

# Torts

## I. Overview

1. Definition of tort: a civil wrong arising independent of a contract.

- a. The law says that if you are injured you have a right to recover damages even without a contract.
- b. Sometimes this injury can be a crime as well. A person can be tried for a crime as well as a civil suit.

2. Three types of torts:

- a. Intentional Tort
- b. Negligence
- c. Strict liability

## II. Intentional Torts (B.A.F.I.T.T. C.)

### A. Battery

1. Rule: The intentional infliction of a harmful or offensive contact to another person.

2. Elements:

- a. **Intentional**: Intent to inflict harmful or offensive contact, or substantial certainty that such contact will be offensive or harmful.
- b. **Harmful or offensive contact**: Even if the contact is not harmful, it is still battery if the contact is offensive.
  - i. *Reasonable Person Standard*: A reasonable person under the circumstances would find such contact offensive.
- c. **Contact**: Defendant does not need to touch the victim to be offensive. Contact with objects closely associated with the body is enough.
- d. **Aware**: There can be a battery even if victim is unaware at the time (i.e. if victim is unconscious). This is different from assault (see below).

### B. Assault

1. Rule: Intentionally place the victim in reasonable apprehension of imminent harmful or offensive contact.

2. Elements:

- a. **Intent**: Intend to cause the apprehension or intent to cause the contact.
- b. **Reasonable Apprehension**: Victim reasonably believes that harm will occur.
- c. **Imminent or Immediate harm**: Assault requires *present ability* to carry out the threat and victim must be aware of the threatened contact.
- d. **Contact**: Actual contact is not necessary; apprehension of harmful contact is sufficient.

### C. False Imprisonment

1. Rule: Intent to confine a person to a specific area against his will (without legal justification).

2. Elements:

- a. **Intent**: D must have either intended to confine P, or D knew with *substantial certainty* that P would be confined by D's actions.
- b. **Confinement**: P was confined within definite physical boundaries. It is not "confinement" if P was simply prevented from entering into certain places (i.e. her home).
- c. **Knowledge**: P must know at the time that she is a prisoner (but need not remember afterwards).

### D. Intentional Infliction of Emotional Distress (IIED)

1. Rule: Intentional or reckless infliction, by *extreme and outrageous conduct*, of *severe emotional or mental distress*, even in the absence of physical harm.

2. Elements:

- a. **Intent**: D intends to cause P emotional distress, or D knows with substantial certainty that P will suffer emotional distress, or D recklessly disregards the high probability that emotional distress will occur.
- b. **Transferred Intent**: Limited recovery: D must direct conduct at P's immediate family, P must be present, and D must be aware of P's presence. (If P does not meet these requirements, P could probably still recover under the theory of negligent infliction of emotional distress).
- c. **Extreme and Outrageous Conduct**: Conduct must exceed all bounds that could be tolerated by society.
- d. **Severe Emotional Distress**: P must show that distress was severe enough that she sought medical aid (but she doesn't have to show resulting bodily harm).  
**Exception**: Common carriers are held to a higher standard of conduct and can be liable for merely using insulting language to passengers or patrons.

### E. Trespass to Land

1. Rule: Intentional interference upon the land of another without consent.

2. Elements:

- a. **Intent**: Must be intentional interference with P's interest in property. Conduct is treated as intentional even if it is due to a mistake or a lack of knowledge as to the ownership or boundary of the land.
- b. **Interference**: D intentionally enters P's land without permission, or D remains on P's land without the right to be there, even if D entered rightfully, or D puts an object on (or refuses to remove an object from) P's

- c. land without permission.
- d. **Property of another:**
- e. **Lack of Consent:**
- f. **Damages:** No damages are required.

## F. Trespass to Chattel

1. Rule: Intentional interference with a person's use or possession of a chattel.

### 2. Elements:

- a. **Intent**: Must be intentional, mistake is no defense.
- b. **Interference**: the chattel is impaired to its condition, quality, or value, or the possessor is deprived of use of it for a substantial period of time, or bodily harm is caused to it.
- c. **Property of Another**:
- d. **Chattel**: Movable or transferable personal property.
- e. **Damages**: Damages are required. D only pays for damages, not the full value of the property.

## G. Conversion

1. Rule: Intentional interference with a person's possession or ownership of property that is *so substantial* that D must pay the property's *full value*.

### 2. Elements:

- a. **Intent**: D intentionally takes possession of property, or transfers property to a third party, or refuses to return property to owner, or destroys or fundamentally alters the property. Neither good faith (unless there is a statute protecting good faith purchases) nor mistake is a defense to conversion.
- b. **Substantial Interference**: Courts use several factors to determine whether interference is substantial: (1) duration of Ds dominion over the property, (2) Ds good or bad faith, (3) the harm done to the property, (4) the inconvenience or expense caused to P.
- c. **Damages**: No damages are required. Measure of recovery is the value of goods at the time of conversion (works like a forced sale).

## III. Defenses to Intentional Torts

### A. Consent

1. Rule: No liability if P consented to the intentional tort.

### 2. Types of Consent:

- a. **Express Consent**: If P expressly consents to an intentional interference with his person or property, D will not be liable.
- b. **Implied Consent**: If a reasonable person in Ds position would believe that P consented, D will not be liable regardless of Ps subjective state of mind. Implied consent is inferred from Ps conduct, from custom, or from the circumstances.

- c. **Doctrine of Informed Consent:** Requires physicians to disclose, in lay terms, all the risks and alternatives of a proposed medical treatment. If not, there may be liability for negligence, battery, malpractice.
- d. **Lack of Capacity to Consent:** Consent is not a defense if P is incapable of giving consent because she is a child, intoxicated, or unconscious.
- e. **Consent as a Matter of Law:** Consent will be implied "as a matter of law" if: (1) P is incapacitated and unable to give consent, (2) Immediate action is necessary to save P's life or health, (3) There is no indication that P would not consent if able, (4) A reasonable person would consent under the circumstances.

## B. Self Defense

1. Rule: A person is privileged to use *reasonable force* to prevent any threatened harmful or offensive bodily contact, or any threatened confinement or imprisonment.

### 2. Elements:

- a. **Apparent Necessity:** Self-defense may be used not only where there is a real threat of harm, but also where D reasonably believes that there is one.
- b. **Limited Force:** D can only use the degree of force necessary to prevent harm. If D uses more force than necessary, he will be liable for the damage caused by the excess.
- c. **Deadly Force:** Use of deadly force is permitted *only if* D is in danger of death or serious bodily injury.

## C. Defense of Others

1. Rule: A person has the right to use reasonable force to protect another person (even a stranger) from a threat of harm.

### 2. Mistake:

- a. **Majority Rule:** A reasonable mistake protects D from liability.
- b. **Minority Rule:** D may be liable if he defends a third person who is actually the aggressor, regardless of how reasonable such an intervention may have appeared to him. *Defend others at your own risk.*

## D. Defense of Property

1. Rule: A person may use reasonable force to defend her property.

### 2. Elements:

- a. **Warning Required:** The owner must make a verbal demand first unless it reasonably appears that violence or harm will occur immediately or warning would be useless.
- b. **Reasonable Mistake:** No liability if D reasonably believes force is necessary to protect property. BUT there is no excuse if P had a privilege to be there

(i.e. permission).

- c. **Deadly Force:** D may use deadly force *only* to protect himself or others on the property against death or serious bodily injury. D cannot use deadly force solely to protect property.

#### E. Recovery of Property (chattels)

1. Rule: A person may use reasonable force to recover property which has been wrongfully taken.

2. Elements:

- a. **Fresh Pursuit:** Owner must act immediately and without unreasonable delay.
- b. **Shopkeeper's Privilege:** Merchants have the right to temporarily detain, for an investigation, someone reasonably suspected of shoplifting.

#### F. Necessity

1. Rule: A person has a privilege to harm the property interest of someone when it is necessary to prevent a greater harm to 3<sup>rd</sup> persons, the community, or himself.

2. Elements:

- a. **Public Necessity:** If acting to prevent a disaster to the community, no compensation has to be paid to owner of property.
- b. **Private Necessity:** If acting to prevent harm to himself, his property, or the person or property of a third person, P must pay for the damage caused. (Incomplete privilege).
- c. **Owner may not resist:** If the owner of property resists to actions taken by someone out of necessity, and as a result the person is harmed, that person can recover from owner.

#### G. Authority of Law

1. Rule: Only reasonable force can be used in making an arrest even if it is lawful.

#### H. Discipline

1. Rule: Where a person has rights or responsibility over others, that person has a limited privilege to use reasonable force to maintain discipline. (Exp. Parent-child, teacher-student, military-soldier)

#### I. Justification

1. Rule: No liability if D has a good reason for excusing an intentional tort. D has burden of proof (affirmative defense).

### III. Negligence

#### A. Definition of Negligence

1. Generally: A person is liable for imposing an unreasonable risk upon another, which results in injury.

2. Elements:

- a. **Duty**: Legal duty requiring D to exercise reasonable care and protect others against unreasonable risks of harm.
- b. **Breach**: Failure to exercise reasonable care.
- c. **Causation**: Causal link between negligence and harm. (Actual: "but for" & Proximate: Foreseeable).
- d. **Damages**: Actual damages required.

B. Unreasonable Risk

- 1. Objective standard: D's conduct is viewed in terms of what a reasonable person in similar circumstances would do.
- 2. Balancing Test: The risk of harm is weighed against the cost of precaution. In other words, the risk is unreasonable if it outweighs the utility of the act or omission.
- 3. Inherently Dangerous Objects:
- 4. Attractive Nuisance Doctrine: Owner of property has a duty to protect trespassers if a dangerous object on the property is attractive to trespassers.
  - a. This is an exception to the rule that a property owner does not have a duty to trespassers.
  - b. The doctrine was created to protect children, but sometimes it is extended to adults.

C. Under the Circumstances

- 1. Custom and Usage: Custom can be used not to set a standard but to show evidence of what reasonable people do.
- 2. Insanity
  - a.. Generally, a person with a mental disability is held to the same standard of care as a person of ordinary intelligence.
  - b. However, no liability if a person is suddenly overcome, without forewarning, by a mental disability or disorder which makes the person unable to conform to the standards of how a reasonable person would act in similar circumstances.
- 3. Physical Disability: A disabled person need only to exercise the care that a reasonable person with the same disability would exercise in the same situation.
- 4. Emergency Doctrine: lowers that standard of care as long as D did not cause the emergency. D must behave as a reasonable person would if confronted with the same emergency. (But in some situations, D is required to anticipate the emergency: i.e. the breaks going out in a car).
- 5. Intoxication: No defense if intoxication was voluntary. D will be held to the same standard of care as that of a sober person.
- 6. Child Standard
  - a. **Generally**: A child is held to the level of conduct of a reasonable person that age and experience.

- b. **Inherently Dangerous Activities:** When the activity the child engages in is inherently dangerous, the child should be held to an adult standard of care (what a reasonable adult in a similar situation would have done).

#### D. Standard of Care

1. Professional Standard of Care: Professionals are held to a higher standard of care than ordinary persons. They must exercise the same due care that a reasonable prudent professional in the same field would in the same circumstances. (Professional negligence = malpractice)

2. Locality Rule: At one time, rural doctors were not held to the same standard of care as urban doctors. Now, health care professionals who are trained according to national standards and who hold themselves out to the public as such, are held to a national standard of care.:

4. Informed Consent: A physician has a duty to disclose any significant risks and alternatives of a proposed treatment to a patient in advance.

- a. If a physician does not and there is an injury, P does not have to prove negligence to recover damages.
- b. It is what this patient would have decided if informed, not what a reasonable patient would have done. The jury must conclude that P would not have chosen the treatment if informed in order for P to recover damages.
- c. P needs expert witness if suing for lack of informed consent.
- d. Exceptions to this rule:
  - i. The risks ought to be known or are already known to the patient.
  - ii. A full disclosure would be detrimental to a patient's total care and best interests. (i.e. patient is highly nervous)
  - iii. There is an emergency and patient is in no condition to make a decision.

#### 5. Fiduciary Relationship

- a. **Definition:** A relationship in which one person is under a duty to act for the benefit of the other on matters within the scope of the relationship.
- b. **Duty:** In order to satisfy his fiduciary duty to obtain patient's informed consent, a physician must disclose personal interests unrelated to the patient's health that may affect his medical judgement.

#### E. Aggravated Negligence

1. Degrees of Negligence: The care that the reasonable person must exercise will vary according to the risk involved. (A person must exercise more care when handling explosives than when handling lumber).

- a. Slight negligence
- b. Ordinary negligence

- c. Gross/reckless/willful/or wanton negligence- D could be held for punitive damages.
- d. All of the above are hard to distinguish and courts generally do not use these distinctions any longer.

2. Common Carriers: Common carriers provide public transportation and must exercise the highest degree of care with regard to their passengers.

3. Automobile Guest Statutes: A few states have statutes that provide that an owner-driver is not liable for injuries to his guest passenger unless the driver was grossly negligent or reckless.

## F. Negligence Per Se (Violation of Statute)

1. Rule: When a person violates a statute that results in an injury to a member of the group of persons the statute was intended to protect, and the harm is of the kind the statute is trying to prevent, than the person is negligent as a matter of law.

2. Elements:

- a. **Member of a protected class**: P must be a member of the class of persons whom the statute was designed to protect.
- b. **Protection against a particular harm**: the statute must have been intended to protect against the particular kind of harm that P seeks to recover for.
- c. **Rebuttable presumption of negligence**:
  - i. *Majority view*- In most jurisdictions a violation of a statute will lead to a presumption of negligence which can be excused.
  - ii. *Minority view*- Some courts say that a violation of a statute results in strict liability negligence. Some courts say that it is only evidence of negligence.

3. Excuses:

- a. The court can find that the statutory violation is excused as long as the statute itself does not show that no excuses are permitted.
- b. **Typical reasons**:
  - i. D was reasonably unaware of the particular occasion for compliance.
  - ii. D made a reasonable and diligent attempt to comply.
  - iii. D was confronted with an emergency not of his own making.
  - iv. Compliance would have involved a greater risk of harm.

## G. Proof of Negligence

1. Court and Jury: If people of reasonable intelligence may differ as to the conclusion to be drawn from facts in evidence, the issue must be left to the jury; if not, the court will decide.
2. Burden of Proof: P has the burden of proof/persuasion. If the evidence P introduces is not greater or more persuasive than D, he must lose.
3. Actual Notice: If evidence shows that an owner of property knew there was a dangerous condition on property, he has actual notice of it and is liable to anyone who sustains injuries as a result of it.
4. Constructive Notice: If evidence shows that the condition has existed for such a long time, than it will be inferred that the owner must have or should have known about it and owner will be liable.

## H. Res Ipsa Loquitur (the thing speaks for itself)

1. Rule: The doctrine of Res Ipsa Loquitur creates an inference of negligence that lessens the burden of proof of P and avoids a dismissal of the suit even without direct evidence of negligence.
2. Elements:
  - a. The accident involved normally doesn't happen unless someone has been negligent.
  - b. The thing that caused the accident was in the exclusive control of D.
  - c. The accident was not the result of contributory negligence by P.
3. Three interpretations:
  - a. **Inference** (majority): it creates an inference of negligence which the jury may draw or not.
  - b. **Rebuttable Presumption**: It raises a presumption of negligence which requires the jury to find negligence if defendant does not produce evidence to rebut the presumption.
  - c. **Burden of Proof**: The burden of proof shifts to D. D must prove by a preponderance of all the evidence that the injuries were not the result of negligence, or that one of the required elements was missing (i.e. the thing was not in the exclusive control of D at all relevant times).

## IV. Causation

### A. Actual and Proximate Causation (need both)

1. Actual Cause- But/For rule: The injury would not have happened to the plaintiff "but for" the act or omission by the defendant. Thus, Ds actions (or omissions) is the actual cause of Ps injuries.
  - a. Some (CA) have substituted this for a "substantial

factor" rule, that is, Ds act or omission was a substantial factor in causing the harm.

2. Proximate Cause: The injury must be closely related to Ds conduct for D to be held liable.

- a. **Foreseeability**- A requirement in proximate cause: the injury must have been a reasonably foreseeable result of Ds conduct.
- b. **Reasoning**- There may be some cases where there was a duty, a breach of duty, and actual cause, but the consequences are so extraordinary and unforeseeable, that courts won't hold D liable as a matter of law.

## B. Proof of Causation

1. Ps Burden of Proof: The mere possibility of causation is not enough, P must prove that D *more likely than not* caused the harm.

2. Preponderance of evidence: P must demonstrate causation by a preponderance of the evidence.

3. Expert testimony: Proximate causation in a medical malpractice case must be established by expert testimony. Expert testimony can be introduced in other cases as well to establish causation.

4. Scientific evidence: Also can be used to prove causation, especially in product liability cases.

## C. Concurrent Causes

1. Rule: Ds conduct can meet the causation requirement even if it is not a "but for" cause, when two events concur to cause the harm, and either one would have been sufficient to cause substantially the same harm without the other.

2. Elements:

- a. **Single Indivisible Injury**- The rule applies only where the concurrent causes produce a single indivisible injury. If the damage caused by one concurrent cause can be separated from that caused by the other, the person causing the former will be liable only for that harm.
- b. **Substantial Factor Standard**- Where each of two events would have been sufficient by itself to bring about the harm, the test for each event is whether it was a "substantial factor" in bringing about the harm.

## D. Determining Who Caused Harm

1. Double Fault and Alternative Liability: The burden of proof shifts where P can establish that two parties were negligent, but that only one could have caused the injury. It is then up to each defendant to show that the other caused the harm. (*Summers v. Tice* both Ds shot in direction of P at the same time).

2. Market Share Liability: Often applied in products liability cases. If P cannot prove which of three or more persons caused

his injury, but can show that all produced a defective product, the court will require each of the Ds to pay a percentage of Ps injuries proportional to Ds total market sales of the product at the time of the injury.

3. Enterprise Liability: Alternate to market share liability which a few courts use. Ds are said to have " jointly controlled the risk" of putting the defective product on the market, so each member of the industry should be held liable. Burden of proof as to actual causation shifts to Ds.

## F. Proximate Cause (Foreseeability)

1. Ordinary and Natural Chain of Events: The damage must be the result of an ordinary and natural chain of events directly traceable to the negligent act, for the act to be the proximate cause.

2. Foreseeable Consequences: Generally, D is liable only for consequences that were reasonably foreseeable at the time he acted. **Exceptions:**

- a. **Eggshell Skull Rule**: D takes P as he finds him/her. D is liable for additional unforeseen consequences from a foreseeable injury. (The fact that injury is much worse than anticipated is irrelevant).
- b. **Unexpected Manner**: Some courts hold that as long as some damage is foreseeable, the fact that the manner in which the damage occurred was unusual is irrelevant, D still liable for all damages.
- c. **Remotely Foreseeable**: Some courts hold that as long as the actual harm to P was remotely foreseeable, there is liability even though consequences were highly unlikely.

3. Foreseeable Plaintiff: Ds liability extends only to the person whom it is reasonably foreseeable the act would affect.

4. Foreseeable Member of Class: The fact that injury to the particular plaintiff was not foreseeable may be irrelevant if the plaintiff is a *member of a class* as to which there was a general foreseeability of harm.

5. Rescue Doctrine: Allows an injured rescuer to sue the party which caused the danger requiring the rescue.

- a. **Unforeseen Rescuer**- Even if intervention of rescuer is not foreseeable, D still may be held liable to rescuer's injuries.
- b. To be considered a rescuer, P must prove:
  - i. D was negligent and consequently caused danger to the person rescued.
  - ii. The danger was imminent.
  - iii. A reasonable person would conclude that the danger existed.
  - iv. The rescuer acted with reasonable care during the rescue.
- c. **Fireman's Rule**- A person who is a public servant and is injured in effecting a rescue cannot recover.

6. Remoteness in Time and Space: Some courts will not hold D liable if his conduct is only remotely (through a chain of events separating the time and space between conduct and result) connected to the actual injury.

7. Intervening Causes: An intervening act does not necessarily break the causal connection between the negligence and the injury. However, some intervening acts supercede Ds negligence as the proximate cause of the injury.

- a. **Foreseeability**- If D should have foreseen the possibility that the intervening cause might occur, or if the kind of harm suffered by P was foreseeable (even if intervening cause was not), Ds conduct is still the proximate cause.
- b. **Superseding Cause**- If neither the intervening cause nor the harm was foreseeable, the intervening cause was a superseding one, relieving D of liability.
- c. **Criminal or Intentionally Tortious Conduct**- Normally such acts are considered to be superseding causes, but not always. If D puts P at risk or has a duty to protect P from such risk and breeches this duty, and the acts of the third party were a foreseeable consequence of Ds breach, than D is liable.
- d. **Suicide**- Most courts hold that suicide is a superseding cause if person is "sane." But if a person is driven "insane" as a result of injuries and consequently has an "irresistible impulse" to commit suicide, D may be liable.

8. Remotely Foreseeable v. Great Risk of Harm:

## V. Joint Tortfeasors

### A. Joint and Several Liability

1. Rule :Where two or more tortfeasors jointly caused an injury, the plaintiff may recover the full amount from any of the defendants.

2. Three situations where defendants will be liable for joint and several liability:

- a. Two or more Ds acted in *concert* to cause an *indivisible* harm.
- b. Two or more Ds failed to perform a *common duty* resulting in injury to P.
- c. Two or more Ds acted *independently* to cause a single *indivisible* injury.

### B. Comparative Negligence (see defenses to negligence below)

Definition

How Joint and Several liability is affected.

### C. Apportionment

1. Rule: The court may apportion damages between defendants for divisible harms.
  - a. **Successive incidents** separated by substantial time is easier to apportion.
  - b. **Burden of Proof**- if it is too difficult to divide the harm, then courts will often shift the burden onto the defendants to determine reasonable allocation, out of fairness to P.

#### D. Plaintiff at Fault

1. Contributory Negligence: A minority of states bars P from any recovery if she is guilty of contributory negligence.
2. Comparative Negligence: Most states allow P to recover total damages minus the damages caused by her own negligence. This is usually done by determining the percentage P is at fault.

#### E. Satisfaction and Release

1. Satisfaction: If P has received full compensation (satisfaction) for the injury from one party, than P cannot recover damages from any other party. No double recovery is allowed.
  - a. **Incomplete Recovery**- If recovery from one party does not fully satisfy the claim, P can recover the remainder from the other defendants.
2. Release: P may release a party from his claim, which he may do for only partial compensation or no compensation at all. This may be in the form of a covenant not to sue.
  - a. **Common law**- If P releases one defendant, than all the defendants are released.
  - b. **Modern law**- Even if P releases one defendant, she may sue remaining Ds as long as *she expressly reserved the right to do so*.

#### F. Contribution

1. Rule: If one tortfeasor is forced to pay the entire amount or more than his share of damages, he may seek contribution from the other tortfeasors in a separate action.

#### G. Indemnity

1. Rule: Allows a defendant who is not responsible for an injury, but nevertheless held liable, to recover the full amount of the judgement from the responsible parties.
2. Situations allowing for Indemnity:
  - a. Vicarious liability/Respondeat Superior
  - b. Contract providing for indemnity

### VI. Duty

#### A. Generally

1. Rule: Negligence requires a judicial determination that Ds unreasonable conduct constituted a breach of duty owed to persons in a class to which P belonged.

2. Policy: A variety of factors are considered in determining whether to impose a duty of care including:
- Forseeability** and severity of the underlying risk of harm.
  - Ability** and opportunity to exercise care to prevent the harm.
  - Relationships** between and comparative interests of the parties.
  - Public** interest in recognizing the duty.

## B. Failure to Act

1. Rule: Generally, a person cannot be held liable for failure to act. A person has no duty to come to the aid of another.

2. Exceptions:

- D causes emergency**- When D causes another's injury or predicament, he has a duty to aid that person.
- Business premises**- (see section on Occupiers of Land below)
- Assumption of duty**- Once D voluntarily begins to render assistance to P, he must proceed with reasonable care.
- Duty to control 3<sup>rd</sup> persons**- If D has a duty to control 3<sup>rd</sup> persons, D can be negligent for failing to exercise that control.
- Co-venturers**- If D and victim are engaged in a common pursuit (such as hiking) some courts have imposed a duty of warning and assistance.
- Instrumentality under Ds control**- Once there has been an injury, the person who has control of the thing causing the injury has a duty to come to the rescue of the other (i.e. escalator case). In such a case, D will only be liable for aggravated injuries due to his failure to act (rather than original injury).
- Spouse's Duty**- When a spouse has actual knowledge or special reason to know of the likelihood of her spouse causing harm (such as sex abuse), the spouse has a duty of care to take reasonable steps to prevent or warn of the harm.
- Doctor's Duty**- If a doctor determines that a patient poses a threat of danger to others, he has a duty to protect or warn the foreseeable victim of the danger.

## C. Attorney's Duty to a Nonclient

1. Rule: A third party cannot sue an attorney for negligence unless the third party was a person intended to be benefitted by the attorney's performance.

## D. Mental Suffering

1. NIED General Rule: If a person gets injured, that person can recover not just for the injury but also for the physical and mental suffering that accompanies the injury.

2. Physical Impact Requirement:

- a. Some courts require that P suffers a physical impact to recover for mental or emotional distress.
- b. Some courts say there can be recovery for purely emotional damages due to negligence.

3. NIED w/o physical impact Rule: Where a definite and objective physical injury is produced as a result of emotional distress proximately caused by D's negligent conduct, P may recover.

- a. P may still recover even if P is highly susceptible to such mental distress.
- b. Nearly all courts deny recovery if there is not only no physical impact, but also no physical symptoms of emotional distress.

4. Witness of accident: can recover for NIED if-

- a. closely related to victim of accident
- b. present at the scene of the accident at the time it occurs
- c. as a result suffers serious emotional distress.

## E. Unborn Children

1. Child Born Alive: All courts allow recovery for pre-natal injuries if the child is eventually born alive.

2. Child not born alive/wrongful death: Courts are split.

- a. Some say a wrongful death action may not be maintained for the death of an unborn child.
- b. Others will find a fetus a "person" within the meaning of a wrongful death statute.

3. Wrongful Life: Courts usually do not allow a child to recover for a "wrongful life" in the sense that it would have been better off aborted.

- a. However, parents can usually recover for the medical expenses, and sometimes emotional distress from the child's condition.

## VII. Owners and Occupiers of Land

### A. Outside the Premises

1. Rule: A landowner has a duty to exercise reasonable care to protect others outside his property from unreasonable harm.

2. Natural Conditions: Generally, there is no duty to protect individuals outside the premises from natural conditions on the property.

3. Artificial Conditions/Activities on Land: A landowner has a duty to exercise reasonable care to protect others outside his premises from artificial conditions on his property.

- a. **Example**- foul balls from baseball field often fly into public street- one causes injury to a passerby.

### B. Within the Premises

1. Rule: A landowner has a duty to exercise reasonable care to

protect others from dangers on the premises.

2. Elements:

- a. **Trespasser**- No permission to be on land.
- b. **Licensee**- permission granted and on the land for own interests; social guests.
- c. **Invitee**- permission granted and on the land to benefit owner or conduct business of owner, or members of the public on land open to public.

C. Trespasser

1. Rule: A landowner has no duty to protect unknown trespassers in unexpected locations against any risks of harm.

2. Exceptions:

- a. **Discovered trespasser**- landowner must act reasonably to prevent harm.
- b. **Attractive Nuisance Doctrine**- Protects children from unreasonable harm. Elements (L.U.R.B.E.):
  - i. It must be *likely* that children will trespass
  - ii. The property poses an *unreasonable* risk of harm
  - iii. Children do not *realize* the risk
  - iv. *Burden* of care is less than the risk of harm
  - v. Lack of reasonable care to *eliminate* danger or protect children.
- c. Frequent or tolerated trespassers become licensees.

D. Licensee

1. Rule: A landowner has a duty to warn licensees (social guests) of hidden dangers and dangerous conditions that are known or should be known.

2. Elements:

- a. A dangerous condition
- b. Defendant knew or should have known about it
- c. The condition is not apparent to P.

E. Invitee

1. Rule: A landowner must take positive steps to prevent injuries to (business) invitees. Warnings are not enough if there is an unreasonable risk.

2. Scope of Invitation: If a visitor's use of the premises goes beyond the business purpose or beyond the part of the premises held open to the public, that person will change from invitee to a licensee.

F. California Rule

1. Rule: CA Supreme Court got rid of the above three categories. In CA a landowner has a duty to act reasonably to protect those that come onto the premises.

- a. Criticized for putting trespassers at the same status as invitees and licensees.

G. Lessor/Lessee

1. Rule: Generally, the tenant and not the landlord has a duty to protect his guests from harm.
2. Exceptions:
  - a. Landlord is responsible for concealed dangerous conditions he knows or should know about that are unknown to tenant.
  - b. **Common Stairway Rule**- Landlord is responsible for common areas under his control (i.e. hallways of an apartment building).
  - c. **3<sup>rd</sup> Party Criminal Acts**- Landlord has a duty to take reasonable precautions from foreseeable harm resulting from a third party's criminal acts (i.e. guard in front of building).
  - d. **Repairs**- If the landlord contracts, under the lease, to keep premises in good repair, breach of this K gives a tort claim to anyone injured. Also, landlord is responsible for negligent repairs.

## H. Analysis

Three questions in finding whether a landowner is liable:

1. What is the status of the injured person?
2. Was there a dangerous condition on the property which caused an injury?
3. If so, was it transitory (i.e. it just happened) or permanent?

## VIII. Damages

### A. Types of Damages

1. Nominal: Small amount of \$\$ to vindicate rights.
2. Compensatory: Money equal to loss or harm suffered by P. Its purpose is to restore P to previous condition before injury.
  - a. **General**- Pain and suffering, disability, disfigurement, loss of enjoyment of life, reduced life expectancy.
  - b. **Special**- Medical bills, loss of wages, repairs.
3. Punitive: Additional \$\$ to punish D, to make an example of D and to deter others.

### B. Personal Injury Damages Due to Negligence

1. No Nominal Damages: Unlike intentional tort actions, nominal damages may not be awarded in negligence actions.
2. Elements of Damages:
  - a. **Direct Loss**- The value of any direct loss of bodily functions.
  - b. **Economic Loss**- Out-of-pocket economic losses stemming from the injury.
  - c. **Pain and Suffering**
  - d. **Hedonistic Damages**- Damages for loss of the ability to enjoy one's previous life.

3. Future Damages: P recovers not only for past damages but also for likely future damages (i.e. loss of work).

### C. Collateral Source Rule

1. Rule: Payments made to or benefits conferred on the injured party from other sources are not credited against the tortfeasor's liability, even if they cover all or part of the harm for which the tortfeasor is liable and even if this results in a double recovery for P.

2. Reasoning: Recoveries from collateral sources must not function to benefit the tortfeasor.

### D. Mitigation

1. Rule: P has a duty to take reasonable care to avoid aggravating an injury caused by a tortfeasor. Otherwise, the court can reduce the amount of damages.

- a. Example- failure to seek medical care when a reasonable person would have done so.

### E. Punitive Damages in Negligence Cases

1. Rule: Can be awarded to penalize a defendant whose conduct was outrageous, reckless, willful, or wanton.

- a. **Products Liability**- Punitive damages are also frequently awarded in these cases, if P shows that D knew its product was defective, or recklessly disregarded the risk of a defect.

### F. Wrongful Death and Survival Actions

1. Survival Statutes: Allows an estate to sue for those elements of damages that the victim himself could have sued for had he lived.

- a. This includes pain and suffering, lost earnings prior to death etc.

2. Wrongful Death Statutes: Most states have these. Allows a defined group to recover the loss they have sustained from someone's death.

- a. This group usually includes the spouse and children of the decedent.
- b. Damages: economic support would have received had death not occurred.
- c. Now parents can usually recover for the wrongful death of a child. Damages are based on loss of companionship.

## IX. Defenses in Negligence Actions

### A. Contributory Negligence

1. Common Law Rule: If P is negligent and his negligence contributes proximately to his injuries, he is barred from recovery.

- a. Most states have replaced this with the doctrine of comparative negligence.

2. Last clear chance: modifies contributory negligence rule. If, just before the accident, D had an opportunity to prevent the harm, and P did not have such an opportunity, the existence of this opportunity eliminates the defense of contributory negligence and D is liable.

## B. Comparative Negligence

1. Rule: P is not barred from recovery by his contributory negligence, but recovery is reduced according to the amount (percentage) that P is at fault.

- a. **Pure comparative negligence (minority)**- Will not bar recovery no matter how much P is at fault.
- b. **50% rule (majority)**- P must be below 50% at fault (D must be more at fault than P) for P to recover.

2. Joint and Several liability (multiple Ds in comparative negligence):

- a. **Minority**- A minority of states have abolished the rule of joint and several liability in adopting comparative negligence. Ds are responsible only according to the amount they are at fault.
- b. **Majority**- Majority of states maintain joint and several liability. If not all Ds are before the court, P can still recover from any D all damages minus the percentage that P is at fault.
  - i. A D can always seek contribution from another D in a separate action.

## C. Assumption of Risk

1. Rule: P assumed the risk if he *voluntarily consented* to a *known risk*.

- a. Voluntary consent
- b. Knowledge of risks

2. Express Assumption of Risk: P has *explicitly agreed* not to hold D liable for harm. Agreements are invalid if:

- a. They violate public policy
- b. D has greater bargaining power (doctor serving public)
- c. P was not aware of the terms of the agreement
- d. They violate a safety statute
- f. P cannot assume the risk of an intentional tort by D or Ds willful, wanton, or reckless negligence.

3. Implied Assumption of Risk: P had knowledge of the risk and he voluntarily consented to bear the risk *through his conduct*.

Invalid if:

- a. There were no reasonable alternatives available to P
- b. **In the majority of states- Comparative negligence cancels assumption of risk.**

## D. Failure of P to take precaution

1. Rule: Some jurisdictions will apportion (mitigate) damages if Ps failure to take precautionary measures led to a more serious injury than he would have suffered if he had exercised due care.

- a. **Example**- P negligently fails to wear his seatbelt and

is more seriously injured than he would have been had he worn it.

- b. **Compare Mitigation**- disallows recovery of aggravated damages that P could have reasonably avoided after the initial injury caused by D.

## E. Statute of Limitations

1. Discovery of Injury: If P does not discover his injury until long after D's negligent act occurred, the SOL may start to run

- a. At the time of the negligent act or
- b. When P discovered or should have discovered the injury.

2. Statute of Repose: Bars recovery after a fixed number of years after D acted, even if this period ends before P suffers an injury.

- a. Usually protects architects, engineers, and product liability manufacturers.

3. Tolling: SOL stops running for minors, the legally insane or incompetent, and in cases of fraud.

## F. Immunities

1. Rule: D is not liable if he is immune from a lawsuit by P (by statute or common law).

2. Spousal Immunity: Abolished. No longer good law.

3. Parent and child: Lawsuits for intentional, willful, and wanton misconduct are allowed.

4. Charitable Immunity: Since charities now function like businesses and have liability insurance, immunity is no longer upheld in many jurisdictions.

5. Employer Immunity: *Workers Compensation Statutes* immunizes employers against liability for work-related injuries even if they were negligent.

- a. If employer does not carry Workers Comp:
  - i. Employee can apply for WCI as if the employer had it all along and,
  - ii. File a tort action against employer.

## X. Vicarious Liability

### A. Respondeat Superior

1. Rule: If an employee commits a tort within the scope of his employment, the employer will be liable (jointly with the employee).

- a. This doctrine applies to all torts, including intentional and strict liability torts.

2. Definition of employee: Someone who is *subject to the control* of the person who hired him.

- a. Rule does not apply to independent contractors because they are not subject to the control of the person who contracts them to do a job.

3. Scope of Employment: Employee is acting with the intent to further the business interest of the employer.

- a. **Trips from home to work**- usually not considered within scope. Courts are divided about trips from work to home.
- b. **Frolic and Detour**- Within scope if reasonably foreseeable.
- c. **Forbidden acts**- Within scope if done in furtherance of employers business interest, even if forbidden by employer.
- d. **Intentional torts**- If done to further business interests, it is within scope. But if done for personal motives, employer will not be liable.

## XI. Strict Liability

1. Rule: Liability is imposed where neither intent nor negligence is present. "Liability w/o fault" or "absolute liability."

2. Policy Reasoning: People who engage in certain activities do so at their own peril and they must pay for the harm that results even if they are very careful. It is also easier and more appropriate for D to bear the loss than the injured P.

3. Types of Cases:

a. **Animals-**

- i. Domestic Animals: No strict liability unless the owner knows or has reason to know that the animal is dangerous.
- ii. Trespassing Animals: Owner is strictly liable for any damages caused by the animal on another person's property.
- iii. Wild Animals: A person who keeps a wild animal is strictly liable for all damages resulting from the animal's known dangerous propensities.

b. **Abnormally Dangerous Activities- Elements:**

- i. High degree of risk that harm will result
- ii. Harm is likely to be serious
- iii. Risk cannot be eliminated by reasonable care
- iv. Activity is not common usage
- v. The activity is not appropriate to the place it is carried out
- vi. The danger outweighs the activity's value to the community

**Example:** Nuclear reactors, explosives, crop dusting

etc.

4. Assumption of Risk: is a defense if P willingly subjects himself to danger. Contributory negligence is no defense.

5. Damages: Liability only for the damages that result from the kind of risk that made the activity abnormally dangerous.

## XII. Products Liability

**Rule:** Liability of a manufacturer arises when a defective product causes physical harm to persons or property. Liability can be based on any of the following categories:

1. **Intentional Acts:** A manufacturer who sells a product that he is *substantially certain* is defective or dangerous w/o warning of the danger may be held liable for **battery** to any persons injured by the product.

2. **Negligence:**

- a. **Rule:** One who negligently manufactures a product is liable for all foreseeable injuries caused by his negligence. Most product liability involves unintentional injuries caused by products.
- b. **Who may be liable:**
  - i. Manufacturer of the product
  - ii. Assembler of product that has a defective component
  - iii. Dealer or middleman (usually not though- no duty to inspect. Usually held liable through warranty or strict liability theories).

3. **Warranty:**

- a. **Express Warranty:** A seller expressly represents to a buyer that the product has certain qualities. If the product does not have such qualities and the product causes subsequent injury, than the buyer may sue for breach of warranty.
- b. **Implied Warranty:** The existence of a warranty as to the quality of goods can also be *implied* from the fact that the seller has offered the goods for sale.
  - i. **Warranty of Merchantability-** Implied warranty that goods are suited for their ordinary purpose.
  - ii. **Warranty of Fitness-** Implied warranty that foods are fit for a particular purpose.
    - A. The seller must know that the buyer wants the goods for a particular (and not customary) purpose.
    - B. The buyer relied on the seller's judgement to recommend a suitable product.

4. **Strict Liability:**

- a. **Rule:** A seller who turns out a defective product will be held strictly liable for any harm resulting to the consumer so long as the consumer uses the product in a manner for which it was intended to be used.
- b. **Elements:**
  - i. D is a commercial seller
  - ii. D supplied the product in a defective manner
    - 1. Manufacturing defect
    - 2. Design defect
    - 3. Inadequate Warning
  - iii. Causation
  - iv. Damages
    - 1. Damages include personal and property

only.

