty to make safe; actual & constructive knowledge
  - **Licensee**: warn if actual; no r/w
  - **Trespasser**: no reckless/wanton
- ❑ Child trespassers: kids likely to trespass
  - You know it's risky, but kid wouldn't
  - Utility/burden balance
  - Attractive nuisance: kids invitees

### **Recreational Sports**

- ❑ Majority: **more than negligence**
- ❑ Minority: **mere negligence**

### **Guest**

- ❑ More than neg (being overtrnd)

**Affirmative action: generally, no**

**Rescue: Generally, NO**

- ❑ Rsble measures to rescue only if:
  - Special relationship (if arguable)
  - Voluntary assumption (if arguable)
  - Reliance on gratuitous promise
  - Int'l preventn of aid by others
  - Non-negligent inflectn of harm (train)
  - Prior innocent conduct: warn (rd obs)
  - **Statute: imply a right of action**
    - **Legis would impose duty + P & harm in protected class**
    - **If no, use for policy argument**

**Third Party Perpetrator: if, then...**

**Need heightened foreseeability**

- ❑ Professional with special relatinshp knows of identifiable person: rsble steps to warn
- ❑ Threat of *physical* harm poses substantial risk: duty not to misrep; must be truthful
- ❑ Hostage: no
- ❑ Neg Entrustment: no, unless:
  - Furnishes dang instrumentality &
  - Rsblly know person poses risk &
  - & Risk materializes
- ❑ Dram shop, Social host
- ❑ LL, if enhanced foreseeability via (no clear majority):
  - Prior similar incidents
  - Totality: PSI + location, condition, etc
  - Balancing: F v Burden (Hand-like)
  - Very minority: specific harm

- ❑ Police: no duty unless all 3 circumstances (voluntary assumption):
  - Direct contact
  - Justifiable reliance by victim
  - Cop knows inaction → harm

### **Neg Inflectn of Emotnl Distress (NIED)**

- ❑ Bystander (ie: "present" at injury):
  - **Dillon/Thing (maj)—rsble foreseeability:**
    - **Close relationship to victim & contemporaneous perceptn**
    - **& Victim's injury substantial**
    - **& P has serious emot'nl harm**
  - **Zone of Physical Risk/ Zone of Danger (minority): inside zone of danger**
    - **Serious emotional injury & Close relationship to victim**
- ❑ Direct Injury (ie: emo harm only injury) if:
  - Z of Danger (near miss + serious emo)
  - Independent duty/ special vulnerability (K-telegram, mortician, statute)
  - Fear of Disease, YES if:
    - 50%+ likelihood; damages: med mon
    - oppression, fraud, malice
    - physical symptoms

### **Economic Loss (ltd JXN)—ltd duty unless:**

- ❑ Particularly frsble P class
- ❑ Rel almost privity

### **Vicarious Liability:**

ER resp if EE acting w/in scope of his/her job

- ❑ No: indep contractor (tools, pd by job, K)

### **Establish/Overrule Duty/Exception:**

- ❑ **Analogies in precedents**
- ❑ **Restatements**
- ❑ **Decisions in other JXNs**
- ❑ **Logic**
- ❑ **Equity**

## **BREACH**

Unrsbl action in light of frsble risks  
How do we know precaution should've been taken?

### **Exceptions to RPP if:**

- ❑ Emergency
  - ❑ D didn't create emerg &
  - ❑ & conduct excused by emerg
  - ❑ & D acted as RPP in emerg
- ❑ Physical Dis: RPP w/ that dis
- ❑ Mental Disability:
  - ❑ Maj: **RPP (no exception)**
  - ❑ Min: **RPP w/ same disability**
- ❑ Sudden Onset

- Maj: **RPP w/ sddn phys illnss**
- Min: **RPP (no exception)**
- ❑ Children: generally, rsbl kid of same age, intel, maturity
  - Dangerous/adult acts: RPP
  - **7 yrs or younger: no duty presumed**
  - **14+ yrs: duty presumed**

### **Foreseeable Risks/Cost**

- ❑ Hand Formula measures RPP
  - ❑ Risk Prob X Risk Seriousness < Cost= Neg
- ❑ Burden/ Untaken Precaution:
  - Weigh SAFeTY
- ❑ Custom: factor to determine rpp
  - D diff, P & harm must be type protected
  - Custom inadequate: *TJ Hooper*
- Alternatives to RPP std
  - Statute, if violated & :
    - P in class, harm protectd type, & No excuse (IIIICO)
    - then **neg per se** (maj) or **evidence of neg** (min)
    - if no clear intent, wld legis 've wanted?
  - Judge-made standard

### **Evidence**

- ❑ Slip & fall: actual or constructiv
- ❑ Res Ipsa (maj: **2 bites OK**)
  - **No Breach Theory, D total control**
  - MLTN, doesn't happen w/ou D's neg:
    - D had exclusive control
    - Neg act during D's control
    - P less than 49% negligent
    - Jury's *free to find* D resp
- ❑ Professional Std: RPP + degree of skill, care, & proficiency of ord prof in circ
- ❑ Doctor: medical malpractice
  - ❑ If inherent risks, proof diff
- ❑ Informed Consent: 2 standards
  - ❑ Prof: custom (WWRDD?)
  - ❑ Patient: what wants to know
- Unless: unconscious or unwise

### **CAUSATION:**

*D's unrsble act caused P's harm*  
**"But For"**

- ❑ not good for multiple Ds
- Substantial Factor (OK in CA)**
- ❑ mult causes contrib to 1 result → any MLTN

Proof: Circ, direct, expert, custom

### **Multiple Ds:**

- ❑ Indep--apport'nable? (D's burd)
  - ❑ Yes: Separate liability
  - ❑ No: Joint & several liability
- ❑ Concerted Action Liability: only 1 inflicted damage, all pay
- ❑ Alternative Liability req all:
  - ❑ Can't apportn, only 1 resp (gun)

- Both D's negligent
- All before the ct (toluene)
  - then, burden on D to exculpate
- Market Share Liability if:
  - Can't tell who inflicted harm
  - Can't get all Ds before the ct
 Need: subst mkt portion before ct  
 Helpful: fungible, signature injury, legislation, discrete time

## General Causation

- Prod/act can cause type of harm
- Daubert factors help determine scientific soundness

## Specific Causation

- D's breach caused the harm (Sowles: N)

## SCOPE OF LIABILITY

The *frsblty* of D's conduct causing the extent of harm to P that a rsble person could expect. Red Flags:

- **Unfrsble P's or conseq**
- **Intervening causes**
  - **Indep of D's act: outside SOL**
  - **Depend on D's act: w/in SOL**

## 1) Foreseeability

### Exceptions :

- D resp for all damages if:
  - Subseq med mal—only gross breaks chain
  - eggshell skull
  - D's acts invited rescue & P injured rescuing D
  - 3<sup>rd</sup> party's int'l act rsblly frsble (Bush mask)
  - Suicide resulted from D's act if:
    - P susceptible to mental prob
    - Frsble emo distress from Ds act
    - P bereft of reason
  - Schizo from accident; D resp for less \$

## 2) Shifting Responsibility

- Intervening act
  - Highly extraor, gross neg (JXN'l variance)
  - Unfrsable indep interv act
- 3<sup>rd</sup> party's act superceded initial neg act

**Framing:** normality v weirdness

## 3) Policy: why should/n't D b exempt?

## 4) Foreseeable consequences (maj)

- **General risk to specific lass &**
- **Harm within the scope of that risk**
- **Generally frsble risk (P-graf: N, McClen: Y)**
- **Ltd by: remoteness, intervening cause**

## DEFENSES

D's burden MLTN via defense

## Assumption of Risk

- Express

- Waiver
- **Public Policy waiver override**
  - **Necessity**
  - **Availability of insurance**
  - **Open to public**
  - **Cover non/ or inherent risks?**
  - **Equal bargaining power**
- Firefighter's Rule
  - Inherent risks: no recovery
  - Ancillary risks: recover
- **Implied (vol confronting known risk)**
  - **Subjective standard: (very very min)**
    - **Knew of risk (implied if gen knowl)**
    - **Vol chose to confront risk**
  - If P's behr rsble, argue no consent
- **CA Rule:**
- **Primary: D has no duty/ hasn't breachd**
- **Secondary: ass & comp overlap**
  - **P's behr unrsble + vol conf known risk**

## Comparative Fault

- P's obj actions not per std (usually, rsble)
  - Child, emerg, etc. RPP exceptns shld apply
- Doesn't bar recovery; 48 states follow:
  - **Pure (no minimum), CA**
  - Cutoff at 50% or 51%
- Problems:
  - Both injured, both at fault
  - Absent or insolvent Ds
    - Reallocate among all Ds
    - Reallocate among Ds & P takes hit
    - Take ab/ins's share off top
      - JXNs in/exclude int'l tortfeasrs
    - Some don't tell jury result if 49%

## Immunities

- Parent/child, spousal—ltd, abolished
- Government Discretionary Function
  - Discretion?
    - Statute, regulation: discretionary
    - Day-to-day: not discretionary
    - Decision effected in future: gen disc
  - Involve eco, social, political factors?

## STRICT LIABILITY

If negligence also, argue negligence

## Abnormally Dangerous Activities

- By their nature, these activities not safe

## Products Liability

- Rationale: cost-spreading, deterrence, administrative ease, Ds have better access to info
  - Hindsight:: assume manuf knows of art
    - **CA: all prods except drugs**
  - No Fault (b/c cost-spreading)
- Prescription drugs: only manuf defect SL**

**Unknowable risks, design, warn only neg**

*St/art= scientific + techncl knowlg; best pract*

## Breach: defective= unrsblly dangerous

**Manufacturing:** deviation from manu specs

## Design: CA: P chooses test

- Consumer Expectations Test
    - Wld ord cons expect prod to... (Kutzler)
    - - defect open & obvious
    - -- ord ppl don't know about a part
  - **Risk-Utility Test (CA); Balance:**
    - cost
    - effectiveness (probability & severity)
    - adverse effects on utility & safety
    - **Feldman Std (maj):**
      - **D's brdn, st/art when prod sold to P**
    - **Mishada: no s/art, pure strict liability**
  - Reasonable Alternative Design (3d only)
    - P's burden to show rsblly possible
    - Unnec when: RIL, stat viol, no soc utility (ie: manifestly unreasonable design)
  - Custom Order Exception, when manuf:
    - Given specs & can't comment: not liable
    - Has opp to suggest changes: liable
- Inadequate Warning**
- Necessity
    - Yes: misuse foreseeable
    - Yes: @ distrbtn, state of art knew risks
    - Yes: Risk serious & warning cost low
    - No: overwarning
    - No: so unique, negs prod's social utility
  - Adequacy

- o Explicit, means, comprehensible, clear, conspicuous, intended aud (Faberger)
- o Learned Intrmdry: enough to warn doc

**Causation:**

defective when marketed, linked to injury

**SOL: foreseeable use & user**

Punitive damages: must have malice

- Proportionality (S.Ct.: lesser factor of 10)

**Covered:**

- Sale, lease, sales promo giveaway, courtesy loan equip, rebuilding/redesign of equip, cert of prod safety, trademark license

**Not Covered:**

- Defective tire installatn, endorsem't of prod, medical svcs, LL, hotel owners, financing of purchases, used goods

**Types of harm covered:**

- Person injury to users/consumers, crashworthiness, damage to other prop, damage to prod itself

**INTENTIONAL TORTS**

Perp's state of mind (kids & incomp, too)

Insurance & wkrs comp don't cover IT

**Intent**

- Purpose or desire
- Substantial certainty
- Transferred intent: if 3<sup>rd</sup> party injured
  - o Battery, assault, trespass: land & chattels, false imprisonment

**Assault**

- Threat
- Imminent harm
- (action indicating apparent ability/intent)
  - o gen, words alone not enough
  - o subj: vic perceives threat (Vetter)
    - comp relative strength, danger
- Victim's rsble apprehension of imm harm
  - o Yes: Conditional, not followed thru
  - o No: unconscious (unless fraud)
- V's ability to defend doesn't preclude ass

**Battery**

- Intent:
  - o To cause ensuing harm (not rcklnss)
  - o To contact, knowing it'll harm (White)
  - o Contact will harm/offend
  - o To contact/touch

- Harmful or offensive: RPP std unless:
  - o If D knows P would be offended
- Contact (w/ body or anything attached)
- Nominal damages OK, asleep actionable

**Intent Infliction of Emotional Distress**

- Intent (see above) or:
  - o Rcklnss/ conscious disregard (Twyman)
- Extreme & Outrageous
  - o **Power differentials (attny, employer)**
  - o More than words unless words E&O
  - o **Abuses power, knows vulnerblty, racial**
- Causing... ("but for")
- ...Severe emotional distress
  - o rpp unless P's sensitivities targeted
  - o obj evidence no req (varies by JXN)
- future threat actionable (no imminence)

**False Imprisonment**

- wrongful confinemt/restraint
  - o force, threats, fraud
- intent to confine
  - o Emergent's priv: detentn OK if ltd to time nec to det if P stole something or not

SOL broader

**Defenses to Intentional Torts**

- Consent
  - o Fight: consent: (cts go both ways)
    - Both: neither recover
    - Can't, b/c fight illegal: both recover
  - o Actual/Apparent
    - Apparent: think "no," act "yes"
    - Effective if not duress, fraud, mental incomp (if D knows of it)
- Self-Defense
  - o Rsbly believe threatened w/ harm
    - Factors: sex, age, strength, etc.
  - o If wrong later, still SD b/c justified acts
  - o Never for aggressor unless w/draw by:
    - Abandoning, w/drawing, notifying
- Defense of others, property, necessity
  - o D of others: if wrong, not OK
  - o No deadly force for prop

- o Nec: privileged to cause harm to avoid greater harm (public v private)

Punitive damages

**DAMAGES**

Don't talk about unless question asks

- Earnings
- Pain, suffering, emo distress
- Loss of enjoyment of life (hedonic)

**A FairDEAL: policy analysis for duty**

- Allocation of loss
- Fairness
- Deterrence
- Economic considerations
- Administrative concerns of courts
- Legislative consideration

**Overruling existing case law:**

- Work within existing case law
- Make distinctions w/ facts & era
- Make policy arguments

Go from specific rule to general rule what are the facts that gave rise to the rule?

Incorporate the rules with your fact analysis

Look **carefully at any statute** prof provides

	Strict Liability	Int'l Torts
Negligenc		
e		
Rsbleness	CE, RU	Intent
Custom	State of art	E&O