THE LAW OF TORTS

SUPPLEMENTAL READINGS

Class 11

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Torts
Tenth Edition

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Wolters Kluwer

TORTS

TENTH EDITION

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SUMMARY OF CONTENTS

CAPSULE SUMMARY

This Capsule Summary is intended for review at the end of the semester. Reading it is not a substitute for mastering the material in the main outline. Numbers in brackets refer to the pages in the main outline where the topic is discussed.

CHAPTER 1
INTRODUCTION

I. GENERAL INTRODUCTION

A. Definition of tort: There is no single definition of "tort." The most we can say is that: (1) a tort is a ***civil wrong*** committed by one person against another; and (2) torts can and usually do arise ***outside of any agreement*** between the parties. [1]

B. Categories: There are three broad categories of torts, and there are individual named torts within each category: [2]

1. Intentional torts: First, ***intentional*** torts are ones where the defendant desires to bring S about a particular result. The main intentional torts are:

a. ***Battery.***

b. ***Assault.***

c. ***False imprisonment.***

d. ***Infliction of mental distress.***

2. Negligence: The next category is the generic tort of ***"negligence."***Here, the defendant has not intended to bring about a certain result, but has merely behaved ***carelessly.*** There are no individually-named torts in this category, merely the general concept of "negligence."

3. Strict liability: Finally, there is the least culpable category, ***"strict liability."*** Here, the Y defendant is held liable even though he did not intend to bring about the undesirable result, and even though he behaved with utmost carefulness. There are two main individually-named torts that apply strict liability: [3]

a. Conducting of ***abnormally dangerous activities*** (e.g., blasting); and

b. The ***selling*** of a ***defective product*** which causes personal injury or property damage.

C. Significance of categories: There are two main consequences that turn on which of the three above categories a particular tort falls into: [4]

1. **Scope of liability:** The three categories differ concerning D's liability for ***far-reaching, unexpected, consequences.*** The more culpable D's conduct, the more far-reaching his liability for unexpected consequences — so an intentional tortfeasor is liable for a wider range of unexpected consequences than is a negligent tortfeasor. [4]

2. **Damages:** The ***measure of damages*** is generally broader for the more culpable categories. In particular, D is more likely to be required to pay punitive damages when he is an intentional tortfeasor than when he is negligent or strictly liable. [4]

D. Exam approach: First, review the fact pattern to spot each individual tort that has, or may have been, committed. Then, for each tort you have identified:

1. **Prima facie case:** Say whether a prima facie case for that tort has been made.

2. **Defenses:** Analyze what ***defenses*** and justifications, if any, D may be able to raise.

3. **Damages:** Finally, discuss what ***damages*** may be applicable, if the tort has been committed and there are no defenses. Pay special attention to: (1) punitive damages; (2) damages for emotional distress; (3) damages for loss of companionship of another person; (4) damages for unlikely and far-reaching consequences; and (5) damages for economic loss where there has been no personal injury or property damage.

CHAPTER 2
INTENTIONAL TORTS AGAINST THE PERSON

I. "INTENT" DEFINED

A. Meaning of intent: There is no general meaning of "intent" when discussing intentional torts. For each individual intentional tort, you have to memorize a different definition of "intent." All that the intentional torts have in common is that D must have intended to bring about some sort of physical or mental effect upon another person. [7-8]

1. No intent to harm: The intentional torts generally are ***not*** defined in such a way as to require D to have intended to ***harm*** the plaintiff. [9]

> **Example:** D points a water gun at P, making it seem like a robbery, when in fact it is a practical joke. If D has intended to put P in fear of imminent harmful bodily contact, the "intent" for assault is present, even though D intended no "harm" to P.

2. Substantial certainty: If D ***knows with substantial certainty*** that a particular effect will R occur as a result of her action, she is deemed to have intended that result. [8]

> **Example:** D pulls a chair out from under P as she is sitting down. If D knew with "substantial certainty" that P would hit the ground, D meets the intent requirement for battery, even if he did not desire that she do so. *[Garratt v. Dailey]*

a. High likelihood: But if it is merely "highly likely," not "substantially certain," that the bad consequences will occur, then the act is not an intentional tort. "Recklessness" by D is not enough.

b. Act distinguished from consequences: For "substantial certain" and "intentional," distinguish betwwen D's act, and the ***consequences*** of that act. The *act* must be intentional or substantially certain, but the *consequences* need not be. [9]

> **Example:** D intends to tap P lightly on the chin to annoy him. If P has a "glass jaw," which is broken by the light blow, D has still "intended" to cause the contact, and the intentional tort of battery has taken place, even though the consequences — broken jaw — were not intended.

B. Transferred intent: Under the doctrine of ***"transferred intent,"*** if D held the necessary intent with respect to person A, he will be held to have committed an intentional tort against ***any other person*** who happens to be injured. [9]

> **Example:** D shoots at A, and accidentally hits B. D is liable to B for the intentional tort of battery.

II. BATTERY

A. **Definition:** Battery is the ***intentional infliction of a harmful or offensive bodily contact.*** [11]

> **Example:** A intentionally punches B in the nose. A has committed battery.

B. Intent: It is not necessary that D desires to physically ***harm*** P. D has the necessary intent for battery if it is the case ***either*** that: (1) D intended to cause a harmful or offensive bodily contact; or (2) D intended to cause an ***imminent apprehension*** on P's part of a harmful or offensive bodily contact. [11]

> **Example 1:** D shoots at P, intending to hit him with the bullet. D has the necessary intent for battery.
>
> **Example 2:** D shoots at P, intending to miss P, but also intending to make P think that P would be hit. D has the intent needed for battery (i.e., the "intent to commit an assault" suffices as the intent for battery).

C. Harmful or offensive contact: If the contact is "harmful" — i.e., it causes pain or bodily damage — this qualifies. But battery also covers contacts which are merely ***"offensive,"*** i.e., damaging to a ***"reasonable sense of dignity."*** [12]

> **Example:** D spits on P. Even if P is not "harmed" in the sense of being caused physical pain or physical injury, a battery has occurred because a person of average sensitivity in P's position would have her dignity offended.

D. P need not be aware: It is ***not*** necessary that P have ***actual awareness*** of the contact at the time it occurs. [13] ***(Example:*** D kisses P while she is asleep. D has committed a battery.)

E. Contact beyond level consented to: Battery can occur where P ***consents*** to a certain level of bodily contact, but D ***goes beyond the consented-to level*** of contact. At that point, the consent becomes invalid, and battery results. Look for this "beyond the consented-to level of contact" scenario when the facts involve either a ***sporting event*** or a ***medical/surgical procedure.*** [12]

> **Example:** In a pick-up ice hockey game in a park, P and D are skirmishing for the puck near the side wall of the rink. D intentionally delivers a hard body check that throws P into the wall, and the collision between P and the wall badly injures P. D sues P for battery.

If D intentionally delivered a body check (a body contact) that went beyond the level or type of contact D knew or should have known P was impliedly consenting to, then it would constitute battery.

III. ASSAULT

A. Definition: Assault is the intentional causing of an ***apprehension*** of ***harmful or offensive contact.*** [14]

Example: D, a bill collector, threatens to punch P in the face if P does not pay a bill immediately. Since D has intended to put P in imminent apprehension of a harmful bodily contact, this is assault, whether D intends to in fact hit P or not.

B. Intent: There are two different intents, either of which will suffice for assault:

1. **Intent to create apprehension:** First, D intends to put P in ***imminent apprehension*** of the harmful or offensive contact, even if D does not intend to follow through (e.g., D threatens to shoot P, but does not intend to actually shoot P); [14] or
2. **Intent to make contact:** Alternatively, D intends to in fact ***cause*** a harmful or offensive bodily contact.

Example: D shoots a gun at P, trying to hit P. D hopes P won't see him, but P does. P is frightened. The shot misses. This is assault.

3. **Summary:** So D has the requisite intent for assault if D either "intends to commit an assault" or "intends to commit a battery." [14]

C. No hostility: It is not necessary that D bear malice towards P, or intend to ***harm*** P. [15]

Example: D as a practical joke points a toy pistol at P, hoping that P will falsely think that P is about to be shot. D has one of the two alternative intents required for assault — the intent to put P in imminent apprehension of a harmful or offensive contact — so the fact that D does not desire to "harm" P is irrelevant.

D. "Words alone" rule: Ordinarily, ***words alone*** are not sufficient, by themselves, to give rise to E an assault. Normally there must be some overt act — a physical act or gesture by D — before P can claim to have been assaulted. [15]

Example: During an argument, D says to P "I'm gonna hit you in the face." This is probably not an assault, if D does not make any gesture like forming a fist or stepping towards P.

1. **Special circumstances:** However, the ***surrounding circumstances,*** or D's past acts, may occasionally make it reasonable for P to interpret D's words alone as creating the required apprehension of imminent contact. [15]

E. Actual contact or apprehension required: Assault requires an ***effect:*** P must either actually ***undergo*** a harmful or offensive contact, or be put in ***immediate apprehension*** of such a contact.

1. **Unsuccessful prank or bluff:** So where D is pulling a ***prank or making a bluff,*** if P believes or knows that no imminent harmful or offensive contact will really occur, and none does occur, there is no assault. [15]

> **Example:** D, holding a revolver, walks into P's office and says, "I know you've been having sex with my wife, and I'm gonna blow your head off." The particular gun that D is holding is a toy replica that cannot fire anything, and P knows this because W has told him so on a previous occasion. D has not committed assault — even if D intended to put P in fear of an imminent harmful contact (a bullet), the "result" requirement for assault has not been met because P has not in fact been put in apprehension of such contact.

F. Imminence: It must appear to P that the harm being threatened is ***imminent,*** and that D has the ***present ability*** to carry out the threat. [17]

> **Example:** D threatens to shoot P, and leaves the room for the stated purpose of getting his revolver. D has not committed an assault on P.

G. P unaware of danger: P must be ***aware*** of the threatened contact. [17]

H. Threat to third persons: P must have an apprehension that ***she herself*** will be subjected to a bodily contact. She may not recover for her apprehension that ***someone else*** will be so touched. [18]

> **Example:** P sees D raise a pistol at P's husband. D shoots and misses. P cannot recover for assault, because she did not fear a contact with her own body.

I. Conditional threat: Where D threatens the harm only if P does not obey D's demands, the existence of an assault depends on whether D had the ***legal right*** to compel P to perform the act in question. [18]

> **Example:** P, a burglar, breaks into D's house. D says, "If you don't get out, I'll throw you out." There is no assault on P, since D has the legal right to force P to leave.

IV. FALSE IMPRISONMENT

A. **Definition:** False imprisonment is defined as the intentional infliction of a ***confinement.*** [19]

> **Example:** D wants to have sex with P, and locks her in his bedroom for two hours hoping A that P will agree. She does not, and D lets her go. This is false imprisonment, because D P has intentionally confined P for a substantial time.

B. Intent: P must show that D either ***intended*** to confine him, or at least that D ***knew with substantial certainty*** that P would be confined by D's actions. The tort of false imprisonment cannot be committed merely by negligent or reckless acts. [19]

> **Example:** D, a shopkeeper, negligently locks the store while P, a customer, is in the bathroom. This is not false imprisonment, since D did not intend to confine P.

C. "Confinement": The idea of confinement is that P is held ***within*** certain limits, not that she is prevented from entering certain places. [20]

> **Example:** D refuses to allow P to return to her own home. This is not false imprisonment — P can go anywhere else, so she has not been "confined."

D. Means used: The imprisonment may be carried out by direct physical means, but also by ***threats*** or by the assertion of ***legal authority.*** [21-22]

1. **Threats:** Thus if D threatens to use force if P tries to escape, the requisite confinement exists. [21]
2. **Assertion of legal authority:** Also, confinement may be caused by D's assertion that he has ***legal authority*** to confine P — this is true even if D does not in fact have the legal authority, so long as P reasonably believed that D does, or is in doubt about whether D does. [21]

> **Example:** Storekeeper suspects P of shoplifting, and says, "I hereby make a citizen's arrest of you." Putting aside whether Storekeeper has a privilege to act this way, Storekeeper has "confined" P, if a reasonable person in P's position would think that Storekeeper had the authority to make such an arrest, even if under local law Storekeeper did not have that authority.

E. P must know of confinement: P must either be ***aware*** of the confinement, or must suffer some actual harm. ***(Example:*** P is locked in her hotel room by D, but P is asleep for the entire three-hour period, and learns only later that the door was locked. This is probably not false imprisonment.) [23]

V. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS (IIED)

A. **Definition:** This tort is the intentional or reckless infliction, by ***extreme and outrageous conduct,*** of ***severe emotional or mental distress,*** even in the absence of physical harm. [23]

> **Example:** D threatens that if P, a garbage collector, does not pay over part of his garbage collection proceeds to D and his henchmen, D will severely beat P. Since D's conduct is extreme and outrageous, and since he has intended to cause P distress (which he has succeeded in doing), D is liable for infliction of mental distress. *[State Rubbish Collectors Assoc. v. Siliznoff]*

B. Intent: "Intent" for this tort is a bit broader than for others. There are three possible types of culpability by D: (1) D ***desires*** to cause P emotional distress; (2) D knows with ***substantial certainty*** that P will suffer emotional distress; and (3) D ***recklessly*** disregards the high probability that emotional distress will occur. [23-26]

> **Example:** D commits suicide by slitting his throat in P's kitchen. D, or his estate, is liable for intentional infliction of mental distress because although D did not desire to cause distress to P, or even know that distress was substantially certain, he recklessly disregarded the high risk that distress would occur. *[Blakeley v. Shortal's Est.*]

1. Transferred intent: The doctrine of ***"transferred intent"*** is applied only in a very ***limited*** E fashion for emotion distress torts. So if D attempts to cause emotional distress to X (or to commit some other tort on him), and P suffers emotional distress, P usually will not recover. [24]

a. Immediate family present: The main exception is that the transferred intent doctrine is applied if: (1) D directs his conduct to a member of P's ***immediate family;*** (2) P is ***present;*** A and (3) P's presence is ***known*** to D.

> **Example:** While P is present, and known to D to be present, D beats up P's father. If P suffers severe emotional distress, a court will probably allow her to recover from D, even though D's conduct was directed at the father, not P.

C. "Extreme and outrageous": P must show that D's conduct was ***extreme and outrageous.*** D's conduct has to be "beyond all possible bounds of decency." [26-27]

> **Example:** D, as a practical joke, tells P that her husband has been badly injured in an

accident, and is lying in the hospital with broken legs. This conduct is sufficiently outrageous to qualify. *[Wilkinson v. Downton]*

1. **Bill collectors:** A common fact pattern in which D may be liable for intentional infliction of mental distress is where D is a ***bill collector.*** The collector's conduct can and often will be sufficiently extreme and outrageous to trigger IIED (e.g., repeated abusive phone calls at night; or denouncing P to P's boss or neighbors as a "deadbeat"). And it's no defense to an otherwise proper IIED action that P ***really owed the money*** that D was trying to collect. [27]

D. Actual severe distress: P must suffer ***severe*** emotional distress. P must show at least that her distress was severe enough that she ***sought medical aid.*** Most cases do not require P to show that the distress resulted in bodily harm. [27-30]

E. Constitutional limits on IIED awards: The ***First Amendment of the U.S. Constitution*** places some important ***limits*** on the right of a state to impose liability for IIED. If the conduct by the defendant that causes the distress is the delivery of a ***message or communication,*** a state's act of awarding damages against the defendant for IIED may well violate the defendant's First Amendment freedom of speech.

1. **P is a public figure; rule from defamation cases:** For instance, a plaintiff who is a ***public figure*** (essentially, a famous or newsworthy person) may succeed with a claim for *IIED* based on a communication only if P shows that the defendant either ***knew that his speech was false or recklessly disregarded whether it was true.*** *[Hustler Magazine v. Falwell]* [29]

   Example: *Hustler Magazine* satirizes religious leader Jerry Falwell as a drunken hypocrite who has sex with his mother. *Held,* Falwell cannot recover against *Hustler* for IIED unless he shows that *Hustler* made a false statement about him with knowledge of its falsity or with reckless disregard of its falsity. *[Hustler Magazine v. Falwell]*

2. **Statement on a matter of public concern:** Another way a tort recovery for IIED can violate the defendant's First Amendment rights is if the alleged distress stems from the communicative impact of the defendant's speech, and the speech involves a matter of ***public concern.*** *[Snyder v. Phelps]* [29]

Example: P is the father of a Marine, Matthew Snyder, recently killed in Iraq. The Ds are members of the Westboro Baptist Church, a church that thinks God punishes the U.S. military for tolerating homosexuality. During the course of Matthew's funeral in Maryland, the Ds, from a public place nearby, carry picket signs with messages like "God hates fags," and "Thank God for Dead Soldiers." (The Ds apparently believe that Matthew was killed because of God's desire to punish the military for not rooting out homosexuality.) P S brings a suit against the Ds for intentionally causing him emotional distress. The jury awards P $4 million in damages, based on its conclusion that the Ds' conduct was "outrageous."

Held (by the U.S. Supreme Court on appeal), for the Ds. Since the Ds' speech was on A a matter of "public concern," their First Amendment rights allowed Maryland to regulate R that speech only in a "content neutral" manner. Since the jury likely reached its verdict Y without observing the required "content neutrality," enforcing the resulting damage award against the Ds violated their First Amendment rights. *[Snyder v. Phelps, supra]*

CHAPTER 3
INTENTIONAL INTERFERENCE WITH PROPERTY

I. TRESPASS TO LAND

A. **Definition:** As generally used, ***"trespass"*** occurs when either: (1) D ***intentionally enters P's land,*** without permission; (2) D ***remains*** on P's land without the right to be there, even if she entered rightfully; or (3) D ***puts an object on*** (or refuses to remove an object from) P's land without permission. [41]

B. Intent: The term "trespass" today refers only to ***intentional*** interference with P's interest in property. There is no strict liability. [42]

Example: D, a pilot, loses control of the aircraft, and the aircraft lands on P's property. This is not trespass to land.

1. Negligence: If D ***negligently*** enters P's land, this is generally treated as the tort of negligence, not trespass. [42]

2. Effect of mistake: If D has the intent to commit a physical contact with P's land, D will have the requisite intent for trespass even if his decision to make the contact is the result of a ***mistake.*** Thus D's mistake about ***legal title*** or ***consent*** won't block liability. [42]

a. Reasonableness irrelevant: This is true even if the mistake is ***reasonable*** (assuming the mistake wasn't induced by anything P did or said).

Example: D, an absentee owner, visits his property, which is a farm. He drives a tractor on what he reasonably thinks is his parcel, but unbeknownst to him (and without negligence on his part), he drives over what is really P's land. This is trespass, despite D's reasonable ignorance of the fact that the land he is entering belongs to someone other than D.

C. Particles and gasses: If D knowingly causes ***objects,*** including particles or gases, to enter P's property, most courts consider this trespass. [45]

Example: D's factory spews pollutants onto P's land. This is a trespass. *[Martin v. Reynolds Metals Co.]*

D. Air space: It can be a trespass for a plane to ***fly over*** P's property. However, today most courts find liability only if: (1) the plane enters into the ***immediate reaches*** of the airspace (below federally-prescribed minimum flight altitudes); and (2) the flight ***substantially interferes*** with P's use and enjoyment of his land (e.g., by causing undue noise, vibrations, pollution). [45-46]

II. TRESPASS TO CHATTELS

A. Definition: "Trespass to chattels" is defined as any ***intentional interference*** with a person's ***use or possession*** of a chattel. [47] D only has to pay damages, not the full value of the property (as in conversion, below).

1. Loss of possession: If P ***loses possession*** of the chattel for any time, recovery is allowed even if the chattel is returned unharmed. [48]

Example: D takes P's car for a five-minute "joy ride" and returns it unharmed. D has committed trespass to chattels.

2. Electronic trespass on computer: If D ***interacts with P's computer*** without permission, whether this is trespass to chattels depends on the ***type of harm*** that occurs. [49]

a. No harm to computer or data: Where D's conduct ***does not harm P's computer or the data on it,*** most courts say trespass to chattels does ***not*** occur even though D's interaction with P's computer was uninvited and P is bothered.

Example: D sends lots of emails to P's computer, which P has to take time to delete, but which don't damage the computer or data on it. This is probably not trespass to chattel.

b. Harm done: But if D's conduct *does* harm the computer or data on it, then trespass to chattels does occur.

Example: D puts "spyware" on P's computer that tracks P's keystrokes and slows down the computer's functioning. This is probably trespass to chattels.

Note: The above discussion assumes that the computer data constitutes ***"property"*** for trespass-to-chattels purpose. Most courts today agree that computer files *are* property for this purpose. [49]

III. CONVERSION

A. **Definition:** Conversion is an ***intentional*** interference with P's possession or ownership of property that is ***so substantial*** that D should be required to pay the property's ***full value.*** [50]

Example: D steals P's car, then seriously (though not irreparably) damages it in a collision. D is liable for conversion, and will be required to pay P the full value of the car (though D gets to keep the car).

B. Intent: Conversion is an intentional tort, but all that is required is that D have intended to take possession of the property. Mistake as to ownership will generally not be a defense. [50]

Example: D buys an old painting from an art dealer, and reasonably believes that the art dealer has good title. In fact, the painting was stolen from P years before. D keeps the painting in his house for 10 years. D is liable for conversion, notwithstanding his honest mistake about title.

C. Distinguished from trespass to chattels: Courts consider several factors in determining whether D's interference with P's possessory rights is severe enough to be conversion, or just trespass to chattels. Factors include: (1) duration of D's ***dominion*** over the property; (2) D's ***good or bad faith;*** (3) the ***harm*** done to the property; and (4) the ***inconvenience*** caused to P. [51]

D. Different ways to commit: There are different ways in which conversion may be committed: [52-54]

1. Acquiring possession: D takes ***possession*** of the property from P.

a. Bona fide purchaser: Most courts hold that a ***bona fide purchaser*** of ***stolen goods*** is a converter, even if there is no way he could have known that they were stolen. [52]

2. **Transfer to third person:** D can also commit conversion by ***transferring*** a chattel to one R who is not entitled to it. [53]

3. **Withholding good:** D may commit conversion by ***refusing to return*** goods to their owner, if the refusal lasts for a substantial time. [53-54]

4. **Destruction:** Conversion may occur if D ***destroys*** the goods, or fundamentally alters them.

E. Intangibles, including computer files: As with trespass to chattels, if the item is ***"intangible"*** property, check to make sure that in the state in question, the item counts as property for conversion purposes. Most courts today say that ***computer files count.*** Therefore if D permanently deprives P of access to files P owns, D will be liable for conversion in most states. [51]

F. Forced sale: If P is successful with her tort suit, a ***forced sale*** occurs: D is required to pay the ***full value*** of the goods (not just the amount of the use or damage, as in trespass to chattels), but gets to keep the goods. [54]

CHAPTER 4
DEFENSES TO INTENTIONAL TORTS

I. CONSENT

A. **Express consent:** If P expressly ***consents*** to an intentional interference with his person or property, D will not be liable for that interference. [60]

> **Example:** P says to D, "Go ahead, hit me in the stomach — I'll show you how strong I am." If D does so, P's consent prevents P from suing for battery.

B. Implied consent: Existence of consent may also be ***implied*** from P's conduct, from custom, or from the circumstances. [61-62]

1. **Objective manifestation:** It is the ***objective manifestations*** by P that count — if it reasonably seemed to one in D's position that P consented, consent exists regardless of P's subjective state of mind. [61]

C. Lack of capacity: Consent will be invalidated if P is ***incapable*** of giving that consent, because she is a child, intoxicated, unconscious, etc.

[62-63]

1. **Consent as a matter of law:** But even if P is incapable of truly giving consent, consent will be ***implied*** "as a matter of law" if these factors exist: (1) P is 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; and (4) a reasonable person would consent in the circumstances. [62-63]

   Example: P is brought unconscious to the emergency room of D, a hospital. D can perform emergency surgery without P's actual consent — consent will be implied as a matter of law. Therefore, P cannot sue for battery.

D. Exceeding scope: Even if P does consent to an invasion of her interests, D will not be privileged if he goes substantially ***beyond the scope*** of that consent. [63]

Example: P visits D, a doctor, and consents to an operation on her right ear. While P is under anesthetic, D decides that P's left ear needs an operation as well, and does it. P's consent does not block an action for battery for the left-ear operation, since the operation went beyond the scope of P's consent. *[Mohr v. Williams]*

1. **Emergency:** However, in the surgery case, an ***emergency*** may justify extending the surgery beyond that consented to. [64]

2. **Athlete's consent:** Participating in a usually-violent ***sport,*** like football or hockey, is generally ***not*** considered to constitute consent to all injuries which may be inflicted by an adversary. Instead, there is an increasing tendency to hold that a player who ***intentionally attacks or injures*** his opponent may be liable in tort. [65]

   a. Scope of implied consent: So if P impliedly consents to some types of harmful or offensive contact during the sport, fellow-participant D won't be liable for contacts falling within the scope of that implied consent, but ***will*** be liable for contacts going ***beyond*** the ones impliedly consented to.

   b. Significance of sport's rules and customs: In determining what contacts the player impliedly consented to, most courts attach great weight to the ***rules or customs*** of the sport. Decisions recognize at least three major ***categories*** of contact, and tend to draw different conclusions about whether the plaintiff "impliedly consented" to the contact based on the category the contact falls into:

[1] Conduct allowed by rules: The first category consists of contact that is ***expressly allowed*** by the rules and customs of the sport. Where the case falls into this category, in virtually all courts the plaintiff will be held to have ***impliedly consented*** to this type of contact, even if in the particular situation the result is an unexpectedly grave injury. [65]

[2] Conduct punishable but not "beyond the bounds" of the sport: The next category consists of conduct that ***violates the rules*** of the sport, but is considered to be essentially ***within the ordinary give-and-take of the sport.*** Conduct would likely fall into this category if it is subject to ***some minor penalty,*** but not to a severe punishment like automatic ejection or a multiple-game suspension. Again, most courts would likely hold that such conduct, while against the rules, is of a type that is sufficiently common (and in most instances insufficiently physically dangerous) that the plaintiff should be ***deemed to have impliedly consented to it.*** [65]

Example: P and D are playing in an NBA basketball game. D commits a "flagrant A foul" on P by grabbing P's arm from behind and throwing him to the ground to prevent him from scoring. (The foul ruling gives P two foul shots, and does not result in D's being ejected or suspended.) P falls, suffering a freak career-ending knee injury when his knee hits the floor. P sues D for battery.

The court would likely hold that judging by the relatively un-severe penalty imposed by the referee, this type of foul is sufficiently ordinary — and sufficiently unlikely to cause severe personal injury — that it should be deemed to be the type of contact to which P implicitly consented by joining the league.

[3] Reckless or intentionally-harmful conduct beyond the usual bounds: The final category consists of conduct that not only violates the rules of the sport, but constitutes a ***flagrant violation*** by means of actions that are ***unrelated to the normal method of playing the game,*** and that are done ***without any competitive purpose.*** Scenarios where D ***intends to physically harm*** his opponent (or ***recklessly disregards*** the danger of such harm), without any *bona fide* belief that D is advancing his own team's competitive interest, are typical of this category. If the case falls into this category, most courts ***allow*** a tort suit (typically one for battery) to be brought by the injured player against the opponent who committed the

violation, and/or the teams that employed that opponent. [66]

Example: P and Clark are NFL players on opposing teams. (Clark plays for the D team.) At the end of a play that goes well for P's team, while P is kneeling and watching the end of the play, Clark comes up behind P and uses his forearm to hit P on the head and neck. Clark strikes this blow (he later testifies) not because he thinks it might help his team, but out of frustration at the play and the fact that his team, D, is losing. The blow fractures P's neck. Therefore, P sues D for the tortious act committed by their employee (Clark). The trial judge, sitting without a jury, rules that P assumed the risk of Clark's conduct, on the theory that "professional football is a species of warfare[.]" P appeals.

Held (on appeal): for P — case remanded for a retrial. The rules and customs of the NFL prohibit the intentional striking of blows. Where one football player intentionally inflicts a serious injury on another, the injured player won't be deemed to have assumed the risk of such a conduct. *[Hackbart v. Cincinnati Bengals, Inc.*] [67]

Note: However, a few cases have ***found for the defendant*** as a matter of law even where the defendant ***intentionally tried to harm*** the plaintiff, or ***recklessly disregarded the high risk*** that the plaintiff would be harmed. These few cases have reasoned that if players and teams have to worry about being held liable in tort for their aggressive on-field acts, their incentive to compete vigorously but lawfully — a desirable thing — will be chilled. [See *Avila v. Citrus Community College District*, holding that P, a varsity college baseball hitter, assumed the risk that the opposing pitcher would intentionally hit him with a pitch as retaliation for the fact that the pitcher's teammate was previously hit by the pitcher for P's team.] [67]

c. A mere negligent violation of rules: Where D's conduct in violating the sports rule manifests ***mere negligence*** as to the risk of injury to P (rather than an intention to hurt P or reckless disregard of P's physical safety), ***few if any cases allow recovery.*** [67]

E. Consent to criminal acts: Where D's act against P is a ***criminal act,*** courts are split. The majority rule is that P's consent is ***ineffective*** if the act consented to is a crime. [69-70] ***(Example:*** P and D agree to fight with each other. In most states, each may recover from the other, on the theory that consent to a crime — such as breach of peace — is ineffective.)

II. SELF-DEFENSE

A. **Privilege generally:** A person is entitled to use ***reasonable force*** to prevent any threatened ***harmful or offensive bodily contact,*** and any threatened ***confinement or imprisonment.*** [70]

B. 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. [71]

C. Only for protection: The defense of self-defense applies only where D uses the force needed to ***protect himself*** against harm. [71]

1. Retaliation: Thus D may not use any degree of force in ***retaliation*** for a tort already committed. [71]

> **Example:** P hits D with a snowball. Ten minutes later, D hits P with a snowball, in retaliation. D has committed battery on P, because D's act was not done in true self-defense.

2. Imminence: D may not use force to avoid harm which is ***not imminent,*** unless it reasonably appears that there will not be a later chance to prevent the danger. [72]

> **Example:** P says to D, "I will beat you up tomorrow." D cannot beat P up today, to prevent tomorrow's attack, unless it appears that there will be no way for D to defend tomorrow.

3. Verbal provocation: D may not use self-defense in response to ***verbal provocation,*** such as ***taunting or insults.*** Self-defense is purely a forward-looking idea: D is entitled to prevent imminent future harm, not redress past harm, especially purely verbal harm. [71]

> **Example:** P calls D a liar and a cheat in front of D's friends. (Assume that D is not a liar and a cheat, and that P's words constitute slander for which D could recover.) P then says to D, "What're you gonna do about, you coward?" D hits P in the face. P can recover for battery, and D cannot successfully claim self-defense. That's because provocation does not justify self-defense in tort law; only the prevention of imminent bodily harm can justify it.

D. Degree of force: Only the ***degree*** of force necessary to prevent the threatened harm may be used. If D uses more force than necessary, he will be liable for damage caused by the excess. [72]

1. Deadly force: Special rules limit the use of ***deadly force,*** i.e., force intended or likely to cause death or serious bodily injury. [72-73]

a. Danger must be serious: D may ***not*** use deadly force unless he himself is in danger of ***death or serious bodily harm.***

> **Example:** P attacks D with his fists, in a way that does not threaten D with serious

bodily harm. Even if there is no other way for D to prevent the attack, D may not use his gun to shoot P, even if the shot is intended only to injure P — D must submit to the attack rather than use deadly force.

E. Retreat: Courts are split on whether and when D has a ***"duty to retreat"*** (i.e., to run away or withdraw) if the threatened harm could be avoided this way. [73]

1. Restatement view: The Second Restatement holds that: (1) D may use ***non-deadly force*** rather than retreating; but (2) D may not use ***deadly force*** in lieu of retreating, except if attacked in his ***dwelling*** by one who does not reside in the dwelling. [73]

Example: If P attacks D on the street with a knife, under the Restatement D may use his U fists rather than running away, but may not use a gun rather than running away if running away would avoid the danger. If the attack took place in D's home, where P was not also a resident, then D could use the gun.

III. DEFENSE OF OTHERS

A. General rule: A person may use reasonable force to defend ***another person*** against attack. The same rules apply as in self-defense: the defender may only use reasonable force, and may not use deadly force to repel a non-deadly attack. [74]

1. Reasonable mistake: The courts are split on the effect of a ***reasonable mistake.*** Older Y courts hold that the intervener "steps into the shoes" of the person aided, and thus bears the risk of a mistake. But Rest.2d gives a "reasonable mistake" defense to the intervener. [74]

IV. DEFENSE OF PROPERTY

A. **General rule:** A person may generally use reasonable force to ***defend her property,*** both land and chattels. [75-78]

1. Warning required first: The owner must first make a ***verbal demand*** that the intruder stop, unless it reasonably appears that violence or harm will occur immediately, or that the request to stop will be useless. [75]

B. Mistake: The effect of a ***reasonable mistake*** by D varies:

1. Mistake as to danger: If D's mistake is about whether force is

necessary, D is protected by a reasonable mistake. [75]

> **Example:** D uses non-deadly force to stop a burglar whom he reasonably believes to be armed. In fact, the burglar is not armed. D can rely on the defense of property.

2. **Privilege:** But if the owner's mistake is about whether the intruder has a ***right*** to be there, the owner's use of force will not be privileged. [76]

> **Example:** D reasonably believes that P is a burglar. In fact, P is a friend who has entered D's house to retrieve her purse, without wanting to bother D. Even non-deadly force by D will not be privileged.

C. Deadly force: The owner may use ***deadly force*** only where: (1) non-deadly force will not suffice; and (2) the owner reasonably believes that without deadly force, ***death*** or ***serious bodily harm*** will occur. [76]

> **Example:** D sees P trespassing in P's backyard. D asks P to leave, but P refuses. Even if there is no way to make P leave except by shooting at him, D may not do so, since P's conduct does not threaten D with death or serious bodily harm.

1. **Burglary:** But a homeowner is generally ***allowed*** to use deadly force against a ***burglar,*** provided that she reasonably believes that nothing short of this force will safely keep the burglar out. [76]

D. Mechanical devices: An owner may use a ***mechanical device*** to protect her property only if she would be privileged to use a similar degree of force if she were present and acting herself. [77-78]

1. **Reasonable mistake:** An owner's right to use a dangerous mechanical device in a particular S case will be measured by whether deadly force could have been used against ***that particular intruder.*** [77]

> **Example:** D uses a spring gun to protect his house while he is away. If the gun shoots an actual burglar, and state law would have allowed D to shoot the burglar if D was present, then D will not be liable for using the spring gun. But if a neighbor, postal carrier, or someone else not engaged in a crime happened to enter and was shot, D would not have a "reasonable mistake" defense — since D could not have fired the gun at such a person directly, the spring gun may not be used either.

V. RECAPTURE OF CHATTELS

A. Generally: A property owner has the general right to use reasonable force to ***regain*** possession of ***chattels*** taken from her by someone else.

[78-80]

1. **Fresh pursuit:** The privilege exists only if the property owner is in ***"fresh pursuit"*** to recover his property. That is, the owner must act without unreasonable delay. [79]

   Example: A learns that B has stolen a stereo and is in possession of it. A may use reasonable force to reclaim the stereo if he acts immediately, but not if he waits, say, a week between learning that D has the property and attempting to regain it.

2. **Reasonable force:** The force used must be reasonable, and ***deadly force*** can never be used. [79]

3. **Wrongful taking:** The privilege exists only if the property was taken ***wrongfully*** from the owner. If the owner parts willingly with possession of the property, and an event then occurs that gives him the right to repossess, he generally will not be able to use force to regain it. [79]

   Example: O rents a TV to A. A refuses to return the set on time. O probably may not use reasonable force to enter A's home to repossess the set, because A's original possession was not wrongful.

B. Merchant: Where a merchant reasonably believes that a person is stealing his property, many courts give the merchant a privilege to ***temporarily detain*** the person for investigation. [79]

1. **Limited time:** The detention must be limited to a short time, generally 10 or 15 minutes or less, just long enough to determine whether the person has really shoplifted or not. Then, the police must be called (the merchant may not purport to arrest the suspect himself). [79]

VI. NECESSITY

A. **General rule:** Under the defense of ***"necessity,"*** D has a privilege to harm the property interest of P where this is ***necessary*** in order to prevent ***great harm*** to third persons or to the defendant herself. [81-83]

B. Public necessity: If interference with the land or chattels of another is necessary to prevent a disaster ***to the community*** or to many people, the privilege is that of "public necessity." Here, no C compensation has to be paid by the person doing the damage. [81]

Example: Firefighters demolish D's house, in which a fire has just barely started, because that is the best way to stop the fire from spreading much further. The firefighters, and the town employing them, probably do not have to pay, because they are protected by the privilege of public necessity.

C. Private necessity: If a person prevents injury to himself or his property, or to the person or property of a third person, this is protected by the privilege of ***"private*** necessity," if there is no S less-damaging way of preventing the harm. [82-83]

Example: A, while sailing, is caught in very rough seas. To save his life, he may moor at a dock owned by B, and will not be liable for trespass.

1. Actual damage: Where the privilege of private necessity exists, it will be a complete defense to a tort claim where P has suffered no actual substantial harm (as in the above example). But if actual damage occurs, P must ***pay for the damage*** she has caused. [83]

Example: On the facts of the above example, if A's boat slammed into B's dock and damaged it, A would have to pay.

2. Owner may not resist: The main purpose of the doctrine of private necessity is to prevent the person whose property might be injured from defeating the exercise of the privilege. [83]

Example: P moors his ship at D's dock, to avoid being shipwrecked by heavy seas. D, objecting to what he thinks is a trespass, unmoors the ship, causing the ship to be harmed and P to be injured. P may recover from D, because P's mooring was privileged by private necessity and D, therefore, acted wrongfully. *[Ploof v. Putnam*, 82]

VII. ARREST

A.Common law rules:

1. Arrest with warrant: Where a police officer executes an arrest with an ***arrest warrant*** that appears to be correctly issued, he will not be liable even if it turns out that there was no probable cause or the procedures used to get the warrant were not proper. [84]

2. Arrest without warrant: [84]

a. Felony or breach of peace in presence: A police officer may make a warrantless arrest for a ***felony*** or for a ***breach of the peace,*** if the offense is being committed or seems about to be committed

in his presence. A citizen may do the same.

b. Past felony: Once a felony has been committed, an officer may still make a warrantless arrest, provided that he reasonably believes that the felony has been committed, and also reasonably believes that he has the right criminal. A citizen may make an arrest only if a felony has ***in fact*** been committed (though the citizen is protected if she makes a reasonable mistake and arrests the wrong person).

c. Misdemeanor: At common law, no warrantless arrest (either by an officer or by a citizen) may be made for a ***past misdemeanor not involving a breach of the peace.***

3. **Reasonable force:** One making an arrest may not use more ***force*** than is ***reasonably necessary.*** [84]

a. Prevention: Where the arrest is made to ***prevent a felony*** which threatens human life or safety, even deadly force may be used, if there is no other way to prevent the crime. But where the felony does not involve such danger, deadly force may not be used.

b. Apprehension after crime: If a crime has already been committed, the police may use ***deadly force*** only if the suspect poses a significant threat of ***death or serious physical injury*** to others. ***(Example:*** Officer spots Burglar escaping after his crime. Officer knows that Burglar is unarmed and unlikely to be violent. Officer may not shoot at Burglar to arrest him, even if there is no other way to make the arrest.)

VIII. JUSTIFICATION

A. Generally: Even if D's conduct does not fit within one of the narrower defenses, she may be entitled to the general defense of ***"justification,"*** a catch-all term used where there are good reasons for exculpating D from what would otherwise be an intentional tort. [85]

CHAPTER 5
NEGLIGENCE GENERALLY

I. COMPONENTS OF TORT OF NEGLIGENCE

A. **Generally:** The tort of "negligence" occurs when D's conduct imposes

an ***unreasonable risk*** upon another, which results in injury to that other. The negligent tortfeasor's mental state is irrelevant. [98]

B. Prima facie case: The five components of a prima face case for negligence are: [98]

1. **Duty:** A legal ***duty*** requiring D to conduct himself according to a certain standard, so as to avoid unreasonable risk to others;
2. **Failure to conform:** A failure by D to conform his conduct to this standard. (This element can be thought of as ***"carelessness.")***
3. **Cause in fact:** A showing that D's failure to act with reasonable care was the ***"cause in fact"*** of the injury to plaintiff. Generally, "cause in fact" means a ***"but for"*** cause, i.e., a cause without which the injury wouldn't have occurred.
4. **Proximate cause:** A sufficiently close causal ***connection*** between D's act of negligence and the harm suffered by P that it's fair to hold D liable, as a matter of policy. This is ***"proximate cause."***
5. **Actual damage:** ***Actual damage*** suffered by P. (Compare this to most intentional torts, such as trespass, where P can recover nominal damages even without actual injury.)

> **Note:** When we say that these five elements make up a ***"prima facie case"*** for negligence, what we mean is that if as part of P's case in chief, P fails to prove any of these five elements, D will be entitled to a directed verdict by the judge (and the jury won't even get to deliberate).

II. UNREASONABLE RISK

A. Generally: P must show that D's conduct imposed an ***unreasonable risk of harm*** on P (or on a class of persons of whom P is a member). [99]

1. **Not judged by results:** It is not enough for P to show that D's conduct resulted in a terrible L injury. P must show that D's conduct, viewed ***as of the time it occurred,*** without benefit of hindsight, imposed an unreasonable risk of harm. [99]

B. Balancing: In determining whether the risk of harm from D's conduct was so great as to be "unreasonable," courts use a ***balancing test:*** "Where an act is one which a reasonable [person] would recognize as involving a risk of harm to another, the risk is unreasonable and the act

is negligent if the risk is of such magnitude as to ***outweigh*** what the law regards as the ***utility*** of the act or of the particular manner in which it is done." [99]

1. **Small risk of big harm:** Under the balancing test, if a reasonable person would realize that a potential injury, if it came to pass, would be ***extremely grave,*** there may be liability even though it was relatively ***unlikely*** that the accident would occur. [100]

   Example: Suppose that D encounters a yellow traffic light while driving his heavy truck into Times Square. He has to decide whether to speed up to make the light, though in any event he intends to keep within the speed limit. D knows that the truck's brakes have been sporadically malfunctioning recently. Assume that D realizes or should realize that if the brakes fail at that moment, numerous people will likely be killed or maimed.

   Even if D reasonably believes that there is only, say, a 2% chance that the brakes will fail at that moment, the potential harm is so great, and the burden of stopping at the yellow light so small, that his conduct in speeding up is probably negligent despite the unlikeliness of a brake failure. [100]

C. Warnings: One of the ways the risks of conduct can be reduced is by giving ***warnings*** of danger. The fact that D gave a warning of dangers to P in particular, or the public in general, is thus a factor that will make it less likely that D will be found negligent when the danger that was warned of results in an accident. [101]

1. **Failure to warn can itself be negligent:** If D ***fails*** to give a warning of a danger that he knows about, and the warning could have been easily given, the mere failure to warn can itself ***constitute negligence.***

2. **Does not immunize D:** However, it's clear that even if D *does* give a warning, this ***does not immunize D*** from negligence liability — if D's activity is unreasonably dangerous (evaluated by balancing its benefits against its risks) despite D's warning to P, D will still be liable.

   Example: Dave, while moving out of his second-floor apartment, throws an old television out the window, aiming for a dumpster on the ground below the window. Just before he throws the TV, he yells out "Look out below." Paula, a pedestrian, does not hear the warning because she is talking on her cellphone. Dave can be found negligent despite having given the warning — it is so dangerous to throw a heavy object out of an upstairs window, and so easy to discard the object by safer means, that the giving of the warning did not make the total benefits of Dave's conduct outweigh its dangers.

III. THE REASONABLE PERSON

A. Objective standard: The reasonableness of D's conduct is viewed under an ***objective standard:*** Would a ***"reasonable person*** of ordinary prudence," in D's position, do as D did? D does not escape liability merely because she intended to behave carefully or thought she was behaving carefully. [102]

B. Physical and mental characteristics: The question is whether D behaved reasonably "under the circumstances." "The circumstances" generally include the ***physical characteristics*** of D himself. [102-105]

1. Physical disability: Thus if D has a physical ***disability,*** the standard for negligence is what a reasonable person with that physical disability would have done. [103]

> **Example:** P is blind and is struck while crossing the street using a cane. If the issue is whether P was comparatively negligent, the issue will be whether a blind person would have crossed the street in that manner.

2. Mental characteristics: The ordinary reasonable person is *not* deemed to have the particular ***mental*** characteristics of D. [104] ***(Example:*** If D is more stupid, or more careless, than an ordinary person, this will not be a defense.)

3. Intoxication: Intoxication is no defense — even if D is drunk, she is held to the standard of conduct of a reasonable ***sober*** person. [105]

4. Children: A ***child*** is held to the level of conduct of a reasonable person of that ***age*** and ***experience,*** not that of an adult. [105-106]

a. Adult activity: But where a child engages in a potentially ***dangerous activity*** normally pursued only by ***adults,*** she will be held to the standard of care that a reasonable adult doing that activity would exercise.

> **Example:** Suppose D, a 12-year old, operates a motorboat. This is an activity that is potentially dangerous and normally pursued by adults. Therefore, D must match the standard of care of a reasonable adult boater.

C. Custom: Courts generally allow evidence as to ***custom*** for the purpose of showing presence or absence of reasonable care. However, this evidence is generally ***not conclusive.*** [107]

1. **Evidence by D:** Thus where D shows that everyone else in the industry does things the way D did them, the jury is still free to conclude that the industry custom is unreasonably dangerous and thus negligent. [107]

   Example: D operates a tugboat without a radio. The fact that most tugboats in the industry do not yet have radios does not prevent the jury from holding that D's lack of a radio was negligent. [The *T. J. Hooper]*

2. **Proof by plaintiff:** Conversely, proof offered by P that others in D's industry *followed* a certain precaution that D did *not*, will be suggestive but ***not conclusive*** evidence that D was negligent. [107]

D. Emergencies: If D is confronted with an ***emergency,*** and is forced to act with little time for reflection, D must merely behave as a reasonable person would if confronted with the same emergency, not as a reasonable person would with plenty of time to think. [108]

Example: D is a cab driver. A thief jumps in the cab, points a gun at D's head, and tells him to drive fast. D, in a panic, mistakenly puts the car in reverse and injures P. The issue is whether a cab driver confronted with a gun-pointing thief would or might have behaved C as D did, not whether a cab driver in ordinary circumstances would have behaved that way.

E. Anticipating conduct of others: A reasonable person possesses at least limited ability to ***anticipate the conduct of others.*** [109-112]

1. **Negligence:** D may be required to anticipate the possibility of ***negligence*** on the part of others. [109]

   Example: It may be negligence for D to presume that all drivers near him will behave S non-negligently, and that these others will not speed, signal properly, etc.

   a. Parental supervision: A ***parent*** has a duty to exercise reasonable care to ***supervise the conduct of his or her minor child,*** to prevent the child from intentionally harming others or posing an unreasonable risk of harm to others. [109]

      i. Direct liability: This principle does ***not*** make the parent ***"vicariously liable"*** for the child's torts. Instead, it constitutes ***direct*** negligence by the parent not to use reasonable care in controlling the child, where the parent has the ability to control the child, and knows or should have known of the risk

being posed by the child's conduct.

Example: As Mom is aware, Kid, her 10-year-old son, is skateboarding on the sidewalk in front of their house, in a way that poses great danger to pedestrian passersby. Mom knows that she could control Kid to prevent him from skateboarding in this manner, but she unreasonably decides that the risks posed by Kid are small enough to make it not worth Mom's while to intervene. Kid runs into P, a little old lady, who is badly injured.

P can recover against Mom, for failing to use reasonable care to prevent Kid from dangerous skateboarding, given that Mom both (1) knew or should have known that she had the ability to control Kid and (2) knew or should have known that Kid's behavior was risky to pedestrians.

2. Criminal or intentionally tortious acts: Normally the reasonable person (and, hence, D) is entitled to presume that third persons will *not* commit ***crimes*** or intentional torts. [110-112]

a. Special knowledge: But if D has a ***special relationship*** with either P or a third person, or special knowledge of the situation, then it may be negligence for D not to anticipate a crime or intentional tort.

Example: It may be negligence for D, a psychiatrist, not to warn P that a patient of D's is dangerous to P. *[Tarasoff v. Regents,* 110]

IV. MALPRACTICE

A. Superior ability or knowledge: If D has a ***higher degree*** of ***knowledge,*** skill or experience than the "reasonable person," D must ***use*** that higher level. [112]

Example: D, because she is a local resident, knows that a stretch of highway is exceptionally curvy and thus dangerous. D drives at a rate of speed that one who did not know the terrain well would think was reasonable, and crashes, injuring her passenger, P. Even though D's driving would not have represented carelessness if done by a reasonable person with ordinary knowledge of the road, D was responsible for using her special knowledge and is negligent for not doing so.)

B. Malpractice generally: Professionals, including doctors, lawyers, accountants, engineers, etc., must act with the level of skill and learning ***commonly possessed by members of the profession in good standing.*** [112-115]

1. Good results not guaranteed: The professional will not normally be held to guarantee that a ***successful result*** will occur, only that she will

use the requisite minimum skill and competence. [112]

2. **Specialists:** If D holds herself out as a ***specialist*** in a certain niche in her profession, she will be held to the minimum standard of that specialty. [113]

   Example: An M.D. who holds herself out as an ophthalmologist must perform to the level of the minimally competent ophthalmologist, not merely to the minimum level of the internist or general practitioner.

3. **Minimally qualified member:** It is not enough for P to prove that D performed with less skill than the ***average*** member of the profession. D must be shown to have lacked the skill level of the ***minimally qualified member*** in good standing. [113]

   a. **Novice:** One who is just ***beginning*** the practice of his special profession is held to the same level of competence as a member of the profession generally. [115]

      Example: A lawyer who has just passed the bar does not get the benefit of a lower standard — he must perform at the level of minimally competent lawyers generally, not novices.

4. **Community standards:** Traditionally, doctors and other professionals have been bound by the professional standards prevailing in the ***community in which they practice,*** not by a national standard. [113]

   a. **Change in rule:** But this rule is on its way out, and many if not most courts would today apply a ***national*** standard. In "modern" courts, P may therefore use expert testimony from an expert who practices outside of D's community.

5. **Informed consent:** In the case of a physician, part of the professional duty is to adequately disclose the ***risks*** of proposed treatment to the patient in advance. The rule requiring adequate disclosure is called the rule of ***"informed consent."*** The doctor must disclose to the patient all risks inherent in the proposed treatment which are sufficiently ***material*** that a reasonable patient ***would take them into account*** in deciding whether to undergo the treatment. Failure to get the patient's adequate consent is deemed a form of malpractice and thus a form of negligence. (In some cases, usually older ones, failure to get informed

consent transforms the treatment into battery.) [114]

V. AUTOMOBILE GUEST STATUTES

A. Generally: A minority of states still have "automobile guest statutes" on their books. These generally provide that an owner-driver is not liable for any injuries received by his ***non-paying passenger,*** unless the driver was grossly negligent or reckless. [115]

VI. VIOLATION OF STATUTE *(NEGLIGENCE PER SE)*

A. "Negligence *per se*" doctrine: Most courts apply the ***"negligence per se"*** doctrine: when a ***safety statute*** has a sufficiently close application to the facts of the case at hand, an unexcused ***violation*** of that statute by D is "negligence *per se*," and thus ***conclusively establishes that D was negligent.*** [116]

1. **Restatement standard:** The Third Restatement articulates the doctrine this way: "An actor is ***negligent*** if, ***without excuse,*** the actor ***violates a statute that is designed to protect against the type of accident the actor's conduct causes,*** and the accident ***victim*** is ***within the class of persons the statute is designed to protect."*** [117]

   Example: D drives at 65 m.p.h. in a 55 m.p.h. zone. While so driving, he strikes and injures P, a pedestrian. Because the 55 m.p.h. limit is a safety measure designed to protect against accidents, and because pedestrians are among those the statute aims to protect, the fact that D has violated the statute without excuse conclusively establishes that D was negligent — D will not be permitted to argue that it was in fact safe to drive at 65 m.p.h.

2. **Ordinances and regulations:** In virtually all states, the negligence *per se* doctrine applies R to the violation of a ***statute.*** Where the violation is of an ***ordinance*** or ***regulation,*** courts are y split about whether the doctrine should apply, but most courts still apply it. [117]

B. Statute must apply to facts: The negligence *per se* doctrine will apply only where P shows that the statute was intended to guard against the ***kind of injury*** in question. [117-122]

1. **Protection against particular harm:** This means that the statute must have been intended to protect against the ***particular kind of harm*** that P seeks to recover for. [117-119]

   Example: A statute requires that when animals are transported, each breed must be

kept in a separate pen. D, a ship operator, violates the statute by herding P's sheep together with other animals. Because there are no pens, the sheep are washed overboard during a storm. P cannot use the negligence *per se* doctrine, because the statute was obviously intended to protect only against spread of disease, not washing overboard. *[Gorris v. Scott*, 118]

2. Class of persons protected: Also, P must be a member of the ***class of persons*** whom the statute was ***designed to protect.*** [118]

Example: A statute requires all factory elevators to be provided with a certain safety device. The legislative history shows that the purpose was only to protect injuries to employees. P, a business visitor, is injured when the elevator falls due to lack of the device. P cannot use the negligence *per se* doctrine, because he was not a member of the class of persons whom the statute was designed to protect.

C. Excuse of violation: The court is always free to find that the statutory violation was ***excused,*** as long as the statute itself does not show that no excuses are permitted. [119-121]

1. Typical reasons: Some typical reasons for finding D's violation to be excused are:

[a] D was reasonably ***unaware*** of the ***"factual circumstances"*** that make the statute applicable;

Example: A statute prohibits any contractor from doing excavation within 10 feet of a high-voltage power line. D, a contractor, excavates within 6 feet of such a line. However, D reasonably fails to realize that the line is present because it is obscured by heavy foliage. D knocks down the line, injuring P, a bystander.

Because D neither knew nor should have known of "the factual circumstances" that made the statute applicable to his particular excavation session, the negligence per se doctrine will not apply to his conduct.

[b] D made a reasonable and diligent ***attempt*** to comply;

[c] The violation was due to the ***confusing way*** the requirements of the statute were ***presented to the public;***

Example: A road sign on Main St. says "No Left Turn." The sign is placed just before two roads turn off of Main St., Maple and Oak. A reasonable driver could be confused about whether the sign means that left turns are prohibited onto Maple, Oak, or both. D, reasonably believing that the sign applies to Maple but not to Oak, turns left onto Oak, and collides with P. D would not be subject to liability under negligence per se, because the confusing nature of the sign would excuse his non-compliance.

[d] Compliance would have involved a ***greater risk of harm.***

D. **Contributory negligence *per se* :** If the jurisdiction recognizes ***contributory negligence,*** D may get the benefit of contributory negligence *per se* where P violates a statute. [121] ***(Example:*** Cars driven by P and D collide. If P was violating the speed limit, and the jurisdiction recognizes contributory negligence, D can probably use the negligence *per se* doctrine to establish that P was contributorily negligent.)

E. Compliance not dispositive: The fact that D has ***fully complied*** with all applicable safety statutes does not by itself establish that he was *not* negligent — the finder of fact is always free to conclude that a reasonable person would take precautions beyond those required by statute. [122]

VII. PROCEDURE IN JURY TRIALS

A.Burden of proof: In a negligence case (as in almost all tort cases) P bears the "burden of proof." This is actually two distinct burdens: [122-123]

1. **Burden of production:** First, P must ***come forward*** with some evidence that P was negligent, that P suffered an injury, that D's negligence proximately caused the injury, etc. This burden is known as the ***"burden of production."*** This burden shifts from P to D, and perhaps back again during the trial. [122-123]

2. **Burden of persuasion:** Second, P bears the ***"burden of persuasion."*** This means that as the case goes to the jury, P must convince the jury that it is ***more probable than not*** that his injuries are due to D's negligence. [123]

B. Function of judge and jury

1. **Judge decides law:** The judge decides all questions of **law.** Most importantly, the judge decides whether reasonable people could differ as to what the facts of the case are. If reasonable people could not differ, the judge will direct a verdict. [124-125]

   Example: In a car accident case, if the judge decides that D drove so fast that no reasonable person could believe that D acted non-negligently, he will take this issue away from the jury. That is, he'll tell the jury that they *must* find D negligent.

2. **Jury decides facts:** The jury is the finder of the ***facts.*** In a negligence

case (assuming that the judge does not direct a full or partial verdict), the jury decides: (a) what really happened; and (2) whether D breached his duty to P in a way that proximately caused P's injuries. This C means that it is the jury that usually decides whether D's conduct satisfied the "reasonable A person" standard. [125]

VIII. *RES IPSA LOQUITUR* — CREATING AN INFERENCE OF NEGLIGENCE

A. Generally: The doctrine of *res ipsa loquitur* ("the thing speaks for itself") allows P to point to the fact of the accident, and to create an ***inference*** that, even without a precise showing of how D S behaved, D was ***probably negligent.***

> **Example:** A barrel of flour falls on P's head as he walks below a window on the street. At trial, P shows that the barrel fell out of a window of D's shop, and that barrels do not fall out of windows without some negligence. By use of the *res ipsa loquitur* doctrine, P has presented enough evidence to justify a verdict for him, so unless D comes up with rebuttal evidence that the barrel did not come from his shop or was not dropped by negligence, D will lose. *[Byrne v. Boadle]* [125]

B. Requirements for: Courts generally impose four requirements for the *res ipsa* doctrine: [126]

1. **No direct evidence of D's conduct:** There must be ***no direct evidence*** of ***how D behaved*** in connection with the event. [126]

2. **Seldom occurring without negligence:** P must demonstrate that the harm which occurred ***does not normally occur*** except through the negligence of someone. P only has to prove that ***most of the time,*** negligence is the cause of such occurrences. [126]

> **Example:** If an airplane crashes without explanation, P will generally be able to establish that airplanes usually do not crash without some negligence, thus meeting this requirement.

3. **Exclusive control of defendant:** P must demonstrate that the instrumentality that caused the harm was at all times within the ***exclusive control*** of D. [128-130]

> **Example:** P, while walking on the sidewalk next to D hotel, is hit by a falling armchair. Without more proof, P has not satisfied the "exclusive control" requirement, because a guest, rather than the hotel, may have had control of the chair at the moment it was dropped. *[Larson v. St. Francis Hotel]*

a. Not always required: But not all courts require P to show that the instrumentality was under D's exclusive control, and the Third Restatement has dropped this requirement. [128]

b. Multiple defendants: Also, if there are ***two or more defendants,*** and P can show that at least one of the defendants was in control, some cases allow P to recover. This is especially likely where all of the Ds participate together in an integrated relationship.

> **Example:** P is injured while on the operating table, and shows that either the surgeon, the attending physician, the hospital, or the anesthesiologist must have been at fault, but is unable to show which one. P gets the benefit of *res ipsa*, and it is up to each individual defendant to exculpate himself. *[Ybarra v. Spangard]*

4. **Not due to plaintiff:** P must establish that the accident was probably not due to his ***own*** conduct. [130]

5. **Evidence more available to D:** Some courts also require that ***evidence*** of what really happened be ***more available to D*** than to P. [130]

> **Example:** This requirement is satisfied on the facts of *Ybarra*, *supra*, since the Ds obviously knew more than the unconscious patient about who was at fault.

C. Expert testimony: As noted, plaintiff has to to show that the type of accident is one that does not normally happen in the absence of negligence by someone, as well as that more likely than not the negligence was probably that of the defendant(s). If the facts are complex or involve ***specialized knowledge*** (e.g., ***technology),*** insight into whether the accident would probably have happened without negligence may be ***beyond the expertise of the jury.*** In this scenario, most courts today ***allow*** the plaintiff to ***use expert testimony*** to establish these preconditions for *res ipsa*.

1. **Medical malpractice:** Thus expert testimony to show that the requirements for *res ipsa* are satisfied is often allowed in ***medical malpractice*** cases, for instance. [131]

> **Example:** The three Ds are all members of a surgical team that operates on P's back. P gets a serious infection at the surgical site, and sues on a *res ipsa* theory. *Held:* P may offer expert testimony by other doctors that this sort of surgical-site infection doesn't generally happen without negligence, and that usually the surgical-team members are the ones in control of what infection-control measures are used. *[Sides v. St. Anthony's Medical Ctr]* [131]

D. Effect of *res ipsa:* Usually, the ***effect*** of *res ipsa* is to permit an inference that D was negligent, even though there is no direct evidence of negligence. *Res ipsa* thus allows a particular kind of circumstantial evidence. When *res ipsa* is used, P has ***met his burden of production,*** and is thus entitled to go to the jury. [131-132]

E. Rebuttal evidence:

1. **General evidence of due care:** If D's rebuttal is merely in the form of evidence showing that he was ***in fact careful,*** this will almost never be enough to give D a directed verdict — the case will still go to the jury. [132]

2. **Rebuttal of *res ipsa* requirements:** But if D's evidence directly disproves one of the requirements for the doctrine's application, then D will get a directed verdict (assuming there is no prima facie case apart from *res ipsa).* [132]

   Example: If, in a state that requires exclusive control by D, D can show that the instrument that caused the harm was not within his control at all relevant times, the doctrine will not apply, and D may get a directed verdict.

F. Typical contexts: Here are a couple of contexts in which the *res ipsa* issue is especially likely to arise:

1. **Airplane accidents:** A commercial ***airplane*** accident in which the plane ***crashes into an obstruction*** like a mountain, often furnishes a good illustration of *res ipsa.* [132]

   a. *Res ipsa* applies: Today, airplanes don't usually fly into obstructions without someone's negligence, at least in clear weather. Therefore, the estate of a dead passenger will normally be deemed to have established negligence merely by showing that the plane crashed into an obstruction in good weather.

   i. Rebuttal: But the airline is always free to try to ***rebut*** the evidence, such as by showing that an unforeseeable explosion caused the airplane to veer off course into the A obstruction.

2. **Car accidents:** Plaintiffs often attempt to apply *res ipsa* to ***car accidents.*** The analysis varies sharply with whether there are multiple vehicles involved or just one. [133]

a. Multiple vehicles: *Res ipsa* usually does ***not*** apply to car crashes involving ***multiple vehicles.*** In most multi-vehicle crashes, it generally cannot be said that that type of accident does not happen without someone's negligence. Furthermore, even if someone's negligence were probable, usually the negligence of persons other than the defendant (e.g., the plaintiff, driving in a separate car) cannot be sufficiently eliminated by the evidence.

b. Single-car accident: On the other hand, if the accident is a ***single-vehicle one*** (e.g., between a driver and a pedestrian), then *res ipsa* will often ***apply,*** since such accidents usually involve driver negligence.

Example: P, a pedestrian walking along the road, is struck from the rear by D's car. P is probably entitled to use *res ipsa* to create an inference of D's negligence, since such accidents usually involve driver negligence.

i. Rebuttal evidence: But D is always free to come up with evidence ***rebutting*** the *res ipsa* inference of negligence (e.g., that D had an unforeseeable heart attack just before the accident, or, in the above example, that P veered directly in front of D just before the accident).

CHAPTER 6
ACTUAL AND PROXIMATE CAUSE

I. CAUSATION IN FACT

A. Generally: P must show that D's conduct was the ***"cause in fact"*** of P's injury. [143]

B. "But for" test: The vast majority of the time, the way P shows "cause in fact" is to show that D's conduct was a ***"but for"*** cause of P's injuries — ***had D not acted negligently, P's injuries would not have resulted.*** [143]

Example: P takes her prescription for a medication to D, her local pharmacy. D mistakenly fills the prescription by giving P pills containing 30 mg of the active ingredient rather than the 20 mg called for by the prescription. After taking the pills, P suffers serious heart arrhythmia, and sues D for this harm. P can recover only if she proves that had D provided the correct, 20 mg, pills, P would not have suffered the arrhythmia. In other words, for P to recover, the trier of fact must be satisfied that the wrong pills were the "but for" cause of P's arrhythmia. [143]

1. **Joint tortfeasors:** There can be ***multiple*** "but for" causes of an event. D1 cannot defend on the grounds that D2 was a "but for" cause of P's injuries — as long as D1 was also a "but for" cause, D1 is viewed as the "cause in fact." [144]

C. Concurrent causes: Sometimes D's conduct can meet the "cause in fact" requirement even though it is *not* a "but for" cause. This happens where two events ***concur*** to cause harm, and either one would have been sufficient to cause substantially the same harm without the other. ***Each*** of these concurring events is deemed a cause in fact of the injury, since it would have been sufficient to bring the injury about. [144]

> **Example:** Sparks from D's locomotive start a forest fire; the fire merges with some other unknown fire, and the combined fires burn P's property. Either fire alone would have been sufficient to burn P's property. Therefore, D's fire is a cause in fact of P's damage, even though it is not a "but for" cause. *[Kingston v. Chicago & N.W. Ry.*]

D. Multiple fault: If P can show that each of two (or more) defendants was at fault, but only one could have caused the injury, the ***burden shifts*** to each defendant to show that the other caused the harm. [149]

> **Example:** P, D1 and D2 go hunting together. D1 and D2 simultaneously fire negligently, and P is struck by one of the shots. It is not known who fired the fatal shot. The court will put the burden on each of the Ds to show that it was the other shot which hit P — if neither D can make this showing, both will be liable. *[Summers v. Tice]*

1. **The "market share" theory:** In ***product liability*** cases, courts often apply the ***"market share"*** theory. 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 that percentage of P's injuries which that D's sales bore to the total market sales of that type of product at the time of injury. The theory is used most often in cases involving prescription drugs. [150-152]

> **Example:** 200 manufacturers make the drug DES. P shows that her mother took the drug during pregnancy, and that the drug caused P to develop cancer. P cannot show which DES manufacturer produced the drug taken by her mother. *Held,* any manufacturer who cannot show that it could not have produced the particular doses taken by P's mother will be liable for the proportion of any judgment represented by that manufacturer's share of the overall DES market. *[Sindell v. Abbott Laboratories,* 150]

   a. **Exculpation:** Courts are split on whether each defendant should be allowed to ***exculpate*** itself by showing that it ***did not make*** the

particular items in question — some more modern cases hold that once a given defendant is shown to have produced drugs for the national market, no exculpation will be allowed. [151]

b. National market share: In determining market share, courts usually use a ***national,*** rather than local, market concept. [151]

c. No joint-and-several liability: Courts adopting the "market share" approach often ***reject joint-and-several liability*** — they allow P to collect from any defendant only that defendant's proportionate share of the harm caused. [151]

> **Example:** P sues a single D, and shows that that D counted for 10% of the market. P's total damages are $1 million. If "market share" is the theory of liability, most courts will allow P only to recover $100,000 from D — D will not be made jointly and severally liable for P's entire injuries.

d. Socially valuable products: The more ***socially valuable*** the court perceives the product to be, the less likely it is to apply a market share doctrine. For instance, a court is likely to reject the doctrine where the product is a vaccine. [152]

E. Increased risk, not yet followed by actual damage: Where D's conduct has increased the ***risk*** that P will suffer some later damage, but the damage has ***not yet occurred,*** most courts ***deny*** P any recovery for that later damage unless he can show that it is more likely than not to occur eventually. But some courts now allow recovery for such damage, discounted by the likelihood that the damage will occur. [148]

> **Example:** D, an M.D., negligently operates on P. The operation leaves P with a 20% risk of contracting a particular disease in the future. At the time of trial, P does not yet have the disease. Most courts would not let P recover anything for the risk of getting the disease in the future. But some might let P recover damages for having the disease, discounted by 80% to reflect the 80% chance that P won't get the disease after all. *[Petriello v. Kalman]*

F. "Indeterminate plaintiff": Sometimes it's clear that D has behaved negligently and injured M some people, but not clear exactly ***which people*** have been injured. This happens most often in toxic tort and other mass-tort cases. Courts today sometimes allow a ***class action*** suit, in which R people who show that they were exposed to a toxic substance made or released by D, and that they suffer a particular medical problem, can recover something, even if they can't show that it's more

probable than not that their particular injuries were caused by the defendant's toxic substance. [152]

> **Example:** D makes a silicone breast implant, which hundreds of plastic surgeons implant into thousands of women. Epidemiological evidence shows that a substantial percentage of women getting such implants will suffer a particular auto-immune disease (but there can be other causes of the disease as well.) Many courts today would let a class action proceed on these facts. Any woman who received a breast implant made by D and who has the auto-immune condition could be a member of the plaintiff class, and could recover at least some damages, even if she couldn't show that her particular disease was more likely than not caused by D's product.

II. PROXIMATE CAUSE GENERALLY

A. General: Even after P has shown that D was the "cause in fact" of P's injuries, P must still show that D was the ***"proximate cause"*** of those injuries. The proximate cause requirement is a ***policy determination*** that a defendant, even one who has behaved negligently, should not automatically be liable for ***all*** the consequences, no matter how ***improbable*** or ***far-reaching,*** of his act. Today, the proximate cause requirement usually means that D will not be liable for the consequences that are very ***unforeseeable.*** [152]

> **Example:** D, driving carelessly, collides with a car driven by X. Unbeknownst to D, the car contains dynamite, which explodes. Ten blocks away, a nurse who is carrying P, an infant, is startled by the explosion, and drops P. P will not be able to recover against D, because the episode is so far-fetched — it was so unforeseeable that the injury would occur from D's negligence — that courts will hold that D's careless driving was not the "proximate cause" of P's injuries.

1. Multiple proximate causes: Just as an occurrence can have many "causes in fact," so it may well have more than one proximate cause. [153] ***(Example:*** Each of two drivers drives negligently, and P is injured. Each driver is probably a proximate cause of the accident.)

III. PROXIMATE CAUSE — FORESEEABILITY

A. The foreseeability rule generally: As the idea is traditionally stated, D is generally liable only for those consequences of his negligence which were ***reasonably foreseeable*** at the time she acted. [153]

> **Example:** D's ship spills oil into a bay. Some of the oil adheres to P's wharf. The oil is then set afire by some molten metal dropped by P's worker, which ignites a cotton rag floating on the water. P's whole dock then burns. *Held,* D is not liable, because the burning of P's dock was not the foreseeable consequence of D's oil spill, and thus

the oil spill was not the proximate cause of the damage. This is true even though the burning may have been the "direct" result of D's negligence. *[Wagon Mound No. 1]* [155]

1. **Third Restatement:** The Third Restatement applies the same basic concept as the above M "foreseeability" principle, but formulates it slightly differently: a defendant is "not liable for harm ***different from the harms whose risk made the [defendant's] conduct tortious."*** [158]

   Example 1: Consider the above example of the oil spill that catches fire. The Third Restatement would presumably agree with the result in the above example: what made D's oil spill tortious was that it was a nuisance (and perhaps a trespass) that risked junking up the wharf with a foreign substance. The risk of a fire from the spill was *not* one of the risks that made the spill tortious, so D isn't liable for it.

   Example 2: D gives a loaded pistol to X, an 8-year-old, to carry across the room and put in a cabinet. While X is carrying the pistol, he drops it. The gun lands on the bare foot of P, X's playmate, and because of its one-pound weight breaks P's toe.

   Under the Third Restatement's "harms that made D's conduct tortious" test, D would not be liable to P, since what made the entrustment of the gun by D to a child negligent was the risk of *shooting* (including a shooting caused by dropping of the gun), not the risk of a foot injury from the weight of the gun if the gun was dropped. [161]

B. Function of judge and jury: Is it the ***judge*** or the ***jury*** who decides the issue of proximate cause? The answer is that *both* the judge and the jury participate in deciding this issue, but they participate in different ways.

1. **Judge formulates the legal rule:** It is up to the ***judge*** to ***formulate the appropriate legal rule*** in the form of an instruction to the jury.

   a. Judge's "gatekeeper" function: Although the judge doesn't make the factual determination of whether D proximately caused P's injuries, the judge exercises an important ***"gatekeeper"*** function. That is, the judge can and should ***prevent the case from ever being decided by the jury,*** if the judge decides that ***no reasonable jury could find that the plaintiff has established each element of her prima facie case*** by the required preponderance of the evidence. [171]

   Therefore, if the judge decides that on the proof offered by the plaintiff, ***no reasonable jury could decide that it is more likely than not that the defendant proximately caused the plaintiff's injuries,*** the ***judge will decide the case*** in favor of the defendant on a motion for summary judgment or for a directed verdict — the jury

will ***never get a chance to decide*** whether D proximately caused P's injuries.

2. **Factual determination left to the jury:** But in most negligence cases, the judge will ***not exercise*** her right to ***short-circuit the case*** by taking the decision on proximate cause away from the jury. That is, usually the judge will decide that a reasonable jury could ***go either way*** on this issue; in that case, the judge will instruct the jury on the test for determining proximate cause, and ***will leave it to the jury to apply that test in deciding the factual issue*** of whether the defendant's failure to use due care was so tenuously connected with the harm that proximate cause should be found lacking.

C. Unforeseeable plaintiff: The general rule that D is liable only for foreseeable consequences is E also usually applied to the ***"unforeseeable plaintiff*** problem. That is, if D's conduct is negligent as to X (in the sense that it imposes an unreasonable risk of harm upon X), but not negligent as to S P (i.e., does not impose an unreasonable risk of harm upon P), P will not be able to recover if through some fluke he is injured. [156-158]

> **Example:** X, trying to board D's train, is pushed by D's employee. X drops a package, which (unknown to anybody) contains fireworks, which explode when they fall. The shock of the explosion makes some scales at the other end of the platform fall down, hitting P.
>
> *Held*, P may not recover against D. D's employee may have been negligent towards X (by pushing him), but the employee's conduct did not involve any foreseeable risk of harm to P, who was standing far away. Since D's conduct did not involve an unreasonable risk of harm to P, and the damage to her was not foreseeable, the fact that the conduct was unjustifiably risky to X is irrelevant. D's conduct was not the "proximate cause" of the harm to P. *[Palsgraf v. Long Island R.R. Co.*, 156]

D. Extensive consequences from physical injuries: A key ***exception*** to the general rule that D is liable only for foreseeable consequences is: once P suffers any foreseeable impact or injury, even if relatively minor, D is liable for ***any additional unforeseen physical consequences.*** [159]

1. **Egg-shell skull:** Thus if P, unbeknownst to D, has a very ***thin skull*** (a skull of "egg-shell thinness"), and D negligently inflicts a minor impact on this skull, D will be liable if, because of the hidden skull defect, P dies. The defendant ***"takes his plaintiff as he finds him."*** [159]

E. General class of harm but not same manner: Another exception to the "foreseeable consequences only" rule is that as long as the harm suffered by P is of the ***same general sort*** that made D's conduct negligent, it is irrelevant that the harm occurred in an ***unusual manner.*** [160]

> **Example:** D gives a loaded pistol to X, an eight-year-old, to carry to P. In handing the pistol to P, X drops it, injuring the bare foot of Y, his playmate. The fall sets off the gun, wounding P. D is liable to P, since the same general kind of risk that made D's conduct negligent (the risk of accidental discharge) has materialized to injure P; the fact that the discharge occurred in an unforeseeable manner — by the dropping of the gun — is irrelevant. (But D is not liable to Y, since Y's foot injury was not foreseeable, and the risk of it was not one of the risks that made D's conduct initially negligent.)

F. Plaintiff part of foreseeable class: Another exception to the foreseeability rule: the fact that injury to the particular plaintiff was not especially foreseeable is irrelevant, as long as P is a ***member of a class*** as to which there was a general foreseeability of harm. [161]

> **Example:** D negligently moors its ship, and the ship breaks away. It smashes into a draw bridge, causing it to create a dam, which results in a flood. The Ps, various riparian owners whose property is flooded, sue. *Held*, these owners can recover against D, even though it would have been hard to foresee which particular owners might be flooded. All of the Ps were members of the general class of riverbank property owners, as to which class there was a risk of harm from flooding. *[Petition of Kinsman Transit Co.]*

IV. PROXIMATE CAUSE — INTERVENING CAUSES

A. Definition of "intervening cause": Most proximate cause issues arise where P's injury is precipitated by an ***"intervening cause."*** An intervening cause is a force which takes effect ***after*** D's negligence, and which contributes to that negligence in producing P's injury. [162]

1. Superseding cause: Some, but not all, intervening causes are sufficient to prevent D's negligence from being held to be the proximate cause of the injury. Intervening causes that are sufficient to prevent D from being negligent are called ***"superseding"*** causes, since they supersede or cancel D's liability. [162]

B. Foreseeability rule: Generally courts use a ***foreseeability*** rule to determine whether a particular A intervening cause is superseding. [162]

1. Test: If D should have ***foreseen*** the possibility that the intervening

cause (or one like it) might occur, *or* if the ***kind of harm*** suffered by P was foreseeable (even if the intervening cause was not itself foreseeable), D's conduct will nonetheless be the proximate cause. But if *neither* the intervening cause nor the kind of harm was foreseeable, the intervening cause will be a superseding one, relieving D of liability. [162-163]

C. Foreseeable intervening causes: Often the risk of a particular kind of intervening cause is the ***very risk*** (or one of the risks) which made D's conduct negligent in the first place. Where this is the case, the intervening cause will almost never relieve D of liability. [162-165]

> **Example:** D leaves his car keys in the ignition, and the car unlocked, while going into a store to do an errand. X comes along, steals the car, and while driving fast to get out of the neighborhood, runs over P. If the court believes that the risk of theft is one of the things that makes leaving one's keys in the ignition negligent, the court will almost certainly conclude that X's intervening act was not superseding.

1. **Foreseeable negligence:** The ***negligence of third persons*** may similarly be an intervening force that is sufficiently foreseeable that it will not relieve D of liability. [163-165]

> **Example:** D is a tavern owner, who serves too much liquor to X, knowing that X arrived alone by car. D also does not object when X gets out his car keys and leaves. If X drunkenly runs over P, a court will probably hold that X's conduct in negligently (drunkenly) driving, although intervening, was sufficiently foreseeable that it should not absolve D of liability.

2. **Criminally or intentionally tortious conduct:** A third person's ***criminal conduct,*** or ***intentionally tortious acts,*** may also be so foreseeable that they will not be superseding. But in general, the court is more likely to find the act superseding if it is criminal or intentionally tortious than where it is merely negligent. [164]

D. Responses to defendant's actions: Where the third party's intervention is a ***"normal" response*** to the defendant's act, that response will generally ***not*** be considered superseding. This is true even if the response was not all that foreseeable. [164-168]

1. **Escape:** For instance, if in response to the danger created by D, P or someone else attempts to ***escape*** that danger, the attempted escape will not be a superseding cause so long as it was not completely irrational or bizarre. [165]

Example: D, driving negligently, sideswipes P's car on the highway. P panics, thrusts the wheel to the right, and slams into a railing. Even though most drivers in P's position might not have reacted in such an extreme or unhelpful manner, P's response is not sufficiently bizarre to constitute a superseding cause.

2. **Rescue:** Similarly, if D's negligence creates a danger which causes some third person to L attempt a ***rescue,*** this rescue will normally not be an intervening cause, unless it is performed E in a ***grossly careless*** manner. D may be liable to the ***person being rescued*** (even if part or all of his injuries are due to the rescuer's ordinary negligence), or ***to the rescuer.*** [165-167]

3. **Aggravation of injury by medical treatment:** If D negligently injures P, who then undergoes ***medical treatment,*** D will be liable for anything that happens to P as the result of negligence in the medical treatment, infection, etc. [167]

Examples: After being initially injured by D in a car accident, P is further injured when R the ambulance carrying her gets into a collision, or when, due to the surgeon's negligence, P's condition is worsened rather than improved. D is liable for this worsening.

a. Gross mistreatment: But some results of attempted medical treatment are so ***gross*** and unusual that they are regarded as superseding. [166]

Example: While P is hospitalized due to injuries negligently inflicted by D, a nurse kills P by giving him an injection of morphine which she knows may be fatal, because she wants to spare him from suffering. D is not liable for P's death because the nurse's conduct is so bizarre as to be superseding.

E. Unforeseeable intervention, foreseeable result: If an intervention is neither foreseeable nor normal, but leads to the ***same type of harm*** as that which was threatened by D's negligence, the intervention is usually ***not*** superseding. [168]

Example: D negligently maintains a telephone pole, letting it get infested by termites. X drives into the pole. The pole breaks and falls on P. A properly-maintained telephone pole would not have broken under the blow. Even though the chain of events (termite infestation followed by car crash) was bizarre, X's intervention will not be superseding, because the result that occurred was the same general *type* of harm as that which was threatened by D's negligence — that the pole would somehow fall down. *[Gibson v. Garcia]*

F. Unforeseeable intervention, unforeseeable results: If the intervention

was not foreseeable or normal, and it produced results which are *not* of the same general nature as those that made D's conduct negligent, the intervention will probably be ***superseding.*** [168-170]

1. **Extraordinary act of nature:** Thus an ***extraordinary act of nature*** is likely to be superseding. [169]

   Example: Assume that it is negligent to one's neighbors to build a large wood pile in one's back yard, because this may attract termites which will then spread. D builds a large wood pile. An unprecedentedly-strong hurricane sweeps through, takes one of the logs, and blows it into P's bedroom, killing him. The hurricane will probably be held to be a superseding intervening cause, because it was so strong as to be virtually unforeseeable, and the type of harm it produced was not of the type that made D's conduct negligent in the first place.

G. Dependent vs. independent intervention: Courts sometimes distinguish between ***"dependent"*** intervening causes and ***"independent"*** ones. A dependent intervening cause is one which A occurs only in ***response*** to D's negligence. An independent intervention is one which would have P occurred even had D not been negligent (but which combined with D's negligence to produce the S harm). Dependent intervening events are probably somewhat more foreseeable on average, and U thus somewhat less likely to be superseding, than independent ones. But a dependent cause can L be superseding (e.g., a grossly negligent rescue attempt), and an independent intervention can be E non-superseding. [170]

H. Third person's failure to discover: A third person's ***failure*** to ***discover and prevent*** a danger will almost never be superseding. For instance, if a manufacturer negligently produces a dangerous product, it will never be absolved merely because some person further down the distribution chain (e.g., a retailer) negligently fails to discover the danger, and thus fails to warn P about it. [173]

1. **Third person does discover:** But if the third person does ***discover*** the defect, and then will fully and negligently fails to warn P, D may escape liability if D took all reasonable steps to remedy the danger.

   Example: D manufactures a machine, and sells it to X. D then learns that the machine may crush the hands of users. D offers to X to fix the machine for free. X declines. P, a worker for X, gets his hand crushed. X's failure to warn P or allow the machine to be fixed by D probably supersedes, and relieves D of liability because D tried to do everything it could.

CHAPTER 7
JOINT TORTFEASORS

I. JOINT LIABILITY

A. Joint-and-several liability generally: If more than one person is a proximate cause of P's harm, and the harm is ***indivisible,*** under the traditional approach ***each defendant*** is liable for the ***entire harm.*** The liability is said to be ***"joint-and-several."*** [181]

> **Example:** D1 negligently scratches P. P goes to the hospital, where she is negligently treated by D2, a doctor, causing her to lose her arm. P can recover her entire damages from D1, or her entire damages from D2, though she cannot collect twice.

1. Modern trend cuts back on joint-and-several liability: But there has been a very sharp trend in recent decades to ***cut back,*** or even completely ***eliminate, joint-and-several liability.*** This has been mainly due to the rise of comparative negligence as a replacement for contributory negligence. (See *infra*, p. C-60.)

a. Few states keep traditional rule: As of 2000, only 15 jurisdictions maintained pure joint-and-several liability.

b. Hybrids: About 20 states have replaced joint-and-several liability with one of several ***"hybrid"*** schemes that combine aspects of joint-and-several liability with aspects of pure several liability. Here are the three most common types of hybrid schemes [182]:

- **Hybrid joint-and-several liability with reallocation:** Under this approach, all defendants are jointly-and-severally liable, but if one defendant turns out to be judgmentproof, the court ***reallocates the damages*** to all other parties (including the plaintiff) in C proportion to their comparative fault.

  > **Example:** P sues D1, D2 and D3 for an indivisible harm. P's damages are $100,000. The jury concludes that P is 10% responsible, D1 40%, D2 25% and D3 25%. D1 turns out to be judgment-proof. The court will reallocate based on D1's insolvency, so that D2 and D3 are each jointly-and-severally liable for 50/60ths of $100,000 (i.e., $83,333). The effect is that P and the remaining Ds will ***share the burden*** of D1's insolvency in a ratio to their relative fault.

- **Hybrid liability based on threshold percentage:** Under this approach, a tortfeasor who bears more than a certain ***"threshold"*** percentage of the total responsibility (e.g., 50%) remains jointly-

and-severally liable, but tortfeasors whose responsibility is less than that threshold are merely severally liable.

- □ **Hybrid liability based on type of damages:** Under this approach, liability remains Y joint-and-several for ***"economic"*** damages but several for ***"non-economic"*** damages (e.g., pain and suffering).

c. Pure several liability: 16 states now have ***pure several liability*** — in these states, a defendant, regardless of the nature of the case, is liable only for her share of total responsibility.

B. Indivisible versus divisible harms: Even where the traditional rule of joint-and-several liability is in force, it applies only where P's harm is ***"indivisible,"*** i.e., not capable of being ***apportioned*** between or among the defendants. If there is a rational basis for apportionment — that is, for saying that some of the harm is the result of D1's act and the remainder is the result of D2's act — then ***each will be responsible only for that directly-attributable harm.*** [183]

1. Rules on apportionment: Here is a summary of the rules on when harms will or won't be capable of being apportioned:

a. Action in concert: If the two defendants can be said to have acted ***in concert,*** each will be liable for injuries directly caused by the other. In other words, apportionment does not take place. [161]

Example: D1 and D2 drag race. D1's car swerves and hits P. D2, even though his car was not part of the collision, is liable for the entire injuries caused by D1's collision, because D1 and D2 acted in concert.

b. Successive injuries: Courts often are able to apportion harm if the harms occurred in ***successive incidents,*** separated by substantial periods of time. [184]

Example: D1, owner of a factory, pollutes P's property from 1970-1990. D1 sells to D2, who pollutes P's property from 1991-2000. The court will apportion the damage — neither defendant will have to pay for damage done by the other.

i. Consequence of non-apportionability: If P is harmed in successive incidents involving multiple Ds, courts will usually place the ***burden of allocating the damages*** on the ***Ds,*** not on P. In other words, if no one proves how much of P's damages

from the two successive torts are reasonably allocated to D1 and how much to D2, the court will typically make the Ds jointly and severally liable, so that the tortfeasors, not the innocent plaintiff, bear the "burden of unallocability." [185]

Example: D1 and D2 each separately pollutes a stream, poisoning P's livestock, and damaging P by $100,000. Neither D (nor P) offers proof allocating the damages as between D1 and D2. A court will likely hold D1 and D2 jointly and severally liable, on the theory that the uncertainty about how damages should be allocated between the two should hurt them, not P.

ii. **Overlapping:** It may be the case that D1 is jointly and severally liable for the harm caused by both her acts and D2's, but that D2 is liable only for his own. This is especially likely where D2's negligence is in ***response*** to D1's. [185]

Example: D1 negligently breaks P's arm. D2 negligently sets the arm, leading to gangrene and then amputation. D1 is liable for all harm, including the amputation. D2 is only liable for the amount by which his negligence worsened the condition — that is, he's liable for the difference between a broken and amputated arm.

c. **Indivisible harms:** Some harms are ***indivisible*** (making each co-defendant jointly and severally liable for the entire harm, in a jurisdiction following the traditional approach to joint liability).

i. **Death or single injury:** Thus the plaintiff's ***death*** or any ***single personal injury*** (e.g., a broken arm) is ***not divisible.*** [185]

ii. **Fires:** Similarly, if P's property is ***burned*** or otherwise destroyed, this will be an indivisible result. [185]

Example: D1 and D2 each negligently contribute to the starting of a fire, which then destroys P's house. There will be no apportionment, so D1 and D2 will each be liable for P's full damages in a state applying traditional joint-and-several liability.

C. **One satisfaction only:** Even if D1 and D2 are jointly and severally liable, P is only entitled to a ***single satisfaction*** of her claim. [186]

Example: P suffers harm of $1 million, for which the court holds D1 and D2 jointly and severally liable. If P recovers the full $1 million from D1, she may not recover anything from D2.

II. CONTRIBUTION

A. Contribution generally: If two Ds are jointly and severally liable, and one D pays more than his ***pro rata share,*** he may usually obtain partial ***reimbursement*** from the other D. This is called ***"contribution."*** [187]

> **Example:** A court holds that D1 and D2 are jointly and severally liable to P for $1 million. P collects the full $1 million from D1. In most instances, D1 may recover $500,000 contribution from D2, so that they will end up having each paid the same amount.

1. **Amount:** As a general rule, each joint-and-severally-liable defendant is required to pay an ***equal share.*** [188]

   a. **Comparative negligence:** But in ***comparative negligence*** states, the duty of contribution is usually ***proportional to fault.***

   > **Example:** A jury finds that P was not at fault at all, that D1 was at fault 2/3 and D2 at fault 1/3. P's damages are $1 million. P can probably recover the full sum from either D. But if P recovers the full sum from D1, D1 may recover $333,000 from D2.

B. Limits on doctrine: Most states ***limit*** contribution as follows:

1. **No intentional torts:** Usually an ***intentional*** tortfeasor may ***not*** get contribution from his co-tortfeasors (even if they, too, behaved intentionally). [188]

2. **Contribution defendant must have liability:** The contribution defendant (that is, the co-tortfeasor who is being sued for contribution) must ***in fact be liable*** to the original plaintiff. [188]

   > **Example:** Husband drives a car in which Wife is a passenger. The car collides with a car driven by D. The jury finds that Husband and D were both negligent. Wife recovers the full jury verdict from D. If intra-family immunity would prevent Wife from recovering directly from Husband, then D may not recover contribution from Husband either, since Husband has no underlying liability to the original plaintiff.

C. Settlements:

1. **Settlement by contribution plaintiff:** If D ***settles,*** he may then generally obtain contribution from other potential defendants. (Of course, he has to prove that these other defendants would indeed have been liable to P.) [189]

2. **Settlement by contribution defendant:** Where D1 settles, and D2 — against whom P later gets a judgment — sues D1 for contribution, courts are split among two main approaches [189-190]:

a. Traditional rule: The traditional rule is that D1, the settling defendant, is ***liable*** for contribution. This is a bad approach, because it sharply reduces a defendant's incentive to settle — she knows that if she settles early, she may be dragged back into extra liability in the form of contribution to the non-settling co-defendants.

b. "Reduction of P's claim" rule: Today, most courts deal with this problem by taking two steps. First, they ***deny contribution*** to non-settlers (or later settlers) from the early settler. But second, they ***reduce the amount of P's claim*** against the non-settlers to reflect the earlier settlement. These courts vary in how they do this [189]:

i. Pro tanto reduction: Some courts reduce P's claim by the ***dollar amount*** of the settlement ***("pro tanto"*** reduction).

ii. Proportional reduction: On the other hand, some reduce it by the ***proportion*** that the settling defendant's responsibility bears to the overall responsibility of all parties (the ***"comparative share"*** approach.

III. INDEMNITY

A. Definition: Sometimes the court will not merely order two joint-and-severally-liable defendants to split the cost (contribution), but will instead completely ***shift*** the responsibility from one D to the other. This is the doctrine of ***"indemnity"*** — a 100% shifting of liability, as opposed to the sharing involved in contribution. [190]

B. Sample situations: Here are two important contexts in which indemnity is often applied:

1. Vicarious liability: If D1 is only ***vicariously liable*** for D2's conduct, D2 will be required to indemnify D1. [190]

> **Example:** Employee injures P. P recovers against Employer on a theory of *respondeat superior*. Employer will be entitled to indemnity from Employee; that is, Employee will be required to pay to Employer the full amount of any judgment that Employer has paid.

2. Retailer versus manufacturer: A ***retailer*** who is held strictly liable for selling a defective injury-causing product will get indemnity from others further up the distribution chain, including the ***manufacturer.***

[191]

CHAPTER 8
DUTY

I. DUTY GENERALLY

A. Concept: Generally, a person owes everyone else with whom he comes in contact a general ***"duty of care."*** Normally, you don't have to worry about this duty — it is the same in all instances, the duty to behave with the care that would be shown by a reasonable person. But there are several situations in which courts hold that the defendant owes plaintiff ***less*** than this regular duty. The most important of these situations are:

[1] D generally has no duty to take ***affirmative action*** to help P;

[2] D generally has no duty to avoid causing unintended ***mental suffering*** to P; and

[3] D has no duty to avoid causing ***pure economic loss*** to P in the absence of more tangible types of harm such as physical injury. [195]

II. FAILURE TO ACT

A. No general duty to act: A person generally cannot be liable in tort solely on the grounds that she has ***failed to act.*** [196]

1. Duty to protect or give aid: This means that if D sees that P is in danger, and fails to render assistance (even though D could do so easily and safely), D is ***not liable for refusing to assist.***

> **Example:** D, passing by, sees P drowning in a pond. D could easily pull P to safety without risk to D, but instead, D walks on by. D is not liable to P.

B. Exceptions: But there are a number of commonly-recognized ***exceptions*** to the "no duty to act" rule: [197-204]

1. Special relationship: A duty to give assistance may arise out of a ***"special relationship"*** between D and P. [197] Here is a list (from the Third Restatement) of relationships that impose such a duty of care [198]:

[a] the relationship of "a ***common carrier*** with its ***passengers";***

[b] "an *innkeeper* with its *guests*";

[c] "*a business* or other possessor of land that *holds its premises open to the public* with those who are *lawfully on the premises";*

Example: P gets his finger stuck in an escalator operated by D, a store where P is a customer. If D does not give P assistance, D will be liable.

[d] "an *employer* with its *employees";*

[e] "a ***school*** with its ***students";***

[g] "a ***custodian*** with ***those in its custody,*** if the custodian is required by law to take custody or voluntarily takes custody of the other and the custodian has a ***superior ability to protect*** the other." *(Example:* The duty of a jailer to a prisoner.)

a. Transient or "ad hoc" relationships: Plaintiffs have sometimes tried to persuade courts to extend the above list of "special relationships" by adding certain ***"ad hoc"*** relationships, i.e. ***transient relationships*** that were formed shortly before the episode in question. But courts have generally ***rejected*** these attempts.

i. No relationship based on "witnessing an emergency": For example, some plaintiffs have argued that the court ought to recognize a special relationship as existing between a ***person who faces a sudden life-threatening injury*** and another person who ***witnesses that injury at close proximity*** and has the ***opportunity to summon help.*** But this argument has generally been ***rejected*** by the courts, on the theory that recognizing this type of relationship as imposing a duty to summon assistance would swallow up the "no duty to assist" general rule, and would present ***no logical stopping point.***

Example: P and D used to be a couple, but have broken up. P enters D's trailer without permission, shoots himself, and falls to the floor. D finds P, thinks he has merely pretended to shoot himself, and doesn't call 911, though she could do so easily. P dies, and the facts indicate that he could have been saved if D had called 911 as soon as she found him on the floor. P's estate argues that the court should recognize a special relationship as arising whenever a witness discovers an acute injury to another; such a witness should be found to have the limited duty to use due care in summoning assistance.

Held, for D; the court will not recognize the "witness to an emergency" relationship urged by the estate. The relationship asserted here does not have either of the elements present in other relationships that have been recognized as

creating a duty of assistance: (1) it didn't exist prior to the present occasion; and (2) it did not involve a defendant who had control over either the person in peril or the premises where the peril arose. Imposing a duty to contact emergency assistance on anyone who witnesses another's injury would be a "duty without any practical limit." *[Estate of Cilley v. Lane]* [199]

2. **Defendant involved in injury:** If the danger or injury to P is ***due to D's own conduct,*** or to an instrument under D's control, D has the duty of assistance. This is true today even if D acted without fault. [199]

   Example: A car driven by D strikes P, a pedestrian. Even though D has driven completely non-negligently, and the accident is due to P's carelessness in crossing the street, D today has a common-law duty to stop and give reasonable assistance to P.

3. **Defendant and victim as co-venturers:** Where the victim and the defendant are engaged in a ***common pursuit,*** so that they may be said to be ***co-venturers,*** some courts have imposed on the defendant a duty of warning and assistance. For instance, if two friends went on a jog together, or on a camping trip, their joint pursuit might be enough to give rise to a duty on each to aid the other. [200]

4. **Assumption of duty:** Once D ***voluntarily begins*** to render assistance to P (even if D was under no legal obligation to do so), D must ***proceed with reasonable care.*** [200-201]

   a. **Preventing assistance by others:** D is especially likely to be found liable if he begins to render assistance, and this has the effect of ***dissuading others*** from helping P.

      Example: If D stops by the roadside to help P, an injured pedestrian, and other passers-by decline to help because they think the problem is taken care of, D may not then abandon the attempt to help P.

   b. **Mere promise:** Traditionally, a mere ***promise*** by D to help P (without actual commencement of assistance) was *not* enough to make D liable for not following through. But many modern courts would make D liable even in this situation, if P has a reliance interest.

      Example: D promises P that while P is away on a two-week trip, D will visit P's apartment every day and feed P's dog. D then forgets to do this, and the dog is seriously injured. Today, many courts (and the Third Restatement) would say that D is liable to P, because once he made the promise to render the assistance, he was required to fulfill the promise with reasonable care. [201]

5. Dutyto controlothers: If D has a duty to ***control third persons,*** D can be negligent for failing to exercise that control. [203]

a. Special relationship: A duty to control a third person may arise either because of a special relationship between D and P, or a special relationship between D and a third person. For instance, some courts now hold that any ***business*** open to the public must protect its patrons from wrongdoing by third parties.

Example: D, a storekeeper, fails to take action when X, an obviously deranged man, comes into the store wielding a knife. P, a patron, is stabbed. Most courts would find D liable for failing to take action.

III. MENTAL SUFFERING

A. **Pure mental suffering without physical impact or injury:** Suppose the defendant's negligence is the cause in fact of intense ***mental suffering*** to the plaintiff, but this suffering has been produced ***without any physical impact*** upon the plaintiff. Does the absence of any physical impact itself bar plaintiff from recovery? As we'll see, the answer is, "not necessarily." [208]

1. Several categories: We'll look at several distinct types of scenarios:

[1] P suffers a physical impact or direct physical injury, and seeks to ***"tack on"*** to her claim a recovery for emotional distress (though this is not one of the "pure emotional distress" scenarios). (See Par. B below.)

[2] P witnesses an accident; she ***never fears*** for the physical safety of either herself or anyone else during the episode, but suffers emotional distress anyway, for which she seeks to recover. (See Par. C below.)

[3] P witnesses an accident or near-accident, and is ***sufficiently close*** to the dangerous event herself that she is for a time in ***danger of immediate bodily harm.*** She escapes the bodily harm, but suffers mental distress from the episode. (See Par. D below.)

[4] P witnesses a ***close relative,*** X, suffer a serious bodily injury; P never fears for her own physical safety but nonetheless suffers emotional distress (on account of her concern for X's welfare), for which she seeks to recover. (See Par. E below.)

[5] Same as [4], but the person, X, that P witnesses suffer a serious bodily injury is ***not P's close relative.*** Again, P suffers emotional distress for which she attempts to recover. (See Par. F below.)

[6] P suffers emotional distress without ever being himself at risk, and without directly witnessing serious injury to anyone else, but because of the ***special relationship*** between P and D (or between D and a third person, X, who suffers injury), for policy reasons the courts allow P to recover for her own emotional distress. (See Par. G below.)

B. Mental distress damages "tacked on" to case involving physical injury: First, let's consider a situation that does not really fall into our "pure mental suffering" category, but that we'll want to compare with the various pure-mental-suffering scenarios we'll be considering. This is the situation in which D causes an ***actual physical injury*** to P's person (or to P's property), and P suffers not just physical injuries but, in addition, mental distress arising out of the episode. [209]

1. P may recover: In this scenario, it's always been clear, in all American courts, that ***D is liable*** not only for the physical consequences of the impact but also for virtually ***all the emotional or mental suffering*** that flows naturally from it. This includes fright at the time of the injury, "pain and suffering" stemming from the injury, anxiety about possibility of a repetition, humiliation from disfigurement, etc. The mental distress claim is said to be ***"tacked on"*** to the claim for physical injury. [209]

2. "Parasitic" damages: Such "tacked on" damages from mental suffering are often called ***parasitic*** — they "attach" to the claim for physical injury, analogously to the way a parasite attaches to the host. The usual reason for allowing parasitic damages is that the existence of a physical injury to P provides sufficient assurance that ***the claim of suffering is not being feigned.***

C. **Emotional distress, unaccompanied by fear of impact on oneself or others:** Next, let's look at the scenario which furnishes probably the ***weakest*** case for allowing P to recover: P ***witnesses*** an accident or near-accident caused by D's negligence, but the danger takes place ***far***

enough from P that she ***never fears an imminent impact*** with her own body, or even with the body of anyone else nearby. Nonetheless, P later suffers mental distress from the episode. In this situation, virtually ***no*** American courts will allow P to recover for her emotional distress, even if that distress has physical manifestations. [210]

> **Example 1:** P is walking in New York City's Times Square. Twenty yards ahead of her, she sees a taxi driven by D speed through a red light, lose control, and crash into a storefront, though miraculously neither D nor anyone else is physically injured. At no time does believe that she or anyone else is likely to be hit by the cab. Nonetheless, P keeps reliving the near-disaster. She develops nightmares, symptoms of PTSD, and an ulcer.
>
> It is unlikely that *any* American court would allow P to recover. As we'll see, there are several exceptions to the general rule against "stand-alone" recovery for negligent infliction of emotional distress. But here, where P never even briefly feared that either she or anyone else was likely to be hit by the cab, none of these exceptions applies. [210]

1. **"Boundless liability" fear:** Courts' universal rejection of a stand-alone distress claim like the one in the above example stems in part from courts' fear that if such claims were allowed, there would be a ***flood of litigation,*** with no way for courts to distinguish genuine claims from ***feigned*** ones. For instance, in the above example letting P recover would raise the possibility that hundreds of similarly-situated people walking or riding in Times Square might bring suit, and there would be no line logically dividing those who should recover from those who shouldn't.

D. P is within the "zone of danger," and suffers distress: Our next category is where P witnesses an accident or near-accident, and is ***sufficiently close*** to the dangerous event that she herself is at some point in ***danger of immediate bodily harm.*** She escapes the bodily harm, but suffers mental distress from the episode. Courts often describe this situation as one in which the plaintiff was ***"within the zone of danger."*** [211]

1. **Most courts allow:** In this "zone of danger" scenario, most courts today ***allow*** the plaintiff to recover for her emotional distress, if plaintiff shows that the distress was ***severe.*** [211]

2. **Third Restatement allows:** The Third Restatement similarly allows the plaintiff to recover in this zone-of-danger situation: "An actor

whose negligent conduct causes ***serious emotional harm*** to another is subject to liability to the other if the conduct: (a) places the other in ***danger of immediate bodily harm*** and the emotional harm results from the danger[.]"

Example 2: Same facts as Example 1 above. This time, however, when the taxi driven by D goes out of control, P is standing two feet away. She jumps out of the path of the oncoming cab and barely avoids being hit. If P suffers severe mental distress from constantly re-living the near-accident, most courts (and the Third Restatement) will allow her to recover for that distress, because she was within the "zone of danger." [211]

E. P is a "bystander," and sees a close relative suffer bodily injury: Now, let's turn to the first of two categories in which the plaintiff is a ***"bystander"*** who from a position of safety ***watches another person suffer bodily injury*** due to the defendant's negligence. In the present category, the injured third person is a ***close relative of the plaintiff,*** such as the plaintiff's ***parent, sibling,*** or ***child.***

As in the above situation illustrated by Example 2 (where the plaintiff was herself within the "zone of danger"), in the present "bystander watching a close relative be injured" scenario, most courts today ***allow the plaintiff to recover*** for her own distress. [211]

2. Third Restatement allows: Again, the Third Restatement agrees that the plaintiff should be allowed to recover: [212]

1. Rationales: There are two rationales for allowing recovery here: (a) we don't have to worry much about ***fraudulent claims,*** since it's highly likely that a person who watches a close relative be injured has indeed suffered great distress; and (b) we don't have to worry about a ***flood of claims,*** since the number of people suffering a bodily injury from a given tortious event will be limited, and therefore the number of close relatives watching those injuries occur will also be limited.

An actor who negligently causes ***sudden serious bodily injury to a third person*** is subject to liability for serious emotional harm caused thereby to a ***person who:***

(a) ***perceives the event contemporaneously,*** and

(b) is a ***close family member*** of the person suffering the bodily injury.

Example 3: P is walking with her 6-year-old son, S, in a cross-walk in Times Square.

As P watches, horrified, a taxi negligently driven by D jumps a red light and runs over S, killing him instantly. P suffers severe mental distress from watching the accident and reliving it. Most courts (and the Third Restatement) will allow P to recover against D for her own distress. This recovery is entirely separate, conceptually, from S's estate's right to recover for his bodily injury. [212]

3. **Meaning of "close relative":** Courts vary in ***how close the family relationship must be*** between the bystander/plaintiff and the third person who suffers serious bodily harm.

   a. **Sibling, parent, child or spouse:** A bystander who is the ***sibling, parent, child,*** or ***spouse*** of the person who suffers the bodily harm is likely to be found to be sufficiently closely-related that the bystander can recover for distress. [212]

   b. **More distant relative:** But if the relationship is even a little more ***distant,*** courts are likely to ***deny*** recovery. Thus one who witnesses the death or serious injury of a ***fiance,*** a ***cohabiting*** significant other, a ***son-in-law,*** or an ***aunt*** or ***uncle*** (even one who has raised the child who suffers the bodily injury) is likely to be ***denied recovery.***

4. **Perception must be "contemporaneous":** Most courts insist that the bystander must ***perceive*** the accident (the bodily harm to the bystander's close relative) ***"contemporaneously."*** In other words, it's not enough that the bystander learns of the accident very soon ***after*** it occurs. [212] So the following two examples produce opposite legal outcomes:

   Example 4: P, sitting on his front porch, watches a car negligently driven by D strike, and badly injure, P's 6-year-old son, S, in the street in front of P's house. Because P has "contemporaneously" perceived the physical injury to S, P will be entitled to recover for P's own mental distress. [212]

   Example 5: P is sitting in the kitchen of his house, which looks out only into P's backyard. The doorbell rings, and P's next-door neighbor, X, tells P, "I just saw your son S be hit by a car on the street; the ambulance just took S to the hospital." P rushes to the hospital, where he sees S lying badly injured in the ER. In most courts — and under the Third Restatement — P will not be allowed to recover for his emotional distress, because P did not "contemporaneously" perceive the event that caused the harm to P's close relative.

   a. **Can "perceive" by another sense:** Ordinarily, the contemporaneous "perception" will be by ***sight*** — P observes the

accident with his eyes. But ***other senses,*** such as ***hearing,*** may also suffice, as long as the "perception" is "contemporaneous." [213]

Example 6: Same facts as Example 4 above, except that P, while sitting on his front porch, does not have his distance glasses on, and therefore cannot see what is happening in the street with any detail. But P knows that his son S is playing in the street. P then hears the squeal of D's brakes, and hears S's screams after he is run over. P has sufficiently "perceived" (through his sense of hearing) the event that caused the serious bodily harm to S that he will be permitted to recover for his mental distress.

b. Perception that occurs remotely rather than in person: It's not clear whether the contemporaneous perception has to occur "in person," as opposed to via some *remote, electronic means.* For instance, if P is *video-Skyping* with X and sees X hit by a car driven by D, has P met the "contemporaneous perception" requirement? There is little if any case law on the issue so far.

5. **Bodily harm witnessed must be serious:** The bodily harm that the bystander witnesses must generally be ***serious.*** So witnessing a close relative's ***death,*** significant permanent ***disfigurement,*** or l***oss of a body part or function*** will almost always be sufficient. But ***bruises, cuts, single simple fractures,*** and ***other injuries that do not require immediate medical treatment*** will ***rarely be sufficient.*** [213]

6. **Bodily injury must be "sudden":** The serious bodily harm suffered by the third person in the plaintiff/bystander's presence must occur in a ***"sudden and dramatic manner,"*** according to most courts. [213]

Example 7: W works for years at a warehouse owned and operated by D. D negligently stores toxic chemicals there, to which W is unwittingly exposed. Over a period of months, W's health gradually deteriorates, and eventually she is left in a coma. Her husband, H, observes the deterioration with horror, and sues D for distress.

Even though H has been a "bystander" who has directly witnessed the serious bodily harm suffered by his wife, W, a court will probably *not* allow H to recover for distress, because W's bodily harm was not "sudden."

7. **P need not be in "zone of danger" or fear for own safety:** In the bystander scenario, most courts that allow bystander recovery at all do ***not*** require that the ***bystander himself have ever been in the "zone of danger,"*** i.e., at risk of direct physical harm. In other words, as long as the bystander "contemporaneously perceives" the injury to a close relative, the bystander's own lack of physical danger does not ruin the

claim. [214]

> **Example:** Recall Example 4 on p. C-42, where P sits on his porch and watches as his son S is struck down by D's car. The fact that P was never in any physical danger himself during the episode does not nullify P's distress claim.

F. P is a "bystander," and sees a non-close-relative suffer bodily injury: Now, let's consider the other major category in which a bystander might try to recover: the bystander witnesses serious bodily harm to another person, but this time the bystander and the physically-injured person are ***not close relatives.*** In this scenario, ***few if any courts allow*** the bystander to recover for mental distress. [211]

1. **Rationale:** This is one of those situations in which courts fear that allowing recovery will produce a ***flood of claims,*** with no easy way to determine which ones are genuine, and no way to avoid subjecting the defendant to potentially boundless liability.

> **Example 8:** Same basic facts as Example 1 on p. C-40. Now, however, P sees the runaway cab strike and kill X, a stranger to P. As in Example 1, P is far enough away (20 yards) from the cab that she never fears that she herself will or may be hit by the cab. Virtually all U.S. courts would deny P the right to recover for her mental distress, even if that distress unquestionably stemmed from seeing the accident and resulted in physical manifestations like ulcers. The same fears of boundless liability and false claims that would result in courts' rejection of P's claim in Example 1 would be cited here. [214]

2. **P not within zone of danger:** The fact that the bystander and the physically-injured person are not close relatives makes the most difference when ***the bystander is never within the zone of danger.*** That's because, in most courts, if the bystander *is* himself within the zone of danger, that fact will ***allow*** the bystander to recover for emotional distress from the entire episode— the court will typically not try to distinguish between distress from the bystander's own narrow escape and distress from the injury to the nearby non-relative. [214]

G. Special relationship or special activity: Finally, there are a few types of ***"special" situations,*** M scenarios that involve either a ***special activity*** or a ***special relationship among the parties,*** such M that courts have decided that the general rule against recovery for negligently-inflicted emotional A distress should ***not apply*** even though none of the above

exceptions to the general no-liability R rule applies. In these special categories, courts have concluded that the ***risk*** of emotional harm to Y the plaintiff is ***so great,*** and the ***number*** of affected plaintiffs likely to be so ***small,*** that the court should not worry about either feigned distress or a flood of claimants.

1. **Two main categories:** There are two main scenarios that courts have long recognized as being "special categories" where pure emotional harm should be recoverable:

   a. **Mishandling of bodies:** One is the scenario in which a ***hospital or funeral home*** negligently ***mishandles a corpse,*** thereby causing emotional distress to a close relative of the deceased. [216]

      Example: Hospital negligently misidentifies a corpse (that of X), causing the corpse to be cremated instead of sent to a funeral home for burial. X's immediate family learns of the error, and suffers great distress because of it. Most courts would allow the family to recover against Hospital.

   b. **Telegrams announcing death or serious illness:** The other is the scenario in which a ***telegraph company*** negligently and incorrectly announces that *A* is dead or seriously ill, and the telegraph is delivered to B, A's intimate family member. [216]

2. **Extension to other situations:** In recent decades, courts have often recognized ***other situations*** as calling for allowing an emotional distress claim that does not fall within either of the above categories, or within any of the physical-impact categories we discussed earlier. [216]

   a. **Factors required:** Here are a few examples, taken from actual cases in which the court declined to rule as a matter of law that P may not recover for distress:

      [1] D, a ***medical clinic*** that has run a blood test on P, negligently (and incorrectly) ***informs P that she is HIV positive;***

      [2] D, an ***obstetrician,*** negligently mishandles a ***pregnancy*** of P, a patient, leading to a ***stillbirth*** that causes P great emotional harm;

      [3] D, a ***fast food chain,*** negligently serves P a hamburger with human blood on the bun.

H. The "at-risk plaintiff": Claims for negligent infliction of purely emotional distress are sometimes raised by ***at-risk plaintiffs."*** That is, it is often possible to say that a particular plaintiff, by virtue of his exposure to a certain substance, has suffered an ***increased likelihood of a particular disease*** (e.g., cancer). May such a plaintiff recover for the purely emotional harm of being ***distressed*** by this increased likelihood of illness, assuming that there are no symptoms of the illness itself?

1. **"Cancerphobia":** Liability for emotional distress due to future illness is often referred to by the umbrella (and not-always-accurate) term ***"cancerphobia."*** For simplicity, we'll use this term here.

2. **Hard for P to win:** Plaintiffs have ***rarely succeeded i***n recovering for pure cancerphobia, i.e., cases where the plaintiff cannot show that he has actually suffered bodily harm. Courts put various obstacles in the path of cancerphobia plaintiffs — including obstacles summarized in Pars. 3, 4 and 5 below— and it's the rare plaintiff who can overcome all of these obstacles. [217]

3. **Need actual exposure in toxic cases:** Most of the cases raising the issue of recovery for cancerphobia are ***"toxic tort"*** cases, i.e., cases in which the plaintiff has been or may have been exposed to some toxic substance, whether it is the AIDS virus, hazardous environmental waste, or some other damaging substance. In this situation, most courts have insisted, at a minimum, that plaintiff show ***actual exposure*** to the substance, not merely the ***possibility*** of exposure. [217]

   Example: Suppose that D is a physician who has open lesions on his hands and arms, and who examines many patients, including P, while having those lesions. P later learns that at the time D examined her, D knew that he had AIDS. P has not yet developed AIDS, and there is no evidence that she has had HIV virus particles pass into her body. However, P is very frightened that she will develop AIDS from her exposure to D.

   A court would probably hold that P loses on her "fear of AIDS" theory, because she cannot show that she was "actually exposed" to the HIV virus from D. That is, she will lose unless she can show that more probably than not, some virus particles actually passed from D's body into her own.

4. **Some courts require showing of actual illness:** Some courts have gone even further, and have required that the cancerphobic plaintiff

show that more probably than not, he will ***actually contract the illness*** that he is frightened of. In other words, fear of a less-than-probable illness, no matter how devastating the illness would be if it occurred, will ***not suffice,*** in these courts. [217]

> **Example:** In such a court, P in the above example would presumably lose unless she showed not only that she was actually exposed to the HIV virus by D but that she had a greater than 50% chance of contracting AIDS.

5. **Need for danger of "immediate" bodily harm:** Another way that courts often make it hard or impossible to recover for emotional harm from fear of future illness is by insisting that the danger of bodily harm be ***"immediate."*** [218]

   a. **Third Restatement:** Thus the ***Third Restatement*** denies recovery for cancerphobia. The Restatement's requirement that the plaintiff can't recover unless she was placed in "immediate" physical danger by the defendant's negligence means that under the Restatement, recovery is ***not allowed*** in cancerphobia cases. [218]

6. **Accompanying physical harm:** But always keep in mind that if there is ***some physical harm*** arising from the episode, the emotional distress will *also* be compensable. [218]

> **Example:** Many workers exposed to ***asbestos*** have developed a lung abnormality known as "pleural thickening." This thickening is not by itself life-threatening, nor does it even directly impair the patient's life. But courts tend to consider as a form of "bodily harm." C And it has been statistically linked to a much higher than normal incidence of certain cancers.
>
> A plaintiff who has suffered pleural thickening is likely to be permitted to recover substantial sums from manufacturer of asbestos to which plaintiff was exposed. Such an award would compensate plaintiff not just for his current physical harm from the pleural thickening itself, but also for his distress at knowing that he has a high risk of future harm.

IV. UNBORN CHILDREN

A. Modern view: Most courts have now rejected the traditional view that an infant injured in a pre-natal accident could never recover if born alive. Today, recovery for pre-natal injuries varies:

1. **Child born alive:** If the child is eventually ***born alive,*** nearly all courts ***allow*** recovery. [219]

Example: D makes a drug that is taken by P's mother while she is carrying P in utero. P is born with serious birth defects resulting from the drug. Nearly all courts would allow P to recover.

2. **Child not born alive:** Courts are ***split*** about whether suit can be brought on behalf of a child who was *not* born alive. Usually, a court will allow recovery only if it finds that a fetus never born alive is a "person" for purposes of the wrongful death statute. [219]

3. **Pre-conception injuries:** The above discussion assumes that the injury occurred while the child was *in utero.* Suppose, however, that the injury occurred before the child was even ***conceived,*** but that some effect from the injury is nonetheless suffered by the later-conceived child. Here, courts are ***split*** as to whether the child may recover. [219-220]

   Example: P's mother, before getting pregnant with P, takes a drug made by D. The drug damages the mother's reproductive system. When P is conceived, P suffers from some congenital disease or defect (e.g., sterility) as a result. P's mother can clearly recover from D for her own injuries, but courts are split as to whether P can recover against D for these pre-conception events. *[Enright v. Eli Lilly]*

4. **Wrongful life:** If a child is born illegitimate, or with an unpreventable congenital disease, the child may argue that it should be entitled to recover for ***"wrongful life,"*** in the sense that it would have been better off aborted. But almost no courts have allowed the child to make such a wrongful life recovery. Courts do, however, often allow the ***parents*** to recover for their medical expenses, and perhaps their emotional distress from the child's condition. [220]

V. PURE ECONOMIC LOSS

A. **The problem generally:** Suppose that D behaves negligently towards X, in a way that causes X personal injury or property damage. Suppose further that D's conduct also injures P, but P's only loss is ***economic,*** not personal injury or property damage. May P recover in tort from D? As we will see, the traditional general answer is ***"no,"*** but there are some important exceptions.

1. **Tacking on of economic loss to personal or property damage:** Before we begin examining the "three party" situation referred to in the prior paragraph, let's first consider a simpler C "two party"

situation: D behaves negligently towards P, and causes P both personal injury and economic loss. In this situation, all courts agree (and have always agreed) that P, in addition to recovering for his personal injury, ***may "tack on" his intangible economic harm as an additional element of damages.***

> **Example:** P owns a retail store, which he personally operates. P is injured by the negligence of D, a careless driver who hits P while P is walking. P can of course recover damages for his physical harm (e.g., his medical bills plus pain and suffering). Once P shows that he has suffered physical harm, he will be permitted to "tack on," as an additional element of damages, his loss of profits from being unable to operate the store. In other words, P's suffering of physical harm qualifies him to recover for the full range of damages which he has suffered, including intangible economic ones.

a. Property damage: Similarly, if P suffers ***property damage*** (even if he does not suffer personal injury), this property damage will qualify him to tack on intangible economic loss as well. Thus suppose, on the facts of the above example, that P's car was struck by D's car, and that as a result: (1) P's car was damaged; (2) P himself was not physically injured; and (3) P lost two days of profits at the store because he could not commute to the store. Once P showed that he suffered direct property damage from P's negligence, all courts would allow him to recover his loss-of-business damages, even though those are purely intangible economic losses.

B. Standard rule disallows pure economic losses: Now, let's return to the three-party situation, in which D's negligence causes physical injury or property damage to X, but only economic loss to P. Nearly all courts agree that ***P may not recover anything for his economic losses,*** since he has not suffered any personal injury or property damage. This is true even though D is clearly a tortfeasor (vis-à-vis X), and even though D's negligence has quite clearly, and foreseeably, brought about the injuries to P. As the idea is often put, a person may not recover for unintentionally-caused ***"pure economic loss."***

1. Restatement 3d follows this rule: The Third Restatement of Torts follows this general no-recovery principle: apart from a few exceptional circumstances:

> a claimant cannot recover for ***economic loss*** caused by (a) ***unintentional personal injury to another party;*** or (b) ***unintentional injury to property*** in which ***the***

claimant has no proprietary interest.

a. **Rationales:** There are some strong ***policy reasons*** behind this general rule barring recovery for pure economic loss. Here are two of the leading rationales:

b. Indeterminate and disproportionate liability: Most importantly, if courts allow recovery for economic loss that is not accompanied by personal injury or property damage to the plaintiff, the likely result is ***indeterminate and disproportionate liability.***

c. **Other ways for claimants to protect themselves:** Second, courts reason that the victims of economic injury can often ***protect themselves effectively by means other than a tort suit.*** For instance, they may be able to ***buy insurance*** against their losses.

2. Contexts in which rule is applied: Here are some of the contexts in which the rule barring recovery for pure economic losses is frequently applied:

a. Blocking of highways or streets and thus access to P's business: Where the defendant negligently causes a street, highway or waterway to be closed, business owners whose property is not directly damaged have often sued, seeking recovery for lost business due to C customers' inability to get to the owner's premises. Most cases find against the plaintiff, in A a straightforward application of the rule denying recovery for negligently-caused pure P economic loss.

Example: Due to the negligent construction by D, a builder, of a building on Madison Avenue in Manhattan, a wall of the building collapses, covering the street with bricks and mortar. City officials close 15 heavily-trafficked blocks near the collapse for two weeks. The named Ps are retail stores that don't suffer physical damage from the collapse or closure, but lose business because shoppers cannot get to these stores during the closure.

Held, for D. The New York courts do not hold that a landowner owes a duty to protect an entire urban neighborhood against purely economic losses. If a particular plaintiff business owner were able to show that (a) D created a "public nuisance" and (b) the particular plaintiff suffered "special injury beyond that suffered by the community at large," R the plaintiff would be entitled to a private recovery for public nuisance. But none of the Y Ps here have suffered the requisite "special injury beyond that of the community." Therefore, the Ps may not recover for their economic losses, either under nuisance or any other theory. *[532 Madison Avenue Gourmet Foods, Inc. v. Finlandia Center, Inc.]* [223]

b. Toxic torts affecting land or water: In another common scenario, the defendant negligently ***spills toxic substances or pollutants*** onto either a waterway or land, and this "toxic tort" interferes with the economic activities of persons or businesses whose person or property are not directly and physically impacted by the spill. Again, most courts apply the general rule to these non-physically-impacted plaintiffs — unless the plaintiff can show that the defendant negligently created a public nuisance, and that the harm suffered by the plaintiff is different in kind from the harms suffered by other businesses in the area, the plaintiff may not recover for its "pure economic loss."

c. Tort against employee or employer causing economic loss to the other: Similarly, if D ***negligently injures P's employee,*** X, P may not recover for P's economic losses stemming from X's unavailability. And the converse is also true - if D negligently damages X, a business, then P, an employee of X who is deprived of work because of the damage to X ***may not recover lost wages*** from D. [224]

Example: Goalie is a star soccer player with a long-term contract to play for Metro, a professional soccer team. Driver negligently injures Goalie in a car accident, causing Goalie to miss Metro's season. Assume that by the terms of the Goalie-Metro contract, Metro has to pay Goalie his salary for the season despite his unavailability. Even if Metro can demonstrate with near certainty that Goalie's unavailability has cost Metro $1 million in ticket sales for the season, Metro cannot recover anything at all from Driver.

That's because, although Driver's negligence has caused physical injury *to Goalie* (for which Goalie himself can of course recover against Driver), Metro has suffered only economic loss, unaccompanied by personal injury or damage to Metro's "property."

d. Interruption to power or supplies: Similarly, if D's negligence causes an interruption of the ***flow of goods or services*** that are needed for P's business, but there is no contractual relationship between D and P (and no physical damage to P's property), the general rule prevents P from recovering for its losses.

Example: Contractor, doing excavation work on private property two buildings away from P's factory, negligently severs the power lines that serve the factory, putting P's factory out of business for a day. Assume that the power outage does not cause any damage to P's building or equipment. The rule against recovery for pure economic

losses prevents P from recovering from Contractor for these losses.

C. Situations that are exceptions or fall outside of the rule: But there are some important situations that are either deemed to fall outside of the scope of the general no-liability-for-pure-economic-loss rule, or to be exceptions to the rule. Two of the more important such situations are (a) where P has a ***"proprietary interest"*** in property that is physically damaged by D's negligence; and (b) where D has created a ***"public nuisance,"*** and P has suffered harm from the nuisance that is "different in kind" from that suffered by other nearby persons.

1. P has a proprietary interest: Since the general rule we're discussing bars recovery only for "pure" economic loss, it's not surprising that a plaintiff can recover economic-loss damages if the plaintiff can also show that ***"property" in which she has a "proprietary" interest*** was damaged by the D's negligence, leading to the economic loss. [225]

a. P owns and possesses the damaged property: If P both ***owns and possesses*** the tangible property damaged by D's negligence, it's easy to see how P can recover for economic losses that stem directly from the property damage.

Example: BargeCo, the owner/operator of a barge, negligently spills chemicals into a harbor. The spilled chemicals flow into the innards of a new custom-designed drill owned by Contractor, a building contractor who is using the drill to finish a construction project owned by Owner at the edge of the harbor. Repair of the drill costs Contractor $10,000, and the process takes a month. Contractor also loses $40,000 because the month's delay causes Contractor to forfeit a "timely completion" bonus in that amount that Contractor would have otherwise received from Owner. (No replacement drill was reasonably available to Contractor sooner because of the drill's custom design.)

Because Contractor suffered direct damage to its tangible property (the drill), Contractor is entitled to recover from BargeCo not only the repair costs, but the intangible economic loss (the $40,000), since that loss stemmed directly from the same negligent act by BargeCo that caused the property damage.

b. P has possession but not ownership; the "proprietary" test: Where P does ***not own*** the property that's physically damaged, but has the right to ***use or possess*** that property, P can recover for economic loss directly resulting from the episode that damages the property if and only if P's arrangement with the owner included at least one (and in some courts both) of the following attributes:

[1] ***control*** of the property, and

[2] the responsibility for ***maintaining and repairing*** the property.

Example 1 (right to recover economic loss): P rents one floor of a building from O. D, a contractor working for O on the exterior of the building, negligently causes a wall to cave in, blocking P's employees from work for two weeks. Most courts would say that P, as the tenant of a floor of the building, had enough control of its part of the premises to be deemed to have a "proprietary" interest in those premises. In such a court, P would be permitted to recover its economic losses (lost production) for the period when its employees couldn't come to work. [225]

Example 2 (no right to recover economic loss): P is a railroad that, along with two other railroads, has the right to use a bridge owned and maintained by O. A tugboat owed by D negligently damages the bridge, causing P to have to re-route its shipments for several weeks, at greater cost to P.

A court would probably say that although P had a non-exclusive right to use the bridge, P's lack of complete control (and of the obligation to maintain) the bridge prevented P from having the required proprietary interest in the bridge. If the court so concluded, the court would probably bar P from recovering its economic losses from D, under the general rule preventing recovery of pure economic losses. [226]

2. **Public nuisance with special harm:** Courts generally recognize an exception to the no-recovery-for-pure-economic-losses rule if the defendant's actions create a ***public nuisance,*** but only if the type of economic harm suffered by the plaintiff is ***qualitatively different*** from that suffered by other members of the community.

   a. **Taken from law of nuisance:** This "exception" is really a recognition that the tort of public nuisance has special features that sometimes call for a private right of action for pure economic loss. (See *infra,* p. C-91, for a more detailed discussion of private rights of action for public nuisances.)

   b. **"Distinct in kind" requirement:** The requirement for private suits that the plaintiff's losses be ***"distinct in kind*** from those suffered by members of the affected community in general" has quite a lot of bite — where the nuisance has some sort of economic impact on a ***significant number of businesses,*** a plaintiff generally ***won't be able to meet*** the "distinct in-kind" requirement merely by showing that her losses are of ***greater magnitude*** than those of most other community members. Rather, the plaintiff typically has to show that something about her situation — usually tied to her particular location — makes her losses of a ***"different kind," not just***

"different magnitude" — from other nearby businesses' losses. The following two examples illustrate the kinds of situations that will or won't meet this "different in kind" requirement.

Example 1 (not different in kind): Recall the *532 Madison Avenue Gourmet* case, *supra*, p. C-47, where the collapse of a building negligently constructed by D caused street closings that prevented customers of the Ps (nearby retail stores) from reaching the Ps' premises. The Ps sought to fit within the public-nuisance exception to the no-recovery-for-pure-economic-loss.

But the court found that the Ps had ***not*** shown the requisite "special injury beyond that suffered by the community at large." (Even if the Ps had shown that their ***dollar losses were greater*** than those of nearly every other person or business in the area, it's unlikely that the court would have found that the "different in kind" requirement was satisfied.)

Example 2 (different in kind): Restaurant is located on the bank of a river. Many of Restaurant's customers arrive by boat, and moor their boat at a dock owned and maintained by Restaurant. Logger floats logs down the river, and negligently allows the logs to become stuck on the river bank near Restaurant's dock, so that Restaurant's customers can no longer arrive by boat. (The log blockage is not located at or immediately adjacent to any part of Restaurant's property.) No other person or business is affected by the blockage.

A court would likely find that Restaurant has suffered the requisite "distinct in kind" harm. If the court so concluded (and if the court also concluded that the stock logs constituted a public nuisance), the court would allow Restaurant to recover damages for its lost business from logger. [227]

c. Commercial fishers as a special case: Some courts allow ***commercial fishers*** to recover their lost business when the defendant wrongfully pollutes the waterway in which the fishers have been fishing. In such suits, the courts typically conclude that the fishers have met the requirement of showing that their harm is "different in kind" from the losses suffered by the community in general.

D. Some courts reject basic rule: A few courts seem to have simply ***rejected the basic rule*** barring recovery for economic damages where the plaintiff has not suffered personal injury or property damage. *[People Express Airlines, Inc. v. Consolidated Rail Corp.]* [228]

1. Rare: But rejection of the general principle barring recovery for pure economic loss is ***relatively rare,*** and seems not to be growing more common.

E. Special statutes: The "rule" barring liability for pure economic losses is a judge-made doctrine, Y and as such can be overruled by a legislature for all or certain scenarios. And, indeed, there are some important contexts in which state and federal ***statutes overturn*** the common-law no-recovery rule.

1. Oil spills and the OPA: For instance, Congress has enacted a special statute that in large part reverses the standard no-recovery-for-pure-economic-losses rule for persons who suffer economic loss as the result of an ***oil spill.*** This is the ***Federal Oil Pollution Act of 1990 ("OPA"),*** 33 U.S.C. § 2702 et seq.

> **Example:** Suppose Hotel is located near (but not on) a beach that is fouled by an oil spill, and Hotel loses business because customers cancel their visit when they realize they won't be able to use the beaches. Hotel and its employees can probably both recover under OPA. [228]

F. Other contexts involving pure economic loss: Here, we've talked about just one aspect of courts' reluctance to award damage to a plaintiff who has suffered only economic loss — the "three party" scenario in which D tortuously causes personal injury or property damage to *A*, but only economic loss to *B*, who nonetheless sues. But there are a number of ***other scenarios*** that similarly raise the issue of whether a plaintiff who has suffered only economic loss may recover, including scenarios in which the defendant has behaved tortiously only to one person (the one who is now bringing suit). These other scenarios — where the court may or may not award liability for pure economic loss — include misrepresentation, products liability, and interference with contract.

CHAPTER 9
OWNERS AND OCCUPIERS OF LAND

I. OUTSIDE THE PREMISES

A.Effect outside: There are special rules lowering a landowner's standard of care. However, these rules do not apply to conduct by the landowner that has effects ***outside*** of his property. Therefore, the general ***"reasonable care"*** standard usually applies to such effects. [236-237]

1. Natural hazards: However, if a hazardous condition exists ***naturally*** on the land, the property owner generally has ***no duty*** to remove it or

guard against it, even if it poses an unreasonable danger to persons outside the property. But in an urban or other thickly-settled area, courts are less likely to apply this traditional rule. [236]

Example: O allows a tree to grow in such a way that it may hit a tall truck passing on the roadway. Traditionally, O may not be held liable to the driver of the truck. But in an urban U or suburban context, O might be liable.

2. **Artificial hazards:** Where the hazardous condition is ***artificially*** created, the owner has a general duty to prevent an unreasonable risk of harm to persons outside the premises. [237]

II. TRESPASSERS

A. General rule: As a general rule, the landowner owes ***no duty to a trespasser*** to make her land ***safe,*** to ***warn*** of dangers on it, to avoid carrying on dangerous activities on it, or to protect the trespasser in any other way. [238]

Example: P trespasses on D railroad's track. His foot gets caught, and he is run over by a train. Even if the reason that P caught his foot was that D negligently maintained the roadbed, P cannot recover because D owed him no duty before discovering his presence. *[Sheehan v. St. Paul Ry. Co.]*

B. Exceptions: There are three main ***exceptions*** to the general rule that there is no duty of care to trespassers:

1. **Constant trespass on a limited area:** If the owner has reason to know that a ***limited portion*** of her land is ***frequently used*** by various trespassers, she must use reasonable care to make the premises safe or at least warn of dangers. This is the ***"constant trespass on a limited area"*** exception. [239]

   Example: If trespassers have worn a path across a railroad, the railroad must use reasonable care, such as whistles, when traversing that crossing.

2. **Discovered trespassers:** Once the owner has ***knowledge*** that a particular person is trespassing, the owner is then under a duty to exercise reasonable care for the trespasser's safety. [239]

   Example: A railroad's engineer must use reasonable care in stopping the train once he sees P trespassing on the tracks.

3. Children: The owner owes a duty of reasonable care to a trespassing ***child*** if: (1) the owner knows that the area is one where children are likely to trespass; (2) the owner has reason to know that the condition poses an unreasonable risk of serious injury or death to trespassing children; (3) the injured child either does not discover the condition or does not realize the danger, due to his youth; (4) the benefit to the owner of maintaining the condition in its dangerous form is slight weighed against the risk to the children; and (5) the owner fails to use reasonable care to eliminate the danger. [240-242]

> **Example:** O knows that children often swim in a swimming pool on O's land. One part of the pool is unexpectedly deep. It would not cost very much for O to install fencing. P, a child trespasser, walks on the bottom of the pool, panics after suddenly reaching the deep part, and drowns. O is probably liable to P on these facts.
>
> **Note:** Traditionally, some or all of these elements are summarized by saying that O is liable for maintaining an *"attractive nuisance."*

a. Natural conditions: The court is less likely to find liability where the condition is a ***natural*** one than where it is artificial. [242]

b. No duty of inspection: The child trespass rules do not generally impose any ***duty of inspection*** upon O. [242]

III. LICENSEES

A. Definition of licensee: A *licensee* is a person who has the owner's *consent* to be on the property, but who does *not have a business purpose* for being there, or anything else entitling him to be on the land apart from the owner's consent. [242]

B. Duty to licensees: The owner does ***not*** owe a licensee any duty to ***inspect for unknown dangers.*** On the other hand, if the owner ***knows*** of a dangerous condition, she must ***warn*** the licensee of that danger. [243]

> **Example:** Rear steps leading from O's house to her back yard contain a rotten wood plank. If O knows of the rotten condition, she must warn P, a licensee, if P cannot reasonably be expected to spot the danger himself. But O need not inspect the steps to make sure they are safe, even if a reasonably careful owner would do so.

C. Social guests: The main class of persons who qualify as licensees are ***"social guests."*** [242]

> **Example:** Even if P is invited to O's house for dinner, P is a "licensee," not an "invitee."

IV. INVITEES

A. **Duty to invitee:** The owner *does* owe an ***invitee*** a duty of ***reasonable inspection to find hidden dangers.*** Also, the owner must use reasonable care to take ***affirmative action*** to remedy a dangerous condition. [244]

B. Definition of "invitee": The class of invitees today includes: (1) persons who are invited by O onto the land to conduct ***business*** with O; and (2) those who are invited as members of the ***public*** for purposes for which the land is held ***open to the public.*** [244-244]

1. **Meaning of "open to the public":** The ***"open to the public"*** branch of invitees covers those who come onto the property for the purposes for which it is held open, even if these people will not confer any economic benefit on the owner. [245]

   > **Example:** P, a door-to-door sales representative, pays an unsolicited sales call on D, a storekeeper. D in fact never buys from such unsolicited callers. However, since P reasonably understood that the premises were held open to salespeople, P is an invitee.

2. **Scope of invitation:** If the 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 an invitee to a licensee. [245]

   > **Example:** P visits O's store to buy cigarettes. O then allows P to use a private bathroom in the back of the store not held open to the public. Even though P was an invitee when he first came into the store, he became a licensee when he went into the private bathroom. *[Whelan v. Van Natta]*

C. **Duty of due care:** The owner owes an invitee the duty of ***reasonable care.*** [245] In particular:

1. **Duty to inspect:** The owner has a duty to ***inspect*** her premises for hidden dangers. O must use ***reasonable care*** in doing this inspecting. This is true even as to dangers that existed before O moved onto the premises. [245]

2. **Warning:** The giving of a ***warning*** will often, but not always, suffice. If O should realize that a warning will not remove the danger, then the condition must actually be remedied. [246]

3. **Control over third persons:** Reasonable care by O may require that she exercise ***control over third persons*** on her premises. [246]

D. Firefighters and other public-safety personnel: Under the common-law ***"firefighter's rule," firefighters, police officers*** and other ***public-safety officials*** who come onto private property in the performance of their duties are treated as ***mere licensees,*** so that the owner does not owe them a duty to inspect the premises or to make the premises reasonably safe. The most common application of the common-law doctrine is that a firefighter who is injured while fighting a blaze cannot recover from the owner of the premises, ***even if the owner's negligence caused the fire.*** [247]

1. Status of rule: A number of states have in recent years expressed dissatisfaction with the firefighters rule. Some have ***eliminated*** it by statute; others have limited it to the case of firefighters, and have refused to extend it to other rescue workers (e.g., paramedics). Still others limit it to suits against ***landowners,*** terming it a rule of "premises liability," not a broad rule against suits by rescue workers. [247]

a. Most apply: But most states ***continue to apply the rule,*** at least in the core case: a firefighter injured fighting a fire may not recover against a negligent fire-setter who owns the premises where the injury occurred.

V. REJECTION OF CATEGORIES

A.Rejection generally: A number of courts have ***rejected*** the categories of trespasser, licensee and invitee. These courts now apply a general single "reasonable person" standard of liability. California *[Rowland v. Christian]* and New York are included in this group. [248]

1. Half the states give social guests benefit of duty of due care: Between the rejection of categories, and other changes in legal rules, ***social guests*** are in a much better position today than at common law. About half the states have either ***included social guests in the invitee category*** or have completely or partially ***abolished the categories,*** so that ***all or most non-trespassing social guests are entitled to reasonable care under the circumstances.*** [248]

a. Not followed as to trespassers: But most states have been ***unwilling*** to abolish the categories when it comes to ***trespassers.***

Most states continue to apply the common-law rule that an owner owes a trespasser no duty of care, and only the duty to refrain from maliciously injuring the intruder. [248]

VI. LIABILITY OF LESSORS AND LESSEES

A. **Lessee:** A ***tenant*** is treated ***as if she were the owner*** — all the rules of owner liability above apply to her. [249]

B. Lessors: In general, a ***lessor*** is ***not*** liable in tort once he transfers possession to the lessee. However, there are a number of exceptions to this general rule:

1. **Known to lessor, unknown to lessee:** The lessor will be liable to the lessee (and to the lessee's invitees and licensees) for any dangers existing at the start of the lease, which the lessor ***knows or should know about,*** and which the lessee has no reason to know about. (This usually does not impose on the lessor a duty to ***inspect*** the premises at the start of the lease.)

   [249]

2. **Open to public:** If the lessor has reason to believe that the lessee will hold the premises ***open to the public,*** the lessor has an affirmative duty to ***inspect*** the premises to find and repair dangers before the lease starts. [249]

3. **Common areas:** The lessor has a general duty to use reasonable care to make ***common areas*** (e.g., the lobby or stairwells of an apartment building) safe. [250]

4. **Lessor contracts to repair:** If the lessor ***contracts,*** as part of the lease, to keep the premises in good repair, most courts hold that the landlord's breach of this covenant to repair gives a tort claim to anyone injured. However, P must show that D failed to use reasonable care in performing — it is not enough to show that D breached the contract. [250]

5. **Negligent repairs:** The landlord may incur liability even without a contractual repair obligation if she ***begins*** to make repairs, and either performs them unreasonably, or fails to finish them. This is clearly true where the landlord worsens the danger by performing the repair

negligently. Courts are split about what happens where the landlord starts the repair, then abandons it, without worsening the danger. [250-251]

6. **General negligence standard:** Courts that impose a general negligence standard on occupiers of land often impose a similar general requirement of due care upon lessors. [252]

VII. VENDORS

A. Vendor's liability: Generally, a ***seller*** of land is released from tort liability once he has turned over the property. But there are some ***exceptions:***

1. **Danger to one on the property:** First, suppose the accident happens to one ***on the property*** (e.g., a tenant of the new buyer). Here, you only have to worry about an exception (i.e., post-closing liability of seller to persons on the property) if the seller ***knew or should have known*** of the condition and its dangerousness. If that condition is satisfied, then the duration of the seller's post-closing liability varies depending on whether the seller actively ***concealed*** the danger:

   a. **Seller actively conceals:** If the seller ***actively concealed*** the condition, her liability persists after sale until the buyer ***actually discovers*** the condition and has a reasonable opportunity to correct it (whether the buyer takes the opportunity or not). So here, there's no cut off if the buyer negligently fails to discover (or fix) the problem. [253]

   b. **Seller doesn't conceal:** If the seller ***didn't actively conceal*** the condition, the seller's liability continues only until the buyer "has had ***reasonable opportunity to discover"*** the condition and correct it. In other words here, the seller's liability is ***cut off*** as soon as the buyer ***should have*** discovered and fixed the problem, even if the buyer negligently failed to actually discover it.

2. **Danger to one outside the property:** Essentially the same rules apply to a seller's post-closing liability to one ***outside the property,*** except that the seller has longer liability not only for active concealment but for having ***created*** the artificial condition. [254] Thus:

a. Seller conceals or created: If the seller ***actively concealed*** the condition, ***or originally created*** the condition, her liability persists after sale until the buyer actually discovers the condition and has a reasonable opportunity to correct it (whether the buyer takes the opportunity or not). So here, there's no cut-off if the buyer negligently fails to discover (or fix) the problem.

b. Seller doesn't conceal or create: If the seller *neither* actively concealed the condition nor S created it, the seller's liability continues only until the buyer "has had ***reasonable opportunity to discover"*** the condition and correct it. In other words, here the seller's liability is cut off as soon as the buyer should have discovered and fixed the problem, even if the M buyer negligently failed to even discover it.

CHAPTER 10
DAMAGES

I. PERSONAL INJURY DAMAGES GENERALLY

A. Actual injury required: In any action based on negligence, the existence of ***actual injury*** is required. Unlike intentional tort actions, ***nominal*** damages may ***not*** be awarded. [259]

1. Physical injury required: Furthermore, P must usually show that he suffered some kind of ***physical*** harm. [260]

> **Example:** D nearly runs P over. P suffers emotional distress, but no physical manifestation or bodily symptoms from the distress. P may not recover since P had no physical symptoms.

2. Elements of damages: But once physical harm has been proven, a variety of damages may be recovered by P. [260] These include:

a. Direct loss: The value of any direct loss of bodily functions. (***Example:*** $100,000 for the loss of a leg.)

b. Economic loss: Out-of-pocket ***economic losses*** stemming from the injury. (***Examples:*** Medical expenses, lost earnings, household attendant.)

c. Pain and suffering: ***Pain and suffering*** damages.

d. Hedonistic damages: Damages for loss of the ability to ***enjoy*** one's previous life. (***Example:*** Compensation for loss of the ability to walk, even if loss of that ability has no economic consequences.)

B. Hedonistic damages: As noted, most courts now allow a jury to award ***hedonistic damages***, i.e., damages for the loss of the ability to ***enjoy life.*** [260]

1. Consciousness required: Courts are ***split*** about whether P must be ***conscious*** of the loss in order to be able to recover damages. Some states (e.g., New York) do not allow hedonistic damages where P is in a coma. [261]

C. Future damages: P brings only ***one action*** for a particular accident, and recovers in that action not only for past damages, but also for likely ***future*** damages. [261-263]

1. Present value: When P is recovering future values, courts generally instruct the jury to award P only the ***"present value"*** of these losses. [261]

2. Periodic payments: Some states now allow D to force P to accept ***periodic payments*** in certain situations. These payments generally terminate upon P's death. [262-263]

> **Example:** In New York medical malpractice cases, where the judgment is for more than $250,000, D may pay the judgment by purchasing an annuity for P, which will terminate S on P's death.

D. Tax: Any recovery or settlement for personal injuries is ***free*** of ***federal income tax.*** [263]

E. The collateral source rule: At common law, P is entitled to recover her out-of-pocket expenses, even if P was ***reimbursed*** for these losses by some ***third party.*** This is known as the R ***"collateral source rule."*** [264-265]

> **Example:** P has hospital bills of $100,000. A health insurance policy owned by P pays every dime of this. When P sues D, and establishes liability, P may recover the whole $100,000 even though in a sense she has collected twice.

1. Statutory modifications: Nearly half the states have ***modified*** the common law collateral source rule in one way or another. [265]

2. **Subrogation:** Where the common law rule remains in effect, P may not get a windfall after all. An insurance company that makes payments to P will normally be ***subrogated*** to P's tort rights. That is, it is the insurance company, not P, who will actually collect any judgment from D up to the amount of the payments made by the insurer. [265]

F. Mitigation: P has a ***"duty to mitigate."*** That is, P cannot recover for any harm which, by exercise of reasonable care, he could have ***avoided.*** In particular, P cannot recover for any harm which would have been avoided had P sought ***adequate medical care.*** [265]

1. **Seat belt defense:** In some states, failure to use a ***seat belt*** may deprive P of recovery under the duty to mitigate — if D can show that P would not have been seriously injured had P worn a seat belt, D may escape liability for the avoidable injuries. [265]

II. PUNITIVE DAMAGES

A. Punitive damages generally: Punitive damages can be awarded to penalize a defendant whose conduct is particularly ***outrageous.*** [266]

1. **Negligence cases:** In cases of negligence (as opposed to intentional torts), punitive damages are usually awarded only where D's conduct was ***"reckless"*** or ***"willful and wanton."*** [266]

   a. **Product liability suits:** Punitive damages are also frequently awarded in ***product liability suits,*** if P shows that D knew its product was defective, or recklessly disregarded the risk of a defect.

   b. **Multiple awards:** In a product liability context, a defendant who has made many copies of a defective product may face ***multiple suits,*** each awarding punitive damages. The possibility of multiple awards by itself generally does not mean that such awards should not be made. But many courts take into account the possibility of multiple awards in fixing the amount of punitive damages in each case.

2. **Constitutional limits:** The U.S. Constitution places some — but not severe — limits on the award of punitive damages. [268]

a. Due process: A defendant might be able to show that a particular punitive damages award violated its Fourteenth Amendment ***due process*** rights.

i. Ratio of actual to punitive: One of the most important factors in whether an award of punitive damages violates due process is the ***ratio*** of the ***punitive damages*** to the ***compensatory damages.*** The higher this ratio, the more likely it is that a due process violation will be found. [267]

> **Example:** D, an insurer, refuses in bad faith to settle a claim by X against P, its policy owner. This refusal temporarily places P in fear of having to pay an excess judgment of $136,000. (D eventually pays the judgment all by itself). A state court awards P punitive damages of $145 million, on top of a $1 million compensatory award. *Held,* this award violated D's due process rights. **"Few *awards*** [significantly] exceeding a ***single-digit ratio*** between punitive and compensatory damages ... will satisfy due process." *[State Farm Mut. Auto. Insur. Co. v. Campbell]*

III. RECOVERY BY SPOUSE OR CHILDREN

A. **General action by spouse:** Most states allow the ***spouse*** of an injured person to bring an independent action for his or her own injuries. [269-270] ***(Examples:*** A spouse of the injured person may recover for loss of companionship or loss of sex.)

B. Recovery by parent: Similarly, nearly all jurisdictions allow a ***parent*** to recover ***medical expenses*** incurred due to injury to the child. Also, there may be an action for loss of companionship (e.g., the child is in a coma). [269]

C. Child's recovery: Some — but still not most — courts allow a child to recover for loss of companionship or guidance where the parent is injured. [270]

> **Note:** The discussion in paragraphs A, B and C above assumes that the victim is only injured, not killed. Where the victim is killed, the "wrongful death" statutes discussed below apply instead.

D. Defenses: In such third-party actions, generally any ***defense*** which could have been asserted in a suit brought by the injured party may be asserted against the plaintiff. [270] ***(Example:*** In a suit by Husband for loss of companionship and sex due to injuries to Wife, D may assert that Wife was comparatively negligent.)

1. **Defenses against plaintiff:** Furthermore, defenses may be asserted against the plaintiff even though these could not have been asserted in a suit brought by the victim. [270]

> **Example:** Husband drives and collides with D; Wife is injured. If Husband sues for loss of companionship, D can raise Husband's comparative negligence as a defense, even though this would not be a defense in a suit brought by Wife.

IV. WRONGFUL DEATH AND SURVIVOR ACTIONS

A. **Wrongful death distinguished from survivor:** Most states have two types of statutes which take effect when a personal injury victim dies. The "survival" statute governs whether the victim's own right of recovery continues after his death. The "wrongful death" statute governs the right of the victim's survivors (typically, spouse and children) to recover. [270]

B. Survival statutes: The ***survival*** statute in most states provides that when an accident victim p dies, his estate may sue for those elements of damages that the victim himself could have sued for had he lived. Thus a survival statute typically allows the estate to sue for pain and suffering, lost earnings prior to death, actual medical expenses, etc. In many states, if death is ***instantaneous,*** there is no survival action at all, since all damages are sustained on account of or after the death. [271]

C. Wrongful death: Most states have ***"wrongful death"*** statutes, which allow a defined group to S recover for the loss they have sustained by virtue of the decedent's death. Typically, the decedent's ***spouse*** and ***children*** are covered. If the decedent has no spouse or children, usually the M ***parents*** are covered. [271-273]

1. **Elements of damages:** In a wrongful death action, the survivors may recover for: (1) the ***economic support*** they would have received had the accident and death not occurred; and (2) usually, the companionship (including sexual companionship) and moral guidance that would have been given by the decedent. Some — but not most — states also allow the survivors to recover for ***grief.*** [272]

   a. **Recovery by parent where child is dead:** Many courts now allow a parent whose child has died to recover for the loss of companionship of that child. [272]

2. Defenses: In a wrongful death action, D may assert any defense which he would have been able to use against the decedent if the decedent was still alive and suing in her own name. [272] ***(Examples:*** The decedent's contributory negligence, assumption of risk, consent, etc. will all bar an action for wrongful death by the survivors.)

CHAPTER 11
DEFENSES IN NEGLIGENCE ACTIONS

I. CONTRIBUTORY NEGLIGENCE

A. **General rule:** At common law, the doctrine of ***contributory negligence*** applied. The doctrine provided that a plaintiff who was negligent, and whose negligence contributed proximately to his injuries, was ***totally barred from recovery.*** [277-278]

> **Example:** P, while crossing the street, fails to pay attention. D, travelling at a high rate of speed while drunk, hits and kills P. Had P behaved carefully, he would have been able to get out of the way. Even though D's negligence is much greater than P's, in a traditional contributory negligence regime P will be totally barred from recovery because of his contributory negligence.

B. Standard of care: The plaintiff was held to the ***same standard of care*** as the defendant (i.e., the care of a ***"reasonable person*** under like circumstances"). [278]

C. Proximate cause: The contributory negligence defense only applied where P's negligence ***contributed proximately*** to his injuries. The same test for "proximate causation" was used as where D's liability was being evaluated. [279]

> **Example:** On the facts of the above example, suppose that D was travelling so fast that even had P been careful, D would still have struck P. P will not be barred by contributory negligence, because his negligence was not a "but for" cause, and thus not a proximate cause, of P's injuries.

D. Claims against which defense not usable: Since the contributory negligence defense was based on general negligence principles, it could be used as a bar only to a claim that was itself based on negligence. [280-281]

1. Intentional torts: Thus the defense could not be used where P's claim is for an ***intentional tort.*** [280]

2. **Willful and wanton:** Similarly, if P's conduct was found to have been ***"willful and wanton"*** or ***"reckless,"*** the contributory negligence defense would not be allowed. (But if D's negligence was merely "gross," contributory negligence usually would be allowed.) The idea is that the defense did not apply where D disregarded a ***conscious*** risk. [280-281]

II. COMPARATIVE NEGLIGENCE

A. Definition: A ***"comparative negligence"*** system rejects the all-or-nothing approach of contributory negligence. It instead attempts to divide liability between P and D in proportion to their ***relative degrees of fault.*** P is not barred from recovery by his contributory negligence, but his recovery is reduced by a ***proportion*** equal to the ratio between his own negligence and the total negligence contributing to the accident. [281]

> **Example:** P suffers damages of $100,000. A jury finds that P was 30% negligent and D was 70% negligent. P will recover, under a comparative negligence system, $70,000 — $100,000 minus 30% of $100,000.

1. **Commonly adopted:** 46 states have replaced contributory negligence with some form of comparative negligence. So *contributory* negligence has largely been ***abandoned*** in American law.

B. "Pure" versus "50%" systems: Only 13 states have adopted "pure" comparative negligence. The rest completely bar P if his negligence is (depending on the state) ***"as great"*** as D's, or ***"greater"*** than D's. [282-283]

C. Multiple parties: Where there are ***multiple defendants,*** comparative negligence is harder to apply:

1. **All parties before court:** If all defendants are joined in the same lawsuit, the solution is simple: only the negligence due directly to P is deducted from his recovery. [283]

> **Example:** Taking all negligence by all parties, P is 20% negligent, D1 is 50% negligent, and D2 is 30% negligent. P will recover 80% of his damages.

2. **Not all parties before court:** If not all defendants are before the court, hard questions arise concerning ***joint-and-several liability.*** The issue is whether the defendant(s) before the court, who is/are found to

be only partly responsible for P's loss, must pay for the whole loss aside from that caused by P's own fault. [283-284]

> **Example:** P's accident is caused by the negligence of D and X. P sues D, but can't find or sue X. The jury finds that P was 20% responsible; D, 30% responsible; and X, 50% responsible. P's damages total $1 million. It is not clear whether P can collect the full $800,000 from D. Under traditional "joint-and-several liability" rules, P would be able to collect this full $800,000.

a. Total abolition: About 1/3 of the states have *completely abolished* the doctrine of joint and several liability in comparative negligence cases. In these states, all liability is "several." That is, each defendant is *only required to pay his or her own share* of the total responsibility. (So in such a state, P in the above example could collect only $240,000 from D, i.e., his 30% share of the overall $1 million in damages.)

b. Hybrid: An additional significant number of states have replaced traditional joint-and-several liability with some sort of ***"hybrid"*** approach, which combines aspects of joint-and-several liability and aspects of several liability. (See *supra*, C-33, for a discussion of these hybrids.)

D. Last clear chance: Courts are ***split*** about whether the doctrine of ***last clear chance*** should survive in a comparative negligence jurisdiction. [284]

E. Extreme misconduct by D: If D's conduct is not merely negligent, but ***"willful and wanton"*** or ***"reckless,"*** most states nonetheless will reduce P's damages. [284]

1. Intentional tort: But if D's tort is ***intentional,*** most comparative negligence statutes will *not* apply. [285]

F. Seat belt defense: The ***"seat belt defense"*** is increasingly ***accepted*** in comparative negligence jurisdictions. In this defense, D argues that P's injuries from a car accident could have been reduced or entirely avoided had P worn a seat belt; P's damages should therefore be reduced. [286]

1. Contributory negligence jurisdictions: In most ***contributory*** negligence jurisdictions, courts ***refuse*** to allow the seat belt defense at all. That is, P's failure to wear a seat belt does not count against his

recovery in most courts. [286]

2. **Comparative negligence jurisdictions:** But in states that have comparative negligence, the seat belt defense is more successful. There are various approaches: (1) D is liable only for those injuries that would have occurred even had P worn a seat belt; (2) D is liable for all injuries, with a reduction made equal to the percentage of P's fault; and (3) D is liable for all injuries, but P's fault reduces his recovery for those injuries that would have been avoided. [287-288]

   a. **Effect of statute:** Thirty-two states have ***mandatory*** seat belt use statutes. But the majority of these either prohibit the seat belt defense completely or make the defense almost valueless by allowing only a small reduction of damages. [288]

G. Imputed comparative negligence: Occasionally, the fault of one person (call her *A)* may by ***imputed to another*** *(B),* to as to reduce *B*'s recovery.

1. **"Both ways" rule:** But under the so-called ***"both ways" rule,*** this imputation will happen ***only*** if *B* would be vicariously liable (see *infra*, p. C-66) for A's torts. As the Third Restatement puts it, "The negligence of another person is ***imputed*** to a plaintiff ***whenever the negligence of the other person would have been imputed had the plaintiff been a defendant[.]"*** [288]

   a. **Employer/employee:** This means that if suit is brought by an ***employer*** for damages arising out of an accident involving the employer's ***employee,*** any fault by the employee will reduce the plaintiff employer's recovery.

Example: Company hires Worker to drive a delivery truck for Company's business. (Assume that Company is not negligent in selecting or training Worker for this role). Worker has a collision with a car driven by Dave, which damages Company's truck. Company sues Dave for the damage to the truck.

If Worker was negligent in driving the truck, this negligence will be imputed to Company under the "both ways" rule. That's because, if Company were the defendant in a suit by Dave, Company would have been vicariously liable for Worker's negligence under the *respondeat superior* doctrine. Therefore, in a comparative-negligence jurisdiction, Company's recovery will be reduced by the percentage of fault attributable to Worker.

   b. **Not attributed from parent to child:** Suppose a ***child is the***

plaintiff, the child's parent has contributed to the accident (e.g., by a ***failure to supervise)*** and some third party has also been negligent. The both-ways rule normally means that any fault attributable to the child's parents ***won't reduce the child's recovery against the third person.*** [289]

Example: Kid is injured in a playground accident, due in part to Guard's failure to supervise rough playing between Kid and Ted, another child. The accident is also due in part to a negligent failure of supervision by Dad, Kid's father, who is also present. Kid has suffered $10,000 in damages, and sues Guard for this sum.

Kid can collect the entire $10,000 from Guard, without reduction for any percentage of fault due to Dad. That's because: (1) Dad would not be vicariously liable for Kid's negligence if Kid were a defendant in an action brought by Ted (since parents are not vicariously liable for their children's torts); (2) consequently, under the "both ways" rule, Dad's fault won't be attributed to Kid, and can't reduce Kid's recovery against either Guard or Dad; and (3) therefore, Dad and Guard are jointly and severally liable, and Guard can be required to pay the whole amount. (Guard could then seek contribution from Dad.)

III. ASSUMPTION OF RISK

A. **Definition:** A plaintiff is said to have ***assumed the risk*** of certain harm if she has ***voluntarily consented*** to take her chances that harm will occur. Where such an assumption is shown, the plaintiff is, at common law, completely barred from recovery. [289]

B. Express assumption: If P ***explicitly*** agrees with D, in advance of any harm, that P will not hold D liable for certain harm, P is said to have ***"expressly"*** assumed the risk of that harm. [290] ***(Example:*** P wants to go bungee jumping at D's amusement park. P signs a release given to him by D in which P agrees to "assume all risk of injury" that may result from the bungee jumping. If P is injured, he will not be able to sue D, because he has expressly assumed the risk.

1. Exceptions: There are three important ***exceptions*** to the general enforceability of express agreements to assume risk:

□ first, when the party protected by the clause (typically the defendant) either ***intentionally causes*** the harm, or else brings about the harm by acting in a ***reckless or grossly negligent*** way;

□ second, when the ***bargaining power*** of the party protected by the clause is ***grossly greater*** than that of the other party, typically a status the court finds to exist only when the good or service being

offered is ***"essential"*** (e.g., the services of public carriers or public utilities);

□ finally, where the court concludes that there is some ***overriding public interest*** which demands that the court refuse to enforce the exculpatory clause.

> **Example:** Even if P signs a contract with D, her doctor, saying, "I agree not to sue you for malpractice if anything goes wrong with my operation," no court will enforce this promise, because of the overriding public interest in not shielding doctors from their own negligence for medical procedures.

[Seigneur v. National Fitness Institute, Inc.] [290]

C. Implied assumption of risk: Even if P never makes an actual agreement with D whereby P assumes the risk, P may be held to have assumed certain risks ***by her conduct.*** Here, the assumption of risk is said to be ***"implied."*** [292]

1. Two requirements: For D to establish implied assumption, he must show that P's actions demonstrated that she: (1) ***knew of the risk in question;*** and (2) ***voluntarily consented*** to bear that risk herself. [292]

> **Example:** D owns a baseball team. D posts big signs at the gates warning of the danger of foul balls. P has attended many games, and in each game buys a seat right behind home plate, a place where she and all other fans know many foul balls are hit. If P is hit by a foul ball, she will not be able to recover against D even if D negligently failed to screen the home plate area. This is because P knew of the risk in question, and voluntarily consented to bear that risk.

2. Knowledge of risk: The requirement that P be shown to have ***known*** about the risk is strictly construed. For instance, the risk must be one which was ***actually*** known to P, not merely one which ***"ought to have been"*** known to her. [292]

3. Voluntary assumption: The requirement that P consented ***voluntarily*** is also strictly construed. [293]

a. Duress: For instance, there is no assumption of the risk if D's conduct left P with ***no reasonable choice*** but to encounter a known danger.

> **Example:** P rents a room in a boarding house from D. She has to use a common bathroom at the end of a hallway. After the lease starts, a hole in the floor leading to the bathroom develops, and D negligently fails to fix it. P knows about the hole, but nonetheless steps in it while going to the bathroom. P will not be barred from

recovery by an implied assumption of risk, because D's conduct left P with no reasonable alternative but to walk down the hallway to get to the bathroom.

b. Choice not created by D: Where it is ***not D's fault*** that P has no reasonable choice except to expose herself to the risk, the defense ***will*** apply.

Example: P is injured and needs immediate medical help. She asks D — who had nothing to do with the injury — to drive her to the hospital, knowing that D's car has bad brakes. P is deemed to assume the risk of injury due to an accident caused by the bad brakes. That's because P's dilemma (does she take the ride in D's car with the bad brakes or not?) is not one that D put P into as the result of any wrongdoing by D. (But there would be *no* assumption if D had caused P's original injuries, because D would then be the cause of P's dilemma.)

4. Distinguished from contributory negligence: Often, P's assumption of risk will also constitute contributory negligence.

Example: P voluntarily, but unreasonably, decides to take her chances as to a certain risk.

a. Reasonable assumption of risk: But this is not always true: sometimes conduct that constitutes assumption of risk is *not* contributory negligence. would be *no* assumption if D had caused P's original injuries, because D would then be the cause of P's dilemma.)

Example: P, injured, asks for a ride to the hospital in D's car, which P knows had bad brakes. This is assumption of risk, even though P has behaved perfectly reasonably in view of the lack of alternatives.

b. Defense to reckless conduct: Distinguishing between assumption of risk and contributory negligence may be important where D's conduct was ***reckless:*** contributory negligence is not a defense to reckless conduct, but assumption of the risk generally is.

5. "Primary" versus "secondary" assumption: Distinguish between ***"primary"*** implied assumption of risk and ***"secondary"*** implied assumption. In the "primary" case, D is never under any duty to P at all. [295] ***(Example:*** Foul balls at a baseball game.) In the "secondary" case, D would ordinarily have a duty to P, but P's assumption of risk causes the duty to dissipate. ***(Example:*** P, injured, asks for a ride to the hospital in D's car, which P knows has bad brakes.)

a. Effect of comparative negligence statute: Where there is a ***comparative negligence*** statute, most states eliminate the "secondary" assumption doctrine, but not the "primary" assumption doctrine.

Example 1: In a comparative negligence state, P, knowing of the risk of foul balls, goes to a baseball game and is hit by one. D can still raise assumption of risk as a complete defense, because the assumption here was a primary one — it prevented D from ever having any duty to protect P from foul balls. [294]

Example 2: In a comparative negligence state, Landlord negligently allows Tenant's premises to become highly flammable, and a fire results. Tenant reenters the premises to try to rescue his child, and is injured. This is a "secondary" implied assumption of risk situation. Therefore, most courts would merge assumption of risk into comparative negligence. If Tenant behaved reasonably, his recovery will not be reduced at all. If Tenant behaved unreasonably, his recovery will be reduced only by the percentage of fault. [295]

b. Sports and recreation: Within the context of ***sports*** and ***recreation, one participant*** sometimes ***injures the other.*** If the risk of this sort of inter-participant injury is found to be "inherent" in the sport or activity, then even in a comparative negligence jurisdiction the plaintiff will not be allowed to recover against the one who injured him, on the theory that C the defendant owes no duty to the plaintiff to avoid that sort of risk. [296]

i. Ordinary carelessness: Most courts now hold that in such co-participant sports, ***ordinary carelessness*** is ***inherent*** in the game (and thus covered by "primary" assumption of risk), so that an injured co-participant may recover only if the injury was ***intentional*** or so ***reckless***ly inflicted as to be ***totally outside the range of ordinary activity in the sport.*** For a more extensive discussion, see *supra*, p. C-11.

IV. STATUTE OF LIMITATIONS

A. Discovery of injury: If P does not ***discover*** his injury until long after D's negligent act occurred, the statute of limitations may start to run at the time of the negligent act, or may instead not start to run until P discovered (or ought to have discovered) the injury. [296-297]

1. Medical malpractice: In ***medical malpractice cases,*** statutes and case law today frequently Y apply the "time of discovery" rule. [296]

Example: D performs an operation on P in 1970, and leaves a foreign object in P's body. P discovers the problem in 2008, and sues immediately. The statute of limitations is six years on tort actions. Many, probably most, states today would allow P to sue, on the theory that the statute only started to run at the earliest time P knew or should have known that the object was left in his body.

2. **Sexual assaults:** Some states also apply the "discovery" rule to toll the statute of limitations in ***sexual assault*** cases. [297]

Example: P is sexually abused by D, her father, when P is five years old. P represses the whole episode, but rediscovers it under psychoanalysis at the age of 30. A modern court might allow P to sue at age 31, on the theory that the statute of limitations was tolled until P remembered, or should have remembered, the abuse.

V. IMMUNITIES

A. **Family immunity:** The common law recognizes two ***immunities*** in the family relationship: between ***spouses,*** and between ***parent and child.*** [298-300]

1. **Husband and wife:** At common law, inter-spousal immunity prevented suits by one spouse against the other for personal injury. [298]

Examples: If W is injured while a passenger in a car driven negligently by H, W cannot sue H. If H intentionally strikes W, W cannot sue for battery.

a. **Abolition:** But over half the states have now completely ***abolished*** the inter-spousal immunity, even for personal injury suits. Other states have partially abolished it (e.g., not applicable for intentional torts, or not applicable for automobile accident suits).

2. **Parent and child:** At common law, there is an immunity that bars suit by a ***child against his parents*** or vice versa. Again, many (though not most) states have abolished this immunity, and others have limited it. [298-300]

B. **Charitable immunity:** ***Charitable organizations,*** as well as educational and religious ones, C receive immunity at common law. [300-301]

1. **Abolished:** But more than 30 states have now abolished charitable immunity. Others have cut back on the doctrine (e.g., abolished as to charitable hospitals, or abolished where there is liability insurance). [300]

C. Governmental immunity: At common law, there is ***"sovereign immunity,"*** preventing anyone from suing the ***government.*** [301-305]

1. United States: Suits against the ***federal government*** are generally allowed today, under the Federal Tort Claims Act (FTCA). But the FTCA does not allow certain types of tort suits. [301-302]

a. Discretionary function: Most important, no liability may be based upon the government's exercise of a ***discretionary or policy-making function,*** even if the discretion is abused.

Example: The U.S. government conducts underground testing of biological weapons. The tests are carried out as carefully as can be done, but the government behaves negligently in making the basic decision that such tests can be done safely. Since this high-level decision is "discretionary," P, injured by escaping gas, probably cannot sue under the FTCA.

2. State governments: State governments have traditionally had similar sovereign immunity. But most have either completely abolished that immunity, or ***waived*** it selectively. [302]

3. Local government immunity: Local government units (cities, school districts, public hospitals, etc.) have traditionally had sovereign immunity as well. [303-304]

a. "Proprietary" functions: But even at common law, where a local government unit performs a ***"proprietary"*** function, there is no immunity. Proprietary functions are ones that have not been historically performed by government, and that are often engaged in by private corporations.

Examples: The running of hospitals, utilities, airports, etc., is generally proprietary, since these are revenue-producing activities; they can therefore be the subject of suit for personal injuries. Police departments, fire departments and school systems are not proprietary, and cannot be sued at common law.

b. Abolition: In any event, most states have abolished the general local government immunity, and some that have not done so allow suits where there is liability insurance.

4. Government officials: Courts often grant ***public officials*** tort immunity, even where their public employer could be sued. [304]

Examples: Legislators and judges generally receive complete immunity, as long as their act is within the broad general scope of their duties.

CHAPTER 12
VICARIOUS LIABILITY

I. EMPLOYER-EMPLOYEE RELATIONSHIP $_c$ (RESPONDEAT SUPERIOR)

A. *Respondeat superior* doctrine: If an employee commits a tort during the ***"scope of his employment,"*** his employer will be ***liable*** (jointly with the employee). This is the rule of ***"respondeat superior."*** [314]

1. Applies to all torts: The doctrine applies to ***all*** torts, including intentional ones and those in which strict liability exists, provided that the tort occurred during the scope of the employee's employment. [314]

B. Who is an "employee": *Respondeat superior* is applied to all cases involving ***"employees,"*** but ***not*** to most cases involving ***"independent contractors."*** You must therefore distinguish between these two. [314-315]

1. Distinction: The main idea is that an employee is one who works ***subject to the close control*** of the person who has hired him. An independent contractor, by contrast, although hired to produce a certain result, is not subject to the close control of the person doing the hiring. [314-315]

a. Physical details: The "control" required to make a person an employee rather than an independent contractor is usually held to be control over the ***physical details*** of the work, not just the general manner in which the work is turned out.

> **Example:** A "newspaper boy" is likely to be an independent contractor, not an employee, because the newspaper usually controls only the general terms of employment — such as the time by which the deliveries must take place — not the physical details, such as whether the work should be done by bike or automobile.

C. Scope of employment: *Respondeat superior* applies only if the employee was acting ***"within the scope of his employment"*** when the tort occurred. The tort is within the scope of employment if the tortfeasor was acting with an ***intent to further his employer's business purpose,*** even if the means he chose were indirect, unwise or even

forbidden. [315-317]

1. **Trips from home:** Most courts hold that where an accident occurs where the employee is travelling ***from her home*** to work, she is not acting within the scope of her employment. If the employee is ***returning home*** after business, courts are divided. [315]

2. **Frolic and detour:** Even a ***detour*** or side-trip for personal purposes by an employee may be found within the scope of employment in many courts, if the deviation was "reasonably foreseeable." [317]

   Example: While D, a salesperson, is taking a two-hour trip to visit a business prospect, she makes a five-minute detour to buy a pack of cigarettes. If an accident occurred during the detour, this would probably be held to be "within the scope of employment," so that D's employer would be liable. But a two-hour detour for personal business while on a one-day trip would probably not be within the scope of employment.)

3. **Forbidden acts:** Even if the act done was expressly forbidden by the employer, it will be "within the scope of employment" if done in furtherance of the employment. [316]

   Example: D, a storekeeper, expressly orders his clerk never to load a gun while showing it to a customer. The clerk ignores this rule and loads the gun, the gun goes off and the customer is hurt. D will be liable because the loading, though forbidden, was done in furtherance of the employer's business purposes, i.e., sale of guns.

4. **Intentional torts:** The fact that the tort is an ***intentional*** one does not relieve the employer of liability. [316-317]

   Example: X is a bill collector for D. X commits assault, battery and false imprisonment on P in attempting to collect a debt. D will be liable.

   a. **Personal motives:** But if the employee merely acts from ***personal motives,*** the L employer will generally not be liable.

      Example: Nurse at D hospital has always hated P because of a prior fight. While P is in the hospital, Nurse kills P. D will not be liable, because Nurse has obviously acted from personal motives, not in an attempt to further D's business.

II. INDEPENDENT CONTRACTORS

A. No general liability: As a very general "default" rule, a person who ***hires an independent contractor*** is ***not*** generally liable for the torts of that person.However, there are a number of significant ***exceptions*** to the

no-liability general rule. [317]

1. **Distinguished from employee:** An independent contractor is one who, although hired by the employer to perform a certain job, is not under the employer's immediate control, and may do the work more or less in the manner he himself decides upon. See *supra,* C-66.

B. Exceptions to non-liability: There are two important exceptions to the rule that an employer is not liable for the torts of his independent contractor.

1. **Employer's own liability:** First, if the employer is ***herself*** negligent in her own dealings with the independent contractor, this can give rise to employer liability.

   a. **Negligent selection:** For instance, suppose the employer ***negligently selects*** an inappropriate contractor, given the requirements of the work — for instance the contractor does not have adequate *experience* in doing the type of project ***safely.*** The employer will be directly liable for her negligence in selection, and for the consequences of that negligence. [318]

   Example: Employer selects Contractor to do certain construction renovation work in Employer's store. A reasonable initial investigation by Employer of Contractor's credentials and work experience would have demonstrated that Contractor was not reasonably qualified to do the work safely. Contractor does the work negligently, and the negligent work causes physical injury to P.

   Employer is directly liable for negligently tasking Contractor to do the work, and will therefore be responsible for P's damages.

2. **Vicarious liability for non-delegable duties:** Second, there are some duties of care that are deemed so important that the delegator is liable for negligence by an independent contractor the delegator hires, even if the delegator used all due care in selecting that particular contractor. These are called ***"non-delegable duties,"*** and the delegator/employer is ***vicariously liable*** for the contractor's negligent performance of those non-delegable duties.

   a. **Most important scenarios:** Here are the most important situations in which the duty will be non-delegable and will thus lead to vicarious liability on the employer's part:

      [1] **"Peculiar risk" of harm:** The work is likely to involve a

"peculiar risk" of physical injury or property damage to others unless special precautions are taken. [319]

Example: D owns a private football stadium and the semi-professional team that plays in it. D hires Contractor to install new high-voltage lighting poles in the parking lot. D is not negligent in picking Contractor for this job, since Contractor has adequate experience and safety credentials. Contractor negligently does the work, leaving a pole in such an uninsulated condition that if someone were to touch it, they would be likely to get a high-voltage shock. P, a patron, touches the pole and is shocked.

Since there is a "peculiar risk" (i.e., a risk of a non-typical type of injury) from high-voltage electrical work that is done without adequate precautions, D will be vicariously liable for Contractor's negligence, in a suit brought by P against D. [319]

[2] **Abnormally dangerous:** The work is ***abnormally dangerous*** (i.e., ultrahazardous), so that the employer would be strictly liable if he did the work himself (see *infra*, p. C-71) rather than via the independent contractor. [319]

[3] **Land possessor:** The employer is a ***possessor or lessor of land,*** and owes a duty of care to the ***public.*** If because of that duty the employer would be liable for negligence in altering or repairing the property himself, the employer will be vicariously liable for comparable negligence committed by the contractor he selects. [320]

Example: O owns a department store. O hires Contractor (properly credentialed) to replace a broken skylight. Contractor does the work negligently. Two months after Contractor turns the repaired area back to O, the skylight falls, injuring P, a patron.

O as the owner of premises open to the public owed a duty of reasonable care to ensure the safety of customers. O will therefore be vicariously liable for the actual negligence of Contractor, since O would have been directly liable for his own negligence if O had done the work himself.

Note about while work is being done: But there's an important clarification to the above rule: it doesn't apply to the contractor's negligence during the period when the contractor is ***actively doing the work,*** and has ***taken over the details of handling of the job*** from the owner. [320]

Example: Same facts as above example. Now, however, assume that Contractor has negligently installed the skylight, but is still in physical possession of, and has responsibility, for the skylight area. (O has let Contractor deal with the details of how the work is to be done safely.) P, a customer, wanders in from an area not under Contractor's control, and is injured when the skylight falls on him. Contractor has also not posted any warning signs.

Since Contractor, not O, was in control of the daily work at the time of the accident, O won't be vicariously liable for Contractor's negligence. (Rationale: We want O to delegate the daily care to the person actually doing the work, and we don't want to encourage micromanagement and meddling by O in that work.) [320]

[4] **Public place:** The work is done in a ***"public place,"*** such as a road, sidewalk, park, etc.

Example: LightingCo hires Contractor to repair a street light (on a public street) that LightingCo. owns and is responsible for illuminating. Contractor negligently does the work, and the streetlight fails soon after. P steps in a pothole which he would have seen had the streetlight been working. Since LightingCo. had the responsibility for maintaining the streetlight in a public place, it is vicariously liable for Contractor's negligence in doing the contracted-for maintenance work. [320]

III. JOINT ENTERPRISE

A. Generally: A ***"joint enterprise,"*** where it exists, may subject each of the participants to vicarious liability for the other's negligence. A joint enterprise is like a partnership, except that it is for a short and specific purpose (e.g., a **trip).** [321-321]

1. Use in auto cases: The doctrine is used most often in ***auto accident cases.*** The negligence of the driver is imputed to the passenger (either to allow the occupant of a second car to recover against the passenger, or to prevent the passenger from recovering against the negligent driver of the other car under the doctrine of imputed contributory negligence). [321]

B. Requirements for joint enterprise: There are four requirements for a joint enterprise: (1) an ***agreement,*** express or implied, between the members; (2) a ***common purpose*** to be carried out by the members; (3) a ***common pecuniary interest*** in that purpose; and (4) an equal right to a ***voice*** in the enterprise, i.e., an equal right of control. [321]

IV. AUTO CONSENT STATUTES, THE "FAMILY PURPOSE" DOCTRINE AND BAILMENT

A. **Consent statutes:** About one quarter of the states have enacted statutes, called ***"automobile consent statutes,"*** which provide that the owner of an automobile is ***vicariously liable*** for any negligence committed by one using the car with the owner's ***permission.***

B. **Automobile insurance omnibus clause:** The need for automobile consent statutes is eliminated, in many states, by the fact that the standard ***automobile liability insurance policy*** covers not only the named insured (usually the head of household, who is also generally the owner or co-owner of the automobile), but also any ***member*** of the named insured's household, and any other person who ***uses*** the automobile with the consent of the insured. So the user of the car becomes financially responsible himself, making liability on the part of the owner unnecessary (at least up to the policy limits. [322]

C. Judge-made doctrines: A number of ***judge-made doctrines*** accomplish the same objective of making the car owner vicariously liable for the negligence of one she permitted to use the car.

1. **Joint enterprise:** Often the ***joint enterprise*** doctrine *(supra*, C-69), can be used to make one member of the enterprise (e.g., the vehicle owner) vicariously liable for the negligence of another member (e.g., the driver).

2. **Family purpose doctrine:** Another important judge-made doctrine is the ***"family purpose doctrine."*** The doctrine, in force in about 12 states, provides that a car owner who lets ***members of her household*** drive her car for their own personal use has done so in order to further a "family purpose" or family objective, and is therefore vicariously liable. (The doctrine is also sometimes called the ***"family car"*** doctrine.)

D. Bailments: In the absence of a consent statute (and assuming the family purpose doctrine doesn't apply), the mere existence of a ***bailment*** does ***not*** make the bailor vicariously liable for the bailee's negligence. [323]

> **Example:** D lends his shotgun to X. X, while hunting in the woods, negligently fires without noticing P nearby. Even though D is a bailor (he has lent his personal property to X), D does not thereby become vicariously liable for X's negligent use of the bailed property.

1. **Negligence by bailor:** But the bailor may, of course, be negligent herself in entrusting a potentially dangerous instrument to the bailee where she ***should know that the latter may use it unsafely.*** In this situation, the claim is directly against the bailor for ***"negligent entrustment,"*** and there is no vicarious liability. [323]

Example: In the above example, if D knew that X often hunted while drunk, D's act of entrusting the shotgun to X might itself be negligent, in which case D would be directly (not vicariously) liable to P for the injuries caused by X.

CHAPTER 13
STRICT LIABILITY

I. STRICT LIABILITY GENERALLY

A. Generally: Apart from the special situation of defective products, there are three major contexts in which D can have ***"strict liability"*** — that is, liability regardless of D's intent and regardless of whether D was negligent. We examine those contexts in this chapter. They are:

- □ strict liability for keeping ***wild or other dangerous animals;***
- □ strict liability for carrying out ***abnormally dangerous*** (or ***"ultrahazardous") activities;*** and
- □ strict liability on the part of an employer for the ***employee's on-the-job injuries,*** a liability that is enforced by ***"workers compensation"*** statutes enacted in all states.

II. ANIMALS

A. **Trespassing animals:** In most states, the owner of livestock or other animals is liable for property damage caused by them if they ***trespass*** on another's land. This liability is "strict" — even though the owner exercises utmost care to prevent the animals from escaping, he is liable if they do escape and trespass. [330]

B. Non-trespass liability: A person is also strictly liable for non-trespass damage done by any ***"dangerous animal"*** he keeps. [330] But if D knew or had reason to know that the dog sometimes attacks people, he would be liable.)

1. Wild animals: A person who keeps a ***"wild"*** animal is strictly liable for all damage done by it, as long as the damage results from a ***"dangerous propensity"*** that is typical of the species in question. ***(Example:*** D keeps a lion cub, which has never shown any violent tendencies. One day, the cub runs out on the street and attacks P. Even if D used all possible care to prevent the cub from escaping, he is liable for P's injuries, because the cub is a wild animal and the

damage resulted from a dangerous propensity typical of lions, that they can attack without warning.) [330]

2. **Domestic animals:** But injuries caused by a ***"domestic"*** animal such as a cat, dog, cow, pig, etc., do not give rise to strict liability unless the owner ***knows*** or has ***reason to know*** of the animal's dangerous characteristics. [330] ***(Example:*** Same facts as above example, except that the animal is a dog. If the dog has never attempted to bite anyone before, D is not liable.

III. ABNORMALLY DANGEROUS ACTIVITIES

A. General rule: A person is strictly liable for any damage which occurs while he is conducting an ***"abnormally dangerous"*** activity. [332-333]

1. **Six factors:** Courts generally consider six factors in determining whether an activity is "abnormally dangerous":
   [1] there is a ***high degree of risk*** of some harm to others;
   [2] the harm that results is likely to be ***serious;***
   [3] the risk ***cannot be eliminated*** by the exercise of reasonable care;
   [4] the activity is ***not common;***
   [5] the activity is not ***appropriate*** for the place where it is carried on; and
   [6] the danger outweighs the activity's ***value*** to the ***community.*** [332]

2. **Requirement of unavoidable danger:** Probably the single most important factor is that the activity be one which ***cannot be carried out safely,*** even with the exercise of reasonable care. [302]

   Example: D, a construction contractor, carries out blasting operations with dynamite, to excavate a foundation. D uses utmost care. However, a piece of rock is thrown out of the site during an explosion, striking P, a pedestrian on the street. Blasting is an abnormally dangerous activity, in part because it cannot be conducted with guaranteed safety. Therefore, D will be strictly liable for the injury to P.

B. Examples: Here are some types of activities that are generally held to be abnormally dangerous:

1. **Nuclear reactor:** Operation of a ***nuclear reactor*** [333];
2. **Explosives:** The use or storage of ***explosives*** (see above example) [334];
3. **Crop dusting:** The conducting of ***crop dusting*** or spraying [335];
4. **Airplane accidents:** There usually is *not* strict liability in suits by passengers for ***airplane accidents.*** Therefore, in a suit by the estate of a passenger against the airline, the plaintiff must show negligence. (But most courts do impose strict liability for ground damage from airplane accidents.)
5. **Use of firearms:** Similarly, the use of ***firearms*** is usually found ***not*** to be abnormally dangerous, because they can be used very safely if good techniques are employed. [335-336]

IV. LIMITATIONS ON STRICT LIABILITY

A. Scope of risk: There is strict liability only for damage which results from the ***kind of risk*** that made the activity abnormally dangerous. [337-338]

> **Example:** D operates a truck carrying dynamite, and the truck strikes and kills P. P must show negligence. Transporting dynamite may be ultrahazardous, but P's death has not resulted from the kind of risk that made this activity abnormally dangerous.

1. **Abnormally sensitive activity by plaintiff:** A related rule is that D will not be liable for his abnormally dangerous activities if the harm would not have occurred except for the fact that P conducts an ***"abnormally sensitive"*** activity. [337]

> **Example:** D's blasting operations frighten female mink owned by P; the mink kill their young in reaction to their fright. D is not strictly liable, because P was conducting an abnormally sensitive activity. *[Foster v. Preston Mill Co.*]

B. Contributory negligence no defense: Ordinary ***contributory negligence*** by P will usually *not* bar her from strict liability recovery. [338]

1. **Unreasonable assumption of risk:** But ***assumption of risk*** is a defense to strict liability. Thus if P ***knowingly and voluntarily*** subjects herself to the danger, this will be a defense, whether P acted reasonably or unreasonably in doing so. [339]

Example: P, an independent contractor, agrees to transport dynamite for D. P understands that dynamite can sometimes explode spontaneously. If such an accident occurs, P cannot recover from D in strict liability, because P has assumed the risk; this is true whether P acted reasonably or unreasonably.

V. WORKERS' COMPENSATION

A. Generally: All states have adopted ***workers' compensation*** (WC) statutes, which compensate the employee for ***on-the-job*** injuries without regard either to the employer's fault or the employee's. [339-343]

1. No fault: The employer is liable for on-the-job injuries even though these occur ***completely without fault*** on the part of the employer. Even if the employee is contributorily negligent, the statutory benefits are not reduced at all. [340]

2. Arising out of employment: A typical statute covers injuries arising out of and in the ***course of employment.*** Thus activities which are purely personal (e.g., injuries suffered while the employee is travelling to or from work) are typically not covered. [340]

3. Exclusive remedy: The WC statute is the employee's ***sole remedy*** against the employer. The employee gives up his right to sue in tort, and does not recover anything for ***pain and suffering.*** [341]

a. Intentional wrongs: But if P can show that the employer ***intentionally*** injured him, the employee may pursue a common-law action.

Example: A few cases have allowed the employee to sue where the employer has wilfully disregarded safety regulations. But most have held that the employer's failure to observe safety regulations or to keep equipment in good repair does not amount to an intentional act, and thus does not permit the employee to escape WC as the sole remedy.

b. Third parties: The WC statute does not prevent the worker from suing a ***third party*** who, under common-law principles, would be liable for the worker's injuries.

Example: At P's job, P uses a machine manufactured by D and sold by D to Employer. If P is injured on the job, he cannot bring a common law action against Employer, but can bring a product liability suit at common law against D.

CHAPTER 14
PRODUCTS LIABILITY

I. INTRODUCTION

A. Three theories: "Product liability" refers to the liability of a seller of a tangible item which, because of a defect, causes injury to its purchaser, user, or sometimes bystanders. [349] Usually the injury is a personal injury. The liability can be based upon any of three theories:

1. ***Negligence;***
2. *Warranty;*
3. *"Strict tort liability."*

II. NEGLIGENCE

A. Negligence and privity: Ordinary negligence principles apply to a case in which personal injury has been caused by a carelessly manufactured product. [348]

> **Example:** D, a car manufacturer, carelessly fails to inspect brakes on a car that it makes. P buys the car directly from D, and crashes when the brakes don't work. P can recover from D under ordinary negligence principles.

1. Privity: Historically, the use of negligence in product liability actions was limited by the requirement of ***privity,*** i.e., the requirement that P must show that he contracted ***directly*** with D. But every state has now ***rejected*** the privity requirement where a negligently manufactured product has caused personal injuries. It is now the case that ***one who negligently manufactures a product is liable for any personal injuries proximately caused by his negligence.***

[348-349]

> **Example:** D manufactures a car, and negligently fails to make the brakes work properly. D sells the car to a dealer, X, who resells to P. While P is driving, the car crashes due to the defective brakes. P may sue D on a negligence theory, even though P never contracted directly with D.

a. Bystander: Even where P is a ***bystander*** (as opposed to a purchaser or other user of the product), P can recover in negligence if he can show that he was a "foreseeable plaintiff."

> **Example:** A negligently manufactured car driven by Owner fails to stop due to defective brakes, and smashes into P, a pedestrian. P can sue the manufacturer on a negligence theory.

B. Classes of defendants: Several different classes of people are frequently defendants in negligence-based product liability actions:

1. **Manufacturers:** The manufacturer is the person in the distribution chain most likely to have been negligent. He may be negligent because he: (1) carelessly ***designed*** the product; (2) carelessly ***manufactured*** it; (3) carelessly performed (or failed to perform) reasonable ***inspections*** and tests of finished products; (4) failed to package and ship the product in a reasonably safe way; or (5) did not take reasonable care to obtain quality ***components*** from a reliable source. [349-350]

2. **Retailers:** A ***retailer*** who sells a defective product may be, but usually is *not,* liable in negligence. The mere fact that D has sold a negligently manufactured or designed product is ***not by itself*** enough to show that she failed to use due care. The retailer ordinarily has ***no duty to inspect*** the goods. Thus suit against the retailer is now normally brought on a warranty or strict liability theory, not negligence. [350-351]

3. **Other suppliers:** ***Bailors*** of tangible property (e.g., rental car companies), ***sellers*** and ***lessors*** of real estate, and suppliers of product-related ***services*** (e.g., hospitals performing blood transfusions) may all be sued on a negligence theory. [351]

III. WARRANTY

A. **General:** A buyer of goods which are not as they are contracted to be may bring an action for ***breach of warranty.*** The law of warranty is mainly embodied in the ***Uniform Commercial Code*** (UCC), in effect in every state except Louisiana. There are two sorts of warranties, ***"express"*** ones and ***"implied"*** ones. [351]

B. Express warranties: A seller may ***expressly represent*** that her goods have certain qualities. If the goods turn out not to have these qualities, the purchaser may sue for this breach of warranty.

[352-353]

> **Example:** D, a car dealer, promises that a particular car has "shatterproof glass." While P is driving the car, a pebble hits the windshield, shatters the glass, and damages P's eyes. P can sue D for breach of the express warranty that the glass would be shatterproof. *[Baxter v. Ford Motor Co.*]

1. **UCC:** UCC §2-313 gives a number of ways that an express warranty may arise: (1) a statement of ***fact*** or promise about the goods; (2) a ***description*** of the goods (e.g., "shatterproof glass"); and (3) the use of a ***sample or model.*** [352]

   a. **Privity:** There is usually ***no*** requirement of ***privity*** for breach of express warranty.

      Example: D manufactures a car, and prepares a brochure stating that the glass is "shatterproof." D sells the car to Dealer, who resells it to P. P never reads the brochure, and is injured when the glass is not shatterproof. P can recover against D for breach of express warranty, because there is no privity requirement, and D's statement was addressed to the public at large.

2. **Strict liability:** D's liability for breach of an express warranty is ***a kind of strict liability —*** as long as P can show that the representation was not in fact true, it does not matter that D reasonably believed it to be true, or even that D could not possibly have known that it was untrue. [353]

C. **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. [353-357]

1. **Warranty of merchantability:** The UCC imposes several implied warranties ***as a matter of law.*** Most important is the warranty of ***merchantability.*** Section 2-314(1) provides that ***"a warranty that goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind."*** [353-354]

   a. **Meaning of "merchantable":** To be ***merchantable,*** the goods must be "fit for the ordinary purposes for which such goods are used."

      Example: A car which, because of manufacturing defects, has a steering wheel that does not work, is not "merchantable," since it is not fit for the ordinary purpose — driving — for which cars are used.

   b. **Seller must be a merchant:** The UCC implied warranty of merchantability arises only if the seller is a ***"merchant with respect to goods of that kind."*** Thus the seller must be ***in business*** and must regularly sell the ***kind of goods*** in question.

Examples: A consumer who is reselling her car does not make any implied warranty of merchantability; nor does a business person who is selling a piece of equipment used in that person's business rather than held in inventory.

2. **Fitness for particular purposes:** A second UCC implied warranty is that the goods are ***"fit for a particular purpose."*** Under §2-315, this warranty arises where: (1) the seller knows that the buyer wants the goods for a particular (and not customary) purpose; and (2) the buyer ***relies on the seller's judgment*** to recommend a suitable product. [354]

   Example: Consumer tells Shoe Dealer that he wants a pair of shoes for mountain climbing. Dealer recommends Brand X as having good traction. If the shoes don't have good traction, and Consumer falls, he can sue Shoe Dealer for breach of the implied warranty of fitness for a particular purpose.

3. **Privity:** States have nearly all ***rejected*** any ***privity*** requirement for the implied warranties. [354-356]

   a. **Vertical privity:** Thus ***"vertical"*** privity is not required. In other words, a manufacturer's warranty extends to ***remote purchasers*** further down the line.

      Example: Manufacturer sells a widget to Distributor, who sells to Dealer, who sells to Owner. Owner resells to Buyer. Buyer is injured when the widget does not behave merchantably. In all states, Buyer can sue Manufacturer, despite the lack of any contractual relationship between Buyer and Manufacturer.

   b. **Horizontal privity:** Similarly, ***"horizontal"*** privity is usually not required. In all states, any member of the ***household*** of the purchaser can recover if the member uses the product. In most states, ***any*** user, and even any foreseeable ***bystander,*** may recover.

D. Warranty defenses: Here are three ***defenses*** unique to warranty claims:

1. **Disclaimers:** A seller may, under the UCC, ***disclaim*** both implied and express warranties. [357-358]

   a. **Merchantability:** A seller may make a written disclaimer of the warranty of merchantability, but only if it is ***"conspicuous"*** (e.g., in capital letters or bold print). Also, the word "merchantability" must be specifically mentioned. (Also, the circumstances may give rise to an implied disclaimer, as where used goods are sold ***"as is."***)

2. **Limitation of consequential damages:** Sellers may try to ***limit the***

remedies available for breach (e.g., "Our sole remedy is to repair or replace the defective product"). But in the case of goods designed for personal use ("consumer goods"), limitation-of-damages clauses for ***personal injury*** are automatically ***unconscionable*** and thus unenforceable. UCC §2-719(3). [357]

E. Where warranty useful: Generally, any plaintiff who could bring a warranty suit will fare better with a strict liability suit. But there are a couple of exceptions:

1. **Pure economic harm:** If P has suffered only ***pure economic harm,*** he will usually do better suing on a breach of warranty theory than in strict liability. For instance, loss of profits is more readily recoverable on a warranty theory. [358]

2. **Statute of limitations:** The ***statute of limitations*** usually runs sooner on a strict liability claim than on a warranty claim. [358]

IV. STRICT LIABILITY

A. General rule: Nearly all states apply the doctrine of ***"strict product liability."*** The basic rule is that a ***seller*** of a product is ***liable without fault*** for personal injuries (or other physical harm) caused by the product if the product is sold in a ***defective condition.*** Once a defect is shown to have existed, the seller is liable even though he used all possible care, and even though the plaintiff did not buy the product from or have any contractual relationship with the seller. [359]

> **Example:** Manufacturer makes a car with defective brakes. Manufacturer sells that car to Dealer, who resells it to Owner, who resells it to Consumer. Consumer is injured when the car crashes because the brakes don't work. Consumer can recover from Manufacturer in "strict tort liability," by showing that the brakes were in a defective condition unreasonably dangerous to users at the time the car left the plant. This is true even though Manufacturer used all possible care in designing and building the car, and even though Consumer never contracted with Manufacturer.

1. **Non-manufacturer:** Strict product liability applies not only to the product's manufacturer, but also to its ***retailer,*** and any other person in the distributive train (e.g., a wholesaler) who is in the business of selling such products. [359] ***(Example:*** On the above example, Consumer can recover against Dealer, even though Dealer merely resold the product and behaved completely carefully.)

2. **Manufacturing, design and failure-to-warn defects:** There are three different types of defects that may exist: (1) a ***manufacturing*** defect; (2) a ***design*** defect; and (3) a ***warning*** defect. It's important to decide which type of defect is or may be at issue, because there are different rules of law governing what constitutes a defect of each type. Here's a brief summary of what each type of defect looks like:

   a. **Manufacturing:** In a ***manufacturing*** defect, a particular instance of the product is different from — and more dangerous than — all the others, because the product ***deviated from the intended design.***

      Example: D makes a bicycle which, because of an air bubble that gets into its front fork during manufacture, has an invisible crack that causes the fork to break while P is riding it. This is a manufacturing defect — this bike is different from the other bikes of the same model, in an unintended way.

   b. **Design:** In a ***design*** defect, all of the similar products manufactured by D are ***the same,*** and they all bear a feature whose design is itself defective, and unreasonably dangerous.

      Example: D makes a particular model step-ladder that, when more than 150 lbs. is placed on it, is likely to crack because the wood used is a poor grade. This is a design defect — all the ladders of this model have the same poor wood and the same risk of breakage when used for the intended purpose.
      Design defects are discussed beginning on p. C-80.

   c. **Warning:** In a ***failure-to-warn*** case, the maker has neglected to give a warning of a danger in the product (or in a particular use of the product), and this lack of a warning makes an otherwise-safe product unsafe.

      Example: D, a prescription drug maker, fails to warn users that the drug causes a serious allergic reaction in 2% of the people who take it.

      Failure to warn is discussed beginning on p. C-82.

B. What product meets test: A product gives rise to strict liability only if it is ***"defective"*** [360-361]

1. **Meaning of "defective":** In the usual case of a manufacturing (as opposed to design) defect, a product is "defective" if the product ***"departs from its intended design*** even though ***all possible care was exercised*** in the preparation and marketing of the product." (Rest. 3d.) [361].

C. Unavoidably unsafe products: A product will not give rise to strict liability if is ***unavoidably unsafe,*** and its benefits outweigh its dangers. [362]

1. Prescription drugs: For instance, a ***prescription drug*** is not "defective" merely because it causes some side effects and may in an individual case cause more damage than it cures. This is also true of ***vaccines.*** In fact, under the new Third Restatment rule, drugs, vaccines, and medical devices will be non-defective (unavoidably unsafe) as long as there is ***even a single group of patients*** for whom the product's benefits outweigh its harms. [363]

a. Consequence: This seems to mean that as long as the drug has a net benefit for one group of patients, the maker doesn't need to make the drug as safe as it could be with reasonable effort! For this reason, many courts have ***rejected*** the Third Restatement drug rule as extreme, and require manufacturers to make reasonable efforts to make the drug as safe as possible. [364]

D. Unknowable dangers: Similarly, if the danger from the product's design was ***"unknowable"*** at the time of manufacture, there will be no liability. See Rest. 3d: a design defect will exist only "when the ***foreseeable*** risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design" — so if the risk of harm from the design is unknowable at the time of manufacture, there was no "foreseeable risk" and thus no design-defect liability. [364]

1. Failure to warn: Similarly, there can be no ***"failure to warn"*** liability (see *infra*, p. C-82) for a danger whose existence was unknowable at the time of manufacture.

E. Food products: Where the product is ***food,*** most courts apply a ***"consumer expectations"*** test. Under that test, the food product is defective if and only if it contains an ingredient that ***a reasonable consumer would not expect it to contain.***

> **Example:** D manufactures a chicken enchilada. P, a consumer, chokes on a chicken bone in the enchilada. Under the prevailing view, the bone constitutes a "defect" if and only if a reasonable consumer in P's position would not have expected to find a bone in a chicken enchilada. (But in a minority of courts, P would lose because the bone was "natural" for that type of food product, even though a reasonable consumer

might not expect to find the bone there.)

F. Obvious dangers: The fact that a danger is ***"obvious"*** may have an impact on whether the product is deemed defective, and thus on whether D is liable. The treatment of obviousness depends on whether the defect is a manufacturing defect, a design defect, or a failure to warn. [365-367]

1. **Manufacturing defect:** Where the defect is a ***manufacturing*** defect, the fact that the danger or defect is obvious probably ***won't*** block P from recovering (though under comparative fault — generally applicable in products liability cases, see *infra*, p. C-87 — it might reduce P's recovery).

   Example: D makes a can of tuna fish, which contains a sliver of metal in it. P fails to notice the metal and is injured when he swallows it. Even if an ordinary consumer would spot the metal and not eat it, the "obviousness" of the danger won't stop the product from being defective, and P will be able to recover.

2. **Design defect:** If what's alleged is a ***design*** defect, under the modern view the obviousness of the defect is a ***factor*** bearing upon liability, but it ***doesn't automatically*** mean that P can't recover. Instead, the question is whether the design's ***benefits outweigh its dangers,*** considering possible alternative designs — if the answer is "no," P can recover even though the dangers were obvious.

   Example: Suppose that D manufactures cigarettes using a particular type of tobacco and a particular curing process, that produces very high tar and nicotine, and thus high risk of cancer. P gets cancer from smoking D's cigarettes. Even if P was perfectly aware of how dangerous D's cigarettes were, this fact won't (in most courts) bar the court from finding that the cigarettes were "defective" and thus from allowing P to recover in products liability.

   So, for instance, if P can show that a cigarette made with a different process would taste as good and have less cancer risk, P could win. (But the test will be a cost-benefit analysis: if P shows merely that a safer cigarette could have been made by reducing the elements that give the cigarette the flavor that most smokers expect, D's process won't be found to be "defective" and P will lose, since the safer cigarette won't have the same "benefits" as D's dangerous one.)

3. **Failure-to-warn:** If the defect or danger is obvious, this will normally ***prevent failure-to-warn liability.*** That's because if P is actually aware of the obvious danger the warning won't add anything, and if P isn't aware of the obvious danger he's unlikely to notice or

respond to the warning either. [366]

G. Proving the case: P in a strict liability case must prove a number of different elements:

- ☐ that the item was ***made or sold by the defendant;***
- ☐ that the product was ***defective;***
- ☐ that the defect ***caused*** the plaintiff's injuries; and
- ☐ that the defect ***existed*** when the product ***left the defendant's hands.***

We consider each element in turn.

1. **Manufacture or sale by defendant:** P must show that the item was in fact manufactured, or sold, by the defendant. [367]

2. **Existence of defect:** P must show that the product was ***defective.*** [367-368]

   a. Subsequent remedial measures: Most courts ***do not*** allow defectiveness to be proved by evidence that D subsequently ***redesigned*** the product to make it safer.

   b. Toxic torts: In the case of a ***"mass toxic tort,"*** plaintiffs often use ***epidemiological*** evidence of defectiveness.

   Example: To prove that the pregnancy drug DES causes cancer, P offers expert testimony that daughters of women who took DES in pregnancy have a much higher incidence of cancer than those whose mothers did not. This is admissible evidence of defect Y and causality.

3. **Causation:** P must show that the product, and its defective aspects, were the ***cause in fact,*** and the ***proximate cause,*** of her injuries. [369-370]

   a. Epidemiology: In ***toxic tort*** cases, causation will often be the key element in controversy. Plaintiffs in such cases often attempt to prove this element, like existence of a "defect," by ***epidemiological*** evidence. [370-372]

      i. "General" vs. "specific" causation: Courts often use the terms ***"general" and "specific" causation*** in toxic tort cases: general causation is a substance's tendency to increase the general incidence of a given disease, and specific causation is

the substance's having caused plaintiff's own disease.

ii. **Specific causation required:** Courts normally require ***proof of specific causation*** as part of the plaintiff's prima facie case. However, if plaintiff's only direct proof on the causation issue is proof of general causation, courts will nonetheless permit the jury to ***infer*** specific causation if the proof of general causation is sufficiently strong, so long as there is also some evidence that the plaintiff was ***actually exposed*** to the agent.

Example: P suffers from a rare cancer. In a suit against D, the maker of a drug called DES, P shows that her mother took DES while pregnant with P. P presents expert testimony showing that daughters of women who took DES in pregnancy are 10 times as likely to get that form of cancer as those whose mothers did not. This proof of "general causation" would probably suffice to allow the jury to infer that DES was the specific cause of P's cancer.

iii. **The "doubling" rule:** Many courts impose the so-called ***"doubling rule":*** the jury will be permitted to infer specific causation if and only if P shows that the agent ***more than doubles the incidence of the disease*** in the population as a whole. These courts reason that without a doubling, it is not "more likely than not" (the relevant prepon-derance-of-the-evidence standard) that the agent caused P's particular disease. [371]

4. Defect existed in hands of defendant: Finally, P must show that the defect existed ***at the time the product left D's hands.*** [369]

a. ***Res ipsa:*** But an inference similar to ***res ipsa loquitur*** is permitted — once P shows that the product did not behave in the usual way, and the manufacturer fails to come forward with evidence that anyone else tampered with it, the requirement of defect in the hands of defendant is satisfied.

H. Bystanders and other non-user plaintiffs: ***Any person who is injured*** due to a dangerously defective product may recover, even if the plaintiff never bought the product. Thus ***family members of buyers, bystanders,*** even ***rescuers,*** may all recover if their injuries are proximately caused by the defect in the product. As the idea is sometimes put, ***"privity"*** is ***not required*** for strict product liability. [372]

Example: Consumer buys a car from Dealer. The steering wheel fails due to a manufacturing defect, causing the car to swerve and hit Ped, a pedestrian walking on the sidewalk. Ped can recover from Dealer in strict product liability, because his physical injuries were Y proximately caused by a defective product sold by Dealer. The fact that neither Ped nor any member of his family ever purchased the product in question doesn't matter.

V. DESIGN DEFECTS

A. **Definition of "design defect":** A ***"design defect"*** must be distinguished from a "manufacturing defect." In a design defect case, all the similar products manufactured by D are the same, and they all bear a feature whose design is itself defective, and unreasonably dangerous. [372]

B. Negligence predominates: Most design defect claims have a heavy ***negligence*** aspect, even though the complaint claims strict liability. As the 3d Restatement puts it, a product has a defective design "when the ***foreseeable risks of harm posed*** by the product ***could have been reduced or avoided by the adoption of a reasonable alternative design*** by the seller or other distributor . . . and the omission of the alternative design ***renders the product not reasonably safe."*** [373]

1. **Practical other design:** So P must show that there was a ***"reasonable alternative design" (RAD).*** In deciding whether P's proposed alternative qualifies as an RAD, the court will consider the cost and utility of the alternative, compared with the ***cost and utility*** of D's design.

   Example: D makes a bullet-proof vest, the Model 101, that covers only the wearer's front and back, not sides. P, a police officer, is shot in the side while wearing D's vest. At trial, P says that a design with side protection was an RAD, and that the no-sides design is therefore "defective." Suppose that the side-protection design would have weighed five pounds more and cost twice as much. A court is likely to conclude that the side-protection design is not an RAD, because its cost-benefit ratio is not clearly superior to the Model 101's, since many wearers would prefer the lighter cheaper design over the greater protection. [374]

C. Types of claims: Two types of common design-defect claims are as follows:

1. **Structural defects:** P shows that because of D's choice of materials, the product had a ***structural weakness,*** which caused it to break or otherwise become dangerous. [377]

2. **Lack of safety features:** P shows that a ***safety feature*** could have

been installed on the product with so little expense (compared with both the cost of the product and the magnitude of the danger without the feature) that it is a defective design not to install that feature. [377]

a. State of the art: D will be permitted to rebut this by showing that competitive products similarly lack the safety feature. This is the ***"state of the art"*** defense. But such a showing will ***not*** be ***dispositive*** — the trier of fact is always free to conclude that all products in the marketplace are defective due to lack of an easily-added feature.

D. Suitability for unintended uses: D may be liable not only for injuries occurring when the product is used as intended, but also for some types of injury stemming from ***unintended uses*** of the product. [378-379]

1. Unforeseeable misuse: If the misuse of the product is ***not reasonably foreseeable,*** D has no duty to design the product so as to protect against this misuse. [378]

2. Foreseeable misuse: But if the misuse is ***reasonably foreseeable*** by D, D must take at least reasonable design precautions to guard against the danger from that use. (Alternatively, a ***warning*** to the purchaser against the misuse may sometimes suffice.) [378]

> **Example:** A car is not "intended" to be used in a collision, and most collisions are in a R sense "misuse" of the product. Nonetheless, a car manufacturer must design a reasonably Y ***crashworthy*** vehicle if it is feasible to do so, because collisions are reasonably foreseeable.

E. Military products sold to and approved by government: If a product is ***sold*** to the ***U.S. government*** for ***military use,*** and the government ***approves*** the product's specifications, the manufacturer will generally be immune from product liability even if the design is grossly negligent. *[Boyle v. United Technologies Corp.]* [380]

F. Regulatory compliance defense: Suppose the manufacturer has ***complied with federal or state regulations*** governing the design of the product. At common law, this compliance does ***not*** absolve D of product liability — regulatory compliance is an item of ***evidence*** that the jury may consider, but it is not dispositive. [380]

1. Labeling: Thus if government requires that a substance be ***designed***

or ***labeled*** in a particular way, and the manufacturer follows that requirement, under the common-law approach P may still be able to bring a product liability suit on the theory that the design or labeling was inadequate and constituted a design defect.

a. Preemption: But if the design or labelling requirement was imposed by ***Congress,*** and the court finds that Congress intended to ***preempt*** the states from requiring stricter or different designs or warning labels, then D has a defense. For more about preemption, see C-88 *infra*.

VI. DUTY TO WARN

A. Significance of the duty to warn: The ***"duty to warn"*** is essentially an ***extra*** obligation placed on a manufacturer. [382-383]

1. **Manufacturing defect:** Thus if a product is ***defectively manufactured, no warning can save D from strict liability.*** [382]

2. **Design defect:** Similarly, if a product is ***defectively designed,*** a warning will generally ***not*** shield D from strict product liability. [382]

3. **Properly manufactured and designed product:** If a product is ***properly designed*** and ***properly manufactured,*** D must nonetheless give a warning if there is a ***non-obvious*** risk of personal injury from using the product. Similarly, in this situation, D may be liable for not giving ***instructions concerning correct use,*** if a reasonable consumer might misuse the product in a foreseeable way. [382]

   Examples: Prescription drugs, even when properly designed and properly manufactured, U must contain warnings about side effects. Similarly, a household utility like a lawn L mower, if it poses a non-obvious risk of personal injury such as cutting a foot, must contain instructions concerning correct use.

B. Risk-utility basis: Liability for failure-to-warn is usually based on a negligence-like ***risk-utility analysis.***

1. **Restatement Third approach:** Thus under the Third Restatement, a product will be deemed defective on account of "inadequate instructions or warnings" "when the ***foreseeable risks of harm*** imposed by the product could have been reduced or avoided by the provision of ***reasonable instructions or warnings*** . . . and the omission of the instructions or warnings renders the product ***not***

reasonably safe." This sounds very much like the traditional negligence standard, used here to determine what warnings must be given.

C. Drug cases: The most common category of failure-to-warn cases involves ***prescription drugs.***

1. Learned intermediary doctrine: Most courts, and the Third Restatement, recognize a defense that makes the manufacturer's duty to warn in prescription drug cases easier-to-satisfy: the ***"learned intermediary"*** defense. Where the defense is allowed, the manufacturer's duty is generally limited to warning the ***prescribing physician*** rather than the patient. The physician is viewed as a "learned [i.e., highly trained] intermediary" between the manufacturer and the user; the rationale is that the physician is, in most cases, in the best position to decide whether a drug should be prescribed and when and how its risks should be disclosed.

[384]

a. Restatement adopts: The Third Restatement basically ***applies*** the learned intermediary rule as the default rule. The Restatement imposes failure-to-warn liability on a drug or medical device maker only if ***"reasonable instructions or warnings*** regarding foreseeable risks of harm" are ***not provided*** to ***"prescribing and other health-care providers*** who are in a position to reduce the risks of harm in accordance with the instructions or warnings."

i. Exception: But the Third Restatement includes an important ***exception*** to this general acceptance of the learned intermediary defense: The language quoted above indicates that if health-care providers will *not* be a position to pass on warnings, the manufacturer has a duty to give the warnings and instructions ***directly to the patient.*** So, for instance, if the product is sold over-the-counter to consumers with a mass-media campaign, then warnings must be made to the consumer (e.g., in packaging inserts and/or on TV ads), not just to physicians who might recommend the item to patients. [384]

b. Exceptions: Most courts that accept the learned intermediary doctrine recognize several ***exceptions*** to it. The most important one

is the one mentioned above in connection with the Restatement: if the health-care provider for that drug will typically not be in a position to pass on the manufacturer's warnings (e.g., because the prescriber will generally not be meeting with the patient about that particular drug), then the doctrine does not apply and the manufacturer must see to it that warnings actually reach the end-user. [384]

c. **Doctrine sometimes rejected:** A ***minority*** of courts have ***rejected*** the learned intermediary doctrine. In these courts, a manufacturer must make serious efforts to get the information ***directly to the patient,*** or be potentially liable for failure to warn. *[State v. Karl]* [385]

2. **Adequacy of warning:** When a warning directly to the end-user is required, the manufaturer must provide, in language comprehensible to a lay person, a warning conveying a fair indication of the ***nature, gravity and likelihood*** of the known or knowable risks of the drug.

D. Unknown and unknowable dangers: If D can show that it ***neither knew*** nor, in the exercise of reasonable care ***should have known*** of a danger at the time of sale, most courts hold that there was ***no duty to warn*** of the unknown danger. [385]

> **Example:** If D sells a prescription drug without having any ability to know of a particular side effect, failure to warn of that side effect will not give rise to strict product liability.

E. Danger to small number of people: If the manufacturer knows that the product will be dangerous to a ***small number*** of people, the need for a warning will usually turn on the ***magnitude*** of the danger; if the danger is great enough, even a small number of potential bad results will require a warning.

F. Government labelling standards: The scope of D's duty to warn may be affected by the fact that the ***government*** imposes certain ***labeling*** requirements. [386-386]

1. **Evidence:** If D can show that it has complied with a federal or state labelling requirement, most courts permit this to be shown as ***evidence*** that the warning was adequate. But in most courts, this

evidence is not dispositive — the jury is always free to conclude that a reasonable manufacturer would have given a more specific, or different, warning. [386]

2. **Preemption:** But where the labelling requirement is imposed by the ***federal government,*** and the court finds that Congress intended to ***preempt*** more-demanding state labelling rules, then compliance with the federal standard *is* a complete defense to P's "failure to warn" claim. [386-386]

G. Post-sale duty to warn: Courts have disagreed about the extent to which a manufacturer has a duty to make a ***post-sale*** warning about dangers of which the manufacturer was not aware at the time of manufacture.

1. **Duty to warn when manufacturer learns of the risk:** The most common approach is to hold that if the manufacturer eventually ***learns about the risk,*** it has an ***obligation to give a post-sale warning,*** assuming the risk is great and the user of the product can be identified. In this situation, a duty to warn probably exists even though the defect was ***not knowable at the time of manufacture.*** [388-390]

2. **Duty to monitor:** Some courts have held that the manufacturer has a duty not only to warn about dangers or defects that it learns about, but also an affirmative duty to ***"keep abreast of the field"*** by ***monitoring the performance and safety*** of its products after sale. Such an affirmative duty of monitoring and testing is most likely to be found in cases involving ***prescription drugs.*** [389]

H. Obvious danger: If the danger is ***obvious*** to most people, this will be a factor reducing D's obligation to warn. But where a warning could easily be given, and a substantial minority of people might not otherwise know of the danger, the court may nonetheless find a duty to warn. [387]

I. Hidden causation issue: In any failure-to-warn scenario, be sure to check that the requirement of a ***causal link*** between the failure to warn and the resulting injury is satisfied. If the provision of a warning ***would not have prevented the accident*** from occurring, then the defendant will ***not*** be liable for failing to warn. [390]

1. **Plaintiff who does not read warnings or ignores them:** For example, in a case in which the injured plaintiff is the one who was the user of the product, and the claim is based upon the S defendant manufacturer's failure to place a warning label on the product, evidence that the plaintiff ***never read any warning labels*** would prevent failure-to-warn liability. Similarly, if there is evidence that even had plaintiff read the warning, plaintiff would have ***ignored the warning*** and used the product in the same way so that the accident would have happened anyway, failure to warn will not be the basis for liability.

VII. WHO MAY BE A DEFENDANT

A. Chattels: In any case involving a ***"good"*** or ***"chattel,"*** both strict and warranty liability will apply to ***any seller*** in the ***business*** of selling goods of that kind. [391]

1. **Retailer:** This means that a ***retail dealer*** who sells the good, but has not manufactured it, will have strict liability as well as warranty liability, even if she could have done nothing to discover the defect. But this is true only if the seller is in the ***business of selling goods of that type*** (so that a private individual selling a good, or a business person selling outside of the usual course of his business, will not have liability). [391]

   a. **Indemnity:** If the retailer is held liable in this way, she will be entitled to ***indemnity*** from the manufacturer or wholesaler, as long as the retailer was not herself negligent.

2. **Used goods:** Courts are split as to whether there is strict or warranty liability for the seller of ***used goods.*** Probably most courts would hold that there is no such liability. [392]

   Example: Dealer, a used car dealer, sells a used car to X. The brakes are defective, and X is unable to avoid hitting P, a pedestrian. Most courts would not allow P to recover in strict liability against Dealer.

B. Lessor of goods: Courts frequently impose strict liability upon a ***lessor*** of defective goods. [393] ***(Example:*** A ***car rental*** company may be strictly liable if it rents a defective car and that car injures a pedestrian due to the defect.)

1. **Negligence or warranty liability:** The lessor may also be liable for negligence in failing to discover the defect, or on an implied warranty theory by analogy to the UCC. [393]

C. Sellers of real estate: Sellers of ***real estate*** have also sometimes been subjected to strict and warranty liability when the property turns out to be dangerously defective. But probably only a ***professional builder,*** not a consumer who resold the house, would be subject to such liability (unless the consumer actively concealed the facts of which he was aware). [393]

D. Services: One who sells ***services,*** rather than goods, generally does ***not*** fall within standard strict liability nor within the UCC implied warranties. [392-393]

1. **Product incorporated in service:** However, if a product is furnished ***in combination with a service,*** then most courts (and the Restatements) ***will*** apply strict liability if the product turns out to be defective. [395]

> **Example:** P goes to D's beauty parlor to get a permanent. D uses a solution made by a cosmetics company, which badly burns P's scalp. A court will probably hold D strictly liable for the defective solution, even though the product is being furnished in combination with services.

2. **Services by professionals:** But where the services are rendered by a *health professional*, she will almost never be liable in either strict tort or warranty, even if she uses a product which is defective. [395]

> **Example:** D is a surgeon, who puts a defective pacemaker into P's heart. D will almost certainly not be held strictly liable for the product defect.

VIII. INTERESTS THAT MAY BE PROTECTED

A. Property damage: All the above analysis assumes that P's injury consists of ***personal*** injury. If P's damages consist only of ***property damage,*** special rules may apply [396-397]:

1. **Strict liability and negligence:** P may generally recover in ***strict liability*** and ***negligence*** even though his damage consists only of property damage rather than personal injury. [396]

   a. Warranties: But he might not win on a ***warranty*** theory. If P is

suing a ***remote defendant*** (one with whom he did not contract), two of the three alternative versions of UCC §2-318 do *not* allow P to recover for property damage unaccompanied by personal injury.

2. **"Property damage" defined:** Since the rules for recovering for property damage are easier for the plaintiff to satisfy than those for recovering "pure economic" damages, the two must be distinguished.

   a. **Property apart from the defective product:** If P's property apart from the defective product is destroyed (e.g., the product causes a fire that burns down P's house), this obviously ***counts*** as property damage, and is recoverable in strict liability. [396]

   b. **Damage to the product itself:** But where the defect causes the ***product itself*** to be destroyed or visibly harmed (e.g., an automobile catches on fire due to a defective radiator), this is probably ***not*** property damage, and thus ***not recoverable*** in strict liability. Instead, it's intangible economic loss, which as described below usually isn't recoverable in strict liability. [397-397]

   c. **Loss of bargain:** Similarly, if P's damages stem from the fact that the product simply ***doesn't work*** because of the defect, or is ***worth less*** with the defect than without it, most courts treat this as unrecoverable intangible economic harm (discussed below).

B. Intangible economic harm: Where P's damages are found to be solely ***intangible economic*** ones (as opposed to personal injury or property damage), P will find it much harder to recover. [397-399]

1. **Direct purchaser:** If P is suing the person who sold the goods to him:

   a. **Warranty:** P can readily recover for breach of ***implied or express warranty.*** P can recover the difference between what the product would have been worth had it been as warranted, and what it is in fact worth with its defect. He can also generally recover consequential damages, including lost profits.

   b. **Strict liability and negligence:** P probably won't be able to recover for the intangible economic harm in ***strict liability*** or ***negligence*** — the court will probably hold that the UCC warranty claims were intended as the ***sole remedy*** for intangible economic harm by a purchaser against his immediate seller.

2. **Remote purchaser and non-purchaser:** Where P is suing not his own seller, but a ***remote person*** (e.g., the manufacturer), he will probably ***not*** recover anything if his only harm is an intangible economic one. [398-399]

   a. Warranty: Most courts would deny an implied ***warranty*** claim, on the grounds that P must sue his own immediate seller for such breaches.

   b. Strict liability: Almost all courts would deny recovery to the remote buyer for economic harm on a ***strict liability*** theory.

   c. Negligence: Most courts deny P recovery in ***negligence*** for pure intangible economic harm.

   d. Non-purchaser: The same is true where P is ***not a purchaser at all*** (e.g., P is a ***bystander)*** — P probably can't recover on any theory for his intangible economic loss.

   Example: P owns a restaurant, located next door to an office building that is owned by X Corp. and occupied exclusively by X Corp's employees. D manufactures a faulty boiler, which it sells to X Corp. The boiler explodes, damaging X Corp's building extensively. The building damage causes X Corp. to suspend operations for one month while repairs are made. During that month, P's restaurant loses 50% of its revenues, and all its profits, due to the absence of X Corp. employees as customers.

   Even though the defective boiler has caused property damage to X Corp. (for which X will be able to recover on a strict liability theory), *P* will not be permitted to recover in strict liability (or, for that matter, in negligence or warranty) because she has suffered only intangible economic harm. [399]

   e. Combined: But remember that if P can show that he has received either physical injury or "property damage," he may then be able to ***"tack on"*** his intangible economic harm as an ***additional*** element of damages. This would certainly be the case in a negligence action, and might possibly be true in a strict liability or warranty action.

IX. DEFENSES BASED ON PLAINTIFF'S CONDUCT

A. **General rule of plaintiff's negligence applies:** Early product liability decisions hesitated to make P's contributory or comparative negligence a defense. But under the modern approach, this has changed: usually, ***whatever*** the jurisdiction's standard method of dealing with plaintiff's

negligence is (typically comparative negligence of one sort or another), ***that method applies to product-liability actions.*** [400]

> **Example:** In a typical comparative-negligence jurisdiction, P's comparative negligence in using a defective product will reduce, but not eliminate, D's liability in a strict product liability action.

B. Different types of negligence by P: There are a number of different ways in which a plaintiff might behave negligently with respect to a product.

1. **Failure to discover the risk:** First, P might ***"negligently" fail to discover that there is a*** P ***defect at all.*** Here, the modern approach essentially agrees with that of the earlier approach: if S P's only fault is to fail to discover the defect, this is probably ***not really "negligence" at all,*** U since a person is normally entitled to assume that a product is not defective. Therefore, in the L ordinary case P's failure to discover the defect will not cause any reduction in her recovery. E [400]

2. **Knowing assumption of risk:** Second, P might be fully aware of a product's defectiveness (whether of a manufacturing or design nature), yet voluntarily and unreasonably decide to ***"assume the risk"*** of that defect. In this situation, the modern trend is to ***treat assumption-of-risk as a form of comparative negligence:*** to the extent that P's decision to use the product in the face of the known risk was ***unreasonable,*** it will cause plaintiff's recovery to be reduced proportionately (and will ***not*** serve as an ***absolute bar*** to recovery). [401]

> **Example:** P is driving a new car manufactured by D. A warning light suddenly flashes, saying "Overheated engine. Stop immediately." P knows that an overheated engine can often lead to an explosion, with consequent physical danger. P then looks under the hood, and sees that a water hose has ruptured, causing the engine to receive too little water. (Assume that this rupture constitutes a manufacturing defect for which D will be liable under standard strict-liability doctrine.) Nonetheless, P continues to drive for 100 more miles in 90 degree temperatures, even though he is merely taking a pleasure drive. The engine explodes, injuring P.
>
> Under the Third Restatement and modern approach, P's conduct — though it consists of a voluntary encountering of a known risk — will be treated the same as any other type of plaintiff's negligence. In a pure comparative negligence jurisdiction, therefore, P's recovery will be reduced by an amount representing P's portion of the combined "responsibility" of P and D, but P will still be allowed to make some

recovery.

3. **Ignoring of safety precaution:** Suppose P ***consciously fails to use an available safety device,*** and is then injured by a product defect that would not have led to injury had the safety device been used. In some situations, the safety device is one provided by the manufacturer of the defective product; in other cases, it is provided by a third party. The analysis is pretty much the same in both types of situations — in most courts the plaintiff's failure to use an available safety device is generally fault that ***reduces*** (but does ***not eliminate)*** plaintiff's recovery. [402]

   Example: P, a consumer, purchases a Slicer-Dicer made by D. The Slicer-Dicer is designed to slice, dice, chop, and puree a variety of household products. The Slicer Dicer comes with a hand guard, which when installed prevents the user's hand from getting near the cutting blades. The hand guard is purposely designed to be removable for easy cleaning; the device and its instruction manual both contain a bold-faced warning that the device should not be operated without the hand guard. P removes the hand guard because he finds it easier to use the machine without it; he realizes that there is a greater danger of cutting his hand, but decides to risk it. P's hand slips, and is severely cut by the blades. P sues D on the theory that D's permitting the guard to be removed for separate cleaning constituted a design defect.

   In a modern comparative-negligence jurisdiction the court will probably hold that P's use of the product without the guard should reduce, but not eliminate, his recovery.

4. **Use for unintended purpose:** If P totally ***misuses*** the product, D will not be relieved from liability unless the misuse was so ***unforeseeable*** or ***unreasonable*** that either: (1) the misuse ***couldn't reasonably be warned against or designed against,*** or (2) the misuse is found to be ***"superseding."*** [403-405]

   Example: D makes a chair with bars across the back. The chair is designed for seating, not climbing. P takes the chair and uses the bars across the back as a step-ladder; he then falls and hurts himself badly. A court would probably hold that the misuse here is so unforeseeable and unreasonable that the risks the design presents (the risk of unsafe climbing) need not be designed against or warned against. [403]

X. DEFENSES BASED ON FEDERAL REGULATION, MAINLY THE DEFENSE OF PREEMPTION

A. Preemption: Federal regulation of product safety can havean important impact on consumers' state product-liability rights. In particular, under the doctrine of ***"preemption,"*** federal regulatory action may ***limit the***

states' freedom to apply their usual rules of tort liability to cases involving the regulated product. [405]

1. **The Supremacy Clause:** The concept of preemption is based on the ***Supremacy Clause*** of the U.S. Constitution. That clause says, in essence, that federal law ***takes priority over conflicting state law.***

2. **Preemption, generally:** Here is a brief summary of how preemption works in the context of product-liability law:

   a. **Express preemption:** First — and usually easiest to apply — is ***"express"*** preemption. This occurs when Congress explicitly says that it intends to take away the states' ability to regulate in a particular way. When it is clear that Congress has meant to do this, the Supremacy Clause nullifies any attempt by a state to do what Congress has said the state may not do. [406]

      i. **Express preemption in medical-device cases:** Express preemption is likely to be found, for instance, where the Food and Drug Administration ***pre-approves*** a newly-developed ***medical device*** such as a pacemaker or heart valve. Once this happens, a user of the device will generally not be permitted to recover under state tort law for the device's defectiveness. That's because the court will likely conclude that the federal approval expressly preempts a state from awarding tort damages premised on the device's defectiveness. *[Riegel v. Medtronic Inc.]* [406]

   b. **Implied preemption:** Most real-life controversies involving preemption in tort law, however, involve ***"implied"*** rather than express preemption. That is, Congress (or a federal agency acting under direction from Congress) does not explicitly tell the states that they may not take a particular tort-related action. Instead, Congress or the federal agency enacts a statute or regulation, and a litigant (usually the manufacturer of the product) argues that the federal enactment should be interpreted as displacing a particular state tort-law rule. There are two different ways in which implied preemption can occur in a tort-law context, a ***direct conflict*** and a federal decision to ***occupy*** an ***entire field.***

i. Direct conflict: Sometimes analysis of the federal law and the state law shows that the two are in ***direct conflict.*** When this happens, as you'd expect, the state law must yield. The direct conflict can be of two sorts:

(1) It is ***impossible*** for the maker of a product to ***comply simultaneously*** with the federal regulation and the state regulation; or

(2) the ***objectives*** behind the federal regulation and the state regulation are ***inconsistent.*** [406]

Example of (1) (compliance with both is impossible): Suppose that Congress says that every package of cigarettes must contain a label stating, "the Surgeon General has determined that smoking may be hazardous to your health." Suppose then that North Carolina, a tobacco-growing state, passes a statute saying "No health warnings are required in this state on any package of cigarettes." Obviously there is a direct contradiction between the federal and state regulatory schemes — a given cigarette package cannot comply with both. Therefore, the state regulation is invalid.

Example of (2) (conflicting objectives): Suppose that Congress says, "it is the desire of Congress that auto manufacturers be encouraged to install airbags in every automobile produced after the date of this act." To further that objective, Congress gives auto manufacturers a $200 tax credit for every car that is made with an airbag. Texas then passes a statute saying, "in any tort litigation in which the occupant of a vehicle alleges that he or she has been injured by the inappropriate inflation of an airbag, the burden of proving the non-defectiveness of the airbag shall be placed upon the manufacturer." A court might well hold that in view of the strong federal interest in encouraging airbag installation, the Texas statute has a sharply conflicting objective — making airbag installation more burdensome to manufacturers — and that the Texas statute should therefore be deemed impliedly preempted by the federal legislation.

ii. Occupation of entire field: The second form of implied preemption occurs where the federal government is found to have ***intended to occupy an entire field of regulation.*** If such an intent is found, then even a state law that does ***not directly conflict*** with the federal law will be preempted. [407]

(1) Need for uniformity: When a court is deciding whether Congress intended to occupy the entire field, the court will give special weight to indications that Congress perceived a need for a ***uniform national rule,*** rather than varying state rules. So, for instance, in the medical-device-labelling field,

the need for manufacturers to have a ***single nationwide system of labels*** (not state-by-state variations) would be an important factor pointing a court towards the conclusion that Congress intended to occupy the entire field.

c. Implied preemption of state common-law tort remedies: Sometimes a manufacturer succeeds with the argument that federal regulation preempts the states from allowing a plaintiff to recover for a ***common-law tort.*** Here, the defendant manufacturer is typically making the argument that merely ***allowing a plaintiff to recover in tort*** would itself constitute an ***implicit*** sort of "regulation" that is inconsistent with the federal regulatory scheme. So these are cases of "implied" (rather than "express") preemption of state law by C federal law. [407]

i. Needs direct conflict or impeding of federal enforcement: It is ***not easy*** for a manufacturer to defeat a common-law tort claim by use of an implied preemption defense. As a good rule of thumb, the manufacturer (D) will win with such a defense *only* if it can show that *either:*

[1] the conduct that P argues D was required to take under state common-law rules ***conflicts*** with the federal regulation; or

[2] allowing the tort recovery sought by P ***would impede enforcement*** of the federal regulatory scheme.

Manufacturers will often have a tough time making either of these showings.

ii. Implied preemption in prescription-drug cases: Cases involving ***prescription drugs*** will often be found to involve only ***"implied"*** preemption. Although Congress has given the FDA authority to regulate prescription drugs just as it allowed the agency to regulate medical devices like the one in *Riegel (supra,* p. C-89), Congress has ***not expressly dealt with preemption*** in the prescription-drug context. Therefore, prescription-drug cases are harder for the defendant manufacturer to win on a preemption theory than are medical-device cases, because an implied-preemption defense tends to be harder to establish than an express-preemption one. *[Wyeth*

v. Levine] [409]

B. Compliance with government standards: Don't confuse the defense of federal preemption of state law with a separate defense, the so-called ***"regulatory compliance"*** defense. The latter defense asserts that because a product complies with a particular government regulation scheme, that compliance automatically means that the product is not defective. Most jurisdictions do *not* accept this defense — the plaintiff is free to show that even though the product meets the relevant federal regulatory requirements, the product is nonetheless defective. (However, nearly all states at least allow the fact that the product meets federal regulatory requirements to be admitted as non-dispositive *evidence* of non-defectiveness.) The regulatory compliance defense is discussed *supra*, p. C-81.

CHAPTER 15
NUISANCE

I. NUISANCE GENERALLY

A. Type of injury: The term "nuisance" refers not to a type of tort, but to a ***type of injury*** which P has sustained. In the case of "public nuisance," the injury is the loss of any right that P has by virtue of being a "member of the public." In the case of "private nuisance," P's injury is interference with his ***use or enjoyment of his land.*** [423]

1. **Three mental states:** A suit for nuisance may be supported by any of the three defendant mental states: (1) intentional interference with P's rights; (2) negligence; or (3) abnormally dangerous activity or other conduct giving rise to strict liability. [423]

II. PUBLIC NUISANCE

1. **Examples:** We talk more below about what is a right "common to the general public." Generally, activities that interfere with ***public waterways, air purity,*** or ***public roads and facilities,*** are the most likely to be found to satisfy this standard.

2. **Factors:** Courts look at a number of factors in deciding whether something is a public nuisance, including the ***type of neighborhood,*** the frequency/duration, the degree of damage, and the social value of

the activity. [424]

a. Substantial harm required: A public nuisance will not be found to exist unless the harm to the public is ***substantial.***

3. **Need not be a crime:** It is no longer the case that for conduct to be actionable as a public nuisance, it must also be a ***crime*** (though the fact the conduct *is* a crime will make it more likely to be held to be a public nuisance). [424]

B. "Right common to general public": The key element of a claim of public nuisance is that the right that is being unreasonably interfered with must be a "right that is ***common to the general public."*** [424]

1. Has impact: This requirement of a right common to the general public has considerable ***impact,*** in that it prevents many widespread harms from being eligible to be considered public nuisances. As the Second Restatement puts it, to be a right common to all members of the general public the right must be ***"collective in nature*** and *not* like the *individual* right that everyone has not to be assaulted or defamed or defrauded or negligently injured." [424]

a. What qualifies: As the idea is sometimes put, the term "public right" is limited to those ***"indivisible resources shared by the public at large,*** such as ***air, water, or public rights of way"*** [424]

i. Interference with just some people: Even if the interference *is* with a shared resource like air or water, the interference won't qualify if by its nature it affects ***only a few isolated landowners, not the public at large.*** Thus the Restatement says, "the pollution of a stream that merely deprives 50 or 100 lower riparian owners of the use of the water for purposes connected with their land does not for that reason alone become a public nuisance. If, however, the pollution prevents the use of a public bathing beach or kills the fish in a navigable stream and so deprives *all members of the community* of the right to fish, it becomes a public nuisance." [424]

ii. Interference that takes place within individual private properties: The "common right" requirement means that

typically, a claim that a product has had a particular effect on a piece of ***privately-owned real estate not accessible to the public*** at large will ***fail*** the common-right test.

Examples: Thus claims that manufacturers have infiltrated ***guns*** into neighborhoods, or that manufacturers of ***paints*** have failed to remove lead from them and thus injured children living in buildings painted with these paints, have tended to fail the "common right" standard. [425]

C. Requirement of particular damage: Courts sometime say that a private citizen may recover for his own damages stemming from a public nuisance, but only if he has sustained damage that is different in ***kind,*** not just degree, from that suffered by the public generally. However, it's not clear how much impact this so-called requirement has anymore; many newer decisions seem to ignore it.

Example: P is a tenant of a small novelty store on the boardwalk opposite a famous beach; the boardwalk contains hundreds of merchants. D, an oil exploration company, negligently causes an offshore oil spill that fouls the beach for the entire summer, causing P's profits to drop 50% or $20,000, and doing approximately the same to hundreds of the other merchants. It's likely that P can recover from D in public nuisance for his lost profits, notwithstanding that hundreds of other merchants have suffered the same sort of harm to their collective right to an unfouled beach. [425]

D. Within "control" of defendant at time of harm: For public nuisance, courts require that the defendant have had ***control over the instrumentality*** at the ***time of damage*** — it's ***not*** enough that defendant had control at some ***earlier*** point (e.g., at the time of a sale of a product).

Example: In a case by a state against makers of lead-paint that poisoned children in aprtment buildings, the Ds (the paint manufacturers) would likely escape liability if the state can't show that when the child plaintiffs were ingesting the lead, the Ds still had the right to abate the nuisance by removing the paint. The fact that the Ds had been in control of the contents of the paint at the time of the much earlier sales to the building owners would be irrelevant — the "control at the time of the harm" requirement is what counts, and is what's not satisfied here. [425]

III. PRIVATE NUISANCE

A. Nature of private nuisance: A ***private nuisance*** is an ***unreasonable interference*** with P's ***use and enjoyment*** of his ***land.*** [425]

1. Must have interest in land: P can sue based on a private nuisance only if he has an ***interest in land*** that has been affected. [426]

Example: A fisherman whose boat is injured by an oil spill that occurs when he is out

at sea cannot sue for private nuisance, because no interest in land held by him is affected.

a. Tenants and family members: But a fee simple is not necessary — a ***tenant,*** or members of the ***family*** of the owner or tenant, may sue.

2. Elements: P must demonstrate ***two*** elements in order to recover: (1) that his ***use and enjoyment of his land*** was interfered with in a ***substantial way;*** and (2) that D's conduct was either ***negligent, abnormally dangerous,*** or ***intentional.*** [426]

B. Interference with use: The interference with P's use and enjoyment must be ***substantial.*** If P's damage is merely a small ***inconvenience*** (e.g., somewhat extra noise, mildly unpleasant smells), there will be no recovery. [426]

C. Defendant's conduct: There is ***no general rule of "strict liability" in nuisance.*** P must show that D's conduct fell within one of the three classes for tortious defendant conduct: ***negligence, intent,*** or ***abnormal dangerousness.*** [427-427]

Example: D, a utility, suddenly spews polluted smoke onto the land of P, a nearby owner. Unless P can show that D was careless in allowing the pollutants, intended to pollute, or was carrying out an abnormally dangerous activity, P cannot recover for private nuisance.

1. Intentional: In nuisance cases, D's conduct will be deemed "intentional" even though D did C not ***desire*** to interfere with P's use and enjoyment of her land, as long as D ***knew with substantial certainty*** that such interference would occur. [427]

Example: In the above example, if P put D on notice that pollution was occurring, and D continued with the conduct, the continuing conduct would be deemed intentional, and D could be liable for nuisance.

2. Unreasonableness: D's interference with P's interest must be ***"unreasonable."*** [428]

a. Test for unreasonableness: The interference will be deemed unreasonable if *either:* (1) the harm to P outweighs the utility of D's conduct; *or* (2) the harm caused to P is greater than P should be required to bear without compensation.

Example: On the above pollution example, even though operation of a utility is socially beneficial, and even if the social benefits outweigh the damage to P from the pollutants, D probably will have to pay for the polluting because it is not fair that P should have to bear Y the burden of this pollution without compensation.

3. **Nature of neighborhood:** One important factor in determining whether D's conduct is "unreasonable" is the kind of ***neighborhood*** in which D and P are located — the more commercial or industrial the neighborhood, the less likely given conduct is to be a nuisance. [429]

D. Remedies: P may be entitled to one or both of the following ***remedies*** for private nuisance:

1. **Damages:** If the harm has already occurred, P can recover ***compensatory damages.*** [430]

2. **Injunction:** If P can show that damages would not be a sufficient remedy, she may be entitled to an ***injunction*** against continuation of the nuisance. (But to get the injunction, P probably has to show that the harm to her and to all others similarly situated ***outweighs*** the utility of D's conduct.) [430]

E. Defenses: P's conduct may give rise to the defenses of contributory negligence and/or assumption of risk. [430]

1. **Contributory negligence:** Where the claim is based on D's ***negligent*** maintenance of the nuisance, contributory negligence will normally be a defense. [431]

2. **Assumption of risk:** The defense of ***assumption of risk*** is generally applicable to nuisance cases. [431]

   a. **"Coming to the nuisance":** Most commonly, the defense arises where D claims that P ***"came to the nuisance,"*** i.e., P purchases property with ***advance knowledge*** that the nuisance exists. Today, "coming to the nuisance" is not an absolute defense, but merely ***one factor to be considered*** in determining whether P should win. [431]

Example: P, a developer, buys a parcel next to D's cattle feed lot, and sells off some of the parcels as homesites. D will be enjoined from operating the feed lot — the manure from which creates flies and odor — even though P came to the nuisance, because the rights of innocent parties, including the homeowners, are at stake. *[Spur Industries, Inc. v. Dell E. Webb Development Co.*]

CHAPTER 16
MISREPRESENTATION

I. INTENTIONAL MISREPRESENTATION ("DECEIT")

A. Definition: The common law action of ***"deceit"*** or "fraud" corresponds to what we today call ***"intentional misrepresentation."*** [438]

1. Elements: To recover for intentional misrepresentation, P must establish the following elements [438]:

a. A ***misrepresentation*** by D;

b. ***Scienter*** (i.e., a culpable state of mind — either knowledge of the statement's falsity or reckless indifference to the truth);

c. An ***intent to induce the plaintiff's reliance*** on the misrepresentation;

d. ***Justifiable reliance*** by P; and

e. ***Damage*** to P, stemming from the reliance.

B. Misrepresentation: D must make a ***misrepresentation*** to P. Normally, this will be in ***words.*** [438-441]

1. Actions: But D's ***actions*** may also constitute a misrepresentation. [438] ***(Example:*** A used car dealer turns back the odometer on a car.)

2. Concealment: If D intentionally ***conceals*** a fact from P, he will be treated the same way as if he had affirmatively misstated that fact. [438-438]

3. Non-disclosure: If D simply ***fails to disclose*** a material fact (as opposed to taking positive steps to conceal it), it is harder for P to establish the requisite misrepresentation [439-440]:

a. Common law: At common law, failure to disclose was almost never a misrepresentation.

b. Modern view: In modern courts, the general rule remains that failure to disclose by itself does ***not*** constitute misrepresentation. [439]

i. Exceptions: But modern cases recognize some ***exceptions,***

including:

[1] matters that must be disclosed because of a ***fiduciary relationship*** between the two parties (e.g., lawyer/client);

[2] matters that must be disclosed in order to prevent a ***partial*** statement of the facts from being ***misleading;***

[3] ***newly acquired*** information, which, if not disclosed, would make a previous statement misleading; and

[4] facts ***basic to the transaction,*** if the party with knowledge knows of the other's reliance and knows that the other would reasonably expect a disclosure of those facts.

Example: A homeowner who fails to disclose to the buyer the presence of *termites* will today often be found to have made a misrepresentation — this is a fact basic to the transaction that, as the seller should know, a buyer would normally expect to be told about. This represents a change from the common-law rule.

C. Scienter: P must show that D had that culpable state of mind called ***"scienter."*** D acts with scienter if he either: (1) knew or believed that he was not telling the truth; (2) did not have the confidence in the accuracy of his statement that he stated or implied that he did; or (3) knew that he did not have the grounds for a statement that he stated or implied that he did. [440-441]

1. Negligence not enough: Scienter does not exist where D was merely ***negligent*** in making the misrepresentation. (In this instance, a claim for negligent misrepresentation, discussed below, must be brought.)

D. Third-party recovery: Where the fraudulent misrepresentation was not made to P, but to some third person, the rules have changed [441-442]:

1. Common law rule: At common law, D was liable only to those persons whom he ***intended*** to influence by his misrepresentation, and not to others, even though their reliance may have been foreseeable. [441]

Example: The Ds, directors of a company, prepare an intentionally false prospectus, Y intending to influence people who buy stock at the initial public offering. P later buys "used" stock from an existing stockholder, and relies on the misrepresentation. At common law, P may not recover against D, because D did not intend to influence P, even though P's reliance was quite foreseeable. *[Peek v. Gurney])*

2. **Modern rule:** But modern cases make it easier for P to recover. Even if D did not intend to influence P, P can recover if she can show that: (1) she is a member of a class which D had ***reason to expect*** would be induced to rely; and (2) the transaction is of the ***same sort*** that D had reason to expect would occur in reliance. [442-443]

> **Example:** D falsely claims to have good title in an auto, and sells the car to X, who D knows is wholesaler. X resells to P, repeating the misrepresentation. Under modern law, P could recover against D, because P is a member of a class — ultimate buyers — whom D had reason to expect might rely on the misrepresentation, and the transaction is of the same sort — sale of the car — as D had reason to expect would occur in reliance. *[Varwig v. Anderson-Behel Porsche/Audi]*

E. Justifiable reliance: P must also show that he in fact ***relied*** on the misrepresentation, and that his reliance was ***justifiable.*** [442-444]

1. **Investigation by P:** If, after receiving D's misrepresentation, P makes his ***own investigation,*** and ***relies totally*** or almost totally upon this investigation, P will be held not to have met the reliance requirement. (But if the misrepresentation is a ***substantial factor*** in inducing the reliance, P can recover even though his own investigation was also a substantial factor.) [442]

2. **Justifiability:** P must show that his reliance was ***justifiable.*** [443]

   a. **No general duty to investigate:** P has no ***duty to investigate*** on his own, even where an investigation could be easily done, and would disclose the falsity of D's statements. (But P may not overlook the ***"obvious"*** — if he does, his reliance is unjustifiable.)

3. **Materiality:** P must show that the fact that he relied on was ***material*** to the underlying transaction. [443]

F. Opinion: It is hard for P to recover for a statement that is fairly characterizable as an ***"opinion."*** [444-446]

1. **Adverse party:** It is especially hard for P to recover where D was an ***"adverse party"*** to P at the time of the misstatements. But even here, P may be justified in relying on D's expression of opinion if: (1) D purports to have ***special knowledge*** that P does not have; (2) D stands in a ***fiduciary*** relationship to P; or (3) D knows that P is especially ***gullible.*** [444]

a. **"Puffing" still not actionable:** ***"Puffing"*** or ***"trade talk"*** is *not* actionable. ***(Example:*** Car Dealer says to Consumer, "This is the best two-door car for the money." In fact, Car Dealer believes that the car is a terrible value. Consumer cannot recover for intentional misrepresentation, because Car Dealer's statement is obviously "puffing.")

2. **Opinion of apparently disinterested person:** If the opinion is expressed not by one of the parties to a business deal, but by someone whom the plaintiff reasonably perceives as being ***"disinterested,"*** it is ***easier*** for P to recover. [445]

3. **Opinion implying fact:** The above rules apply only to statements of "pure" opinion. Where an opinion either ***expresses*** or ***implies facts,*** can recover for misstatement of the underlying facts. [445]

   a. **Lack of knowledge of inconsistent facts:** Thus an opinion often contains the implied statement that its maker knows of no facts ***incompatible*** with that opinion. If P can show that D really knew facts incompatible with his opinion, P can recover. ***(Example:*** Seller tells Buyer, "In my opinion, this house is structurally sound." Seller really knows that the foundation is badly cracked. Buyer can probably recover.)

G. Statements about law: Today, statements involving ***legal principles*** are generally treated the same as any other statement. Thus if D's representation of law includes an implied statement about ***factual*** matters, P may rely upon the factual part of the statement. [446]

> **Example:** Seller tells Buyer that the house to be sold meets all applicable zoning regulations. If Seller knows that the house violates the local set-back rules, Buyer can recover.

H. Prediction and intention

1. **Prediction:** If the defendant ***predicts*** that something will happen, this will generally be treated as an opinion, which means that in most instances it cannot be relied on. [446]

2. **Intention:** But where D makes a statement as to her own ***intentions,*** this is generally treated as a factual representation that can be relied on. [446]

I. Damages: If the misrepresentation was made directly by D to P, most courts give P the "*benefit of the bargain*" measure of damages. [447-448]

II. NEGLIGENT MISREPRESENTATION

A. **General:** At common law, there was no action for "negligent misrepresentation." Unless P suffered personal injury or direct property damage (thus enabling her to bring a conventional negligence action), P was out of luck. But today, most courts ***do*** allow recovery for negligent misrepresentation, even where only ***intangible economic harm*** is suffered. [449]

1. **Same requirements:** Most requirements for a negligent misrepresentation action are the same as for an intentional misrepresentation action. [449]

B. Business relationship: Courts are quickest to allow recovery for negligent misrepresentation where D's statements are made in the course of his ***business or profession,*** and D had a ***pecuniary interest*** in the transaction. (Thus if D is P's friend, and makes a representation that is not in C the course of D's business, P cannot recover.) [449]

C. Liability to third persons: The maker of a negligent misrepresentation is liable to a much ***narrower class*** of third persons than is the maker of a fraudulent misstatement. [450]

1. **Persons intended to be reached:** According to the Restatement, D is liable for negligent misrepresentation to a ***"limited group of persons"*** whom D either: (1) ***intends to reach*** with the information; or (2) knows the ***recipient intends to reach.*** [450]

> **Example:** D runs a stock ticker service, which negligently reports that X Corp has declared higher earnings, when in fact its earnings are lower. P, an investor, learns of the "higher" earnings from a subscriber to D's service, and buys the stock, losing money. P probably cannot recover from D, since they were not in contractual privity, and since P was not a member of a "limited group of persons" whom D intended to reach or whom D knew that its subscriber intended to reach.

a. Persons covered: Even though the class of third persons covered is narrow, it is still important. Examples where liability might attach include: (1) a surveyor knows or should know that his survey will be given to a prospective purchaser, and a purchaser relies on the

survey in buying the property; (2) a lawyer drafts a will negligently cutting out a particular intended heir, and the heir sues the lawyer; (3) an accountant negligently certifies the books of X Corp, knowing that X Corp plans to seek a loan from Bank; Bank makes the loan, X Corp goes bankrupt, and Bank sues the accountant.

III. STRICT LIABILITY

A. **Not generally allowed:** Generally, a person has no liability for an ***"innocent"*** misrepresentation. In other words, as a general rule there is no strict liability for misrepresentations. But there are some exceptions, discussed below. [452]

B. Sale, rental or exchange: If two parties are involved in a ***sale, rental*** or ***exchange*** transaction, and one makes a material misrepresentation to the other in order to close the deal, he will be liable even if the misrepresentation is innocent. [452]

1. **Warranty:** Usually, the buyer can get as much relief from a claim of ***breach*** of express warranty as from the tort claim of strict liability for misrepresentation. But P may avoid certain contract defenses by relying on the tort theory rather than the warranty theory (e.g., the parol evidence rule). [452]

2. **Service transactions:** A few courts have applied strict liability where D sells P a ***service,*** and makes a misrepresentation. [452]

> **Example:** An agent for Insurance Co. tells P that the policy he is buying will cover him for liability from drunk driving, and through no fault of the agent, the policy does not in fact cover P for this. Some courts might allow P to recover from the agent.

3. **Privity:** The sale, rental or exchange must have been ***directly*** between P and D. [452]

C. Sale of chattel: A seller of goods who makes any misrepresentation on the label, or in public advertising, will be strictly liable for any ***physical injury*** which results, even if the injured person did not buy the product directly from D. [453]

CHAPTER 17
DEFAMATION

I. GENERAL PRINCIPLES

A. **Meaning of "defamation":** The tort called ***"defamation"*** is actually two sub-torts, "libel" and "slander." These both protect a person's interest in his ***reputation.*** A state's freedom to define these torts as it wishes is sharply curtailed by the First Amendment. [461]

B. Prima facie case: To establish a prima facie case for either libel or slander, P must prove [461]:

1. Defamatory statement: A ***false*** and ***defamatory*** statement concerning him;

2. Publication: A ***communicating*** of that statement to a person other than the plaintiff (a ***"publication");***

3. **Fault:** ***Fault*** on the part of D, amounting to at least ***negligence,*** and in some instances a greater degree of fault;

4. Special harm: Either ***"special harm"*** of a pecuniary nature, or the actionability of the statement despite the non-existence of such special harm.

II. DEFAMATORY COMMUNICATION

A.Injury to reputation: To be defamatory, a statement must have a tendency to ***harm the reputation*** of the plaintiff. [462]

1. Reputation not actually injured: For the statement to be defamatory, it need not have ***actually*** harmed P's reputation. It must simply be the case that, ***if the statement had been believed,*** it would have injured P's reputation. [462] (But in most cases of slander, and in cases of libel where the defamatory meaning is not apparent from the face of the statement, P has to prove "special damage," i.e., that his reputation was in fact damaged and caused him pecuniary harm — this is not part of the definition of "defamatory," however.)

B. Meaning attached: Many statements can be ***interpreted in more than one way.*** Where this is the case, the statement is defamatory if ***any one*** of the interpretations which a reasonable person might make would tend to injure P's reputation, and P shows that at least one of the recipients did ***in fact*** make that interpretation. [462]

C. Reference to plaintiff: P must show that the statement was reasonably interpreted by at least one recipient as ***referring to P.*** [463-463]

1. **Intent irrelevant:** But P does not necessarily have to show that D ***intended*** to refer to him, rather than to someone else. As a common-law matter (putting aside constitutional decisions), even if D behaved non-negligently and intended to refer to someone else entirely, P can still sue. [463]

2. **Groups:** If D's statement concerns a ***group,*** and P is a member of that group, P can recover only if the group is a ***relatively small one.*** [463]

   Example: The statement, "All lawyers are shysters," would not be defamatory as to any particular lawyer, assuming there was no evidence indicating that the statement was intended to refer to P in particular.

3. **Reference need not be by name:** If a non-explicit reference to P is reasonably understood A as in fact referring to P, it does not matter that P is referred to by a ***different name*** or characterization. This is true even if the publication is labelled a "novel." [463]

D. Truth: A statement is ***not defamatory*** if it is ***true.*** At common law, it is always the ***defendant*** who has had the burden of proving truth. [464-465]

1. **Matters of public interest:** Today, as the result of constitutional decisions, the ***plaintiff*** must bear the burden of proving falsity, if: (1) D is a media organization; and (2) the statement involves a matter of ***"public interest"*** (whether P is a public figure or a private figure). [464]

2. **Private figure, no public interest or non-media defendant:** It is probably the case that the M states may still require the ***defendant*** to bear the burden of proving truth if: (1) the defendant A is not a media organization; *or* (2) the plaintiff is a private figure and the statement is not of public interest. [464-465]

3. **Substantial truth:** For truth to be a barrier to recovery, it is not necessary that the statement be ***literally*** true in all respects. Instead, the statement must merely be ***"substantially"*** true.

   [465]

E. Opinion [465-467]

1. **Pure opinion:** A statement of ***pure opinion*** can never be defamatory. [465] ***(Example:*** "I think Smith is a disgusting person," without any factual basis for this statement either expressed or implied.)

2. **Implied facts:** But if a statement of opinion ***implies undisclosed facts,*** and a statement of those facts would be defamatory, then the statement will be itself treated as defamatory. [466]

   Example: "I think P must be an alcoholic" is probably actionable, because it implies that the speaker knows precise facts about P's alcohol consumption that would justify an opinion of alcoholism.

III. LIBEL vs. SLANDER

A. **Significance of distinction:** Distinguish between "libel" and "slander." It makes a difference only with respect to the requirement of ***special harm:*** to establish slander, P must show that he suffered pecuniary harm (unless the statement falls into one of four special categories). To prove libel, by contrast, P does not have to show such special harm (except, in some courts, if the defamatory nature of the statement is not evident on its face). [467]

B. Libel: Libel consists mainly of all ***written or printed matter.*** [468-468]

1. **Embodied in physical form:** Most states hold that it also includes any communication embodied in ***"physical form."*** [468] ***(Examples:*** A phonograph record, or a computer tape, would be libel in most courts.)

2. **Radio and TV:** Where a program is ***broadcast*** on radio or TV:

   a. Written script: If it originated with a ***written script,*** all courts treat it as libel.

   b. No script: If the program is "ad libbed" rather than coming from a written script, courts are split as to whether it is libel or slander.

C. Slander: All other statements are ***slander.*** An ordinary ***oral statement,*** for instance, is slander. [468]

D. Special harm: P may generally establish slander only if he can show that he has sustained some ***"special harm."*** This harm generally must be

of a ***pecuniary nature.*** [468-470]

Example: P shows only that his friends believed D's defamatory statements, and the friends now socially reject P. If the statement is slander, and does not fall within one of the four "slander per se" categories, P cannot recover.

1. **"Slander per se":** There are four kinds of utterances which, even though they are slander rather than libel, require ***no showing*** of special harm [469]:

   a. Crime: Statements imputing morally culpable ***criminal behavior*** to P.

   b. Loathsome disease: Statements alleging that P currently suffers from a ***venereal*** or other loathsome and communicable disease.

   c. Business, profession, trade or office: An allegation that adversely reflects on P's fitness to conduct her ***business,*** trade, profession or office. ***(Example:*** "P cheats his customers.")

   d. Sexual misconduct: Statement imputing serious ***sexual misconduct*** to P.

2. **Libel:** In the case of ***libel,*** at common law courts do not require proof of actual harm, and can award ***"presumed"*** damages even without a showing of harm. However, recent Supreme Court decisions cut back on the states' ability to do this [470-470]:

   a. Matters of public concern: If the statement involves a matter of ***public concern*** or a ***public figure,*** and recovery is allowed without proof of "actual malice," presumed damages may not constitutionally be awarded.

   b. Matter of private concern: But if the defamatory statement does *not* involve a matter of "public concern" or a public figure, presumed damages *may* be allowed, even without a showing of "actual malice."

   Example: D, a credit reporting agency, sends a subscriber a written report falsely stating that P, an ordinary private corporation, is insolvent. Since the statement is not of "public interest," P may recover $50,000 presumed damages without showing any financial loss, and without showing that D knew of the falsity or recklessly disregarded the truth. *[Dun & Bradstreet v. Greenmoss Builders]*

   c. Actual malice: If P does show "actual malice" (that D either knew

of the falsity or recklessly disregarded the truth), presumed damages may probably be constitutionally awarded, even if P is a public figure and the matter is one of public interest.

IV. PUBLICATION

A. **Requirement of publication generally:** P must show that the defamation was ***"published."*** "Publication" means merely ***"seen or heard by someone other than the plaintiff."*** [471]

1. **Must be intentional or negligent:** D's publication must have been either ***intentional*** or ***negligent.*** Thus there is no "strict liability" as to the publication requirement. [471]

> **Example:** D makes a defamatory statement to P himself, while in P's office. D does not realize (and isn't negligent in not realizing) that X is standing outside the office listening through a keyhole. X hears the statement. D has no liability for defamation, because he did not intentionally or negligently publish the statement (i.e., communicate it to one other than the plaintiff).

B. Repeater's liability: One who ***repeats*** a defamatory statement made by another is held to have published it, and is liable as if he were the first person to make the statement. [472] This is true even if he indicates the source, and indicates that he himself does not believe the statement.

> **Example:** D says, "X told me that P is a thief who steals from his customers, though I doubt U it." Technically, D has published the defamatory statement, and can be liable.

V. INTENT

A. Common-law strict liability: At common law, libel and slander were essentially ***strict liability*** torts. P had to show that the ***publication*** occurred due to D's intent or negligence, but did not have to show intent or negligence as to any of the other aspects. For instance, it was irrelevant that D had every reason to believe that the statement was ***true.*** [473]

B. Constitutional decisions: But Supreme Court decisions on the First Amendment have eliminated courts' right to impose strict liability for defamation. The precise mental state which D must be shown to have met depends on whether P is a public figure [473-475]:

1. **Public figure:** If P is a ***"public figure,"*** he can recover only if he shows that D made the statement with either: (1) ***knowledge that it***

was false; or (2) ***"reckless disregard"*** of whether it was true or false. *[New York Times v. Sullivan]* (These two alternate states of mind are collectively called ***"actual malice,"*** which is a term of art.) [473-474]

a. Meaning of "reckless disregard": For P to show that D "recklessly disregarded" the truth, is *not* enough to show that a "reasonably prudent person" would not have published, or would have done further investigation. Instead, P must show that D ***in fact entertained serious doubts*** about the truth of the statement. [474]

2. Private figures: But if P is ***neither*** a public official nor a public figure, he is ***not constitutionally required*** to prove that D knew his statement was false or recklessly disregarded whether it was true or false. *[Gertz v. Robert Welch, Inc.*] [474]

a. No strict liability: However, the First Amendment prohibits a state from applying ***strict liability,*** even in the "private figure" situation, at least if the suit is against a ***media defendant.*** In other words, even in suits brought by private figure plaintiffs, if D is a media defendant P must prove that D was at least ***negligent*** in not ascertaining the statement's falsity.

i. Suits by one private person against another: In suits by a private-figure plaintiff against a ***private individual*** or other ***non-media*** defendant, the Supreme Court has never said whether strict liability is constitutionally allowable. However, virtually all states — as a matter of ***common law,*** not federal constitutional law — refuse to allow private-figure plaintiffs to recover against even non-media defendants unless the plaintiff ***shows at least negligence.*** In other words, as a common-law matter, all defamation suits require ***at least a showing that the defendant negligently failed to make reasonable efforts to ascertain the statement's truth or falsity.*** (States are always free to require more than negligence regarding truth, such as recklessness or intent.) [475]

Example: D fires P. P seeks a new job from X. X asks D for a reference. D writes back, "We fired P because P sexually harassed a co-worker." If D's belief that P harassed a co-worker was reasonable, under state common-law principles P cannot recover from D for libel, even if P can prove that the accusation was completely false.

VI. PRIVILEGES

A. **Absolute privileges:** An ***"absolute"*** privilege applies even if D was motivated solely by malice or other bad motives. The following classes of absolute privilege are usually recognized:

1. **Judicial proceedings:** Judges, lawyers, parties and witnesses are all absolutely privileged in what they say during the course of ***judicial proceedings,*** regardless of the motives for their statements. [476] ***(Example:*** D, in a pleading in a civil lawsuit between him and P, calls P a crook. P cannot recover from D for defamation, even if P shows that D knew D's statement was a lie.)

2. **Legislative proceedings:** ***Legislators*** acting in furtherance of their legislative functions are absolutely privileged. [476]

3. **Government officials:** Many ***government officials*** have absolute immunity for statements issued in the course of their jobs. Thus all federal officials, and all high state officials, have this privilege. [476]

4. **Husband and wife:** Any communication between a ***husband and wife*** is absolutely privileged. [476]

5. **Consent:** Any publication that occurs with the ***consent*** of the plaintiff is absolutely privileged. [477]

B. **Qualified privilege:** Other privileges are merely ***"qualified"*** or "conditional" ones. A qualified privilege will be lost if D is acting primarily from ***malice,*** or from some other purpose not protected by the privilege. [477-481]

1. **Protection of publisher's interests:** D is conditionally privileged to ***protect his own interests,*** if these are sufficiently important, and the defamation is directly enough related to those interests. [477-477]

> **Example:** If D reasonably believes that his property has been stolen by P, he may tell the police of his suspicions. If D's belief is reasonable, he is protected against a slander action by P, even if his suspicions are wrong.

2. **Interest of others:** Similarly, D may be qualifiedly privileged to act for the protection of the ***recipient*** of his statement, or some other third person. The issue is whether D's statement is "within the generally accepted standards of ***decent conduct."*** [477]

a. Old boss to new boss: Thus an ex-employer generally has the right to give information about his ***ex-employee*** to a new, prospective, employer if asked by the latter.

Example: D, a newspaper, accurately reports that in a lawsuit, X has called P a crook and a liar. Even if X's statement is completely untrue and was made with malice, D has a qualified privilege to make the report of the public proceeding, and therefore may not be sued for libel.

3. **Public interest:** D may be conditionally privileged to act in the ***public interest.*** [478] ***(Example:*** A private citizen's reasonable but mistaken accusation made to the police that P committed a crime would be covered.)

4. **Report of public proceedings:** There is a conditional privilege to report on ***public proceedings,*** such as court cases, legislative hearings, etc. [478-479]

Example: D, a newspaper, runs a story saying, "Citizen said at a press conference that he saw Mayor Brown take a bribe from a developer." If Citizen really made these charges, D would be protected under the "neutral reportage" privilege even if D had serious doubts about the truth of the charges. This is so even though D's doubts would cause D's conduct to constitute "actual malice" under *New York Times v. Sullivan.*

5. **Neutral reportage:** A few cases have recognized a ***"neutral reportage"*** privilege. Under this privilege, one who ***correctly*** and ***neutrally*** reports charges made by one person against S another will be protected if the charges are a matter of ***public interest,*** even if the charges are false. [479-481]

C. Abuse of qualified privilege: Even where a qualified privilege exists, it may be ***abused*** (and therefore forfeited) in a number of ways. [481-481]

1. **Actual malice:** Most importantly, the privilege will be lost if D ***knew that his statement was false,*** or acted in ***reckless disregard*** of whether it was true. [481]

Example: D, P's ex-employer, is asked for information by X, P's new prospective employer, concerning P's work. D's clerk negligently misreads the file, and asserts that P was fired for dishonesty, when in fact P quit voluntarily. If the clerk is shown to have behaved recklessly, D's qualified privilege — to protect the interest of a third person by commenting on an employee's fitness — will be deemed abused and thus forfeited. But if the clerk was only negligent, the privilege will probably not be lost.

2. **Excessive publication:** The privilege is abused if the statement is

made to persons to whom publication is ***not reasonably necessary*** to protect the interest in question, or if more damaging information is stated than is reasonably needed. [481]

D. Statutory privileges: Many states, and the federal government, have enacted a number of ***statutory privileges.***

1. Internet Service Providers: One of the most important of these is the federal immunity given to ***Internet Service Providers*** (ISPs) under the Communications Decency Act of 1996. Part of the CDA, 47 U.S.C. § 230(c)(1), says that **"no *provider or user*** of an interactive ***computer service*** shall be treated as the ***publisher or speaker of any information*** provided by ***another information content provider."*** This provision amounts to a grant of ***immunity*** from state defamation liability for "publishing false or defamatory material so long as the ***information was provided by another party."*** *[Carafano v. Metrosplash.com, Inc.]* [482]

Example: D, a corporation, owns the matchmaker.com Internet dating service. Some unknown person posts a dating profile of P (a well-known actress) on the matchmaker.com site, without P's consent. The posting is done in the form of answers to a questionnaire that D requires posters to fill out; many of the questions are in multiple-choice format. The posting includes P's picture, her home address, her e-mail address and various sexually-oriented statements. People who send e-mail to the e-mail address are then given C P's home phone number. As a result, P receives numerous phone calls, voice mail messages and e-mails, some of which are sexually explicit or threatening. She sues D in state court for defamation and invasion of privacy. D defends on the grounds that the CDA gives it immunity against all such claims by P. P responds that the CDA immunity does not apply where D supplies part of the defamatory content, and that that is what happened here, since most of the content was formulated in response to matchmaker.com's detailed questionnaire.

Held, for D. The immunity given by the CDA was intended by Congress to be ***"quite robust."*** It is true that the immunity does not apply where the defendant functioned as an "information content ***provider"*** for the portion of the statement or publication at issue. But here, the fact that some of the content was formulated in response to D's questionnaire does not mean that D was the provider of the content in question. And the fact that D's site structured and standardized the poster's answers (e.g., by supplying multiple-choice answers for dozens of questions) did not turn D into a supplier of the content in the profile. [*Carafano v. Metrosplash.com, Inc., supra]* [482]

VII. REMEDIES

A. Damages: A successful defamation plaintiff may recover various sorts of damages:

1. **Compensatory damages:** First, of course, P may recover ***compensatory*** damages. These can include [482]:

   a. **Pecuniary:** Items of ***pecuniary loss*** (e.g., P's lost earnings from being fired from her job, due to D's statement to P's boss that D was dishonest in the last job).

   b. **Humiliation, lost friendship:** Compensation for ***humiliation,*** lost friendship, illness, etc. (even though these items would not count as "special harm" for purposes of slander).

2. **Punitive damages:** Also, under some circumstances ***punitive*** damages may be awarded [483-484]:

   a. **Public figure or matter of public interest:** If P is a ***public figure,*** or the case involves a matter of ***public interest,*** punitive damages may be awarded only on a showing that D knew his statements were false or recklessly disregarded the truth. (That is, the "actual malice" requirement of *New York Times v. Sullivan* extends, as far as punitive damages go, not only to public figures but also to private figures suing on matters of public interest.) [*Gertz v. Robert Welch]*

   b. **Private figure/private matter:** But if P is a ***private*** figure and D's statement relates to a private matter, then punitive damages may be awarded even if P shows only that D was ***negligent. (Example:*** D, a credit reporting agency, falsely reports to a few subscribers that P, a corporation, is insolvent. Because P is a private figure and the report did not involve any matter of public concern, punitive damages can be awarded, as a constitutional matter. [Dun *&* *Bradstreet v. Greenmoss Builders*, 483])

3. **Nominal damages:** Even a plaintiff who has suffered no direct loss may recover ***nominal*** damages, to "clear his name." Certainly if P shows knowledge of falsehood or reckless disregard of the truth on the part of D, P may recover nominal damages. It is not clear whether or when a plaintiff who shows less than this may recover nominal damages. [484]

B. Retraction: Most states have enacted ***"retraction"*** statutes. Some of these statutes hold that if D publishes a retraction within a certain

period, this bars P from recovery. Other statutes merely ***require*** news organizations to grant a right of response to P, without providing that this eliminates P's defamation action. [484]

CHAPTER 18
MISCELLANEOUS TORTS: INVASION OF PRIVACY; MISUSE OF LEGAL PROCEDURES; INTERFERENCE WITH ADVANTAGEOUS RELATIONS; FAMILIAL AND POLITICAL RELATIONS

I. INVASION OF PRIVACY

A. **Four torts:** The so-called ***"invasion of privacy"*** cause of action is essentially four distinct minitorts. They all involve P's "right to be let alone." The four are:

[1] ***misappropriation*** of P's name or picture;

[2] ***intrusion*** on P's solitude;

[3] undue publicity given to P's ***private life;*** and

[4] the placing of P in a ***false light.*** [494]

B. Misappropriation of identity: P can sue if her ***name or picture*** has been ***misappropriated*** by D for his own financial benefit. [494]

> **Example:** D, a cereal maker, runs an ad containing a photo of P eating D's cereal. P does in fact eat D's cereal, but has never agreed to endorse it. P can recover for appropriation of his picture.

C. Intrusion: P may sue if his ***solitude*** is ***intruded upon,*** and this intrusion would be "highly offensive to a reasonable person." [495]

> **Example:** P and D are roommates at college; they share a suite, but each has his own small bedroom. D hides a web-cam in P's room, and uses it to stream video on the Internet of P having sex with X. P (as well as X) will have a claim against D for the intrusion-on-solitude branch of invasion of privacy: the use of hidden electronic equipment to monitor P's private space is an intrusion that would be "highly offensive to a reasonable person." [495]

1. Must be private place: This "intrusion upon solitude" branch is triggered only where a ***private place*** is invaded. Thus if D takes P's picture in a public place, this will normally not be enough. [495]

D. Publicity of private life: P may recover if D has ***publicized*** the details of P's ***private life.*** The effect must be "highly offensive to a reasonable

person." [495-496] ***(Example:*** D, a sensationalist newspaper, prints the details of the extramarital sex life of P, who is wealthy but not a public figure. P can recover against D for publicity of private life.)

1. **Not of legitimate public concern:** As a constitutional matter, it is probably a requirement for the "publicity of private life" action that the material ***not be of legitimate public concern.*** [496]

   Example: If P is on trial for murder, it is not an invasion of his privacy for newspapers to give reports on even minor private details of his past life, such as his sexual history.

E. False light: P can sue if he is placed before the public eye in a ***false light,*** and this false light would be highly offensive to a reasonable person. [497]

Example: P is war hero. D makes a movie about P's life, including fictitious materials such as a non-existent romance. D is liable for invasion of privacy, of the "false light" variety.

1. **Actual malice:** But at least where P is a public figure, he can recover for "false light" only if he can show that D knew the portrayal was false, or acted in reckless disregard of whether it was. In other words, *New York Times v. Sullivan* applies to false light actions by public figures. *[Time, Inc. v. Hill]* Probably private figures do not have to meet this "actual malice" standard.

II. MISUSE OF LEGAL PROCEDURE

A. **Three torts:** Three related tort actions protect P's interest in not being subjected to ***unwarranted judicial proceedings:*** (1) ***malicious prosecution;*** (2) ***wrongful institution of civil proceedings;*** and (3) ***abuse of process.*** [497]

B. Malicious prosecution: To recover for ***malicious prosecution,*** P must prove the following: (1) that D instituted ***criminal proceedings*** against him; (2) that these proceedings terminated ***in favor of P*** (the accused); (3) that D had ***no probable cause*** to start the proceedings; and (4) that D was motivated primarily by some purpose other than bringing an offender to justice. [497-499]

1. **Initiating proceeding:** P must show that D took an ***active part*** in instigating and encouraging the prosecution. [498] ***(Example:*** If D

merely states what she believes to be the facts to the prosecutor, and lets the prosecutor decide whether to prosecute, this is probably not "institution" of proceedings. But if D attempts to persuade the prosecutor to prosecute, this will be sufficient.)

2. **Favorable outcome:** The criminal proceedings must ***terminate in favor of the accused*** (P). An acquittal will of course be enough; so will a prosecutor's decision not to prosecute (but a plea bargain to a lesser offense will not suffice). [498]

3. **Absence of probable cause:** P must show that D ***lacked probable cause*** to institute the criminal proceedings. [498]

   a. **Reasonable mistake:** If D made a ***reasonable mistake,*** she does not lack probable cause.

   b. **Effect of outcome:** The fact that P was ***acquitted*** does not itself establish lack of probable cause. D still has the right to show, in the tort case, by a preponderance of evidence, that P was guilty and that D therefore had probable cause.

4. **Improper purpose:** P must show that D acted out of ***malice,*** or for some other purpose than bringing an offender to justice. [499]

C. Wrongful civil proceedings: In most states, a tort action exists for wrongful institution of ***civil*** proceedings. The requirements are virtually identical to the "malicious prosecution" action, except that the original proceedings are civil rather than criminal. [499-500]

1. **Elements:** Thus P must prove that: (1) D initiated civil proceedings against P; (2) D did not have probable cause to believe that his claim was justified; (3) the proceedings were started for an improper purpose (e.g., a "nuisance" suit or "strike suit," brought solely for the purpose of extorting a settlement); and (4) the civil proceedings were terminated in favor of the person against whom they were brought. [499]

D. Abuse of process: The tort of ***"abuse of process"*** occurs where a person involved in criminal or civil proceedings uses various ***litigation devices*** for improper purposes. [500] ***(Example:*** Even if a civil suit is properly brought by P, if P then uses his power of ***subpoena*** to harass D or make him settle, rather than for the proper purpose of obtaining his

testimony, this is an abuse of process.)

III. INTERFERENCE WITH ADVANTAGEOUS RELATIONS

A. **Three business torts:** Three related torts protect business interests: (1) injurious falsehood; (2) interference with contract; and (3) interference with prospective advantage. [500]

B. Injurious falsehood: The action for ***"injurious falsehood"*** protects P against certain false statements made against his business, product, or property. Most important is so-called ***"trade libel."*** This occurs where a person makes false statements disparaging P's ***goods or business.*** [500]

1. Elements: P must prove the following elements for trade libel [500]:

a. False disparagement: D made a ***false statement disparaging*** P's goods, business, etc. ***(Example:*** D falsely states that P is out of business);

b. Publication: P must show that the statement was "published," as the word is used in defamation cases;

c. Scienter: P must show ***scienter*** on D's part. That is, P must show that D knew her statement was false, acted in reckless disregard of whether it was false, or (in some courts) acted out of ill-will or spite for P.

d. Special damages: P must prove ***"special damages,"*** i.e., that P suffered ***"pecuniary"*** harm.

2. Defenses: D can raise a number of ***defenses,*** including [501]:

a. Truth: that the statement was ***true;*** and

b. Fair competition: that D was ***pursuing competition by fair means.*** In particular, D is privileged to make ***general comparisons*** between her product and P's, stating or implying that her product is the better one. In other words, "puffing" is protected. But if D makes ***specific*** false allegations against P's product, D will not be protected.

C. Interference with existing contract: The tort of ***"interference with contract"*** protects P's interest in having others perform ***existing***

contracts which they have with him. The claim is against one who ***induces*** another to breach a contract with P. [502-504]

> **Example:** P, a theater owner, has contracted to have actor X perform in P's theater on a certain date. D, a competing theater owner, induces X to perform for him on that date instead. P can recover against D for interference with contract.

1. **Privileges:** D can defend on the grounds that his interference was ***privileged.*** [503]

   a. **Business competition:** D's desire to ***obtain business*** for herself, however, is *not* by itself enough to make her privileged to induce a breach of contract. (But in most courts, if P's contract was ***terminable at will,*** D is privileged to induce a termination of it for the purpose of obtaining the business for herself.)

D. Interference with prospective advantage: If due to D's interference, P loses the benefits of ***prospective, potential*** contracts (as opposed to existing contracts), P can sue for ***"interference with prospective advantage."*** [504-506]

1. **Same rules:** Essentially the same rules apply here as for "interference with contract." The big difference is that D has a much greater scope of ***privilege*** to interfere. [504]

   a. **Competition:** Most importantly, D's desire to ***obtain the business for herself*** will be enough to give her a privilege, which is usually not the case where there is an existing contract.

   > **Example:** P and D are competitors. D learns that P has been pursuing a certain prospect for nine months, and is about to sign a long-term supply contract with that customer. D can jump in, and offer a money-losing low price, even if this is for the sole purpose of weakening P.

IV. INTERFERENCE WITH FAMILY AND POLITICAL RELATIONS

A. Family: A family member's interest in having the ***continued affections*** of the other member of his family is sometimes protected. [506-508]

1. **Husband and wife:** In some states, a jilted ***spouse*** may bring either of two tort claims against an outsider who has interfered with the marital relation:

a. **Alienation of affections:** Some states allow P to sue for ***"alienation of affections"*** against anyone who has caused P's spouse to lose his or her affection for P. (This is usually, but not always, a romantic rival — for instance, the action can be brought against a friend or relative who has convinced the spouse to leave P.) But D has a ***privilege*** to interfere to advance what D reasonably believes to be the alienated spouse's welfare. [506]

b. **Criminal conversation:** A person who has ***sexual intercourse*** with one spouse may be liable to the other for ***"criminal conversation."*** [507]

2. **Parent's claim:** A ***parent*** will *not* usually have a tort claim against one who alienates his ***child's affections.*** But there are a couple of exceptions, where suit is allowed:

a. **Minor leaves home:** The parent has a claim against the person who has caused his minor child to ***leave home,*** or not to return home. [507] ***(Example:*** A parent might sue the members of a cult, if the cult induces the minor child to leave home.)

b. **Sex:** The parent has a tort claim against anyone who has ***sexual intercourse*** with the parent's minor ***daughter*** (but not son).

B. Interference with political and civil rights: There may be a common-law tort action for interfering with P's ***political rights*** (e.g., his right to vote), his ***civil rights*** (e.g., his right to make a A public protest), or his ***public duties*** (e.g., his duty to serve on a jury). [508]

1. **§1983 suits for state violation of federal rights:** The most important statute allowing recovery for civil rights violations is the famous federal ***"section 1983,"*** 42 U.S.C. §1983. Section 1983 allows a person to bring a tort action against any person who, ***"under color of state law,*** deprives the plaintiff of "any rights, privileges, or immunities" secured by the ***federal Constitution or a federal statute.*** So the basic effect of §1983 is to permit a tort suit by anyone who is injured when a ***state or local official*** violates the plaintiff's federal rights, typically her ***constitutionally-guaranteed civil rights.*** Dobbs, §44, p. 82.

a. **Constitutional provisions:** Most §1983 actions allege that state or

local officials have violated one of these three federal constitutional provisions:

[1] the 14th Amendment's guarantee of ***substantive and procedural due process*** of law, and its guarantee of ***equal protection*** of the laws;

[2] the 4th Amendment's prohibition of ***unreasonable searches and seizures;*** and

[3] the 8th Amendment's ban on ***cruel and unusual punishment.*** *Id.*

Example (Fourth Amendment): Suppose that Officer, an officer in the City police force, arrests P without probable cause, and then brutally beats P in an unsuccessful attempt to extract a confession. P can recover tort damages from both Officer and City under §1983. Officer has acted "under color of state law — that is, he has used his official position as justification for his acts. And Officer's conduct amounts to an "unreasonable seizure" under the 4th Amendment. City is vicariously liable under the doctrine of *respondeat superior (supra*, p. 66).

b. Limitations: Supreme Court decisions over the last few decades have placed two important ***limits*** on the extent to which suits brought under §1983 can supplement state tort law recoveries.

i. Must show actual damage: First, compensatory damages may not be awarded based on the abstract ***value*** or ***importance*** of the constitutional rights that were violated.

ii. Negligence: Second, where the deprivation of a constitutionally-guaranteed right results from a public official's ***negligence*** rather than intent, §1983 ***may not be used at all.***

Example: P, a prisoner, is attacked by X, a fellow prisoner. Prior to the attack, a prison guard working for D (the state) negligently fails to heed P's warning that X plans to attack him. *Held,* for D: §1983 protects only against intentional, rather than negligent, deprivations of Due Process. So P has only his state-law tort remedies (which, apparently, don't exist here because of sovereign immunity). *[Davidson v. Cannon]*

c. Implied right of action from constitutional provision: Section 1983 allows only actions against state and local government officials, not federal ones. However, when a federal official violates a citizen's constitutional rights, the citizen is often permitted to bring a federal tort-like suit against the official. This occurs

because the court finds an ***"implied private right of action"*** for violation of the constitutional provision. [509]

i. 4th Amendment violation: For example, suppose that a federal law-enforcement official violates P's 4th Amendment right to be free from unreasonable searches and seizures. The Supreme Court has held that P has an implied right to bring a federal civil-damages suit against the official for this violation. *[Bivens v. Six Unknown Named Agents of FBI* (civil suit for money damages allowed against FBI agents for search and arrest made without probable cause).]

CHAPTER 1
INTRODUCTION

I. NATURE OF TORT LAW

A. No satisfactory definition: There is no really useful definition of a "tort" which will allow all tortious conduct to be distinguished from all non-tortious conduct. In fact, courts are constantly changing their view of what constitutes tortious conduct (usually by way of *expansion* of liability). The best that can be done is to identify a few of the main features and purposes of tort law:

1. Not contractual: Tort law, unlike contract law, is not based on the idea of ***"consent."*** Whereas a contract is an expression of the parties' consent to be bound, every member of society will be liable in tort if he behaves in certain ways, whether he has consented to such liability or not. Thus an automobile driver who drives carelessly will be liable in tort to one he hits, regardless of consent.

2. Compensation: The overall purpose of tort law is to ***compensate*** plaintiffs for ***unreasonable harm*** which they have sustained.

a. Societal standard: The unreasonableness of the harm is generally measured from a broad ***"social utility"*** standpoint. For instance, in determining whether the defendant's conduct is "negligent," the social utility of that conduct (e.g., running a railroad) plays an extremely important role.

b. Economic efficiency: When the law takes into account the "social utility" of the defendant's conduct, courts are to some extent trying to achieve ***economic efficiency.*** That is, they try to impose on the defendant an ***incentive*** to make sure that the ***costs*** associated with her activities do not outweigh the ***benefits*** from those activities. Normally, a defendant will not engage in conduct whose costs outweigh its benefits anyway; tort law addresses those cases where the defendant gets the benefits, but the costs are imposed on ***third parties.***

Example: Assume that D is a driver who is running ten minutes late for an important — and potentially lucrative — business meeting. If D does not face civil liability for

driving at 70 m.p.h., and feels that he is completely protected by his airbag, he is likely to speed — all of the benefits from speeding will accrue to him (he gets to the meeting on time, and gets to make the business deal), and the big potential costs from the activity are likely to be imposed on others (e.g., the pedestrian he may run over). Even if the expected financial benefit to D from speeding in this case is fairly small (say, $1,000), and the expected "cost" to others from the speeding is higher (e.g., $200,000 estimated cost of injury to a pedestrian if one is hit, times, let's say, a 1% chance of such an accident occurring, for an expected value of $2,000), D will still have an incentive to speed. Making D responsible for the cost to others from his activity thus induces D to behave "efficiently" (here, by refraining from conduct that has an expected "benefit" of $1,000 versus expected "cost" of $2,000).

3. **Shifting of burden:** Apart from tort law's interest in promoting economic efficiency, this branch of law also has an interest in imposing the cost of accidents on those who can ***afford*** them. That is, where financial hardship must fall on someone, the courts generally attempt to place it on the party who can best bear it (usually because he is, or could easily have been, covered by ***insurance).***

   a. **Not dispositive:** The parties' relative ability to bear the burden is not dispositive; a worker who dashes out into the street and is hit by a U.S. Mail Truck will usually not be able to recover very much from the U.S. (because of his "comparative negligence"), even though he is obviously far less able to bear financial burdens of his injury than would the U.S. government. But ability to bear the burden is certainly one important factor in courts' decisions; this is seen most clearly in cases of "products liability," in which manufacturers and other sellers of defective products are required to bear the cost of injuries caused by these products, regardless of negligence, on the theory that such costs should be treated as simply part of the "cost of doing business." See *infra*, p. 347.

4. **Conflict:** Observe that the goal of "economic efficiency" and the goal of "shifting costs to those who can afford them" will often be ***at odds*** with each other. Consider the above hypothetical of the worker who dashes carelessly into the street and is hit by a U.S. mail truck. If we want to encourage "economic efficiency" — that is, if we want to give all parties the economic incentive to avoid activities whose economic costs outweigh their economic benefits — we would make sure that the worker cannot recover, because he is the one who had the best opportunity to change the outcome, by not dashing carelessly

into the street. If, on the other hand, we want to make sure that costs are imposed on those who can best bear them, we will allow the dasher to recover from the U.S., which obviously has the deeper pocket. After an enormous expansion of liability from about the 1960s through '80s (during which courts seemed to engage mostly in shifting costs to the deepest available pocket), there are signs post-1990 that courts are paying increasing attention to economic-efficiency issues. See, e.g., *Indiana Harbor Belt R.R. Co. v. American Cyanamid Co.*, *infra*, p. 337.

II. CATEGORIES OF TORTS

A. Three types of defendant conduct: Most Torts courses and casebooks organize the bulk of tort law into three categories, relating to the nature of the ***defendant's conduct.*** This is also the approach followed here. Thus we consider, in order: (1) ***intentional*** torts; (2) the tort of ***"negligence"*** (i.e., roughly speaking, "carelessness"); and (3) torts in which the defendant's conduct is neither intentional nor careless, but he is made ***"strictly liable"*** because of the nature of his activity (e.g., abnormally dangerous activity, manufacture of defective products, etc.).

B. Historical overview: The relations among these three categories have undergone vast historical development.

1. Early strict liability: Under early (15th century) common law, courts often imposed ***strict liability.*** Thus in ***Hulle v. Orynge (The Case of Thorns),*** King's Bench, 1466, the text says, "[i]f a man does a thing he is bound to do it in such a manner that by his deed no injury or damage is inflicted upon others." For instance, as that case stated, if A lifted his stick to defend himself against an attack by B, and the stick accidentally hit C, standing behind A, A would be liable, notwithstanding his carefulness, and the fact that he was engaged in lawful self-defense.

a. Trespass vs. trespass on the case: A distinction developed between the action of ***"trespass"*** (which was for a ***direct invasion*** of the plaintiff's person or property) and ***"trespass on the case"*** (which was for an indirect invasion of these interests). A classic example was that of a log which falls on the road; if the log hit the plaintiff while she was walking, this was trespass. But if she

stumbled on the log after it had landed, this was merely trespass on the case.

b. Significance of distinction: One important consequence of the distinction between the two causes of action is that for trespass, strict liability existed (as in *Hulle, supra).* For trespass on the case, however, it was normally necessary to show some fault on the defendant's part.

2. Negligence for trespass: But the rule of strict liability for "trespass" began to break down, with respect to certain kinds of trespasses. Thus in *Weaver v. Ward*, 80 Eng. Rep. 284 (K.B. 1616), P and D were soldiers engaged in military exercises. As they were skirmishing, D's musket went off, wounding P. The court held for P, but noted that if D had been able to show that the accident was "utterly without his fault," as would be the case if P had run in front of the gun at the moment of firing, D would not be liable. The burden of proving pure accident was upon D, however, and he did not make such a showing.

3. Shift of burden of proof to plaintiff: Still later, courts began to hold not only that the defendant in a "trespass" case was not liable if he was completely without fault, but also that the ***burden of proving fault*** should be on the ***plaintiff.***

> **Example:** Two dogs, owned by P and D, are fighting. D, attempting to separate them, raises his stick over his shoulder, hitting P in the eye.
>
> *Held*, " ... if the injury was unavoidable, and the conduct of the defendant was free from blame, he will not be liable. . . . Want of due care became part of the plaintiff's case, and the burden of proof was on the plaintiff to establish it." *Brown v. Kendall,* 60 Mass. 292 (Mass. 1850).

a. Meaning of "negligent": The courts came to adopt a more-or-less "moral" standard of negligence, by which the defendant would be held to have failed to use due care only if his conduct was somewhat ***blameworthy.*** See, e.g., Rest. 2d, §283C, Comment c ("[A]n automobile driver who suddenly and quite unexpectedly suffers a heart attack does not become negligent when he loses control of his car and drives it in a manner which would otherwise be unreasonable; but one who knows that he is subject to such attacks may be negligent in driving at all.")

4. **Return of strict liability:** But in recent decades, courts have made a sweeping return to the principle of strict liability, at least in many areas. Chief among these are where the defendant engages in an ***abnormally dangerous activity*** *(infra,* p. 332), and where he makes or sells a ***defective product*** that causes physical injury *(infra,* p. 358).

> **Example:** D, a contractor building a tunnel for the City of New York, uses dynamite to set off large blasts near a garage owned by P. The garage is wrecked, and P sues. There is no evidence that D failed to use ordinary care in doing the blasting.
>
> *Held,* for P. It is irrelevant that the damage to P's property was done not by the direct impact of rocks or other materials, but by concussion or shock waves. Strict liability for all blasting damage will not block the building of towns and other progress; P is not trying to stop the tunnel, but merely to obtain compensation. A previous case allowing strict liability only where the damage is caused directly by rocks is overruled. *Spano v. Perini Corp.*, 250 N.E.2d 31 (N.Y. 1969), *infra,* p. 45.

C. Combined torts: Our analysis of liability founded on the three major types of defendant conduct (intent, negligence and strict liability) appears on pp. 7 through 421 *infra.* After that, a number of torts are treated which may be based upon more than one of these three types of defendant conduct. For instance, the torts of nuisance and misrepresentation may be founded on either intent, negligence or strict liability; the same is true for a manufacturer's or retailer's sale of a defective product.

1. **Significance of distinction:** The distinction among these three major types of defendant conduct is most significant, apart from the basic question of liability, with respect to two issues:

   a. **Scope of liability:** First, if the defendant's conduct produces ***far-reaching, unexpected, consequences,*** will he be liable for these consequences? In general, ***the more culpable his conduct, the more far-reaching his liability*** for unexpected consequences. Liability for intentional torts, for instance, extends significantly further than that for the tort of negligence; see *infra,* p. 10.

   b. **Damages:** Secondly, what ***measure of damages*** must the defendant pay once he is found liable? For all torts, he must pay "compensatory damages," i.e., damages whose purpose is to repay the plaintiff for the harm she has suffered. (Obviously, this objective is virtually never realized in cases of personal injury; can

$100,000 really repay the plaintiff for loss of an arm?

i. **Punitive and nominal damages:** But in intentional tort cases, the plaintiff may also sometimes obtain ***"punitive damages"*** and ***"nominal damages,"*** both of which are discussed *infra*, p. 10. Punitive and nominal damages are almost never recoverable where negligence or strict liability is the basis for recovery.

D. Analyzing tort problems: The student should analyze a tort problem by considering three major questions about each possible tort:

1. **Basic requirements:** Are the basic requirements (the "*prima facie* case") for the tort satisfied?

2. **Are defenses available?** Are there any ***defenses*** or justifications which the defendant can raise that would prevent him from being liable (e.g., self-defense as a defense to a claim of assault, or contributory negligence as a defense to a claim of negligence)?

3. **What damages?** If the *prima facie* case has been established, and there are no defenses, what elements of ***damages*** may the plaintiff recover (e.g., medical expenses, lost income, pain and suffering, punitive damages, etc.)?

III. SOURCES OF LAW

A. Restatement as source of law: In addition to cases and treatises, the principal sources for the black-letter rules stated in this outline are very influential ***Restatements of Torts,*** drafted by the American Law Institute.

1. **Second Restatement:** The ***Second*** Restatement of Torts was published in the 1960s and 70s.

2. **Third Restatement:** As of this writing (mid-2015), most major torts topics have been covered by a ***Third*** Restatement, including Liability for Physical & Emotional Harm (final), Products Liability (final), Apportionment of Liability (final) and Liability for Economic Harm (Proposed Final Draft #2). We discuss these parts of the Third Restatement where appropriate.

B. Term "plaintiff's decedent" not used: Many of the cases discussed in

this outline are ones in which a death resulted, and which the tort claim was brought by the executor or administrator of the dead person's estate. In this situation, it is the executor or administrator who is actually the "plaintiff," and the dead person is called the ***"plaintiff's decedent."*** However, for purposes of simplicity, the cases are discussed here as if the dead person were the plaintiff, and the term "plaintiff's decedent" is not used.

CHAPTER 2
INTENTIONAL TORTS AGAINST THE PERSON

ChapterScope

This chapter is concerned with four "intentional" torts that are committed against "the person" (as opposed to being committed against property): (1) ***battery;*** (2) ***assault;*** (3) ***false imprisonment;*** and (4) ***infliction of emtional distress.*** (In later chapters, we will consider non-intentional torts related to some of the torts discussed in this chapter. For instance, we will consider the tort of *negligent* infliction of mental distress *infra*, p. 216.) Here are the key concepts in this chapter:

- **Intentional:** Each of the torts covered here is committed only if the defendant acted ***"intentionally."*** However, the precise meaning of "intent" is different for each of the torts.
- **Transferred intent:** Under the doctrine of ***"transferred intent,"*** if D held the necessary intent with respect to person A, he will be held to have committed an intentional tort against ***any other person*** who happens to be injured.
- **Battery:** ***Battery*** is the ***intentional infliction of a harmful or offensive bodily contact.***
- I **Assault:** ***Assault*** is the intentional causing of an ***apprehension*** of ***harmful or offensive bodily contact.***
  - □ **Imminence:** It must appear to P that the harm being threatened is ***imminent,*** and that D has a present ability to carry out the threat.
- **False imprisonment:** ***False imprisonment*** is defined as the intentional infliction of a ***confinement.***
- **Infliction of mental distress:** Intentional infliction of mental distress is defined as the ***intentional or reckless*** infliction, by ***extreme and outrageous conduct,*** of ***severe emotional or mental distress,*** even in the absence of physical harm.

I. "INTENT" DEFINED

A. Intent generally: What exactly must a tortfeasor intend to do in order for him to commit an "intentional" tort against another person? For

instance, suppose that "battery" is defined as the intentional infliction of a harmful or offensive contact (the definition given *infra*, p. 11). Suppose further that we are interested in determining whether a slap given by A to B's face is a battery. Does A have the necessary intent if he merely intended to move his hands through the air as a gesture to make a point, and did not intend either to touch B or to frighten her? What if he did intend to touch her, but did not intend to harm her?

1. **Summary of rule:** It is difficult to formulate a definition of intent which would apply to the battery example given above, and to all the other torts discussed in this chapter. Therefore, the precise kind of intent required for each of these torts will be discussed when the other aspects of that tort are treated. However, a general principle applicable to all these torts can be stated:

   a. **General principle:** The intent must be at least to bring about some sort of ***physical or mental effect upon another person,*** but does not need to include a desire to "harm" that person. Thus the gesture described above would not be a battery, since the person making it did not intend to touch or frighten the person he hit; this is true even though he did intend to move his hand through the air. But the slap that was not intended to "harm" the victim is nonetheless a battery, since there was an intent to ***make the bodily contact.***

2. **Intent to commit different tort:** Suppose a person intends to commit one tort, but in fact commits another. For instance, suppose A intends to frighten B by shooting at him and missing, but she accidentally hits him. She will be held to have had the intent necessary for a battery, even though the only tort she intended to commit was the tort of assault (the intentional infliction of an "apprehension of a bodily contact"). See Rest. 2d §18(1).

   a. **Broadly applicable:** The rule that a person who intends to commit one intentional tort and in fact commits another is liable for the tort actually committed, applies ***no matter which kinds of torts are involved.***

      Example: If *A* accidentally hits *B* while trying to subject him to false imprisonment, *A* is liable for battery.

B. "Substantial certainty": An occurrence is obviously "intentional" if

the actor desires to bring it about. But tort law also calls it intentional if the actor didn't desire it, but ***knew with substantial certainty*** that it would occur as a result of his action. See Rest. 2d, §8A.

> **Example:** Brian Dailey, five years old, pulls a chair out from under P as she is sitting down. The evidence at trial shows that he did not desire that she hit the ground, but that he may have known with substantial certainty that she was trying to sit, and would hit the ground.
>
> *Held*, the case must be remanded the trial court, to determine whether Brian indeed knew with substantial certainty that P would fall. If so, he meets the intent requirement for battery.
>
> On remand, the trial court found that Brian knew with substantial certainty that P was trying to sit when he pulled the chair away, and that there was therefore the intentional tort of battery (defined *infra*, p. 11). *Garratt v. Dailey*, 279 P.2d 1091 (Wash. 1955).

1. Less than substantial certainty: But if it is not "substantially certain" that the invasion of the plaintiff's interest in his person will occur, but merely highly likely, the act is not an intentional tort. This is true even though it may be "reckless," and may give rise to liability for negligence.

> **Example:** Suppose Brian Dailey, in the above example, thought it was very probable, but not "substantially certain," that P would hit the ground when he pulled out the chair. His act ("act" defined here as his causing P to hit the ground, since that is the respect in which P's interest in her person was invaded) is not "intentional," and cannot give rise to battery. It might, however, give rise to a cause of action for negligence, if Brian in acting had failed to meet a reasonable standard of care for one of his age.

a. Act distinguished from consequences: But while the "act" must be intentional or substantially certain, as distinguished from highly probable, this is not true for the ***consequences*** of the act. Thus if D intends to tap P lightly on the chin, to annoy him, and unbeknownst to D, P has a "glass jaw," D will be liable for any unforeseeable injury suffered by P as a result of the tap. In other words, the causing of the tap, the contact, must be intentional or substantially certain, but the consequences (the injury), do not have to be intended or substantially certain, or even foreseeable. See the further discussion of this matter, *infra*, p. 10.

C. No intent to harm necessary: A person can have the intent necessary

for an intentional tort even though he does not desire to ***"harm"*** the victim, and does not have a hostile intent.

> **Example:** D, a schoolboy, kicks his classmate P. The jury finds that although D intended to kick P, he did not intend to harm him. Nonetheless, P suffers severe injuries. *Held*, whether D intended to harm is irrelevant, as long as D intended to kick P. *Vosburg v. Putney*, 50 N.W. 403 (Wis. 1891), *infra*, p. 10.

1. **Ignorance of the law no excuse:** Similarly, it is irrelevant that the defendant did not know that the action would constitute a tort or a crime. Thus in the law of intentional torts, "ignorance of the law is no excuse."

2. **Insane persons are liable for their torts:** ***Insane people*** do not automatically escape liability for committing intentional torts.

> **Example:** P, a registered nurse, is charged with the care of D, an insane person. During a fit of rage, D strikes P on the head with the leg of a piece of furniture. P sues for assault and battery.
>
> *Held*, for P. If an insane person is capable of forming an intent to do a harmful act, he may be held liable for the intentional tort just as a normal person would be. The fact that insanity may have been the cause of the intent is irrelevant. Here, the jury could reasonably find that D was capable of intending to strike P. *McGuire v. Almy*, 8 N.E.2d 760 (Mass. 1937).
>
> **Note:** As indicated by the *McGuire* court, an insane person may be *incapable* of forming the necessary intent. This is particularly likely to be the case with respect to a tort requiring an unusual degree of intelligence or rationality, such as *deceit.* In that event, the insane person would not be liable.

D. Transferred intent: In all kinds of intentional torts, the doctrine of ***"transferred intent"*** may apply. This doctrine holds that as long as the defendant held the necessary intent with respect to one person, he will be held to have committed an intentional tort against ***any other person who happens to be injured.*** See P&K, pp. 37-39.

> **Example:** D sees Smith and X on D's shed. D throws a stick at Smith or X, and accidentally hits P. *Held*, assuming that D used an unreasonable degree of force, he is liable to P, even though it was not P he was trying to hit. *Talmadge v. Smith*, 59 N.W. 656 (Mich. 1894).

1. **Different kind of tort intended:** We saw above that if a defendant intended to commit an assault, and in fact struck the plaintiff, he will be deemed to have had the intent necessary for battery. This rule applies in the "transferred intent" situation as well. Thus if A intends

to frighten B by shooting near her, and the bullet accidentally hits C, A has committed a battery upon C.

II. NOMINAL AND PUNITIVE DAMAGES

A. Significance of intent: Often the judge or jury will have to decide whether a defendant's conduct constituted an intentional tort, or merely negligence. Assuming that it is either one or the other, how they decide will have several possible consequences. But the most important is probably the ***measure of damages.***

1. Nominal damages: If the tort is held to have been an intentional one, the judge or jury may award ***nominal damages,*** (i.e., a token sum), even if the plaintiff cannot show that he suffered any actual pecuniary harm. But if the tort is merely that of negligence, nominal damages are not awardable, and the plaintiff may recover only the damages that he shows he actually suffered.

> **Example:** D attempts to shoot P. She misses, but P sees her aiming, and is frightened. This is the intentional tort of assault, and P will be entitled to recover nominal damages (perhaps $1.00) even if he cannot show that he suffered more than a momentary fright of little consequence. But if D had been hunting, and had almost shot P out of negligence, P could not recover nominal damages. He would recover only the actual damages he sustained (though these might include a sum in compensation for fright suffered during and after the episode, so-called "mental suffering" damages).

2. Punitive damages: An intentional tort victim may also recover ***punitive*** damages, if the defendant's conduct was outrageous or malicious. Rest. 2d, §908. Such damages may be very substantial (perhaps even in the hundreds of thousands of dollars), and may be awarded even where little or no compensatory damages are awarded. Thus in the above example of an attempted shooting, P would have a good chance of being awarded substantial punitive damages together with nominal damages and slight or no compensatory damages.

a. Negligence: In ordinary negligence cases, on the other hand, punitive damages are not awardable. Rest. 2d, §908, Comment b.

b. Non-outrageous conduct: Nor are punitive damages awardable in ***every*** intentional tort case. It is only where the conduct is outrageous or malicious that they will be allowed. For instance, in a situation like *Vosburg v. Putney*, *supra*, p. 9, where the defendant

intended the kick but meant no harm, the court would almost certainly hold as a matter of law that the jury could not award punitive damages.

III. SCOPE OF LIABILITY

A. Distinction: Another important consequence of the distinction between intentional torts and negligence has to do with liability for unexpected results. Whereas the negligence defendant will generally be held liable only for those consequences which were at least somewhat foreseeable, the intentional tortfeasor will be liable for virtually every result stemming directly or even somewhat indirectly from his conduct, however unlikely it might have seemed at the time of his act that this result would follow. Rest. 2d, §435B.

> **Example:** D intentionally hits P on the head intending merely to annoy him. P is slightly injured, and is taken to the hospital. There, by a gross and completely unforeseeable error, a nurse gives him poison instead of medicine, and P dies. D will be liable for P's death, not just the minor injury. But if D had merely negligently given P the same minor injury, he would not be liable for the unanticipated death. Rest. 2d, §435B, Illustr. 1.

IV. BATTERY

A. Battery generally: Battery is the ***intentional infliction*** of a ***harmful or offensive bodily contact.*** See Rest. 2d, §§13, 18.

> **Example:** *A* intentionally punches *B* in the nose. *A* has committed a battery.

B. Intent: Battery cases often turn on subtle questions of ***intent.***

1. **Meaning of "intent":** Saying that battery is an "intentional" tort does not mean that D must have desired to physically ***harm*** P. D has the necessary intent for battery if it is the case ***either*** that:
   [1] D intended to ***cause a harmful or offensive bodily contact;*** *or*
   [2] D intended to cause an ***imminent apprehension*** on P's part of a harmful or offensive bodily contact (even if D did not intend to cause the contact itself).

> **Example of [1]:** D shoots at P, intending to hit him with the bullet. D has the necessary intent for battery.

> **Example of [2]:** D shoots at P, while facing him, intending to miss P, but also intending to make P think that P would be hit. D has the intent needed for

battery. That is, the "intent to commit an assault" (see *infra*, p. 14) suffices as the intent for battery.

2. **Intent to create apprehension of contact:** Alternative [2] above means that an ***"intent to commit an assault"*** will suffice as the intent for battery. That is, if D intends merely to put ***P in fear of an imminent harmful or offensive contact,*** that's a sufficient intent for battery, and it doesn't matter that D does not intend that such a contact actually occur.

   a. **Prank gone bad:** So, for instance, be on the lookout for a ***"prank gone bad,"*** where D tries to trick P into thinking that P will undergo an imminent harmful or offensive contact, but D doesn't intend the contact to actually occur. If something goes wrong and a harmful contact occurs, that's battery of the "intent to commit assault" (i.e., intent to create an imminent apprehension of harmful or offensive contact) variety. See generally, Rest. 2d, §13 and Comment c thereto.

Example: D and P are golfing together. As a prank, D swings his club towards P's head, desiring to make P think (falsely) that the club will strike P. D holds up his swing at the last instant, but due to a hidden defect in the club the clubhead flies off and strikes P in the fact, injuring him. This is battery, because: (1) D intended to create in P an apprehension of an imminent harmful or offensive contact; and (2) an actual harmful or offensive contact ensued.

C. Harmful or offensive contact: Battery of course includes the infliction of contacts that are truly "harmful," in the sense of causing pain or bodily damage. But it also includes contacts which are merely ***"offensive,"*** i.e., damaging to a ***"reasonable sense of dignity."***

Example: P consults D, an ear doctor, about her right ear. She consents to an operation on that ear, but does nothing about her left ear. During the operation, D discovers that the left ear (but not the right ear) needs surgery, and performs it.

Held, the surgery on the left ear was an unauthorized, offensive contact, and constituted battery even though it was not in fact harmful to P's health. *Mohr v. Williams*, 104 N.W. 12 (Minn. 1905).

1. **Reasonableness standard for "offensive" contact:** In determining whether a particular contact is "offensive," the standard is not whether the particular plaintiff was offended, but whether "an ***ordinary person not unduly sensitive*** as to his dignity" would have been offended. P&K, p. 42.

a. Ordinary and reasonable contacts: Thus if A gently pushes past B in a crowded subway, or taps him on the shoulder to ask directions, no battery will be found even if it turns out that B is unduly sensitive and was in fact offended by the touching. But if A uses violence to push past B, this will be battery.

b. Where defendant has knowledge of plaintiff's sensitivity: But suppose that the defendant happens to have known that the plaintiff was an unusually sensitive person (e.g., a Howard Hughes-type who is afraid that being touched by a stranger will infect him). Can the defendant be held liable for a touching which would not be offensive to a normal person? It is not at all clear how such a case would come out — Rest. 2d, Caveat to §19, expressly declines to take a position on this issue.

2. Contact beyond level consented to: Battery can occur where the plaintiff ***consents*** to a certain level of bodily contact (see *infra*, p. 63), but the defendant ***goes beyond the consented-to level*** of contact. At that point, the consent becomes invalid, and battery results. Look for this "beyond the consented-to level of contact" scenario when the facts involve either a ***sporting event*** or a ***medical/surgical procedure.***

> **Example 1:** In a pick-up ice hockey game in a park, P and D are skirmishing for the puck near the side wall of the rink. D intentionally delivers a hard body check that throws P into the wall, and the collision between P and the wall badly injures P. D sues P for battery.
>
> If the level of contact between P and D was within the level to which players in this pickup game would be found to have impliedly consented (based on past practices, actual words, etc.), then consent would be a complete defense to P's claim. But if D intentionally delivered a body check (a body contact) that went beyond the level or type of contact D knew or should have known P was consenting to, then it would constitute battery.
>
> **Example 2:** D, a surgeon, agrees to perform liposuction on P's thighs. While P is under anesthesia, D decides that D could benefit from liposuction on P's arms. Assuming that P is not found to have impliedly consented in advance to the procedure on the arms, that procedure was battery, because it went beyond the scope of the bodily contact to which P consented.

D. Extends to personal effects: A battery may be committed not only by a contact with the plaintiff's body but also by a contact with her ***clothing,*** an object she is ***holding,*** or anything else that is so ***closely identified with her body*** that contact with it is as offensive as contact with the

body would be. See Rest. 2d, §18, Comment c; see also P&K, pp. 39-40.

> **Example:** P, who is black, is attending a luncheon at the Brass Ring Club, located in D hotel. As P is standing in line waiting for his food, one of D's employees snatches the plate from P's hand, and shouts that because P is black, he cannot be served in the club. P is not actually touched, nor is he frightened. He is, however, highly embarrassed.
>
> *Held*, P has suffered a battery. "The intentional snatching of an object from one's hand is as clearly an offensive invasion of his person as would be an actual contact with the body." Furthermore, P can recover compensatory damages for his mental suffering, even though there was no physical injury. *Fisher v. Carrousel Motor Hotel, Inc.*, 424 S.W.2d 627 (Tex. 1967).

1. **Indirect contact:** It is not necessary that the defendant touch the plaintiff with his own body. It is sufficient if he causes the contact ***indirectly*** (e.g., by ordering his dog to attack the plaintiff.) See Rest. 2d, §18, Comment c.

> **Example:** As a prank, D mails P a box of home-made cookies containing peanuts, to which D knows P is highly allergic. P eats a cookie (not thinking it contains peanuts), and suffers severe hives, necessitating a hospital stay. D has committed battery, since he knew with substantial certainty that a harmful contact between the object and P's body would occur. The fact that the contact was indirect (from an object mailed by D instead of from D's body or an object held by D) is irrelevant.

E. Plaintiff's awareness of contact: It is not necessary that the plaintiff have ***actual awareness*** of the contact at the time it occurs.

> **Example:** D kisses P while she is asleep, but does not awaken or harm her. D has committed battery. Rest. 2d, §18, Illustr. 2.

F. Unforeseen consequences: Once it is established that the defendant intended to commit a harmful or offensive touching (or intends any other tort, such as assault) and such a contact occurs, the defendant is liable for ***any consequences which ensue,*** even though he did not intend them, and in fact could not reasonably have foreseen them. (This is, as noted above, true for intentional torts generally.)

> **Example:** D is playing golf. P, his caddy, is not paying intention, and D becomes annoyed. Intending to frighten P but not to hurt him, D swings at him with a golf club but stops eight inches from P's head. Because of the negligence of the manufacturer of the golf club, the head of the club flies off and hits P in the eye. D could not have discovered the defect in the club without removing the head. Nonetheless, he is liable to P for the injury to the eye, since he intended to commit an act which would have been an assault (i.e., the causing of an imminent apprehension by P of a harmful bodily contact). See Rest. 2d, §16, Illustr. 2.

G. Damages: If the plaintiff can establish that the intentional harmful or offensive contact occurred, she may, as noted, recover ***nominal damages*** even if she suffered no physical injury. This might be the case, for instance, where the contact is "offensive" but not "harmful."

1. Mental disturbance: Also, she may recover compensation for any pain, suffering, embarrassment, or other ***mental effect,*** even in the absence of physical harm.

> **Example:** The plaintiff in *Fisher v. Carrousel Motor Hotel, Inc.*, *supra*, p. 13, was allowed to recover $400 in compensatory damages for his "humiliation and indignity" even though he suffered no physical injury. (He also recovered $500 in punitive damages, a subject discussed immediately below.)

2. Punitive damages: If the defendant's conduct was particularly outrageous, the court may, as noted, award ***punitive damages.*** The subject of punitive damages is discussed more generally *supra*, p. 10.

V. ASSAULT

A. Definition: Assault is the intentional causing of an ***apprehension*** of ***harmful or offensive contact.*** See Rest. 2d, §21.

1. Explanation: In other words, the defendant has committed the tort of assault if he has intentionally caused the plaintiff to think that she will be subjected to a harmful or offensive contact. The interest being protected is plaintiff's interest in freedom from ***apprehension*** of the contact; thus the tort can exist even if the contact itself never occurs.

> **Example:** P runs a tavern with her husband. One night when the tavern is closed, D demands wine. P leans out the window to tell him to go away, and D swings at her with a hatchet. He misses, but P is frightened by the attempt.
>
> *Held*, D has committed the tort of assault, even though P was not touched. *I. De S. and Wife v. W. De S.* (Eng. 1348).

B. Intent: To have the requisite intent, the defendant must either have intended to cause the apprehension of contact, or have intended to cause the contact itself. See Rest. 2d, §21(1)(a) and (b).

1. Intended apprehension: Thus if the defendant merely intends to frighten the plaintiff, and does not intend an actual contact, he has the necessary intent.

2. Attempted battery: Furthermore, if the defendant intends to commit

a battery, and does not intend to put the plaintiff in apprehension of a contact, he also has the necessary intent for assault.

> **Example:** D sneaks up behind P, intending to shoot her through the back of the head. P happens to turn around just as D is raising the gun. P thinks that D is about to shoot her, but D in fact lowers the gun because he has been discovered. D had the necessary intent for an assault, even though he never intended to put P in apprehension of the bodily contact (and in fact desired that P never know what hit her).

3. **No hostility required:** As in the case of battery, it is not necessary that the defendant bear ***malice*** or ***hostility*** to the plaintiff, or intend to harm her. See Rest. 2d §34.

   a. **Pranks:** This means that a ***"prank"*** can often constitute assault. That is, suppose D tries to induce in P an apprehension of an imminent harmful or offensive contact, without intending to cause an actual contact; then, something goes wrong, and an unintended harmful or offensive contact ensues. We saw that this is battery (see *supra*, p. 11), but it's ***also assault,*** if P was placed in apprehension of an actual harmful-or-offensive contact, however briefly. So the correct analysis in this kind of fact pattern will typically be that *both* assault and battery have been committed. See Rest. 2d, §34, Illustr. 1.

   > **Example:** D, intending as a prank to cause P to think P is about to be hit in the head (but not intending to make contact), swings a golf club toward P's head. P momentarily thinks that he'll be hit. Then, due to a manufacturing defect, the head of the club flies off, hitting P in the head. Not only is this battery (see *supra*, p. 11), it's also assault, because P momentarily was in apprehension that he'd be hit, and D intended to cause this apprehension. (Indeed, this would be assault even if the head never flew off — once D succeeded in his intent to make P believe he was about to be hit, the tort of assault was complete.)

4. **Transferred intent:** Again, as in the case of battery, the doctrine of ***"transferred intent"*** applies. Thus if D throws a stone at X, and P, who is standing nearby, is put in fear of being hit, D is liable to P for assault even though he never intended either to hit or frighten P. See Rest. 2d, §33.

C. **"Words alone" rule:** Many cases state the general principle that "words alone are not sufficient to constitute an assault." These cases hold that words must be accompanied by some ***overt act,*** no matter how slight, that adds to the threatening character of the words.

1. **Qualification:** Some commentators, however, as well as the Second Restatement, suggest that there may be cases where the surrounding circumstances are such that words by themselves, without any overt act, are sufficient to constitute an assault. See Rest. 2d, §31.

   Example: D, a notorious gangster, who is known to have killed others, telephones P and tells him that he will shoot him on sight. Coming around the corner, P encounters D standing on the sidewalk. Without moving, D says to P, "your time has come." D has committed an assault upon P, according to the Restatement. Rest. 2d, §31, Illustr. 4.

2. **Words may negate assault:** Although words by themselves will almost never constitute an assault, their impact must be taken into account, along with any overt act, in determining whether there has been one. Just as threatening words may convert an overt act into an assault where it would otherwise not be one (e.g., D reaches into his pocket, and says to P, "I've got a gun in my pocket and I'm going to fill you full of lead"), words may also ***negate an intent*** to commit assault.

   Example: It is assize time and the travelling judges are in town. P gets into an argument with D, puts his hand on his sword, and says "if it were not assize-time, I would not take such language from you." D then attacks P, injuring him.

   Held, P has made no assault, because these words make it clear that despite his gesture of reaching for his sword, he had no intent to commit a present battery or assault. Therefore, D cannot claim self-defense, and is liable for P's injuries. See *Tuberville v. Savage*, 86 Eng. Rep. 684 (Eng. 1669).

D. Actual contact or apprehension required: Apart from the defendant's intent, the tort of assault requires an ***effect:*** P must either actually ***undergo*** a harmful or offensive contact, or be put in ***immediate apprehension*** of such a contact.

1. **Unsuccessful prank or bluff:** So where D is pulling a ***prank or making a bluff,*** if P believes or knows that no imminent harmful or offensive contact will really occur, and none does occur, there is no assault.

   Example: P has been having sex with D's wife, W, and P knows that D knows this. D, holding a revolver, walks into P's office and says, "I know you've been having sex with my wife, and I'm gonna blow your head off." The particular gun that D is holding is a toy replica that cannot fire anything, and P knows this because W has told him so on a previous occasion. D has not committed assault — even if D intended to

put P in fear of an imminent harmful contact (a bullet fired at him), the "result" requirement for assault has not been met because P has not in fact been put in apprehension of such contact.

2. **Feared contact with ground or independent object suffices:** The harmful or offensive contact of which P is placed in apprehension does not have to be with D or an instrumentality under D's control — it can be with the ***ground*** or some other ***free-standing object.***

   Example: While P is driving along a narrow two-lane road which has a stone wall to P's right, D drives up behind P from the same direction. D wants to frighten P into thinking that D will force P's car into the stone wall. D therefore comes up even with the left side of P's car, and veers right-ward until there is just one inch between the right side of his car and the left side of P's. P believes, for an instant, that P will be forced into contact with the wall. Then D veers away, laughs, and drives off. P's car never touches either the wall or D's car. This is assault — D intended to make P believe that P's car (which is part of his person for this purpose) would touch the wall, and D succeeded in that goal, so the tort was complete at the moment P had the "I'm about to hit the wall" belief.

E. Imminence of threatened contact: For assault, it must appear to the plaintiff that the harm being threatened is ***imminent.***

1. **Future threats:** Threats of future harm cannot constitute assaults, although they may constitute the tort of intentional infliction of emotional distress (discussed *infra*, p. 23). The dividing line between a threat of imminent harm and one of future harm is hard to define, but the courts and commentators have taken a relatively strict view requiring a ***short period*** between the making of the threat and the time when, according to the threat, the harm will take place. See Rest. 2d §29, Comment c.

   Example: A threatens to shoot B, and leaves the room for the stated purpose of getting his revolver. A has not committed an assault on B. Rest. 2d. §29, Illustr. 4.

2. **Present ability to commit harm:** The defendant must have what appears to the plaintiff to be the ***present ability*** to commit the threatened contact. Just as there is no assault if the defendant's words indicate that the threatened harm will not take place imminently, so there will be no assault if it is apparent to the plaintiff that the defendant does not have the ability to commit the threatened harm immediately. See Rest. 2d §29, Comment b.

F. Plaintiff unaware of danger: Since the tort of assault protects what is

essentially the plaintiff's interest in freedom from a mental condition (apprehension of imminent contact), the plaintiff must be ***aware*** of the threatened contact.

> **Example:** D, standing behind P, raises his gun to shoot P. X, a bystander, sees what is about to happen and disarms D before he can shoot. P then turns around, and realizes for the first time the danger that he has been subjected to. Because P was not aware of the threatened harm at the time the threat existed, he cannot recover for assault, no matter how shaken up he becomes after the fact. See Rest. 2d, §22, Illustr. 2.

G. Apprehension is not same as fear: The plaintiff must have "apprehension" of imminent harmful or offensive contact. But "apprehension," as the term is used in the definition of assault, does ***not necessarily mean "fear."*** It is sufficient that the plaintiff believes that if she does not take action, a harmful or offensive contact will occur in the near future. The plaintiff's right to recover is not negated by the fact that she is confident of her own ability to take action to avoid the contact.

> **Example:** "A, a scrawny individual who is intoxicated, attempts to strike with his fist B, who is the heavyweight champion pugilist of the world. B is not at all afraid of A, is confident that he can avoid any such blow and in fact succeeds in doing so." A has nonetheless committed an assault on B. Rest. 2d, §24, Illustr. 1.

1. Where threat by itself incapable of performance: But if it appears to the plaintiff that even without action on her or a third person's part, the defendant will be unable to make good his threat of harm, there is no assault.

> **Example:** D points a pistol at P, threatening to shoot. P happens to know that D is holding not a loaded weapon, but a water pistol with no water in it. Because P knows that D will not be able to make good his threat in the imminent future, there is no assault, regardless of how hard D is trying to frighten P.
>
> **Note:** Suppose, in the above example, that P knew that D was holding a water pistol, but that she also knew that the water pistol was loaded. Would the threat of being sprinkled with water be sufficient to give rise to an action for assault? Remember that P's mental state must be apprehension of an imminent "harmful or offensive" contact; it is quite possible that having water sprayed in one's face would be an offensive contact, although obviously not a harmful one. If so, P would have an action for assault.

H. Unreasonable apprehension: Just as most courts have held that a battery does not exist where it is only because of the plaintiff's unusual sensitivity that a particular contact is offensive, so the courts have generally held that a plaintiff who is unusually timid may not recover for

assault where a normal person would not have an apprehension of contact. See P&K, p. 44.

1. **Restatement view:** The Second Restatement, however, takes the position that as long as the defendant ***intends*** to put the plaintiff in apprehension of an immediate bodily contact, and succeeds in so doing, there is an assault "although [the] act would not have put a person of ordinary courage in such apprehension." Rest. 2d, §27.

I. Threat to third persons not actionable: The plaintiff must have an apprehension that ***he himself*** will be subjected to a bodily contact; he may not recover for his apprehension that someone else will be so touched.

> **Example:** P sees D raise a pistol at P's wife. P realizes the danger his wife is in, and manages to disarm D before he fires. P cannot recover for assault, because although he was apprehensive of an imminent bodily contact, it was a contact upon his wife, not upon P himself. See Rest. 2d, §26.
>
> **Note:** It is anomalous that P in the above example cannot recover for assault, despite the very real fear for the safety of his wife that he feels; yet P, the heavyweight boxer in the example on p. 17, who is confident of his ability to avoid the blow, may recover, despite his absence of fear. This discrepancy is due to historical reasons. P in the above example could, however, probably recover for intentional infliction of mental distress, a modern tort discussed *infra*, p. 23.

J. Ability to carry out threat: We have seen that the plaintiff must believe that the defendant has the ability to carry out his threat of contact unless the plaintiff or some third force intervenes. But it is not necessary that the defendant ***in fact*** have the ability to carry out the threat.

> **Example:** D points an unloaded pistol at P. If P does not know that the pistol is unloaded, and she is put in apprehension of being shot, she may recover for assault. See Rest. 2d, §33.

K. Conditional threats: Suppose the defendant threatens the plaintiff with immediate bodily harm unless the plaintiff will pay him money, turn over a secret formula, or something of the like. Does the fact that the threat is ***conditional*** mean that the defendant has not committed an assault?

1. **Question of legal right:** The Second Restatement and most courts hold that there is nonetheless an assault unless the defendant had the ***legal right*** to compel the plaintiff to perform the act in question. Since

the robber has no legal right to force his victim to turn over his money, and the industrial spy has no right to compel disclosure of the secret formula, they may not use the existence of these demands as an escape hatch from an assault suit.

a. Privilege: But if the defendant is privileged to enforce the condition, there is no assault unless he uses or threatens ***unreasonable force in presenting the choice between contact and compliance.***

Example: P, a burglar, breaks into D's house. D surprises him, and says "If you don't get out, I will throw you out." There is no assault, since D has the legal right to throw P out (see discussion of defense of property, *infra*, p. 75). If P were a household employee whom D was firing, and D pointed a pistol at P and said "Get out right now or I'll shoot you through the head," there would be an assault. This is so because although D would be entitled to put P out of the house, he is threatening the use of unreasonable and unlawful force. See Rest. 2d, §30, Illustrs. 1 and 2.

L. Assault is not attempted battery: From the above discussion, it should be clear that an assault is not the same thing as an "attempted battery," despite the tendency of some courts to think that it is. Thus an assault is committed where the defendant intends to frighten the plaintiff by pointing a pistol at her, but does not intend to shoot her; this is clearly not an attempted battery.

M. Abandoned attempt: The tort of assault is complete as soon as the plaintiff suffers the requisite apprehension. It is not negated by the fact that the defendant subsequently has second thoughts, and ***abandons*** her plan.

Example: D points her pistol at P, intending to shoot P. P sees the danger, and is apprehensive that he will in fact be shot. D changes her mind, lowers the pistol, and says to P, "I was going to shoot you, but I've changed my mind." The tort of assault was complete as soon as P had an apprehension that he would be shot, because D had the requisite intent. (Remember that an intent to commit a battery, like an intent to cause an apprehension of a battery, is sufficient — see *supra*, p. 14). The fact that D changed her mind, and never committed the battery, does not negate the assault.

N. Damages: The rules for damages in the case of assault are the same as in the case of battery.

1. Nominal damages: Thus nominal damages can be awarded where the plaintiff shows no out-of-pocket loss.

2. **Mental suffering:** Similarly, the plaintiff can be awarded compensatory damages based upon his mental suffering. In fact, since the tort of assault is based upon a mental harm, mental suffering forms the principal or sole foundation for damages in most cases. If, however, the plaintiff suffers physical injury or ailment as a result of the assault (e.g., he is frightened, and tries to run away, and is hit by an oncoming car), he may recover for this as well.

3. **Punitive damages:** And, if the defendant's conduct is sufficiently outrageous or malicious, punitive damages may be awarded.

VI. FALSE IMPRISONMENT

A. Definition: The tort of "false imprisonment" is defined as the intentional infliction of a ***confinement.*** It is unclear whether the plaintiff must be aware of the confinement; this issue is discussed below.

B. Intent: Since false imprisonment is an intentional tort, the plaintiff must show that the defendant intended to confine him. As with assault and battery, he can meet this burden by showing that the defendant knew with ***"substantial certainty"*** that the confinement would result.

C. Transferred intent: Similarly, as with assault and battery, the doctrine of ***"transferred intent"*** applies.

> **Example:** P is shopping in the D store. D's store detective, an unduly zealous person, erroneously and unreasonably believes that X, who is also shopping in the store, has attempted to shoplift. She orders all exits to the store to be closed. This has the effect of confining P, who the detective does not even know to be in the store. Since the detective had the requisite intent for false imprisonment vis-à-vis X, D will be liable to P as well as to X for false imprisonment, by the doctrine of transferred intent.
>
> **Note:** The reasons for which D is liable to X for false imprisonment, despite the detective's honest though unreasonable belief that X has been shoplifting, are discussed *infra*, p. 79, in the treatment of the defense of recapture of chattels. If D were not liable to X because the detective's belief, although erroneous, was reasonable, it is not clear whether D would be liable to P. Probably, however, the detective would be held not to have had the requisite intent vis-à-vis X, and the doctrine of "transferred intent" would have no application, thereby absolving D with respect to P's suit as well.

D. Nature of confinement: The plaintiff must be confined within ***definite physical boundaries.*** Blocking of the plaintiff's path is not enough: it is not enough that the path the plaintiff wishes to travel is obstructed by the defendant, or that the plaintiff is prevented from entering a particular

place.

1. **Confinement:** In other words, the essence of the idea of "confinement" is that the plaintiff is held ***within*** certain limits, not prevented from entering certain places. The distinction is a matter of degree, but most cases will be clear one way or the other. See P&K, p. 47; see also Rest. 2d, §36(3).

   Example: A portion of a public road has been reserved for paying spectators of a boat race. P wants to enter the restricted area, but is prevented from doing so by D's police officer.

   Held, P has been confined in the sense that he was not permitted to go in the spectating area. However, since he was free to travel along the other direction of the road, he has *not* been subjected to false imprisonment. *Bird v. Jones*, 115 Eng. Rep. 668 (Q.B. 1845).

   Note: The result in the above example is the same regardless of whether D's blocking off of the highway was lawful. See Rest. 2d, §36, Illustr. 11.

E. Means of escape: It is irrelevant that there is some means of escape from the area of confinement, provided that the plaintiff does not know of this means. Rest. 2d, §36(2).

1. **Means must be "reasonable":** Even if the plaintiff does know the means of escape, he will not lose his action for false imprisonment unless the means is "reasonable." The Second Restatement (§36, Comment a) takes the view that the means of escape is reasonable only if the plaintiff's use of it would not be physically dangerous to the plaintiff, harmful to his clothing, "offensive" to his "reasonable sense of decency or personal dignity," or dangerous to some third person.

F. Means by which confinement enforced: If the plaintiff is physically confined, as where he is put in a room with all doors locked, the confinement obviously meets the requirements for false imprisonment. But there are other, less explicitly physical, kinds of duress to confine a person, which may also give rise to the tort.

1. **Use of threats:** Thus if the defendant threatens to use force if the plaintiff tries to escape (and appears to have the ability to do so), the requisite confinement exists. Rest. 2d, §40, Comment a. This is so whether the threats are explicit, or merely implied by the defendant's

conduct (e.g., D displays a gun in a menacing manner).

a. Plaintiff's desire to clear himself: However, if the plaintiff's confinement is due solely to his own desire to clear himself of suspicion, there is no false imprisonment. Thus, in the usual case where a suspected shoplifter submits to a search or remains for questioning at the store, the existence of false imprisonment will turn on whether the plaintiff submitted to the search or questioning solely to clear himself, or, rather, submitted at least in part because of the threat of implied force.

i. Possible privilege: But even if the detention of a suspected shoplifter is not voluntary, the detention may be ***privileged*** if it is brief and the store's suspicion is reasonable. See *infra*, p. 79.

b. Purely verbal commands: If the plaintiff voluntarily submits to commands that are ***strictly verbal,*** unaccompanied by force or threats, there is no false imprisonment.

2. Threat to harm others: Just as a threat to use force against the plaintiff if he tries to escape may give rise to false imprisonment, so may a threat to harm a third person if the plaintiff tries to escape. Thus if the defendant threatens to harm the plaintiff's spouse if the plaintiff does not remain in a particular room, there is false imprisonment. See Rest. 2d, §40A.

3. Threat to property: Threats to the plaintiff's ***property*** may also constitute the necessary duress. For instance, if a storekeeper believes that a customer has been shoplifting, and seizes his shopping bag to dissuade him from leaving, there will probably be false imprisonment.

a. Threats of future harm: But the duress, whatever its nature, must involve ***imminent*** harm. Threats of ***future*** harm (e.g., "if you don't stay here in my store and clear yourself of shoplifting, I'll call the police and have them arrest you at your house"), as in the case of assault and battery, are not sufficient. See P&K, p. 50.

4. Assertion of legal authority: Just as the confinement may be caused by threats of force, so it may be caused by the defendant's assertion that she has ***legal authority*** to confine the plaintiff. This is so even if

defendant does not in fact have legal authority, as long as the plaintiff reasonably believes that she has, or is in doubt about whether she has, such authority. See Rest. 2d, §41.

> **Example:** D is a private detective who works for Storekeeper. She sees P leaving the store, and chases him down the street. When she catches up to him, she says "I'm a plainclothes police officer, and I hereby arrest you." P believes D's statement, and follows D back to the store for interrogation. D is liable for false imprisonment, even though she used no force.

a. Validity of asserted authority: For purposes of determining whether there has been a prima facie case of false imprisonment, it is ***irrelevant whether the asserted legal authority is in fact valid or invalid.*** Thus in above example, it is irrelevant whether D was only a store detective who under local criminal law had no authority to make the arrest in question, or was in fact a police officer. As long as the plaintiff ***believes*** that the defendant has legal authority, or is in reasonable doubt about whether the defendant has such authority, there is false imprisonment if the plaintiff submits.

i. Defense of valid arrest: Of course, if a party asserting legal authority in fact has the ***right*** to make an arrest, this will serve as a defense to a false imprisonment claim. (The general rules governing when arrests may be validly made by police officers and private citizens are discussed *infra*, p. 84.)

b. Actual submission necessary: The mere assertion of legal authority will be sufficient if the plaintiff in fact submits to the confinement (as P in the above example did by going back to the store). But if the plaintiff refuses to submit, and leaves, the defendant's assertion of legal authority will not be enough to give rise to an action for false imprisonment. Thus in the above example, if P merely walked away from D, D's statement "I arrest you" would not in itself be a false imprisonment. However, if D used force to detain P, that use of force would of itself be false imprisonment.

c. Instigation in arrest: If a private citizen participates in an arrest which turns out to have been unlawful (under the rules discussed *infra*, p. 84), she may be liable for false imprisonment even though she was not the one who ultimately made the arrest itself. Thus if

the owner of a store tells a private detective to detain a suspect, and the detective purports to "arrest" the suspect in circumstances where she does not have the right to do so, the storekeeper may, like the detective, be liable for false imprisonment.

i. **Mere filing of complaint:** But a private person who merely files a complaint with the police will not be liable. To incur liability, he must take a more active role than the mere furnishing of information (e.g., urging the police to make the arrest). However, one who furnishes information to the police may, if the information is false, be liable for ***malicious prosecution*** (discussed *infra,* p. 497).

ii. **Distinction:** Even if the defendant does take an active part in the arrest (as by urging the police to make it), he will not be liable for false imprisonment as long as the requisite legal formalities are met. That is, if the police themselves act lawfully (e.g., they obtain a warrant, or they make the arrest in a situation in which no warrant is required, such as where they have probable cause), the private citizen will not be liable for false imprisonment (though he may be liable for malicious prosecution). But if he actively helps the police, and the police do not follow proper procedures (e.g., they act on information which they know to be false), he will be liable for false imprisonment.

iii. **Summary:** There are thus two requirements for "instigator" liability for false imprisonment: (1) an unlawful arrest must have occurred (judged against the rules given on p. 84) and (2) the defendant must have actively aided the arrest (i.e., persuaded the authorities to make the arrest, rather than merely giving them information and letting them decide what to do about it). See Rest. 2d, §45A.

G. Duty to aid in escape or release: It may happen that the plaintiff ***consents*** to an initial confinement (thus negating the tort — see *infra,* p. 60). If so, there will nonetheless be a false imprisonment if the defendant is under a duty to release the plaintiff, or to help him escape, and does not do so. See Rest. 2d, §45.

Example: D induces P to sail with him from Syria to America, promising to let P off the boat as soon as it arrives in the U.S. The boat arrives at a U.S. port, but D refuses to give P a row boat so that she can leave the yacht.

Held, P committed false imprisonment, since he had implicitly agreed to furnish P with whatever was necessary (here, a row boat) to enable her to leave the yacht. *Whit-taker v. Sandford*, 85 A. 399 (Me. 1912).

H. Necessity that plaintiff know of confinement: We have seen that in the case of assault, the plaintiff must be ***aware*** of the tort at the time it is committed, but that in the case of battery, he ***need not be aware.*** In false imprisonment cases, most courts have held that the tort is like assault, and that the plaintiff must be ***aware of his confinement*** while he is suffering it.

1. Second Restatement view: The Second Restatement, in §42, holds that ***either*** the plaintiff must be aware of the confinement, or he must suffer some actual harm. Thus the Restatement states that if a six-day-old child is locked in a bank vault for two days, and suffers from hunger and thirst, he has been falsely imprisoned despite his lack of awareness of the confinement. See Rest. 2d, §42, Illustr. 3.

I. Damages: As in the case of the other intentional torts we have examined, the plaintiff may recover ***nominal damages*** for false imprisonment, even if he has suffered no actual physical or mental harm. He may also recover for mental suffering, humiliation, loss of time, inconvenience, etc., and where actual malice is shown, he may recover punitive damages. See P&K, p. 48-49.

VII. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS ("IIED")

A. Definition: Nearly all modern courts recognize the tort of intentional infliction of emotional distress (which we'll sometimes call "IIED" for short). This tort may be defined as the intentional or reckless infliction, by ***extreme and outrageous conduct,*** of severe emotional or mental distress, even in the absence of physical harm.

B. Intent: In the intentional torts we have examined so far (battery, assault and false imprisonment), we have seen that the requisite intent may exist not only where the defendant ***desires*** to cause a certain result, but also where she knows with "substantial certainty" that the result will occur.

In the case of infliction of mental distress, however, the necessary mental state is ***even broader*** — there are ***three*** possible mental states on D's part, any of which will qualify:

[a] D ***desires*** to cause P emotional distress;

[b] D knows with ***substantial certainty*** that P will suffer emotional distress; and

[c] D ***recklessly disregards the high probability*** that emotional distress will occur.

See Rest. 2d, §46(1).

1. Meaning of "reckless": For the defendant's conduct to be ***"reckless"*** (the third mental state listed above), however, it must be in the face of risk that is significantly higher than the risk of harm that would make her conduct "negligent." (Negligent conduct is discussed generally *infra*, p. 97.) In other words, for recklessness it is not enough that the defendant acted despite a risk of causing emotional harm that a person of average prudence would recognize was ***unreasonable.***

a. Third Restatement's definition: Thus the Third Restatement says that a person "recklessly" causes harm if (1) the person ***"knows of the risk*** of harm created by his conduct, or ***knows facts that make that risk obvious*** to anyone in the actor's situation"; and (2) the precaution that would eliminate or reduce that risk involves ***burdens that are so slight*** relative to the magnitude of the risk as to render ***highly blameworthy*** the actor's failure to adopt the precaution." Rest. 3d (Liab. for Phys. & Emot. Harm) §2.

b. Typical case: Here is an example of a case holding that ***reckless disregard*** of the high chance of causing emotional distress is the equivalent of causing the distress.

Example: D's wife has left him, and he is a guest in the home of a friend of his, P. While P is away from the house, D decides to commit suicide by slitting his throat in P's kitchen. P returns to find his corpse lying there, in a pool of blood and suffers from nervous shock, and becomes ill. She sues D's estate for intentional infliction of mental distress.

Held, the jury could find that D "willfully" caused P emotional distress, since he acted in disregard of the high probability that she would suffer the distress. Therefore, the tort may be treated as if it were intentional. *Blakeley v. Shortal's Estate*, 20 N.W.2d 28 (Iowa 1945).

i. **Application of Third Restatement to *Blakeley:*** Let's see whether the Third Restatement's definition of recklessness, just quoted above, would apply to D's conduct in *Blakeley*. First, whether or not P would be able to show that D actually knew of the risk that P might suffer emotional distress at finding D's body in her kitchen, D surely knew of the fact that P (or some resident of the house) would discover the body, so D "[knew] facts that [made] the risk obvious to anyone in the actor's situation" (satisfying the first prong one of the Restatement definition). Second, presumably it would not have been very burdensome on D to wait until he was somewhere else (e.g., in his own home, or a hotel room) to commit suicide, so that a stranger rather than a friend would find the body. So the second prong of the Restatement definition seems to be satisfied as well. Thus D seems to have acted "recklessly" under the Third Restatement.

2. **"Transferred intent":** The doctrine of "transferred intent" is ***not*** generally applicable in cases of IIED. That is, if the defendant attempts to cause emotional distress to X, or to commit some other tort upon him, and P suffers emotional distress (e.g., because he witnesses the defendant's attempt and becomes frightened), P will not usually be able to recover.

   a. **Rationale:** The most frequent reason given for this refusal by courts to make the doctrine of transferred intent generally applicable to IIED cases is that it would open too wide the gate for litigation. Prosser, for instance (PW&S, p. 62) suggests that if transferred intent were allowed, three million people watching an assassination of a President on television would be able to sue the assassin.

   b. **Exception:** However, the cases have generally recognized at least one exception to the rule that transferred intent is not applicable: if the defendant directs her conduct at a member of the ***immediate family*** of the plaintiff, and the plaintiff is present. Most of these cases impose the further requirement that the plaintiff's presence be ***known*** to the defendant, so that the mental distress could have been reasonably anticipated by the defendant.

Example: P watches her father being beaten up by D, and as a result of seeing this beating, suffers severe emotional distress.

Held, since P does not allege that D knew of her presence (nor that D intended to cause her emotional distress), P's claim does not state a cause of action. *Taylor v. Vallelunga*, 339 P.2d 910 (Cal. App. 1959).

c. Restatement has more liberal view: The Second Restatement, however, extends the category of persons who can recover for conduct which they witnessed being directed at others.

i. Bodily harm: Under the Restatement view, any person who is present at a beating, attack, threat, etc. made to another may recover if he suffers "bodily harm" from watching the episode, even if the witness is not a member of the victim's immediate family. (Once the witness shows bodily harm, he may also recover for purely emotional harm.)

ii. Relative: If the witness is a member of the victim's immediate family, he may recover for his purely emotional distress even if he suffers no bodily harm. See Rest. 2d, §46(2).

Example: P, while walking down the street, is stopped by a stranger, X, who asks him for a match. While P is pulling out his cigarette lighter, X is suddenly shot down by D. As a result, P suffers emotional distress, and becomes physically ill. According to the Second Restatement, P may recover from D on a theory of intentional infliction of emotional distress. See Rest. 2d, §46, Comment l.

3. Emotional distress where other tort attempted: We saw *(supra*, p. 8) that if the defendant has attempted to commit an assault or false imprisonment, and in fact commits a harmful or offensive touching, a battery has occurred, even though the touching itself may not have been intentional. A similar rule does ***not,*** in general, apply to infliction of emotional distress. That is, if the defendant attempts to commit some other tort, and the only effect on the plaintiff is emotional distress, the tort of IIED has not occurred. Rest. 2d, §47.

Example: D tries to shoot P in the back of the head; she hopes that P will not suspect anything until the bullet actually enters. However, as D is aiming, X knocks the gun away. P, when he learns of what D was trying to do, becomes exceptionally distraught, even though the danger is, for the moment, over. This is not an assault, since P did not learn of the danger until after it had passed — see *supra*, p. 17. Nor is it a battery, of course, since no contact in fact occurred. And, even though emotional distress to P resulted, the tort of intentional infliction of emotional distress has not

occurred, because D did not have the requisite intent (i.e., the intent to cause the distress, as opposed to intent to cause bodily harm).

a. Assault distinguished: But keep in mind that if the defendant attempts to commit battery, false imprisonment, or some other intentional tort, and the plaintiff suffers emotional distress in the form of an "apprehension of imminent harmful or offensive contact," the tort of assault has occurred, and the plaintiff can recover for his mental suffering. Similarly, if the plaintiff has mental distress as the result of a battery, he can recover damages for this distress, even though the separate tort of infliction of mental distress has not occurred.

C. Extreme and outrageous conduct: For the plaintiff to recover, he must show, among other things, that the defendant's conduct was ***extreme and outrageous.*** It is not enough for him to show that the defendant insulted him, or hurt his feelings. Even the defendant's use of profanity to him will not be enough, unless the relationship of the parties is such that the use of the dirty words is particularly outrageous (see the discussion below of aggravating circumstances).

1. Restatement test: As the Second Restatement has put the idea, the conduct must be "[s]o outrageous in character, and so extreme in degree, as to go ***beyond all possible bounds of decency,*** and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, 'Outrageous!' " Rest. 2d, §46, Comment d.

2. Typical cases: The following are two of the best-known cases in which the defendant's conduct was held to be outrageous, and liability for intentional infliction of emotional distress was found.

Example 1: D, as a practical joke, tells P that her husband has been badly injured in an accident, and is lying in the hospital with both legs broken. D suggests that P go to the hospital to fetch her husband with two pillows. P suffers nervous shock with consequent serious physical illness, and is at one point in danger of going insane.

Held, P may recover from D for her emotional suffering and physical harm. *Wilkinson v. Downton,* 2 Q.B. 57 (Eng. 1897).

Example 2: D is a rubbish collector. The president of P, an association of rubbish

collectors, summons D to a meeting of the association, and tells him that he, D, is infringing on territory held by one of P's members. The president tells D that if he does not join P, and pay over a portion of the proceeds of his collections, the members of P will beat him up, burn his truck, and put him out of business. D, intimidated, agrees, and signs some notes for payment of these proceeds. D defaults on the notes, P sues on them, and D counterclaims for intentional infliction of emotional distress.

Held, D may recover on his counterclaim against P for emotional distress, even though he suffered no physical harm. (Also, P may not recover on the notes.) *State Rubbish Collectors Association v. Siliznoff,* 240 P.2d 282 (Cal. 1952).

3. Bill collectors: A common fact pattern in which the defendant is alleged to be liable for intentional infliction of mental distress is where the defendant is a ***bill collector.*** The collector's conduct can and often will be sufficiently extreme and outrageous to trigger IIED. And it's no defense to an otherwise proper IIED action that the plaintiff ***really owed the money*** that D was trying to collect.

Example: D operates a collection agency. He is trying to collect a $1,000 bill for goods sold to P by Store. D goes to P's house and when Sis, P's sister, answers the door, D tells Sis he is there to collect a bill owed by P. Sis tells D that P has been unemployed for six months, and that P will pay the bill as soon as she can. D, in a loud voice, then demands to see P and says to Sis that if D does not receive payment immediately, he will file a criminal complaint charging P with fraud on creditors. P then comes to the door, and D in a loud voice that can be heard by neighbors across the street, repeats his demand for immediate payment and his threat to have P prosecuted.

If P suffers severe emotional distress from D's conduct, she can recover for IIED against him, because D's conduct is extreme and outrageous. And that's true even if P *really does owe* the $1,000 to Store.

4. Individual circumstances of case: In determining whether the defendant's conduct is sufficiently outrageous, the court will take into account the particular characteristics of the plaintiff, and the relationship between him and the defendant.

a. Plaintiff's situation: Thus if the plaintiff is very young, or retarded, or senile, the defendant's conduct might be held to be outrageous even though it would not be so if the plaintiff were a normal adult. Similarly, if the defendant is or holds herself out to be a police officer in her dealings with the plaintiff, her threats to have the plaintiff arrested might be deemed outrageous, where they would not be if defendant was and appeared to be a private citizen.

b. Defendant's knowledge of plaintiff's sensitivity: Where the defendant's conduct is outrageous only because of the plaintiff's particular characteristics, it is usually held that the defendant must have been ***aware*** of these characteristics. See Rest. 2d §46, Comment f.

D. Actual severe distress: Once the plaintiff has shown that the defendant's conduct was extreme and outrageous, he must then show that he, the plaintiff, in fact suffered ***severe*** emotional distress. See Rest. 2d §46, Comment j.

1. Medical effects: At a minimum, the plaintiff must always show that his mental distress was sufficiently severe that he ***sought medical aid.***

2. Physical harm: Some cases even hold that recovery may be allowed only where there is some ***physical harm*** in addition to emotional distress. See P&K, p. 64. But most modern courts appear not to require physical harm. Thus in *Siliznoff, supra,* the court explicitly held that the recipient of threats of violence could recover even though he suffered no physical harm.

a. Restatement view: The Second Restatement does not require that the emotional distress be accompanied by any kind of bodily harm. However, it notes that courts may tend to look for bodily harm as a guaranty that the emotional distress is real; but if the outrageousness of the act is clear enough, liability will be found without bodily harm. Rest. 2d, §46, Comment k.

3. Reasonable standard: In addition to the requirement that the plaintiff suffer severe mental distress, the defendant's conduct must be such that a ***reasonable person*** would suffer such distress. Thus if the plaintiff turns out to be an unusually sensitive person, who suffers severe distress where a normal person would not, there will be no recovery.

a. Exception: However, this "reasonable person" standard does not apply where the defendant has ***notice*** that the plaintiff is unusually sensitive. In most respects, therefore, this "reasonable person" rule is merely a restatement of the principle, described above, that the defendant's conduct must be "outrageous," taking into account the

peculiarities of the plaintiff that are known to the defendant.

> **Example:** P is a superstitious woman, who believes that there is a pot of gold buried in her backyard. D, as a practical joke, plants a pot, containing things other than gold, in P's backyard. P digs up the pot, and D escorts her in triumph to the town hall, where she opens the pot and is humiliated.
>
> *Held*, P may recover against D. *Nickerson v. Hodges*, 84 So. 37 (La. 1920).

b. Insulting language: ***Insulting words,*** even if they are profane, will almost never be enough by themselves to give rise to an action for intentional infliction of emotional distress.

i. Two rationales: Some cases refusing relief rely upon the theory that insults by themselves are never sufficiently "outrageous"; other cases reach the same result by holding that insults do not cause "severe emotional distress" in a person of ordinary sensitivity.

ii. Special notice: But again, remember that if the defendant has special notice that the plaintiff is a person of unusual sensitivity, insults by themselves might be enough to establish liability.

E. Directed at third person: If D intentionally or recklessly directs extreme and outrageous conduct at ***someone other than P*** (call this third person X), D will nonetheless be liable for IIED to P, if either of two scenarios occurs. (The scenarios differ as to whether D and X were close relatives). In both cases, P will have to be ***physically present*** (and known to D to be present) when the conduct occurs.

1. P and X are close relatives: First, suppose P (the person who suffers the severe emotional distress) and X (the one at whom D's outrageous conduct is directed) are members of the ***same immediate family.*** P can recover for severe emotional distress, ***even if it does not result in bodily harm,*** as long as P was ***present,*** and known by D to be present.

2. P and X are not close relatives: Now, consider the situation in which P (the person suffering the emotional distress) and X (the one at whom the conduct is directed) are ***not members of the same immediate family.*** Here, P can recover only if P satisfies ***two*** conditions:

□ P was ***present*** at the time; *and*

□ The emotional distress suffered by P ***led to bodily harm.***

Example 1 (close relatives): In front of P, D pulls a gun and threatens to shoot X to death. P, who is X's wife, suffers great emotional distress from watching the episode. P can recover from D for IIED, even if P never suffered bodily harm from the distress.

Example 2 (not close relatives): Same facts as Example 1, but now P and X are friends, not relatives. If P suffers great emotional distress without any bodily harm, she (probably) cannot recover from D for IIED. But if P's emotional distress leads to bodily harm (e.g., a miscarriage), she can recover.

F. Constitutional limits on IIED awards: The ***First Amendment of the U.S. Constitution*** places some important ***limits*** on the right of a state to impose liability for IIED. Most importantly, if the conduct by the defendant that causes the distress is the delivery of a ***message or communication,*** a state's act of awarding damages against the defendant for IIED may well violate the defendant's First Amendment freedom of speech.

1. P is a public figure; rule from defamation cases: One scenario in which such a First Amendment violation can easily result from an IIED action arises where the plaintiff is a ***"public figure"*** We'll see when we come to the law of *defamation* (see *infra*, p. 461) that a public figure (essentially, a famous or newsworthy person) can recover only by showing that the defendant either ***knew*** that his speech about P was false or ***recklessly disregarded*** whether it was true or false; see *New York Times v. Sullivan (infra*, p. 473), the famous Supreme Court case that established this constitutional rule.

a. Same rule for IIED: The Supreme Court has extended the *Sullivan* principle to hold that, similarly, a plaintiff who is a public figure may succeed with a claim for *IIED* based on a communication only if P makes this same showing that the defendant either ***knew that his speech was false or recklessly disregarded whether it was true.*** *Hustler Magazine v. Falwell*, 485 U.S. 45 (1998).

Example: *Hustler Magazine* satirizes religious leader Jerry Falwell as a drunken hypocrite who has sex with his mother. *Held,* Falwell cannot recover against *Hustler* for IIED unless he shows that *Hustler* made a false statement about him with knowledge of its falsity or with reckless disregard of its falsity. *Hustler Magazine v. Falwell, supra.*

2. Statement on a matter of public concern: Another way a tort recovery for IIED can violate the defendant's First Amendment rights is if the alleged distress stems from the communicative impact of the defendant's speech, and the speech involves a matter of ***public concern.*** The main case on point is ***Snyder v. Phelps,*** 131 S.Ct. 1207 (2011), whose facts are set forth in the following Example.

Example: P is the father of a Marine, Matthew Synder, recently killed in Iraq. The Ds are members of the Westboro Baptist Church, a church that thinks God punishes the U.S. military for tolerating homosexuality. During the course of Matthew's funeral in Maryland, the Ds carry picket signs nearby with messages like "God Hates the USA/Thank God for 9/11," "God hates fags," and "Thank God for Dead Soldiers." (The Ds apparently believe that Matthew was killed because of God's desire to punish the military for not rooting out homosexuality; they seem to have believed, though incorrectly, that Matthew was gay.) The picketing takes place entirely on a small plot of public land, 1,000 feet from the church where the funeral is being held. None of the Ds ever enter the church, or interfere with the funeral. P learns of the protest after it's over, when he sees footage of it on the local TV news. P brings a federal-court diversity action against the Ds for IIED, based on Maryland substantive tort law. The jury finds in his favor, based on its conclusion that the Ds' conduct was "outrageous," and was intended to cause P emotional distress. P is awarded a civil judgment for $4 million in combined compensatory and punitive damages. The Ds appeal on First Amendment grounds.

Held (by the U.S. Supreme Court), for the Ds. Allowing P to recover any damages at all would be a violation of the Ds' First Amendment right to speak freely on a matter of "public concern." That's because speech on matters of public concern "occupies the highest rung of the hierarchy of First Amendment values [making it] entitled to special protection." Speech involves a matter of public concern when it either (1) "can be fairly considered as relating to ***any matter of political, social, or other concerns to the community,"*** or (2) "is a ***subject of legitimate news interest."*** The fact that the statement is ***"inappropriate or controversial"*** is ***irrelevant*** to the question of whether it involves a matter of public concern.

The messages on the picket signs here were clearly designed to speak on a broad public issue, and indeed, to reach as broad a public audience as possible. Since the speech was of public interest, Maryland could regulate it only in a "content neutral" manner. The substantive tort law of Maryland gave the jury the right to allow recovery for "outrageous-ness," a concept that is so subjective that the jury was ***"unlikely to be neutral*** with respect to the content of the speech." Since the jury likely reached its verdict without observing the required "content neutrality," enforcing the resulting damage award against the Ds violated their First Amendment rights. *Snyder v. Phelps, supra.*

G. Public utility and common carrier liability: *Common carriers* and ***public utilities*** are held to a ***stricter standard*** of conduct than the rest of the population, with respect to IIED. Whereas insults, no matter how gross, will almost never be held actionable when made by an ordinary

person, a utility or carrier will be liable when its employee, during the course of his work, uses highly insulting language to a customer. Rest. 2d, §48.

1. **Hotels:** This rule applies not only to transportation companies, and to the water and power companies that are usually thought of as "public utilities," but also to ***hotels.*** See Rest. 2d, §48, Comment a. (But it has not generally been applied to ordinary businesses which hold their doors open to the public.)

2. **Rationale:** Originally, the rationale for this rule was the theory that the person who purchased a ticket or paid for services had a ***contractual*** right to respect. But later cases hold that a carrier or utility is liable for insults made to a ***prospective*** customer (e.g., one who is seeking to buy a ticket). Thus the liability does not really seem to be based on contract, but instead on a general duty on the part of utilities, common carriers, etc., to treat the public at large with courtesy. See Rest. 2d, §48, Comment a.

Quiz Yourself on
INTENTIONAL TORTS AGAINST THE PERSON *(Entire Chapter)*

1. Juliet is gazing at the stars from her balcony, exclaiming dreamily, "Romeo, Romeo, where art thou, Romeo?" A voice from below responds, "Here I am, you moron, give me a hand up." Juliet looks down and sees Romeo climbing up to the balcony. Before she has a chance to help, Romeo loses his footing, and falls, breaking his arm. Juliet races downstairs and tries to set the arm, even though Romeo tells her that she should wait for a doctor. Juliet makes the break much worse by moving the arm the wrong way. Has Juliet committed a battery even though she was only trying to help? _____

2. Calvin takes his mean-tempered pet tiger, Hobbes, out for a walk to terrorize the neighborhood. He sees little Susie Derkins playing across the street, and yells to her, as he walks toward her, "Hey, you stupid girl! Why don't you come over and say hello to Hobbes!" Calvin's intent is to frighten Susie, but nothing more. Susie stands, frozen with fear. Hobbes snarls at Susie, straining at his leash. The leash breaks, and Hobbes runs over and attacks Susie. Is Calvin liable to Susie for battery?

_____

3. Speed Racer takes his squeeze, Trixie, on a wild spin through town in his hot racing car, the Mach 5. Paying more attention to Trixie than the road, Speed carelessly runs a stop sign and narrowly avoids hitting Chim-Chim, a pedestrian who is crossing the street at a crosswalk. Chim-Chim is terrified. Has Speed Racer committed an assault?

_____

4. Zorro leaves his valuable cape with the cloakroom attendant at a restaurant. When he returns, the attendant wrongfully refuses to hand over the cape, and threatens to burn it. Zorro stays for two hours before he gets the cape back. Can he successfully claim false imprisonment?

_____

5. Pocahontas runs Indian Trader, a novelty shop. It's closing time, and she takes a quick look around the store to see if there are any patrons left. She doesn't see any. In fact, however, John Smith is crouching down behind a counter, looking at the bottom shelf of a display of plastic tomahawks. Pocahontas leaves and locks up the shop, unwittingly locking Smith in the store. False imprisonment? _____

6. To play a joke on his friend Ethel Rosenberg, Max disguises himself as an FBI agent, comes to Ethel's door, and tells her that her husband Julius has just been arrested for spying and is about to be executed. In fact, Max knows that Julius has been out fishing all day, and that Ethel has been scared sick worrying about him. She screams and faints, and is extremely anguished for months afterwards. When she recovers, she sues Max for intentional infliction of emotional distress. Max defends on the grounds that Ethel's distress has not led to any physical illness or injury (a factually correct statement). Will Max's defense succeed?

_____

7. Cleopatra and her boyfriend, Marc Antony, have a fight at his house. He storms out. Despondent, Cleopatra goes to his bathroom, gets in the tub, and slashes her wrists. Antony comes back, and finds her in a pool of blood. Shocked and horrified, he rushes her to the hospital. Cleopatra survives. Antony sues her for intentional infliction of emotional distress. She defends on grounds that she didn't intend to distress him. Who wins? _____

8. Jerry Joker, a notorious practitioner of pranks, wants to play one on his friend, Frank Friendly. Jerry takes a real gun and loads it with blanks. He puts a stocking cap over his head so that he cannot be identified. At eleven o'clock at night, he rings Frank's doorbell. When Frank answers, Jerry puts the gun two inches from Frank's temple, says "Greetings from the Godfather," and presses the trigger. Jerry intends that Frank merely be startled by the loud noise. Frank is not startled. However, a small piece of the casing from the blank breaks loose, and causes a small scratch on Frank's face, which heals quickly. What tort(s), if any, has Jerry committed? _____

9. Timid owes money to Mobster, a loan shark. When the money is overdue, Mobster sends his henchman, Hulk, a large and scary-looking man, to try to collect the debt from Timid. Hulk goes to Timid's house, and while standing in the foyer, says to Timid, "If you don't have the money back by next Thursday, with the 2% per week vigorish, next Friday I'm gonna shoot out both your kneecaps. Think about what it'll be like for a young man like yourself to spend the next thirty, forty years on crutches." Tina, Timid's wife, watches this conversation, and Hulk knows she is watching. Both Timid and Tina become extremely terrified, and go into hiding, where Hulk has been unable to find them. What tort(s) have been committed by Hulk, and against whom?

_____

Answers

1. Yes. The distinction here is between intent and motive. Intent is the desire to cause a certain immediate result; motive is why the tortfeasor chose to behave a certain way. A battery is the intentional infliction of a harmful or offensive bodily contact. The required intent is the intent to make a contact (or to create an apprehension of a contact). It is not necessary that the defendant desire to harm the plaintiff, as long as he intends the contact and the contact is in fact harmful or offensive. The harmful touching here was mis-setting the arm; Juliet voluntarily set the arm as she did, so she satisfies the intent element of battery. Her *motive* was to help, but that by itself won't relieve her of liability.

NOTE: Motive isn't an element of any intentional tort, but it *can* be relevant. It can aggravate, mitigate, or excuse a tort. For instance, acting with malice can justify "punitive" damages. Acting in self-defense can excuse a tort. But there are other motives that don't have an impact on liability for intentional torts. For instance, say Romeo kissed Juliet without her consent. The fact that his motive was to *compliment* her wouldn't mitigate his liability to her. Similarly, if Juliet pushed Romeo as a joke, the fact that she intended only a joke doesn't change the nature of the act; it's still a battery.

2. **Yes.** The "intent" requirement for battery is satisfied if D either (a) intended to cause a harmful or offensive contact; *or* (b) intended to cause in another person an apprehension of a harmful or offensive contact. Where D's conduct falls within (b), D will be liable for battery if the conduct causes (directly or indirectly) a harmful or offensive contact. Here, even though the attack itself was unintended, the harmful contact was the result of Calvin's intentional act (taking the mean tiger out and putting it near Susie to frighten her). Since Calvin "set the force [the tiger] in motion," he'll be liable for battery.

3. **No.** Assault is an "intentional" tort, and the intent required is that D either desired to cause a harmful-or-offensive contact, or desired to place P or another in apprehension of such a contact. Here, Speed Racer may have intended to drive (and even intended to drive extremely fast), but he didn't intend either to hit anyone or frighten anyone, so there's no assault.

   RELATED ISSUE: Say that as Speed Racer approaches the stop sign, he sees Chim-Chim, and speeds up with the idea of scaring the bejesus out of Chim-Chim. Since Speed *intends* to scare Chim-Chim, there *would* be an assault.

   RELATED ISSUE: Say that as Speed Racer approaches the stop sign, he sees Chim-Chim and, hoping to scare Chim-Chim, aims his car at him, intending to swerve away at the last moment. The car skids and hits Chim-Chim. Speed would be liable for battery (as well as assault) even though he didn't intend to hit Chim Chim, because he intended to *scare* him and he did in fact *touch* him, and that's enough for a battery.

4. **Yes.** A false imprisonment claim requires intentional confinement to a

bounded area. The restraint needn't be physical; it can be accomplished by duress. Wrongfully keeping the plaintiff's valuable property is regarded as one type of duress that qualifies.

5. **No.** False imprisonment is the intentional confinement of someone to a bounded area. Here, Pocahontas didn't intend to confine Smith; she did so accidentally. Without intent, she can't be liable for false imprisonment. At best, she'd be liable for negligence.

   RELATED ISSUE: Say instead that Pocahontas is really paranoid about the threat of shoplifting, and falsely and unreasonably believes that Smith stuck one of the plastic tomahawks in his satchel without paying for it. She locks the doors to the shop (intending to confine Smith), and doesn't realize that another customer, John Rolfe, is in the store. If she's liable to Smith for false imprisonment, she'd be liable to Rolfe, as well — even though she didn't intend to confine him. That's because of "transferred intent." When someone intends to commit a tort against one person, but injury to another results, the actor's intent is said to be "transferred" from the intended victim to the actual one for purposes of establishing an intentional tort. Here, Pocahontas confined Rolfe as well as her intended victim, Smith, so her intent towards Smith will be "transferred" to Rolfe. (Note, by the way, that Pocahontas didn't have a right to detain Smith to investigate for shoplifting, because her belief that he stole something was unreasonable. Detention for shoplifting investigations is only permissible if the merchant's suspicion is reasonable. See *infra,* p. 79.)

6. **No.** So long as the defendant's conduct has produced serious emotional distress, the fact that that distress is not manifested by physical symptoms (e.g., sleeplessness, nausea, or ulcers) is not fatal to the claim. (Obviously, the presence of physical symptoms makes the distress easier to prove, but physical harm is not actually required.)

   On the other hand, the distress must be severe; mere unhappiness, humiliation, or a couple of sleepless nights won't suffice. In general, the more objectively outrageous the conduct, the less proof of great distress is required. Max's conduct here is so completely outrageous that Ethel probably won't need very detailed proof of her distress.

7. **Marc Antony, probably.** Even where conduct is not intentional, but

only reckless — that is, the defendant proceeds with a conscious disregard of a high probability that emotional distress will result — most courts hold that a claim for IIED will lie. See, e.g., *Blakeley v. Shortal's Estate.*

NOTE: A minority of courts hold that recklessness is not sufficient, and require intent (that is, intending emotional distress or knowing that it will result from the outrageous conduct).

8. **Battery.** Battery is the intentional infliction of a harmful or offensive bodily contact. Here, the contact by the piece of bullet casing against Frank's cheek was certainly a "harmful contact," even though it was not a very serious one. The nub of the question relates to ***intent.*** The intent to cause the harmful or offensive contact will of course qualify. But alternatively, the intent to commit an ***assault*** will meet the intent requirement for battery, if a harmful or offensive contact actually results. Jerry intended to commit an assault, since he intended to put Frank in apprehension of an immediate bodily contact (clearly he intended that when Frank heard the blank go off, Frank would believe that a bullet was simultaneously hitting him). This intent to commit assault will also supply the intent required for battery.

9. **Intentional infliction of emotional distress, against both Timid and Tina.** Hulk's conduct was "extreme and outrageous," and he intentionally caused severe emotional distress to Timid (indeed, that was the purpose of his visit). Since Hulk knew that Tina was present, he is also liable for Tina's distress, since she is a member of Timid's immediate family. At least under the Restatement view, Hulk is liable even if Timid and Tina did not suffer bodily harm, so long as they suffered severe mental distress. See Rest. 2d, §46(1) and §46(2)(a). (Interestingly, Hulk's conduct does *not* constitute assault. The reason is that Hulk did not put Timid or Tina in apprehension of an ***imminent*** harmful or offensive contact — the threatened contact was not to take place until next week.)

***Exam Tips** on*
INTENTIONAL TORTS AGAINST THE PERSON

For three of the torts covered in this chapter — battery, assault and false imprisonment — you shouldn't have much trouble spotting the tort on an essay exam. The fourth tort — intentional infliction of emotional distress — can be easier to miss. Since these are all "intentional" torts, it's not surprising that the most commonly-tested issues relate to intent. Here are the main things to look for:

- ☞ Look for a ***battery*** issue whenever you have what seems to be a ***"harmful or offensive contact."***
- ☞ If you spot a battery problem, introduce your discussion with the following definition: "Battery is the intentional infliction of a harmful or offensive bodily contact."
- ☞ ***"Intent"*** is probably the most frequently tested sub-issue in battery.
  - ☞ One type of intent is "desire to ***cause contact."*** That's a pretty obvious and spottable type of intent. *(Example:* D swings at P and hits him.)
  - ☞ Another type of intent is "desire to ***frighten."*** Remember that even if D didn't intend contact to occur (and just wanted to make P think it would) this "intent to cause assault" is enough for battery, if contact ensues. *(Example:* D swings at P, intending to just miss P's nose, but miscalculates and makes contact.)
  - ☞ Finally, there's the ***"substantially certain"*** variety of intent — if D knows that a harmful or offensive contact is "substantially certain" to occur, the fact that D doesn't "desire" that contact is irrelevant. *(Example:* D is repossessing P's car, while P is on the running board — if D knows that P is substantially certain to fall off, that's enough for battery even though D doesn't desire that P fall.)]
    - ☞ Remember that for "substantially certain," the test is

"subjective" — the issue is what D really thought, not what he "should" have thought, so even if an ordinary person would have realized that a harmful or offensive contact with P was nearly certain, D is protected if he didn't realize this.

- ☞ Also, "substantially certain" doesn't mean ***"very*** likely" — it means "almost certain."

- ☞ ***"Transferred intent"*** is often tested — if D tries to make contact with (or frighten) X, and contact ensues with P, that's enough for battery.

- ☞ Contact of a ***"different sort"*** than intended can suffice. *(Example:* D tries to ram his car into P's car, but P swerves into a fire hydrant — since P has come into contact with the fire hydrant, it doesn't matter that this contact is different from the "ramming" contact intended by D; D is still liable for battery.)

☞ The nature of ***"contact"*** is often tested:

- ☞ The contact can be either ***"harmful"*** or ***"offensive."*** An "offensive" contact means that as long as P's dignity is harmed, ***no injury*** is necessary. *(Example:* D pushes P while speaking nastily to him — even if there is no physical harm at all to P, there has been an "offensive" contact.)

- ☞ The contact can be by ***indirect*** means, i.e., not necessarily D's person touching P's person. *(Examples:* D throws an object at P, or hits P with his car, or lets loose an animal to attack P.) The use of ***"mechanical devices"*** to protect property is often tested, and will typically involve battery unless the property owner had a privilege. *(Example:* If D puts a security system in his car that administers an electric shock to anybody who tries to touch the car, that's a battery.)

☞ Whenever a person seems to ***exceed a privilege,*** look for a possible battery.
(Example 1: D tries to defend himself against an attack from P, but uses excessive force — D is liable for battery. *Example 2:* D uses

non-deadly force against one who he thinks is an intruder on D's property, but who is really the mail carrier. Again, that's battery.)

- ☞ In a ***medical malpractice*** or ***sports*** context, consider the possibility that there may be battery.

  Example 1: D is a doctor who fails to get the patient's informed consent before performing a certain procedure; he may be found to have battered the patient.
  Example 2: P and D play a contact sport (so P impliedly consents to contacts that are within the usual practices or rules of the sport). D hits or tackles P on purpose, and outside of the rules; D probably has committed battery, by going beyond the scope of what P impliedly consented to.

☛ Look for an ***assault*** issue whenever you have a person who is put in ***"apprehension of an imminent harmful or offensive contact"*** by another person.

- ☞ If you have an assault issue, work the following definition into the beginning of your discussion of the issue: "Assault is the intentional causing of an apprehension of harmful or offensive contact."

- ☞ Anytime you have identified a *battery*, also consider whether there was ***first*** an assault — there usually was. As long as P ***saw was about to happen*** there's an assault just before the battery. *(Example:* If D swings at P's jaw, there's an assault just before the impact, as long as P saw D's swing.)

- ☞ ***Intent*** issues are sometimes tested in assault:

  - ☞ Remember that there are two distinct intents, either of which can suffice: (1) D intends to commit a battery, but fails; or (2) D intends to put P in apprehension, but not to really cause the contact (so that the intent is "attempt to frighten").

  - ☞ ***"Transferred intent"*** operates in assault cases. Thus if D tries to frighten X (or to make a contact with X), and P thinks that he himself will be hit, then D has assaulted P even if D never intended any effect on P or even saw P.

- ☞ Remember the ***"words alone"*** rule — words alone can't constitute an assault. But typically, the facts will show at least some small ***overt act,*** which will be enough. *(Example:* While saying words, D

raises his fist, or steps menacingly towards P — that's enough of an overt act to prevent the "words alone" rule from applying, so that there is an assault.)

- ☞ The contact must (in P's mind) be ***"imminent."*** *(Example:* P's fear of being beaten tomorrow isn't enough.)

- ☞ The sub-issues relating to whether P has suffered the requisite ***"apprehension"*** are often tested in assault fact-patterns:

  - ☞ Remember that P must be ***aware*** of the danger before it happens, and it's not enough that contact eventually does happen. Be on the lookout for fact patterns that tell you that something is happening ***behind P's back,*** or happening just before P comes on the scene — these are typically a tip-off that P may not have seen the contact coming in advance, thus negating assault. *(Example:* D aims at P from behind, shoots and misses; P then realizes that he was almost hit — there's no assault.)

  - ☞ Especially often tested: P's apprehension must be that there will be a contact with ***herself,*** not a contact with a loved one. *(Example:* D shoots at X, while X's mother, P, looks on. If P feared only that the bullet would hit X, not that it would hit P herself, P has not been assaulted.)

  - ☞ P must be apprehensive of a "harmful or offensive contact," but ***not*** necessarily apprehensive of a "battery." That is, if P thinks the contact is some ***natural event*** or some ***unintentional human event,*** that can still be enough to satisfy the "apprehension" requirement. *(Example:* P sees a "tarantula" that he thinks is real, and that he thinks will bite him. It's really a fake put there by D to scare P. Even though P doesn't think a human was involved, and thus doesn't think that this is an attempt at "battery," it's still an assault because P has been put in apprehension of a harmful or offensive contact.)

- ☞ As with battery, consider the possibility of assault whenever someone exceeds the scope of a ***privilege.*** *(Example:* D, a

homeowner, shoots at P, who D knows is an unarmed burglar. D misses. Since D wasn't permitted to use deadly force here, he had no defense of self-defense or defense of land, so he has committed garden-variety assault.)

☛ Look for the tort of ***"false imprisonment" (FI)*** anytime you see one person ***intentionally confine*** another person ***within boundaries.***

- ☞ If you spot an FI issue, lead with the following definition: "False imprisonment occurs when the defendant intentionally confines the plaintiff. The plaintiff is 'confined' when his will to leave a place with fixed boundaries is overcome in a way that would overcome the will of an ordinary person in the plaintiff's position."
- ☞ Here are a couple of particular contexts that should clue you to the possibility of FI:
  - □ P is detained in a ***store*** on suspicion of shoplifting;
  - □ P is detained on a ***bus*** or ***train*** on suspicion of not having paid the fare;
  - □ P is ***arrested*** (or otherwise detained by a law enforcement official), and placed in a patrol car, or handcuffed to a post or other fixed support.
- ☞ Remember that the essence of the tort is that P is kept **"in."** Keeping P ***"out"*** is not enough, even if the place P is being kept out of is a place where he has the right to be, and even if it's P's own ***home.*** *(Example:* Landlord keeps P out of P's apartment, by changing the lock. Even if Landlord's conduct is wrongful, there is no FI because P is not being kept "in.")
- ☞ The confinement must be ***"enforced,"*** i.e., it must be ***against P's will.*** *(Example:* If P is told to "stay here," but a reasonable person in P's position would believe that nothing bad would happen to P if P left, there's no enforced confinement and thus no FI.) However, remember that "enforcement" may happen even ***without force.***
  - ☞ Thus ***threats*** of physical harm or prosecution may be enough to constitute "enforcement" of the confinement. Similarly, assertions of ***legal authority*** to detain P, together with a command that P remain, will usually be enough. *(Example:*

"I'm a police officer; get in the patrol car and stay there," would be enough.) The test is always whether an ordinary person in the plaintiff's position would feel that he couldn't leave, or would suffer some harm if he tried to leave.

- ☞ When a store detective says, "Wait here," to a suspected shoplifter, that's probably "enforcement," even though P realizes that the detective has no official status. On these facts, P can reasonably anticipate that the detective will use force to confine him, or will call the police.

- ☞ If P is given a ***"choice"*** between staying or leaving, but there is some sacrifice to P's interests that will occur if P leaves, that's still FI if a reasonable person in P's position wouldn't leave. *(Example:* If P is stopped on suspicion of shoplifting, and forced to leave his wallet as "security" that he'll answer charges, that's probably a sufficiently unpleasant choice that if P stays, he has suffered FI. However, it's not FI if P takes the deal and leaves, even if it was wrongful for D to put P to this choice.)

- ☞ P is generally required to be ***aware*** of the confinement while it is going on. *(Example:* P is locked in a room while he is asleep; the room is unlocked before P wakes up. This is not FI.) One exception recognized by modern courts and the Restatement: if P suffers ***harm*** during the confinement, that's FI even if P was not aware of the confinement while it was occurring. *(Example:* P suffers an allergic reaction while locked in his hotel room asleep.)

  - ☞ Except for this modern exception to the requirement of awareness, FI will occur even if ***no damage*** to P occurs. *(Example:* If D is wrongfully and unreasonably suspected of shoplifting and detained in the store for one half hour, that's FI even if P does not suffer mental distress or any physical injury.)

- ☞ If your FI fact pattern involves detention of P as a suspected shoplifter, remember to check out the ***"shopkeeper's privilege"*** (discussed *infra)* — most courts let a merchant who reasonably suspects P of shoplifting to detain P for the time reasonably needed

to conduct an investigation, and there is no FI even if it turns out that P is innocent.

- ☞ Remember that this tort requires ***intent*** to ***confine.*** Mere intent to do an act that has the unexpected effect of confining P is not enough, unless D knew with substantial certainty that confinement would result. *(Example:* While P is on an elevator, D stops the elevator to make repairs; if D did not realize that P was on the elevator, there's no FI because there was no intent to confine.)

☛ Look for the tort of ***intentional infliction of emotional distress*** (IIED) whenever one person does something to another that seems really ***"outrageous,"*** and the latter suffers great ***anguish.***

- ☞ If you spot an IIED issue, introduce your discussion with the following definition: "The tort of intentional infliction of emotional distress occurs whenever the defendant intentionally or recklessly causes, by outrageous conduct, severe emotional or mental distress in another person."
- ☞ Here are some contexts where you should be on the lookout for an IIED issue:
  - □ The facts mention that P is ***"humiliated"*** or "suffers great distress" (especially where the facts tell you that P seeks medical attention for the distress);
  - □ The facts involve a business dispute where one party spies on another, follows the other, or otherwise ***"harasses"*** the other;
  - □ D is a ***debt collector*** who wrongfully harasses P, or wrongfully repossesses P's goods (or does so rightfully but in an outrageous manner);
  - □ D commits a major ***crime*** against P's person or against the person of P's close relative (e.g., D kidnaps P's child); or
  - □ D plays a really nasty practical joke on P (but in this scenario, you should probably conclude that there is insufficient "outrageousness").
- ☞ P's ***mental state*** is often tested:

- Three types of mental state will suffice: (1) D ***intended*** to bring about the distress; (2) D knew with ***substantial certainty*** that the distress would result, even if D didn't desire it; or (3) D ***recklessly disregarded*** the possibility that distress would result. Note that "recklessly disregarded" applies for IIMD even though it does not for the other intentional torts (assault, battery and false imprisonment).
- Intent to do a particular ***physical act*** is not sufficient — the intent must relate to P's distress. *(Example:* Suppose D intends to repossess P's trailer home, and does so, but it turns out that P wasn't really in default. The mere fact that D intended the act of repossession is not enough to meet the "intent" requirement — unless D intended to cause P anguish, knew P's anguish was substantially certain to occur, or recklessly disregarded the possibility that P would be anguished, the requisite mental state is not present.)

- ***"Outrageousness"*** is the most frequently tested issue for IIED:
  - ***Mere insults*** are generally ***not*** sufficiently outrageous.
  - P's special ***sensitivity*** is normally irrelevant — outrageousness is measured by whether D's conduct would cause great distress to a person of ordinary sensitivity. (But if D ***knew*** of P's special sensitivity, then outrageousness is judged by reference to whether a person of P's sensitivity would have been seriously anguished.)
  - Publication of a ***true story*** about P probably is not sufficiently outrageous (unless the publication would also constitute invasion of privacy, and perhaps not even then).
- Requirements for the type of ***harm*** suffered by P are also sometimes tested:
  - At a minimum, P must seek ***medical attention*** for the distress. Thus if P is merely "outraged," or somewhat "embarrassed," that's not sufficient (even if the act itself is "outrageous").
  - Some courts hold that the distress must be severe enough to cause ***physical manifestations*** (e.g., sleeplessness) in P.

Therefore, if there are no physical manifestations, note that this poses an issue (but also say that most modern courts, and the Restatement, do not require physical harm if P has suffered anguish, has sought medical attention, and the act was "outrageous).

☞ Be on the lookout for a situation in which the way D commits the IIED is by a ***communication*** as to a ***"matter of public concern."*** Here, you should write that the ***First Amendment*** prevents the state from allowing P to recover unless the jury's determination that the conduct was "outrageous" was made in a strictly "content-neutral" way (something that is almost impossible for a jury to do).

Example: D pickets P's son funeral, with signs saying "God killed P because he was gay, and God punishes gays." When the jury in P's IIED action considers whether D's conduct was "outrageous," the jury must make this decision without considering the "message" communicated by D, since the message is on a topic of "public concern." Since it will be almost impossible for a jury to find outrageousness without considering the message's content, any verdict in P's favor will almost certainly violate D's First Amendment rights. [Cite to *Snyder v. Phelps,* on similar facts.]

CHAPTER 3
INTENTIONAL INTERFERENCE WITH PROPERTY

ChapterScope

In this chapter, we consider various kinds of intentional interferences with plaintiff's goods and land. We are concerned primarily with three torts: (1) ***trespass to land;*** (2) ***trespass to chattels*** (i.e., goods); and (3) ***conversion*** (the taking of goods). Here are the main concepts in this chapter:

- **Trespass to land:** ***Trespass to land*** occurs when the defendant ***enters the plaintiff's land,*** or causes another person or an object to enter the plaintiff's land.
  - **Intentional trespass:** As a matter of semantics, the phrase "trespass to land" usually covers only ***intentional*** entry on another's land. (Negligent entry is also a tort, but it is usually classified as an aspect of the general tort of negligence, and is not covered in this chapter.)
- **Trespass to chattels:** The tort of ***"trespass to chattels"*** occurs when the defendant ***intentionally interferes*** with the plaintiff's ***use or possession*** of a ***"chattel"*** (i.e., a piece of personal property, such as a car or a diamond ring).
  - **Loss of possession:** The tort occurs when D interferes with the owner's ***"possession"*** of the good, even if it is a brief interference (e.g., an unauthorized "borrowing" of the item, such as taking a neighbor's lawnmower for 10 minutes, or taking his car for a two-block joy ride).
- **Conversion:** The tort of ***conversion*** occurs when D so ***substantially interferes*** with P's possession or ownership of property that it is fair to require D to pay the property's ***full value.***
  - **Dividing line:** So the dividing line between trespass to chattels and conversion is the line between a not-so-serious interference with possession (trespass to chattels) and a serious interference with possession, or complete destruction, of the item (conversion).

I. TRESPASS TO LAND

A. **Definition:** A trespass to land can occur when the defendant enters the plaintiff's land, or causes another person or an object to enter the plaintiff's land.

1. **Wrongfully remaining:** Alternatively, it can occur if the defendant remains on the plaintiff's land without the right to be there, even if she initially entered rightfully.

2. **Failure to remove:** Finally, trespass can occur if the defendant fails to remove an object from the plaintiff's land which she is under a duty to remove.

B. Intentional trespass: In this chapter, we are concerned only about ***intentional*** forms of trespass; the requisite intent is discussed shortly below.

1. **History of trespass:** Under English common law, prior to the 19th century, liability for trespass to land was ***strict.*** That is, the plaintiff did not have to show that the defendant's entry was either intentional or negligent. For instance, if the defendant cut a tree on her own property, without negligence, and the tree accidentally fell onto the plaintiff's property, the defendant was liable.

   a. **Rationale:** This strict liability for trespass to land was an historical anomaly, probably arising from the fact that the action was usually used to adjudicate title disputes. See P&K, pp. 67-68.

   b. **Involuntary acts not included:** But even the strict liability theory for trespass required that the defendant's act be ***voluntary.*** Thus if the defendant was forcibly carried onto the plaintiff's land by third persons, she did not commit trespass, although it would have been a trespass if she had walked onto the land thinking it was her own. See *Smith v. Stone,* 82 Eng. Rep. 533 (K.B. 1647), *infra*, p. 44.

2. **Intent:** Today, virtually all American jurisdictions have ***rejected strict liability*** for trespass except where the defendant has been carrying out some "abnormally dangerous activity." Thus the Second Restatement, §166, provides that where entry on land is neither intentional nor negligent, the defendant is liable only if the entry occurred pursuant to his carrying out of an "abnormally dangerous activity."

Example: D is walking along a sidewalk bordering P's land. Accidentally, and non-

negligently, he slips, and falls against and breaks a plate glass window in a store that P has built on the land. D is not liable for trespass (although he probably would have been in 16th century England). See Rest. 2d, §166, Illustr. 1.

a. Requisite intent: In this chapter, we examine only the tort of intentional trespass; negligent trespass follows the rules described in the material on negligence generally *(infra*, p. 97); strict liability from abnormally dangerous activity is treated *infra*, p. 334.

C. Kind of intent required: As with the other intentional torts, the defendant can have the requisite intent even though he does not intend any ***harm*** to the plaintiff's property interest.

Example: D, a nine-year-old boy, is a member of the P Swim Club. While swimming in the pool one day, D raises a metal cover over a drain. Thinking that there is no suction at the time, he inserts a tennis ball into the drain pipe, then replaces the cover. When he returns to get the ball, it is gone. The ball enters a critical part of the pipe and causes the pool not to drain properly, which in turn forces P to close and to make repairs. P sues D for trespass.

Held, D had the requisite intent if he intended to place the ball in the pipe, regardless of whether he intended to cause any harm, or even knew that harm might occur. The question is whether D "possessed the capability to perform the physical act intentionally without regard to knowledge of possible injurious consequences.... " *Cleveland Park Club v. Perry*, 165 A.2d 485 (D.C. App. 1960).

1. Effect of mistake: If the defendant has the intent to commit a physical contact with the plaintiff's land, he will have the requisite intent for trespass even if his decision to make the contact is the result of a ***mistake.*** Thus D's mistake about ***legal title*** or ***consent*** won't block liability.

a. Reasonableness irrelevant: This principle that "mistake is no defense to trespass" is true even if the mistake is ***reasonable*** (assuming the mistake wasn't induced by anything P did or said).

Example: D, an absentee owner, visits his property, which is a farm. He drives a tractor on what he thinks is his parcel, but unbeknownst to him (and without negligence on his part), he drives over what is really P's land. This is trespass, despite D's reasonable ignorance of the fact that the land he is entering belongs to someone other than D.

i. Induced by P's conduct: However, if the defendant's mistaken belief is induced by the plaintiff's conduct, this may amount to an implied consent by the plaintiff. See the

discussion of consent, *infra*, p. 60. See Rest. 2d, §§163, 164.

D. Damages: At common law, the plaintiff who could show that a trespass had occurred was entitled to receive ***nominal damages*** where no actual harm occurred, whether the trespass was intentional, negligent or accidental.

> **Example:** D enters P's land with a surveyor and chain carriers. They survey the land, and D claims it as his own, but does not mark any trees, cut any bushes, or cause any other physical harm to the property.
>
> *Held*, P may recover against D for the trespass, even though there was no actual harm. He is entitled to nominal damages. "From every . . . entry against the will of the possessor, the law infers some damage; if nothing more, the treading down the grass or herbage, or as here, the shrubbery." *Dougherty v. Stepp*, 18 N.C. 371 (1835).

1. **Modern view:** Today, only intentional trespass, the variety of trespass being discussed in this chapter, entitles the plaintiff to nominal damages where no harm has occurred. See Rest. 2d, §163. Thus the *Dougherty* case, *supra*, would probably turn out the same way today, since the trespass there was intentional despite D's mistake (he intended to enter the land). But if D had been on his own land, and had negligently or accidently fallen onto P's land, P would today not recover nominal damages, and could recover only for harm she could actually prove.

E. Scope of recovery: Once trespass is established, the defendant is liable for virtually ***all consequences*** of the trespass, no matter how and unpredictable. (This rule apparently still applies to cases of negligent and accidental trespass, as well as intentional trespass.)

1. **Far-reaching results:** Thus in the *Cleveland Park* case, *supra*, even if D reasonably believed that the ball would not be sucked into the pipe, and even if he had no reason to foresee that extensive repairs would be necessary, he is still fully liable for these repairs.

2. **Personal injury and mental distress:** If ***personal injury*** to the possessor of the property occurs as a result of the trespass, or even injury to the possessor's family, the trespasser will be liable in full for this injury, regardless of how unpredictable it was. Some courts have even awarded the possessor and her family damages for mental distress suffered as a result of the trespass where there was no

physical harm. See P&K, pp. 76-77.

F. Only possessor has claim: Only the ***possessor*** of the property has the right to bring an action in trespass. Thus if the owner of an apartment building has rented it to X, and D trespasses in the building, only X, not the owner, can bring a trespass action. (The owner may sue on a modified trespass action for the injury to her right of reversion, but she will have to show actual permanent harm affecting her interest, and cannot recover nominal damages as in a normal trespass action.) See P&K, pp. 77-78.

1. **Possessor who is not owner:** The corollary of this rule is that one who is in possession of property that she does ***not own*** may nonetheless sue in trespass. Thus a tenant may sue, although she can recover damages only for her interest up to the end of her lease term.

2. **Vacant land:** If the land is unoccupied, the owner may sue in trespass, under the legal fiction that she is in "constructive possession" of the property.

3. **Wrongful possessor:** Even if the plaintiff's possession is ***wrongful*** because someone else owns the property, he can sue any third person who enters it.

   a. **Suit by rightful owner:** And once the wrongful possessor has held the property for an appreciable period of time, and has a "colorable" (i.e., not completely absurd) claim of ownership, the rightful owner cannot sue ***him*** in trespass. Instead, the owner must bring the common law action of ejectment, or its statutory equivalent. P&K, p. 78.

G. Indirect invasions: If the defendant causes a ***tangible object*** to enter the plaintiff's land, there is a trespass even though the defendant himself has not made the entry. See p. 426, *infra*.

> **Example:** D intentionally throws a pail of water against P's house, but D himself never steps on P's land. D has nonetheless committed trespass. See Rest. 2d, §158, Illustr. 3.

1. **Entry substantially certain:** It is also a trespass if the defendant does not intend to cause the entry of the object, but knows that it is substantially certain to occur. "Thus one who so piles sand close to

his boundary that by force of gravity alone it slides down onto his neighbor's land . . . becomes a trespasser on the other's land." Rest. 2d, §158, Comment i.

2. **Causing entry to third person:** The defendant also trespasses if he causes a ***person*** to enter the land. Thus in *Smith v. Stone*, *supra*, p. 42, the court noted that the people who had carried the defendant onto the plaintiff's land themselves committed trespass.

3. **Blasting damage:** Under English common law, trespass existed only if the defendant ***directly*** caused the entry on the plaintiff's property. Thus if the defendant set off a blast that caused concussion or vibrations on the plaintiff's property, and these caused damages, the plaintiff could not sue in trespass.

   a. **Action on the case:** Instead, the victim of such an indirect entry had to bring an action known as ***"trespass on the case."*** The essence of this action was that the defendant had indirectly invaded the plaintiff's interest in her property. See *supra*, p. 3. There were some important differences between an action in pure trespass, and an action in trespass on the case. For one thing, in an action "on the case," the plaintiff had to show either intention, negligence, or abnormally dangerous activity, and could not take advantage of strict trespass liability. Also, she had to prove that there was actual harm, and could not recover nominal damages.

   b. **Modern view:** Most modern courts reject the distinction between direct and indirect injury. They therefore hold that if the defendant sets off a blast that causes concussion or vibrations, the plaintiff may recover in trespass. See *Spano v. Perini Corp.*, *supra*, p. 4. See also P&K, pp. 68 & 553. (However, since most courts no longer impose strict liability for non-negligent and non-abnormally-dangerous trespasses, the major advantage of being able to bring such a direct trespass action is lost. But the plaintiff will often be able to show that the activity was in fact abnormally dangerous and thus gave rise to strict liability.)

4. **Particles and gasses:** By the same token, most courts now hold that a defendant who has caused ***particles,*** however fine, or ***gasses,*** to enter the plaintiff's property, has committed trespass. The court's decision

to apply a trespass rather than non-trespassory theory often has important consequences on the applicable ***statute of limitations,*** as shown by the following example.

> **Example:** D runs an aluminum reducing plant, which causes certain gasses and particles to travel through the air and to settle on P's farm, making it unfit for raising livestock. P sues in trespass for the damage to his land and to his cattle. D contends that at most, a nuisance, not a trespass, occurred.
>
> *Held*, D has committed trespass. "[W]e may define trespass as any intrusion which invades the possessor's protected interest in exclusive possession, whether that intrusion is by visible or invisible pieces of matter or by energy which can be measured only by the mathematical language of the physicist." Therefore, the local six-year statute of limitations for trespass, not the two-year statute applicable to nuisance, applies, and plaintiff can recover for all damages suffered during the six years prior to commencement of the suit. *Martin v. Reynolds Metals Co.*, 342 P.2d 790 (Or. 1959).

H. Air space: At common law, it was said that *"cujus est solum ejus est usque ad coelum"* — the one who owns the soil owns all the way to heaven. In other words, the property owner owned the ***air space*** above the land, and she could recover in trespass against someone who put telephone wires over it, fired shots across it, or otherwise entered it.

> **Example:** D hunts ducks by standing on X's land and shooting over P's land. No bullets land on P's land.
>
> *Held*, for P. D, by firing over P's land, interfered with the "quiet, undisturbed, peaceful enjoyment of the plaintiff," and committed a trespass to the land. *Herrin v. Sutherland*, 241 p. 328 (Mont. 1925).

1. Air travel: This theory was obviously impractical once the age of general aviation began. Private owners clearly could not be given the right to block the passage of airplanes, no matter how high above their land. Yet most courts felt that the property owner did have a right not to have planes fly overhead at extremely low altitudes, say 50 feet. In trying to set rules for just how far up the property owner's right to exclusive use of his air space goes, the courts have adopted several different solutions. The confused state of the law can be summarized as follows:

a. Federal law pre-empts: The U.S. Supreme Court has held that federal statutes and C.A.B. regulations make the air space above the C.A.B.-prescribed minimum flight altitudes a federal and public

domain. Therefore, it seems that federal law has preempted this area, and that the state courts may ***not award trespass damages*** for any flight occurring above these minimum altitudes. See P&K, p. 81, fn. 38.

b. Nuisance theory: Even for flights occurring below federally prescribed minimum altitudes, more and more courts are rejecting traditional trespass ideas. Instead, they are permitting the landowner to recover only when she can show ***actual*** harm from the flights. To do this, the landowner will usually attempt to show that her ***use*** of the property has been curtailed (e.g., by the noise, vibrations, pollution, etc.) The basis for recovery in these cases is thus either implicitly or explicitly a ***nuisance*** theory, rather than a traditional trespass theory based on strict liability. See the discussion of nuisance *infra*, p. 423.

c. Restatement view: The Second Restatement adopts what might be called an "implicit nuisance" approach to plane flights. §159(2) allows the plaintiff to recover in trespass for aircraft overflight only if the plane "enters into the ***immediate reaches*** of the airspace next to the land," ***and*** the flight "interferes substantially with the [plaintiff's] ***use and enjoyment*** of his land."

I. Refusal to leave as trespass: Even if the defendant had permission to enter the plaintiff's land, it will be a trespass if he refuses to ***leave*** when the permission is terminated. Similarly, if the defendant is authorized to put an object on the plaintiff's land, but then refuses or neglects to remove it when he is supposed to, there will be a trespass. See Rest. 2d, §160.

> **Example:** P gives the D Board of Road Commissioners permission to put a snow fence on P's property parallel to a road running past P's farm. D agrees that at the end of the winter, the fence will be removed. At the end of the winter, D removes the fence, but leaves behind an anchor post. P's husband, driving a mowing machine, hits the post, is thrown to the ground, and dies.
>
> *Held*, D committed a trespass by not removing the anchor post, and is liable to P for the damages she sustained by loss of her husband. *Rogers v. Board of Road Commissioners*, 30 N.W.2d 358 (Mich. 1948).
>
> Note: Observe that in the above example, the defendant was found to have trespassed even in the absence of a showing that its failure to remove the post had been either intentional or negligent. Apparently this rule of "strict liability" for failure to remove

objects is limited to cases where there is actual harm. See PW&S, p. 73, n. 5.

J. Continuing trespass: Where a trespass is caused by the entry of an object on the land, it is often the case that the trespass is a ***continuing*** one. That is, as long as the object is present on the land, the landowner's harm continues. When this occurs, and the property owner wants to sue, must she sue at one time for all past damages and all ***future ones*** that she might sustain if the trespass continues? Or may she bring an action for only those damages she has suffered thus far, and then bring a series of later actions for harm after the first suit?

1. Conflicting law: The law on this question is confused and often conflicting.

a. New trespass to remove: Where the trespass is such that the defendant would have to commit a new trespass on the plaintiff's land to remove it, the courts usually hold that a single action for all past and future damages must be brought, on the ground that the defendant may not commit a second trespass to eliminate the first one, and that therefore the trespass should be viewed as permanent. This will be true, for instance, if the defendant built a house on the plaintiff's land.

b. Other cases: But if the trespass is indirect (e.g., sewage from the defendant's plant flows onto the plaintiff's land), courts have required a single suit only where the condition seems fairly permanent and unlikely to be abated. See P&K, p. 84.

II. TRESPASS TO CHATTELS

A. **Torts against personal property generally:** The owner of a chattel (i.e., personal property, as opposed to real estate) may have several possible tort actions against one who interferes with his use or possession of that chattel.

1. Negligence: If the interference is negligent, not intentional, the plaintiff's claim would be an ordinary negligence action, and will follow the rules for such actions discussed *infra*, p. 97.

2. Intentional: If the interference is intentional, the action will be for either ***trespass to chattels*** or ***conversion,*** depending on the severity of the interference. If the interference is so great that it is fair to require

the defendant to pay the full value of the chattel (regardless of whether it could be returned in some form to the plaintiff), the action will be for conversion; if the interference is less substantial, the action will be for trespass to chattels.

B. Definition: Any ***intentional interference*** with a person's ***use or possession of the chattel*** is a trespass to chattel. Thus if the defendant takes the chattel out of the plaintiff's possession (e.g., D takes P's car for a joy ride), or harms the chattel (e.g., D intentionally puts a dent in P's car), a trespass to chattel has occurred.

C. Intent: Trespass to chattel is, today, an exclusively intentional tort. (Negligent interference with personal property is treated according to the general rules of negligence.) However, as in the case of trespass to land, it is unnecessary that the defendant had intended to cause harm to the plaintiff's interest in his property. She must merely intend to do an act which turns out to constitute an interference.

> **Example:** D picks up P's book in the library, thinking it is her own. She underlines a few pages, then discovers the error, and returns the book. Although D's mistake was completely innocent, she nonetheless intended the physical act of picking up the book and marking it, and she is liable for trespass to chattels.

D.Must be actual damages: Most courts hold that a trespass to chattels occurs only where the plaintiff can prove some ***actual harm.*** In other words, in contrast to the rule for trespass to land, the plaintiff is not entitled to nominal damages where he merely shows that the defendant has touched his property.

> **Example:** P, a four-year-old girl, climbs on the back of Toby, a dog owned by D. P pulls the dog's ears, and the dog snaps at her nose. P sues for damages for the bite. D contends that under local law, P may not recover if P was a trespasser, and that P was in fact committing a trespass to chattels at the time she was bitten.
>
> *Held*, P can recover. She did not commit trespass to chattels, because there was no showing by D that the dog was harmed in any way. *Glidden v. Szybiak*, 63 A.2d 233 (N.H. 1949).

1. Second Restatement's explanation: The Second Restatement, §218, Comment e, explains the requirement of actual harm in the case of trespass to chattels as follows: "The interest of a possessor of a chattel in its inviolability, unlike the similar interest of a possessor of land, is not given legal protection by an action for nominal damages for

harmless intermedlings with the chattel. . . . Sufficient legal protection of the possessor's interest in the mere inviolability of his chattel is afforded by his privilege to use reasonable force to protect his possession against even harmless interference."

a. Criticism: However, if it is true that the right to use reasonable force to protect against harmless interference is sufficient in the case of trespass to chattels, it is hard to see why this right is not also sufficient to protect against harmless trespasses to land. The requirement of actual harm in one case but not the other is probably due more to the differences in the historical development of the two torts than to any policy reasons.

2. Loss of possession: If the trespass to chattels is such that the plaintiff ***loses possession*** of the chattel for any time, no matter how brief, this loss of possession will be deemed to be an "actual harm," and recovery will be allowed. Some value will then be placed on the temporary loss of possession, and the result will be almost the same as if nominal damages had been allowed. See P&K, p. 87. See also Rest. 2d, §218, Comment i.

3. Contact not causing dispossession: On the other hand, where D merely ***makes contact*** with the chattel, ***without taking the chattel out of P's possession,*** D is liable only where some ***harm*** to the chattel, or some interference with P's ***use and enjoyment*** of the chattel, occurs.

> **Example:** D, a child, climbs on P's large dog, and pulls its ears. No harm to the dog results. D has not committed a trespass to chattels, because D neither took the dog out of P's possession, nor harmed the dog or P's "use and enjoyment" of the dog. Rest. 2d, §218, Comm. e and Illustr. 2.

4. Mistake as to ownership: As with trespass, the required intent ***does not encompass details about ownership.*** So if D intends to take possession of an object, and does take possession of it, the fact that D ***mistakenly believes the object is his own*** is ***no defense.*** That's true even if the mistake is a ***reasonable*** one.

> **Example:** D enters a restaurant for lunch and hangs her coat on the coat rack. When she is leaving, she removes from the rack a coat which looks like hers, but which actually belongs to P. (At the time she took it, D believed it to be her own coat.) When D has driven two miles from the restaurant, she realizes that the coat is not hers. D turns around and drives back to the restaurant, where she hands it to P, who

has been angrily trying to figure out where her coat has gone.

D committed trespass to chattels as soon as she took possession of P's coat. The fact that D honestly and/or reasonably thought the coat was her own does not negate the tort, or constitute an affirmative defense.

5. Electronic trespass on computer: Suppose D ***interacts with P's computer*** without permission; when does D's conduct rise to the level of trespass to chattels? The answer generally depends on the ***type of harm*** that occurs.

a. No harm to computer or data: Where D's conduct ***does not harm P's computer or the data on it,*** courts have generally held that trespass to chattels does ***not*** occur even though D's interaction with P's computer was uninvited. And the fact that P's ***employees*** may have been bothered by the intrusion does not change this result, according to most courts: there must be some harm, or at least serious possibility of harm, ***to the data or the computer itself*** (the "chattel"), for trespass to chattel to occur.

Example: D, a former employee of P (Intel Corp.) sends, on six occasions, e-mails to thousands of P's employees complaining of P's employment practices. On one occasion, the e-mail goes to 35,000 employees. No harm occurs to P's computer systems, but P's employees allegedly suffer a loss of productivity by having to read and delete D's messages. D does not breach any computer security imposed by P, and offers to remove from his future e-mails any recipient who so requests. P sues for an injunction against further e-mails, contending that they constitute trespass to P's chattels.

Held, for D. Trespass to chattels can occur only where there is harm to the personal property in question, or to the possessor's interest in personal property. Here, P is not claiming any injury to its personal property (i.e., to the computers or the data on them), so the tort cannot occur. As to the claim by some computer industry groups as amici that the rules of trespass to real property should be applied to computers (so that any unauthorized intrusion, however harmless, is a trespass), such a rule requiring advance permission would substantially reduce the freedom of electronic communication, and would diminish the social value of networks. *Intel Corporation v. Hamidi*, 71 P.3d 296 (Cal. 2003).

b. Harm to computer or data: On the other hand, if the defendant's intrusion ***causes harm*** to the plaintiff's computer system or data — or even poses a real ***risk*** of such harm — then that *will* satisfy the requirements for a trespass-to-chattels claim.

Example: P alleges that the Ds tricked P into downloading "spyware" and "adware" software onto P's computer. P claims that this software (1) causes advertising "pop-

ups" to appear, and (2) tracks P's computing activities, thereby slowing down P's system and possibly harming P's files. *Held*, the Ds are not entitled to have P's claim of trespass to chattels dismissed, because P has alleged facts which, if proven, would satisfy the harm-to-personal-property requirement for that tort. *Sotelo v. DirectRevenue, LLC*, 384 F.Supp.2d 1219 (N.D. Ill. 2005).

c. **Must be "property":** Keep in mind that a recovery for trespass to chattels based on D's misuse of P's computer files requires that P's interest in these files constitutes *"property"* under the law of trespass to chattels (and the law of conversion, *infra*, p. 50). Courts are split about whether various types of intangibles, including computer data, count as property for these purposes. The issue is discussed further *infra*, p. 51.

E. Return of chattel: If the trespasser is still in possession of the chattel at the time suit is brought, she has the right to tender the goods to the plaintiff, in mitigation of the latter's damages. In other words, title is treated as never having left the plaintiff. This is in distinction to the tort of conversion, discussed below, as a result of which title is deemed transferred from plaintiff to defendant, and the defendant is required to pay the full value of the property.

F. Protects possessory interest: Any person in ***possession*** of the chattel may sue for trespass to chattels, even if he is not the rightful owner. In other words, the defendant is not permitted to use the defense of *"jus tertii,"* i.e., that the plaintiff has no right to sue because some third person really owns the property. The reason for this is that "The maintenance of decent order requires that peaceable possession be protected against wrongdoers with no rights at all." P&K, p. 87. See also Rest. 2d, §219.

1. **Colorable claim:** However, the plaintiff in possession must have at least a "colorable" claim to the property, i.e., a claim that is not completely absurd. Thus Prosser suggests that a thief would not be allowed to recover. P&K, p. 87, fn. 24.

2. **Non-possessor:** A person who ***owns*** goods but who is ***not in possession*** of them at the time of the trespass may also sue. This is true whether he is entitled to the goods immediately upon request (e.g., a bailor), or only to possession at some future time (e.g, a lessor). However, in the latter case the owner may sue only for the

damages done to his future possessory interest.

> **Example:** Ace Car Leasing leases a car for a two-year period to Lessee. D takes the car for a one-day joy ride, and then returns it unharmed. Lessee could sue for the damage to his possessory interest, even though he is not the owner of the car. Ace, however, could sue only for the damage to its future possessory interest, which in this case would probably be nothing.

III. CONVERSION

A. **Introduction:** The tort of conversion occurs when the defendant ***so substantially interferes*** with the plaintiff's possession or ownership of property that it is fair to ***require the defendant to pay the property's full value.*** See Rest. 2d §222A.

1. Dividing line: The dividing line between interferences which are so serious as to constitute conversion and those which are merely enough to constitute trespass to chattels (for which only actual damages must be paid, and as to which there is no "forced sale" to the defendant) is thus a matter of degree. Most of our discussion of conversion will consist of describing where the courts have drawn this dividing line.

B. Intent: As with trespass to land and trespass to chattels, conversion is exclusively an intentional tort, but the requisite intent need not include a desire to harm the plaintiff's possessory interest. An innocent mistake by the defendant as to the ownership of goods, for instance, will not negate the existence of the required intent. (However, innocent intentions may be a factor in determining whether the interference with the plaintiff's rights is so severe as to constitute conversion; this factor is discussed below.) See Rest. 2d, §244.

> **Example:** D, an auctioneer, receives a valuable painting from X, which he reasonably believes X owns. D sells the painting on behalf of X, but it turns out to have been owned by P. D is liable to P for conversion, notwithstanding his honest and reasonable mistake. See Rest. 2d, §244, Illustr. 4.

1. Negligence: But if the defendant's exercise of dominion or control of the plaintiff's property is merely negligent, not intentional, there will be no conversion. Instead, the plaintiff must sue for the tort of negligence.

> **Example:** P deposits bonds in D Bank as collateral for a loan from the latter. D Bank negligently misplaces the bonds, and is unable to return them to P when the loan is paid off. D has not committed conversion either by losing the bonds or by failing to

return them since it did not intentionally do either. See Rest. 2d, §244, Illustr. 1.

C. What can be converted: The tort of conversion, like the tort of trespass to chattels, originated as a way to protect ***tangible property*** only. In recent decades, courts have struggled with whether to allow recovery for trespass or conversion where the "thing" that the defendant has interfered with is an ***intangible.***

1. Document closely associated with right: Where the "property" in question is a ***document*** that ***embodies*** or is highly important to some underlying ***ownership right*** of the plaintiff, courts will generally hold that the document ***can*** be the subject of conversion or trespass to chattels.

> **Examples:** So, for example if D steals from P a stock certificate, a savings account bank book, or a physical insurance policy, each of these documents is likely to be found to be sufficiently tangible — and sufficiently linked to a property right — that P will be deemed to have met the requirement that what was taken be "property." See P&K, p. 91

a. Computer files: The biggest issues arise in the case of ***computer files.*** Suppose D steals or interferes with files on P's computer. Does the intangible nature of the files prevent them from being the sort of property that can be converted or trespassed upon? In general, the trend has been sharply in favor of answering ***no*** — the files, although intangible, are usually found to be the sort of property that ***can*** be converted or trespassed upon.

D. Character of defendant's act: The courts consider several factors in determining whether the defendant's interference with the plaintiff's property is sufficiently great so as to justify requiring the defendant to pay the entire value of it. The Second Restatement lists these factors, among others:

1. Dominion: The extent and duration of the defendant's exercise of ***"dominion"*** or ***"control";***

2. Good faith: The defendant's ***good faith;***

3. Harm: The ***harm*** done to the property; and

4. Inconvenience: The ***inconvenience*** and ***expense*** caused to the plaintiff. See Rest. 2d, §222A.

a. Blending of factors: In many cases, some of these factors will indicate that conversion should be found, but others will indicate the contrary. The issue is inevitably a relatively imprecise one, but the following examples, taken from the Second Restatement, will indicate how the factors might be reconciled.

Example 1: D, leaving a restaurant, mistakenly picks up P's hat from the coat rack, thinking it is his own. When he gets to the sidewalk, D puts on the hat, realizes that it is not his own, and returns it to the rack. This is not a conversion, because no harm is done, the interference with P's right of control is limited, and D acted in good faith. Rest. 2d, §222A, Illustr. 1.

Example 2: Same facts as above, except that D keeps the hat for three months before discovering his mistake and returning the hat. This is a conversion, due to substantial interference with P's use of his property; this is so despite D's complete good faith. *Ibid*, Illustr. 2.

Example 3: Same as above, except that as D gets to the sidewalk, the hat is blown off his head, and disappears through an open manhole. This is conversion, since P's property interest is completely destroyed, even though D acted in good faith, would otherwise have discovered and returned the hat immediately, and was not negligent in permitting it to be blown away. *Ibid,* Illustr. 3.

Example 4: Same as above, except that D takes P's hat knowingly, intending to steal it. As he leaves the restaurant, he sees a police officer, and immediately returns the hat. This is a conversion, notwithstanding the short interference, because of D's bad faith. *Ibid*, Illustr. 4.

E. Kinds of interference: The following are a number of ways in which a conversion may be committed:

1. Acquiring possession: The defendant may take ***possession*** of the property from the plaintiff. A claim for conversion thus lies against a ***thief,*** or a sheriff who wrongfully levies upon property, or a con artist who obtains goods by ***fraud*** (e.g., by paying with a worthless check.)

a. Bona fide purchaser: Most courts hold that a ***bona fide purchaser of stolen goods*** is a converter, ***even if there is no way he could have known that they were stolen.*** However, the courts of New York and a few other states hold that such a good faith purchaser is not liable for conversion if he is willing to give back the goods to the rightful owner upon demand.

b. Transfer of goods procured by fraud: We have seen that one who obtains goods from the plaintiff by fraud is a converter. What

is the status of a *bona fide* purchaser of these goods from the defrauder? Because the owner's right to get back the goods is based upon the equitable doctrine of rescission, and because a *bona fide* purchase always cuts off all equitable rights, the purchaser is ***not a converter*** in this situation. P&K, *ibid.*

c. Bailment of converted goods: One who takes goods as a ***bailee,*** for purposes of storing or transporting them, is not a converter if the goods turn out to have been stolen or lost. However, since this rule exists only to make it possible to run a parking garage, warehouse, or transportation service, it applies only where the bailee does ***not have knowledge,*** at the time she accepts the goods, that someone else is entitled to them. P&K, p. 95.

2. Removal of goods: One who ***removes goods*** from one place to another may be liable for conversion, if the removal constitutes a sufficiently serious interference with the plaintiff's right to possession and control. However, this is a question of degree.

3. Withholding goods: The defendant may also commit conversion by ***refusing to return goods*** to their owner. As with the other kinds of conversion, the existence of conversion will depend on the severity of the interference with the plaintiff's right to the goods. See generally Rest. 2d, §§222A, 237-241.

a. Parking garage: Thus a parking garage which intentionally refuses to give the plaintiff back her car for half an hour would not be liable for conversion, but one which refused to surrender the car for a month would be. See Rest. 2d, §222A, Illustrs. 14-15. Similarly, if the garage delayed only a half hour, but the car was destroyed by fire during that period, there would be conversion, due to the substantial interference with plaintiff's rights. Ibid, Illustr. 16.

i. Good faith: Once again, the defendant's good faith or bad faith may play an important role in determining whether the interference is so substantial as to give rise to conversion. Remember, however, that bad faith is not a prerequisite to liability, and that a parking garage which refuses to deliver the plaintiff's car for a month because it honestly and reasonably believes that the car belongs to someone else would

nonetheless be liable. But in close cases, good or bad faith can make the difference.

b. Dominion: If the defendant refuses to return the plaintiff's goods, it is irrelevant that the defendant is not using them for his own purposes, or that no permanent damage to them occurs, provided that the interference with the plaintiff's rights is otherwise sufficiently grave. The essence of the conversion claim is that the defendant has exercised ***dominion*** over the goods.

Example: D borrows P's lawn mower, then leaves it locked in D's toolshed without ever using it, and refuses to return it. P has the police help him retrieve the mower 6 months later. Even though D hasn't used (or damaged) the mower, he's liable for conversion. So he'll have to pay P the full value of the mower measured as of the time of his first refusal to return it. (But D will then get to keep the mower.)

Note: This example illustrates the essence of a conversion action, i.e., that it is a *forced sale* to the defendant.

c. Demand: There is generally no liability for conversion until the plaintiff has ***demanded return*** of the chattel and has been refused. The defendant is deemed to have "refused" to return the goods not only where he explicitly states that he will not surrender them but also where he equivocates, or falsely promises to return them, or stalls for a substantial time.

i. Intentional refusal: It is only an ***intentional*** refusal to return the goods that gives rise to an action for conversion. If the defendant is unable to return the goods because he has lost them, the plaintiff's only remedy will be an action for negligence. See Rest. 2d, §237, Comment f.

ii. Qualified refusal: Once the plaintiff demands return of his goods, the defendant is entitled to take a reasonable time necessary to ***check the validity*** of the plaintiff's claim, provided that he gives the reasons for not yielding immediate possession. P&K, pp. 99-100.

4. Destruction or alteration of the goods: Perhaps the clearest cases of conversion occur when the defendant ***destroys*** the goods, or ***alters*** them in some ***fundamental way.***

Example: P stores his fur coat with D. Without P's knowledge or consent, D alters

the coat by reducing its size, so that P can no longer wear it. This is a conversion. But if D had merely repaired a hole in the coat, there would not be a conversion. See Rest. 2d, §222A, Illustrs. 19 and 20.

a. Partial alteration: If only part of a chattel is destroyed or altered, there may not be a conversion of the whole, depending on how hard the partial alteration is to repair. Thus Prosser suggests that if the defendant removes a tire from the plaintiff's automobile, there will not be a conversion of anything except the tire itself if a replacement tire is easily available, but there will be a conversion of the entire car if the episode occurs in the middle of the desert. See P&K, p. 101.

5. **Use of the chattel:** Conversion may occur by virtue of the defendant's ***use*** of the plaintiff's goods. Again the existence of conversion will be a question of degree, depending on the extent of the use and the harm it causes to the goods.

   Example: P lends her car to D, a dealer, in order for D to sell it. On one occasion D drives the car, on his own business, for 10 miles. This is not a conversion. But if D drove the car 2,000 miles, there would be a conversion. Rest. 2d, §222A, Illustrs. 21 and 22. Similarly, if D intended to drive the car only 10 miles, but it was seriously damaged in a collision during this trip, there would be a conversion, regardless of whether D drove negligently. Rest. 2d, §222A, Illustr. 26.

6. **Assertion of ownership:** A conversion will ***not*** be found from the mere fact that defendant ***asserts ownership*** of the goods, where he does not interfere with the plaintiff's possession or other rights. For instance, if the defendant advertises the sale of the plaintiff's car, there is no conversion. But if the defendant actually conducted the sale, and permitted his buyer to gain possession of the car for even a short time, there would be. See P&K, p.

Quiz Yourself on
INTENTIONAL INTERFERENCE WITH PROPERTY ***(Entire Chapter)***

10. Miles Standish likes to take long walks every day along what he believes is the edge of his property, Turkey Ridge. The course he travels is actually on land belonging to Chief Big Foot. Has Standish committed a trespass to land? _____

11. Jack T. Ripper jumps into H. G. Wells' time machine, mistakenly believing it's his. He takes it on a whirl through time, realizes his mistake, and returns it. Has Ripper committed a trespass to chattels?

_____

12. Icarus asks Orville Wright if he can borrow Wright's wax wings. Wright hands them over, Icarus straps them on, and soars into the wild blue yonder. Unfortunately, Icarus flies too close to the sun, the wings melt, and Icarus isn't too well off, either. Icarus returns the wings to Wright as one solid mass of wax. Wright claims that Icarus has committed a conversion. Icarus claims that since he rightfully borrowed the wings, he can't be liable for conversion. Who's right?

_____

13. Owner leaves his watch with Jeweler for repairs. Jeweler does the repairs, then ships the watch, properlyaddressed to Owner, via American Parcel Service (APS). APS mistakenly delivers the package to Neighbor, who lives next door to Owner. APS learns of its mistake one day after making it, immediately retrieves the watch from Neighbor, and delivers it to Owner. What torts, if any, has APS committed against Owner? _____

_____

Answers

10. Yes. Trespass to land requires intentional physical invasion of another's land. It is defendant's simple intent to enter land that in fact belongs to the plaintiff— not defendant's intent to do so wrongfully — that is the basis of liability. To put it another way, a mistake of fact — even a reasonable one — about who owns the land is no defense to a trespass-to-land claim. Thus even if Standish had hired the best surveyor in the county and the surveyor had (mistakenly) told Standish that Standish owned the land in question, Standish would still lose. PK §13 at 73.

RELATED ISSUE: Remember that Big Foot doesn't have to prove damages as part of his prima facie case — damages don't have to be proven in order to prevail on a trespass to land claim (and Big Foot can recover nominal damages if he can't prove actual damages).

11. **Yes.** Trespass to chattels consists of intentionally interfering with personal property in someone else's possession. The issue here is whether mistake of fact is a defense to trespass to chattels. In fact, it's not. It's intent to do the act which creates the interference that's required — not to do so *wrongfully*.

    NOTE: H. G. Wells won't have to prove actual damages here, because the type of trespass involved was "dispossession" as opposed to "intermeddling." Loss of possession itself, regardless of the length of time involved, is sufficient to satisfy the damage requirement of a trespass to chattels claim. Had Ripper merely interfered with the time machine — for instance, by putting a bumper sticker on it — Wells would have to prove actual damages as part of his trespass claim.

12. **Wright's right.** Conversion is an intentional interference with the plaintiff's personal property that is so substantial that it's fair to require the defendant to pay the property's full value. Severe damage, destruction, or misuse all qualify as a misappropriation serious enough to constitute conversion. It doesn't matter that the initial entrustment of possession to D was with P's consent; so long as the interference with P's possessory rights went beyond what was consented-to (here, Wright didn't consent to a melt-down), there can be a conversion.

    SIMILAR SITUATION: Say Fairy Godmother turns Farmer Brown's coach into a pumpkin. She will be liable for conversion, since *substantial change* to the chattel is sufficient to justify the claim.

13. **Probably trespass to chattels, but not conversion.** Conversion exists only where the owner's rights are so seriously interfered with that it is fair to make the defendant pay the chattel's full value. Here, the oneday interference with Owner's right to use or possess the watch is not sufficiently great. See Rest. 2d, §222A, Illustr. 9 & 10. On the other hand, the deprivation of use is probably great enough that the tort of trespass to chattels has been committed; if so, APS would have to pay Owner the value of one day's use of the watch (compared with having to pay the entire value of the watch, if it had been destroyed while at Neighbor's.)

***Exam Tips** on*
INTENTIONAL INTERFERENCE WITH PROPERTY

In a complex fact pattern, the presence of any of the three torts covered in this chapter (trespass to land, trespass to chattels and conversion) is usually pretty easy to spot. By and large, your problem is to determine whether the tort has in fact been committed. Here are particular things to look for:

- Look for ***"trespass to land"*** whenever one person intentionally comes onto another person's land.
  - If you spot a trespass issue, lead with the following definition: "Trespass to land is the intentional unauthorized entry onto the land of another."
  - Trespass is an ***intentional*** tort. The intent is the intent to ***enter land,*** not the intent to harm the defendant or the land in any way.
    - If D knows with ***"substantial certainty"*** that he is entering (or causing an object to enter) land, the intent requirement is met. *(Example:* Suppose D operates a factory that discharges particles of ash onto P's land, and that D knows that this is happening. D meets the intent requirement for trespass, even though D doesn't "desire" that the particles touch P's land.)
    - The most frequently tested sub-issue in trespass relates to ***mistake.*** As long as D knows he's entering land, the intent requirement is satisfied, and D's mistaken belief (even his ***reasonably*** mistaken belief) that his entry is ***authorized*** is ***irrelevant.*** *(Example 1:* D thinks he's coming onto land owned by X, who has in fact invited D, but D is really by mistake coming onto land owned by P. That's trespass. *Example 2:* D thinks he has a legal right to enter P's land to repossess P's car, but P is really paid up so D has no right to be there. Again, that's trespass.)
    - Remember that the term "trespass" refers only to ***intentional*** interference. There is no strict liability. *(Example:* D, a pilot,

loses control of the aircraft, and the craft crash lands on P's property. This is not trespass. But if the pilot has a mechanical problem and intentionally selects a particular parcel to emergency land on, that probably is trespass, though the pilot may have the defense of necessity.)

- ☞ Trespass occurs not only where D himself comes onto the land, but also where D causes an ***object*** to come onto the land. *(Example:* D puts a car onto P's land, or sends pollutant particles onto P's land.)
- ☞ Remember that a landowner is deemed to have exclusive possessory rights to at least some of the ***air space*** above the land. Whenever you spot one person ***flying over*** another's land, consider the possibility of trespass.
  - ☞ If D is flying high enough that he is within FAA-defined "navigable air space," the states cannot deem him to be trespassing.
  - ☞ But if D is flying lower than the limits of navigable air space, some states make this automatically trespass. Most states make it trespass ***only*** if P's use and enjoyment of the land is interfered with (the "implicit nuisance" approach).
- ☞ Even if there is ***no actual harm*** to P's land, the tort still takes place as soon as D comes on the property (and P can get ***nominal*** damages).
- ☞ Even if D's initial entry is ***"authorized"*** by P (e.g., P invites D on as a business visitor) the entry will ***turn into trespass*** if D ***remains*** after being asked to leave.

☛ Look for ***"trespass to chattels"*** (T/C) whenever one person intentionally interferes with another's possession of a "thing."

- ☞ If you spot a T/C issue, lead with the following definition: "Trespass to chattels is the intentional interference with another's possessory interest in a chattel, resulting in damage to that interest."
- ☞ Most T/C issues relate to ***intent.***
  - ☞ The relevant intent is the intent to take possession or otherwise

affect the chattel. D's belief about his ***right*** to do the act, or about who holds ***title,*** is ***not*** part of the requisite intent.

- ☞ Most often tested is the effect of ***mistake.*** In general, mistake is ***never*** a defense to T/ C. Thus the following types of mistake (even if ***reasonable)*** will all be no defense.
  - □ D believes that the chattel already belongs to D. *(Example:* D takes P's umbrella in a restaurant, thinking it's his own — this is T/C.)
  - □ D believes that X has title to the object, and buys the object from X when it really belongs to P. *(Example:* X steals a radio from P and sells it to D, who does not know the radio is stolen. D is liable to P for T/C.)
  - □ D is a creditor who wrongly thinks that he has the right to ***repossess*** P's chattel.
- ☞ Also, the distinction between intent and ***accident*** is often tested. If D doesn't intend to even make contact with P's possession, and this contact happens by accident, there's no T/C. But you should still discuss T/C (even though the tort hasn't been committed) in this scenario. *(Example:* D, while driving either carefully or carelessly, hits and damages P's car without intending any contact. That's not T/C.)

- ☞ The ***degree of interference*** is sometimes tested. T/C takes place as long as there's some ***"damage."*** So there are no ***nominal damages*** as in trespass to land. *(Example:* D picks up P's umbrella, realizes the mistake, and immediately puts the umbrella down. That's not T/C.) But "damage" is deemed to take place even if the only damage is a temporary one to P's right of ***"possession,"*** and the item is returned unharmed. *(Example:* D picks up P's umbrella, walks around the block with it, and returns it after noticing the mistake. That's T/C.)

- ☞ Always distinguish between T/C and ***conversion.*** Conversion only occurs when the injury to P's interests is so severe that it is appropriate to make D pay for the whole value of the item as opposed to damages for just the interference. (See the discussion of conversion, below, where we cover the factors that go into this

distinction.)

- Look for ***"conversion"*** at the same time you look for T/C. Remember that conversion is more "serious" than T/C.
  - When you spot a conversion issue, use the following definition as your lead-in: "Conversion occurs when the defendant so substantially interferes with the plaintiff's possession or ownership of goods that it is fair to require the defendant to pay the property's full value."
  - Conversion is an "intentional" tort — the definition of "intent" is the same as for T/C (so D's mistake about the right to possess, or about who has title, doesn't negate his intent).
  - The main issue in conversion is to ***distinguish*** it from T/C. Remember the factors that courts consider:
    - The extent and duration of D's ***"dominion"*** (the greater/longer, the more likely it's conversion). *(Example:* If D keeps the item for three months, that's probably conversion.)
    - D's ***good*** or ***bad faith.*** *(Example:* D buys property thinking his seller has good title — this suggests T/C rather than conversion, because D has behaved in good faith.)
    - The degree of ***harm*** to the property. *(Examples:* If the item is given back to P in an unchanged condition except for the passage of time, this suggests T/C rather than conversion. But if D takes P's car for a 10-minute joy ride, and returns it to P with the front end smashed, this suggests conversion.)
    - The ***inconvenience*** and ***expense*** caused to P.
  - For both conversion and trespass, if the ***"property"*** in question is an ***intangible,*** point out that the item must be "property" of the sort required for these torts under state law. But remember that today, in most courts ***electronic files*** *are* deemed to be "property" that can be trespassed on or converted.
  - Remember why the distinction between conversion and T/C makes a difference: in T/C, D just pays for the damage, but in conversion

there's a ***"forced sale"*** — D "buys" the item for the value it had at the time of the conversion (and gets to keep the item).

- ☞ If it's conversion, the value of the item is the *sole* measure of damages — the fact that D may have gotten benefits from the item while using it, or that D physically damaged the item, is ***not*** added. Since D is "buying" the item, he gets the right to past benefits, or to commit physical damage, at "no additional charge."
- ☞ P can always ***"elect"*** to sue for T/C (and get the item back plus damages for the harm) even where the facts would support conversion.

CHAPTER 4
DEFENSES TO INTENTIONAL TORTS

ChapterScope

This chapter discusses various ***defenses*** that D may raise to P's claim that an intentional tort has been committed. Here are the main defenses considered in this chapter:

- **Consent:** Under the defense of ***"consent,"*** if P has consented to an intentional interference with his person or property, D will not be liable for that interference. This consent may be either express, or may be ***implied*** from P's conduct or from the surrounding circumstances.
- **Self-defense:** A person is entitled to use ***reasonable force*** to prevent any threatened ***harmful or offensive bodily contact,*** and any threatened confinement or imprisonment. This is the defense of "self-defense."
  - **Degree of force:** Only that ***degree*** of force ***necessary to prevent the threatened harm*** may be used. (Special rules limit the use of ***deadly force,*** i.e., force intended or likely to cause death or serious bodily injury.)
- **Defense of others:** A person may use reasonable force to defend ***another person*** from attack. The same general rules apply as in self-defense.
- **Defense of property:** A person may generally use reasonable force to ***defend her property,*** both land and chattels.
- **Recapture of chattels:** A property owner generally has the right to use reasonable force to ***regain*** possession of ***chattels*** taken from her by someone else.
  - **Merchant:** Where a ***merchant*** reasonably believes that a person is stealing his property, most states give the merchant a privilege to ***temporarily detain*** the person for investigation.
- **Necessity:** Under the defense of ***"necessity,"*** D has a privilege to harm the property interests of P where this is ***necessary*** in order to prevent ***great harm*** to third persons or to D herself.

- **Arrest:** The police or a private citizen are entitled to make an ***arrest*** depending on the circumstances. This arrest may be with or without a warrant. Only that degree of force that is reasonably necessary may be used.
- **Justification:** Even if D's conduct does not fit within one of the above narrow defenses, she may be entitled to the general defense of ***"justification,"*** a catch-all term.

I. INTRODUCTION

A. Defenses generally: This chapter discusses the various defenses that a defendant may raise to the plaintiff's claim that an intentional tort has been committed. These defenses may be broadly grouped into two categories: **(1)** the defense that the plaintiff ***consented*** to the invasion of his interest; and **(2)** defenses that are imposed as a matter of law.

1. **Privileges:** The latter group, those imposed as a matter of law, are usually called ***privileges.*** The defendant's conduct is said to be privileged where, even though she has damaged the plaintiff by committing actions which would otherwise constitute a tort, she has acted to "further an interest of such social importance that it is entitled to protection. . . ." P&K, p. 109.

2. **Distinguish from *prima facie* case:** It is up to the defendant to affirmatively plead, and ***bear the burden of proving,*** the existence of a privilege. That is, the non-existence of privilege is not an element of the plaintiff's *prima facie* case. Thus whereas the elements of the various torts examined in the previous two chapters are matters which must be affirmatively pleaded and proven by the plaintiff, the plaintiff does not bear the burden of showing that the defendant's conduct was not privileged.

3. **Consent:** The non-existence of ***consent,*** on the other hand, ***is*** part of the plaintiff's *prima facie* case, at least with respect to torts against the person (assault, battery, false imprisonment and infliction of mental distress) and the tort of conversion. Therefore, it is not strictly speaking a "privilege," since that term is generally reserved for exculpatory defenses which the defendant bears the burden of raising and proving. However, consent to trespass to land is usually

considered to be a true privilege, and not a part of the plaintiff's *prima facie* case. P&K, p. 112. fn. 2.

B. Mistake: The defendant's conduct will never be privileged solely by virtue of the fact that it arose from a ***mistake.*** Thus we have seen that one who intentionally enters land, in the honest and even reasonable belief that it is her own, is nonetheless liable for the intentional tort of trespass; similarly, the doctor who believes he is operating on *A*, and who is in fact performing unauthorized surgery on B, is liable for battery.

> **Example 1:** While hunting for wolves, the Ds see P's dog, which resembles a wolf, and kill it. *Held*, the Ds are liable for the damages caused by their mistake, even though they may have been acting in good faith. *Ranson v. Kitner*, 31 Ill. App. 241 (Ill. 1888).
>
> **Example 2:** D mines coal from under P's land, having mistaken the location of the boundary line. D is liable to P for trespass, even though the mistake is a reasonable one. Rest. 2d, §164, Illustr. 2.

1. Important factor in privileges: However, the existence of a mistake will sometimes be an important ***factor*** in determining whether the defendant's conduct falls under one of the specific privileges discussed in this chapter. For instance, the defendant in a battery case may be able to establish that he is protected by the privilege of self-defense, if he can show that he honestly and reasonably, although mistakenly, believed that the plaintiff intended to cause him bodily harm. The effect of mistake will be examined in the context of each of the privileges discussed below.

II. CONSENT

A. General rule on consent: Generally, if the plaintiff has consented to an intentional interference with his person or property, the defendant will not be liable for that interference. In fact, as was stated above *(supra*, p. 60), most courts take the position that as to all intentional torts except trespass to land, lack of consent is part of the plaintiff's *prima facie* case, and he must plead and prove it.

B. No operation in negligence cases: The doctrine of consent is generally of importance only in intentional tort cases. The policy behind the doctrine, that of letting the parties agree on the relationship between

them to a relatively great extent, is in negligence and strict liability cases embodied by the doctrine of ***assumption of risk*** (discussed *infra* at p. 289 and p. 339).

C. Implied consent: The plaintiff's consent to an invasion of his interests may sometimes be express or explicit, as where he says "I'll be your sparring partner" (thus negating the existence of assault and battery). But the existence of consent may also be ***implied*** from the plaintiff's conduct, from custom, or from the circumstances.

1. Objective manifestation: If it reasonably seemed to the defendant that the plaintiff consented, consent will be held to exist ***regardless of the plaintiff's subjective state of mind.*** That is, it is the ***objective manifestations*** by the plaintiff that are taken into account — a not surprising rule, since defendants are not mind readers.

a. Manifestations: These objective manifestations may be not only words spoken by the plaintiff, but any other conduct or even lack of conduct, by him. The test is ***whether a reasonable person in the position of the defendant would believe that the plaintiff had consented to the invasion of his interests.***

Example: As passengers are about to leave a ship owned by the D Ship Co. after a transatlantic voyage, they are told that they may not enter the U.S. unless they have a certificate to show that they have been vaccinated. They are also told that X, a doctor employed by D, will vaccinate anyone who wishes to have this done. P stands in line with the other passengers, and tells X that she has already been vaccinated before. He says that there is no mark and that she should be vaccinated again. She says nothing, and holds up her arm, whereupon he vaccinates her. P sues D for battery, and D claims that P consented.

Held, for D. It reasonably appeared to X that P consented to the vaccination. Therefore, P is deemed to have consented, regardless of the actual state of her mind. "If the plaintiff's behavior was such as to indicate consent on her part, [the doctor] was justified in his act, whatever her unexpressed feelings may have been. In determining whether she consented, he could be guided only by her overt acts and the manifestations of her feelings." *O'Brien v. Cunard S.S. Co*, 28 N.E. 266 (Mass. 1891).

2. Real but unmanifested consent: On the other hand, if the plaintiff ***subjectively consents,*** and there is some way to prove this, the consent will be effective even though it was never manifested to the defendant. P&K, p. 113.

Example: "A repeatedly states to members of his own family that he would be glad to

have B make use of his tennis court. A makes no such statement to B, does nothing else to manifest his consent, and none of the members of A's family communicate the information to B. B enters A's tennis court and plays on it." A has consented to B's entry and there is no trespass. Rest. 2d, §167, Illustr. 3.

3. **Custom:** If the defendant can show that it was ***customary*** for one in the plaintiff's position to consent to a certain act by the defendant, there will be consent even if the plaintiff made no objective manifestation of consent in this particular case. See Rest. 2d, §892, Comment d.

   Example: D fishes in a small pond that is almost completely enclosed by P's farm. P sues D for trespass, and D claims that P implicitly consented.

   Held for D. In the jurisdiction in question, it has always been customary to permit the public to fish in small ponds. Therefore, in the absence of any notification by P to the contrary, D reasonably understood the fishing to be consented to, and consent will be found. *Marsh v. Colby*, 39 Mich. 626 (1878).

4. **Inaction:** Similarly, there may be circumstances where the plaintiff's ***inaction*** by itself indicates consent. Once again, the issue is whether a reasonable person in the position of the defendant would have inferred the consent from the inaction.

   Example: D, a boy, and P, a girl, sit on a park bench together in the moonlight. D says that he is going to kiss P; P says and does nothing, and D kisses her. P will be deemed to have consented by her silence and inaction. P&K, p. 113; Rest. 2d, §50, Illustr. 2.

D. Lack of capacity to consent: There are circumstances in which the plaintiff is clearly ***incapable*** of giving consent. This is so where P is a child, intoxicated, unconscious, etc. In such a case, any objective manifestation of consent by the plaintiff will be ineffective, at least where the defendant knows or should know that the plaintiff is not competent to give a meaningful consent. Nutshell, p. 160.

1. **Exception:** However, the patient's consent will be implied "as a matter of law" if *all* of the following factors exist:

   a. Incapacitated: The patient is unable to give consent, either because he is unconscious or for some other reason;

   b. Emergency: In order to save his ***life*** or safeguard his health, ***immediate*** action is necessary;

c. Lack of consent not indicated: There is no indication that he would not consent if able to; and

d. Reasonable person: A reasonable person would consent in the circumstances.

> **Example:** P is run over by a train, and is carried unconscious to a hospital where D is the resident doctor. It reasonably appears to D that P will die if his foot is not immediately amputated. D performs the amputation before P regains consciousness, and without procuring the consent of a relative. P will be deemed to have consented to the surgery, because of its vital and emergency nature. Rest. 2d, §62, Illustr. 3.

2. Consent by relative: Even if the factors listed above are not all present, a doctor may, if the patient is unconscious or otherwise incapable of consenting, procure the consent of a ***close relative*** instead. P&K, p. 115. Conversely, even if all these factors are met, the physician may still be under a duty to seek the consent of a close relative if one is at hand.

a. Minor: If the patient is a ***young child,*** he will usually be held not to be capable of giving consent, and either his parents must consent, or an emergency must exist. But if the patient is a minor who is approaching the age of majority, he will be able to consent on his own, and this consent may be effective regardless of whether the parents also consent. Thus a 17-year-old girl presumably has the ability to consent to a legal abortion, despite the opposition of her parents; if so, she will not be able to sustain a battery action.

b. Court order: If medical care is necessary to save a child's life, and the parents ***refuse to consent*** (e.g., because they are Jehovah's Witnesses), the doctor or hospital will normally be able to obtain a ***court order*** overruling the parents. But if such an order is not obtained, the doctor may be held liable (unless there was not enough time to obtain one.)

i. Aiding child's comfort: If the operation is not necessary to save the child's life, but is a matter of aiding his comfort, the courts are split on whether to overrule the parents. See P,W&S, p. 96, note 12.

c. Substituted consent when no emergency exists: As stated, a parent or guardian generally has the power to consent on behalf of

a youthful minor, incompetent, etc., whether or not an immediate emergency exists. But does the parent or guardian have the right to consent to surgery that is not for the patient's benefit, but is instead for the ***benefit of some third person?*** This question has arisen recently in the case of ***kidney transplants,*** and has received conflicting answers.

E. Exceeding scope of consent: If the plaintiff does give actual consent to an invasion of his interests, the defendant will not be privileged if she goes substantially ***beyond the scope*** of that consent. That is, the plaintiff generally consents to the defendant's performing acts of a certain nature, and no others. If the defendant invades the plaintiff's interests in a way that is substantially different from that consented to, she will be liable.

> **Example:** P, while having a few drinks at the local bar, challenges D to "step outside and put up your dukes." They go outside, and D attacks P with a knife, not with his fists. D has gone beyond the scope of P's consent, and will be liable for battery, and perhaps assault, as if consent had not been given. See P&K, p. 118.

1. **Consent to act, not consequences:** "The consent is to the plaintiff's conduct, rather than to its consequences." P&K, p. 118. Thus in the above example, D's conduct went beyond the scope of what was consented to, since it consisted of the use of a knife rather than a fist. But if D had used his fists, and due to P's weak heart, P had dropped dead, D would not have exceeded the scope of the consent, even though the damage clearly exceeded the scope of what P anticipated.

2. **Surgery:** The scope-of-consent issue frequently arises in cases involving surgery. As in other contexts, the rule is that the plaintiff patient's consent, if it is to one particular kind of surgery for one particular purpose, ***will not constitute consent to another, substantially different, surgical procedure.***

> **Example:** P visits D, an ear specialist. D tells P that she has a diseased right ear, and needs an operation. She consents to such an operation. After D administers the anesthetic, D decides that P's right ear is not seriously enough diseased to need surgery, but that her left ear is; he therefore operates on it, without obtaining P's specific permission for this operation. P sues for battery, and D raises the defense that she consented.
>
> *Held*, P did not consent. No emergency threatened P's life or health. Therefore, there was a technical battery, despite the fact that the operation benefitted P. (However, a new trial should be held as to damages, since the jury's finding of

$14,322.50 was excessive.) *Mohr v. Williams*, 104 N.W. 12 (Minn. 1905).

Note: As the appellate court in *Mohr* noted, P's recovery would be dependent upon the extent and the nature of her injury. Although the original trial court awarded P damages in the amount of $14,322, the court in the second trial awarded her only $39, probably because little actual physical harm occurred.

a. Desirability irrelevant: As the *Mohr* case shows, it is irrelevant that the additional or different surgery was medically desirable. The physician (and the hospital employing her) are nonetheless liable for battery. The fact that the doctor conformed to standard medical practice by the additional surgery will not be taken into account. Furthermore, even if the patient sustained no actual injury, the court may award nominal and punitive damages. P&K, p. 118-19.

b. Emergency: However, an ***emergency*** may justify extending the surgery beyond that consented to, just as it can justify surgery without consent in the first instance *(supra*, p. 62). The test is a balancing one, weighing the risks of waiting to bring the patient back to consciousness to obtain his consent, against the risks from the additional surgery.

Example: "A consents to a particular operation and for that purpose places himself in the hands of B, a surgeon, and submits to anesthesia. Upon opening A's body, B discovers conditions which make it necessary to extend the operation or to perform a different operation from that consented to. The conditions apparently require the new or extended operation to save A's life or to accomplish the cure desired by him, and its postponement would involve pain and distress to A out of proportion to the risk of the new operation. A reasonable person would consent to the operation if he knew of the conditions discovered by B. B performs the operation." A will be deemed to have implicitly consented to the operation, and B will not be liable. Rest. 2d, §62, Illustr. 4.

Note: Observe that by the standards of the above example, the defendant in *Mohr v. Williams*, *supra*, might have been able to establish the existence of implied consent. He could have argued that the purpose of the plaintiff's operation was to remove the latter's ear problems in general, and that postponing this until the plaintiff could be revived and her consent obtained would involve trauma and pain out of proportion to the risk of the operation. But the fact that the operation involved a completely different ear (as opposed to an adjoining organ), coupled with the fact that the defendant had had ample opportunity to examine both ears, would probably cause a court to reach the same result as the *Mohr* court did.

c. Hospital consent forms: The issue of consent to the scope of an operation is often academic today, since most surgery is performed in hospitals pursuant to extremely general ***consent forms.***

d. Broad consent: Even when no general hospital consent form is signed, courts may interpret the plaintiff's consent to an operation as being quite broad, particularly where complete diagnosis is impossible until anesthesia has been applied and the incision made.

i. Construed as general: Thus one court held that in such cases, unless there is proof to the contrary, the patient's consent "will be construed as general in nature and the surgeon may extend the operation to remedy any abnormal or diseased condition in the area of the original incision whenever he, in the exercise of his sound professional judgment, determines that correct surgical procedure dictates and requires such an extension...." *Kennedy v. Parrott*, 90 S.E.2d 754 (N.C. 1956).

3. Athlete's consent: Participating in a usually-violent ***sport,*** like football or hockey, is generally ***not*** considered to constitute consent to all injuries which may be inflicted by an adversary. Instead, there is an increasing tendency to hold that a player who ***intentionally attacks or injures*** his opponent may be liable in tort (or even subjected to criminal prosecution.) See Rest. 2d, §50, Comment b and Illustrs. 4-6.

a. Scope of implied consent: So if P impliedly consents to some types of harmful or offensive contact during the sport, fellow-participant D won't be liable for contacts falling within the scope of that implied consent, but *will* be liable for contacts going *beyond* the ones impliedly consented to.

b. Significance of sport's rules and customs: How, then, should the court decide *which* types of contacts fall within the scope of the plaintiff's "implied consent"? Most courts seem to attach great weight to the ***rules or customs*** of the sport. Decisions recognize at least three major categories of contact, and tend to make different conclusions about whether the plaintiff "impliedly consented" to the contact based on which category the court thinks the contact falls into:

[1] Conduct allowed by rules: The easiest category to analyze consists of contact that is ***expressly allowed*** by the rules and customs of the sport. Where the case falls into this category, in virtually all courts the plaintiff will be held to have ***impliedly***

consented to this type of contact, even if in the particular situation the result is an unexpectedly grave injury.

Example: Assume that the rules of professional soccer permit a certain type of "tackle" by a defender, where the defender intentionally slides into the legs of the player with the ball. Assume that in a professional game, while P is dribbling the ball down court, D, a defender, makes a legal tackle that has the unexpected (and unintended) consequence of severing P's ACL ligament, ending his career. Virtually all courts would say that since the tackle by D did not violate any rule or custom of soccer, P impliedly consented to that tackle, and may not recover for battery (or, for that matter, for negligence).

[2] Conduct punishable but not "beyond the bounds" of the sport: The next category consists of conduct that ***violates the rules*** of the sport, but is considered to be essentially ***within the ordinary give-and-take of the sport.*** Conduct would likely fall into this category if it is subject to ***some minor penalty,*** but not to a severe punishment like automatic ejection or a multiple-game suspension. Again, most courts would likely hold that the conduct, while against the rules, is of a type that is sufficiently common (and in most instances insufficiently physically dangerous) that the plaintiff should be ***deemed to have impliedly consented*** to it.

Example: P and D are playing in NBA basketball game. While P has the ball and has a clear path to a layup, D lunges at P from behind, grabs P's arm, and throws P to the ground. Assume that the referee believes that D's sole motive was to intentionally foul P (and send him to the free-throw line), not to engage in what D thought was an acceptable defensive move. The referee calls a "Flagrant Foul – Penalty 1" (defined in NBA rules as a foul involving excessive contact, but not so culpable as to justify immediate ejection if it is the player's first such foul of the game). As often happens in the case of this type of foul, P falls; but on this occasion, he suffers a freak career-ending knee injury when his knee hits the floor. P sues D for battery.

The court would likely hold that judging by the relatively un-severe penalty imposed by the referee, this type of foul is sufficiently ordinary — and sufficiently unlikely to cause severe personal injury — that it should be deemed to be the type of contact to which P implicitly consented by joining the league.

[3] Reckless or intentionally-harmful conduct beyond the usual bounds: The final category consists of conduct that not only violates the rules of the sport, but constitutes a flagrant violation by means of actions that are ***unrelated to the normal method of playing the game,*** and that are ***done without any***

competitive purpose. Scenarios where D ***intends to physically harm*** his opponent (or ***recklessly disregards*** the danger of such harm), without any *bona fide* belief that D is advancing his own team's competitive interest, are typical of this category. If the case falls into this category, most courts allow a tort suit (typically one for battery) to be brought by the injured player against the opponent who committed the violation, and/or the teams that employed that opponent.

Example: P plays for the Denver Broncos NFL team, and "Booby" Clark plays for D (the Cincinnati Bengals team). The Broncos intercept a Bengals pass, and P blocks Clark from pursuing the player who had made the interception and was running downfield. While P is kneeling and looking at the run-back, Clark comes up behind him and uses his forearm to hit P on the head and neck. Clark strikes this blow (he later testifies) not because he thinks it might help his team, but out of frustration at the interception and the fact that the Bengals are losing. The blow fractures P's neck. Therefore, P sues D[1] for the tortious act committed by their employee (Clark). The trial judge, sitting without a jury, rules that P assumed the risk of Clark's conduct, on the theory that "professional football is a species of warfare and ... so much physical force is tolerated that ... injuries [are] not actionable in court." P appeals.

Held (on appeal): for P — case remanded for a retrial. The rules of the NFL prohibit the intentional striking of blows, and the general customs of the sport also prohibit such conduct. These principles "are intended to establish reasonable boundaries so that one football player cannot intentionally inflict a serious injury on another." The trial judge was incorrect to assume that because football involves violence, "all reason has been abandoned"; it cannot be the case that "the only possible remedy for the person who has been the victim of an unlawful blow is retaliation." *Hackbart v. Cincinnati Bengals, Inc.*, 601 F.2d 516 (10th Cir. 1979).

(1) A few cases rule against P: However, a few cases have ***found for the defendant*** as a matter of law even where the defendant ***intentionally tried to harm*** the plaintiff, or ***recklessly disregarded the high risk*** that the plaintiff would be harmed. These few cases have reasoned that if players and teams have to worry about being held liable in tort for their aggressive on-field acts, their incentive to compete vigorously but lawfully — a desirable thing — will be chilled.

Example: P plays varsity baseball for Rio Hondo Community College team. During a preseason game against D (the Citrus Community College Owls), the pitcher for the Owls hits P on the head, cracking his helmet and injuring him.

P alleges that the pitch was an intentional "beanball" thrown in retaliation for the fact that a previous Owls batter was hit by the Rio Hondo pitcher. P sues D on various theories, including D's failure to supervise the pitcher. The trial judge holds that P assumed the risk of a pitch like the one that hit him. P appeals.

Held (on appeal), for D. Being intentionally hit by a pitched ball is an "inherent risk of the sport, so accepted by custom that a pitch intentionally thrown at a batter has its own terminology: 'brushback,' 'beanball,' 'chin music.'" It's true that intentionally throwing at a batter is forbidden by the rules of baseball. But despite this prohibition, allowing tort suits for such conduct "might well alter fundamentally the nature of the sport by deterring participants from vigorously engaging in activity that falls close to, but on the permissible side, of a prescribed rule." It's also true that in California, an athlete does not assume the risk of a co-participant's intentional or reckless conduct "totally outside the range of the ordinary activity involved in the sport." But even if the Owls pitcher here intentionally threw at P, his conduct "did not fall outside the range of ordinary activity involved in the sport." Therefore, P will be deemed to have accepted the risk of such an intentional brushback pitch, thereby relieving D of any duty to prevent such a pitch. *Avila v. Citrus Community College District*, 131 P.3d 383 (Cal. 2006).

Note: But don't assume that most courts would agree with the California Supreme Court's holding in *Avila*. See D,H&B Csbk (7th), saying that "*Avila* is one of a ***very small number of cases*** that suggest even a reckless or intentional harm would be in the range of ordinary activity."

c. A mere negligent violation of rules: All of the above cases and examples of sporting rule violations involved violations in which D either ***intended*** to injure P or ***recklessly disregarded*** a high risk that P would be injured. In this situation, as we've seen, the plaintiff has some chance of recovery if the court believes that the defendant's violation was outside of the ordinary range of activities involved in the sport. But where D's conduct in violating the sports rule manifests ***mere negligence*** as to the risk of injury to P (rather than an intention to hurt P or reckless disregard of P's physical safety), ***few if any cases allow recovery.*** See D,H&B Csbk (7th Ed.), p. 326: "A growing number of courts say that 'personal injury cases arising out of an athletic event must be predicated on [at least] reckless disregard of safety.'"

Example: P, a famous jockey, is riding in a race in which D is also a jockey. D rides his horse in such a way that P's horse is cut off and jostled, and P is thrown to the ground. P becomes a paraplegic. D's conduct constitutes "foul riding," a violation of thoroughbred racing rules. P sues D for negligence.

Held, for D. The fact that D violated a rule of the sport does not prevent P from

having assumed the risk of D's conduct. Here, the claim is merely that D negligently violated the rules, not that he intentionally or recklessly did so. Since foul riding is not "unrelated to the normal method of playing the game," and was not an intentional rules violation, P has assumed the risk. *Turcotte v. Fell*, 502 N.E.2d 964 (N.Y. 1986).

F. Consent due to mistake: Suppose the plaintiff's consent would not have been given except for the fact that he is ***mistaken*** about some material aspect of the transaction. As a general rule, such a mistake is ***not*** by itself enough to make the consent ineffective.

Example: P and D are on their first date. D, in order to induce P to go to bed with him, tells her that he doesn't have herpes. P is very concerned about the risk of catching herpes, but in reliance on D's statement, consents to sex. Unbeknownst to either P or D, D in fact has herpes, which he transmits to P. Notwithstanding the mistake, P's consent is effective, even though she would never have given it had she known the full facts. Therefore, P cannot sue for battery (although she might be able to sue for negligent misrepresentation, if she could show that D should have known that he had herpes).

1. Mistake known or induced by defendant: But if the defendant knew of the plaintiff's mistake, or induced that mistake (as by lying to the plaintiff), then the mistake would vitiate the consent. Thus, in the above example, if D knew that he had herpes, and was lying to P when he said he didn't, P's consent would be ineffective, and she could sue for battery.

Example: P, a woman in labor, summons D1, a doctor, to her house to help her in child birth. To help carry certain essential items, D1 brings with him D2, who is young, unmarried, and not a doctor; these facts are known to D1 but not to P. P permits D2 to be present during the birth, and to hold her hand.

Held, P's consent to D2's presence and contact is ineffective, because it was a mistake induced by D1's and D2's deceit. Therefore, P may recover against both. *De May v. Roberts*, 9 N.W. 146 (Mich. 1881).

a. Collateral matter: Even where the defendant induces the plaintiff's mistaken consent, that consent will be ineffective only if the mistake related to some ***essential*** aspect of the transaction. That is, the mistake must relate to an aspect of the invasion that makes it harmful or offensive, not to some "collateral" matter that induces the consent. See P&K, p. 120.

Example: P consents to have intercourse with D, because D offers her what appears to be a $20.00 bill. The bill turns out to be counterfeit. P's consent is nonetheless effective, because P's mistake related to a collateral aspect of the transaction. See Rest. 2d, §57, Illustr. 1. But if D induced P to have intercourse with him by taking her

through a marriage ceremony which he knew was fake and P didn't, her consent would be ineffective, since the married state of the parties would be held to go to the essence of whether the intercourse was offensive. See Rest. 2d, §55, Illustr. 2.

2. **Medical cases:** Questions of mistaken consent often arise in medical cases, where the plaintiff alleges that the defendant did not adequately ***inform him*** of the ***risks*** of the proposed treatment.

   a. **Active misrepresentation:** If the physician has affirmatively misstated the existence or probability of risks, most courts hold that this is enough to render the plaintiff's consent to the treatment ineffective, and thus to permit a battery claim. Similarly, the consent will be ineffective if the doctor fails to disclose consequences that she ***knows*** will definitely follow the treatment. P&K, p. 120.

   b. **Non-disclosure:** But if all the doctor has done is to fail to mention the risk of consequences that may or may not follow the treatment, most courts hold that the doctor's conduct is merely ***negligent,*** and that only a collateral matter is involved. Therefore, these courts do not allow a battery claim and instead treat the action as one for negligence.

      i. **Consequence:** Hence, the doctor may show that her failure to disclose was ***acceptable medical practice*** in the community in which she practiced, regardless of whether full disclosure would have altered the patient's decision. The issue of "informed consent" is thus discussed more fully in the treatment of negligence, *infra*, p. 114. (Some cases even hold that the doctor's duty to disclose is not measured by standard medical practice, but rather, by what is reasonable under the circumstances.)

G. Consent to criminal acts: If the defendant's act against the plaintiff is a ***criminal act,*** the courts are split as to whether the plaintiff's consent to that act is effective.

1. **Majority rule:** Most courts, particularly in older decisions, hold that the plaintiff's consent is ***ineffective*** if the act consented to is a crime. For instance, where plaintiff and defendant fight each other, these courts hold that each may recover from the other.

a. Minority view: But approximately eight states, and the Second Restatement, take the view that the plaintiff's consent to the defendant's criminal act is ***always effective*** even where a breach of the peace is involved. This position is expressed by the maxim, *in pari delicto potior est conditio defendentis* ("In equal guilt the position of the defendant is the stronger").

2. Certain class protected: Where the legislature's purpose in making the defendant's conduct a crime is to ***protect a class of persons against their own poor judgment,*** however, and the plaintiff is a member of the protected class, his consent will generally be ineffective, even in those jurisdiction that do ***not*** follow the ***majority rule*** (i.e., jurisdictions that do ***not*** agree that the existence of a crime involving a breach of the peace is by itself enough to render the plaintiff's consent ineffective).

> **Example:** D, a boxing promoter, puts on a boxing exhibition between P and X, without a license to do so, and without following the State Athletic Commission's rule on ring padding, fouls, etc. P, who is 18 years old, is injured during the fight, and sues D.
>
> *Held*, P's consent was not effective to bar his suit against D. The state statute making unlicensed boxing matches a crime is concerned primarily with protecting the contestants. Therefore, P is a member of the protected class, and his consent to the fight does not relieve D of liability, "regardless of what the rule may be as between the combatants." *Hudson v. Craft*, 204 P.2d 1 (Cal. 1949).

a. Statutory rape: Where the defendant commits the crime of ***"statutory rape"*** (i.e., intercourse with a person below a certain age, regardless of that person's actual consent), the same rule applies — the victim may sue for battery, and his or her consent is ruled ineffective because he/she is a member of the class for whose protection the statutory rape statute exists.

III. SELF-DEFENSE

A. Privilege generally: Just as the criminal law recognizes the privilege of self-defense, so does tort law. In fact, the rules concerning when the privilege of self-defense exists are virtually the same in the two contexts. See P&K, p. 124, fn. 3.

B. Two issues: In determining whether the privilege exists, there are two questions:

1. **Does privilege exist?** Was the defendant privileged to use *some kind* of force to defend herself?; and

2. **What degree of force?** If so, was she privileged to use the *degree* of force that she did?

C. What may be defended against: A person is entitled to use reasonable force to prevent any threatened ***harmful or offensive bodily contact,*** and any threatened ***confinement or imprisonment.***

1. **Negligent or intentional:** This is true whether the threat is ***intentionally imposed*** (i.e. a danger which if it occurs would be an assault, battery, or false imprisonment), or merely ***negligent.***

> **Example:** P, walking along a crowded street, is swinging a cane. D, walking behind him, wants to pass, but realizes that she is in danger of being hit by the cane if she does. There is no room to step in the street, and P refuses to stop swinging. D may use reasonable force to take the cane out of P's hand, in order to protect herself against being hit, even though P's conduct is negligent, and is not the product of an intent to hit her. See Rest. 2d, §64, Illustr. 2.

2. **Burden of proof:** The defendant bears the burden of proving that the privilege of selfdefense existed. P&K, p. 124.

D.Apparent necessity: Self-defense may be used not only where there is a real threat of harm, but also where the defendant ***reasonably believes*** that there is one.

> **Example:** "A, a notorious desperado, has threatened to shoot B on sight. B sees A approaching him with his hand in his hip pocket. A does not see B and is putting his hand in his pocket to draw out a handkerchief. B mistakenly but reasonably believes that A is about to shoot him." B may use reasonable force to block what he thinks is an attempt to shoot him (e.g., knocking A down and perhaps, if necessary, shooting A). Rest. 2d, §63, Illustr. 7.

1. **Contrast:** A reasonable but mistaken belief thus has a ***very different effect*** in cases of self-defense than it does in situations involving most of the *prima facie* torts discussed previously. Recall, for instance, that a person's reasonable but mistaken belief that the land he is entering is his own will not prevent him from being a trespasser, and a practical joker's reasonable mistaken belief that the butt of his joke will not find it a harmful or offensive contact will not shield him from liability for battery. This difference in the significance given to reasonable mistakes has been attributed to the importance courts

attach to "self-preservation as the first law of nature." P, W&S, p. 102.

2. **Reasonableness:** But the defendant's belief that a threat exists must, as noted, be reasonable. Thus in the above example, if B were abnormally timid or paranoid, and a reasonable person in his position would not have believed that A was about to shoot him, B's use of force would not be privileged, no matter how real B's fear was.

E. Protection only: The defendant may use only the force reasonably required to ***protect herself*** against harm.

1. **Retaliation:** Therefore, she may not use any degree of force in ***retaliation*** for a tort already committed on her, or as a punishment.

   Example: P, a small boy, throws a snowball at D, hitting her in the eye and causing her severe pain. D may not use force to inflict a beating on P either as a punishment or as a warning against similar misconduct in the future. Rest. 2d, §63, Illustr. 4.

2. **Disarmed or helpless adversary:** Similarly, once the defendant's adversary is disarmed or helpless after committing an attack, the defendant may not use force against him.

3. **Verbal provocation:** D may not use self-defense in response to ***verbal provocation,*** such as ***taunting or insults.*** In part that's because in tort law, self-defense is purely a forward-looking idea: D is entitled to prevent imminent future harm, not redress past harm, let alone redress purely verbal harm.

   Example: P calls D a liar and a cheat in front of D's friends. (Assume that D is not a liar and a cheat, and that P's words constitute slander for which D could recover.) P then says to D, "What're you gonna do about, you coward?" D hits P in the face. P can recover for battery, and D cannot successfully claim self-defense. That's because provocation does not justify self-defense in tort law; only the prevention of imminent bodily harm can justify it.

   a. **Words alone:** So just as ***words*** of insult by themselves will usually not constitute an assault (see *supra*, p. 15), so they will not by themselves justify the use of any degree of force. But when insults or threats are spoken in combination with any kind of ***hostile act*** (e.g., the raising of a fist), they may contribute to the defendant's overall belief that she is in imminent danger of physical harm, in which case the defendant *will* have the right to use force in self-

defense. P&K, p. 125.

4. **Harm must be imminent:** The defendant may not use force to avoid harm which is ***not imminent,*** but future, unless it reasonably appears to her that there will not be a later chance to prevent the danger.

   Example: "A draws his sword from his scabbard and says, 'If it were not an assize time, I would run you through, but God help you when the court rises.' B immediately grapples with A and takes his sword from him, wounding him, but not severely." B was not privileged to use force against A, because the harm was a future one, and it should have appeared to B that he would have a later opportunity to defend himself. But if the confrontation had taken place in a tavern, and A had drawn his sword and said, "When you step out of this tavern tonight, I will run you through," B would have been justified in disarming A, since his ability to protect himself stepping out into the dark is limited. See Rest. 2d, §63, Illustrs. 10 and 11.

F. Degree of force: Just as no force may be used unless necessary to protect against an imminent harm, so only the ***degree*** of force necessary to prevent that harm may be used. If the defendant uses more force than was necessary, she will be liable for damage caused by the excess.

1. **Both sides with claims:** As a result of the rule against the use of more force than necessary, it may happen that each party to a fight has a claim against the other. Thus if A attacks B with his fists, injuring him slightly, and B defends himself by seriously wounding A with a knife, B will have a claim against A for his injuries and A will have a claim against B for the knife wounds (which would not have occurred had B limited his response to a reasonable degree of force, such as the use of his own fists).

2. **Minor assaults:** Even if a threatened harmful or offensive contact or imprisonment does not seem likely to lead to more than ***minor injury,*** the person threatened may use such force as is necessary to avoid it.

   Example: P and D get into an argument. According to D's later testimony, P calls D a liar and makes an attempt to hit him with his fist. D then hits P and injures him.

   Held, D was entitled to use a reasonable degree of force (his fists) so as to prevent P's attack, even though D did not believe that he was in danger of serious bodily harm. Therefore, the trial court's jury instructions limiting the right of self-defense to cases where the defendant believes himself in danger of great harm was incorrect. *Boston v. Muncy,* 233 P.2d 300 (Okla. 1951).

G. Deadly force: As we have seen, the general rule is that the defendant may use whatever degree of force is necessary to defend herself against

imminent harmful or offensive contact. But there is an exception to this rule: the defendant may ***not*** use ***deadly force*** (i.e., force intended or likely to cause death or serious bodily injury) unless she herself is in danger of death or serious bodily harm. Rest. 2d, §§65 and 66. (And, of course, even where the defendant is threatened by such serious bodily harm or death, she may not use deadly force if a lesser degree of force would suffice to dispel the danger.)

> **Example:** P swings his fists twice at D's face, but since P is weak, the blows don't do any real damage. D, instead of retreating (as he could safely do) or swinging his own fists (which he could also safely do), gashes P with a large knife, killing him. P's estate brings a wrongful death claim against D.
>
> D cannot claim self-defense. He was not, nor reasonably seemed to be, in danger of great bodily injury or death. Therefore, he had no right to use deadly force to repel the attack.

1. **May have to submit:** The "deadly force" rule means that even if the defendant *cannot protect himself* against a non-deadly attack without the use of deadly force, he *still* may not use deadly force. Thus even if D in the above example had been a poor street-fighter who couldn't have repelled P's non-deadly attack with D's own fists, and couldn't have retreated, D would still have had to submit to the beating by P rather than use the deadly knife.

2. **"Deadly force" defined:** What constitutes "deadly force" will depend not only upon the weapon, but upon the way it is used. Thus the hand of a black-belt karate expert, if capable of breaking an adversary's neck and used with that intent, will be deadly force; conversely, the use of the butt of a gun merely to stun an opponent would not be. See Rest. 2d, §63, Comment d.

   a. Rape: The threat of ***rape*** or ***sodomy*** is deemed sufficiently serious that the victim may use deadly force if there is no other way to prevent the attack. Rest. 2d, §65(1)(b).

H. Retreat: The general rule, as we have seen, is that force (whether deadly or otherwise) may be used only if necessary to prevent the threatened harm. What if the threatened harm could be avoided merely by running away? The defendant's ***"duty to retreat"*** has been the subject of much debate, and the courts are split.

1. **One view:** Some courts hold that the defendant may ***stand her ground and use deadly force against an attack, even if she could retreat with complete safety.*** This view gives priority to the "dignity and sense of honor of the individual." P&K, p. 127.

2. **Other view:** Other courts, "giving priority to the importance of human life" (P&K, p. 127), hold that one who is attacked must retreat if she can do so safely. Even these courts, however, do not require one who is attacked in her ***own home*** to retreat "from room to room." P&K, p. 128.

3. **Analogy to criminal statute:** Most courts, regardless of precedent, will probably apply in a tort suit the same rule that the legislature has decreed for ***criminal*** cases. *Id.* The trend in the criminal area is towards requiring retreat where this can be done safely.

4. **Restatement view:** The Second Restatement requires the person who is attacked to retreat (if she can do so safely) in some situations, but not in others:

   a. **Use of non-deadly force:** The person being attacked may ***always refuse to retreat,*** if she is willing to use ***only non-deadly force*** to repel the attack. Rest. 2d, §63(2).

   b. **Deadly force:** Where the person attacked wants to use deadly force to defend herself, she may not do so if she is attacked somewhere other than her dwelling, and she could retreat to safety. So there's a general duty to retreate before use of deadly force, according to the Restatement. But if the person is attacked *within her dwelling*, she does ***not*** have to retreat (except that she must retreat if she is being attacked by someone who also lives in the same dwelling, e.g. a spouse). Rest. 2d, §65(2).

5. **Ordinary rules apply in dwelling:** But keep in mind that although the duty to retreat may not exist where a person is attacked in his own dwelling, the other rules regarding self-defense still apply. Thus the homeowner who is robbed at gunpoint may not shoot the robber if there is another, less deadly, way of disposing of the threat.

   a. **Prevention of crime:** But if it does appear to the homeowner that there is no way to prevent a burglary or robbery except by, say,

shooting the perpetrator, he may do so ***even if he himself is not directly attacked.*** This is so because deadly force may be used to ***prevent most felonies,*** including those involving the breaking and entry of a residence. See Rest. 2d, §143(2).

I. Injury to third person: Suppose that in a situation where the defendant is entitled to use reasonable force in his self-defense, he does so, and injures an ***innocent bystander.*** In this situation, the use of force in self-defense will generally be privileged, assuming that the defendant did not act negligently.

> **Example:** D is attacked by X and Y. He defends himself by shooting at them, and hits P.
>
> *Held*, assuming that D was entitled to use deadly force to defend himself against X and Y, he is not liable to P even if P was merely an innocent bystander. *Morris v. Platt*, 32 Conn. 75 (1864).

IV. DEFENSE OF OTHERS

A. General rule: The common law recognized a person's right to use reasonable force to defend a member of his own family against attack. Today, even if a bystander sees a ***complete stranger*** being attacked, all courts would allow the bystander to use reasonable force to intervene; P&K, p. 130; Rest. 2d, §76.

1. Degree of force: The intervenor is subject to the same rules of reasonable force as the person being attacked would be. Thus the intervenor may not use deadly force to repel what appears to him to be a non-deadly attack. Similarly, he may not use a greater degree of force than appears necessary to repel the attack.

2. Reasonable mistake: What about ***mistake?*** Although courts are split, the modern view is that if a person makes a ***reasonable mistake about the need for force (including the degree of danger to the third person),*** the defense-of-others defense is ***not forfeited.*** See Rest. 2d §72.

a. Unreasonable mistake: But *all* courts agree that D's belief in the need to use force in defense of another (and D's selection of the level of force to use) ***must at least be reasonable.*** So if D makes a ***negligent mistake*** about whether the third person (call her X) is in

physical danger, or about whether D's proposed physical contact will help avoid the danger, D will not be able to use the defense-of-others defense.

Example: D, a good samaritan, sees P, a little old lady, who is slowly crossing the street. D believes that P is about to be struck by an SUV, so he pushes P out of the way, causing her to fall and break her hip. If D was negligent in believing that P was actually in danger, D will be liable to P for battery. But if D was reasonable in his belief that P would likely be hit by the SUV if she was not pushed out of the way, and reasonable in the amount of force he used, he will be able to use defense-of-others as a defense to a battery action by P. And that's true even if D was mistaken about the existence of the danger (e.g., because the driver of the SUV saw P and wouldn't have hit her).

V. DEFENSE OF PROPERTY

A. General rule: There is a privilege to defend property (both land and chattels) on essentially the same basis as the right to defend oneself.

1. Reasonable force: The property owner may use only as much force as appears necessary to protect the property.

2. Verbal demand required first: The owner must first make a ***verbal demand*** that the intruder stop, before using force, unless it reasonably appears that violence or other harm will occur immediately, or that the request to stop will be useless. See Rest. 2d, §77(c).

a. Allow time for intruder to obey: Furthermore, if the owner does make a request to leave, the owner must give the intruder ***sufficient time to obey the request,*** unless it's clear that the request will not be heeded.

Example: While O is walking around his rural property, he comes upon Neighbor, who is trespassing. O says, "Get off my property!" Neighbor pauses for two seconds without saying anything, at which point O hits him in the leg with a stick that O is carrying. This is battery, and the defense-of-property defense does not apply, because O was required to give Neighbor a reasonable time to obey the request to leave, unless it reasonably appeared to O (which it didn't) that Neighbor would not obey.

B. Mistake: A ***reasonable mistake*** of fact by the property owner will have different consequences, depending on whether the mistake relates to the existence of the danger, or, instead, to the intruder's own lack of privilege.

1. Mistake as to danger: If the property owner mistakenly but

reasonably believes that force is necessary to protect her property, her use of force will be privileged, provided that there is a real non-privileged intrusion.

> **Example:** D is sitting at home one night, when she sees P crawling through an open window in D's house. D mistakenly but reasonably believes that P is armed and might commit violence; accordingly, she rushes at P without warning, throws him out of the window, and slams the window. In fact, P was unarmed, and has never committed the slightest violence during his long career as a cat burglar. D's use of force without warning is privileged, even though in reality no violence was threatened (thereby making this the kind of situation in which a warning before the use of force would ordinarily be necessary); this is so because D's mistake was as to the necessity for using force.

2. **Mistake as to intruder's privilege:** But if the property owner reasonably believes that the intruder has no right to be there, and it turns out that the intruder's presence was in fact privileged for some reason (see, e.g., the discussion of necessity, *infra*, p. 81), the property owner's use of force will ***not*** be privileged. P&K, pp. 131-32; Rest. 2d, §77(a).

> **Example:** P's boat goes adrift, and runs aground on D's beach. A storm arises, threatening to carry the boat out to sea. P enters D's land to save his boat (as he is privileged to do under the doctrine of necessity — see *infra*, p. 82). D reasonably but mistakenly believes that P is attempting to steal D's own boat. He therefore blocks P's way and knocks him down. D will be liable for his injuries to P, and for the loss of P's boat, despite the reasonableness of his mistake. This is so because D was mistaken not about the necessity of using force, but about the absence of P's own privilege to enter D's property. See Rest. 2d, §77, Illustr. 1.

C. Deadly force: As stated, the property owner can never use more force than reasonably appears necessary to protect the property. But even beyond this, the owner does ***not*** have a general right to use ***deadly force*** even where the intrusion can only be prevented this way.

1. **Serious bodily harm:** Instead, the property owner may use deadly force against the intruder only if she believes that the latter will, unless he is kept out, cause ***death or serious bodily harm.***

   a. Certain felonies: However, the property owner may be privileged to use deadly force to ***prevent certain felonies,*** namely those involving death, serious bodily harm, or the ***breaking and entering of a dwelling place.*** This is really a separate privilege to prevent certain crimes, and is only indirectly related to the privilege to

defend one's property. See Rest. 2d, §143(2).

b. Burglary: This privilege to prevent breaking and entering crimes in dwellings means that a ***homeowner may use deadly force against a burglar,*** provided that she reasonably believes that nothing short of this force will safely keep the burglar out. Most courts would probably also hold that she has the right to use such force against a burglar who has already entered, again assuming that there is no other apparent safe way of expelling him.

i. Limited to dwelling place: However, this privilege to prevent burglaries and other breaking and entering felonies (e.g., a breaking and entering occurring during the daytime, and therefore not a burglary under many state statutes) applies only in the case of ***dwelling places.***

ii. Not applicable to trespassers: And this privilege also does not permit the homeowner to use deadly force (e.g. a shotgun) against one who is merely a ***trespasser*** on lands belonging to the family homestead. The casual trespasser, in fact, must normally be warned before even ***non-deadly force*** is used against him.

2. Where expulsion would injure intruder: If the situation is one where the property owner may not use deadly force against the intruder, she may furthermore not ***eject*** the intruder if this is likely to cause him serious injury. See Rest. 2d, §77, Comment e. See also, *Ploof v. Putnam*, *infra*, p. 82, where D was held liable to P for unmooring P's boat during a storm and thereby injuring P.

D. Mechanical devices: Property owners frequently make use of various ***mechanical devices*** to protect their property. These include barbed wire, glass shards on top of walls, vicious watchdogs, and spring guns (guns rigged mechanically to go off when the premises are entered). The general rule regarding such devices is that the owner is privileged to use them ***only if he would be privileged to use a similar degree of force if he were present and acting himself.*** Thus to the extent that the devices are likely to cause serious bodily harm, and are therefore to be considered deadly force, they may be used only to protect against serious injury to the inhabitants, or, possibly, to protect against breaking

and entering felonies in a dwelling.

1. **Trespasser:** Thus if an electrified fence causes serious injury to a trespasser who has no intent to enter the house, the owner will be liable since he would not have been privileged to use such deadly force personally against the trespasser.

2. **Reasonable mistake:** And regardless of whether the property owner's intent was to protect his home against dangerous felonies (e.g. armed robbery), his right to use the mechanical device in a particular case will be measured by considering whether deadly force could have been used against ***that particular intruder.*** Thus an electrified fence intended to guard only against burglary but which nonetheless severely injures a casual trespasser (not to mention a person with a privilege to enter, e.g. the postman) will give rise to liability.

3. **Spring gun case:** The most important case involving mechanical devices is one concerning a spring gun, described in the following example.

> **Example:** D owns an unoccupied boarded-up farmhouse. Because the house has been broken into many times and robbed of various household items, D conceals a shotgun in the bedroom, and connects it to the bedroom doorway in such a way that a person entering that room will discharge the gun. P, with a friend, breaks into the house, in order to steal some bottles and fruit jars which they think are antiques. When P enters the bedroom, the gun goes off, and part of his leg is blown away by the blast. P sues for his injuries, wins in a jury trial, and D appeals.
>
> *Held*, on appeal, D is liable. A property owner may not use deadly force to defend his property against a trespasser, unless the latter is committing a felony of violence, or is endangering human life by his act. And what a property owner may not do directly, he may not do indirectly by a spring gun or other mechanical device. *Katko v. Briney*, 183 N.W.2d 657 (Iowa 1971).
>
> A dissent argued that D should be liable only if P showed that D ***intended*** to shoot anyone who entered the bedroom. The dissent contended that P had not met that burden, and that, in fact, D had testified that he was only trying to "frighten" intruders, not to shoot them.
>
> Note: The court in *Katko* approved a jury instruction to the effect that the crime of breaking and entering is not a felony of violence, and therefore does not give rise to the owner's right to use deadly force (unless the inhabitants' safety is threatened for some other reason). This position is contrary to that of the Second Restatement, which explicitly gives a right to use deadly force to prevent the breaking and entering of a *dwelling*. Rest. 2d, §143(2). Note, however, that the Restatement test would have led

to the same result here, since the unoccupied farmhouse was not a dwelling.

Note: As stated, the dissent claimed that liability would lie only where it was shown that the property owner intended to injure intruders, not just to frighten them. However, "deadly force" is generally defined to include not only force intended to cause serious bodily injury, but also that which is *likely* to cause such injury, regardless of the user's intent. See Rest. 2d, §79. Therefore, the *Katko* majority seems to have been correct to require D to show that the situation entitled him to use deadly force, a burden which he failed to meet. Also, the jury was free to believe that D knew with "substantial certainty" that injury would result, whether or not he literally intended it. See *Garratt v. Dailey, supra*, p. 8.

4. **Warning:** In the case of non-deadly mechanical devices, (e.g. barbed wire), most courts have held that the owner must post some kind of ***warning*** of the existence of the device, unless its use in the area is so common that it is reasonable to assume an intruder is aware that it may be present. See Rest. 2d, §84, Comment f. See also P&K, pp. 134-35.

   a. **Deadly devices:** But if a mechanical device constitutes deadly force (i.e. it is intended or likely to cause death or serious injury), and the use of the device meets the other requirements for use of deadly force, listed above, then normally no warning of the existence of the device will be required. See Rest. 2d, §85, Comment c. Thus in *Katko, supra*, the fact that no warning of the spring gun present was posted, seems to have had no effect on the outcome of that case.

      i. **Warning not bar to liability:** But, conversely, if such a deadly device is used against an intruder against whom the owner himself could not use deadly force, the fact that a warning has been posted will not save the owner from liability.

VI. RECAPTURE OF CHATTELS

A. General right: Just as a property owner may in some circumstances have the right to use force to defend her possession of land or chattels (discussed *supra)*, so she may sometimes have the right to use force to ***regain*** possession of chattels or land taken from her by someone else. Re-entry on land is discussed *infra*, p. 80. Here, we deal only with recapture of chattels.

B. Similar to defense of possession: The right to forcibly recapture chattels is more limited than the right to defend existing possession. This is so because in one case, the owner is merely seeking to maintain the status quo, whereas in the other she is herself the aggressor, disturbing the peace. Therefore, there are several respects in which the right of recapture is circumscribed:

1. **Reasonable mistake:** If the owner reasonably but ***mistakenly*** believes that some third person has possession of the former's goods, or if she reasonably but mistakenly believes that force is necessary to retake the goods, it is she, not the third person, who must bear the consequence of her mistake, and ***no privilege will exist.*** This is somewhat different from the case of defense of property, where the property owner is not liable for a reasonable but mistaken belief that force is necessary.

   a. **Shoplifting:** However, in the case of a suspected shoplifter, a merchant may be protected against a reasonable but mistaken suspicion under certain circumstances described *infra,* p. 79.

2. **Fresh pursuit:** The privilege exists only if the property owner is in ***"fresh pursuit"*** to recover her property. P&K, p. 138. If the owner waits a substantial length of time before making his attempt to get the property back (in some circumstances, probably as little as an hour), she can no longer use reasonable force to retake it, and instead must resort to the courts.

3. **Reasonable force:** The force used must be reasonable in the circumstances, and ***deadly force*** can never be used.

   a. **Resistance:** But if the wrongdoer resists the owner's attempt to get the property back, this resistance may itself give rise to the right to use deadly force in self-defense. This was the case in the *Hodgeden* case, discussed *infra.*

4. **Wrongful taking:** The privilege exists only if the property was taken ***wrongfully*** from the owner. If the owner parts willingly with possession, and then an event occurs which gives her the right to repossession of the goods, she will generally not be able to use force to regain it.

Example: Storekeeper sells a TV to Consumer on a chattel mortgage, with the contract providing that Storekeeper may repossess the television if Consumer does not make the monthly payments. Consumer misses several payments, and Storekeeper attempts to break into Consumer's house to repossess the set. He has no right to do so, since the breaking-in constitutes the use of force, and since Storekeeper willingly parted with possession. (He could repossess if this could be done without "breach of the peace," but that is not the case here. See §9-503 of the UCC.)

C. Detention by merchant: A merchant who thinks that a customer is shoplifting is put to a difficult choice. If she attempts to stop the customer and search or question him, she may be liable for false imprisonment or false arrest, if it turns out that no crime was committed or attempted. But the alternative, of course, is to let the customer walk away, possibly with the goods. A number of courts have aided the storekeeper in this position by granting her or her employees a privilege to ***temporarily detain*** for investigation a person who is ***reasonably suspected*** of stealing property. See P&K, pp. 141-42. See also Rest. 2d, §120A.

1. **Limited privilege:** The privilege is a limited one. First, the detention must be limited to a short time, generally 10 or 15 minutes or less, the time necessary to make a quick investigation.

2. **No coercion:** Also, the storekeeper or detective may not use the detention to attempt to coerce ***payment.***

3. **No arrest:** Nor may the merchant or detective purport to ***arrest*** the suspect — if this occurs, the privilege terminates, and there is liability for false imprisonment and false arrest if a crime was not in fact committed.

4. **No confession:** And the storekeeper may not attempt to obtain a ***confession*** once it is determined the crime was committed.

5. **Off premises:** Some cases have held that the privilege of detention exists only where the suspect is stopped and detained ***on the store's premises.*** Thus the Rest. 2d, §120A, in a Caveat, states that no opinion is expressed as to whether the privilege extends to one who has left the premises but is immediately nearby.

   a. **New view:** However, some cases have extended this privilege to cover the area immediately around the store. See, e.g., *Bonkowski v. Arlan's Department Store,* 162 N.W.2d 347 Mich. 1968)

(privilege held applicable where store detective stops P who is outside store and walking toward next-door parking lot). A court would probably be more likely to find the privilege applicable if the stop occurred on the store's own property (e.g., a store-owned parking lot) than if it happened elsewhere (e.g., in the street, or in a parking lot not owned by the store).

D. Entry on land: Just as an owner attempting to recover her goods may sometimes use reasonable force against the person of the wrongdoer, so she may use reasonable force to ***enter the wrongdoer's land*** to recover the missing goods.

1. **Reasonable time and manner:** The entry must be made at a ***reasonable time*** and in a ***reasonable manner.***

2. **Use of force:** The owner of the goods may use reasonable force to enter, but only if the circumstances are such that she would be allowed to use force against the landowner's person (see *supra*, p. 78).

3. **Where landowner not at fault:** But if the chattels are on another person's property through ***no fault of the latter*** (e.g. carried on by storm) the owner has only a limited privilege to enter to recover them — she may enter the land, but she is liable for any actual substantial harm which she causes. This privilege is similar to that of necessity, discussed below.

   a. Chattel owner's fault: However, if the goods are on the other person's land because of their ***owner's*** own fault (e.g. she negligently lets her boat drift onto a neighbor's beach) she may not enter, even if she is willing to pay for actual damage. She must instead bring a court action (usually called "replevin") to get back the property. See Rest. 2d, §200, Comment c.

VII. RE-ENTRY ON LAND

A. Privilege generally: A property owner who has been deprived of his possession of his ***land*** may sometimes recover it by force, just as one deprived of possession of his chattels may, as we have just seen.

B. Majority rule: The issue of recovery of real property usually arises in the case of a ***tenant who overstays the lease,*** and is forcibly thrown out

by the landlord. Most American courts hold that a landlord has ***no right*** to use force (whether it results in bodily harm or not) to eject a tenant. P&K, p. 144. In states following this rule, the tenant may therefore recover for assault and battery, trespass to chattels, etc.

1. **Rationale:** The majority rule relies in part on the fact that there are almost always summary procedures permitting the landlord to use legal process to obtain a speedy recovery of his property, thus minimizing the need for him to take matters into his own hands.

2. **Mere entry:** But states following this majority rule usually do allow the landlord to enter the property if he can do so ***without force.*** And if the lease itself says that the landlord may use force to re-enter, courts which would otherwise follow the majority rule may nonetheless uphold forcible entry, provided that no more than reasonable force is used.

VIII. NECESSITY

A. Directed towards innocent person: The privileges we have examined so far are generally triggered by wrongdoing on the part of the plaintiff. For instance, it is the plaintiff's attack upon the defendant that triggers the latter's right of self-defense, the plaintiff's wrongful taking of the defendant's chattel that gives the latter the right to recapture it, etc. This being the case, it is not unreasonable to cause the plaintiff to lose his tort action, since he may be fairly said to have brought his injury upon himself. But there are situations in which the defendant is privileged, because of unusual exigencies, to harm the plaintiff, even though the plaintiff himself is completely blameless. This privilege is usually described as that of ***"necessity."***

B. General scope: There are two categories of emergencies which may justify the defendant in harming the plaintiff's property: cases of so called ***"public necessity"*** and those of ***"private necessity".***

1. **Single rule:** A single rule applies to both of these categories: the defendant is privileged to harm the property interest of the plaintiff where it is necessary to do so in order to prevent great harm to third persons or to the defendant herself. If the class of persons being protected is the ***public as a whole,*** or a substantial number of persons,

the privilege is said to be that of "public necessity." If the defendant is only protecting ***her own interests,*** or those of a few private citizens, the privilege is that of "private necessity."

2. **Distinction:** The principal distinction between these two kinds of necessity is that in the "public" case, the defendant does ***not have to pay*** for the damage, whereas in the private case, she does.

C. Public necessity: The privilege of public necessity exists wherever interference with the land or chattels of another is necessary, or reasonably appears necessary, to prevent a ***disaster*** to the community, or to a substantial number of people.

> **Example:** A fire is raging in the houses within the immediate vicinity of P's house, and P is removing goods from it. Although the fire has already passed over P's house, D, the Fire Warden of San Francisco, determines that there is a danger that the fire will spread elsewhere, and in order to prevent this, orders P's house blown up. P sues for the damage to his property.
>
> *Held*, for D. His conduct was privileged, in order to prevent the spread of the fire. "At such times [of emergency], the individual rights of property give way to the higher laws of impending necessity." *Surocco v. Geary*, 3 Cal. 69 (1853).

1. **Act by private persons:** In the above examples, the privileged act was committed by public officials. But even a private individual, if she is acting on behalf of the community, may claim the privilege of public necessity.

> **Example:** D, a private citizen, breaks into P's house to put out a fire inside it that D reasonably thinks may spread to numerous nearby buildings. D will have the privilege of public necessity.

2. **Apparent necessity:** The privilege will exist as long as the necessity was reasonably apparent, whether or not it in fact existed. (This is true for the privilege of private necessity, as well.) P&K, p. 148.

3. **Compensation:** The person who injures the plaintiff's property, and successfully claims the privilege of public necessity, will never herself be required to reimburse the plaintiff for the damage suffered. And generally, the community as a whole (e.g. the state or town which benefitted) has ***not,*** as a matter of common law, usually been required to ***compensate*** the victim.

   a. Statutes: However, several states have enacted ***statutes*** providing

for compensation to the victim in a case of public necessity. Such statutes are analogous to eminent domain statutes applicable where property has been taken to build highways, public projects, etc. See Rest. 2d, §196, Comment h.

4. **Personal injury:** The privilege of public necessity is usually used to justify injury to the plaintiff's land or chattels. However, in a sufficiently compelling case, it could also justify the infliction of injury to the ***person.*** See P&K, p. 148. But remember that as in the case of property damage, the privilege only applies where there is no other less-damaging way of combatting the danger.

D. Private necessity: The doctrine of ***private necessity*** is similar to that of public necessity. Any person is privileged to prevent injury to himself or his property, or to the person or property of a third person, by injuring private property, if there is no less-damaging way of preventing the harm.

> **Example:** P and his family are sailing on a sloop, when a sudden storm arises. P moors at D's dock for safety. D unmoors the boat, causing it to be driven onto the shore, destroying it and injuring P and his family. P sues in trespass and also for negligence.
>
> *Held*, P had the privilege of private necessity to moor himself to D's property. Therefore, D had no right to interfere with P's exercise of this privilege, and D is thus liable for the damages his unmooring of the boat inflicted upon P. *Ploof v. Putnam*, 71 A. 188 (Vt. 1908), *supra*, p. 76.

1. **Limited danger:** Whereas public necessity apparently only applies where the danger to the community is severe, private necessity can apply even in less drastically dangerous situations. However, in determining whether the privilege exists in a particular case, the harm to the plaintiff's property interest must be weighed against the severity and likelihood of the danger that the defendant seeks to avoid. See Rest. 2d, §263, Comment d.

2. **Technical tort nullified:** Where the privilege of private necessity exists, it will be a ***complete defense*** to a tort claim where the plaintiff has suffered no actual substantial harm. Thus a claim for "technical" trespass, alleging merely that the defendant intentionally entered the plaintiff's land, and not showing any actual damages, will be defeated by the privilege of private necessity. (This is what happened in the

Ploof case, where there was no showing that D's dock would have been harmed by the mooring.)

a. Actual damage: But if the defendant causes ***actual damage*** to the plaintiff, private necessity provides only a ***limited privilege*** — the defendant has the right to interfere with the plaintiff's property rights, but she must ***pay for the damage*** she causes the plaintiff. That's what makes private necessity a more limited privilege than public necessity. See P&K, p. 147; see also Rest. 2d, §263(2).

Example: D's boat is discharging cargo at P's dock when a storm arises. Because of the severity of the storm, D is unable to move his boat and has his employees moor it tightly to the dock. During the storm, the boat repeatedly knocks against the dock, damaging the latter. P sues D for the damage to the dock.

Held, D had a right to use the dock to protect its property. However, it also had an obligation to compensate P for the damage caused to P, since D's act was an intentional one and the source of the danger was not an object belonging to P. "Theologians hold that a starving man may, without moral guilt, take what is necessary to sustain life; but it could hardly be said that the obligation would not be upon such person to pay the value of the property so taken when he became able to do so. And so . . . necessity, in times of war or peace, may require the taking of private property . . . ; but under our system of jurisprudence compensation must be made." *Vincent v. Lake Erie Transportation Co.*, 124 N.W. 221 (Minn. 1910).

b. Owner may not resist: If the holder of the privilege of private necessity must pay for any actual damage she causes, one might wonder what the use of the privilege is in such cases. But there is one very significant use — where the privilege exists, the person whose property is being harmed has ***no right to use reasonable force*** to defeat the exercise of the privilege, and is liable for any damages he causes by using such force. See Rest. 2d, §263, Comment b. Thus in the *Vincent* case, if P had unmoored D's ship (as the dock owner in *Ploof* did), and the ship had been damaged as a result, D presumably would have had a counterclaim for this damage. And D probably would also have been justified in using reasonable force in turn to prevent P from such an unmooring.

IX. ARREST AND OTHER AUTHORITY OF LAW

A. Generally: Acts done under ***authority of law*** are, in general, privileged. For instance, a police officer who executes a valid arrest warrant, and uses proper procedure in doing so, of course has a defense against a

false imprisonment suit by the person he arrests. (This is so even if it later turns out that the arrested person committed no crime.)

1. **Difficulties:** However, if the police officer or other official fails to use proper procedures, or enforces a purported legal order which was itself issued without jurisdiction, or there is some other flaw in the proceedings, it can be very hard to determine whether the privilege of legal authority exists. We examine here in detail only the privilege of ***arrest,*** since it this privilege that is usually at issue in intentional tort cases.

B. Common law rules: There are a variety of common law rules which govern the privilege of arrest. These have been changed substantially by statute in most jurisdictions, but they nonetheless furnish a general overview of the privilege.

1. **Arrest with warrant:** Where a police officer executes an arrest ***with an arrest warrant,*** he will be privileged if the court has jurisdiction to issue the warrant, the warrant is "fair on its face" (i.e. is formally complete and consistent), and the officer uses proper procedures in making the arrest. Many modern cases hold that the arrest will be privileged even if the court did not have jurisdiction to issue the warrant (e.g., because it was issued without probable cause). P&K, p. 149.

   a. **Mistaken identity:** Even if the warrant is completely correct, the officer will be liable if he reasonably but mistakenly arrests X when the warrant means Y. P&K, p. 150. Furthermore, the officer is liable if he uses more force than is reasonably necessary to make the arrest (discussed below).

2. **Arrest without warrant:** The rules governing arrest without warrant are complex, and only a few of the general principles are set forth here:

   a. **Felony or breach of the peace in presence:** An ***officer*** may make a warrantless arrest for a felony or breach of the peace which is being committed or seems about to be committed ***in his presence.*** A ***citizen*** may do the same.

   b. **Past felony:** Once a felony has been committed, an ***officer*** may

still make a warrantless arrest, provided that he ***reasonably believes*** that the felony has been committed, and also ***reasonably believes*** that he has the right criminal. The arrest is privileged so long as he can show both of these reasonable beliefs, even if it turns out either that there was no crime or that he has arrested the wrong person.

i. **Citizen:** A ***citizen,*** on the other hand, has a narrower privilege in the case of a past felony. A citizen's arrest is valid only if a felony has ***in fact been committed.*** However, the citizen, like the officer, will not lose the privilege by arresting the wrong person, provided that she reasonably believed him to be the right one. P&K, p. 154.

c. **Past breach of peace:** If there has been a past breach of peace (i.e., a non-felony involving a threat of violence or disorder, such as a threat to make a criminal assault), neither an officer nor a citizen may make a warrantless arrest, unless the breach of peace was committed in his presence, and he is in "fresh pursuit." P&K, p. 154.

d. **Misdemeanor:** The common law rule with respect to ***misdemeanors*** not involving the breach of the peace was that neither officer nor citizen could arrest without a warrant. However, some states have allowed an officer to arrest for such a misdemeanor if it is committed in his presence.

3. **Reasonable force:** One making an arrest may not use more force than is reasonably necessary. What is "reasonable" force in various specific circumstances has been the subject of much dispute in the courts.

a. **Prevention:** Where the arrest is made to ***prevent a felony*** which threatens human life or safety, courts have universally held that even deadly force may be used, if there appears to be no other way to prevent the crime. Where the crime does not involve such danger, however, most courts have held that deadly force may ***not*** be used, since it would be out of proportion to the severity of the offense. P&K, p. 155.

b. **Apprehension of suspect after crime:** If a crime has ***already been***

committed, the right of the police to use deadly force to effect an arrest is now a ***constitutional*** issue, as the result of a 1985 Supreme Court decision. Deadly force may not be used "unless it is necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a ***significant threat of death or serious physical injury*** to the officer or others." *Tennessee v. Garner*, 471 U.S. 1 (1985). So an officer who uses deadly force to prevent escape of a non-dangerous felon may be liable to the felon for his injuries from the deadly force.

C. Privilege to use force in resisting arrest: Just as there may be a privilege to use force in making an arrest, so there may in a few situations be a privilege to use force in ***resisting*** an ***unlawful*** arrest. However, one may never use deadly force to resist arrest, even if unlawful. And in general, the privilege to resist unlawful arrest by force has been very much curtailed in recent years. P&K, pp. 156-57.

X. DISCIPLINE

A. Generally: A person who by virtue of her job or status is charged with maintaining ***discipline*** may sometimes be privileged to use force and restraint to ensure that discipline. This is most frequently the case for ***parents, teachers*** and ***military officials.***

1. Reasonable degree of force: Predictably, however, the rule is that the person doing the disciplining may not use more force than is reasonably necessary to maintain the discipline. To determine whether the degree of force is reasonable, the severity of the misconduct, the age, strength, sex, etc. of the person being disciplined, the motive of the discipliner, are all to be taken into account.

XI. JUSTIFICATION

A. Justification as a "catch-all" defense: Even if the defendant's conduct does not fit within one of the conventional defenses discussed above, he may be entitled to the general defense of ***"justification,"*** a "catch-all" used where there are good reasons for exculpating the defendant for what would otherwise be an intentional tort.

> **Example:** On the last day of the school year, P, 14 years old, is a passenger on a school bus owned by D1, and driven by D2. The 65 to 70 students aboard are in a boisterous and exuberant mood, and a number of them break windows and lights, and

cause other damage to the bus. D2, after failing to restore order, bypasses several scheduled stops and takes the children to a police station. P, who did not take part in any of the destruction, sues for false imprisonment.

Held, the Ds should have been allowed to introduce evidence of *justification.* D2, the driver, had a duty to "take reasonable measures for the safety and protection of . . . the passengers and the property," and his conduct may have constituted such reasonable measures. *Sindle v. New York City Transit Authority,* 307 N.E.2d 245 (N.Y. 1973).

Quiz Yourself on
DEFENSES TO INTENTIONAL TORTS (*Entire Chapter)*

14. Anne Boleyn enters the hospital to have her sinuses drained. While she is anesthetized, her doctor, Ryno Plasty, removes her eleventh finger (which doesn't function anyway), as well. Has Plasty committed a tort? _____

15. In an NHL playoff hockey game, Wayne Greatsky gets around the player defending him, Mario Lemeow, and scores. Lemeow, enraged at being scored upon, skates up behind Greatsky and hacks at him with his stick. Greatsky falls, strikes his head on the ice, and suffers a career-ending injury. Greatsky sues Leme-ouw for battery. Lemeow raises the affirmative defense of implied consent. Will this defense succeed?

16. Axel Cutioner tells Mary, Queen of Scots, that he is a magician, and offers her a solid gold ring if she lets him saw her in half. She consents, not realizing the gold ring is cheap plastic, and, in fact, still has Cracker Jack candy stuck to it. When she discovers the fraud, she sues him for battery. Does her consent constitute a valid defense? _____

17. Ron is a "responsible" rapist — he never rapes anyone without wearing a condom, and he does not carry a weapon. One night, he attempts to rape Lorena, telling her that he'll be gentle and won't hurt her as long as she doesn't resist. He in fact uses no overt force as he puts on a condom and prepares to assault her. Lorena decides (reasonably under the circumstances) that the least deadly way to prevent intercourse is to use a knife she has hidden in her purse; she does so, and castrates Ron. Ron sues Lorena for battery. She defends on grounds of self-defense. Who wins? _____

18. Fletcher Christian, deck hand on the ship HMS Bounty, plays a practical

joke on Captain Bligh. Bligh whips Christian, in violation of Navy regulations. Humiliated, Christian sets Bligh afloat on a raft. When Bligh gets back to civilization and sues Christian, Christian claims he acted in self-defense. Is his defense valid? _____

19. Aaron Burr is sitting in an aisle seat in the bleachers at a baseball game, minding his own business. Alexander Hamilton walks up to Burr, his arms laden with beer, nachos, and bratwurst. Hamilton sneers, "Get out of my way, you stupid butthead." People in nearby seats titter. Burr gets up and decks Hamilton, sending him sprawling backwards. Hamilton sues Burr for battery. Burr defends on self-defense grounds. What result? _____

20. Dorothy is out for a drive with her dog, Toto. A howling storm kicks up, and the visibility decreases to almost nothing. Dorothy is terrified, and says, "Toto, I don't think we're in Kansas anymore." She pulls off the road, into the driveway of the Wicked Witch of the West. She grabs Toto and runs into the garage. Wicked Witch sees Dorothy coming and reasonably believes she's trying to steal Witch's magic brooms, which she keeps in the garage. Witch runs out and beats her up. When Dorothy sues Wicked Witch for battery, will Wicked Witch have a valid "defense of property" privilege? _____

21. Portentia Lardo, circus fat lady, visits the U-Pik-M Meat Market. She browses for a while in the Beef Department. As she leaves, not having purchased anything, a store detective runs up behind her yelling, in front of other shoppers, "Stop! Thief! She has a side of beef under her coat!" She is, indeed, so large that she looks like she's hiding something. Portentia stops, mortified, and the detective catches up to her, saying, "Come with me." She follows him to the store office, where he asks her to take off her coat. She does so. When it's obvious she's only fat and not a thief, he says, "I'm sorry. You can go." Does Portentia have a valid claim against the store? _____

22. The Minnow, a tiny ship, sets sail from a tropical port for a three-hour tour. Shortly thereafter a fearsome storm kicks up, the tiny ship is tossed, and the crew seeks refuge at a private dock belonging to Snively. If Snively sues for trespass, will he win? _____

23. Shakespeare, a playwright, is walking down the street. As he passes a

doorway, he sees a woman, Lady Macbeth, standing there. She has a glazed look in her eyes, she's holding a cleaver dripping with blood, and her hands are covered with blood as well. Shakespeare slips surreptitiously into a phone booth, calls the police, and emerges, brandishing a gun. He tells Lady Macbeth that if she moves an inch he'll blow her head off. In fact, Lady Macbeth works at the Titus Andronicus Butcher Shop, and she didn't have a chance to wash her hands before she left work. However, when she tries to tell Shakespeare this, he thinks it's a pile of baloney, and doesn't let her go until the police arrive. She sues Shakespeare for false imprisonment. Can he defend on grounds of legal authority? _____

24. Surgeon believes that Patient is suffering from a non-cancerous growth in his esophagus. Patient agrees to have Surgeon perform surgery for the limited purpose of removing the polyp. After Patient is under a general anesthetic, Surgeon opens him up, and discovers that the polyp is in fact a malignancy that has spread to the stomach. Surgeon realizes that if the malignancy is not removed, Patient's life will be in danger. It would subject Patient to material (though not extreme) extra risk to sew him up, bring him out of anesthesia, get his consent to the extended operation, and then do the operation. Instead, Surgeon simply removes the cancerous growth from the stomach. Unbeknownst to Surgeon, Patient has always told friends and relatives, "If I ever get cancer, I don't want them to cut it out of me — I just want to be left alone to die." Patient recovers, and sues Surgeon for battery. Does Patient win?

_____

25. Drug Lord is in the business of selling crack. He has heard rumors in the neighborhood that a man nicknamed Scarecrow is a hit man for a rival drug gang, and that Scarecrow has been given a contract on Drug Lord's life. As Drug Lord is finishing a sale of crack one day, he sees Scarecrow come up to him and draw and aim his pistol at Drug Lord. As Scarecrow is about to say something, Drug Lord shoots him in the hand to disable him. Scarecrow turns out to be an undercover police officer, who wanted to arrest Drug Lord (an arrest which would have been legal in the circumstances). Has Drug Lord committed battery against Scarecrow? _____

26. Pilot is flying her two-engine private jet from New York to Boston.

Suddenly, one engine stops working, and Pilot is unable to restart it. Pilot knows that there is a good, but not 100%, chance that she will be able to continue on just the other engine until Boston. However, she decides that it would be more prudent to make an emergency landing sooner. There are no commercial airfields around, so she lands in a meadow owned by Farmer. There is no measurable economic harm done to the meadow. Farmer sues Pilot for trespass. May Farmer recover anything?

Answers

14. **Yes, he's committed a battery.** The focus here is on the role consent plays in battery. Consent is a valid defense to almost every tort, but only within the scope of the conduct the victim consented to, or conduct closely related to that consent. Here, Anne gave her consent to having her sinuses drained. Removing her extra finger would be well outside the scope of her consent, *and since no emergency situation existed to justify it*, Plasty will be liable for battery. (For the rule in an emergency, see Question 23.)

15. **Probably not.** Where people participate in an organized sport, each will be held to have impliedly consented to those harmful or offensive bodily contacts that are an ***ordinary part of the give-and-take of the game,*** even if the contact violates the rules of the game. But a player will generally *not* be held to have impliedly consented to actions by fellow competitors that are "unrelated to the normal method of playing the game," and that are done without any competitive purpose. Here, if Lemeow had, say, tripped Greatsky in an attempt to stop him from scoring, the court would probably hold that Greatsky impliedly consented to that conduct, even though it constituted a foul, because the contact was part of the ordinary give-and-take of professional hockey, and was done for competitive purposes. But when Lemeow struck Greatsky out of frustration, and not until the play was over, a court would likely hold that Lemeow's action was "unrelated to the normal method of playing the game," was not done with a competitive purpose, and was therefore not covered by the consent that Greatsky will be

found to have impliedly given by entering the league. Cf. *Hackbart v. Cincinnati Bengals, Inc.* (where one football player strikes another out of anger after the play was over, this was not a contact to which the person struck impliedly consented).

16. Yes. The rule on fraud as it relates to consent is that it only invalidates consent if it relates to an *essential* matter, not a collateral one (i.e., an unimportant one). The fraud here relates to a collateral matter, not an essential one; as such, the consent is valid.

RELATED ISSUE: Had Axel not, in fact, been a magician, the fraud would have related to an essential matter and the consent would have been invalid, and Axel would be liable for battery.

17. **Lorena.** One may not use deadly force (i.e., force intended or likely to cause death or serious bodily injury) unless one is in danger of death or serious bodily harm. Lorena's use of the knife here certainly qualifies as deadly force (even though she was only trying to injure, not kill, Ron). However, courts hold that the threat of rape alone — even if there is no overt threat of additional bodily injury — constitutes a threat of serious bodily injury. Rest. 2d §65(1)(b). Since Lorena did not use more force than the situation seemed to require, she qualifies for the privilege of self-defense.

18. No. The privilege of self-defense only allows one to use reasonable force to prevent threatened harmful/ offensive contact or confinement. When Christian set Bligh adrift there was no longer a threat of danger; it was retaliation, which is *not* a valid ground for self-defense.

19. Hamilton wins. Self-defense gives one the privilege to use reasonable force to prevent threatened harmful or offensive contact or confinement. The focus here is on whether insults alone can justify the use of force in self-defense, and the rule is that they can't. But don't interpret this too broadly! Insults (or other types of words) *can* help create a threat of imminent physical harm, especially when they're accompanied by threatening physical gestures. Say, for instance, that Hamilton hadn't had his hands full, but rather had waved a fist at Burr in a menacing way as he spoke to him. In *that* case, self-defense would probably be justified, because there's a threat of physical harm, and not just verbal provocation. Cf. Rest. 2d of Torts §69.

20. No. The focus here is on the how the defendant's *mistake* impacts his assertion of the "defense of property" privilege. The answer depends on what it is the defendant's mistaken about. Mistake *negates* the privilege if the mistake consists of a false (even if reasonable) belief that the intruder is not privileged to enter the land. That's the case here; Dorothy entered Witch's land out of necessity, and that's a privilege. Witch was mistaken about Dorothy's privilege to enter, and that mistake negates Witch's defense of property privilege. That means she'll be liable to Dorothy.

RELATED ISSUE: But a reasonable mistake as to *whether force is necessary* will leave the privilege *intact.* For instance, let's say Dorothy really was trying to steal the brooms, but she didn't have any weapons and force wouldn't have been necessary to subdue her. If Witch mistakenly believed force was necessary and it wasn't, and that mistake was reasonable, she'll be able to rely on "defense of property" as a defense.

21. Yes, because the detention wasn't reasonable; she was needlessly humiliated. Although stores have a right to temporarily detain those reasonably suspected of shoplifting, the privilege is limited. It cannot be lengthy (the few minutes here seem reasonable); it cannot exceed the scope of a brief investigation (e.g., the storekeeper cannot use the detention to attempt to coerce payment for the items); and it cannot involve public humiliation. Here Portentia was publicly humiliated by the detective, and so she may have an intentional infliction of emotional distress claim. She may also have a slander claim (since other shoppers heard the false accusation).

RELATED ISSUE: A common claim in instances like this is for false imprisonment. However, since Por-tentia was not held anywhere for an appreciable length of time, such a claim wouldn't exist here. But Por-tentia could sue for slander.

22. No. The crew has a private necessity defense, because it seemed necessary to invade Snively's dock to avoid death or serious harm, and the invasion they committed was substantially less serious than the injury they faced. NOTE: Private necessity is analogous to self-defense, but there the *plaintiff* is the source of the threat.

Note: The privilege of necessity means the landowner cannot take even what would otherwise be *lawful* action against the entrant. So if Snively turned the boat out to sea, and it was destroyed, Snively would be liable for conversion.

Note: The privilege only lasts until the danger has passed. Any excess = trespass.
RELATED ISSUE: Any loss caused to the landowner must be compensated; the private necessity privilege is *limited.*

23. No, because Lady Macbeth didn't commit the crime. When it comes to felonies, a private citizen has a privilege of legal authority only if a felony was in fact committed (with no room for a reasonable mistake), and he's got reasonable grounds to believe the person in question committed it. The problem here is that no felony was in fact committed. As a result, Shakespeare won't have a defense based on legal authority even though his mistake may have been "reasonable."

RELATED ISSUE: Say that Shakespeare had been a police officer, and not a private citizen. Then he would have a defense based on legal authority. That's because the privilege of legal authority for a police officer encompasses a reasonable mistake as to whether a felony was actually committed.

RELATED ISSUE: Say that a murder *had* actually taken place nearby, and the perpetrator had escaped. But let's say that Lady Macbeth is innocent; she really did get bloody at her butcher shop job. Whether or not Shakespeare was a police officer, he would have a good "legal authority" defense. That's because where a felony has in fact been committed, a private citizen won't lose the "legal authority" privilege by arresting the person he reasonably (but wrongly) believes committed the crime.

24. No. A patient will be deemed as a matter of law to have consented if all the following conditions are met: (1) the patient was unable to give consent (as where he was under anesthesia); (2) the action was necessary to save his life or safeguard his health; (3) the defendant did not know that the patient would refuse to consent if conscious; and (4) a reasonable person would have consented in the circumstances. Here, these conditions were all satisfied, so Patient is deemed to have

consented. The fact that in reality Patient was idiosyncratic — and would not have consented if given the choice — is irrelevant, since Surgeon had no way of knowing this. (But if Surgeon *knew* of this strong desire on the part of Patient not to have cancerous growths removed, and Surgeon went ahead anyway, this would be battery.)

25. **No.** In the circumstances, Drug Lord reasonably believed that Scarecrow was about to kill or seriously wound him. Therefore, Drug Lord had a privilege to use self-defense if it seemed under the circumstances that he could not obtain his safety in any other way (e.g., by retreating). On the facts as known to Drug Lord, retreat would not have reasonably seemed to be a successful strategy. The fact that Scarecrow was actually a police officer who did not intend serious bodily harm is irrelevant — what matters is the reasonableness and genuineness of Drug Lord's belief that he was in imminent peril. Therefore, Drug Lord has a privilege of self-defense. See Rest. 2d, §65.

26. No. Under the doctrine of ***"private necessity,"*** a person has a privilege to enter another's property if this is necessary to protect herself (or another) from serious harm. This privilege constitutes a complete defense to Farmer's trespass action. See Rest. 2d, §197, Illustr. 3.

***Exam Tips** on*
DEFENSES TO INTENTIONAL TORTS

Once you spot what appears to be an intentional tort, always check for defenses. The main ones to check for are: (1) ***consent;*** (2) ***self-defense;*** (3) defense of ***others;*** (4) defense of ***property;*** (5) recapture of ***chattels;*** (6) ***re-entry*** on land; (7) ***necessity;*** (8) ***arrest.*** Here's what to look for as to each:

☛ Whenever your fact pattern involves an intentional tort, be alert to the possibility that P ***consented*** (since consent is a defense to all intentional torts).

☞ Here are some typical contexts where there is or may be consent:

□ P and D engage in a contact sport, and D then makes a harmful

contact with P. As long as the contact was within the rules of the sport, P will be found to have impliedly consented to it. (And even if D *did* violate a rule of the sport, if the contact was part of the ***"ordinary give-and-take"*** of the sport, and was done for competitive purposes, P will still probably be found to have impliedly consented to the conduct.)

□ P is injured by a mechanical security device (e.g., a spring gun or an electric-shock guard device) — if there's a ***warning*** sign, which P actually saw, he may be deemed to have consented.

□ P is a suspected shoplifter, who is told to "wait here" by the storekeeper's detective — the circumstances may indicate that P waited voluntarily, in which case there was no true confinement.

□ P's claim is for conversion, but D reasonably believed that P was letting D have the goods. *(Example:* P has moved out of an apartment shared with D, and D reasonably thinks that P has abandoned his property, so D sells it.)

☞ Remember that the existence of consent is determined by ***"objective,"*** not "subjective," analysis. That is, the question is always what a reasonable person in ***D's position*** would have ***thought*** that P meant, not what P really meant. Thus consent can be "implied" from P's conduct or from the surrounding circumstances. *(Example:* P and D have each consented to the other's practical jokes on past occasions, including frightening "assaults." This may mean that P can't sue for assault when D frightens him with a fake tarantula.)

☞ But in any consent situation, and especially where the consent is "implied" rather than express, be sure that the ***scope*** of consent hasn't been ***exceeded.*** *(Example:* Even if P and D have sparred before, giving rise to implied consent for a "fight" on the present occasion, this is not consent to D's use of brass knuckles that he has never used before.)

☞ ***Fraud*** and ***mistake*** are very frequently tested in the consent context.

☞ D's ***fraud*** will vitiate P's consent, if the fraud goes to the ***essence*** (usually, the nature of the contact), but ***not*** if the fraud

merely goes to some ***"collateral"*** aspect. *(Example:* If D tells P an electric cattle prod to be used in an experiment won't hurt P when D knows that it will, this fraud goes to the essence of the contact, and thus vitiates P's consent; P can sue for battery. But D's knowingly false statement to P that P will be paid for undergoing the experiment is "collateral," and therefore doesn't vitiate P's consent; therefore, P can't sue for battery.)

- ***P's "mistaken consent,"*** i.e., his mistake about the nature of the event that will take place, usually does ***not*** vitiate consent (as long as D wasn't aware of P's mistake). This is true even if P would never have consented had he known the true facts. *(Example:* P consents to have surgery performed on him under anesthetic by D. P is not aware that D has been sued several times for malpractice. D does not realize that P would never consent if he knew these facts. P's consent is valid.)

- ***D's mistake*** about whether P has in fact consented depends on the reasonableness of D's belief — D is protected for his reasonable belief (since the test is always the "objective" standard of what one in D's position should reasonably think), but is not protected from his unreasonable mistakes. *(Example:* While in P's store, D reads a sign that says, "Take one" — if an ordinary person would realize that the sign refers to brochures, not the merchandise underneath the sign, D will be liable for conversion for taking the merchandise even though D honestly believed that P was consenting.)

- If your facts suggest that X is threatened with a battery or false imprisonment, and X ***responds*** with ***force,*** consider whether X can assert ***"self-defense"*** as a defense against liability for battery or assault.

  - Look out for the possibility of self-defense whenever *two* parties fight. Even if it is not clear who started it, you should consider each fighter's chances of claiming self-defense.

  - Do your best to identify the *first* to commit battery or assault. Being the first has two consequences: (1) the other can now use self-defense; and (2) the initial aggressor ***cannot*** respond to the other's self-defense with self-defense of his own. *(Example: A* insults B; *B*

swings at *A* and misses; *A* hits *B; B* hits A. Analysis: A's insults aren't enough to trigger B's right to swing; B's swing was therefore tortious; *A* probably then had the right of self-defense; *B* probably didn't have the right of self-defense in return, because his act was in response to A's valid right of self-defense.)

- ☞ But remember that even the "initial aggressor" can use self-defense in response to an inappropriate ***escalation*** of the level of force. *(Example:* A swings at B without cause; B pulls out a gun; now, A can probably use his own gun in self-defense, because B has gone beyond the scope of reasonable self-defense by answering non-deadly force with deadly force.)
- ☞ ***Verbal provocations*** (e.g., ***insults)*** won't by themselves justify self-defense. (See the next-prior example, in which *A* insults *B*, and *B* is not thereby justified in swinging at *A).*

☞ D can use self-defense even if based on a *mistake*, if D's belief in the need for self-defense was ***reasonable.*** *(Example:* P puts his finger in his pocket and points it at D; if D's belief that P has a gun is reasonable, D can use self-defense even though he is wrong.)

☞ After you determine that D had the right to use self-defense, always examine the ***level of force.*** This is probably the most commonly-tested area of self-defense. Here's a recap of the general rules:

- ☞ D can't use non-deadly force that's more than is reasonably needed in the circumstances;
- ☞ D can't use deadly force to oppose non-deadly force;
- ☞ Even against deadly force, some jurisdictions say D must ***retreat*** instead of using deadly force if he knows he can do so safely (but some of these jurisdictions make an exception where the encounter takes place in D's dwelling, in that they allow D to "stand his ground").
- ☞ Many questions require you to determine whether the force used is ***deadly*** or not. The test is: was the force likely to cause ***death*** or ***serious bodily injury?*** This can vary with the circumstances. *(Example:* A's fists could be deadly force if A was very skilled or strong, or if his adversary was unskilled,

weak or temporarily incapacitated.)

- It's easy to spot a ***"defense of others"*** (D/O) issue — one person will be coming to the aid of the other, to repel some sort of attack.
  - Almost all of the issues discussed above in self-defense can be present in D/O, and the substantive rules are the same. Especially likely: an issue about level of force.
  - One special D/O issue: Can you come to the defense of a ***complete stranger?*** Most courts now say ***"yes."*** If so, the rules are the same as for defending your relatives or yourself.
  - Biggest issue specific to D/O: D comes on the scene ***after the fight has already started,*** and doesn't realize that X (who D helps out) was really the initial ***aggressor.*** Older cases say D ***"steps into the shoes"*** of X, which means that since X as the aggressor wouldn't have had the right to use self-defense, D can't either (even where D's mistake is ***"reasonable").*** But modern courts, and the Restatement, usually let D off the hook for a reasonable mistake here.
- Whenever X is attempting to ***evict*** someone from his property, consider whether the defense of ***"defense of realty"*** applies. Whenever X is attempting to keep possession of his personal property, think about the defense of ***"defense of chattels."*** The same rules apply (and the same test issues pop up) as to both. Here, we use the phrase "defense of property" (D/P) to cover both.
  - Remember that D normally cannot use ***deadly force*** to protect his realty or his chattels. (However, some states allow deadly force to be used to prevent the breaking and entering of a dwelling if there is no other way to stop the entry.)
  - Frequently-tested: D uses a ***trap*** or other ***mechanical device*** to injure or frighten intruders. Sub-issues:
    - Remember that the case is analyzed as if D had been ***present*** and was using the force in person. So if D couldn't use that particular level of force in person against ***that particular intruder,*** he can't do it by mechanical device either.

(Example: D puts a spring gun in his unoccupied farm house. When P, seeking to steal whatever's inside, breaks in, the gun shoots him. If under state law D would not have been privileged to use deadly force in person to protect a non-dwelling (which this is, because it's unoccupied), D's use of the spring gun is not allowed either. Cite to *Katko v. Briney* for this type of fact pattern.)

- ☞ Most courts say that D must post a ***warning*** unless the danger is obvious (e.g., barbed wire).
- ☞ Often, the fact pattern will involve ***unexpectedly severe*** injury to P (the intruder). General rule: if D ***reasonably believed*** that the injuries would be non-existent or not severe, D gets the defense. *(Example:* D rigs a device to give a mild shock to anyone who touches his car; P gets shocked, then has an unexpected heart attack. D wins, since the "take the victim as you find him" rule doesn't apply in determining whether D stayed within the D/P privilege in the first place.)

☞ Other special D/P issue: D is "defending" his land against P's "intrusion," but in reality P is ***privileged*** to be on the land. In this scenario, D has no privilege to evict P, and is liable for battery if he tries.

- ☞ Usually this scenario occurs when P goes onto D's property to ***reclaim a chattel*** that he reasonably believes D has taken from him. (See "reclaiming of chattel" privilege discussed below.) This scenario can also occur when P is on D's land under the privilege of ***necessity*** (e.g., the crash-landing of P's plane or boat).

☛ The privilege to ***recapture chattels*** (or "recapture property" or "reclaim property") can pop up in several different contexts.

☞ The two most likely scenarios in which you should be on the lookout for this privilege are:

- ☞ D's property is wrongfully taken from him in some sort of street crime (e.g., a mugging), and D either tries to get it back immediately from the criminal's person, or later goes onto the

land of the criminal (or the land of some third person who's now in possession of the item) to get it back.

- ☞ D is a merchant who detains a suspected shoplifter.

- ☞ ***Mistake*** is sometimes tested — if D is mistaken about whether P wrongfully took the property (or about whether P is in possession of the item), D loses the privilege even if his mistake was "reasonable." (But this isn't true for the merchant's privilege to detain a suspected shoplifter — see below.)

- ☞ Remember that D must act ***"promptly"*** to recapture the item. Essentially, this means that D must be acting in ***"fresh pursuit,"*** so even a wait of an hour is probably fatal to the privilege.

- ☞ Most-often tested: the ***merchant's*** privilege to ***detain a shoplifting suspect*** while investigating. (You can refer to this as the ***"shopkeeper's privilege.")*** This is analytically distinct, but related, to the privilege to recapture chattels. Most common sub-issues in the merchant case:
  - □ Did D (the merchant) have ***reasonable grounds*** for suspecting P? (It's not required that P actually have committed the shoplifting, so here a "reasonable mistake" by D is protected — but D's suspicion must at least be "reasonable.")
  - □ Did D take ***too long*** to complete the investigation? (10 minutes or so is usually the maximum allowed.)
  - □ Did D stop P outside the ***store's property*** (e.g., as P got into his car located on the street)? Courts are split about whether the privilege extends beyond the store's own property line.
  - □ Was the detention done in a ***reasonable manner?*** If P was roughed up, handcuffed, or coerced to confess, the privilege is lost.

- ☛ Be alert for the defense of ***"necessity"*** whenever D intentionally does something to ***protect himself*** or others in an ***emergency,*** and this affects the rights (usually the land rights) of P, an innocent person.

  - ☞ When you write your answer, always say whether the applicable doctrine is ***"public"*** necessity or ***"private"*** necessity. "Public" necessity applies only where there's a serious danger to many

people; "private" applies where the danger is to D and/or a few others. (The distinction is mainly important on the issue of whether D must pay for the damage caused, as discussed below.)

- ☞ The two most common contexts for "necessity":
  - □ D, who can be either a public official or private citizen, tries to stop the spread of a ***fire*** by destroying P's house, moving things out of P's building, putting barriers on P's property, etc. Prevention of fire is generally "public" necessity.
  - □ D is a ***pilot*** who makes an "intentional" but emergency landing on P's property. This is usually "private" necessity, at least where the plane is a small private one.
- ☞ Most common issue: Must D ***pay for the harm?*** If the necessity is "private," the answer is "yes." (Therefore, private necessity is usually useless unless the landowner physically resists the privilege, or is seeking nominal damages for trespass.) But if the privilege is "public," the answer is "no."
  - ☞ In the private necessity situation, often the question is whether D is liable for ***nominal damages*** where no actual harm has occurred. Answer: D is not liable. *(Example:* D crash lands on P's open field, but does no significant damage. D pays nothing.)
- ☞ Most common scenario: *A* comes onto B's land under the privilege/defense of necessity, but *B* ***resists,*** injuring A. Here, ***A*** can recover against ***B.*** *(Example: A* is a pilot who makes an emergency landing on *B*'s property, and is injured. *B* evicts *A*, aggravating *A*'s injuries. *B* is liable to *A* for the aggravation of the injuries, in addition to being unable to recover nominal trespass damages from *A.* But *B* could recover for actual damage to his property that occurred before *B* resisted, assuming that A's necessity was "private.")

☛ The privileges of ***"arrest"*** and ***"prevention of crime"*** will often be found together.

- ☞ A common scenario for prevention-of-crime: D intervenes to ***break up a fight.*** Typically, D injures one of the fighters, who turns out to

have been a "non-aggressor" who then sues D for battery. Here, D has the privilege, so long as D's belief and level of force were reasonable.

- ☞ Common scenario for arrest: D is a private individual who makes or tries to make a ***"citizen's arrest"*** for a felony he sees committed, or believes has just been committed. Generally, D has the privilege to make this citizen's arrest as long as the force he uses is reasonable, even if D makes a reasonable mistake about who did it. (But D loses the privilege if there was no felony committed at all.)
- ☞ Use of ***"deadly force"*** is often tested.
  - ☞ Most common sub-issue: May either a police officer or citizen use deadly force to stop a ***fleeing suspect?*** Answer: neither may use deadly force unless the suspect poses a threat of ***death*** or ***serious physical injury*** to others. *(Example:* Neither a homeowner nor the police may shoot a fleeing burglar in the back, unless there is evidence of the burglar's serious dangerousness. Such "serious dangerousness" might be evidenced by the fact that the burglar is armed.)

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1. Because the short one-year statute of limitations for assault and battery had already passed, P did not sue on an assault or battery charge; instead, he based his claim on Clark's reckless disregard of the risk that his action would seriously injure P, a separate negligence-like tort that was not time-barred.

CHAPTER 5
NEGLIGENCE GENERALLY

ChapterScope

Tort law recognizes a broadly-defined "omnibus" tort called "negligence." The essence of this tort is that the defendant has imposed an "unreasonable" risk of harm on the plaintiff, and the plaintiff has been injured as a result. Here are the most important concepts covered in this Chapter:

- **Negligence generally:** The tort of "negligence" occurs when D's conduct imposes an ***unreasonable risk*** upon another, resulting in an injury to that other. D's mental state is irrelevant.
  - **Balancing:** In determining whether the risk of harm from D's conduct was so great as to be "unreasonable," courts use a ***balancing test:*** if the risk of harm to another from D's conduct is greater than the "utility" of that conduct, the risk is deemed "unreasonable."
- **The reasonable person:** The reasonableness of D's conduct is viewed under an objective standard: Would a ***"reasonable person*** of ordinary prudence," in D's position, do as D did?
- **"Negligence *per se"* doctrine:** Most courts apply the ***"negligence per se"*** doctrine: when a ***safety statute*** has a sufficiently close application to the facts of the case at hand, an unexcused violation of that statute by D is "negligence *per se"*, and thus conclusively establishes that D was negligent. (But the negligence *per se* doctrine will apply only where P shows that the statute was intended to guard against ***the very kind*** of injury in question.)
- ***Res ipsa loquitur:*** The doctrine of ***res ipsa loquitur*** ("the thing speaks for itself) allows P to point to the fact of the accident, and to create an inference that, even without a precise showing of how D behaved, D was probably negligent.
  - **Requirements:** P must meet four main requirements to use the doctrine: (1) There must be ***no direct evidence*** as to D's precise conduct; (2) P must show that the harm is of a type that ***does not normally occur*** except through the negligence of someone; (3) P must show that the instrumentality which caused the harm was at

all times within D's ***exclusive control;*** and (4) P must show that the injury was not due to P's ***own*** negligence.

I. INTRODUCTION

A. Distinguished from intentional torts: In the previous chapters, we have examined a number of distinct, narrowly defined "intentional" torts. We now turn to a much more broadly defined tort, that of "negligence". While a cause of action for negligence has a number of components, which will be listed and discussed below, the tort differs from intentional torts in one particular way: whereas the intentional tortfeasor generally desires to create a certain objectionable result (e.g. a harmful contact with the defendant's person), or at least knows with substantial certainty that such a result will occur, the negligent tortfeasor has no such desire, and may have in fact desperately wished to avoid the harmful result which occurred. To phrase it another way, the intentional tortfeasor's mental state is of the utmost importance, but the negligent tortfeasor's mental state is irrelevant — the essence of his tort is that his ***conduct*** (without regard to his mind) imposed an ***unreasonable risk*** upon others.

II. COMPONENTS OF CAUSE OF ACTION

A. "Negligence" has two meanings: "Negligence," used in its everyday nonlegal sense, refers to carelessness. And, as we shall see, a failure to appreciate the risks of one's own conduct is one of the components of the tort of negligence. But in addition, there are a number of other elements that together with carelessness make up a ***prima facie case*** for the tort of negligence. The five components of a prima facie case for negligence are as follows:

□ ***Duty;***

□ ***Failure to conform*** to duty;

□ Causation in fact;

□ Proximate cause;

□ ***Actual damage.***

We consider each of these in turn below.

1. **Duty:** Plaintiff must show that defendant owed plaintiff a ***legal duty*** to conduct himself according to certain standards, so as to avoid unreasonable risks to others;

2. **Failure to conform:** Plaintiff must show a ***failure by the defendant*** to ***conform his conduct to this standard.*** This is the aspect of the cause of action that can by itself be thought of as "carelessness" or "lack of reasonable care."

   a. **Significance of duty:** Most negligence cases focus on this aspect, since generally the scope of the defendant's duty is the same: to act with the care that a "reasonable person" would exercise. However, there are kinds of cases in which the defendant owes the plaintiff no duty at all, or only a very limited duty; thus a landowner generally owes a trespasser of whom he is not aware no duty of care at all. In such a circumstance, even if the plaintiff trespasser shows that the defendant was "negligent" in the sense of being careless, she will not establish a cause of action for negligence, since it will be held that the defendant was not under any duty ***not*** to be careless.

3. **Cause in fact:** Plaintiff must show that defendant's failure to act with reasonable care was the ***"cause in fact"*** of the injury to plaintiff. Generally, "cause in fact" means a ***"but for"*** cause, i.e., a cause without which the injury wouldn't have occurred.

4. **Proximate cause:** The plaintiff must also show that there is a sufficiently close connection, or ***causal link,*** between the defendant's act of negligence and the harm suffered by the plaintiff, to justify holding the defendant liable as a matter of policy. This aspect of the cause of action is generally called ***"proximate cause"*** or ***"legal cause."***

5. **Actual damage:** Finally, the plaintiff must also show that she suffered ***actual*** damage. Thus the tort of negligence is different from most of the intentional torts discussed previously (which allow a plaintiff who suffered no actual injury to generally recover purely ***nominal damages).***

III. UNREASONABLE RISK

A. **Imposition of risk:** To demonstrate that the defendant's conduct failed to meet the duty of care imposed on him (i.e. to show the second of the components listed above), the plaintiff must show that the defendant's conduct imposed an ***unreasonable risk of harm*** on the plaintiff (or on a class of persons of whom the plaintiff is a member). Rest. 2d, §282.

1. Not judged by results: To make this showing, the plaintiff cannot simply show that the defendant's conduct resulted in a terrible injury to her. Rather, she must show that the defendant's conduct, viewed ***as of the time it occurred,*** without the benefit of hindsight, imposed an unreasonable risk of harm. P&K, p. 170.

> **Example:** D, a water company, installs water mains in the street, leading to fire hydrants. Twenty-five years after D does so, a hydrant in front of P's house springs a leak caused by the expansion of freezing water, during a winter of unprecedented severity. As a result, P's house is flooded.
>
> *Held*, D's conduct was *not* negligent because the risk of such a heavy frost was so remote as not to be the kind of risk an ordinary prudent person would guard against in doing the work. *Blyth v. Birmingham Waterworks Co.*, 156 Eng. Rep. 1047 (1856).

a. Inherently dangerous objects: This "no hindsight" principle is also illustrated by cases in which ***potentially dangerous objects*** are left lying around. Some objects (e.g. a shotgun) are so dangerous that it is negligence to leave them lying around without special handling (e.g., unloading the shotgun.) But other objects pose less of a danger, and it will not be negligence to leave them around ***even if it turns out that, unexpectedly, they cause harm.*** The risk is to be evaluated as it reasonably appeared before the accident.

> **Example:** D1 leaves a golf club lying in the backyard of his house. D2, D1's 11-year-old son, swings the club in order to hit a stone, and in doing so strikes P in the jaw and chin. P sues both D1 and D2 on a negligence theory.
>
> *Held*, for D1. A golf club is not so "obviously and intrinsically dangerous" that by leaving it on the ground D1 committed negligence. But D2 was negligent in the way he swung the club. *Lubitz v. Wells*, 113 A.2d 147 (Conn. 1955).
>
> **Note:** In some situations, however, it may be negligence not to anticipate the negligence of others. (See *infra* p. 109.) Thus if D1 knew that his son had a history of injuring people, the leaving of the club might have been combined with D1's lack of supervision of D2 to result in D1's liability.

B. Balancing test: As the above examples indicate, in determining whether the risk of harm from the defendant's conduct was so great as to be

"unreasonable," the test is whether a "reasonable person" would have recognized the risk, and have striven to avoid it. (The attributes of such a "reasonable person" will be examined further below.) However, because it is often exceptionally difficult to tell what a reasonable person would have done in a particular situation, the courts have developed a "balancing test" as a rough guide as to whether the defendant's conduct is so risky as to involve an unreasonable threat of harm to others. The most famous formulation is that stated by Judge Learned Hand: Liability exists if:

$B < L \times P$

where B equals the burden which the defendant would have had to bear to avoid the risk, L equals the gravity of the potential injury, and P equals the probability that harm will occur from the defendant's conduct.

> **Example:** This test was formulated by Judge Hand in a case involving the following facts: P's barge, docked at a pier, broke away from its moorings due to D's negligence in shifting the lines that moored it. D, however, argued that P was also negligent in not having an employee on board the barge, and that, according to the rules of admiralty, the damage should be divided between D and P according to their respective degrees of negligence.
>
> *Held* (on appeal), it is burdensome, to a degree, to have an employee on board at all times. However, there was wartime activity going on in the harbor, and ships coming in and out all the time. Therefore, the risk that the mooring lines would come undone, and the danger to the barge and to other ships if they did, was sufficiently great that P should have borne the burden of supplying a watchman (unless he had some excuse for his absence) during working hours. *U.S. v. Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947).

1. **Threat of serious injury:** As the Learned Hand formula implies, the more serious the potential injury, the less probable its occurrence need be before the defendant will be held to be negligent for not guarding against it. Thus if a reasonable person would realize that a potential injury, if it came to pass, would be ***extremely grave,*** there may be liability even though it was relatively ***unlikely*** that the accident would occur. See Rest. 2d, §291.

   > **Example:** Suppose that D encounters a yellow traffic light while driving his heavy truck into Times Square. He has to decide whether to speed up to make the light, though in any event he intends to keep within the speed limit. D knows that the truck's brakes have been sporadically malfunctioning recently. Assume that D realizes (or should realize) that if the brakes fail at that moment, numerous people will likely be killed or maimed.

Even if D realizes that there is only, say, a 2% chance that the brakes will fail at that moment, the potential harm is so great, and the burden of stopping at the yellow light so small, that his conduct in speeding up is probably negligent despite the unlikeliness of a brake failure.

C. Calculation of burden: *"B"* in the above equation, the burden which the defendant would incur in order to avoid the risk, is itself a function of not only the cost to him, but also the broader ***social utility*** of the conduct which he would have to forego. Hence the courts attempt, in effect, to answer the question: "Would society be better off if all defendants in the position of D were permitted to act as D did, or were instead required to change their conduct so as to avoid the kind of risk which resulted in injury to P?" Only if the answer to this question is that defendants in D's position should be required to change their conduct will the cause of action for negligence lie (assuming that the other requirements are met).

Example: D Railroad maintains a railway turntable (a rotating platform with a track for turning a locomotive) near a publicly traveled path. P, a child, discovers that the turntable is unlocked, climbs on it, and while playing on it with a group of children gets his foot caught between the rails and severed at the ankle joint.

Held, it was negligent of D not to keep the turntable locked and guarded. The business of railroading is facilitated by the use of turntables, so the public good demands that their use not be entirely outlawed, since their utility is out of proportion to the occasional injuries which result. But the burden of keeping the turntable locked is so small that the danger of not doing so outweighs this burden. *Chicago, B. & Q. Railway Co. v. Krayenbuhl*, 91 N.W. 880 (Neb. 1902).

D.Restatement standard: The Second Restatement, §291, sets forth the balancing test this way: "Where an act is one which a reasonable [person] would recognize as involving a risk of harm to another, the risk is unreasonable and the act is negligent if the ***risk is of such magnitude*** as to ***outweigh*** what the law regards as the ***utility of the act*** or of the ***particular manner in which it is done."*** In more down-to-earth terms, the question is whether "the game is worth the candle." Rest. 2d, §291, Comment a.

E. Warnings: One of the ways the risks of conduct can be reduced — usually without reducing the social benefits of the conduct very much — is by giving ***warnings*** of danger. The fact that D gave a warning of dangers to P in particular, or to the public in general, is thus a factor that will tend to make it at least somewhat less likely that D will be found

negligent if the danger that was warned of results in an accident.

1. **Failure to warn can itself be negligent:** If D ***fails*** to give a warning of a danger that he knows about, and the warning could have been easily given, the mere failure to warn can itself ***constitute negligence.*** As the Third Restatement expresses the concept, "A defendant whose conduct creates a risk of physical harm can fail to exercise reasonable care by ***failing to warn*** of the danger if: (1) the defendant knows or has reason to know: (a) of that risk; and (b) that those encountering the risk will be unaware of it; and (2) a warning ***might be effective in reducing the risk*** of physical harm." Rest. 3d (Liab. for Phys. & Emot. Harm) §18(a).

2. **Does not immunize D:** However, it's clear that even if D *does* give a warning, ***this does not immunize D from negligence liability*** — if D's activity is unreasonably dangerous (evaluated by balancing its benefits against its risks) despite D's warning to P, D will still be liable. As the Third Restatement puts it, "Even if the defendant adequately warns of the risk that the defendant's conduct creates, the defendant can fail to exercise reasonable care by ***failing to adopt further precautions*** to protect against the danger if it is foreseeable that despite the warning some risk of physical harm will remain." Rest. 3d (Liab. for Phys. Harm) §18(b).

   Example: Dave, while moving out of his second-floor apartment, throws an old television out the window, aiming for a dumpster on the ground below the window. Just before he throws the TV, he yells out "Look out below." Paula, a pedestrian, does not hear the warning because she is talking on her cellphone. Dave can be found negligent despite having given the warning — it is so dangerous to throw a heavy object out of an upstairs window, and so easy to discard the object by safer means, that the giving of the warning did not make the total benefits of Dave's conduct outweigh its dangers. Cf. Rest. 3d (Liab. for Phys. Harm) §18, Illustr. 1, from which this example is drawn.

F. Activity level vs. care level: One of the peculiarities of our negligence system is that it usually focuses on the actor's level of ***care*** in ***carrying out*** the activity, but not on the social utility of the actor's decision to ***engage in that activity at all.*** Consequently, a defendant who engages in a fairly safe activity but does so negligently is likely to be liable for damages, whereas one who engages in a risky-and-not-socially-beneficial activity but does so carefully, will not — this is true even

though the net burden on others is greater in the latter situation.

> **Example:** Consider two drivers, *A* and *B*. *A* is a doctor on his way to perform an important operation at a hospital, and there is no other way for him to get there in time. If *A*'s attention wanders, and he strikes P (a pedestrian), *A* is liable — we weigh the "cost" to *A* of paying attention while he drives, and because this cost is small relative to the cost of the injuries to P multiplied by the likelihood of those injuries, we hold *A* liable. Now, consider *B: B* is a bored teenager who is not driving anywhere in particular, and is driving merely because it is a moderately pleasurable way to fill the time. *B* drives "carefully," in the sense that he pays close attention. Nonetheless, he strikes P, because his eyes are momentarily blinded by the sun. We would not find *B* negligent, even though there was virtually no social utility from *B*'s decision to drive in the first place — all we focus on is whether *B* drove carefully once *B* decided to drive at all. Yet it may well be that the total social utility of B's conduct — its benefits less its costs — was less than for *A*'s. Consequently, people in *B*'s position will drive "too much," because they are not required to "pay" for the accidents that their excess driving causes. See Epstein, p. 199; see also 9 J. Leg. Stud. 1 (1980).

1. **Compare with strict liability:** Observe that something quite different happens when the liability scheme is ***strict liability*** rather than negligence. Under strict liability, an actor who engages in, say, an "ultrahazardous" activity is responsible for ***all*** injuries that he proximately causes, even if these occur without negligence. Under a strict liability regime, D ***does*** have an incentive to weigh the social utility from engaging in the activity at all, not just an incentive to behave carefully once having decided to do the activity. In terms of the above example, if we impose strict liability on motorists, *B* would have an incentive not to take the meaningless-but-enjoyable ride. See Epstein, p. 199-200. See the further treatment of strict liability beginning *infra*, p. 329.

IV. THE REASONABLE PERSON

A. Objective standard: The balancing test described above, for weighing burden against risk, is a very abstract one, and neither a jury nor a potential defendant can be expected to use it to evaluate conduct in most instances. Therefore, the negligence issue is usually put to the jury as: "Would a ***'reasonable person' of ordinary prudence,*** in the position of the defendant, have conducted himself as the defendant did?" This is essentially an objective standard. That is, it does not ask whether the defendant intended to behave carefully or thought he was behaving carefully. However, this hypothetical "reasonable person" does, as we shall see below, bear some of the characteristics of the actual defendant,

at least to the extent of some of his physical attributes.

B. Physical and mental characteristics: As we have said, the test for negligence is whether the defendant behaved as a reasonable person would "under the circumstances" that confronted the defendant. "The circumstances" obviously include the external facts of the case, such as the traffic conditions, speed limits, etc., which confront a motorist. But an important question is to what extent "the circumstances" should be deemed to cover the ***physical or mental characteristics of the defendant.***

1. Physical disability: Most courts have extended "the circumstances" to include the ***physical characteristics of the defendant himself.*** That is, they have held that the test is whether a reasonable person with the physical attributes of the defendant would have behaved as the defendant did. Thus if the defendant has a ***physical disability,*** the standard for negligence is what a reasonable person with that physical disability would have done. See Rest. 2d, §283C; Rest. 3d (Liab. for Phys. & Emot. Harm) §11(a).

a. Sudden disability: A key factor will often be whether the disability has struck for the first time immediately preceding the accident. A defendant who reasonably believes himself to be in good health, and who suddenly suffers, for the first time ever, a ***heart attack*** or ***epileptic seizure*** while driving, would almost certainly not be held to have negligently caused the ensuing accident. But one who knows that he is subject to such attacks or seizures might well be negligent in driving at all. See Rest.2d, §283C, Comment c.

b. Blindness: Many disability cases have involved ***blindness.*** Typically, it is the plaintiff who is blind, who has been injured, and ***against whom*** the defense of ***comparative negligence*** is asserted. (This defense, discussed *infra*, p. 281, involves roughly the same definition of negligence as on the defendant side, except that this definition is applied to the plaintiff's conduct.) Other times, it is the defendant who is blind. Both for the blind-plaintiff and blind-defendant situation, the usual rule is that the blind person must conduct himself in a way that ***a reasonable person would act if he***

or she were blind. See Rest. 2d, §283C, Illustr. 1 and 2.

i. **What is required:** This general requirement of reasonableness means that sometimes, the blind person will have to take ***greater precautions*** than a reasonable sighted person, sometimes not.

(1) **Illustrations:** For instance, a blind plaintiff who attempts to cross a street without asking for assistance or carrying a cane might well be found negligent, and thus subject to comparative fault, even though a sighted person who crossed without assistance would not be. Conversely, it would not be negligence for a blind person to step into a depression on the sidewalk, whereas a sighted person who saw the depression would be negligent if he tried to walk through it rather than around it. See Rest. 2d, §283C, Illustr. 1 and 2.

c. **Strict liability rejected:** Observe that if the definition of negligence did not take into account the actor's physical disabilities, something akin to ***strict liability*** (see *infra*, p. 329) would be imposed for accidents stemming from such disabilities. For instance, if a driver were held liable for conduct which would otherwise be negligent (e.g., going through a stoplight or off the road), and no account were taken of the fact that he had just suffered an unforeseen heart attack or epileptic seizure, this would not be a true negligence standard at all, but rather, something like the absolute liability for defective products imposed upon manufacturers and sellers (see *infra*, p. 347). But courts do not in fact impose such a strict-liability standard for negligence.

2. **Mental attributes:** The ordinary reasonable person is generally **not,** however, deemed to have the particular ***mental*** characteristics of the defendant. For instance, the defendant is not absolved of negligence because he is more stupid, hot-tempered, careless or of poorer judgment than the ordinary reasonable person. P&K, pp. 176-77.

Example: D builds a hay rick (a device for drying hay) near the edge of his property. P is afraid that the stack will ignite, burning his nearby cottages. He repeatedly warns D, but D says he will "chance it." The hay spontaneously catches fire, and the resulting conflagration destroys P's cottages.

Held, D is not entitled to a jury instruction that he is not negligent if he acted in good faith and according to his best judgment, and that he should not be penalized for not being of the highest intelligence. Such a standard would be "as variable as the length of the foot of each individual," and would be impossible to administer. Instead, an objective standard, the prudence of an ordinary person, must be applied. *Vaughan v. Menlove*, 132 Eng. Rep. 490 (1837).

3. **Imbecility or insanity:** Courts are split about whether a mental state so low that it must be considered ***imbecilic*** or ***insane,*** and which prevents the actor from even understanding that danger exists, should be held to render negligence impossible. "Probably the prevailing orthodoxy is that ***neither insanity nor mental deficiency relieves the actor from liability,*** and that his conduct must ***conform to the general standard of care*** of a reasonable person under similar external circumstances." Dobbs & Hayden (5th), p. 128.

   a. **Restatement agrees:** The Third Restatement agrees with this "prevailing orthodoxy," and holds that mental deficiency, no matter how severe, may not relieve a person of negligence. See Rest. 3d (Liab. for Phys. & Emot. Harm) §11(c): "An ***actor's mental or emotional disability is not considered*** in determining whether conduct is negligent, unless the actor is a child."

Example: D, who suffers from Alzheimer's disease, attacks P, his caretaker at a nursing home. D defends on the ground that he should not be held to the usual standard of due care because of his extreme mental disability.

Held (on this point) for P. Several policy reasons support holding the mentally disabled to an ordinary standard of care. For example, such a policy "provides incentive to those responsible for people with disabilities and interested in their estates to prevent harm and 'restrain' those who are potentially dangerous." Also, the policy "forces persons with disabilities to pay for the damage they do if they 'are to live in the world'." National policy changes since the 1970s favoring the deinstitutionaliza-tion of the disabled — such as the Individuals with Disabilities Education Act and the Americans with Disabilities Act — reflect "a determination that people with disabilities should be treated in the same way as non-disabled persons."

(However, a person who agrees to care for a patient known to be combative because of Alzheimer's has ***assumed the risk*** of injuries from that care. Therefore, P may not recover despite the general rule that the mentally disabled will be held to the usual adult standard of care. *Creasy v. Rusk*, 730 N.E.2d 659 (Ind. 2000).)

   i. **Child's mental deficiency:** However, most courts and the Restatements hold that a ***child's*** mental deficiency ***may*** be

taken into account. Rest. 2d, §283A; Rest. 3d §11(c).

ii. **Same rule for contributory negligence:** Whatever the jurisdiction's rule as to whether the mentally disabled are to be held to the usual standard of care, that rule generally also applies to disabled *plaintiffs* against whom ***contributory negligence*** is asserted. See, e.g., Rest. 3d (Liab. for Phys. & Emot. Harm), Comment e to §11 (stating that that section's "rule ... that an actor's mental disabilities shall be disregarded applies in the context of the actor's contributory negligence as well as the context of the actor's negligence.")

4. **Intoxication:** A defendant who is intoxicated at the time of an accident is ***not*** permitted to claim that his intoxication stripped him of his ability to comprehend and avoid the danger; he is held to the standard of conduct of a ***reasonable sober person.*** P&K, p. 178. See also, Rest.2d, §283C, Comment d.

5. **Children:** Another exception to the general objective "reasonable person" standard is that ***children*** are not held to the level of care which would be exercised by a reasonable adult. A child must merely conform to the conduct of a "reasonably careful person of the same ***age, intelligence,*** and ***experience."*** Rest. 3d (Liab. for Phys. & Emot. Harm) §10(a).

   a. **Subjective:** Note that this is a somewhat subjective standard, in that if a child is less intelligent that most children of his age, he is held simply to the degree of care which a similarly unintelligent contemporary would exercise. This should be distinguished from the standard for adults, which makes no allowance for the fact that the individual is less intelligent than the average person.

   b. **Fixed chronological test discarded:** Many older cases applied an irrebuttable presumption that a child under the age of seven could not be negligent, a rebuttable presumption that one between seven and fourteen was not negligent, and a rebuttable one that a child between fourteen and twenty-one was capable of negligence. However, the arbitrary divisions stem more from the Bible than from any sound judicial reasoning, and they are no longer used by most modern courts.

c. Definition of "child": At least under the Third Restatement, the special "person of the same age, intelligence and experience" rule applies to ***all minors,*** not merely to young children. On the other hand, the Restatement's "minor" rule means that in a state where 18-year-olds are deemed to have reached the age of majority, an 18 yearold will ***not*** get the benefit of the special rule. See Rest. 3d (Liab. for Phys. & Emot. Harm) §10, Comment a.

i. Very young child: At the other end of the spectrum, ***very young children*** are still deemed to be ***incapable of negligence*** under the modern/Restatement approach. As noted, the traditional "rule of sevens" (making children under seven incapable of negligence) rarely applies today. But even under modern cases, children under the age of ***five*** are usually deemed incapable of negligence. See, e.g., Rest. 3d (Liab. for Phys. & Emot. Harm) §10(b) ("A child less than five years of age is incapable of negligence.").

d. Adult activity: Another exception to the special rules for children is that where a child engages in a ***potentially dangerous activity that is normally pursued only by adults,*** he will be held to the standard of care that a reasonable adult doing that activity would exercise. See Rest. 3d (Liab. for Phys. & Emot. Harm) §10(c). This principle has been applied to ***driving a car, operating a motorboat,*** and even to ***playing golf.*** See P&K, pp. 181-82.

i. Dangerous but not adult: Suppose the activity is potentially dangerous, but ***not*** one that is usually engaged in by adults rather than children. The courts are split as to the standard of care which should be applied in this situation. The Third Restatement would apply the child rather than adult standard of care, since the adult standard will be applied to children only if the activity is ***"characteristically undertaken by adults."*** Rest. 3d (Liab. for Phys. & Emot. Harm) §10(c). For a case following the Restatement approach, see *Purtle v. Shelton,* 474 S.W.2d 123 (Ark. 1972) (deer-hunting will not trigger adult standard, since activity is often pursued by minors).

C. Knowledge: Assuming that the general "reasonable person" standard is the one which applies to a case at hand, there a number of basic issues about how a reasonable person generally behaves. One of these troublesome areas has to do with ***knowledge*** that a reasonable person would possess.

1. **Ordinary experience:** There are obviously many things which every adult has learned; these include such things as that objects will fall when dropped, that flammable materials can catch fire, that other human beings are likely to react in certain ways such as by attempting to rescue a person in danger, etc. These items of knowledge that virtually every adult in the community possesses will be imputed to the "reasonable adult" and thus to the defendant. This is true whether the defendant herself actually knows the fact in question or not. P&K, pp. 182-84. See also, Rest. 2d, §290.

2. **Stranger to community:** Furthermore, facts generally known to all adults in a particular community will be imputed to a ***stranger*** who enters the community without having had the experience of knowledge in question. Thus a city dweller who visits a farm, and who has never learned that a bull can be dangerous, will nonetheless be held to the standard of behavior that would be exercised by one who did have such knowledge, since that knowledge is common to dwellers in rural areas. P&K, p. 184

3. **Duty to investigate:** Even where a certain fact is not known to members of the community at large, or to the defendant herself, she may be under a duty to end her ignorance. A driver who senses that something is wrong with his steering wheel, for instance, would have a duty to find out what the problem is before an accident is caused. P&K, p. 185.

   Example: As D's car is passing P's car, D has a blowout, causing a collision. There is evidence at trial that D's tires were badly worn.

   Held, D was under a duty to know of the condition of the tires (whether he in fact knew or not), and was also under a duty to know that worn tires are dangerous. *Delair v. McAdoo*, 188 A. 181 (Penn. 1936). See also, Rest. 2d, §290, Illustr. 2.

4. **Memory:** Just as the reasonable person knows certain facts, she also has a certain level of memory. Thus, a motorist who has passed a

particular intersection many times will be charged with remembering that it is dangerous in a certain way, whereas one who never or seldom had passed that intersection before would not have the same burden. See Rest. 2d, §289, Illustr. 4.

5. **Distractions:** Similarly, the reasonable person pays attention to what she is doing, and is not ***distracted,*** unless there is a ***legitimate reason*** for such distraction. Thus, a driver who turns to look at his passenger and slams into another car would be held to have failed to behave like a reasonably prudent person. See Rest. 2d, §289, Comment k.

6. **Some frailties remain:** The "reasonable person" is not, however, completely without imperfections. Her care for her own safety and that of others is merely reasonable, not ***flawless.*** For instance, the reasonable person may occasionally become slightly distracted, or may panic slightly in the face of a serious emergency.

D. Custom: In litigating the defendant's negligence, one thing that either side may point to is ***custom,*** that is, the way a certain activity is habitually carried out in a trade or a community. The plaintiff may try to show that the defendant did not follow the safety-motivated custom that others in the same business follow, or the defendant may try to show that he exercised due care by using the same procedures as everyone else in the trade.

1. **Not conclusive:** The vast majority of courts allow evidence as to custom for the purpose of showing the presence or absence of reasonable care, but do not treat this evidence as ***conclusive.*** Thus, the fact that everyone else in the defendant's industry does a certain thing the same way the defendant did it does not mean that that way was not unduly dangerous, if there are other factors so indicating.

> **Example:** Two tugboats owned by D are towing cargo owned by P. Most tugboats have not yet installed radio receiving sets, although some have; D's two tugs do not yet have these sets. They are therefore unable to receive messages that a strong storm is overtaking them, and are sunk.
>
> *Held*, the fact that most tugs have not installed sets does not conclusively establish that D was non-negligent in not having installed them. For custom is not dispositive on the issue of negligence — "a whole calling may have unduly lagged in the adoption of new and available devices. . . . Courts must in the end say what is required; there are precautions so imperative that even their universal disregard will not excuse their omission." Here some tug owners had already installed the sets, so

D's case is even weaker, and was liable. *The T.J. Hooper,* 60 F.2d 737 (2d Cir. 1932), *infra,* pp. 113, 377.

Caveat: Even though custom is not conclusive on the issue of negligence, it is nonetheless evidence on this question, and if there is no evidence in rebuttal, the fact that the defendant did or did not follow custom may be sufficient for him to prevail.

2. **Advances in technology:** The technological ***"state of the art"*** at a particular moment is, similarly, relevant to what constitutes negligence. For instance, the defendant's failure to take action to prevent a certain known risk might be either negligent or non-negligent, depending upon whether technology exists that could reduce that risk. Consequently, conduct that would be non-negligent in earlier times may have become negligent today due to technological advances.

Example: In the 1920s, little technology was available to keep cars from running off roadways. Therefore, it might not have been negligent for a municipality that built a road to fail to install guardrails strong enough to keep a car from leaving the roadway or crossing over into the other lane. But today, guardrail technology has probably advanced sufficiently that installation of a 1920s'-style guardrail (or none at all) would be negligent.

E. Emergency: As we have seen, the general rule is that the defendant must follow the standard of care that a reasonable person would exercise "considering all of the circumstances." One of the circumstances of a particular case may be that the defendant was confronted with an ***emergency,*** and was forced to act with little time for reflection. If this is so, the defendant will not be held to the same standard of care as one who has ample time for thinking about what to do; instead he must merely behave as would a reasonable person confronted with the same emergency. See Rest. 2d, §296.

Example: Cab Driver, who drives a cab for the D cab company, is suddenly accosted one day by a thug, who jumps into the cab, puts a gun to the cab driver's back, and tells him to step on it. Meanwhile, a number of pedestrians start shouting, "Stop, thief!" The thug tells Cab Driver that the latter will "suffer the loss of his brains" if he does not obey the thug's orders. Cab Driver then jams on the brakes, puts on the emergency brake, and, leaving the motor running, jumps out. The cab keeps on rolling, and injures P.

Held, Cab Driver did not behave negligently, and D is therefore ***not*** liable (as it would be under the doctrine of *respondeat superior, infra,* p. 314, if Cab Driver had been negligent). "If under normal circumstances an act is done which might be considered negligent, it does not follow as a corollary that a similar act is negligent if

performed by a person acting under an emergency, not of his own making, in which he suddenly is faced with a patent danger with a moment left to adopt a means of extrication." *Cordas v. Peerless Transportation Co.*, 27 N.Y.S.2d 198 (N.Y. 1941).

1. **Emergency caused by defendant:** But if the emergency was ***caused by the defendant's negligence,*** the fact that the emergency leads the defendant into an accident will not absolve him of liability. In such a situation, it is the initial negligence leading to the emergency, ***not*** the subsequent response to the emergency, that makes the defendant negligent.
2. **Negligence still possible:** Even if the emergency is not of the defendant's own making, he must still live up to the standard of care of a reasonable person confronted with such an emergency. That is, if he behaves unreasonably, even conceding the fact that he had little time for reflection, he will nonetheless be negligent. Thus a person driving on an undivided highway who sees an accident ahead of him, and who swerves left into oncoming traffic instead of right onto a shoulder, might well be held liable notwithstanding the fact that he had little time for reflection.
3. **Activity requiring special training:** There are certain activities which by their nature require an unusual capacity to react well in an emergency. In a case involving such an activity, the defendant will therefore be held to this higher standard of preparedness. A bus driver, for instance, should by her training be better prepared than the average driver to anticipate various traffic emergencies, and she will be held to this higher standard. See Rest. 2d, §296, Comment c. In fact, even the average motorist will probably be held to bear the burden of being capable of anticipating certain kinds of common emergencies (e.g., a child rushing out into the street after a ball), and will be charged with reacting more quickly in such a situation than if that kind of emergency arose less frequently. See P&K, p. 197.

F. Anticipating conduct of others: Just as the reasonable person must possess certain knowledge, so she must possess a certain ability to ***anticipate the conduct of others.*** Following are a few kinds of responses by third persons that a defendant may be charged with the burden of anticipating.

1. **Negligence of others:** The defendant may be required to anticipate the possibility of ***negligence*** on the part of others. Generally, this will be so only if the likelihood of injury is great, or the magnitude of the injury is very substantial. P&K, p. 197. See Rest. 2d, §290, Comment m.

   Example: An automobile driver is normally entitled to assume that other drivers will drive non-negligently. But if she has reason to know that the car ahead of her is being driven by a drunk driver, or if the road conditions are such that a short stop by the driver ahead is very likely to cause the defendant to run over a pedestrian, the defendant will be required to guard extra carefully against these consequences.

   a. **Children:** Furthermore, the defendant is charged with anticipating careless or dangerous conduct on the part of ***children,*** since they are commonly known to be incapable of exercising the degree of care of the average adult. Thus one who drives down a street crowded with children playing is not entitled to assume that the children will stay out of the car's path and must take extra precautions to guard against their carelessness. P&K, p. 200.

   b. **Parental supervision:** A ***parent*** has a duty to exercise reasonable care to ***supervise the conduct of his or her minor child,*** to prevent the child from intentionally harming others or posing an unreasonable risk of harm to others. Rest. 2d, §316.

      i. **Direct liability:** This principle does ***not*** make the parent ***"vicariously liable"*** (see *infra*, p. 313 for the meaning of vicarious liability) for the child's torts. Instead, it constitutes ***direct*** negligence by the parent not to use reasonable care in controlling the child, where the parent has the ability to control the child, and knows or should have known of the risk being posed by the child's conduct.

      Example: As Mom is aware, Kid, her 10-year-old son, is skateboarding on the sidewalk in front of their house, in a way that poses great danger to pedestrian passersby. Mom knows that she could control Kid to prevent him from skateboarding in this manner, but she unreasonably decides that the risks posed by Kid are small enough to make it not worth Mom's while to intervene. Kid runs into P, a little old lady, who is badly injured.

      P can recover against Mom, for failing to use reasonable care to prevent Kid from dangerous skateboarding, given that Mom both knew or should have known that she had the ability to control Kid and knew or should have known that Kid's behavior was risky to pedestrians.

2. Criminal and intentionally tortious acts: The reasonable person, and hence the defendant, is normally entitled to assume that third persons will not commit ***crimes*** or ***intentional torts,*** unless she has some reason to believe the contrary as to a particular third person.

a. Special relationship: However, the defendant may have a ***special relationship*** with either the plaintiff or a third person, such that the defendant will bear the burden of anticipating and preventing intentionally tortious or criminal acts by that third person.

i. Psychotherapist-patient relationship: For instance, in the famous case set forth in the following Example, the California Supreme Court held that the ***psychotherapist-patient*** relationship is one of those special relationships. So at least in California, the psychotherapist bears a burden to use reasonable care (e.g., has a duty to ***warn)*** on behalf of a ***non-patient*** who the psychotherapist learns is at risk of intentional harm at the hands of the patient.

Example: Poddar is under the care of the Ds, university psychotherapists. He tells them that he intends to kill Tatiana, the Ps' daughter. One of the Ds asks the campus police to detain Poddar, but after he seems rational, they release him. Neither of the Ds warns Tatiana or the Ps. Two months later, Poddar in fact kills Tatiana.

Held, the psychotherapist-patient relationship between the Ds and Poddar was sufficiently "special" that it created a duty for the Ds to protect third persons such as Tatiana (with whom they had no relationship at all) from reasonably foreseeable harm by Poddar. The Ds therefore had the duty to take reasonable steps to protect her, including probably the giving of a warning to her or the Ps. The university police, on the other hand, had no special relationship to Poddar (even though they detained him) or to Tatiana; they therefore bore no duty to protect Tatiana against harm from Poddar, and the Ps' complaint as against them must be dismissed. *Tarasoff v. Regents of the University of California*, 551 P.2d 334 (Cal. 1976), *infra,* p. 203.

b. Premises liability: One important context in which the special relationship between plaintiff and defendant may impose a duty on the defendant to protect the plaintiff against third-party crimes is ***"premises liability."*** That is, the owner of ***real estate*** that is ***held open to the public*** normally has some sort of duty to ***make reasonable protections against crimes*** committed by third persons against those legitimately on the property. Thus a ***shopping-mall***

operator, a ***hotel,*** or a ***school*** may be liable for failing to impose reasonable security measures to protect against crimes against shoppers, hotel guests or students.

i. Different standards: Courts are not in agreement on precisely what ***standard*** to use in evaluating whether the risk of third-party crime was sufficiently foreseeable that the property owner owed a duty to those on the premises to prevent that crime. The two major tests for foreseeability seem to be the ***"totality of the circumstances"*** test and the ***"balancing"*** test.

(1) **"Totality of circumstances" test:** The ***"totality of the circumstances"*** test, as its name implies, takes a whole variety of factors into account in determining whether the crime that ensued was sufficiently foreseeable that the property owner should have protected against it. When the totality test is used, a very important factor is the number, nature, and location of ***prior similar incidents.*** When courts use this test, they often focus on the level of crime in the ***surrounding area,*** and are willing to impose liability even if there has not been much crime on the particular premises, as long as the owner knew that there was significant crime ***nearby.***

(2) **"Balancing" test:** The totality test is often criticized as placing ***too great a burden on business owners.*** Therefore, a number of courts (including those of California, Tennessee and Louisiana) have adopted the ***"balancing"*** test. This test "seeks to address the interests of both business proprietors and their customers by ***balancing*** the ***foreseeability of harm*** against the ***burden of imposing a duty*** to protect against the criminal acts of third persons." *Posecai v. Wal-Mart Stores, Inc.*, 752 So.2d 762 (La. 1999). Under the balancing test, a court will often hold that the defendant may not be required to use effective measures to deal with even a foreseeable risk, because of the ***high cost of the measures.*** D&H, p. 466. For instance, a court using this test would typically hold that a store operator had no duty to post security guards where there had been some

crime in the surrounding neighborhood but not much on the actual store premises.

> **Example:** D (Wal-Mart) operates a Sam's Club store in the town of Kenner. After shopping at the store, P goes to the parking lot, where she is robbed of $19,000 of jewelry. P sues D, asserting that D was negligent in not posting security guards in the parking lot during business hours. Evidence shows that the store was adjacent to, but not in, a high-crime area: in the prior six years, there were only three robberies on the store premises, but 83 "predatory offenses" at other businesses on the same block.
>
> *Held*, for D. The court adopts the balancing test. Under this test, "a very high degree of foreseeability is required to give rise to a duty to post security guards, but a lower degree of foreseeability may support a duty to implement lesser security measures such as using surveillance cameras [or] installing improved lighting or fencing[.]" By this standard, the foreseeability of a robbery in D's parking lot was not sufficiently great to place on D a duty to provide security patrols in the lot. *Posecai v. Wal-Mart Stores, Inc., supra.*

G. Misrepresentation: Just as a defendant's acts may be negligent, so her ***speech or other communication*** may be. Where the resulting injury is an abstract economic one (e.g., investors' losses due to a financial statement negligently prepared by accountants), special rules apply, generally tending to limit the defendant's liability; these are discussed in a separate section on misrepresentation, *infra*, p. 438.

1. **Physical injury:** Where, however, a negligent statement leads to physical injury, or to tangible property damage, the case is treated under the same general rules as any other kind of negligence.

   > **Example:** D, a truck driver, gives a hand signal to P, driving behind him, to indicate that the way is clear for P to pass D. In fact, D has carelessly failed to notice that there is an oncoming car, which P smashes into. D will be held liable for negligence. P&K, p. 206, fn. 34. See also Rest. 2d, §311, Illustr. 6.

2. **Persons who may sue:** The person to whom the false information is given may, as we have seen, sue. Furthermore, ***third persons*** who the defendant knew or should have known might rely on the information may also sue. Thus a driver who gestures to one pedestrian to cross, and who should anticipate that other pedestrians nearby will also cross, will be liable to them if she runs them over. See Rest. 2d, §311(1)(b).

3. **Right to rely:** However, the circumstances must be such that the plaintiff is ***reasonably justified*** in relying on the defendant's

information. For instance, "There may be no reasonable justification for taking the word of a casual bystander, who does not purport to have any special information or any interest in the matter, as to the safety of a bridge or scaffold...." Rest. 2d, §311, Comment c.

V. MALPRACTICE

A. Superior ability or knowledge: We have seen that the usual standard of care and knowledge is an objective one, based on the level of a hypothetical reasonable person. But what if the defendant in fact has a higher degree of knowledge, skill or experience than this reasonable person — is she charged with using that higher level, so that she will be held for using, say, only the skill of an ordinary reasonable person? The short answer is "yes" — the defendant is charged with making reasonable use of whatever specialized type of knowledge or skill she possesses.

B. Malpractice generally: The issue of superior skill or knowledge arises most frequently in suits against professional persons, commonly known as ***malpractice*** suits. The general rule is that professionals, including doctors, lawyers, accountants, engineers, etc., must act with the level of skill and learning ***commonly possessed by members of the profession in good standing.*** See Rest. 2d, §299A; P&K, p. 187. There are, however, a number of more specific rules which, in practice, govern the disposition of malpractice suits.

1. Good results not guaranteed: The professional will ***not*** normally be held to guarantee that a ***successful result*** will occur. She is liable for malpractice only if she acted without the requisite minimum skill and competence, not merely because the operation, lawsuit, etc. was not successful.

> **Example:** The Ds, lawyers, handle a suit for P against an out-of-state insurance company. They make service on the company by serving the State Insurance Commissioner. The trial judge holds that the service is valid. At that point, the Ds elect to stand by this method of service, and not to serve the defendant again by alternate means. The defendant appeals, and it is held that the service was invalid. Under local procedural rules, P is thenceforth barred from bringing a new suit against defendant, since the statute of limitations has run. P then sues the Ds for malpractice.
>
> *Held*, it was widely assumed by lawyers throughout the state that service on the Insurance Commissioner would suffice; therefore, the Ds were not negligent in failing to use an alternate form of service, even though this later turned out to have been a

strategic error. A lawyer is *not* liable for a "*mere error of judgment,* or for a "mistake in a point of law which has not been settled by the court of last resort . . . and on which reasonable doubt may be entertained by well-informed lawyers." *Hodges v. Carter,* 80 S.E.2d 144 (N.C. 1954).

2. **Specialists held to a higher standard:** Where the defendant holds herself out as a specialist in a certain portion of her profession, she will be held to the minimum standards of that specialty (which will obviously be higher than those of the profession at large). This will be true, for instance, for an ophthalmologist or a tax lawyer.

3. **Need for expert testimony:** It is almost always held that the defendant professional's negligence may be shown only through ***expert testimony.*** That is, in a medical malpractice case, the plaintiff must produce another doctor to testify, another accountant to establish the defendant accountant's negligence, etc. The expert testimony must normally establish both the standard course of conduct in the profession, and that the defendant departed from it.

   a. **Difficult burden:** This is generally an extremely difficult burden for the plaintiff to carry, in view of professionals' notorious unwillingness to testify against each other. It is made even more difficult by the general rule that it is not enough for the expert to say that he would have handled the matter differently from the defendant; he must testify that the defendant's conduct departed from all courses of conduct accepted by some portion of the profession.

   b. **Standard applied:** The correct standard has always been the level of skill of the ***minimally qualified member in good standing,*** not the average member. " ... [T]hose who have less than median or average skill may still be competent and qualified. Half of the physicians of America do not automatically become negligent in practicing medicine at all, merely because their skill is less than the professional average. On the other hand, the standard is not that of the charlatan, the quack, the unqualified or the incompetent individual who has succeeded in entering the profession or trade. It is that common to those who are recognized in the profession or trade itself as those qualified, and competent to engage in it." Rest. 2d, §299A, Comment e.

c. Exception where negligence obvious to lay person: If the defendant's negligence is so blatant that the court determines as a matter of law that a ***lay person could identify it*** as such, expert testimony will not be needed. This would be the case, for instance, if a doctor amputates the wrong leg, injures the patient's shoulder during an appendectomy *(Ybarra v. Spangard*, *infra*, p. 129), etc.

i. Lay person understands obligation: There may also be no need for expert testimony on negligence where the nature of the professional's obligation is such that a lay person can understand it, and determine whether it has been met, even though its absence is not blatant.

4. "Standards of the community": Until the last few decades, doctors and other professionals were almost always held to be bound by the professional standards prevailing in the ***community in which they practiced*** (or similar communities), not by a national professional standard. A reason usually cited for this rule was that education and facilities varied tremendously from place to place, and allowance should be made for the "country practitioner's" inability to keep up with his city counterpart.

a. Changing rule: As professional education has become more uniform nationally, however, more and more courts have abolished the "local standards" rule; as a result, the plaintiff may now frequently fulfill his burden of producing expert testimony by calling on an expert from outside the community (who may be more willing to testify). Abolition of the local standards rule has been particularly common where the defendant is a ***specialist.*** See Rest. 2d, §299A, Comment g.

5. **Objective standard for professional:** The standard of care for one who engages in a business, occupation or profession is ***objective,*** not subjective. Thus the defendant's ***own training and experience are irrelevant*** in determining whether she behaved with due care (at least where she does not hold herself out as a specialist); the issue is whether the defendant matched the standard of care commonly found among other members of the same profession.

6. Informed consent: In the case of a physician, one of the professional

standards which must be met is that the ***risks of a proposed treatment*** must be adequately disclosed to the patient before he consents to that treatment. Older cases held that the physician's failure to make such disclosure vitiated the consent, and paved the way for a battery action (see *supra*, p. 69). More recently, however, courts have generally held that lack of full disclosure constitutes professional negligence, and that the matter must be handled under the general malpractice rules. The doctrine that adequate disclosure of risks must be made is known generally as the rule of ***"informed consent".***

a. Professional standard: Most courts hold that what should be disclosed to the patient is itself a question of professional standards, as to which expert testimony is necessary. The general principle is that the doctor must disclose to the patient all risks inherent in the proposed treatment which are sufficiently ***material*** that a reasonable patient ***would take them into account*** in deciding whether to undergo the treatment, provided that the patient's ***well-being*** would not be unduly disturbed by such disclosure. Also, disclosure of other possible courses of treatment must generally be made.

i. Causality: Because of the requirement of proximate cause *(infra,* p. 152), the plaintiff must show that he would probably have ***declined the treatment*** had full disclosure been made. (If the patient would have undergone the treatment even had full disclosure of the risks been made, the lack of informed consent could not have been a proximate cause of the injury.) Some courts have held that what counts is what decision the patient himself would have made (whether a reasonable decision or not), not what some hypothetical "reasonable patient" would have done had full disclosure been made. See, e.g., *Scott v. Bradford*, 606 P.2d 554 (Okla. 1979). Other cases have applied a "reasonable patient" standard to this issue. But observe that even under the *Scott* standard, the jury does not necessarily have to take P's word that he would not have undergone the treatment; the jury may always choose to conclude that P's testimony is not credible.

b. Exceptions: Of course, if there is an ***emergency*** and the patient is

incapable of giving consent, disclosure will not be necessary; similarly, if the patient is exceptionally high-strung, and the doctor has reason to believe that he will overreact to any risk, and will elect a course of nontreatment which is, in reality, much more dangerous, disclosure may not be necessary.

7. **Novice:** One who is just ***beginning*** the practice of her profession (e.g., a hospital intern, a lawyer who has just passed the bar, etc.) is nonetheless ordinarily held to the same level of competence as a member of the profession generally, despite her inexperience. This is a special case of the general rule that a beginner at anything (e.g., a beginning automobile driver) may not have the benefit of a lower standard of care. "The law does not require the general public to assume the risk of the neophyte's lack of competence." Nutshell, p. 53.

   a. **Assumption of risk:** However, in the facts of a particular case, the plaintiff may be found to have been aware of the defendant's inexperience, and to have consciously accepted the risk of it. Thus a lawyer who carefully tells her client that she has recently been admitted to practice and knows little about civil procedure may be entitled to some lessening of the standard of performance owed by her in pursuing the plaintiff's lawsuit. But it is hard to believe that this principle would apply to a hospital intern, even if the patient-plaintiff knew full well of the frequent incompetence of such interns.

VI. AUTOMOBILE GUEST STATUTES

A. Gross negligence and recklessness: Thus far, we have discussed what might be termed "ordinary negligence". There are a few situations, however, in which the standard for liability is not ordinary negligence but some degree of culpability beyond that; this is sometimes called ***"gross negligence",*** or ***"willful and wanton disregard",*** or ***"recklessness",*** etc. While distinctions have been frequently attempted among these various formulations (see P&K, pp. 211-12), the main thing to keep in mind is that all of these terms refer to a more serious departure from standards of ordinary care than would be required to constitute ordinary negligence. Generally, this departure is more serious

because the risk of harm is substantially greater than the risk whose disregard constitutes ordinary negligence. See Rest. 2d, §500.

B. Automobile guest statutes: The major context in which a standard of gross negligence or recklessness is applied is that in which a ***nonpaying passenger in an automobile*** is injured, and sues the ***driver-owner*** of the car. So-called ***"automobile guest statutes,"*** at one time in force in approximately half the states, provide that the owner-driver is not liable for injuries received by his nonpaying passenger (whether a family member or not) ***unless the driver has been "grossly" or "willfully negligent" or "reckless."***

1. **Rationale:** Two principle rationales have been advanced for such statutes.

   a. **Ingratitude:** First, at the time most of these statutes were enacted in the 1930s, automobile liability insurance was not widespread, and a driver who was successfully sued by his "guest" was likely to bear the considerable expense himself; most legislatures felt that it was unfair to encourage "ingratitude" by guests.

   b. **Collusion:** Secondly, to the extent that there was insurance, there was (and presumably still is today) a risk that the guest and the driver (who are most probably either friends or relatives) will behave ***collusively*** in the lawsuit. That is, the defendant owner, since he will not be paying the bill, may try to help out the plaintiff by conceding that he was in fact negligent.

2. **Constitutional attack:** In the last several decades, a number of the statutes have been repealed, and at least eleven state statutes have been found violative of either or both the ***federal or state constitutions.*** P&K, p. 216-17 and fn. 86. The most important decision in this area is *Brown v. Merlo*, 506 P.2d 212 (Cal. 1973), holding that the California guest statute violates the Equal Protection clause of the United States Constitution because it is "over-inclusive" — in order to guard against a few collusive suits, it denies recovery to a much larger class of non-colluding plaintiffs.

3. **Present status:** Today, only nine states have guest statutes still in force, and two of these (Texas and Illinois) are of restricted

application. See P&K, p. 217, fn. 87.

4. **Intoxication as gross negligence:** It is sometimes held where the host driver drives while ***intoxicated,*** his conduct constitutes gross negligence, making the guest statute inapplicable.

VII. VIOLATION OF STATUTE (NEGLIGENCE PER SE)

A. Significance of statutory violation: In the cases we have examined thus far, the decision as to what a reasonable person would do in the circumstances was left to the judge and jury. Sometimes, however, the ***legislature*** passes a statute which appears to define reasonable conduct in a certain kind of situation. This is most often true of legislation establishing ***safety standards*** for industry, transportation, etc. A substantial body of case law has arisen discussing the extent to which the court is required to treat a violation of such legislation as ***"negligence per se."***

1. **"Negligence per se doctrine":** Most courts follow the general rule that when a safety statute has a sufficiently close application to the facts of the case at hand, an unexcused violation of that statute is ***"negligence per se,"*** and the defendant will not be permitted to show that the legislature set an unduly high standard of care.

> **Example 1:** P drives a buggy after dark without lights, in violation of a New York criminal statute requiring lights. The buggy collides with D's automobile, and P is killed. The trial judge instructs the jury that it may consider the lack of lights as some evidence of negligence, but not as conclusive on the question of negligence.
>
> *Held*, in an appellate decision by Judge Cardozo, "We think the unexcused omission of the statutory signals is more than some evidence of negligence. *It is negligence itself."* Since there was evidence at trial that the absence of lights was causally related to the accident, P's violation was necessarily contributory negligence, and he may not recover. *Martin v. Herzog*, 126 N.E. 814 (N.Y. 1920), *infra*, p. 121.
>
> **Example 2:** D owns a drugstore. His clerk sells a bottle of poison to P without labeling the bottle "poison," as required by statute. P, not knowing that the bottle contains poison, drinks the contents, and dies.
>
> *Held*, D is negligent because he violated the standard of care imposed upon him by statute. P's action is not "statutory"; it is simply based on conduct by D which, because of the statutory duty of labelling, is deemed by the court to constitute "negligence *per se." Osborne v. McMasters*, 41 N.W. 543 (Minn. 1889).

a. Third Restatement: The Third Restatement gives a good summary

of how the negligence per se doctrine operates:

> "An actor is negligent if, ***without excuse,*** the actor ***violates a statute that is designed to protect against the type of accident the actor's conduct causes,*** and if the accident ***victim*** is ***within the class of persons the statute is designed to protect."***
>
> Rest. 3d (Liab. for Phys. & Emot. Harm) §14.

b. Three requirements: As the above-quoted Third Restatement rule illustrates, there are three main requirements for application of the negligence per se doctrine:

[1] D ***violated a statute;***

[2] the statute was ***designed to protect against the same type of accident*** that D's conduct caused; and

[3] the accident ***victim*** (presumably P) falls within the ***class of persons the statute was designed to protect.***

We'll consider each of these requirements in more detail below.

B. Penal statutes: Some statutes contain an explicit provision that their violation will give rise to civil liability. If this is the case, of course, the court has no choice but to give the statute its intended effect, presuming that it is validly enacted and constitutional. The statutes we are talking about principally here, however, are ones which are solely ***penal*** in nature; that is, they provide that a violation is a crime or a misdemeanor, but they do not say anything about whether civil liability ensures.

1. Deference: The majority rule that in such situations, the court will apply the statutory standard as a matter of law, is therefore usually explained not by reference to the doctrine of separation of powers, but by the fact that the court is adopting the legislature's determination of what is necessary for safety "voluntarily, out of deference and respect for the legislature." P&K, p. 222.

2. Ordinances and administrative regulations: The negligence per se doctrine ordinarily applies to violations of ***local ordinances*** and ***administrative regulations*** just as to ordinary statutes. Dobbs, p. 316. However, some courts treat such violations as being merely non-dispositive "evidence" of negligence.

C. Statute must apply to facts: Even in states following the majority rule

that statutory violations can sometimes be "negligence per se," the courts have set up a series of requirements to ensure that, before the violation will be negligence per se, the statute was intended to guard against the ***kind of injury*** in question.

1. **Protection against particular harm:** The first requirement the statute must meet before there is a violation per se is that the statute was intended to protect against the ***particular kind of harm*** that the plaintiff seeks to recover for. See Rest. 2d, §286(b).

   Example: A statute requires that vessels carrying animals across the ocean shall keep them in separate pens. The statute is obviously intended to protect only against the spreading of contagious diseases from animal to animal. P sends his sheep on D's ships, and D violates the statute by herding P's sheep together with other animals. Because there are no pens, the sheep are washed overboard during a storm.

   Held, the statutory violation cannot be relied on because "the damage is of such a nature as was not contemplated at all by the statute, and as to which it was not intended to confer any benefit on the plaintiffs." There might have been a recovery, however, had P's sheep been lost through disease because of overcrowding. *Gorris v. Scott*, L.R. 9 Ex. 125 (Eng. 1874). See also Rest. 2d, §286, Illustr. 4.

   a. **Keys left in car:** The significance of how the "type of risk" question is resolved is illustrated by cases where ***keys*** have been left in a parked car, in violation of a statute requiring that keys not be so left, and a theft, and an ensuing accident, have resulted. Where the court has construed the purpose of the statute as being to guard against reckless driving by thieves, negligence per se has been found; where it has been found to be for some other purpose, there has been no such automatic liability. P&K, pp. 224-25.

2. **Class of persons protected:** The second requirement for the application of negligence per se is that the plaintiff must be a member of the ***class of persons*** whom the statute was designed to protect. See Rest. 3d (Liab. for Phys. & Emot. Harm) §14.

   Example: A statute requires that all factory elevators be provided with a certain safety device. The legislative history, title and details of the statute make it clear that the statute's sole purpose was to protect employees of the factory, not visitors. P1, an employee in D's factory, and P2, a business visitor to the factory, are both injured when the elevator falls, because of a lack of the safety device. The statute will establish that D's failure to have the safety device was negligence as to P1, but not as to P2, because P2 was not a member of the class of persons whom the statute was designed to protect. Rest. 2d, §286, Illustr. 1.

a. General interests of state: A sub-species of this rule is the principle that where the statute is intended to protect only the interests of the ***state*** or of the ***public at large,*** and not to protect particular individuals against harm, its violation will not be negligence per se.

i. Blue Law: Thus, a ***"Blue Law",*** prohibiting stores from being open on Sunday, would not conclusively establish the negligence of a store owner who opened on Sunday, exercising all reasonable care, but whose customer slipped on the store floor. The law would be held to protect the interest of the public at large in having a day of rest, not to protect individuals who would otherwise shop on Sundays. (Such a statute would also be held not to meet the other requirement, that of protecting against the kind of harm in question, since it is clear that the statute is not designed to protect against Sunday falls in stores.) P&K, pp. 222-23.

b. Two classes of persons protected: But a statute may be held to have been intended to protect both the public at large as well as a particular class of individuals. If so, its violation may be negligence per se if the plaintiff belongs to the particular class.

D. Causal link: Even where the statute is applicable to the facts of the case, the "negligence per se" does not make the defendant liable unless the plaintiff shows that there is a ***causal link*** between the act constituting a violation and the resulting injury. See P&K, pp. 229-30.

1. Warnings and safety devices: This principle requiring proof of causation is often important in cases involving ***warnings or safety devices*** — if D violates a statute requiring a particular type of warning or safety device, but the accident would have happened even if the warning or device had been furnished as required, then the negligence per see doesn't matter.

Example: A statute requires the manufacturer of a prescription drug to insert into the drug package a warning of adverse side effects. D fails to insert an appropriate warning of a particular side effect, cardiac arrhythmia, in a drug it manufactures. P buys the drug and contracts fatal arrhythmia. P's estate sues D for negligence, arguing that the omission of the warning was negligence per se.

If D can show that neither P nor anyone in his household ever read warnings that

accompany prescription drugs, D should win. That's because D has shown that the statutory violation had no causal connection to the harm (since the harm would have occurred even if the never-to-be-read warning had been placed in the package).

E. Excuse of violation: Once the plaintiff has shown that the statute was designed to guard against the kind of harm that she sustained and that it was addressed to a class of person that included the plaintiff (and assuming that plaintiff carries the more general burden of showing that the act that was violative of the statute was the actual ***cause*** of the harm), a prima facie case of the defendant's negligence per se has been established. However, in some circumstances, the defendant may then have the right to show that his violation of the statute was ***excusable.*** If he can do this, the violation will be stripped of its "negligence per se" nature, and will be, at most, evidence of negligence which the jury will weigh, and may disregard.

1. Absolute duties: There are some statutes which, the court may hold, by their nature and history leave no room for excuses. That is, they impose upon the defendant an ***absolute duty*** to comply with the statute, and a good faith attempt to do so is not sufficient.

a. Typical cases: For instance, statutes prohibiting the use of ***child labor*** have generally been held to fall in this category. Thus an employer who hires a child in violation of the statute will be held liable if an injury occurs of the sort that the act was intended to protect against, and the employer will not be heard to say that he believed in good faith that the child was above the minimum age.

2. Rebuttable presumption or excuse: Most statutes, on the other hand, are not interpreted to impose an absolute duty of compliance. Courts have chosen two similar (but not exactly identical) ways of preventing statutes from being given this absolute effect. Sometimes, the statute is viewed as merely establishing a ***rebuttable presumption*** of negligence; the defendant can then introduce evidence of due care in order to rebut the presumption. Other courts treat the statute as establishing negligence per se, but allow certain ***excuses*** for non-compliance; if one of the available excuses is demonstrated, the violation has no bearing on the issue of negligence. The Third Restatement follows the "excuse" approach. Thus Rest. 3d (Liab. for Phys. & Emot. Harm) §15, lists a number of factors that will excuse a

violation:

a. Disability: The violation is reasonable because of the defendant's ***"childhood, physical disability,*** or ***physical incapacitation."*** §15(a).

Example: A local ordinance makes it an offense to drive through a stop sign without stopping. After a collision between cars driven by P and D, in which D dies, P sues D's estate for damages. P produces uncontested evidence that D drove through a stop sign, and that that action proximately caused the collision, while P drove properly. D's estate produces undisputed evidence that (1) D had no previously known heart condition; (2) D was driving properly until moments before the accident; (3) D suffered a fatal heart attack a few second before arriving at the stop sign; and (4) that heart attack prevented D from pressing the brake when the car got to the stop sign.

P will not recover. The only evidence of negligence in the case is D's violation of the stop sign ordinance. But this violation will be excused due to D's incapacity, making negligence per se inapplicable. Therefore, there is no evidence of D's negligence, entitling D's estate to a directed verdict.

b. Ignorance of need: The defendant neither knew nor should have known of "the ***factual circumstances*** that render[ed] the statute applicable." §15(c).

Example: A statute prohibits any contractor from doing excavation within 10 feet of a high-voltage power line. D, a contractor, excavates within 6 feet of such a line. However, D does not realize that the line is present because it is obscured by heavy foliage (and a reasonable person in D's position would not have realized that the line was or might be present). D knocks down the line, injuring P, a bystander.

Because D neither knew nor should have known of "the factual circumstances that render[ed] the statute applicable" to his particular excavation session, the negligence per se doctrine will not apply to his conduct. Cf. Rest. 3d (Liab. for Phys. & Emot. Harm) §15, Comment d (giving a hypothetical with essentially these facts).

c. Reasonable attempt to comply: Similarly, the violation may be excused because the defendant "exercise[d] ***reasonable care in attempting to comply*** with the statute," but was unsuccessful. §15(b).

d. Confusion to public: The violation may be excused if it was "due to the ***confusing way*** in which the requirements of the statute are ***presented to the public."*** §15(d).

Example: A road sign on Main St. says "No Left Turn." The sign is placed just before two roads turn off of Main St., Maple and Oak. A reasonable driver could be confused about whether the sign means that left turns are prohibited onto Maple, Oak,

or both. D, reasonably believing that the sign applies to Maple but not to Oak, turns left onto Oak, and collides with P. D would not be subject to liability under negligence per se, because the confusing nature of the sign would excuse his non-compliance. Cf. Rest. 3d (Liab. for Phys. & Emot. Harm) §15, Comment e ("If a sign or signal is such as to confuse the reasonable motorist, negligence per se is not appropriate.")

e. Greater risk of harm: A violation by a person may be excused if compliance would have "involve[d] a ***greater risk of physical harm*** to the actor or to others than noncompliance." §15(e).

Example: A statute provides that pedestrians walking along the highway shall walk towards oncoming traffic. Ps are walking along a highway one night, when traffic conditions are such that traffic on the left side (where Ps are required by statute to walk) is much heavier than on the right side. They therefore walk on the right side, and are hit by D. D argues that they were contributorily negligent as a matter of law, because of their statutory violation.

Held, Ps's violation will be excused where it would have been more dangerous to comply. *Tedla v. Ellman*, 19 N.E.2d 987 (N.Y. 1939), *infra*, p. 280. See also Rest. 2d, §288A, Illustr. 6.

Note: The court in *Tedla* distinguished between statutes which "define the standard of care and the safeguards required to meet a recognized danger" (as to which the court said no excuse is allowable) and statutes such as the one before it, which "fixes no definite standard of care which would under all circumstances tend to protect life, limb or property, but merely codifies or supplements a common law rule, which has a always been subject to limitations and exceptions." In this latter event, the court held, the statute "should not be construed as intended to wipe out the limitations and exceptions which judicial decisions have attached to the common law duty. . . . " However, Prosser and Keeton suggest that this "implied exception theory" is really a rationalization, and that the true reason the court allowed the exception was simply because "the courts reserve the final authority to determine whether the civil standard of reasonable conduct will always require obedience to the criminal law." P&K, p. 228.

3. Foolish or obsolete legislation: There are many statutes on the books which have never been enforced, or which have not been enforced for so long that they may be treated as ***obsolete.*** In such a situation, the court will often in effect treat the violation as excused, although in reality the court is really simply declining to accept the legislative standard as binding on the civil liability question.

F. Effect of the plaintiff's contributory negligence: Even where the defendant's negligence per se is established, he may be able to assert the defenses of ***contributory negligence*** or ***assumption of risk.*** However, if the statute is of a sort that is held to impose an absolute duty on the

defendant, and therefore to allow no excuses (see *supra*, p. 119) these defenses may not be available. Thus an employer who violates the child labor laws will not be allowed to raise the defense of contributory negligence, since this would defeat the entire purpose of the statute. This limitation upon the defenses of contributory negligence and assumption of risk is further discussed *infra* at pp. 281 and 294, respectively.

G. Contributory negligence per se: The defendant may, in an appropriate case, demonstrate that the plaintiff's violation of a statute constitutes ***contributory (or comparative) negligence per se.*** Generally speaking, the rules are the same for asserting contributory negligence per se as for defendant's negligence per se. See, for instance, *Martin v. Herzog*, *supra*, p. 116.

1. **Hurdles:** But keep in mind that the hurdles which must be surmounted before negligence per se is established are still imposed; thus if the statute is construed as one which was not intended for the protection of a person in the position of the plaintiff, the violation will not conclusively establish contributory negligence.

2. **Speed limits:** Generally, however, such statutes as ***speed limits*** and other traffic regulations are held to be for the purpose of protecting plaintiff drivers who violate them, as well as innocent third persons. See P&K, p. 232.

H. Violation as evidence: Even if the plaintiff (or the defendant, in a case involving contributory negligence) is unable to meet all the requirements of the negligence per se doctrine, the statutory violation may still be taken as ***evidence of negligence.***

> **Example:** A statute providing that hogs must be confined by fences of a particular strength is construed to be solely for the purpose of preventing misbreeding. D violates the statute by using less than the required strength of fence to enclose his hogs. One breaks the fence, runs into the highway, collides with P's car, and the resulting accident injures P. Even though the violation is not negligence per se (since the statute was not intended to guard against the kind of harm which occurred) the jury may consider the degree of strength required by the statute as evidence as to how strong a fence is needed to keep hogs from breaking loose. See Rest. 2d, §288B, Illustr. 2.

I. Compliance with statute not dispositive: The converse of the "negligence per se" doctrine does not hold true. That is, the fact that the

defendant has ***fully complied*** with all applicable state safety regulations does ***not by itself establish*** that he was not negligent. The finder of fact is always free to conclude that a reasonable person would take precautions beyond those required by statute. See, e.g., Rest. 3d (Liab. for Phys. & Emot. Harm) §16(a): "An actor's compliance with a pertinent statute, while evidence of non-negligence, ***does not preclude a finding*** that the actor is negligent ... for failing to adopt precautions ***in addition*** to those mandated by the statute."

1. **Greater hazard:** This rule is especially applicable where the situation at hand was ***more hazardous*** than the usual situation the statute was designed to govern. See Rest. 2d, §288C.

   a. **Usual case:** But if the situation confronting the defendant was substantially the same as that which the statute was designed to control, the finder of fact may consider the defendant's full compliance with all statutes as significant evidence that nothing more was required of a reasonable person. See P&K, p. 233.

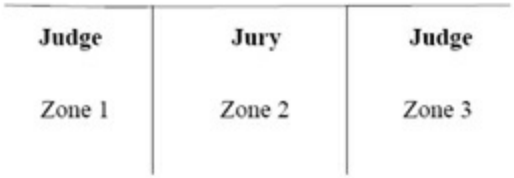
VIII. PROCEDURE IN JURY TRIALS

A. Aspects of procedure: Since most tort cases are tried before juries, it is important to understand at least a few basic aspects of jury trial procedure. Considered here are two principal topics: (1) the ***burden of proof,*** and (2) the allocation of functions between ***judge and jury.*** See generally Rest. 2d, Chapter 12, Topic 9.

B. Burden of proof: In a negligence case, as in virtually all tort cases, the plaintiff is said to bear the ***"burden of proof."***In reality, the plaintiff actually bears two distinct burdens:

1. **Burden of production:** First, she must come forward with some evidence that the defendant was negligent, that she, the plaintiff, suffered an injury, that the defendant's negligence was the proximate cause of this injury, etc. This burden is generally known as the ***"burden of production."***The burden of production may be defined as the obligation upon a party to come forward with evidence in order to avoid a directed verdict (i.e., an instruction from the judge to the jury telling them that they must decide in favor of the party not bearing the burden of production). This burden can and does shift from the

plaintiff to the defendant and possibly back again, depending on the strengths of the proof offered by each side. The following diagram, adapted from Field, Kaplan & Clermont, *Cases and Materials on Civil Procedure,* 7th Ed., p. 672, is illustrative:



a. Directed verdict for defendant: The case starts off in Zone 1 — if the plaintiff does not produce any evidence in support of her *prima facie* case, the judge will order a directed verdict for the defendant. That is, she will tell the jury that as a matter of law, it must find for the defendant.

b. Jury case: If the plaintiff comes forward with enough evidence in support of her *prima facie* case that a reasonable person could (but would not necessarily have to) decide in the plaintiff's favor, the case is in Zone 2, and will go to the jury. Once the case is in Zone 2, neither party bears the burden of production, since neither party must come forward with additional evidence in order to avoid a directed verdict.

c. Directed verdict for plaintiff: It may be, however, that the plaintiff's case is so strong that, unless the defendant comes forward with rebutting evidence, the court will have to order a directed verdict in the plaintiff's favor (i.e., the court will decide that no reasonable person could find in favor of the defendant). If so, the case is in Zone 3, and plaintiff has in effect shifted the burden of production to the defendant.

d. Effect of defendant's case: When the defendant puts on his case, he can similarly move the burden of proof from Zone 3 to Zone 2 or 1 (leading to submission of the case to the jury, or a directed verdict in favor of the defendant, respectively). Or, if he starts his portion of the case with the matter in Zone 2, he may produce so little evidence that the case stays in that Zone (and is given to the jury), or enough to get it to Zone 1, directed verdict for himself.

2. **Practical significance:** The judge does not monitor the shifting burden of production throughout the trial. It is really only at two points that evaluation of the burden is significant: first, at the end of the plaintiff's case, the defendant usually moves for a directed verdict; that is, he asks the court to declare that the plaintiff has failed to move the case out of Zone 1, and that the jury should be instructed that it must decide in his, the defendant's, favor. Secondly, at the end of the defendant's case, each side is likely to move for a directed verdict, the plaintiff alleging that the case is in Zone 3, and the defendant that it is in Zone 1.

3. **Burden of persuasion:** The second respect in which the plaintiff begins by bearing the burden of proof is that she bears what is sometimes called the ***"burden of persuasion".*** This means that if the case goes to the jury (i.e., if the case ends up in Zone 2), the plaintiff must convince the jury that it is ***more probable than not*** that her injuries are due to the defendant's negligence. To put it another way, the fact that the plaintiff bears the burden of persuasion means that if the jury believes that there is exactly a fifty percent chance that the defendant caused the injuries, the plaintiff loses. The concept is usually expressed by saying that the plaintiff must demonstrate her case ***"by the preponderance of the evidence".***

   a. **Not usually shifted:** The burden of persuasion, in a negligence case (and, in fact, in almost every kind of case) rests on the plaintiff from the beginning, and almost never shifts.

C. Circumstantial evidence: Sometimes, the plaintiff may be lucky enough to prove her case by direct evidence. For instance, she may be able to produce an eye witness who will testify that the defendant behaved in a particular way, and that the plaintiff was injured in a particular way as a result. But very often, the plaintiff will make her case by ***circumstantial*** evidence. Circumstantial evidence has been defined as "evidence of one fact . . . from which the existence of the fact to be determined may reasonably be inferred. It involves, in addition to the assertions of witnesses as to what they have observed, a process of reasoning, or inference, by which a conclusion is drawn." P&K, p. 242.

> **Example:** P, departing from a train run by D Railroad, slips on a banana peel left on the railroad platform. No one testifies as to how long the banana lay there prior to the

accident (which would bear on whether D's employees were negligent in not yet having picked it up). However, witnesses testify that the banana was, after the accident, "flattened down, and black in color," "dry, gritty, as if there were dirt upon it," etc.

Held, the jury could have justifiably inferred, from the appearance and condition of the banana peel, that it had been on the platform for such a long period of time that D's employees would have seen and removed it if they had been reasonably careful. This circumstantial evidence was enough to rebut the possibility that the peel might have been dropped moments prior to the accident by another passenger. Therefore, it was error to direct a verdict for the defendant. *Anjou v. Boston Elevated Railway Co.*, 94 N.E. 386 (Mass. 1911).

D. Function of judge and jury: Both the judge and jury play a significant role in the adjudication of a negligence case. An extended discussion of the allocation of roles between the two is not possible here; however, a few general observations may be made:

1. Judge decides law: The ***judge,*** of course, decides all ***questions of law.*** In a negligence case, this means that the judge will decide, typically, the following issues:

a. State of facts: She will decide, after all the evidence is in, whether that evidence admits of more than one conclusion. If she decides that ***reasonable people could not differ*** as to what the facts of the case are, she will instruct the jury as to the findings of fact they must make (thus virtually taking the case out of their hands).

Example: Suppose plaintiff begins a medical malpractice case, and attempts to show that the defendant left a sponge in his body. If the judge decides that reasonable people could differ as to whether the sponge was really left in the plaintiff's body, or as to whether it was really left there by the defendant, the judge will allow the jury to decide this fact question (assuming that the plaintiff has demonstrated the other aspects of his case sufficiently so as to be entitled to go the jury). But if the judge concludes that all reasonable people would agree that the sponge was left in the body, she will instruct the jury that it must so find; similarly, if there could be no doubt that the sponge was not left in the body, she will so instruct the jury. See Rest. 2d, §328D, Illustr. 9.

b. Existence of duty: The judge will also determine what the defendant's ***duty*** to the plaintiff was. This is done as a matter of law. Thus in a suit by a plaintiff trespasser against a defendant landowner, the court will probably instruct the jury that, provided the defendant did not know of the plaintiff's presence, he owed him no duty of care at all. And in an accident case, the judge will

instruct the jury that the defendant owed the plaintiff the duty of care that a reasonable person would exercise in the circumstances.

c. Directed verdict: By deciding aspects of both of these matters, the judge may remove the case from the jury by ***directing a verdict.*** Thus in an accident case, if the judge concludes that reasonable persons would all agree that the defendant had behaved reasonably, and also decides as a matter of law that the defendant owed only the duty of behaving as a reasonable person would under the circumstances, she will direct the jury to find for the defendant.

2. Jury's role: The jury, it is commonly said, is the finder of the facts. However, since as we have seen the judge may sometimes decide the facts as a matter of law, what this really means is that the jury will be permitted to find the facts only where these facts are in such dispute that reasonable persons could differ on them. If the case is sufficiently unclear that it is permitted to go to the jury, the jury will decide two principle factual issues:

a. What happened: First, what really happened; and

b. Particular standard of care: Secondly, whether the facts as found indicate that the defendant breached his duty of care to the plaintiff, in a way that proximately caused the plaintiff's injuries. See generally, P&K, pp. 235-38.

IX. *RES IPSA LOQUITUR* — CREATING AN INFERENCE OF NEGLIGENCE

A. Aid in proving the case: A plaintiff's tort lawyer often has a difficult task in proving his case. Frequently, it is made particularly hard by the fact that the plaintiff does not have any knowledge of or access to the facts about the defendant's conduct. This section is about a doctrine which, when it applies, makes the plaintiff's task significantly easier. The doctrine of ***res ipsa loquitur*** (which in English means ***"The thing speaks for itself")*** allows the plaintiff to point to the fact of the accident, and to ***create an inference*** that, even without a precise showing of how the defendant behaved, the defendant was ***probably negligent.*** See generally Rest. 2d, §328D.

Example: P is walking in the street past D's shop, when a barrel of flour falls on him

from a window above the shop. In P's suit against D, his evidence demonstrates only these facts, and shows nothing about any actual acts by D or his employees.

Held, P has presented enough evidence to justify a verdict for him. "A barrel could not roll out of a warehouse without some negligence, and to say that a plaintiff who is injured by it must call witnesses from the warehouse to prove negligence seems . . . preposterous. . . . It [is] apparent that the barrel was in the custody of the defendant who occupied the premises, and who is responsible for the acts of his servants who had the control of it; . . . the fact of its falling is *prima facie* evidence of negligence, and the plaintiff who was injured by it is not bound to shew that it could not fall without negligence, but if there are any facts inconsistent with negligence, it is for the defendant to prove them." *Byrne v. Boadle*, 159 Eng. Rep. 299 (Eng. 1863).

Note: It was in this case that one of the judges, Chancellor Pollock, observed that this was a situation "of which it may be said *res ipsa loquitur.*"

B. Requirements for doctrine: Virtually all American courts recognize that there are situations in which the doctrine of *res ipsa loquitur* should be applied, thus permitting the plaintiff to create an inference of the defendant's negligence without any direct evidence showing that negligence. The courts generally agree on at least ***four requirements*** before the doctrine may be applied (see also Rest. 2d, §328D):

1. **No direct evidence of D's conduct:** First, there must be ***no direct evidence of how D behaved*** in connection with the event.
2. **Seldom occurs without negligence:** Second, the plaintiff must demonstrate that the event is of a kind which ***ordinarily does not occur except through the negligence*** (or other fault) of ***someone.*** See Rest. 2d, §328D(1)(a).
3. **In defendant's control:** Third, plaintiff must show that the instrument which caused her injury was, at the relevant time, in the ***exclusive control*** of the defendant.
4. **Rule out plaintiff's contribution:** Fourth, plaintiff must show that her injury was not due to her ***own*** action. P&K, p. 244.
5. **Accessibility of information:** Some courts have purported to hold that in addition to establishing these four things, the plaintiff must also show that a true explanation of the events is more readily ***accessible*** to the defendant than to herself. However, few courts have really relied on this requirement, as is discussed further below.

C. No direct evidence of D's conduct: As a threshold matter, most courts

insist that there must be ***no direct evidence of how D behaved*** in connection with the event. *Res ipsa* is only used as an indirect means of inferring that D was probably negligent, so there's no need to use the doctrine if we know the details of D's conduct.

D. Inference of someone's negligence: The plaintiff must, as stated, demonstrate that the harm which befell her does not normally occur except through the negligence of someone. This is true of, for instance, falling elevators, escaping gas or water from utility mains, the explosion of boilers, etc. (See Rest. 2d, §328D, Comment c.) The plaintiff is not required to prove that such events ***never*** occur except through someone's negligence; all she has to do is to show that ***most of the time,*** negligence is the cause of such occurrences.

> **Example:** P is driving behind a truck driven by D. As the truck goes over some railroad tracks, a heavy spare tire comes out of its cradle underneath the truck and falls to the ground. The truck's rear wheels then cross over the spare, throwing the spare into the air. The spare crashes through P's windshield, injuring him badly. P sues D on a *res ipsa* theory. At trial, D testifies that the tire was secured to the truck's underside by a chain, which he says he inspected before the trip. (The chain cannot be located for the trial.) The judge instructs the jury that it may apply *res ipsa*. The jury finds for P. D appeals on the grounds that this is not the type of accident that would not have occurred without negligence.
>
> *Held*, for P. "We conclude that the spare tire escaping from the cradle underneath the truck . . . is the type of accident which, on the basis of common experience and as a matter of general knowledge, would not occur but for the failure to exercise reasonable care by the person who had control of the spare tire." *McDougald v. Perry*, 716 So. 2d 783 (Fla. 1998).

1. Certainty not required: The plaintiff is ***not*** required to demonstrate that there were ***no other possible causes*** of the accident. She must merely prove that ***most*** of the time, this type of accident is caused by negligence.

> **Example:** Suppose P's decedent dies in a plane crash over water. P is not required to demonstrate that there was no mechanical failure, or to negate every other possible cause. All P has to do is show that in *most* airplane crashes over water, negligence is a but-for cause. (P will often attempt to do this by expert testimony — in this case, perhaps by testimony from an expert on the causes of plane crashes.)

a. Negating non-negligence causes: The plaintiff may satisfy the "most of the time" requirement in part by ***excluding certain causes:*** if P can show that certain non-negligence-based causes

suggested by the defendant could not possibly have been the cause of the particular accident, these will be taken out of the "more likely than not" computation.

b. Proof that one cause is especially likely: Conversely, if the plaintiff can come up with evidence that a certain cause is ***especially likely*** to have produced the present harm, this may be enough to ***raise*** the overall chance of negligence beyond the required 50% threshold. Thus in the following pair of examples given by the Third Restatement, notice how the second one satisfies the plaintiff's burden on the "most of the time" issue:

> Assume, for example, that the evidence identifies ***five causes, of essentially equal likelihood,*** for a particular type of accident: ***causes A and B*** are associated with the negligence of the defendant, while the remaining three causes are not. Given this evidence, res ipsa loquitur should be ***denied,*** since the probability of defendant negligence is ***less than 50 percent.*** Assume now, however, that some evidence is available about the defendant's conduct in the particular case that ***raises the possibility of cause A*** to roughly ***40 percent,*** while leaving undisturbed the relative likelihood of the remaining causes. Given this evidence, the likelihood of defendant negligence is now ***55 percent*** (40 percent plus 15 percent), and res ipsa loquitur ***can be properly applied.***
>
> Rest. 3d (Liab. for Phys. & Emot. Harm) §17, Comment d.

2. **Aviation:** It is now generally accepted that where an ***airplane crashes*** without explanation, the jury may infer that negligence was more than likely the cause. In the early days of aviation, however, where the elements were often sufficient to cause a crash without anyone's negligence, and where there was no body of accident history to justify any conclusion about the general causes of accidents, most courts refused to allow this inference, and the doctrine of *res ipsa loquitur* was therefore not applied. See P&K, pp. 246-47.

3. **Basis of conclusions:** Normally, the fact that a particular kind of accident does not usually occur without negligence is within the ***general experience of the jury,*** and does not have to be explicitly proved by the plaintiff. However, there are other cases (e.g., ***medical malpractice*** cases) where the court may conclude that juries don't have enough pertinent experience to decide the issue on their own; thus the court may require plaintiff to provide — as a prerequisite for getting the case to the jury — ***expert testimony*** to the effect that

accidents such as the one that occurred normally do not happen without negligence.

E. Showing that negligence was defendant's: The plaintiff must also show, again by a preponderance of evidence, that the negligence was ***probably that of the defendant.*** In the older cases, this requirement is usually expressed by stating that the plaintiff must demonstrate that the instrumentality which caused the harm was at all times within the ***exclusive control*** of the defendant.

> **Example:** During the great V-J celebration, P is walking on the sidewalk next to D Hotel, when she is hit by a falling armchair. P proves no other facts at trial.
>
> *Held*, "A hotel does not have exclusive control, either actual or potential, of its furniture. The guests have, at least, partial control." Therefore, P has failed to establish the requirement for *res ipsa. Larson v. St. Francis Hotel*, 188 P.2d 513 (Cal. 1948).

1. Modern view: Most modern cases, however, do not express this requirement solely in terms of "exclusive control" by the defendant. Instead, they simply require the plaintiff to show that, more likely than not, the negligence was the defendant's, not someone else's.

a. Third Restatement abandons requirement: The Third Restatement explicitly ***abandons*** the requirement that the plaintiff show that the instrumentality that brought about the accident was under D's exclusive control. See Rest. 3d (Liab. for Phys. & Emot. Harm) §17, and Comment b thereto. The commentary points out that the concept of the person in exclusive control theoretically functions as a proxy for the likely negligent party, but that "frequently exclusive control functions poorly as such a proxy." *Id.*

> **Example:** The Restatement gives this example: Consumer buys a new car. The day after the purchase, the brakes fail, and Consumer strikes Pedestrian. Consumer has had exclusive control the car prior to the accident, but there is no reason to believe that Consumer was the negligent one. Rather, there is every reason to believe that the responsible party is the manufacturer. So Pedestrian ought not to have a *res ipsa* claim against Consumer (and ought to have a res-ipsa-like claim against the manufacturer) even though the car was under Consumer's exclusive control immediately prior to the accident. Id., Comment b.

2. **Plaintiff's particular evidence:** To demonstrate that the negligence is more probably that of the defendant, the plaintiff is required to produce evidence ***negating other possibilities.*** "[H]owever, the

evidence need not be conclusive, and only enough is required to permit a finding as to the greater probability." P&K, p. 249. Thus a plaintiff injured by a soda bottle which explodes after she has bought it from a retailer must produce evidence showing that there were no intervening causes, i.e., that the retailer handled the bottle carefully, and that she herself handled it carefully, at all times. *Id.*

3. **Multiple defendants:** Sometimes the plaintiff sues ***two or more defendants*** at once, alleging that some or all of them have been negligent. If the plaintiff can demonstrate the probability that the injury was caused by the negligence of at least one of the defendants, but cannot show which of them, may the doctrine of *res ipsa* be applied against all? This has been one of the major questions in the recent history of the doctrine.

   a. *Ybarra* case: The most famous case holding that the answer to this question can sometimes be "Yes" is ***Ybarra v. Spangard,*** set forth in the following example.

   Example: P goes into the hospital for an appendectomy. After the operation, his shoulder hurts, and turns out to have sustained a serious injury during the operation. P sues the surgeon, the attending physician, the owner of the hospital, and the anesthesiologist. He demonstrates that at least one of them (or a nurse under the control of one of them) must have been negligent, but is unable to offer any evidence as to which.

   Held, *res ipsa* may be applied. It would be unreasonable to require the plaintiff to identify the negligent defendant, insofar as he was unconscious throughout the operation. Furthermore, the defendants bore interrelated responsibilities; each of them had a duty to see that no harm befell P. Therefore, each of the defendants who had any control over or responsibility for P must bear the burden of rebutting the inference of negligence by making an explanation of what really happened. (This should be done at a new trial.) *Ybarra v. Spangard*, 154 P.2d 687 (Cal. 1944), *supra*, p. 113, *infra*, p. 150.

   Note: At the retrial, all of the defendants except the hospital owner testified that nothing had occurred during the operation which would explain P's injury. The trial court, without a jury, found against all of the defendants.

   b. Special relationship: The result in *Ybarra* seems to be at least partially due to the fact that the defendants all bore an integrated relationship as professional colleagues, and that all had a responsibility for the patient's safety. Where the multiple defendants are ***strangers*** to each other, and have only an ordinary

duty of care to the plaintiff, *res ipsa* has generally ***not*** been allowed merely upon a showing that at least one of them must have been negligent.

Example: P, a pedestrian, is injured by a collision between cars driven by D1 and D2. P shows at trial that automobile accidents do not normally occur without the negligence of someone, but he is unable to show that the accident was more likely due to the negligence of one than the other. P will be unable to obtain application of the doctrine of *res ipsa*, because he has not shown that a particular defendant was, more likely than not, negligent. See P&K, p. 251.

F. Not due to plaintiff: The final requirement for the application of *res ipsa* is that the plaintiff establish that the accident is probably not due to her own conduct.

Example: P is an engineer operating a locomotive of D Railroad. Part of his job is to keep the right amount of water (and therefore the right level of steam) in the boiler. The boiler explodes and kills P. If there is no evidence showing that P was not himself responsible for the explosion (by putting in too much water), *res ipsa* will not apply. But if there is testimony that P acted properly, the doctrine may apply. Rest. 2d, §328D, Illustr. 11.

1. Contributory negligence: ***Contributory negligence*** on the part of the plaintiff will sometimes, but ***not always,*** constitute a failure to meet this requirement. Thus, in the above example, if it were shown that P was contributorily negligent in his duty to keep the right water level, the doctrine would not be applied. But if the plaintiff's contributory negligence does not lessen the probability that the defendant was also negligent, the requirement may be met.

Example: P, walking near a construction site, is hit by a falling beam. P proves that beams do not usually fall from construction sites without negligence, and shows that D's employees were at all times in control of all beams. The fact that P may have been contributorily negligent in walking too close to the construction site is irrelevant as far as application of *res ipsa* goes; the doctrine will still apply. (Of course, contributory negligence may bar P from a recovery anyway, but it would not if the jurisdiction is one which applies comparative, as opposed to contributory, negligence — see *infra*, p. 281).

G. Evidence more available to defendant: A number of courts have stated that *res ipsa* will only apply where evidence of what really happened is more available to the defendant than to the plaintiff. This was, for instance, one of the underlying rationales involved in the *Ybarra* case. However, although it is true that application of *res ipsa*

helps to "smoke out" the defendant (i.e., forces him to explain or pay), it does not seem to be a real requirement that evidence be more available to defendant than to plaintiff. For instance, in the airplane-crash hypo referred to on p. 128, the reasons for the airplane's crash are no more available to the D airline than to P, yet most courts (and the Restatement) would apply *res ipsa.* See P&K, p. 255.

H. Expert witnesses on negligence issues: Recall that the plaintiff is required to make several showings *(supra*, p. 126) regarding negligence in order to establish a *prima facie* case for getting the benefit of the *res ipsa* doctrine. Thus the plaintiff must show that the accident is one that does not normally happen in the absence of negligence by someone, and must also show that more likely than not the negligence was probably that of the defendant(s). In cases where the facts are complex or involve ***specialized knowledge*** (e.g., ***technology,)*** insight into whether the accident would probably have happened without negligence may be ***beyond the expertise of the jury.***

1. Expert testimony usually allowed: In this scenario, most courts today ***allow*** the plaintiff to ***use expert testimony*** to establish that the type of accident in question typically does not occur without negligence, and/or that the defendants were in control of all the most probable causes.

a. Medical malpractice: The question arises most often in the case of ***medical malpractice;*** something goes horribly wrong either in surgery or as the result of the patient taking a drug that the defendant manufactures or prescribes. Generally, courts today ***permit*** the plaintiff to show by ***expert medical testimony*** that the requirements for *res ipsa* are satisfied.

Example: P arranges with D1 (an individual doctor), D2 (a medical corporation that employs D1 and other orthopedists) and D3 (a hospital) to have them perform a spinal fusion on P. Shortly after the operation, P is diagnosed with an E. coli infection at the surgical site. She sues all three D's, alleging that they negligently failed to guard against E. coli. She argues that she's entitled to the benefits of *res ipsa*, on the theory that E. coli infections do not normally happen without a negligent failure of infection-prevention, and that the members of the medical team are the ones in control of whether infection-prevention is done adequately. P seeks to offer expert testimony by other doctors that in their opinion these conditions were satisfied here. D says that expert testimony should not be allowed on these points.

Held, for P. The vast majority of courts (and the Second Restatement) endorse the use of expert testimony in medical malpractice cases seeking to invoke *res ipsa.* Using expert testimony helps bridge the gap between "the jury's common knowledge and the complex subject matter that is 'common' only to experts in a designated field." So P may present expert medical opinion that E. coli infections do not normally occur in the absence of negligence, and that the defendants here collectively had a right to control the factors that likely caused the infection. However, the Ds will of course have the right to combat these assertions, including the right to use medical testimony of their own to do so. *Sides v. St. Anthony's Medical Center*, 258 S.W.3d 811 (Mo. 2008).

I. Effect of *res ipsa:* The usual effect of the application of *res ipsa* is, as we have seen, to permit an inference that the defendant was negligent, even though there has been no direct, eyewitness evidence that he was. In this respect, *res ipsa* is merely a doctrine that sanctifies the use of a particular kind of ***circumstantial evidence.*** The consequence of the doctrine's application is that the plaintiff has ***met her burden of production.***

Example: P is a guest in a tractor-trailer driven by D. D loses control of the truck, it overturns, and crushes P to death. P sues, and at trial D is unable to explain what caused the accident. Nonetheless, the jury finds for D, and P appeals.

Held, the case was a proper one for *res ipsa loquitur*, since the vehicle was under D's control, and vehicles usually don't suddenly run off the road without negligence. But application of the doctrine merely means that the jury *could* find negligence, not that it was *required* to. Therefore, its verdict in D's favor will not be overturned. *Sullivan v. Crabtree*, 258 S.W.2d 782 (Tenn. 1953).

1. Diagram: Putting the problem in terms of the diagram, *supra*, p. 123, P in *Sullivan*, by earning the right to have *res ipsa* apply, moved the case at least into Zone 2 (where it would be sent to the jury). According to the *Sullivan* court, he did not move it to Zone 3, where a directed verdict in his favor would have been required. Occasionally, however, the plaintiff may meet the requirements for the doctrine's application so convincingly that the court will rule, as a matter of law, that the defendant must have been negligent (i.e., the case will end up in Zone 3).

J. Third Restatement's stripped-down approach: The Third Restatement has a ***simplified standard*** for *res ipsa:* the Restatement's complete formulation of the doctrine is that "The factfinder may ***infer*** that the defendant has been negligent when the accident causing the plaintiff's physical harm is a ***type of accident that ordinarily happens as***

a result of the negligence of a class of actors of which the defendant is the relevant member." Rest. 3d (Liab. for Phys. & Emot. Harm) §17.

1. **Requirements eliminated:** So the new Restatement eliminates several of the requirements often imposed by courts, including (1) the requirement that there be no direct evidence of how D behaved, (2) the requirement that P show that the injury-causing instrument was in D's exclusive control (see *supra*, p. 128 for more about this), and (3) the requirement that P make an affirmative showing that the injury was not due to her own action. However, the comments to §17 suggest that this new, simpler, phrasing was not intended to alter how the doctrine is applied in most cases.

K. Defendant's rebuttal evidence: Suppose that the plaintiff, in her own case, establishes the elements of *res ipsa* sufficiently that she would, in the absence of any evidence from the defendant, be entitled to go to the jury. (This is the usual effect of application of the doctrine). Now, however, the defendant steps forward with ***rebuttal evidence*** of his own. What is the effect?

1. **General evidence of due care:** If the defendant merely offers evidence to show that he was ***in fact careful,*** this will almost never be enough to put the case back in Zone 1 (diagram, *supra*, p. 123), entitling the defendant to a directed verdict. The defendant's evidence will therefore usually simply be enough to prevent a directed verdict against him (unless it is so weak that it does not overcome the plaintiff's particularly convincing satisfaction of the three requirements for *res ipsa)*, and it will be up to the jury to decide whether the defendant's evidence is enough to negate the inference of negligence stemming from application of *res ipsa.*

2. **Rebuttal of *res ipsa* requirements:** But the defendant's evidence may, rather than merely tending to establish the defendant's due care, directly ***disprove one of the requirements*** for application of *res ipsa.* Thus if the defendant conclusively shows that the accident is not of a sort which normally occurs only as the result of negligence, or shows that all reasonable people must agree that the cause was something other than the defendant's negligence, he will be entitled to a directed verdict. In such a situation, the defendant has really shown that the

case is not a *res ipsa* case at all, and the doctrine is out of the case. See Rest. 2d, §328D, Comment o.

L. Typical contexts: Here are a couple of contexts in which the *res ipsa* issue is especially likely to arise:

1. Airplane accidents: A commercial ***airplane*** accident in which the plane ***crashes into an obstruction*** like a mountain, often furnishes a good illustration of *res ipsa.*

a. *Res ipsa* applies: Today, airplanes don't usually fly into obstructions without someone's negligence, at least in clear weather. And typically, the influence of factors other than the airline won't be pointed to by the evidence. Therefore, the estate of a dead passenger will normally be deemed to have established negligence merely by showing that the plane crashed into an obstruction in good weather.

i. Rebuttal: But the airline is always free to try to ***rebut*** the evidence, such as by showing that an unforeseeable explosion caused the airplane to veer off course into the obstruction. See the discussion of rebuttal evidence *infra*, p. 133.

2. Car accidents: Plaintiffs often attempt to apply *res ipsa* to ***car accidents.*** The analysis varies sharply with whether there are multiple vehicles involved or just one.

a. Multiple vehicles: *Res ipsa* usually does ***not*** apply to car crashes involving ***multiple vehicles.*** In most multi-vehicle crashes, it generally cannot be said that that type of accident does not happen without someone's negligence. Furthermore, even if someone's negligence were probable, usually the negligence of persons other than the defendant (e.g., the plaintiff) cannot be sufficiently eliminated by the evidence.

b. Single-car accident: On the other hand, if the accident is a ***single-vehicle one*** (e.g., between a driver and a pedestrian, or between a driver and some fixed obstruction), then *res ipsa* will often ***apply,*** since such accidents usually involve driver negligence. In such a single-vehicle fact pattern, if the defendant (typically the driver) cannot come up with affirmative evidence of his non-negligence, or

of some other cause, the plaintiff will not only win, but may be entitled to a directed verdict.

Example: P, a pedestrian, is struck in broad daylight by a car driven by D, while P is crossing at a crosswalk with the green light in her favor. These are the only facts proven by either side in P's suit against D.

P will be entitled to a directed verdict. That's because *res ipsa* applies; pedestrians don't normally get hit by motorists while walking in a crosswalk with the light in their favor on a clear day, unless the driver has been negligent. Since *res ipsa* means that P has met her burden of producing some evidence of D's negligence, and since there is no countervailing evidence of D's non-negligence or some other cause, no reasonable jury could find for D. That's enough to entitle P to a directed verdict from the judge. (Even if P might have also been negligent for not spotting D's approaching car, in a comparative negligence jurisdiction P's negligence would not negate D's liability, and would merely reduce P's damages.)

i. **Rebuttal evidence:** But D is always free to come up with evidence ***rebutting*** the *res ipsa* inference of negligence, and in single-vehicle accident cases D will often succeed in doing so. For instance, D may be able to show that he had an unforeseeable ***heart attack*** just before the accident, which is a non-negligent explanation that, if believed, would remove the *res ipsa* inference.

Quiz Yourself on NEGLIGENCE GENERALLY (Entire Chapter)

27. Arthur Fonzarelli is a bored teenager. He rides all over Mayberry on his Harley Davidson just to kill time. Arthur is very concerned about damage to his spotless Harley, so he is always watchful when he rides. One day, however, he runs over Aunt Bea when he is momentarily blinded by the sun. Aunt Bea sues Arthur for negligence on the grounds that there is no social utility in riding around merely to kill time. Will she win? _____

28. Batman's son, Batboy, is thirteen. One night, while Batman is playing poker with the Commissioner, Bat-boy sneaks into the Batcave, stuffs a chaw of chewing tobacco in his cheek, jumps into the Batmobile, and takes off like a bat out of hell. Robin is walking his bike across the street at a crosswalk, and Batboy negligently hits him, ruining the bike and injuring Robin. When Robin sues Batboy for negligence, what standard

of care will Batboy be held to? _____

29. The Hotten Swettee Nightshirt Company manufactures childrens' nightclothes. The cloth it uses is highly flammable. One youngster, Emma Layshen, wearing a Hotten Swettee nightie, naps a bit too close to her night light and is engulfed in flames. When Hotten Swettee is sued in negligence, Hotten Swettee defends by pointing out (correctly) that the industry custom is to use this same kind of cloth for childrens' night-clothes. Can Emma win? _____

30. The Han-dee Shop-R Grocery Store is open 24 hours a day, seven days a week, in violation of a Sunday closing law. Pierre Lucky is shopping at Han-dee one Sunday, and is injured when he slips on a ketchup slick in Aisle 3, which had been there for hours. Pierre sues Han-dee for negligence on the basis of opening for business in derogation of the Sunday closing law. Will he win? _____

31. The State of Anxiety has a criminal statute requiring that people lock their space saucers when they park them in public places. George Jetson carelessly leaves his keys in the ignition and his space saucer unlocked, when he takes his dog Astro to the park one day. Kibbles Enbitts steals the saucer, and goes for a "joy-fly" in it. Enbitts knocks over Mr. Spacely, who's walking along a sidewalk. Spacely sues Jetson for negligence based on Jetson's violation of the statute. Assuming Spacely can prove the statute was designed to protect pedestrians from being hit by stolen saucers, will Jetson be liable, in most jurisdictions?

_____

32. Redd Wightenbleu, soldier, survives six tours of duty in Europe during World War II, and is awarded the Purple Heart for bravery. After the war, he returns, victorious, to the states. During the V-E Day celebrations, he is on a sidewalk in front of the Booby von Trapp Hotel, when an armchair falls on his head from an upper story window. He sues the hotel for negligence. Will *res ipsa* loquitur be applicable?

33. In the trucking industry, it is customary to use only a side-view mirror, not a rear-view mirror, on tractor-trailers, since a rear-view mirror is impractical. In recent years, a video camera device has become available, which can be mounted at the rear of the trailer and which transmits the view from the rear of the truck to a monitor next to the

driver. Because of the substantial cost ($3,000) of the device, only about 10% of large trucks have been outfitted with the new device. Trucker, an individual who owns his own large rig, has not installed the new camera device and therefore has no ability to see the view from the rear of his truck. One day Trucker sideswipes Driver, who is driving a small car near the rear of Trucker's truck. Even a very careful driver in Trucker's position could not have avoided the accident without the rear camera device. However, if Trucker's truck had had the camera device, a reasonable driver would almost certainly have seen the danger and avoided the accident. Driver sues Trucker for negligence.

(a) May the availability and growing usage of the camera device be admitted as part of Driver's case, on the question of whether Trucker was negligent? _____

(b) Assume for this part only that the answer to (a) is "yes." May Trucker introduce evidence that the widely-followed custom in the industry is not to install the cameras, because of their high cost?

(c) May a jury properly find that Trucker was negligent? _____

34. The federal Food and Drug Act provides that any poisonous substance must be marked with the word "poison" and with a skull and cross-bones at least one-half inch high. Cleaner Co., a manufacturer of various household cleaners, sells DeClog, a very powerful chemical for unclogging drains. Cleaner sells DeClog in a clear plastic bottle which exposes the substance's attractive cherry-red color, similar to the color of Hawaiian Punch. On the bottle, Cleaner includes the required "poison" and skull and cross-bones markings, but takes no other child-proofing precautions. Child, who is two years old, finds a bottle of DeClog underneath the kitchen sink, drinks it, and is horribly wounded. Child sues Cleaner, and Cleaner defends on the grounds that it complied with all applicable warning statutes (a correct assertion). Does Cleaner's statutory compliance bar Child's negligence suit? _____

35. Passenger is aboard an airplane operated by Airline. The airplane disappears over the Mediterranean Sea in clear weather, and no trace is ever found. Passenger's estate sues Airline. The estate does not come forward with any evidence of Airline's negligence. Airline produces

testimony that some otherwise unexplained plane crashes turned out to have been caused by plastic bomb devices that even very close security inspection could not have detected. However, Airline does not produce any evidence directly suggesting that this is what happened here. There is no other evidence as to the cause of the accident. Should the judge:

(a) Direct a verdict for Passenger;

(b) Direct a verdict for Airline; or

(c) Send the case to the jury?

_____

_____

Answers

27. **No.** One of the peculiarities of our negligence system is that it usually focuses on the actor's level of care in *carrying out* an activity, rather than on the social utility of the actor's *decision* to engage in the activity at all. Thus, a defendant who carelessly engages in a socially-useful (and low-risk) activity is likely to be liable for damages; whereas one who carefully engages in a risky activity that is not socially beneficial is not likely to be liable. Even though there was virtually no social utility in Arthur's ride, he rode "carefully," in the sense that he was *attentive*. Therefore, he will not be liable for negligence.

28. **The obligation to operate the Batmobile in the way a reasonable adult of ordinary intelligence would have operated it, even though Batboy is only thirteen.** Although the duty owed by a child is *generally* measured as that of an ordinary child of like age, intelligence, education and experience, when children undertake adult activities, like driving cars, they are held to an adult standard of care.

29. **Yes.** Although custom is admissible as evidence of a minimum standard of due care, it is not conclusive because, as here, an entire industry is capable of negligence. The industry standard here is likely motivated by cost considerations and clearly not by safety concerns; as such, the custom cannot control as a minimum standard of care.

30. **No, because Han-dee's violating the Sunday closing law was not the**

cause of Pierre's injuries. In order for a violation of a criminal statute to provide the basis of a civil negligence claim, the breach of the statute must have caused the injury in question. Here, it didn't. Thus, it is irrelevant in determining Han-dee's liability for his injuries.

RELATED ISSUE: If Pierre sued Han-dee for its negligence in not cleaning up the ketchup earlier, he would probably succeed, since the "hours" it had been there suggest that the store was on notice that there was a danger to customers, and Han-dee carelessly ignored it.

31. Yes, because most jurisdictions view violation of a safety standard embodied in a criminal statute as being conclusive proof of negligence ("negligence per se"), as long as the statute was formulated for the purpose of preventing the kind of harm in question, and the plaintiff is a member of the class the legislature intended to protect. Since the facts tell you to assume that the statute's purpose is to prevent pedestrian accidents involving stolen saucers, and since Spacely is indeed a pedestrian injured in such an accident, the above requirements are satisfied, and Jetson will be automatically deemed to have been negligent.

There are certain situations in which D's non-compliance with the statute will ordinarily be excused (and negligence per se not applied), but none applies to Jetson here:

1. The violation was reasonable in light of D's childhood, physical disability, or physical incapacitation.
2. D reasonably attempted to comply. (E.g., the doorlock suddenly broke and Jetson couldn't get it to work right away).
3. D neither knew nor should have known of the factual circumstances that rendered the statute applicable. (E.g., after Jetson left the car locked, his friend unlocked it without Jetson's knowing about it).
4. The statute's requirements were presented in a confusing way to the public. (E.g., the statute said that it applied only to "cars," and a reasonable person wouldn't know whether a space saucer was a car.)
5. Compliance with the statute would have been more dangerous than violation. Rest. 3d (Liab. for Phys. & Emot. Harm) §15.

32. No. *Res ipsa loquitur* requires an event that would not normally have occurred in the absence of negligence; the instrumentality must have been in the exclusive control of the defendant; and the plaintiff must not have voluntarily contributed to his injury. The element missing here is the exclusivity of control. Since guests have at least some control over the furniture in hotel rooms, *res ipsa loquitur* doesn't apply here.

Note: The hotel *could* be liable in negligence for failing to take reasonable steps to adequately protect passersby; it's just that *res ipsa loquitur* isn't the means by which the negligence claim would be proven.

RELATED ISSUE: The hotel could not be strictly liable for Redd's injuries, even if the actual tortfeasor couldn't be identified.

33. (a) Yes. The question is always what a reasonable person in Trucker's position would have done. Evidence that a new safety device was available would certainly be admissible as evidence on whether Trucker was behaving reasonably in choosing not to install the device.

(b) **Yes.** Conversely, the "custom" in an industry is always admissible as tending to show that a person who followed that custom was acting reasonably.

(c) **Yes.** Neither the availability of a new safety device not used by the defendant, nor the fact that the defendant was following industry customs, will be dispositive on the issue of negligence. On these facts, a reasonable jury could go either way — by finding that it was not reasonable for Trucker to decline to use an available safety device, or by finding that the lack of widespread adoption of the device meant that a reasonable trucker could decline to use it.

34. **No, probably.** A state or federal safety statute will generally be construed to establish merely a minimum standard. If in the particular circumstances a reasonable person would adopt additional precautions, then failure to so adopt can be negligence. (Occasionally, a federal enactment will be found to have been intended to "pre-empt" state law as to what constitutes reasonable safety or warnings — as is the case with cigarette labeling — but a general statute saying that all poisons must be marked as such would probably not be held to have been

intended as pre-emptive.) Since a jury could properly find that a reasonably careful manufacturer of an exceptionally dangerous poison would adopt additional safeguards (e.g., a child-proof cap), Child's case will be permitted to go to the jury.

35. (c). The situation is an appropriate one for application of *res ipsa loquitur:* a plane does not normally crash in clear weather except through the negligence of someone, the airplane was in the exclusive control of Airline at the time it crashed, and Passenger himself was almost certainly not at fault. However, in most courts, even if *res ipsa* applies, it does not ***require*** an inference of negligence. Rather, the doctrine merely ***permits*** an inference of negligence; that is, the doctrine allows the plaintiff to be deemed to have met his burden of production, thus entitling him to get to the jury. Therefore, the judge should send the case to the jury and let the jury decide whether it is more probable than not that the crash was caused by Airline's negligence. See Rest. 2d, §328D, Illustr. 3.

***Exam Tips** on NEGLIGENCE*

In any fact pattern, you must of course be on the lookout for the distinct tort of "negligence." But the tips in this chapter relate mainly to one sub-issue within the tort of negligence, namely, how to determine whether D "was negligent," i.e., failed to behave with reasonable care.

☞ On any set of facts, check whether each participant may have behaved "negligently," i.e., carelessly. Once you find this, check for ***all*** of the elements of the tort of negligence:

□ a ***duty*** of reasonable care to the plaintiff, i.e., that there was ***foreseeable danger*** if care was not used (covered in the next chapter);

□ failure by D to ***exercise*** that ***reasonable care;***

□ ***harm*** (usually required to be physical harm or at least danger of

physical harm) to P; and

□ ***causation,*** i.e., that the failure of care actually and proximately caused the harm.

(This chapter only deals with second of the above requirements, that D failed to exercise reasonable care.)

☞ Your main job is to spot situations where D *may* have behaved negligently, and to articulate both sides of this issue. There's rarely a "right" or "clear" answer to the question, "Was D negligent?" — that's why the existence of due care is almost always a question left for the jury.

☞ Be especially careful to check for negligence when the facts involve a ***vehicle accident*** — there are few car or truck accidents on exams where there ***isn't*** a negligence issue.

  ☞ Don't presume that D's conduct is definitely negligence, even though it seems to be. *(Example:* Even if the facts tell you that D took his eyes briefly off the road while driving, consider the possibility that there was a good cause for this, or at least that this was within the range of things that a reasonable driver might do on, say, a long trip.)

☞ One type of negligence often tested is the ***failure to warn*** another person about a danger. Here the negligence is a form of "omission," so you can miss the issue if you're not looking carefully for it. *(Example:* D has car trouble, and parks his car at the side of the road without placing warning flares around it.)

☞ The issue of ***"custom"*** comes up often. The fact that a particular precaution is or isn't "customary" in the industry is ***evidence*** of what would be reasonable care, but it's ***not dispositive*** either way. (That is, failure to follow a custom that is usually observed for safety reasons, such as the giving of a particular type of warning, doesn't necessarily mean that D's conduct is negligent; conversely, the giving of, say, a customary warning doesn't necessarily mean that D's conduct wasn't negligent.)

☞ Sometimes, the negligence is ***"antecedent,"*** not carelessness right before the accident. That is, D's negligence lies in having put

himself in a dangerous position by ***engaging in the activity in the first place,*** not in carrying out the activity carelessly. *(Example:* D takes a prescription drug, then drives and gets into an accident while having an allergic reaction; even if D was as "careful" as his condition let him be at the precise moment of the accident, he may have been negligent in getting in the car at all after taking a new drug with a tendency to cause allergic reactions.)

- The standard of care for ***children*** is often tested. This happens both where the child is the defendant and where the child is a plaintiff who might be barred by contributory negligence (or have his recovery reduced by comparative negligence). Remember that in most instances, the test is, "What is the level of care of a ***reasonable child*** of the ***age and experience*** of this child?"
  - But remember that a child engaging in an ***adult activity*** (e.g., water skiing) is evaluated by an adult standard.
  - Related issue: It can be negligence for an adult to ***entrust a task*** to a child when a child wouldn't normally have the skills. *(Example:* It may be negligence to leave a 12-year-old to watch a one-year-old.)
  - Also, remember that a parent has a duty to exercise reasonable care to ***supervise the conduct of her minor child,*** to prevent the child from intentionally harming others or posing an unreasonable risk of harm to them. (If the parent doesn't fulfill this duty, she's "directly liable" for her own negligence, not "vicariously liable" — a parent isn't vicariously liable for the torts of her minor child, even ones committed in the parent's presence.)
- One of the most-tested negligence issues: D negligently fails to ***anticipate the negligence*** (or other wrongdoing) of ***another person.*** *Examples:*
  - D is a car rental agency that fails to verify that X has a license; X then has an accident, hurting P. D is probably negligent.
  - D somehow helps X drive while drunk. Thus D may be a bartender or social host who serves X after X is already drunk,

or a passerby who helps X start X's car when X is obviously drunk. D is probably negligent.

- ☞ D imposes some sort of hazard which isn't dangerous to others who are paying attention, but is dangerous to a person who isn't paying attention. *(Example:* D parks his car at the shoulder of a highway, posing a danger only to one such as X who is speeding.) Here, D is probably negligent in not anticipating the negligence of others.

☛ ***"Negligence per se"*** is one of the very most often-tested issues in all of torts. This is because it's easy for professors to construct fact patterns testing the doctrine, it's easy for students to miss the issue completely (e.g., the statute is buried in a complex fact pattern), and once the student spots the issue, there are still many sub-issues.

- ☞ Whenever you spot a statute in your fact pattern, and the professor gives you the precise language (or even a pretty precise summary) of the statute, that's a tip-off that you should be looking for a negligence per se issue. (In fact, if the statute relates to some safety issue, negligence per se is practically the ***only*** issue to which the statute is likely to be relevant.)

- ☞ Here's a good statement of the negligence per se doctrine, to begin your answer with: "D is negligent if, ***without excuse,*** D ***violates a statute that is designed to protect against the type of accident D's conduct causes,*** and the accident ***victim*** is ***within the class of persons the statute is designed to protect."*** Rest. 3d, §14.

- ☞ The single most commonly-tested sub-issue: Was the ***type of harm*** that occurred the type of harm the statute was ***designed to prevent?*** Usually, the answer is ***"no,"*** but you will often have to speculate about what types of harm the legislature might have had in mind.

  - ☞ This issue is especially likely to occur where the statute is essentially ***bureaucratic,*** such as a ***licensing*** requirement. *Examples of the "type of harm" problem:*

    □ A statute says, "No pilot may take on a passenger for pay unless the pilot has a commercial pilot's license." An accident then happens in flight while P is flying as D's

paying passenger, and D has only a regular pilot's license. (Probably you should conclude that the licensing requirement was not enacted for the purpose of avoiding in-flight accidents, in which case the violation would not establish negligence.)

- □ A statute says, "No one may leave a parked car with the keys in the ignition." D violates that statute; the car is stolen, and the thief crashes into P. You have to examine why the legislature passed this statute — was it to prevent accidents from thief-driven cars (in which case the per se doctrine applies), or was it to prevent some other harm (e.g., a child's driving the car), in which case the doctrine does not apply.

☞ A related issue: the violation must ***"cause"*** the accident. (This issue really belongs in the next chapter on causation, but we'll consider it here.) The violation of a regulatory statute — especially a licensing statute — usually is not deemed to be the "proximate cause" of the accident, so the violation gets disregarded.

Example: A statute says, "No one may drive a truck without a $500,000 minimum truck liability insurance policy." An accident occurs to D, an uninsured truck driver. Since the accident would still have happened even with insurance, the causal link between statute violation and accident will probably be found missing. (The same rule usually applies where the violation is not having a required license to engage in the activity.)

☞ Also tested: Was P a ***member of the class*** that the legislature intended to protect by means of the statute? Don't be too narrow in interpreting the "protected class." In any event, you'll usually not be able to say for sure, and you just want to spot this issue and argue the pros and cons.

Example: The statute says, "No one may leave a vehicle parked and unattended on a part of a street marked 'school zone.'" P is an adult who crashes into D's unattended car parked in such a zone. You can't know what the legislature intended. Therefore, say that if the legislature intended only to protect school children, P will not get the benefit of the negligence per se doctrine. But discuss the possibility that although the statute is tied into a school zone, it may have been intended to protect ***any member*** of the public (e.g., a child's parent, a visitor to the school, etc.) who is using the street in front of the school, in which case the doctrine would apply.

☞ If the provision is an ***ordinance*** or an ***administrative regulation***

instead of a statute, you should note that not all courts apply the negligence per se doctrine here. (But also note that those courts that don't accept the doctrine would probably accept the violation as at least strong evidence of negligence.)

- ☞ Fact patterns often raise the issue of ***"excuse"*** of the violation. D is likely to be "excused" from his non-compliance if either: (1) he couldn't avoid the violation even though he was "careful"; or (2) he chose to violate the statute as the lesser of two evils. *(Example:* A statute says, "All drivers must keep their brakes in working order at all times." D's brakes fail suddenly, and he crashes into the car ahead of him. If D shows that he had no advance notice that his brakes were failing, he'll probably be deemed to be excused, and the negligence per se doctrine won't apply.)

☛ Sometimes D's ***compliance*** with a statute poses the converse issue: Does the fact that D complied with a fairly precise statutory safety rule automatically mean that D ***wasn't*** negligent? Usually, the answer is "no" — compliance is at most non-dispositive evidence of D's non-negligence.

☛ Look for a ***"res ipsa loquitur"*** (RIL) issue whenever there's no direct evidence as to whether D was negligent.

- ☞ Requirements for the RIL doctrine in most courts: (1) there must be ***no direct evidence*** as to D's precise conduct; (2) the event must be one that ***normally doesn't occur without negligence by somebody;*** and (3) D must be the ***most likely person*** whose negligence would have caused the event (sometimes clumsily expressed by saying that the event must have been "within D's exclusive control").
  - ☞ Most of the time, the existence of a RIL issue is easy to spot. The tougher part is determining whether all conditions for the doctrine are satisfied.
- ☞ Some contexts where RIL frequently arises on exams (and can be successfully asserted by the plaintiff):
  - □ The product is grossly defective, and suit is brought in negligence rather than in strict product liability. *(Examples:* Food with a foreign object in it; exploding containers.) In this "product"

situation, RIL is most useful where there is no direct evidence that the manufacturer screwed up, i.e., no information about what happened during the manufacture of that particular item.

- □ An airplane crashes into the ground, and there are no clues as to what caused the accident.
- □ A driver hits a pedestrian from the rear, while the pedestrian is walking along the side of the road; the pedestrian dies or doesn't know how the accident happened. (But RIL usually ***doesn't*** apply to ***multiple-vehicle*** accidents, since you can't say that such accidents usually don't occur without the negligence of the particular driver who's the defendant.)
- □ P gets surgery, and something unexpected results (e.g., a surgical tool is left inside P's body, or the wrong part of P's anatomy is removed).

☞ The requirement that D be the person most likely to have been negligent is often tested. It's up to you to spot this issue and discuss it, because the facts won't usually tip you off. *(Example:* P undergoes surgery by D, and a later x-ray shows a surgical tool left in his body. It's up to you to say, "But P will have to show that D was probably the only one who operated on P, or at least that he's more likely than anyone else to have left the tool in P's body.")

☞ Because of the "D is the most likely negligent person" requirement, RIL is not usually successfully used against the manufacturer of an airplane or other machine that has to be operated by a third person — since the manufacturer is not in control of the machine at the time of the accident, the doctrine doesn't fit unless negligence can be directly traced to the time of manufacture. (RIL works better against the operator than against the manufacturer, in this operated-machine situation.)

☞ The requirement that the accident be of a sort that ***usually doesn't occur without negligence*** is also sometimes tested. Again, the issue is usually hidden — it's up to you to notice that you've been given no information about whether an accident of this type "usually doesn't occur without negligence." *(Example:* P is killed when a plane piloted by D crashes into a mountain. It's up to you to notice

and discuss that you don't know whether this accident is of a type that usually doesn't happen without negligence. You might, for instance, speculate that such accidents may often be due to an undetectably-faulty altimeter or some reason other than negligence.)

- ☞ But remember that P doesn't have to show that this type of accident ***never*** occurs without negligence, only that it ***usually*** involves negligence. (That's what allows use of the doctrine in airplane-crash-into-ground suits against airlines.)
- ☞ Also, keep in mind that in technical cases (e.g., ***medical malpractice),*** P is generally allowed to use ***expert witnesses*** to show that the accident is one that usually doesn't happen without negligence, and/or that the defendants were the ones in control of whether this type of event occurred.

☞ The doctrine is only used as ***indirect evidence*** of negligence. Therefore, it's not used when there is ***direct evidence*** of what caused the episode, or of exactly how D behaved during the event.

- ☞ Thus if the facts tell you that D "used all possible care" or some such, then RIL is not used.
- ☞ Similarly, if the facts tell you that the cause of the particular accident was something other than D's negligence, the fact that the accident falls into a "class" in which RIL usually is used is irrelevant. *(Example:* If an airplane crashes, but the facts suggest that a defective altimeter was probably the cause, RIL will not be used in a suit against the pilot.)
- ☞ If the facts describe D's conduct in detail, and the sole issue is, "Was that conduct reasonably careful?" don't use RIL — it's only used when we don't know the specifics of what D did.

☞ Since the purpose of the doctrine is to produce circumstantial evidence of negligence, it's not used in cases based on a non-negligence theory, such as those based on strict product liability.

Example: The suit involves a product with a foreign object in it. If the suit is brought in strict product liability, we don't use RIL because we only need to know, "Was there a 'dangerous defect?'" not "Did the manufacturer use due care?"

Note: On the other hand, we'll see in the Products Liability chapter that in strict liability cases, courts often give P the benefit of a "res-ipsa-like" inference on the issue of whether the product was defective. Thus here, in the product-with-a-foreign-object-in-it suit, P would get the benefit of an inference that a product with a foreign object in it is usually "defective."

☞ You may want to point out that, in most states, the function of the RIL doctrine where applicable is to treat P as having produced ***enough evidence of negligence to get to the jury.*** That is, if the RIL is not rebutted, D won't succeed with a motion for a directed verdict alleging that P hasn't proved that D was negligent. (But remember that D is generally allowed to come up with ***rebuttal*** evidence that he was in fact careful, or that the accident was in fact caused by someone or something else.)

CHAPTER 6
ACTUAL AND PROXIMATE CAUSE

ChapterScope

Once the plaintiff has shown that the defendant behaved negligently, he must then show that this behavior "caused" the injury complained of. Actually, P must make two quite distinct showings of causation:

- **Cause in fact:** P must first show that D's conduct was the ***"cause in fact"*** of the injury. This usually means that P must show that ***"but for"*** D's negligent act, the injury would not have occurred.
- **Proximate cause:** P must also show that the injury is sufficiently ***closely related*** to D's conduct that liability should attach. This requirement is commonly called the requirement of ***"proximate cause"*** or "legal cause."
  - **Foreseeability:** The requirement of "proximate cause" usually means that the injury must have been at least a reasonably ***foreseeable*** (and not bizarre or extraordinary) result of the defendant's negligence.

I. CAUSATION IN FACT

A. General significance: When the plaintiff alleges that the defendant "caused" his injuries, it is pretty clear what he means — that the injuries were the actual, ***factual,*** result of the defendant's actions. In most cases, the question of "causation in fact" is a purely factual one, with few legal or policy issues attached to it.

1. "But for" test: In the vast majority of situations, the defendant's conduct is the (or a) cause of the plaintiff's injuries if it can be said that "Had the defendant not so conducted herself, the plaintiff's injuries would not have resulted." This formulation is sometimes known as the ***"sine qua non"*** or ***"but for"*** test.

a. Third Restatement's formulation: The Third Restatement implements the idea of a "but for" cause. After saying that liability will exist only where the defendant's tortious conduct was a "factual cause" of the plaintiff's injury, the Restatement goes on to

express the idea that ***a "but for" cause is always a factual cause:*** "Conduct is a factual cause of harm when the harm would not have occurred absent the conduct." Rest. 3d (Liab. for Phys. & Emot. Harm) §26.

Example: P takes her prescription for a medication to D, her local pharmacy. D mistakenly fills the prescription by giving P pills containing 30 mg of the active ingredient rather than the 20 mg called for by the prescription. After taking the pills, P suffers serious heart arrhythmia, and sues D for this harm. P can recover only if she proves that had D provided the correct, 20 mg, pills, P would not have suffered the arrhythmia. In other words, for P to recover, the trier of fact must be satisfied that the wrong pills were the "but for" cause of P's arrhythmia. *Id.*, Illustr. 2.

2. Broad test: Observe that the "but for" test casts an extremely broad net. Every injury occurring to a plaintiff has thousands of causes, by this standard, since if any of a thousand things happened differently, there would have been no accident. For instance, in a nighttime automobile accident, the fact that one of the drivers worked late at the office that night would be a cause, since had he not, he would not have been at that location in time to be hit by the other car. See P&K, p. 264, fn. 6.

a. Multiple negligence: It follows that a defendant may not claim that she is not an actual cause of the plaintiff's injury merely because ***some other person's negligence*** also contributed to that harm. This matter is more fully discussed in the material on joint tortfeasors, *infra*, p. 181; the general principle is that each of several joint tortfeasors will be held liable for the entire harm.

Example: P is a passenger in a car driven by D1. On a stormy night, the car crashes into an unlit truck which has been parked in the middle of the road by D2. There is evidence that D1 was negligent in not seeing the truck, and that D2 was negligent in leaving it parked where and how he did.

Held, D2 should not be dismissed from the case merely because the accident would not have happened without D1's negligence. "Where separate acts of negligence combine to produce directly a single injury each tortfeasor is responsible for the entire result, even though his act alone might not have caused it." *Hill v. Edmonds*, 270 N.Y.S.2d 1020 (N.Y. App. 1966).

B. Concurrent causes: Inclusive as the "but for" test is, it nonetheless rules out one kind of cause which the courts have generally held does constitute a true cause in fact. This is the situation where two events ***concur*** to cause harm, and ***either one would have been sufficient*** to

cause substantially the same harm without the other. To provide for this case, it is generally stated that ***each*** of these concurring events is a cause of the injury, insofar as it would have been sufficient to bring that injury about. See Rest. 2d, §432(2).

> **Example:** Sparks from one of D's locomotives start a forest fire. The fire merges with another fire of unknown origin, and the combined fires burn P's property. The evidence indicates that the fire started by D's locomotives would by itself have been sufficient to burn P's property.
>
> *Held*, D is liable for the entire damage to P's property, even though the property would have burned anyway had D not started the fire that it did. Because the fire started by D played a substantial role in the destruction of P's property, it would not be equitable to allow D to escape liability, since the entire loss would then be placed on the innocent P. *Kingston v. Chicago & N.W. Ry.*, 211 N.W. 913 (Wis. 1927), *infra*, p. 185.

1. **"Substantial factor" standard:** Where each of the two events would have been sufficient by itself to bring about the harm, the test for each event is often said to be whether it was a ***"substantial factor"*** in bringing about the harm. If so, that harm is a cause in fact. Thus in the above example, the spark from D's locomotive was undoubtedly a "substantial factor" in starting the fire, so it's a cause in fact of the damage to P's property, and we disregard the fact that the spark wasn't a "but for" cause of the damage.

   a. **Third Restatement uses "sufficient causal set" formulation:** The new Third Restatement does not use the phrase "substantial factor." But even so, it still applies the traditional rule under which if there are two concurrent causes, each sufficient to produce the injury, each is deemed to be a factual cause. The Restatement does this by saying that "If ***multiple acts*** exist, ***each of which alone*** would have been a factual cause ... of the physical harm at the same time, ***each act is regarded as a factual cause*** of the harm." Rest. 3d (Liab. for Phys. & Emot. Harm) §27.

2. **Caveat:** The rule of double liability for concurrent causes, stated above, applies only where ***each*** of the concurrent causes would be sufficient, by itself, to bring about substantially the same harm as occurred. If the defendant's conduct would not have been sufficient, by itself, to do so, but the other concurrent event *would* have been sufficient, the defendant will not be liable.

3. **Distinguished from apportionable harms:** Also, the rule applies only where the concurrent causes produce a single, ***indivisible,*** harm. If the damage caused by one concurrent cause may be separated, analytically, from that caused by the other, the person causing the former will be liable only for that harm. See the discussion of apportioning harm among joint tortfeasors, *infra*, pp. 183-186.

C. Proof of actual cause: The plaintiff bears the burden of proving that the defendant actually caused his injury, just as he must bear the burden of proving the other parts of his *prima facie* case. However, he must demonstrate this actual causation merely by a preponderance of the evidence.

1. **Proof of "but for" aspect:** Thus the plaintiff does not have to prove with absolute certainty that had it not been for the defendant's conduct, the injury would not have occurred. All he has to do is to show that it is ***probable*** that the injury would not have occurred without the defendant's act.

> **Example:** P, a 250 lb. woman, falls down an unlit staircase outside of the waiting room of D Railroad. P argues that D's failure to light the staircase was the actual cause of her injury; D contends, however, that P might have fallen even had the stairs been brightly lit.
>
> *Held*, P has adequately established actual cause. " . . . Where the negligence of the defendant greatly multiplies the chances of accident to the plaintiff, and is of a character naturally leading to its occurrence, the mere possibility that it might have happened without the negligence is not sufficient to break the chain of cause and effect between the negligence and the injury." *Reynolds v. Texas & Pacific Ry. Co.*, 37 La. Ann. 694 (La. 1885).

   a. **Inference by jury:** In fact, most courts do not actually require P to "prove," in any exact sense, even that it is more likely than not that D's negligent act caused the particular damage at issue. Instead, the jury is permitted to make ***common-sense inferences*** that the negligence caused the damage, as long as such an inference is not unreasonable. Thus in *Reynolds, supra,* unless a modern court would conclude that ***no reasonable jury*** could believe that it was more probable than not that the unlit staircase was a "but for" cause of the accident, P would be permitted to get the jury.

   b. **Dosages in medical malpractice cases:** An illustration of this

principle arises in ***medical malpractice*** cases where the claim is that the defendant administered an ***unsafely-large dose*** of an otherwise-safe drug. The plaintiff must theoretically prove that the "extra" dose made the difference (i.e., that the recommended dose would not have produced the damage). But the court will be quick to let the jury decide that because dosages are set at particular levels for good scientific reasons, a dose significantly in excess of the recommended level is likely to have caused the damage.

Example: A doctor working for D (the U.S.) negligently prescribes twice the maximum recommended daily dose of the drug Danocrine for P. P takes the too-high dosage every day for the next month. During that month, she develops various symptoms of illness, and is soon thereafter diagnosed with a rare and fatal disease, primary pulmonary hypertension ("PPH"). After P eventually dies from PPH, her estate sues D. At trial, P's expert medical witness provides good evidence that P's exposure to the Danocrine caused her PPH. But the expert's evidence is much less convincing as to whether the overdose, as opposed to a properly-sized dose, caused the disease.

Held, for P. "[W]hen a negative side effect is demonstrated to be the result of a drug, and the drug was wrongly prescribed in an unapproved and excessive dosage (i.e. a strong causal link has been shown), the plaintiff who is injured has generally shown enough to permit the finder of fact to conclude that the excessive dosage was a substantial factor in producing the harm." Therefore, P's estate has adequately proved that the excessive dosage was the cause in fact of her death. *Zuchowicz v. U.S.*, 140 F.3d 381 (2d Cir. 1998).

2. **Expert testimony:** Sometimes ***expert testimony*** may be necessary to prove actual causation by the defendant. This is frequently true in ***medical malpractice*** cases, where the jury has no knowledge of its own which would permit it to conclude that the defendant's treatment caused the plaintiff's injury.

Example: P, a guest in D's hotel, cuts his forehead on a piece of glass which falls from a broken transom. The injury does not heal, and two years later, a physician tells P that a skin cancer has developed at the point of injury. Two medical experts testify at the trial; one states that there is a remote possibility that a skin cancer could develop from such a wound, and the second declares there is "no causal connection" between P's injury and the cancer.

Held, for D on the issue of liability for the cancer. A mere possibility that the cancer to P was the result of the injury does not provide the requisite causal connection. The jury should not have been permitted to find D liable for the cancer, since the causes of cancer are outside the experience of laymen, and the only relevant medical evidence, that of the two experts, indicated that it was highly unlikely that the injury caused the cancer. *Kramer Service, Inc. v. Wilkins*, 186 So. 625 (Miss. 1939).

3. **Scientific evidence:** Similarly, ***scientific evidence*** often plays a big role in proving causation, especially in ***product liability*** cases. Thus plaintiffs will frequently attempt to prove by ***epidemiological*** evidence that a product manufactured by the defendant is more likely than not to have been the "but for" cause of the plaintiff's injuries. This leads to the question, *How "reputable" or "well established" must scientific theories of causation be before the jury is permitted to hear them?*

   a. **Differing possible approaches:** Courts follow different approaches to this question.

      i. **"Generally accepted" standard:** Some states hold that only ***"generally accepted"*** scientific theories may be presented to the jury. This is the so called *Frye* standard, from *Frye v. U.S.*, 293 F. 1013 (D.C.App. 1923). Under this theory, a scientific theory or piece of evidence that was accepted by only a minority of specialists would not be admissible at all.

      ii. **"Relevance" standard:** At the other end of the spectrum, some states allow virtually any scientific theory or evidence to be placed before the jury, so long as it is relevant, and so long as the expert presenting it has reasonable scientific credentials; even a theory or approach rejected by the vast majority of scientists working in a particular area could be presented, if done so by an expert who was one of the few who believed the theory. Under this approach, it is up to the jury how much or little weight to give the evidence.

      iii. **Middle approach for federal cases:** The Supreme Court has adopted a ***middle*** approach for scientific evidence presented in ***federal*** cases. Under this middle approach, the evidence does not need to be "generally accepted." But it does need to be ***"scientific knowledge,"*** which means that it must have been ***"derived by the scientific method. "*** Usually, this will mean that the proposition has been, or is at least capable of being, ***"tested."*** The fact that the theory or technique has or has not been subjected to ***peer review*** and ***publication*** is one factor in determining whether it is "scientific knowledge," but this is

not a ***dispositive*** factor. So even a distinctly minority theory or approach that has not yet been published could be admitted under this new federal standard (at least if advanced by scientists with reasonable credentials), but a theory or approach that had been published and rejected by the vast majority of working scientists might well be excluded. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S.Ct. 2786 (1993), also discussed *infra*, p. 371.

Example: P sues D, a drug company, after P's children are born with serious birth defects. P claims the birth defects were caused by Bendectin, an anti-nausea drug manufactured and marketed by D for pregnant mothers. To demonstrate causation, P proposes to rely on eight experts, who will testify that a re-analysis of previously published epidemiological studies, plus their own unpublished experiments, suggests that Bendectin can cause birth defects. D, correctly claiming that none of the many published studies on Bendectin ever concluded that the drug could cause birth defects, moves to have the case thrown out on summary judgment.

Held, for P. For federal cases, the test for admissibility of scientific evidence is not whether the testimony is "generally accepted," but merely whether the testimony is "scientific knowledge." The degree to which the testimony or theory has been accepted in the scientific community is relevant, but is not dispositive — new theories that have not yet been generally accepted may nonetheless be "scientific knowledge," in the sense that they have been tested according to the procedures of science. Similarly, the fact that a theory has not yet been published or peer-reviewed is relevant but not dispositive. "Ordinarily, the key question to be answered in determining whether a theory or technique is scientific knowledge . . . will be ***whether it can be (and has been) tested."*** *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, *supra.*

4. **Increased risk, followed by actual damage:** Suppose that the defendant's conduct cannot be shown to have necessarily caused a later event to come about, but can be shown to have increased ***the risk*** that that later event would happen, and the later event ***does in fact happen.*** Is the defendant a "cause in fact" of the later event? The issue arises most frequently in connection with ***medical misdiagnoses*** — if the doctor misdiagnoses the patient's condition, thus delaying treatment, and it can be shown that statistically this delay caused the patient's chance of survival to be reduced, is the doctor liable when the patient dies from the originally-undiagnosed condition? Some courts have found the doctor ***liable*** in this situation, ***even if the patient would probably have died of the condition with proper diagnosis.***

Example: P consults the Ds, a group of doctors. The Ds fail to diagnose P as having lung cancer. The correct diagnosis is later made, but P dies of the disease. The parties agree that had the Ds promptly diagnosed P, he would have had a 39% chance of survival, and that with the delay in diagnosis his chances dropped to 25%. The Ds argue that since P would probably have died anyway, their negligent delay in diagnosis was not the cause in fact of his death.

Held, for P. On these facts, a jury could reasonably find that the Ds caused P's death. "Medical testimony of a reduction of a chance of survival from 39% to 25% is sufficient evidence to allow the [causation] issue to go to the jury." (But P can recover only for direct items of damage due to premature death, such as lost earnings and additional medical expenses, not for emotional suffering, loss of consortium, etc.) *Herskovits v. Group Health Cooperative of Puget Sound*, 664 P.2d 474 (Wash. 1983).

a. Measure of damages: It is arguably unfair for the Ds in *Herskovits* to have to pay for the entire direct damages suffered by P as a result of early death (lost earnings, additional medical expenses, etc.), since there was only a one-seventh chance that the Ds' negligence produced a death that would not otherwise have happened when it did. Perhaps a fairer handling of the damages problem would be to make the Ds liable for 14% of the damages that P suffered by dying early (e.g., 14% of the earnings he would have had had he lived to a normal old age, etc.). See P&K, p. 272. On the other hand, P in this situation could argue that the relation between the Ds and the cancer should be analogized to the relation between joint tortfeasors — because the Ds were "a" cause in fact (even if not the sole cause in fact) of P's premature death, they should be jointly and severally liable for the full damages, just as one of several joint tortfeasors is jointly and severally liable for the loss he partly causes (see *infra*, p. 181). *Id.*

5. Increased risk, not yet followed by actual damage: Now, consider the flip side of the problem discussed in paragraph (4) above: assume that the defendant's conduct increased the risk that some later damage would occur, but the actual damage has ***not yet occurred.*** May the plaintiff recover something on a ***"probabilistic"*** basis?

Example: For instance, suppose a product manufactured by D has increased P's risk of incurring fatal pancreatic cancer from 1% to 15%. P does not yet have pancreatic cancer (though, perhaps, P has some pre-cancerous condition). May P recover now an amount equal to 14% of what he could recover for an actual fatal case of pancreatic cancer?

a. Traditional view: The traditional approach is to answer ***"no"*** to this question — unless P can show that it is ***more probable than not*** that he will incur the harm in the future, P cannot recover anything now, and must wait until he actually incurs the harm, if that ever happens. H,P&S, p. 694. Courts adhering to this traditional view worry that the tort system will be swamped with tens of thousands of claims, especially in toxictort situations.

b. "Emerging view" allows recovery: But a few modern decisions (representing what we'll call the "emerging view") have ***allowed*** recovery where P shows a real, but less than 50% chance, that he will incur the harm in the future.

i. Smoothing effect: Observe that the "emerging view" has a "smoothing" effect compared with the traditional rule. Under the traditional rule, if P has a less than 50% chance of incurring the harm, P gets nothing; if P has a greater than 50% chance, P collects ***full*** damages (not discounted for the chance that the harm will never occur). Under the emerging view, as it is usually put forth, there should be a discount for the chance that the harm will not occur, whether P's chance of incurring the harm is less than 50% or greater than 50%. So at least in theory, neither side gets a windfall under the emerging view. (On the other hand, a lot more suits probably get brought, especially in mass-exposure toxic tort scenarios, such as a chemical explosion or widespread exposure to a substance like asbestos.)

c. Surveillance: Even courts following the traditional view generally allow the plaintiff to recover for the costs of ***medical surveillance.*** That is, the defendant is required to pay the ongoing costs for ***checking*** the plaintiff's condition periodically, to determine whether the plaintiff has incurred the condition.

d. Fears: Plaintiffs also frequently attempt to recover for ***emotional distress*** damages, i.e., damages for the ***fear*** that they will incur the harm in the future. As you might expect, courts following the traditional view that the plaintiff may not recover for a less-than-50% chance of incurring the harm in the future also generally do

not permit the plaintiff to recover for his fear of incurring the harm. See the discussion of this topic (sometimes called "cancerphobia") *infra*, p. 216.

6. **"Double fault and alternative liability":** Generally, as noted, the plaintiff must bear the burden of proving actual causation. In one situation, however, the court may thrust this burden on the *defendant* (or defendants). This situation has been termed by Prosser and Keeton that of "clearly established ***double fault and alternative liability."*** P&K, pp. 270-71. That is, the burden shifts where the plaintiff can show that each of two persons was negligent, but that only one could have caused the injury. In this situation, it is, according to most courts, up to each defendant to show that the other caused the harm. See Rest. 2d, §433B(3).

   Example: P, D1, and D2 go hunting together. D1 and D2, at the same time, negligently fire at a quail, and P is struck by one of the shots. It is not known from which gun the bullet was fired.

   Held, the burden is on each of the defendants to show that it was the other's shot which hit P. The defendants "brought about a situation where the negligence of one of them injured the plaintiff, hence it should rest with them each to absolve himself if he can." Otherwise, P might be left remediless. (The court then analogized to the case of *Ybarra v. Spangard, supra,* p. 113, 129.) *Summers v. Tice,* 199 P.2d 1 (Cal. 1948).

   a. **Failure to show negligence:** In *Summers*, it was established that both defendants had behaved negligently. A few courts have apparently extended this rule of shifting the burden of proof onto the defendants to cases where it is ***not*** so clear that all defendants were negligent. For instance, if the plaintiff is injured by one of two cars involved in a collision, and cannot prove which, a court might impose the burden of proof as to causation on the defendants, even if it was not clear that both had been negligent. However, Prosser and Keeton recommend against such a shift in this situation. See P&K, p. 271.

7. **The "market share" theory:** The "double fault and alternative liability" theory has occasionally been extended to situations involving ***three*** or more parties. Thus if the plaintiff cannot prove which of three or more persons caused her injury, but can show that all were negligent (or produced a defective product), the court may

cast upon each defendant the burden of proving that he did not cause the injury. This is especially likely to occur in cases of ***products liability,*** where the plaintiff was injured by her long-ago usage of a product which she can identify only by ***type,*** not brand name. If a given member of the class of defendants is unable to prove that he did ***not*** cause the injury, the court may well require him to pay that percentage of the plaintiff's injuries which the defendant's sales of the product bore to the total market sales of that type of product. This is known as the ***"market share"*** theory of liability.

Example: At least 200 manufacturers use an identical formula to produce DES, a synthetic estrogen. P alleges that her mother took the drug during pregnancy, and that it has caused P to develop cancer. P is unable to show which manufacturer of DES produced the drug that P's mother took. However, she sues five drug companies, who she asserts manufactured 90 percent of the DES ever marketed.

Held, P need not identify the single manufacturer of the drug that her mother used, since this would be impossible to do. It is true that it cannot be said with certainty that one of the five D's produced the dosages taken by P's mother. However, the unavailability of proof is not at all P's fault, and is partially attributable to the fact that the D's produced a drug whose bad effects were not visible for many years. Furthermore, "[f]rom a broader policy standpoint, defendants are better able to bear the cost of injury resulting from the manufacture of a defective product," since they can discover and guard against defects, and warn of harmful effects. Thus the rule here will give the D's an incentive to make their products safe.

Each defendant is free to show (but has the burden of proving) that it could not have produced the particular dosages consumed by P's mother. Any defendant who cannot make such a showing will be liable for the proportion of any judgment represented by that defendant's share of the overall DES market. *Sindell v. Abbott Laboratories*, 607 P.2d 924 (Cal. 1980).

a. No right to exculpate oneself: In *Sindell*, the court said that if a particular defendant could show that it could not ***possibly*** have manufactured the drug that P's mother used (e.g., because it didn't start making the drug until later, or never sold in the state where P's mother purchased the drug), D would escape liability. But some later decisions that have applied the market share theory have *not* agreed that the defendant should be allowed to exculpate itself by showing that it did not make the particular items in question. For instance, *Hymowitz v. Eli Lilly & Company*, 539 N.E.2d 1069 (N.Y. 1989), was, like *Sindell*, a DES case. The New York Court of Appeals held that the particular defendant could escape liability by

showing that it *never* sold DES for pregnancy use. But, the court held, a defendant should not be permitted to escape liability merely by showing that it could not have possibly produced the DES that injured *the particular plaintiff:* "Because liability here is based on the over-all risk produced, and not causation in a single case, there should be no exculpation of a defendant who, although a member of the market producing DES for pregnancy use, appears not to have caused a particular plaintiff's injury."

b. National market share: Courts faced with a market share situation have also struggled with the issue of ***what market*** should control for purposes of divvying-up damages among defendants according to their market shares. For instance, should the relevant market be the national market for the product, or the market in the state where the plaintiff's injury took place? The emerging consensus seems to be that a ***national*** market concept should be used, since this is easiest to administer. For instance, the court in *Hymowitz, supra,* adopted a national-market approach mostly because a localmarket approach would require complete litigation of the market share of possibly hundreds of participants for every single case, or at least for every single state, creating unworkable administrative problems. (Of course, a consequence of the nationalmarket approach is that a plaintiff injured in New York and suing in New York might be able to recover from D 20% of her damages based on D's 20% share of the national market, even though D never sold a single dosage in New York.)

c. No joint-and-several liability: Suppose that some manufacturers who had market share have since gone out of business, or are not before the court in the present action. Ordinarily, co-tortfeasors are subject to ***"joint-and-several"*** liability. That is, the plaintiff may recover her ***entire*** damages from any one defendant, rather than just that defendant's proportionate share of the harm caused. (See *infra,* p. 185.) But courts adopting the "market share" theory are, more and more, ***rejecting*** the standard jointand-several liability approach, in favor of allowing a plaintiff to collect from any defendant only that defendant's ***proportionate*** share of the harm caused.

Example: Suppose that 200 manufacturers made the drug DES at one time or another

during the 1960's. Suppose that by 2005, when P sues, only 10 of these defendants are left in business. These 10 defendants together accounted for 20% of the national market share for the product during the '60s (assume that they each held 2% of the market). These 10 are defendants before the court, but all other makers are out of business and insolvent. If joint-and-several liability were allowed, P could collect her entire damages from *any one* of these 10 defendants. But most courts today, if they follow the "apportion by market share" approach at all, would limit P to collecting from each of defendant only that defendant's actual share of the harm caused. Thus if P suffered $1 million of damages, she would be permitted to collect from each D only 2%; she would collect only 20% of her damages overall, because of the failure of the other 80% of the makers to be reachable for damages.

d. Alternate "enterprise liability" theory: A few courts, instead of applying the market share theory, have imposed liability via what is sometimes called the theory of ***"enterprise liability."*** As the theory goes, the multiple defendants have engaged in some sort of industry-wide ***cooperation*** (e.g., delegating to an industry trade association the authority to promulgate labelling or product-safety standards.) By this cooperation, the defendants may be said to have "jointly controlled the risk," so that it is not unreasonable to hold each member of the industry liable.

i. Joint-and-several liability more likely: A court following the "enterprise liability" approach will probably be more apt to impose joint-and-several liability than when using the market share theory, since by hypothesis, the defendants have acted in concert, and tort law has always traditionally awarded joint-and-several liability against co-defendants who acted together. (See *infra*, p. 185.)

II. PROXIMATE CAUSE GENERALLY

A. Scope of problem: Suppose that the plaintiff has established that the defendant was "negligent", in the sense that the defendant acted with an unreasonable disregard of the risks her conduct would impose on others. Suppose further that the plaintiff has succeeded in establishing that the defendant's negligence was the "cause in fact" of the plaintiff's injuries. There remains one more major hurdle for the plaintiff — he must show that the defendant ***"proximately"*** caused the injuries.

1. Misnomer: This requirement of "proximate cause" is really a misnomer. The word "proximate", when it was first used in this context, meant merely "close in time or space"; yet, as will be seen,

this kind of proximity is only one of many factors that go into determining whether the defendant's act was the proximate cause of the plaintiff's injury. Nor does the word "cause" add much — since the plaintiff always has to make a separate showing that the defendant's act was the "cause in fact" of his injury, the limitation on liability imposed by the proximate cause requirement is really not causal at all.

2. **True nature of requirement:** Instead, the proximate cause requirement is a ***policy determination,*** arising out of a judicial sense that a defendant, even one who has behaved negligently, should not automatically be liable for ***all*** of the consequences, no matter how ***improbable or far-reaching,*** of her act.

   Example: Suppose D, driving carelessly, collides with a car driven by X. Unbeknownst to D, the car contains dynamite, which explodes. Ten blocks away, a nurse who is carrying P, an infant, is startled by the explosion, and drops him. (See *Palsgraf v. Long Island R.R.* [Andrews dissenting] discussed extensively *infra,* p. 156.)

   In this situation, all courts would undoubtedly hold that P could not recover against D. This is not because D has not been negligent (since she did impose an unreasonable risk of harm upon X); nor is it because her careless driving was not the cause in fact of P's injury (since without that carelessness, the collision and the explosion would not have occurred). The reason that D will not be liable is simply that the injury is so ***farfetched*** that courts administering a system based on fault feel it unfair to hold D liable. This feeling is expressed by stating that D's careless driving was not the "proximate cause" of P's injuries.

   a. **"Legal cause" better name:** Many writers feel that the term ***"legal cause"*** is a more descriptive label than "proximate cause". The Second Restatement uses the former term; see Rest. 2d, §434(2).

3. **Relation to "cause in fact":** The term "proximate cause" is sometimes used to include the concept of "cause in fact"; that is, in holding that the defendant's conduct was not the cause in fact of the plaintiff's negligence, the court may label this a failure of proximate cause. In this outline, however, the term "proximate cause" is not used to include the idea of actual causation, and encompasses only the restrictions on the defendant's liability for consequences that are deemed unduly far-fetched.

B. Multiple proximate causes: Just as an occurrence can have many

"causes in fact" *(supra,* p. 143-145), so it will also often have more than one proximate cause. For instance, if each of two drivers drives negligently and an accident results, it is quite likely that each will be held to be a proximate cause of the accident.

1. **Joint tortfeasors:** In fact, the whole idea of joint-and-several liability of joint tortfeasors *(infra,* p. 181) is premised on the fact that a tort can have more than one proximate cause, and more than one person legally responsible for it. In general, each possible tortfeasor's actions must be examined, by use of the tests described below, to ascertain whether his acts were so closely related to the resulting damage that he is a proximate cause of it.

III. PROXIMATE CAUSE — THE FORESEEABILITY PROBLEM

A. Need for dividing line: Since everyone agrees that the defendant's liability must stop short of the most far-reaching and bizarre consequences, the difficulty is to define exactly where this dividing line should be. It is quite likely that the task of formulating mechanical rules which will apply to all cases is an impossible one, and that the matter must be determined case by case, according to what seems instinctively fair.

1. **Conflicting views:** However, among courts which have tried to resolve the problem, two conflicting views have emerged. One, which might be termed the ***"direct causation"*** view, would impose liability for any harm that may be said to have directly resulted from the defendant's negligence, no matter how unforeseeable or unlikely it may have been at the time the defendant acted. The other, which could be called the ***"foreseeability"*** or ***"scope of the risk"*** view, would limit the defendant's liability to those results that are of the same general sort that made the defendant's conduct negligent in the first place; i.e., results of a generally foreseeable nature, both as to kind of injury and as to person injured.

2. **"Foreseeability" leading contender:** The "foreseeability" view appears to be "on its way to ultimate victory as the criterion of what is 'proximate,' if it has not already achieved it." P&K, p. 297-300. However, there are certain kinds of cases in which this view does not explain the result which is usually reached by the courts. Therefore,

an examination of both views, and the leading cases advocating each, is worthwhile.

B. The "direct causation" view: The ***"direct causation"*** view holds that the defendant is liable for all consequences of her negligent act, provided that these consequences are not due in part to what might be called "superseding intervening causes" (discussed *infra*, p. 162). The most significant aspect of this view, contrasted with the "foreseeability" view, is that the former would hold the defendant liable for all consequences, ***no matter how far-fetched or unforeseeable,*** so long as they flowed "directly" from her act, and not from independent new causes.

1. Formulation: One has sumarized this "direct causation" view as follows: " [N]egligence is tested by foresight but proximate cause is determined by ***hindsight."*** *Dellwo v. Pearson*, 107 N.Y. 859 (Minn. 1961). The "direct causation" view is thus sometimes called the "hindsight" theory of proximate cause.

2. The *Polemis case:* The most famous case espousing the "direct causation" view is ***In Re Polemis,*** 3 K.B. 560 (Eng. 1921).

a. Facts: In *Polemis*, the plaintiffs chartered their ship to the defendants. While the defendants were unloading it at the end of the voyage, they negligently dropped a plank into the hold; the plank somehow struck a spark, and this spark ignited petroleum the ship was carrying. The resulting fire destroyed the ship.

b. Holding: It was clear to the court both that the defendants had acted negligently in dropping the plank, and that no one could reasonably have foreseen that dropping the plank would strike a spark, let alone burn up the ship. Nonetheless, because the fire was the "direct" result of the negligent act, the defendants were held liable. "If the act would or might . . . cause damage, the fact that the damage it in fact causes is not the exact kind of damage one would expect is immaterial, so long as the damage is in fact directly traceable to the negligent act, and not due to the operation of independent causes having no connection with the negligent act. . . ."

c. Overruled: The *Polemis* case was, forty years later, overruled in a case known as *Wagon Mound No. 1*, discussed *infra*, p. 155. However, it nonetheless represents a powerful viewpoint, as evidenced by the fact that shortly after *Wagon Mound No. 1*, a case known as *Wagon Mound No. 2*, discussed *infra*, p. 160, very nearly reinstated it.

3. Rationale: The "direct causation" rule is often attacked on the grounds that it may result in limitless liability.

> **Example:** D, a railroad, operates one of its engines in a negligent manner. The engine sets fire to D's woodshed, which in turn causes P's house, located nearby, to be consumed by the fire.
>
> *Held*, for D. While the destruction of the woodshed is the "ordinary and natural result" of the negligent operation of the engine, to place liability on D for the destruction of P's house is too remote. "To sustain such a claim . . . would subject D to a liability against which no prudence could guard, and to meet which no private fortune would be adequate." *Ryan v. New York Central R. R. Co.*, 35 N.Y. 210 (1866).

a. Who should bear the loss: However, proponents of the "direct causation" view observe that where the issue arises, the injury has already occurred, and "the simple question is, whether a loss, that must be borne somewhere, is to be visited on the head of the innocent or guilty." *Fent v. Toledo, P. & W. R. Co.*, 59 Ill. 349 (1871).

b. Further support: Further support for this rule stems from the fact that in most cases of far-reaching harm from a single negligent act, the defendant is a large corporation, government, utility, etc., which by ***adjusting its prices, obtaining insurance,*** or by some other means, is better able to bear the burden of compensation than the plaintiff, who normally had no reason, or ability, to guard against the economic consequences of such a loss. P&K, p. 287.

c. Additional consideration: Furthermore, the imposition of extended liability does not really impose a higher burden of ***conduct*** upon the defendant. By hypothesis, he has been negligent in some respect toward some person; therefore, we are only asking him to bear the consequences of his negligence, not to conform to a standard of conduct higher than that which would be observed by the "reasonable person." *Id.*

C. The foreseeability view: The opposite view is one which seeks to apply the same factors to limit the scope of liability as are used to determine whether the conduct is negligent in the first place. That is, this view would make the defendant liable, as a general rule, only for those consequences of his negligence which were ***reasonably foreseeable*** at the time he acted.

1. ***Wagon Mound case:*** This view is clearly articulated in a case usually called ***Wagon Mound No. 1,*** A. C. 388 (Austral. 1961), *supra*, p. 154, *infra*, p. 160.

a. Facts: In *Wagon Mound,* the defendants' ship spilled oil into a bay. Some of the oil adhered to the plaintiffs' wharf, slightly interfering with the wharf's use. (The interference was so slight that no damage claim was made for it.) Then, however, the oil was set afire by some molten metal dropped by plaintiffs' workers, which ignited a cotton rag floating on the water. Because of this, the whole dock burned.

b. Unforeseeable result: The trial court found that it was not reasonably foreseeable to the defendants that the oil could be set afire on the water. The burning of the wharf was therefore also an unforeseeable result of the spillage.

c. Holding: The appeals court held that, in these circumstances, the defendants were ***not liable.*** The court rejected the "direct causation" rule, whereby any consequences, no matter how far-reaching, were laid at the defendant's door, simply because they were the "direct" result of his negligence: " . . . It does not seem consonant with current ideas of justice or morality that for an act of negligence, however slight or venial, which results in some trivial unforeseeable damage the actor should be liable for all consequences, however unforeseeable and however grave, so long as they can be said to be 'direct'."

d. Application of foreseeability rule: The court pointed out that it was both simpler, as well as less burdensome to defendants, to apply the same rule to the question of the scope of liability as is applied to determining whether the conduct is negligent to begin with, i.e., whether the result was foreseeable.

2. **Unforeseeable plaintiff:** *Wagon Mound* involved a plaintiff as to whom the defendant's conduct was clearly negligent in a trivial respect (minor interference with the use of the dock), and the question was whether the defendant should also be charged with more serious, but far-fetched, injury suffered by this same plaintiff. A slightly different kind of situation, but one involving much the same issue, might be termed the ***"unforeseeable plaintiff"*** problem. Suppose the defendant's conduct is negligent as to X (in the sense of imposing an unreasonable risk of harm upon him), but not negligent as to P (i.e., not imposing an unreasonable risk of harm upon P). If P is nonetheless injured through some fluke of circumstances, may she in effect "tack on" to the negligence against X, and establish the defendant's liability for her injuries?

   a. ***Palsgraf:*** This question was posed, and answered in the ***negative,*** by the most famous American tort case of all time, ***Palsgraf v. Long Island R. R. Co.,*** 162 N.E. 99 (N.Y. 1928), also discussed *infra*, p. 195.

      i. **Facts of *Palsgraf:*** In *Palsgraf,* a man running to board the defendant's train seemed about to fall; one of the defendant's employees, attempting to push him onto the train from behind, dislodged a package from the passenger's arms. The package, unbeknownst to anyone (except perhaps the passenger) contained fireworks, which exploded when they fell. The shock of the explosion made some scales at the other end of the platform fall down, hitting the plaintiff.

      ii. **Issue:** It was clear from the facts of the case that, although the defendant's employee may have been negligent toward the package-carrying passenger (by pushing him), his conduct did not involve any foreseeable risk of harm to the ***plaintiff,*** who was standing far away. The issue was whether, given the fact that the defendant had been negligent toward someone, this negligence was enough to give rise to liability to the plaintiff, injured by fluke.

      iii. **Holding:** The court, in a decision by Judge Cardozo, held that the defendant was ***not liable.*** "The conduct of the defendant's

guard, if a wrong in its relation to the holder of the package, was not a wrong in its relation to the plaintiff, standing far away. Relatively to her it was not negligence at all. Nothing in this situation gave notice that the fallen package had in it the potency of peril to persons thus removed. . . . The plaintiff sues in her own right for a wrong personal to her, and not as the vicarious beneficiary of a breach of duty to another." Furthermore, generally speaking, " . . . [A] wrong is defined in terms of the natural or probable, at least when unintentional."

iv. **"Negligence in the air":** Since the defendant's conduct did not involve an unreasonable risk of harm to the plaintiff, and the damage to her was not foreseeable, the fact that the conduct was unjustifiably risky to someone else is irrelevant. ***"Proof of negligence in the air, so to speak, will not do."***

v. **"Duty" formulation:** The majority opinion phrased its rule in terms of "duty", more than "foreseeability". The question, the court said, was whether the defendants had a duty of care to the plaintiff which was violated by their acts. But this formulation simply poses the same question as to the scope of liability; if the rule is that a defendant will be liable only to a plaintiff as to whom his conduct imposed a foreseeable risk, it will also be the case that the defendant violated no duty to a plaintiff as to whom there was no foreseeable risk. Phrasing the question in terms of duty does, however, have the advantage of not making the question sound like one of factual causation when it is really one of policy. See P&K, p. 281.

b. Dissent: A famous dissent by Judge Andrews put forth the opposing view (roughly similar to the "direct causation" view discussed above), in what many believe is a more convincing opinion than Cardozo's majority one. The defendant, like every member of society, bears a burden of due care, a burden to "protect ***society*** from unnecessary danger, not to protect A, B or C alone." When an act imposing an unreasonable risk of harm to "the world at large" occurs, "Not only is he wronged to whom harm might reasonably be expected to result, but he also who is in fact injured, even if he be outside what would generally be thought the danger

zone."

i. **Limitation of convenience:** The Andrews dissent recognized a need to cut a defendant's liability short of all possible consequences which might stem from his negligent conduct. However, Andrews' limit was not determined by the foreseeability of these consequences, but by a more nebulous test: "What we . . . mean by the word 'proximate' is that, because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point. This is not logic. It is practical politics."

ii. **Factors:** Andrews did, however, list some of the factors which he thought courts should consider in determining whether the consequences are so remote that liability should not attach. These included whether there was a "natural and continuous sequence" between cause and effect, whether there was a "direct connection" between them, without "too many intervening causes", whether the result was "too remote from the cause, and here we must consider remoteness in time and space", etc. In any event, Andrews argued, the court in *Palsgraf* should not rule on the record before it that the defendant's negligence was not the proximate cause of the plaintiff's injuries.

c. **Relevance to *Wagon Mound* problem:** Observe that the "unforeseeable plaintiff" problem, posed by *Palsgraf*, is extremely similar to the issue posed by *Wagon Mound* (in which a single defendant is subjected to an unreasonable risk of trivial injury, which in fact occurs, as well a risk of more serious damage, which damage is so unlikely as to be "unforeseeable", but which nonetheless occurs).

i. ***Wagon Mound* view:** The *Wagon Mound* court itself thought that these two issues must be resolved by the ***same test.*** Suppose, the *Wagon Mound* court said, there were two plaintiffs, each of whom had suffered the same unforeseeable injury as the result of a single act by the defendant. It would

be unjust to allow one to recover and not the other, merely on the grounds that the former had coincidentally suffered some trivial, but foreseeable, damage from the defendant's action. Thus in the view of the *Wagon Mound* court, and probably in the view of both sides in *Palsgraf*, the same test, whether "foreseeability" or "direct causation" is chosen, should be applied to both the plaintiff unforeseeably damaged by an act which constituted negligence towards someone else, as well as a plaintiff who suffers both foreseeable and unforeseeable injury from a single act by the defendant.

D. Cardozo rule generally followed: Cardozo's "reasonably foreseeable" standard has generally been ***followed by American courts,*** although only a few cases have involved precisely the *Palsgraf* "unforeseeable plaintiff" problem. P&K, p. 286.

1. "Highly extraordinary" test: Many courts express the Cardozo foreseeability approach by saying that the defendant will not have liability for injuries that are ***"highly extraordinary."*** Under this formulation, an injury that was a somewhat-unlikely but not completely-unforeseeable consequence of the defendant's negligence can still be a proximate result; but an injury that, viewed after the fact, seems to be an ***extraordinarily unlucky or unlikely consequence*** will ***not*** be proximate result. The case set forth in the following example is a good illustration of "highly extraordinary" formulation.

Example: D owns a house, and allegedly makes faulty repairs on a second-floor toilet. P, who is lawfully outside D's house watering D's flowers, receives a severe electric shock when he touches the outside water faucet. P sues D for negligence. It turns out (according to P's complaint) that due to the faulty repairs, the second-floor toilet had overflowed, and the flooding water reacted with the home's electrical system, causing current to flow to the outside faucet. D moves for summary judgment on the grounds that even if events happened the way P asserts, D's negligent repairs were not the proximate cause of P's electric-shock injuries.

Held, for D. As a matter of law, the injuries sustained by P were such a "highly extraordinary" consequence of the defective second-floor toilet that D could not be required to guard against such injuries. P's assertion that the requirement of proximate cause is automatically satisfied as long as D's negligence can be connected in an "unbroken causal chain" to P's injuries is not correct — if D couldn't reasonably foresee injuries like that befalling P, D's negligence is not the proximate cause of those injuries regardless of whether there was a "unbroken chain." *Hebert v. Enos*, 806 N.E.2d 452 (Mass. App. 2004).

2. **Third Restatement follows Cardozo view:** The various Restatements essentially follow the Cardozo foreseeability view, though with tweaks. Thus the Third Restatement agrees that there should not be liability for very unexpected harms: "An actor's liability is limited to those physical harms that ***result from the risks that made the actor's conduct tortious."*** Rest. 3d (Liab. for Phys. & Emot. Harm) §29. We'll call this the ***"scope of risk"*** standard. Illustration 9 to §29 essentially restates the facts of *Palsgraf:* Bob, an employee of Railroad, jostles passenger Betsy so that she drops a package. Unbeknownst to Bob or Railroad, the package contains explosives, which explode on impact, knocking over a platform scale 30 ft. away. The scale falls on waiting passenger Heather. The illustration agrees with the result in *Palsgraf:* Railroad (and for that matter Bob) is not liable, because the harm to Heather did not result from the types of risks that made Bob's jostling of Betsy negligent — what made Bob's jostling negligent was the risk to the package or perhaps to Betsy's person from direct contact, not the risk of "concussive forces due to an explosion." *Id.*

   a. **No separate rule for "unforeseeable plaintiffs":** The Third Restatement does ***not*** share Cardozo's the view that there should be a ***separate rule*** barring the liability for injury to ***"unforeseeable plaintiffs."*** Comment n to §29 says that the Restatement has no such special unforeseeable-plaintiff rule. Instead, the lack of liability in situations like the *Palsgraf* rewrite in Illustration 9 above derives from the Restatement's *general* rule barring liability for harmful results that are ***outside of the type of harms the risk of which made the conduct negligent.*** (Thus if the explosion had harmed Betsy, the package's owner, presumably the Third Restatement would have still concluded that Bob and the Railroad were not negligent, because what made the jostling negligent was not the risk of an explosion.)

3. **Exceptions to the foreseeable-consequences approach:** Although courts (and the Restatements) have generally accepted the view of Cardozo in *Palsgraf* that only foreseeable consequences may be recovered for,[1] there are a number of recurring situations in which most courts do *not* follow the *Palsgraf* no-liability view. Here are

some of these special situations:

a. Extensive results from physical injuries: Once the plaintiff suffers any foreseeable impact or injury, even if relatively minor, it is universally agreed, even by courts following the foreseeability rule, that the defendant is liable for ***any additional unforeseen physical consequences*** (provided these do not stem from "intervening causes" so unlikely that they should supersede liability — see *infra*, p. 168-168).

i. Plaintiff with egg-shell skull: This principle is most frequently illustrated by the hypothetical case of a plaintiff who, unbeknownst to the defendant, has a ***skull of egg-shell thinness.*** If the defendant negligently inflicts a minor impact on this skull, but because of this hidden defect, the plaintiff dies, the defendant will be liable for his death. See P&K, p. 292. The rule is sometimes expressed by saying that the defendant ***"takes his plaintiff as he finds him."***

Example: D, a taxicab driver, negligently strikes P, an alcoholic, with his cab. The accident hastens the development of delirium tremens, a condition which only occurs in alcoholics, and P dies from it.

Held, for P. Even though the delirium tremens probably would have resulted in P's death at a later time had D not injured P, D is nonetheless liable, since he negligently aggravated P's condition. *McCahill v. New York Transp. Co*, 94 N.E. 616 (N.Y. 1911).

(1) Rationale: Since the initial physical injury in these "thin skull" cases was foreseeable, the holding that the defendant is liable for the far-reaching physical consequences might be explained as simply a refusal by the courts to divide an essentially indivisible physical harm into foreseeable and unforeseeable components. But these decisions may really be more a function of courts' tendency to carry liability further in cases of personal injury than in cases involving property damage or other, even more abstract, economic loss.

(2) Intentional torts: This tendency is analogous to the tendency referred to previously *(supra*, p. 10) of courts to impose broader liability for unlikely consequences in the

case of intentional torts than in the case of negligent ones. This all points up the fact that tort law is largely an instrument of what courts perceive as justice and social planning, and not so much a series of strict legalistic rules of physical causation and compensation.

b. Rescuers: The "foreseeability" rule also seems frequently not to be strictly applied where the plaintiff is a ***rescuer*** of one who is endangered by the defendant's conduct, and the rescuer is herself injured. These cases are discussed *infra,* p. 165, in the treatment of intervening causes; here, we'll just say that the intervention of the rescuer is often not truly foreseeable, but this has not stopped the courts from imposing liability.

c. Foreseeable but highly unlikely: The foreseeability rule has also been weakened by cases holding that as long as the actual harm to the plaintiff was ***remotely foreseeable,*** there is liability even though these consequences were highly unlikely.

Example: The same facts as *Wagon Mound No. 1, supra,* p. 155, *infra,* p. 165. This time, however, the suit is brought by the owner of two ships which were docked at the wharf which burned; the defendant is the same as in *Wagon Mound No. 1.* Here, however, there is a finding of fact that it should have been foreseeable to the defendant that discharge of oil posed *some small risk of fire.*

Held, it does not follow from *Wagon Mound No. 1* that merely because the risk was small, the defendant was justified in ignoring it. The defendant should have weighed the risk against the difficulty of eliminating that risk, and avoiding the spillage would have been so unburdensome that it should have been done. Therefore, the defendant is liable. *Wagon Mound No. 2,* 1 A.C. 617 (Austral. 1966) *infra,* p. 165.

Note: Observe that the court here has taken the Learned Hand "balance the risk against the burden" analysis for determining negligence *(supra,* p. 99), and applied it for determining scope of liability. But it is hard to know how far the court meant to go — does liability only extend as to those consequences which by themselves were sufficiently likely and severe, in view of the small burden of avoiding them, that the defendant should have acted differently? Or does it apply to *any* consequence that is remotely foreseeable, even if the risk of that consequence was, by itself, not sufficient to justify the defendant's taking measures to avoid it (and the act was negligent only because of the risks of other consequences that did not materialize)? If the court meant the latter, then Prosser and Keeton seem to be correct in saying that the effect of this case is to "let the *Polemis* case in again by the back door, since cases will obviously be quite infrequent in which there is not some recognizable slight risk. . . . " P&K, p. 296.

d. General class of harm but not same manner: The courts have

also cut back on the apparent rationale of *Palsgraf* by holding that as long as the harm suffered by the plaintiff was of the ***same general sort*** that made the defendant's conduct negligent, it is irrelevant that this harm occurred in an ***unusual manner.***

Example: D gives a loaded pistol to X, an 8-year-old, to carry to P. In handing the pistol to P, X drops it, injuring the bare foot of Y, his playmate. The fall sets off the gun, wounding P. D is liable to P, since the same general kind of risk that made D's conduct negligent (the risk of accidental discharge) has materialized to injure P; the fact that the discharge occurred by means of an unforeseeable dropping of the gun is irrelevant. D is not liable to Y, however, since his foot injury was not foreseeable, and the risk of it was not one of the risks that made D's conduct initially negligent. See Rest. 2d, §281, Illustr. 3.[2]

e. Plaintiff part of foreseeable class: Similarly, it has been held that the fact that injury to the particular plaintiff was not especially foreseeable is irrelevant, so long as the plaintiff is a ***member of a class*** as to which there was a general foreseeability of harm. Both this rule, and the rule just mentioned (that the harm must merely be of the same general class as that the risk of which made the defendant's conduct negligent), are illustrated by the following well-known case.

Example: D1, a shipping company, negligently moors its ship at a dock run by D2. Ice and debris force the ship adrift, and it collides with another ship, which is properly moored. Both ships smash into a drawbridge run by D3, the City of Buffalo, which might have been able to raise the bridge except for the fact that its employees were not on duty at the time. The bridge is toppled, and a dam is created by the collapsed bridge, the two ships, and floating ice. A flood results, and suit is brought by the various owners of flooded riparian property.

Held, all three defendants are liable to the property owners. First, the fact that it would have been impossible to identify in advance precisely which property owners would be harmed is irrelevant; a loose ship surely poses a danger to river-bank property owners in general, and the failure to raise a drawbridge similarly threatens at least some owners, if only those whose property might be harmed by having the bridge tower fall on them. Since all of the plaintiffs were members of this general class of river-bank property owners, they are within the scope of risk, and are not barred from recovery by *Palsgraf*. Furthermore, the defendants may not succeed with their argument that there is no liability because the precise manner of the accident (i.e., flood damage from the backing up of ice due to the draw bridge's blocking the stream) was not foreseeable. There was a general, foreseeable risk that a loose ship would injure adjoining property, and that a drawbridge's failure to be raised would similarly damage adjoining owners. " . . . Where, as here, the damages resulted from the same physical forces whose existence required the exercise of greater care than was displayed and were of the same general sort that was expectable, unforeseeability

of the exact developments and of the extent of the loss will not limit liability." *Petition of Kinsman Transit Co. ("Kinsman No. 1")*, 338 F.2d 708 (2d. Cir. 1964).

IV. PROXIMATE CAUSE — INTERVENING CAUSES

A. Nature of intervening cause: Questions of proximate cause arise particularly frequently in cases where the plaintiff's injury is precipitated by what is generally called an ***"intervening cause".*** An intervening cause is a force which takes effect ***after*** the defendant's negligence, and which contributes to that negligence in producing the plaintiff's injury. Rest. 2d, §441(1).

1. Superseding cause: Some, but not all, intervening causes are sufficient to prevent the defendant's negligence from being held to be the proximate cause of the injury. Intervening causes of this kind are usually called ***"superseding causes",*** since they supersede, or ***cancel,*** the defendant's liability. See Rest. 2d, §440.

B. Foreseeability rule: In general, the issue of whether a particular intervening cause is a superseding one (i.e., one which prevents the defendant's act from being the proximate cause of the plaintiff's injury) is determined by the application of a test much like the Cardozo "foreseeability" test, described above.

1. Test: If the defendant should have foreseen the possibility that the intervening cause (or one like it) might occur, ***or*** if the ***kind of harm*** suffered by the plaintiff was foreseeable (even if the intervening cause was not itself foreseeable) the defendant's conduct will nonetheless be the proximate cause.

a. No liability: But if ***neither*** the intervening cause nor the harm was foreseeable (or "normal", a somewhat watered-down version of foreseeable), the intervening cause will be a superseding one, relieving the defendant of liability. P&K, p. 302.

C. Foreseeable intervening causes: There are situations in which the risk of a particular kind of intervening cause is the ***very risk*** (or one of the risks) which makes the defendant's conduct negligent in the first place. (Recall that the issue of proximate cause never arises until it is established that the defendant's conduct was negligent, in at least some way toward some person.) When this is the case, the intervening cause

will virtually never relieve the defendant of liability. See Rest. 2d, 442A.

1. **Illustration of scope of risk:** When courts hold that an intervening cause is not superseding because the risk of that intervention was one of the things that made the defendant's conduct negligent, they are really collapsing the concept of proximate cause into that of negligence. This is illustrated by the following Example.

   Example: P is riding as a passenger in a car driven by X. A fuel truck driven by an employee of D Oil Co., coming in the opposite direction, skids and blocks the road; X swerves to avoid it, and ends up off the highway. Because the accident occurs near the top of a hill, P gets out of the car to warn drivers coming up the hill from the other direction. While doing so, he is hit by an oncoming car.

   Held, D's negligence is the proximate cause of P's injury. D's basic act of negligence towards P was in endangering him during the initial near-collision. But one of the extra risks of D's conduct was that P would do exactly what he did, namely, try to warn other motorists. (The court noted that if P had gotten back in the car, and had an accident five miles down the road, D's negligence would not have been the proximate cause because, despite the fact that P would not have been at the fatal intersection had it not been for D's conduct, that conduct would not have increased the risk of the five-miles-down-the-road collision.) P's injury was therefore "not remote, either in time or place", from D's negligence, and D is liable. *Marshall v. Nugent*, 222 F.2d 604 (1st Cir. 1955).

2. **Acts of nature generally:** If the intervening event is an act of nature that is truly "extraordinary," and not foreseeable, it will often be held to be a superseding cause. But one exception to this principle is that if the extraordinary, unforeseeable, act of nature (or ***"act of God,"*** as such catastrophes are often called, particularly in insurance policies) merely produces the ***same result*** as was threatened in other ways by the defendant's negligence, the defendant may still be liable. The general rule that the defendant is liable in cases of "unforeseen intervening causes but foreseeable result" is discussed *infra,* p. 168.

3. **Risk of harm must be increased:** For the defendant to remain liable under this "foreseeable intervening cause" rule, it is not enough that the intervening cause was foreseeable. It must also be the case that the ***risk of harm*** due to this force was ***increased*** by the defendant's conduct.

   Example: P, on a long drive throughout which there is a lot of thunder and lightning, stops because D has carelessly smashed into a tree, blocking P's path. While P is waiting, his car is struck by lightning. D will be held not to be the proximate cause of P's injury. It is true that the lightning is somewhat foreseeable. It is also true that D is

a "but for" cause of P's injury, in the sense that had D not blocked P's route, D would have been somewhere else. But P was just as likely to be hit by lightning a few miles further down the road, where he would have been had there been no accident. Thus D's conduct has not increased the risk of damage to P through the foreseeable intervening cause. See P&K, p. 305-06. See also *Marshall v. Nugent*, supra.

4. **Foreseeable negligence:** The ***negligence of third persons*** may also be an intervening force that is sufficiently foreseeable that it will not relieve the defendant of liability. As was noted previously *(supra*, p. 109), the negligence of others is, in some situations, sufficiently foreseeable that it is negligence on the part of the defendant not to anticipate it and guard against it. In such a situation, it is not surprising that when the third person's negligence does occur, the defendant will be held to be a proximate cause of damage that was immediately precipitated by the third person's conduct.

Example: P is standing in a telephone booth located in a parking lot 15 feet from a major street. D1, while drunk, is driving on that street; she loses control of her car and crashes into the booth, severely injuring P. P would probably have been able to get out of the booth before the crash except that the booth's doors did not open properly. P sues not only D1 but also D2 (the phone company, which built and owned the phone booth). P claims that D2 is liable on both negligence and strict liability theories. D2 defends on the grounds that it was D1's negligence, not any negligence or design defect by D2, that was the proximate cause of the accident.

Held, P has stated a valid cause of action against D2. A jury could find that there was a reasonably foreseeable risk that a hard-to-open telephone booth located near a major thoroughfare might cause a person inside to be trapped and injured in a collision. Nor was D1's gross negligence superseding — "If the likelihood that a third person may act in a particular manner is the hazard or one of the hazards which makes the actor negligent, such an act whether innocent, negligent, intentionally tortious, or criminal does not prevent the actor from being liable for harm caused thereby." Since a jury could find that the risk that the booth would be hit by a negligent driver was one of the very things that made D2's conduct dangerous, P should be allowed to present his case to the jury. *Bigbee v. Pacific Telephone & Telegraph Co.*, 665 P.2d 947 (Cal. 1983).

a. Liquor sales: The doctrine that the foreseeable negligence of others will not be superseding also furnishes a rationale for holding ***tavern owners*** liable for accidents caused by patrons who have been served too much liquor. Many states accomplish this result by statutes known as ***Dram Shop Acts,*** which make commercial sellers of liquor statutorily and automatically liable for such accidents if they have served a person who they should have realized was already intoxicated. But this result is also sometimes

reached by the court acting without a Dram Shop statute.

i. **Social furnishing of liquor:** But where the defendant is not a commercial tavern or liquor store owner, but one who serves liquor ***socially*** or as part of ***business entertainment,*** most states have ***not*** been willing to impose common law liability.

5. **Criminal or intentionally tortious conduct:** A third person's ***criminal conduct*** may, similarly, be sufficiently foreseeable that, even though it is clearly an intervening act, it will not be a superseding one. This is also true of ***intentionally tortious acts*** by third persons, the risk of which the defendant could have foreseen. In practice, however, the plaintiff may find it quite difficult to establish that the risk of criminal or intentionally tortious intervention was so great that it should have been guarded against.

Example: D Railroad negligently derails a tank car full of gasoline, and the gasoline spills into the street. X then throws down a lighted match, which ignites the gasoline, leading to an explosion that injures P. Evidence at trial is conflicting as to whether X was merely negligent in throwing down the match, or rather did it on purpose.

Held, on appeal, if X acted merely negligently (e.g., by lighting his cigar with the match), D is liable, since the risk of such a casual act by someone was one of the risks which made D's derailment negligent. But if X set the fire intentionally, such an intervention was so unlikely that D could not reasonably have been expected to guard against it. Case remanded for a new trial to determine whether X was negligent or criminal. *Watson v. Kentucky & Indiana Bridge & R.R. Co.,* 128 S.W. 146 (Ky. 1910), *infra*, p. 168.

a. **Shifting responsibility:** Courts may also avoid holding the defendant liable for intervening criminal or intentionally tortious acts by holding that responsibility for the plaintiff's harm has ***shifted*** to the intervenor. See the discussion of shifting responsibility, *infra*, p. 172. Thus the court in *Watson,* instead of holding that the intentional-match-throwing was unforeseeable, could have reached the same result by holding that foreseeable or not, this criminal act was so clearly the direct responsibility of X that D should be relieved of liability. See P&K, pp. 317-18.

D. Weakening of "foreseeable": We saw that in courts following the general "foreseeability" approach to proximate cause, the requirement that the type of harm suffered by the plaintiff have been foreseeable has often been watered-down; this was true, for instance, of the decision in

Wagon Mound No. 2, supra, p. 160, where even a very slight chance that the harm would occur was held to render it foreseeable. A similar weakening of the concept of foreseeability has occurred in cases involving intervening causes; that is, certain intervening causes have been held to be "foreseeable", and thus not superseding, even where the odds that these causes would intervene were very long indeed.

1. **"Normal" intervention:** This watering-down of foreseeability has sometimes been expressed by saying that the intervening cause will not be superseding so long as it is a ***"normal"*** consequence of the defendant's conduct, whether foreseeable or not. See Rest. 2d, §443. This has been particularly true in cases where the intervening cause is a ***response*** to the danger or harm caused by the defendant. This includes cases of attempted ***escape from harm, rescue, aggravation*** of the harm by responses such as attempted ***medical treatment,*** and actions taken under emotional disturbance (including ***suicide).*** We consider each of these scenarios separately below.

2. **Attempted escape from danger:** Thus if, in response to the danger created by the defendant's conduct, the plaintiff or someone else attempts to ***escape*** that danger, thus causing injury to the plaintiff, the attempted escape will not be a superseding cause so long as it was not completely irrational or bizarre.

   Example: D, driving on the highway, negligently attempts to pass a car driven by P, even though there is a truck approaching from the other direction. To avoid the threatened collision, P turns the car to the right edge of the highway, and hits a railing. X, a passenger in P's car, foolishly goes into an entirely unreasonable panic, opens the door of the car, and throws out his child, injuring her. P's act will not be a superseding cause relieving D of liability for damage to P's car; this is so because P's act was a "normal" (i.e., not extraordinary) response to the danger. (This is the case even if P's act was contributorily negligent, although this might be a defense that could be asserted by D). X's act is so bizarre and abnormal, however, that it will be a superseding cause, relieving D of liability for the injury to X's child. See Rest. 2d, §445, Illustr. 2 (slightly different facts).

3. **Rescue:** Similarly, if the defendant's negligence creates a danger which causes some third person to attempt a ***rescue,*** this rescue will normally not be an superseding cause, unless it is performed in a ***grossly careless manner.*** Assuming that the rescue is not of this latter class, the defendant may be liable either to the ***person being rescued*** (even if part or all of his injuries are due to the rescuer's ordinary

negligence), or to the ***rescuer*** (if she is injured in her rescue attempt).

a. Foreseeability: Some cases have held the rescuer not to be a superseding cause on the theory that the rescue was "foreseeable." The most notable such case is *Wagner v. International Railway,* a decision of Judge Cardozo set forth in the following Example.

Example: P and his cousin Herbert take an electric railway run by D. As the train is crossing a bridge, it lurches violently, and Herbert is thrown out. P leaves the train and walks along the bridge, trying to find Herbert's body; in the dark, he falls off the bridge and is hurt.

Held, D owed a duty to P as well as to Herbert. ***"Danger invites rescue. The cry of distress is the summons to relief.*** . . . The risk of rescue, if only it be not wanton, is born of the occasion. . . . The wrongdoer may not have foreseen the coming of a deliverer. He is as accountable as if he had." (However, a new trial must be had to decide whether P was contributorily negligent.) *Wagner v. International Ry.*, 133 N.E. 437 (N.Y. 1921).

b. Gross negligence: As noted, if the rescuer's act is ***grossly negligent*** or otherwise ***bizarre,*** it will generally be regarded as a superseding cause.

c. Firefighters' rule: If the rescuer is a ***firefighter, police officer,*** or other public employee ***paid to assume particular risks,*** most states apply the so-called ***"firefighters' rule,"*** also known as the ***"professional risk takers rule."*** Under this rule, a professional risk taker may ***not recover*** for injuries caused by another's negligence, where "the negligently created risk was the very reason for [the plaintiff's] presence on the scene." Dobbs, §286. Despite the term "firefighters' rule," the rule extends to ***police officers*** as well, when they are called to premises to perform law-enforcement duties.

Example: D negligently invites guests to his house, whom he has reason to know often get into fights. Two guests get into a fight, and D calls the police. P, a police officer, responds, and suffers a broken jaw while breaking the fight.

Under the common-law firefighters' rule, still in force in most jurisdictions, P will not be able to recover against D. That's because the rule says that a professional risk-taker such as a police officer may not recover in negligence against one who created the peril, if that peril was the very reason for the risk-taker's presence on the scene, and the peril is one of the special risks inherent in the plaintiff's job. The facts here meet these requirements for application of the rule.

i. Beyond premises liability: Originally, the firefighters' rule

applied only to premises liability. But those courts that apply it today generally extend it to cover professional rescue efforts that take place ***outside of D's (or anyone's)premises.*** And they extend it to non-rescue situations, such as ***chasing suspects.***

Example: D is speeding. P, a police officer, chases him at high speed, and is injured in a collision. If the jurisdiction follows the modern version of the firefighters' rule, P will not be permitted to recover against D for creating the peril, because police officers are deemed to have voluntarily accepted the risk of injury from high-speed chases. Dobbs, §285, p. 770.

ii. Normal risks: Even among courts that apply the firefighters' rule, the doctrine is generally limited to ***risks*** that are ***inherent in, and special to,*** that particular occupation. Dobbs, §286.

Example: While driving on the job, P, a police officer, is injured in a collision in ordinary traffic with a car driven negligently by D. Even if the jurisdiction applies the firefighters' rule, P can recover against D, because the rule doesn't apply to the collision here. That's because the risk of a collision in ordinary traffic is not one of the special risks inherent in police work.

4. Aggravation of injury: If the defendant negligently injures the plaintiff, and as a result of that injury the plaintiff receives a further injury or an ***aggravation*** of the existing one, the defendant is liable for all of this.

a. Medical treatment: Thus if the defendant injures the plaintiff, who then undergoes ***medical treatment,*** the defendant will be liable for anything that happens to the plaintiff as a result of negligence in the medical treatment, infection, or other by-products. *See, infra,* p. 185.

i. Bizarre result: Some results of attempted medical treatment are, however, so ***gross and bizarre*** that they are regarded as superseding. The Second Restatement illustrates this by the example of a nurse who is unable to bear the plaintiff's suffering, and kills him by an injection of morphine which she knows may be fatal. (Rest. 2d, §457, Illustr. 4.)

ii. Most malpractice not superseding: But most of the things that can go wrong in medical treatment are not superseding causes. For instance, if the plaintiff is injured when the

ambulance carrying him gets into a collision, the person causing the initial need for the ambulance will be liable (P&K, p. 310, fn. 86); similarly, if the plaintiff is hospitalized, and then receives an unnecessary operation due to a ***clerical mix-up*** of his records with those of another patient, the defendant who caused him to be hospitalized in the first place will be liable. (Rest. 2d, §457, Illustr. 3.)

iii. Lowered vitality: Similarly, if the defendant causes the plaintiff to become sick or otherwise weakened, and this weakened state leads the plaintiff to ***catch another disease*** which she might not otherwise have caught, the defendant's liability will extend to the results of this subsequent disease. Rest. 2d. §458.

b. Subsequent accidents: And if the defendant injures the plaintiff, and this injury makes the plaintiff particularly susceptible to ***another accident,*** which occurs, again there will be full liability.

> **Example:** D negligently runs over P, breaking his leg. Two months later, as P is learning to walk on crutches, he slips, and breaks his arm. D is liable for injuries to the arm as well as the leg. See Rest. 2d, §460, Illustr. 1. (But if P tried to walk on the crutches down a ladder into his basement, and fell, D would not be liable for this fall; the fall would be such an abnormal consequence of the original broken leg that it would be viewed as superseding. *Ibid*, Illustr. 2.)

5. Suicide: What if the plaintiff becomes so despondent or pained by the injuries he has received from the defendant's negligence that he ***kills himself?*** If the plaintiff was ***sane*** at the time he committed suicide, the courts unanimously hold that the suicide was a superseding cause, and the defendant has no liability for it.

a. Insanity: But if the injury drives the plaintiff ***insane,*** and the suicide is the product of this insanity, recovery is usually allowed. The requisite insanity has generally been found only where the suicide is shown to be the product of an ***"irresistible impulse"*** on the part of the plaintiff. This phrase, however, has acquired a broader meaning in recent years.

E. Unforeseeable intervention but foreseeable result: The "intervening cause" cases examined above were ones in which the intervention was foreseeable, or at least "normal". What if the intervention is neither

foreseeable or normal, but it leads to the ***same type of harm*** as that which was threatened by the defendant's negligence? The general tendency in such situations is to hold that the intervention is ***not a superseding cause.*** See P&K, p. 316; see also Rest. 2d, §442B.

1. **Rationale:** The rationale for this result is that since the defendant has imposed upon the plaintiff an unreasonable risk of the same type of harm as that which occurred, it is unjust to allow him to escape responsibility merely because the harm was in fact produced by an unforeseeable intervention. As Prosser and Keeton put it, this result is compelled by "an instinctive feeling of justice." P&K, *ibid.*

   Example: D Transit Co. runs a trolley system, as part of which it maintains wooden poles. It allows one of these poles to become infested by termites. P is standing near that pole when X, negligently driving his car, collides with the pole, knocking it over onto P.

   Held, if the evidence shows that a properly maintained pole would not have broken under the impact of X's car (so that D's negligence is a cause in fact of the injury), X's negligence will not be a superseding cause, even though it was unforeseeable. Since the general risk imposed by D's negligence is that the pole would, due to its own weight or outside forces, fall on a bystander, and since the same general type of harm occurred (falling pole injures bystander), the fact that the actual precipitating cause was unforeseeable is irrelevant. *Gibson v. Garcia,* 216 P.2d 119 (D.C. App. Cal.1950).

2. **Criminality or intentional tort:** But if the unforeseeable intervening act is a ***crime or intentional tort,*** it ***will*** usually be a superseding cause, even if the injury that results to the plaintiff is the same as that threatened by the defendant's negligence.

   Example: This was the case in *Watson v. Kentucky & Indiana Bridge & R.R. Co., supra,* p. 164 in which the court held that if the explosion of gasoline spilled by the defendant was due to arson on the part of a third person, that arson would a superseding cause.

   a. **Rationale:** As noted, *supra*, p. 164, the rationale for holding that an intervening intentionally tortious or criminal act is a superseding cause is often that responsibility has ***"shifted"*** to the third-party criminal or tortfeasor. See the discussion of shifting responsibility *infra*, p. 172. See Rest. 2d, §442B, Comment c.

F. Unforeseeable intervention with unforeseeable results: The last major class of intervening causes consists of those interventions which

are not foreseeable (or even "normal"), and which produce results that are not of the same nature as those potential results that made the defendant's conduct negligent. Generally, the courts have treated such intervening causes as superseding. As with the other classes of intervening causes, this result has been reached on basically instinctive feelings of justice; in this case, that it is not fair to hold the defendant liable for a harm that was not within the original risk of her negligent conduct, where that harm was produced through an unforeseeable intervention. See P&K, p. 312.

1. **Extraordinary acts of nature:** Thus an extraordinary act of nature ("Act of God") which brings about damage to the plaintiff different from the damage threatened by the defendant's negligence, will relieve the defendant of liability. See Rest. 2d, §451

   Example: In a state where it is a tort to build a "spite wall" (i.e., a wall separating one's land from that of one's neighbor), D builds such a wall. The wall is strong enough to withstand any foreseeable winds, but an extraordinary cyclone blows the wall down, damaging the house of P, D's neighbor. The cyclone will be held to be a superseding cause relieving D of liability, since it was not foreseeable or even "normal", and the risk of damage to the land of his neighbor was not one of the risks that made D's original conduct tortious. See Rest. 2d, §451, Comment a.

2. **Other extraordinary acts:** Similarly, intentionally tortious or criminal acts by third persons, gross negligence by third persons, and other highly unusual intervening causes, have been held to be superseding, where they produce a result different from that the threat of which made the defendant's conduct negligent. See P&K, pp. 312-13. Several of the more frequently recurring fact situations in which this rule is applied are as follows.

   a. **Key-in-ignition cases:** Suppose the defendant leaves his car unlocked, with the ***key in the ignition,*** and a thief steals it, later running down the plaintiff. Is the thief's act a superseding one? In most circumstances, the courts have answered ***"yes,"*** whether or not there is a local car-locking ordinance. See P&K, pp. 313-14.

      i. **Rationale:** The rationale for this result can be expressed as follows: First, the risk of the intervening act (if one defines it as not merely the theft of the car, but the subsequent negligent driving of it) is not one of the risks which makes the

defendant's conduct negligent. (His conduct is negligent, if at all, because of the danger to the owner's own car.) Secondly, the kind of result (personal injury or property damage to third persons) is not the kind of result that is threatened by the defendant's negligence.

ii. **Unusual circumstances:** But in a particular case, circumstances may be such that the owner should foresee that leaving the keys in the car will materially increase the risk of harm to others. For instance, suppose the owner leaves the car in an area known to have a high crime rate; the owner may well be held to have been on notice of the increased danger of theft and ensuing negligence, in which case the owner would be liable for the later injuries to the plaintiff.

iii. **Negligence per se:** Recall that the car-locking problem arose in the discussion of negligence *per se*, *supra*, p. 118. There, it was noted that statutes requiring carlocking are sometimes held to be for the protection of third persons, and violations are held to be negligent *per se* towards a bystander who is injured. Where negligence *per se* is found on this basis, the court will normally also conclude that the theft and the thief's negligence are not superseding causes, since their conduct was somewhat foreseeable and was part of the risk that the statute was designed to prevent.

b. Delays by carriers: Suppose a ***common carrier*** negligently ***delays the transport of goods,*** leading them to be destroyed by a flood, fire, etc. The delay is clearly the cause in fact of the damage, since had there been no delay, the goods would not have been in the place that was flooded or burned. But unless the plaintiff can show that an ***increase in the risk*** of such a catastrophe was foreseeable as the result of the delay (e.g., the carrier fails to move the goods out of an area where floods have been threatened into a safer one), most courts (and the Second Restatement, §451) would probably hold that the act of nature was a superseding cause.

i. **Minority view:** Other courts might impose liability on the carrier, but this is more properly viewed as the imposition of

strict liability (i.e., liability without regard to fault) than as the application of traditional rules of proximate cause and negligence. See P&K, p. 315.

G. Dependent vs. independent causes: In deciding whether to treat an intervening cause as superseding, courts have often distinguished between ***"dependent"*** intervening causes and ***"independent"*** ones. A dependent intervening cause is one which operates in ***response*** to the defendant's negligence. An independent intervention is one which would have existed even had the defendant not been negligent (but which, in any case in which the defendant's negligence is a cause in fact of the plaintiff's harm, combined with that negligence to produce the harm.)

> **Example:** Suppose D negligently fails to maintain his tires in a safe condition. If he has a blow-out, and this blow-out makes his car swerve in such a way that P, in an oncoming car, tries to avoid him by going off the road and runs into a fence, P's act of avoidance is a dependent intervening cause. But if P had gently bumped into D prior to the blow-out, and this bump had precipitated the blow-out, P's act would be an independent one, since it would have occurred regardless of the condition of D's tires (although the resulting blow-out might not have occurred).

1. Significance of distinction: An intervening cause's status as dependent or independent is ***not per se dispositive*** as to whether that intervention is superseding. It may well be that dependent causes are generally more foreseeable than independent ones, and are thus more likely to be superseding. But an independent intervening force can certainly fail to supersede (e.g., X's collision with the termite-infested pole in *Gibson v. Garcia*, *supra*, p. 168, which would have occurred even if the pole had been in good condition), and a dependent cause can be superseding (e.g., a grossly negligent rescue attempt, which would not have occurred but for the danger to the rescued person created by the defendant).

a. Distinction not important: The student should therefore not place too much attention on the "independent" and "dependent" labels, and should instead ask the question, "Did the defendant's conduct increase the risk either that an intervening cause like the one that occurred would occur and bring damage, or that damage like that which occurred would occur?" If the answer is yes, the intervening cause will generally not be superseding.

H. Function of judge and jury: Is it the ***judge*** or the ***jury*** who decides the issue of proximate cause? The answer is that *both* the judge and the jury participate in deciding this issue, but they participate in different ways.

1. **Judge formulates the legal rule:** As you would expect, it is up to the ***judge*** to ***formulate the appropriate legal rule*** in the form of an instruction to the jury.

   Example: Assume that the jurisdiction has adopted the Third Restatement's "scope of risk" formulation *(supra,* p. 158). In that event, assuming the case went to the jury, the judge would instruct the jury in words something like the following: "You may find that the defendant is liable for the physical injuries suffered by the plaintiff only if you conclude that those injuries were the result of the type of risk that made the defendant's conduct unreasonably dangerous to other persons."

2. **Judge's "gatekeeper" function:** Keep in mind, however, that although the judge doesn't make the factual determination of whether D proximately caused P's injuries (as we'll see below, that's the jury's job), trial judges can and often do exercise an important ***"gatekeeper"*** function. That is, the judge can and should ***prevent the case from ever being decided by the jury,*** if the judge decides that ***no reasonable jury could find that the plaintiff has established each element of her prima facie case*** by the required preponderance of the evidence. (See *supra*, p. 98, for more about the *prima facie* case.)

   Now, one of the elements of the plaintiff's *prima facie* case is, of course, what we're calling "proximate cause." Therefore, if the judge decides that on the proof offered by the plaintiff, ***no reasonable jury could decide that it is more likely than not that the defendant proximately caused the plaintiff's injuries,*** the judge will decide the case in favor of the defendant on a motion for summary judgment or for a directed verdict — the jury will ***never get a chance to decide*** whether D proximately caused P's injuries. And that's true even if the judge believes that the plaintiff has satisfied other elements of her *prima facie* case (e.g., the judge believes that a reasonable jury could properly conclude that the defendant failed to exercise due care as to a duty he owed the plaintiff).

3. **Factual determination left to the jury:** But in most negligence cases — at least ones in which the judge believes that the jury could properly find that the defendant failed to use due care, and that the defendant's lack of due care was the cause in fact of the plaintiff's injuries — the judge will ***not exercise*** her right to ***short-circuit the case*** by taking the decision on proximate cause away from the jury. That is, in most but not all instances, the judge will decide that a

reasonable jury could go either way on this issue; in that case, the judge will instruct the jury on the test for determining proximate cause, and ***will leave it to the jury to apply that test in deciding the factual issue*** of whether the defendant's failure to use due care was so tenuously connected with the harm that proximate cause should be found lacking

Example: The Ds, a couple, disassemble a trampoline and place its components in their backyard, 38 feet from an adjacent road. Because they intend to dispose of these parts soon, they do not secure them in place. A few weeks later, a severe thunderstorm blows the top of the trampoline from the yard onto the road. Later, P, driving on the road, swerves to avoid the trampoline top that is obstructing the road, causing him to roll his car into a ditch and injuring him. Prior to the trial of P's negligence suit against the Ds, the Ds move for summary judgment. The trial judge grants the motion, in part on the theory that even if the Ds behaved negligently in not securing the trampoline parts, that negligence was not the proximate cause of the injuries to P because the danger that the unsecured trampoline parts would be displaced by a force of nature from the Ds' backyard to the road was not reasonably foreseeable to them.

Held (on appeal), for P: summary judgment reversed, and case remanded for trial. First, the court now adopts the Third Restatement's scope-of-risk formula for handling what has traditionally been called the "proximate cause" inquiry: "An actor's liability is limited to those physical harms that result from the risks that made the actor's conduct tortious." Turning to the issue of whether the trial judge correctly decided that no reasonable jury could find that the harm here resulted from the risks that made the Ds' conduct negligent, the answer is "no." "[T]he question of whether a serious injury to a motorist was within the range of harms risked by disassembling the trampoline and leaving it untethered for a few weeks on the yard less than forty feet from the road is not so clear in this case as to justify the district court's [grant of] ... summary judgment[.]" That's because "[a] reasonable fact finder could determine [that the Ds] should have known high winds occasionally occur in Iowa in September and a strong gust of wind could displace the unsecured trampoline parts the short distance from the yard to the roadway and endanger motorists." *Thompson v. Kaczinski*, 774 N.W.2d 829 (Iowa 2009).

V. SHIFTING RESPONSIBILITY

A. Nature of problem: We have encountered several situations where the defendant acts negligently, and this negligence or other wrongdoing of third persons, in combination produces the plaintiff's injury. As has been noted, there are some situations in which the defendant will be allowed to say, in effect, that responsibility for the dangerous condition created in part by her has ***passed to that third person,*** absolving the defendant of responsibility. That is, the responsibility is said to have ***"shifted".***

B. No general rule: Prosser and Keeton (P&K, p. 205) and the Restatement (Rest. 2d, §452, Comment f) both agree that it is difficult or impossible to state a general principle about when the responsibility will have shifted. But a few general observations and typical fact situations may be stated.

1. **Contract or other agreement on responsibility:** There may be an ***agreement*** between the defendant and the third person expressly or implicitly shifting responsibility to the latter. Such an agreement will not be dispositive, if there are strong policy considerations in favor of not relieving the defendant of liability. Nonetheless, such an agreement will be a factor making it more likely that the court will find responsibility to have shifted in the manner that the agreement refers to. Rest. 2d, §452, Comment e.

2. **Cases where there is no agreement:** Where there is no agreement between the defendant and the third person regarding apportionment of responsibility, the court must make an even more abstract weighing of factors. Among these are the degree to which the defendant should have ***foreseen*** that the third person might be negligent, the ***severity*** of the harm which would result if such negligence by the third person occurred, and the ***lapse of time.*** See Rest. 2d, §452, Comment f.

3. **Third person's failure to discover defect:** One rule that is well-established is that if a manufacturer negligently produces a dangerous product, he will ***never*** be absolved of responsibility merely because some person further down the distributive chain (e.g., a distributor or a consumer who resells the product) negligently ***fails to discover the danger,*** and thus fails to warn the plaintiff (the ultimate user) about it. See P,W&S (9th), p. 351, Note 1. See also *infra*, p. 350.

   Example: In 2008, Manu manufactures a power saw that it sells to Factory. The saw contains a hidden design defect that makes the saw blade likely to snap off, potentially injuring the user. In 2010, Manu discovers the problem as the result of consumer complaints. Manu then promptly writes a letter to Factory (addressed to Factory's president) describing the problem and offering to fix it for free. The president negligently throws the letter away, instead of reading it or telling anyone on the shop floor about the danger. In 2013, User, a Factory employee, uses the saw and is injured when the blade breaks.

   A third person's failure to discover a danger will virtually never, by itself, constitute a superseding cause relieving the original tortfeasor of liability. Therefore,

the negligence of Factory's president in discarding the letter will not prevent Manu's defective design from being a proximate cause of User's injury, so that negligence won't block User from recovering against Manu in strict product liability.

a. Third person does discover: Even if the third person *does* discover a danger caused by the defendant, the third person's ***failure to warn*** the plaintiff about that danger usually ***won't be superseding.***

Example: Same facts as above example. Now, however, Factory's president reads the recall letter, then due to press of other business fails to mention it to User or to get the saw fixed. It's unlikely that this third-party failure to warn will be deemed superseding. So Manu's defective design will still likely be considered a proximate cause of User's injuries. (A different result — an interruption of the causal chain — might occur if Manu then called up Factory, or otherwise did everything reasonably in its power to fix the saw, and Factory's president simply refused to allow the saw to be fixed or replaced by Manu for free.)

Quiz Yourself on ACTUAL AND PROXIMATE CAUSE (Entire Chapter)

36. King's Man catapults a styrofoam ball at Humpty Dumpty's forehead, intending only to embarrass him. In fact, Humpty falls and cracks his skull, where a normal person would have been unhurt. Will King's Man be liable for Humpty's injuries?

37. Things are kind of anxious in Europe, and Gavrilo Princip takes to carrying a gun. He's watching a parade one day, when a man next to him, Dr. Pangloss, carelessly drops a peanut into Princip's gun. When Princip tries to shake the peanut out, the gun goes off, killing Archduke Ferdinand and starting World War I. Rupert, who is badly injured in WWI, sues Pangloss for negligently causing Rupert's injuries. Can Rupert win?

38. Vronsky is raking the leaves in his front yard, and he carelessly blocks the sidewalk with a huge pile of leaf-filled bags. As a result, Anna Karenina must walk out into the heavily-travelled street to get around the pile, and she is run over by a driver who negligently fails to stop in time. Will Vronsky be liable for Anna's injuries?

39. Sprooss Goose Plane Repairs negligently fixes Amelia Earheart's plane, such that the next time she flies, she crashes and breaks her leg. The leg

is set in a cast. Shortly thereafter, she goes rowing on a local lake. The rowboat tips over, and she drowns, the cast pulling her down and making her unable to swim to safety. Will Sprooss be liable for her death?

40. Abel, while driving his car, hit the brakes as a child ran into the road. Baker, who was tailgating Abel, slammed into Abel. Carr, who was tailgating Baker, slammed into Baker, causing an additional impact on Abel's car. Abel suffered serious whiplash. Abel sued Baker and Carr for his injuries. No party produces evidence as to which crash (Baker into Abel, or Carr into Baker and thence into Abel) caused Abel's whiplash. What is the most likely result:

(a) Both Baker and Carr are liable; or

(b) Neither Baker nor Carr is liable?

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41. With Driver at the wheel, Driver and Passenger motor into town one day. Passenger has fallen asleep during the trip. Driver parks the car in front of a fire hydrant next to a bank, in violation of a municipal statute and also in violation of what motorists all over America know to be prudent practice. Driver goes into the bank to make a quick deposit, while Passenger remains asleep. Trucker, who is driving his truck down the street, suddenly swerves to avoid hitting a dog. Trucker's truck smashes into Driver's car, seriously injuring Passenger. Had Driver parked the car anywhere but in front of the hydrant, Trucker's truck would not have hit Driver's car. Passenger sues Driver for negligence. Will Passenger recover?

42. Dan is driving his car with Patti as passenger. Dan negligently runs a red light, and his car is struck by an oncoming car driven by Xavier. Patti is seriously though not fatally injured. An ambulance is called, which rushes Patti to the hospital. The ambulance driver drives at an excessive rate of speed (even considering the need to get Patti to the hospital quickly), and crashes. Patti is killed. Her estate sues Dan. Assuming the estate may recover for the serious but not fatal injuries sustained by Patti during the initial collision, may it also recover for Patti's death?

Answers

36. Yes. The rule is that the defendant is responsible for all personal injury to the plaintiff flowing from his wrongful conduct, even if the injury is surprisingly severe. Here, King's Man committed a battery; he intentionally acted to cause harmful or offensive contact with Humpty, so he is responsible for all personal injuries flowing from his conduct. This is known as the "eggshell skull" theory — particularly apropos when applied to Humpty Dumpty!

Note: Note that it doesn't matter that King's Man only wanted to embarrass Humpty; his motive won't relieve him of liability. His action could still constitute a battery if he intended the act that brought about harmful or offensive contact, or even if he only intended to create the *apprehension* of such contact.

Note: The "eggshell skull" theory applies to all intentional torts, as well as negligence. It is sometimes summed up by the phrase "The defendant takes his plaintiff as he finds him."

37. No. Negligence requires duty, breach, causation, and damages. There is no negligence here because Pangloss didn't have a duty to Rupert, anymore than he had such a duty to all the other millions who were harmed in some way by the War. An individual owes a duty only to prevent the foreseeable risk of injury to one in plaintiff's position. In this case, injury to millions of war-injured people is not a foreseeable result of dropping a peanut in a gun — which is really saying that, as a matter of policy, Pangloss will not be held liable for such widespread damages on the basis of his act. (This result is often expressed in terms of proximate cause rather than duty: one is liable only for those consequences that one's carelessness proximately caused.)

Note: The level of fault bears on the scope of duty. Thus, intentional wrongdoers are commonly held liable for consequences beyond the foreseeable risk created; and, in turn, negligent tortfeasors are responsible for a broader scope of potential damage than those subject to strict liability.

38. Yes, because one is responsible for those intervening causes that are considered "foreseeable." The negligence of drivers on heavily-travelled streets, as here, would be considered foreseeable. What this tells you is that others' negligence *can* be considered foreseeable.

39. **No, probably.** Negligent defendants are liable for damages from foreseeable intervening causes. Where plaintiff's initial injury leaves him susceptible to subsequent diseases or injury, defendant will be liable for these. However, Amelia's death here was not the result of her weakened condition. Drowning is so abnormal a consequence of a broken leg that it will probably be considered a "superseding" cause, relieving Sprooss of liability for Amelia's death.

40. (a) Both liable. When the conduct of two or more defendants is tortious, and plaintiff proves that the harm to him has been caused by only one of them, but he cannot prove which one, the burden is on each of the defendants to prove that he did not cause the harm. Here, the fact that Baker and Carr were each tailgating the car in front of him, establishes that they were each negligent. Abel has certainly proved that the damage resulted from the negligence of either Baker or Carr. Therefore, the burden was placed on Baker and Carr each to show that his negligence was not the cause in fact of Abel's injury — since neither carried this burden, each is liable for the full amount of Abel's injuries (though of course he may not have a double recovery, so that if he recovers the full amount of his injuries from Baker, he may not recover from Carr, and vice versa). See Rest. 2d, §433B, Illustr. 11.

41. No. First, let's analyze the case from the perspective of the negligence per se doctrine. Even though Driver was negligent per se in parking in front of the hydrant, he will only be liable for those consequences which were of a ***type*** the ***risk of which*** the ordinance was enacted to guard against. What makes parking in front of a hydrant prohibited is that fire engines may not be able to get water to put out fires; parking in front of a hydrant does not increase the risk that some other driver will collide with one's own car (since such collisions are equally likely to occur whether there is a hydrant on the sidewalk or not). Because the presence of the hydrant did not increase the risk of such a collision, a court would hold that Driver's negligence per se was not the proximate cause (or "legal cause") of Passenger's injuries.

A similar analysis applies to whether Driver's conduct was "ordinary" negligence (i.e., negligence independent of the negligence per se doctrine.) Again, Driver's parking in front of the hydrant was negligent only in that it increased the risk that fire trucks couldn't get access to the

hydrant to fight a fire. Again, therefore, Driver's negligence has not increased this risk, and therefore is not the proximate cause of Passenger's injuries.

42. Yes. A defendant who behaves negligently will be liable for additional damage caused by foreseeable rescue efforts, even if these rescue efforts were themselves conducted with negligence. It is foreseeable that ambulance drivers will sometimes travel too fast and get in accidents, so Dan's negligence was the proximate or "legal" cause of Patti's death. (But the result would be different if the ambulance driver behaved in a totally bizarre, unforeseeable, and dangerous manner. For instance, if the driver knew that Patti had sustained only mild non-life-threatening injuries that could wait half an hour for medical attention, and the driver travelled at 80 m.p.h. in a 25 m.p.h. zone in order to shorten the trip from 10 minutes to 3 minutes, Dan would not have been liable for Patti's death in the resulting ambulance crash.)

***Exam Tips** on*
ACTUAL AND PROXIMATE CAUSE

D can't be liable for negligence (or any other tort) unless he in some sense "caused" the harm to P. When you deal with causation on an exam, you must always deal with two distinct issues: (1) was D the ***"cause in fact"*** or "factual cause" of the harm to P?; and (2) was D the ***"legal cause"*** or ***"proximate cause"*** of the harm to P?

☛ Even if there's no true "issue" on either of these types of causation, you should ***discuss each*** at least briefly in your essay answer, since they're part of P's prima facie case. *(Sample answer where both types of causation are clear:* "Since D hit P while driving carelessly, D is clearly the 'cause in fact' of P's broken leg, because that leg wouldn't have been broken had D not driven his car into P. Also, D is clearly the proximate or legal cause of the injuries, since it was quite foreseeable that D's careless driving in this situation might cause injury to a pedestrian like P, and there were no intervening factors.")

- Here's what to look for concerning ***"cause in fact":***
  - In virtually every situation except one, use the ***"but for"*** standard — D's negligent act is the "cause in fact" of the harm to P ***if the harm would not have happened "but for" D's negligent act.*** *(Example:* "D's speeding was the "but for" cause of P's broken leg, because but for D's speeding, D could have stopped or swerved in time, or P could have jumped out of the way. . . . ")
    - Usually, the fact pattern on an exam is such that the "but for" test is satisfied. But you must look out for the occasional fact pattern where the accident or injury ***"would have happened anyway"*** even without D's negligence, so the "but for" is not satisfied. *(Example:* D1 negligently maintains a telephone pole so it rots. D2 negligently drives his car into the pole, knocking the pole down so it hits P. You should say on your answer something like, "If D2 hit the pole so hard that it would have fallen even had it not been rotten, then the court will treat D1's negligence as not being the "but for" cause, or cause in fact, of the impact to P.")
  - The one time you shouldn't use the "but for" test is where the facts disclose two ***"concurrent causes," each of which would have been enough by itself*** to cause the harm. Here, you should use the ***"substantial factor"*** test — if one of the causes was a "substantial factor" in bringing the harm about, it's deemed a cause-in-fact even though the other cause could have sufficed alone. (So both causes are likely to be found "causes in fact" on this scenario.) *(Example:* D1 and D2 are each bar-owners. Each serves X enough alcohol to get X legally drunk. X hits P with his car. The facts suggest that even a just-barely-legally-drunk driver probably would have hit P. D1 and D2 are each a "substantial factor" in P's injury, and thus each is a cause-in-fact, even though neither is truly a "but for" cause since the accident would have happened based solely on the drinks served by one.)
  - You'll often have two ***serial*** causes. If so, distinguish between two situations:
    - In one situation, both causes are necessary (and neither is

sufficient alone) to cause a ***single injury.*** In that instance, ***both*** are "causes in fact." *(Example:* D1 drives negligently onto the sidewalk, forcing P, a pedestrian, to jump into the street. D2 comes along driving too fast, and hits P because he can't stop in time. D1's and D2's careless acts are each "but for" causes, and thus "causes in fact," because, as to each, we can say that the impact wouldn't have happened "but for" that careless act.)

- ☞ In the other situation, you have two causes, but you have ***two sets of injuries*** (an earlier set and a later set). Here, the earlier tortfeasor will be liable for ***both*** sets of injuries, but the later tortfeasor will typically be liable only for the ***later set*** of injuries. *(Example:* D1 hits P with his car, breaking P's leg. D2, an ambulance driver, taking P to the hospital, crashes, breaking P's arm. D1 is the cause in fact of both the leg and the arm injuries, but D2 is the cause in fact of *only the arm injury.)*

- ☞ You'll often have to ***speculate*** in your answer about whether D is a cause in fact, based on "what would have happened" if D had behaved differently. Your speculation is especially likely where D's negligence consisted of ***failing to act.*** Keep in mind that the "but for" element merely has to be established as "more likely than not." *(Example:* D abandons his stalled car in the road, without staying to warn other traffic. P, another driver, hits D's car and injures himself. You don't really know what would have happened if D had stayed around, so you'll have to speculate something like this: "If D had stayed around to warn oncoming traffic, he probably (but not certainly) would have been able to successfully warn P of the danger, thereby avoiding the accident. Consequently, D's failure to stay and warn should probably be treated as the "but for" cause of P's injuries.")

- ☛ For ***"proximate cause,"*** here's what to look for:

  - ☞ Proximate cause generally boils down to whether the harm was ***"foreseeable."*** If it was reasonably foreseeable that D's behavior might (not would, just might) cause an injury somewhat like the

one that happened to P, then you should probably conclude that D's behavior was the proximate cause of P's injury.

☞ A good definition of proximate cause to use on an exam is: "Conduct will be deemed to be a proximate cause of harm if the harm was a foreseeable result of the conduct, and if the harm was not brought about by an extraordinary or unforeseeable sequence of events."

☞ D's act (even though negligent) won't be a proximate cause unless it somehow increased the foreseeable risk of an accident ***of a type like the one that happened.*** You may want to quote the Third Restatement's test: a defendant is "not liable for harm ***different from the harms whose risk made the [defendant's] conduct tortious."***

Example: D builds a building using what he knows to be weak steel. Five years later, an earthquake occurs. The building falls on a gasoline truck, causing gas to leak into the roadway. The gas travels two blocks, to where X is standing. X throws a match, and the ensuing explosion hurts P. P probably loses: The harm whose risk made the use of weak steel negligent might include a building collapse. But it probably doesn't include a building's collapse, during an earthquake, onto a gasoline truck, followed by gasoline spillage that causes an explosion two blocks away. So the injury to P was a "harm different from the harms whose risk made the weak-steel-use negligent," preventing that injury from being the proximate result of D's negligent use of steel.

☞ One common exam fact pattern illustrating this "scope of risks" principle: D's negligence causes someone (D, P or a third person) to be in a particular place at a ***different time*** — or at a ***different place*** altogether — than if D hadn't acted. Assuming that being in the place at that different time or being in that different place wasn't inherently and foreseeably more risky, then D's initial act is ***not*** the proximate cause of the harm that ensues. *(Example:* D is a pilot who misreads his fuel gauge before taking off, and has less gas than he thinks. D is therefore forced to make a landing at an airport that isn't his final destination. While the plane is on the runway, parked properly, P's plane collides with it. D's negligence is not the proximate cause of the crash, because although it put the plane where it wouldn't have otherwise been, this didn't materially increase the risk of a crash — falling out of the sky, not being

parked on a particular runway, was the kind of risk that made D's misreading negligent in the first place.)

- ☞ This "scope of risk" analysis is also used in negligence *per se* cases — if the type of accident that occurred wasn't the type of accident the statute was designed to prevent, then D's violation of the statute isn't the proximate cause of the accident. *(Example:* A motorist who violates a statute requiring a certain amount of insurance has an accident while driving cautiously — the insurance violation is not the proximate cause of the accident.)

- ☞ In any proximate-cause scenario, be alert to the allocation of ***decision-making*** as between ***the judge and the jury.*** Remember, the judge instructs the jury on what legal test to apply in deciding whether D's tortious conduct proximately caused the harm to P (and the jury then applies that test). However, if the judge believes that ***no reasonable jury could find*** that D's conduct was the proximate cause of the harm, the judge can ***take the case away*** from the jury (by issuing a directed verdict or summary judgment for D).

  - ☞ But say that usually, the judge will conclude that the jury could decide the proximate-cause issue ***either way,*** in which case the judge will let the jury make the decision.

- ☞ Unforeseen ***medical complications*** suffered by P are often tested. Here, as long as D was the proximate cause of ***some*** harm to P, the fact that the harm was much worse than anticipated is irrelevant. This is the ***"eggshell skull"*** problem. Quote the classic rule here: "D takes P as he finds him." *(Example:* P has one eye. D's negligence causes P to lose that eye. D is responsible for total blindness.)

- ☞ Most proximate cause issues involve ***intervening events,*** either by nature or by people. Whenever you see an initial careless act by one person, followed by another act or event by nature or someone else, that's probably a tip-off to ask whether the first person's act was the proximate cause of the eventual injury.

- ☞ In this "intervening event" situation, the basic issue is still ***foreseeability*** — if the intervening act/event was reasonably foreseeable, it doesn't block the first event from being a proximate cause. If the intervening act/event was unforeseeable, it's probably ***"superseding,"*** i.e., it prevents the first act from being the proximate cause.

- ☞ Courts sometimes distinguish between ***"dependent"*** and ***"independent"*** intervening acts. (On this view, a dependent act occurs in response to D's act, such as a rescue of a victim injured by D, whereas an independent act would have happened anyway but without the bad consequences.) However, the distinction is not that significant — you may want to classify the particular event, but then you should probably ignore the distinction.

- ☞ Many fact patterns involve D's failure to foresee the ***negligence or intentional wrongdoing of third persons.*** Often, the facts will be such that this third-party wrongdoing is foreseeable, and thus not superseding. *Examples:*

  □ D leaves the key in the ignition of his car. The risk that X will steal the car and injure a pedestrian is probably foreseeable (and is probably part of the same general risk that makes leaving a key in the ignition negligence in the first place), so D will be the proximate cause of the injury to the pedestrian.

  □ D leaves explosives around. X, a terrorist, steals them. (This is foreseeable, if one who deals in explosives should know that these are attractive to terrorists or other criminals.)

  □ D leaves his car in an intersection where no parking is allowed. Careful drivers would be able to avoid it, but the car is hit by a careless speeding driver, X. D will still be a proximate cause of the damage. (As a general rule, the negligence of other drivers on the road is probably ***always*** foreseeable, so a third party's negligence in driving is almost never superseding.)

- ☞ ***Rescuers*** are often part of the fact pattern. General rule: the

rescue is a foreseeable response to an accident or injury. Therefore, the initial tortfeasor will still be on the hook when either the injured person is hurt worse, or the rescuer is hurt. This is true even if the rescuer behaves negligently. Quote Cardozo: "Danger invites rescue." *(Example:* D hurts P. P is then injured worse when the ambulance is speeding to the hospital and gets into an accident. D is responsible for the worsened injuries to P.)

- ☞ But if it's the rescuer that gets hurt, check to see whether she's a firefighter, police officer, or other person "paid to assume" that type of risk. Most states apply the ***"firefighters' rule,"*** under which such ***professional-risk-takers can't recover*** against the person who negligently caused the need for the rescue.

- ☞ Remember that ***medical malpractice*** is usually deemed foreseeable and thus not superseding. *(Example:* D1 hurts P slightly. D2, a doctor, hurts P worse while treating him. D1 is the proximate cause of the whole set of injuries.) But "gross" medical negligence (e.g., the doctor operates on the wrong leg) is probably superseding.

☞ Sometimes ***"responsibility shifting"*** is tested. If X is ***aware*** of the risk caused by D, but ***consciously disregards*** that risk, then X's going forward generally supersedes, and shifts the risk away from D to X. This principle applies in strict products liability, not just negligence cases. *(Example:* D manufactures a car. Two years later, D discovers that a part was defective, and notifies X (the owner) that D is recalling the car and will fix it for free. X gets the message, but declines to take up the offer. Three years later, X sells the car to P, who is later injured in a crash caused by the defect. X's conscious disregard of the risk will probably be deemed to shift the responsibility away from D to X, so P can't recover from D. (But this probably isn't true where X doesn't get the recall message; here, D's initial fault is still the proximate cause of P's injury.))

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1. Of course, as noted above, Cardozo formulated his rule in *Palsgraf* as being a rule of "duty" rather than a rule of "foreseeability." But there is little practical difference between these two approaches. So the generally-stated American rule that there is no liability for "unforeseeable

consequences" is usually thought to be the substantial equivalent of the Cardozo / *Palsgraf* "no duty to protect against unforeseeable dangers" rule.

2. See also Rest. 3d (Liab. for Phys. & Emot. Harm) §29, Illustr. 3, posing a comparable hypo, and concluding that D is not liable for Y's foot injury because what made the entrustment of the gun to a child negligent was the risk of shooting, not the risk of a foot injury. Illustration 3 does not address the issue of whether a bystander injured when the dropped gun goes off (P in the example in the text) would recover. But under the Third Restatement's "scope of risks" rule, the answer would still be yes — at a general level, D's act was negligent because of the risk of shooting, which is what injured the bystander.

CHAPTER 7
JOINT TORTFEASORS

ChapterScope

This chapter deals with situations in which more than one defendant is liable for some or all of the harm suffered by the plaintiff. The key concepts in this chapter are:

- **Joint liability:** If more than one person is a proximate cause of the plaintiff's harm, and the harm is ***"indivisible," each defendant*** is liable for the ***entire harm.*** The liability in this situation is said to be ***"joint-and-several."***
- **Contribution:** A defendant who has paid to the plaintiff more than his pro rata share of damages will usually be able to recover ***partial reimbursement*** from the other defendants. Such partial reimbursement is referred to as ***"contribution."***
- **Indemnity:** Sometimes, courts will ***shift*** the entire financial responsibility for the tort from one defendant to the other (even though both are jointly and severally liable). This is done by the doctrine of ***indemnity.***

I. JOINT LIABILITY

A. Joint liability for concurrent wrongdoing: The chapter on proximate cause was replete with cases in which more than one person behaved negligently, or otherwise wrongfully. When this is the situation, may the plaintiff recover against all of them, and if so, in what amounts relative to her overall injury?

1. Joint liability for indivisible result (traditional rule): First, it is necessary to determine whether each of the defendants was a proximate cause of the plaintiff's harm. (Recall that, as stated *supra*, p. 144, the plaintiff's harm may have more than one proximate cause, i.e., two or more events which substantially contributed to it, and which are so closely related to it as to give rise to liability.) If more than one person is a proximate cause of the plaintiff's harm, and the harm is ***indivisible,*** then under the ***traditional common-law rule, each***

defendant is liable for the ***entire harm.*** The liability is said to be ***" joint-and-several."***

a. Consequence: Therefore, under this rule the plaintiff may sue and collect from *either* of them or *both* of them. (But of course she is only entitled to recover a sum equal to her overall damages — i.e., she cannot collect twice.)

Example: D1 and D2, each driving her own car, approach each other at an intersection. Each has a stop sign, and each runs that stop sign. The two cars collide. The resulting force pushes D2's car onto the sidewalk, where it hits P, a pedestrian. P suffers $100,000 in damages. In a jurisdiction following the traditional rule of joint-and-several liability, P will be entitled to a judgment against both D1 and D2 for $100,000. Then, P can recover the full judgment from D1, the full judgment from D2, or part from D1 and part from D2, all at P's sole option. (However, P may not recover a total of more than $100,000.) This is true even if the trier fact concludes that D1 was much more at fault than D2.

i. Risk of one defendant's insolvency: The biggest effect of the traditional joint-and-several-liability rule is that if one defendant is or becomes ***insolvent,*** the risk of that insolvency is ***put on the remaining defendant(s),*** not on the plaintiff. Thus in the above example, if D1 has no assets or insurance, P will still recover her full damages, because she can get them all from D2.

b. Similar liability for both joint and concurrent tortfeasors: The traditional rule making each defendant liable for the entire indivisible harm applies whether the defendants are ***concurrent*** tortfeasors (those whose ***independent*** acts concurred to proximately cause the injury) or ***joint*** tortfeasors (those who have acted in concert).

2. Indivisible harm: But this traditional rule of joint-and-several liability applies only where the plaintiff's harm is not capable of ***apportionment*** between or among the defendants. If there is a rational basis for saying that some of the harm is the result of one defendant's act, and the remainder the result of the act of the other defendant, then each will be responsible only for that harm attributable to him. See Rest. 3d (Apport.) §26.

3. Modern trend cuts back on joint-and-several liability: There has

been a very sharp trend in recent decades to ***cut back,*** or even completely ***eliminate, joint-and-several liability.*** This trend has been caused mainly by the near-universal substitution of ***comparative*** negligence for ***contributory*** negligence.[1] (See *infra*, p. 282.) After all, if a plaintiff's recovery is to be diminished precisely in proportion to the ratio between his own culpable conduct and the total culpability of all parties, it seems reasonable to say that each defendant, too, ought to be liable only for her portion of the total culpability.

a. Few states keep traditional rule: As of 2000, only 15 jurisdictions (Alabama, Arkansas, Delaware, Maine, Maryland, Massachusetts, Minnesota, North Carolina, Pennsylvania, Rhode Island, South Carolina, South Dakota, Virginia, and West Virginia, plus D.C.) maintained pure joint-and-several liability. And five of these 15 are the five states that have retained traditional contributory rather than comparative negligence. So less than one-quarter of comparative-negligence jurisdictions have retained joint-and-several liability. See Rest. 3d (Apport.) §17, Reporters' Note and tables.

b. Hybrids: Many states have replaced joint-and-several liability with one of several ***"hybrid"*** schemes that combine aspects of joint-and-several liability with aspects of pure several liability. Here are the three most common types of hybrid schemes:

□ **Hybrid joint-and-several liability with reallocation:** Under this approach, all defendants are jointly-and-severally liable, but if one defendant turns out to be judgment-proof, the court ***reallocates the damages*** to all other parties (including the plaintiff) in proportion to their comparative fault.

> **Example:** P sues D1, D2 and D3 for an indivisible harm. P's damages are $100,000. The jury concludes that P is 10% responsible, D1 40%, D2 25% and D3 25%. D1 turns out to be judgment-proof. The court will reallocate based on D1's insolvency, so that D2 and D3 are each jointly-and-severally liable for 50/60ths of $100,000 (i.e., $83,333). The effect is that P and the remaining Ds will ***share the burden*** of D1's insolvency in a ratio to their relative fault. Cf. Rest. 3d (Apport.) §C21, Illustr. 1.

□ **Hybrid liability based on threshold percentage:** Under this approach, a tortfeasor who bears more than a certain ***"threshold"*** percentage of the total responsibility remains jointly-and-severally liable, but tortfeasors whose responsibility is less than

that threshold are merely severally liable.

Example: Suppose that the jurisdiction has set a 25% threshold. P sues D1, D2 and D3 for an indivisible harm. P's damages are $100,000. The jury concludes that P is 10% responsible, D1 20%, D2 30% and D3 40%. D3 turns out to be insolvent. D1, because he is below the 25% threshold, is merely severally liable, and must therefore pay only $20,000 (20% of $100,000). Since D2 is above the threshold, he is jointly and severally liable for all the Ds' share (i.e., $90,000). This means that if P collects the $20,000 from D1, D2 can be required to pay $70,000 (i.e., his own share plus the full share of the insolvent D3.) Cf. Rest. 3d (Apport.) §D18, and Illustr. 1.

□ **Hybrid liability based on type of damages:** Under this approach, liability remains joint-and-several for ***"economic"*** damages but several for ***"non-economic"*** damages.

Example: P sues D1 and D2 for injuries arising out of a car accident. P's damages are $100,000, consisting of $40,000 in lost wages and $60,000 for pain and suffering. The jury concludes that P is blameless, D1 is 30% at fault and D2 70%. D2 turns out to be insolvent. In a state applying the economic/non-economic distinction, D1 will be required to pay the full $40,000 for P's lost wages (since these are economic damages for which D1 and D2 are jointly and severally liable), but only $18,000 (30% x $60,000) for P's pain and suffering (since these are non-economic damages, for which D1 and D2 are merely severally liable).

c. Pure several liability: 16 states now have ***pure several liability*** — in these states, a defendant, regardless of the nature of the case, is liable only for her share of total responsibility. See Rest. 3d (Apport.) §17, Table.

B. No joint-and-several liability for divisible harms: The traditional rule of joint-and-several liability, even when it applies, does ***not apply*** to so-called ***"divisible"*** harms. When two defendants each harm the plaintiff, but the harms can be readily ***apportioned*** into those caused by one defendant and those caused by the other, the harms are said to be divisible. In that event, each defendant is responsible ***only for the harms that he himself caused.***

Example: D1 and D2 each hates P. Acting independently but at virtually the same moment, D1 shoots P in the arm and D2 shoots him in the leg. The leg injuries are sufficiently distinguishable from the arm injuries that the two harms will be deemed to be divisible. Suppose that the jury concludes that P's damages from the arm shooting should be valued at $10,000 and the leg shooting at $20,000. Because the harms are divisible, joint-and-several liability will not apply even in a jurisdiction that still ordinarily follows the traditional rule of joint-and-several liability. Consequently, P can collect only $10,000 from D1 and $20,000 from D2. If D2 turns out to be

insolvent, P, not D1, will bear the burden of this insolvency, by being limited to a total recovery of $10,000.

1. **Action in concert:** But if the two defendants can be said to have acted ***in concert,*** each will be liable for injuries directly caused by the other, even if the harms caused by each are divisible. See Rest. 3d (Apport.) §15 ("When persons are liable because they acted in concert, all persons are jointly and severally liable. . . .")

   Example: D1 and D2 drag-race against each other on a public highway at twice the speed limit. The Ps are traveling in their car towards the speeding racers. D1, unable to steer his car back into the proper lane, collides with the Ps. D2 is not involved in the accident.

   Held, both Ds are fully liable, even though only one actually struck the Ps. " ... All parties engaged in a motor vehicle race on the highway are wrongdoers acting in concert and . . . each participant is liable for harm to a third person arising from the tortious conduct of the other, because he has induced and encouraged the tort." *Bierczynski v. Rogers*, 239 A.2d 218 (Del. 1968).

   a. **Burden of proof:** In those situations where the harm is theoretically apportionable, but in practice difficult to do so, usually because of difficulties of proof, courts have sometimes ***shifted the burden of proof*** onto the defendants to demonstrate a reasonable allocation of harms. See, e.g., Rest. 3d (Apport.) §26, Comment h (stating that the best solution to the problem of proving the appropriate apportionment "is to place the burden of proof on the party seeking to avoid responsibility for the entire injury. . . .")

      Example: The Ps, a group of 37 residents, contend that the Ds, three corporations who own industrial plants, have polluted the air around the Ps' homes. The Ds contend that the Ps may not recover anything, because they cannot allocate responsibility among the various defendants.

      Held, for the Ps. Where, as here, dividing the harm is theoretically possible, but very difficult, the burden of proof as to who is responsible for what is shifted to the Ds. If none of the Ds can produce satisfactory proof as to who is responsible, all will be jointly and severally liable. *Michie v. Great Lakes Steel Div., Nat'l Steel Corp.,* 495 F.2d 213 (6th Cir. 1974).

2. **Successive incidents:** One situation in which courts are often able to apportion harm is where the harms have occurred in ***successive incidents,*** separated by substantial periods of time. See Rest. 2d, §433A, Comment c.

Example: D1 operates a factory, and pollutes a stream from 1990 to 2000. The plant is sold to D2, which operates it and pollutes the same stream from 2001 through 2005. In a suit by the owner of land abutting the stream, the court will apportion the damage caused by D1 and that caused by D2 (probably by assessing a certain amount of damage per year of pollution, in which case D1 will pay twice what D2 pays). If the plaintiff is unable to collect the judgment against, say, D1, D2 will *not* be required to pay D1's portion. See Rest. 2d, §433A, Comment c.

a. Consequence of non-apportionability: In any scenario in which P is harmed in successive incidents involving multiple Ds, courts will usually place the ***burden of allocating the damages*** on the ***Ds,*** not on P. In other words, if no one proves how much of P's damages from the two successive torts are reasonably allocated to D1 and how much to D2, the court will typically make the Ds jointly and severally liable, so that the tortfeasors, not the innocent plaintiff, bear the "burden of unallocability."

Example 1: P suffers upper-back injuries in a collision with D1. Six months later, P suffers lower-back injuries in a collision with D2. At P's trial of claims against D1 and D2 jointly, P is unable to produce evidence allocating her extreme and ongoing back pain between the upper-back injuries and the lower-back ones. Neither D1 nor D2 produces allocation-of-harm evidence.

A court will likely hold that D1 and D2 are jointly and severally liable, because if damages cannot be allocated, the tortfeasor defendants, not the innocent plaintiff, should bear the financial consequence of that impossibility.

Example 2: D1 and D2 both pollute a stream, poisoning P's livestock, and damaging P by $100,000. Neither D (nor P) offers proof allocating the damages as between D1 and D2. A court will likely hold D1 and D2 jointly and severally liable, on the theory that the uncertainty about how damages should be allocated between the two should hurt them, not P.

3. **Overlapping liability:** Even if the harm *is* apportionable among the various defendants, it may still be the case that more than one defendant is liable for all or a portion of the harm. For instance, if the defendant negligently breaks the plaintiff's leg, and a physician negligently treats the leg so that it becomes infected and has to be amputated, the original defendant will be liable for the full harm, including amputation (since he will be held to have been a proximate cause of the entire injury — see *supra*, p. 167); the physician, however, will only be liable for the worsening of the condition due to her negligence (i.e., the damage represented by having a broken leg become an amputated leg.)

4. **Indivisible harms:** Some types of harms, however, are not sensibly divisible into portions caused by each of the defendants. As to these indivisible harms, joint-and-several liability will apply to the extent that it remains in force in the particular jurisdiction.

   a. **Death or single injury:** If the plaintiff ***dies,*** for instance, as a result of concerted or independent acts by two defendants, each will be liable for the death, because death is not apportionable. This will similarly be the case for any other kind of ***single personal injury.***

   b. **Fires:** Similarly, if the plaintiff's property is ***burned*** or otherwise destroyed, this will generally be an indivisible result. Thus in *Kingston v. Chicago & N.W. Ry., supra,* p. 144, in which a fire started by the defendant merged with a fire of unknown origin, and both destroyed the plaintiff's property, the defendant was held liable for the entire result. Recall that in cases involving such "concurrent causes" *(supra,* p. 144), the defendant will generally be liable if his conduct was a "but for" cause (and a proximate cause) of the damage, or a "substantial factor" in producing the result. If the harm is indivisible, then once the defendant is liable at all, he is liable for the whole harm.

   c. **Apportionment between guilty and innocent causes:** But if apportionment is feasible, it may be made between a guilty and an innocent cause, just as between two guilty ones. Thus in *Kingston, supra*, if it had been possible to show that half the plaintiff's property was burned by the unknown fire, and half by the fire caused by the defendant, the defendant would have had to pay only for the value of the half he burned.

II. SATISFACTION

A. Only one recovery: As we have seen, a plaintiff may bring an action against any or all of the potential defendants in order to secure a judgment. However, she is entitled to only one ***satisfaction*** of her claim. Thus if D1 and D2 are jointly and severally liable for a $1,000,000 judgment in favor of P, and P recovers the full $1,000,000 from D1, she can't collect anything from D2. (D1 is probably entitled to "contribution" from D2; see *infra,* p. 187.)

1. **Incomplete recovery:** If the recovery from one of the joint tortfeasors does not fully satisfy the claim, the amount received by the injured party is credited to the other defendants who may be liable.

III. RELEASE

A. Significance of release: A plaintiff who has possible causes of action against two or more defendants may ***settle*** with one while pursuing a lawsuit against the remainder. Until recently, the precise manner in which she settled his claim against the one had grave consequences for her ability to pursue the others.

1. **Release:** At common law, if the plaintiff gave a ***"release"*** to one defendant (i.e., a document absolving the latter of all liability), this was held to ***release the other defendants as well.*** This rule was the product of the common law fiction that a plaintiff had only one, indivisible, cause of action against all the joint tortfeasors, and it could not be extinguished as to one yet alive as to the others.

   a. **Covenant not to sue:** But if the settlement was embodied by a ***"covenant not to sue"*** (i.e., a contract in which the plaintiff promised not to sue, and would be liable in damages if she did) other defendants were not absolved of liability. Thus careful lawyers used the covenant not to sue rather than the release whenever there was any possibility of continuing the action against some other defendant.

2. **Majority view:** Only two states, Washington and Virginia, still apply the common law rule that a release of one defendant relieves all others, even if the release explicitly provides otherwise. (On the other hand, most states hold that P's later recovery against the non-settling Ds must be ***reduced*** to account for the settlement/release. For more about this, see pp. 189-190 *infra.)*

   a. **Where release is silent:** Also, most states, either by statute or case law, still completely relieve the non-settling defendants if the release is ***silent*** on the question of continuing liability of other defendants. See, e.g., *Cox v. Pearl Investment Co.,* 450 P.2d 60 (Colo. 1969).

IV. CONTRIBUTION

A. Contribution generally: Suppose that the case is one in which several defendants are theoretically jointly and severally liable (because each was a proximate cause of the plaintiff's indivisible harm). As we have seen, this means that the plaintiff may obtain a judgement against any one of the defendants, and collect the full amount from him. If this happens, does that defendant get stuck with the entire loss? Or may he instead turn to the other defendants and obtain at least a share from them?

1. Sometimes available: The answer is that the defendant who has paid more than his *pro rata* share may often obtain partial reimbursement from the other defendants; when he does so, he is said to have received ***contribution.***

B. Historically limited: It has always been virtually universally held, both in England and America, that a ***willful or intentional*** tortfeasor has no right to contribution from his fellow wrongdoers. For a variety of historical reasons, this rule was extended during the latter part of the nineteenth century, to prevent contribution on behalf of ***any*** tortfeasor, even if he was merely "ordinarily" negligent.

1. Changed by statute: However, in recent years, more than half the states have enacted statutes permitting contribution among tortfeasors in various situations. These statutes are frequently patterned on the Uniform Contribution Among Tortfeasors Act. Another 9 states or so have judicially accepted contribution in at least some circumstances. See P&K, p. 337, fn. 12.

> **Example:** The Ps, guests in a car owned and operated by D, are injured when D's car collides with a taxicab, owned by X, and operated by Y, X's employee. The Ps sue X but not D. The jury finds that the accident was caused by the negligence of both D and Y, and awards damages against X on a theory of vicarious liability (see *infra*, p. 313). X, who has brought D into the suit as a third-party defendant, is given the right to collect from D half of the damages, if he pays the Ps the full amount of the judgment.
>
> *Held*, on appeal, the grant of the right of contribution to X from D was proper. It is irrelevant that there was no judgment obtained by the Ps against D. The common-law rule disallowing contribution between non-intentional tortfeasors is hereby overruled. Otherwise, the plaintiff and one defendant could gang up on another defendant, and force him to pay for the plaintiff's entire damages. *Knell v. Feltman,* 174 F.2d 662 (D.D.C. 1949).

a. Restatement allows: The Third Restatement follows this majority

view of allowing contribution among tortfeasors. See Rest. 3d (Apport.) §22(a): "When two or more persons are or may be liable for the same harm and one of them discharges the liability of another by settlement or discharge of judgment, the person discharging the liability is entitled to recover contribution from the other, unless the other previously had a valid settlement and release from the plaintiff."

2. **Amount of contribution:** To the extent that contribution has been allowed in the absence of statute, many courts have required each defendant to pay an ***equal share.*** See P&K, p. 340.

   a. **Comparative negligence:** But states adopting ***comparative negligence*** (see *infra*, p. 281), as the vast majority have now done, have often taken the similar step of making the duty of contribution proportional to fault.

      i. **Restatement agrees:** The Third Restatement agrees that the principles of comparative fault should govern the amounts of contribution that may be recovered by one tortfeasor against another. See Rest. 3d (Apport.) §22(b): "A person entitled to recover contribution [under §22(a), quoted above] may ***recover no more*** than the ***amount paid to the plaintiff in excess of the person's comparative share*** of responsibility."

         Example: P sues D1 and D2. The jury finds that P's damages total $100,000, and that P is 10% responsible, D1 is 30% responsible and D2 60%. Assume that the jurisdiction maintains joint-and-several liability in this situation. Assume that P recovers the full $90,000 (i.e., the 90% representing the defendants' collective share) from D1, as he is entitled to do under joint-and-several liability. Now, under the Restatement approach, D1 is permitted to recover only $60,000 in contribution from D2 — that is, D1's contribution recovery is limited to an amount that would put D1 in the position he would have been in had each party borne his own share of the responsibility (since in that event, D1 would have paid $30,000, or 30% of the damage total). See Rest. 3d (Apport.) §23, Illustr 5.

C. **Present limitations:** Use of the contribution doctrine is still limited, however, in certain important respects, even in those states which allow it.

1. **No intentional torts:** Thus in many courts it is still the rule that an ***intentional*** tortfeasor may not have contribution from his co-tortfeasors. See P&K, p. 339.

2. **Contribution defendant must have liability:** The contribution defendant (i.e., the co-tortfeasor who is being sued for contribution) must in fact be ***liable to the original plaintiff.*** If the contribution defendant has a defense that would bar his liability to the plaintiff, the other defendant may not have contribution against him even if the two acted in concert. And the contribution ***plaintiff bears the burden of proving*** in the contribution suit that the contribution defendant would have this liability to the original plaintiff.

   a. **Restatement agrees:** The Third Restatement agrees with this requirement that the contribution defendant must be liable to the original plaintiff. See Rest. 3d (Apport.) §23, Comment j, stating that normally, "A person seeking contribution must prove that the person against whom contribution is sought would have been liable to the plaintiff in an amount and share equal to or greater than the amount of contribution."

3. **Other barriers to suit:** Most courts also bar a contribution suit against the employer of a plaintiff employee where a ***Workers' Compensation*** statute prevented the plaintiff from suing the employer in tort. (See *infra*, p. 339.) Similarly, where the plaintiff was an injured automobile passenger, who recovers against the driver of the other car involved in a collision, it is usually held that that driver cannot recover against the driver of the passenger's car, where the passenger would have been barred from suit by an ***automobile guest statute.*** However, the major purpose of such guest statutes is to prevent collusion between passenger and driver, and this objective would not be weakened by permitting a contribution suit by the other driver. See P,W&S, p. 196.

D. Settlements: The most controversial issues in the law of contribution have involved ***settlements.*** There are two distinct issues: First, may a defendant who has settled with the plaintiff recover contribution from other potential defendants? Second, may a defendant who has settled be sued later by other defendants against whom a judgment is recovered?

1. **Settlement by contribution plaintiff:** Where there is no statutory provision on point, it is almost always held that a defendant who settles may turn around and ***obtain contribution*** from other potential

defendants. However, he bears the burden of proving not only that he and these other defendants were actually liable, but also that the ***settlement amount was reasonable.*** See Rest. 3d (Apport.) §23, Comment h.

a. Restrictive statutes: Several state statutes, however, allow only those defendants against whom a judgment has been rendered to obtain contribution from potential co-defendants.

2. Settlement by contribution defendant: The most controversial question of all is whether a defendant who has settled can later on be sued for contribution by another defendant against whom a judgment has been obtained by the plaintiff.

a. Traditional rule: The traditional, majority, rule has been that the settling defendant ***can*** be later held liable for contribution. This is not a very good rule, however, since it greatly discourages any defendant from settling — he cannot settle and close the file, since he knows he may have contribution liability later on; therefore he has no incentive to settle.

b. No contribution, but plaintiff's claim is reduced: The modern trend is to prevent this problem by imposing two rules:

(1) the non-settling defendants who are found liable are ***not permitted to get contribution*** against the previously-settling defendant; but

(2) the ***plaintiff's recovery*** against the non-settling defendants is ***reduced*** to account for the prior settlement.

See Rest. 3d (Apport.) §23, Comment i (no contribution against prior settlers) and §16 (plaintiff's recovery against non-settlers reduced by proportion of responsibility assigned to settler). See also §8(b) of something called the Uniform Apportionment of Tort Responsibility Act, a uniform act promulgated in 2002 by the Commissioners on Uniform State Laws — §8(b) implements these same two rules.

i. How to reduce P's share: Even within courts following this modern "reduce P's recovery against the non-settling Ds" approach, there is a further sub-issue: should the plaintiff's recovery against the non-settling defendants be reduced by (i) the ***dollar amount*** of the settlement (the ***"pro tanto"***

approach); or (ii) the ***proportion*** that the settling defendant's responsibility bears to the overall responsibility of all parties (the ***"comparative share"*** approach)? The Third Restatement follows the latter (comparative share) approach, as can be seen from the following example.

Example: While P is a passenger in D1's car, that car collides with D2's car, and P is injured. P suffers $100,000 in damages. P sues D1 and D2, then settles with D1 for $20,000 before trial. At trial, the jury concludes that P was 20% responsible (because he distracted D1), D1 45% responsible, and D2 35%. Assume that the jurisdiction otherwise enforces joint-and-several liability in this situation. Under the Restatement's "comparative share" approach, D2 will be entitled to a $45,000 credit (D1's 45% share of comparative responsibility times $100,000 damages) on account of the settlement by D1. Therefore, P will only be able to recover $35,000 from D2. See Rest. 3d (Apport.) §16, Illustr. 1. See also Unif. Apport. Tort Resp. Act, §8(b). Compare this result with the result under the "pro tanto" approach, where D2 would get just a $20,000 credit (the dollar amount of the settlement), allowing P to collect $60,000 from him.

V. INDEMNITY

A. Concept of indemnity generally: Contribution is, as we have seen, a sharing of payment for joint liability. There are situations, however, in which, either out of a general sense of fairness, or because of a great difference in the degree of culpability of the two defendants, the court will ***shift*** the financial responsibility for the tort from one defendant to the other. This is done by the doctrine of ***indemnity;*** when the one tortfeasor pays some or all of the plaintiff's damages, he is indemnified by the other tortfeasor for ***everything*** that he paid. Thus indemnity is a 100% shifting of liability, whereas contribution is a sharing.

1. Restatement's explanation: The Second Restatement, §886B(1), expresses the rationale for indemnity by saying that there shall be a shifting when one tortfeasor has paid the claim (discharging both), and the other would be ***"unjustly enriched"*** if he were not required to fully reimburse the first.

B. No general rule: It is impossible to state a general rule about when indemnity will be permitted. However, some of the more common situations in which it will be allowed are as follows:

1. Vicarious liability: If one defendant is only ***vicariously liable*** for the other's conduct, the former will be indemnified. For instance, an

employer is generally liable for the torts of his employee *(infra*, p. 314), and an employer who had to pay for such a tort could recover the full amount of the payment from the employee. See Rest. 3d (Apport.) §22(a)(2)(i).

2. **Retailer versus manufacturer:** A ***retailer*** who is held ***strictly liable*** for selling a d***efective injury-causing*** product will get indemnity from others further up the distribution chain, including the ***manufacturer.***

   Example: A dangerously defective product causes injury to P. P sues (in strict product liability) the wholesaler who sold it to the retailer who sold it to P. If the wholesaler has to pay P, the wholesaler can get full indemnity from the manufacturer.

   a. **Higher up the chain:** In fact, more generally, anyone in the distribution chain who is held strictly liable can probably get indemnity from ***anyone higher up in the chain,*** especially where the higher-up person is more at fault. See Rest. 3d (Apport.) §22(a)(2)(ii).

      Example 1: Manu, a manufacturer of a product whose defective design made it dangerous, is required to pay a strict product liability judgment to P, who was injured by the product. Manu licensed the design for the product from Des, an industrial designer. Manu made the product exactly according to Des' full set of specifications. Manu did not know, or have reason to know, of the product's defective design or dangerousness. Des will be required to fully indemnify Manu for the judgment.

      Example 2: EngineCo sells an engine to Pilot for her private plane, and installs it. Due to a defect in the engine, the plane crashes into Paul's building. Paul recovers against Pilot's estate under strict liability for ground damage from airplanes (see *infra*, p. 335). Pilot's estate is entitled to full indemnity from EngineCo for the judgment it had to pay, even if EngineCo acted without fault in selling and installing the engine.

3. **Negligent vs. intentional tortfeasor:** If one tortfeasor is merely ***negligent,*** and the other commits an ***intentional*** tort, the intentional tortfeasor will be required to indemnify the negligent one. This can happen, for instance, if D1's negligence consists of not preventing D2 from committing an intentional tort where D1 had an obligation to use reasonable care to prevent such a tort.

   Example: D1 negligently entrusts his car to his friend D2, knowing that D2 is unstable and often violent. D2 takes the car and purposely runs over P, D2's former girlfriend. P's estate recovers in negligence from D1 for entrusting the car to D2. D1 will be entitled to full indemnity from D2 for the judgment, since D2 was an intentional tortfeasor and D1 was merely negligent.

a. Dangerous condition on land: The general principle that one is entitled to indemnity for failing to discover another's misconduct also means that a ***contractor*** who negligently constructs or repairs a building will usually be required to indemnify an ***owner*** who negligently or innocently fails to discover the defect, if the latter is liable to a tenant, guest, etc. who injures herself.

4. Contract: A ***contract*** between two tortfeasors may provide that one will indemnify the other. This is a frequent provision, for instance, in building contracts between a general contractor and sub-contractor.

Quiz Yourself on
JOINT TORTFEASORS (Entire Chapter)

43. Caesar and Antony are fighting over possession of an asp which slithered into a street from the woods. As they wrestle over it, Cleopatra walks by, and they accidentally bump into her with the snake. It bites her and she is seriously injured. She sues Caesar (but not Antony) in negligence, and recovers a $100,000 judgment from him. Is Caesar likely to be entitled to contribution from Antony? _____

44. Pompeii Canned Goods, Inc., ships cans of Vesuvius Stew to the Volcano Grocery Store. The cans are not properly sealed, and are starting to bulge due to bacteria growth. Volcano doesn't notice and puts them on the shelves anyway. Most of the city comes down with salmonella poisoning as a result of eating the tainted stew. One purchaser who becomes violently ill, Frequentus Regurgitus, sues Volcano on a strict product liability theory, and recovers a $100,000 judgment. Is Volcano likely to be able to recover the entire $100,000 from Pompeii? _____

45. Aggressive, while riding her bicycle on the sidewalk (instead of on the street where she should be), and riding too fast, nearly hits Bystander. To avoid being hit, Bystander throws himself into the street. Bystander is not seriously injured by the impact with the street. However, before he can get up, Careless, who is driving his car too fast and not paying attention, runs over Bystander, causing Bystander's leg to be amputated. Bystander chooses to sue only Aggressive for his injuries. Under the common-law approach, may Bystander recover the full value of his lost

leg from Aggressive? _____

_____

Answers

43. Yes. Where joint tortfeasors act in concert and their negligence causes harm, and the plaintiff only sues one of the tortfeasors, that tortfeasor can seek contribution (partial reimbursement) from the other joint tortfeasor(s). If the jurisdiction follows comparative negligence, the court will probably apportion the liability between the two in proportion to their fault. In a non-comparative-negligence jurisdiction (and in some comparative-negligence states), the court will split the liability evenly regardless of which tortfeasor was most at fault. Without the doctrine of contribution (which applies in most but not all states), Caesar could not recover anything from Antony, since this is a case of "joint liability": Caesar and Antony acted in concert, and the damages are indivisible.

Note: Since Cleopatra recovered the entire judgment from Caesar, her claim has been "satisfied," and she can't proceed against Antony. Also, note that Cleopatra could have sued Caesar and Antony in the same lawsuit, recovered a judgment against them, and then proceeded to collect from either one or partially from both — her choice — until her claim was satisfied. Finally, note that the rule of "contribution" is not applicable to intentional torts.

RELATED ISSUE: Say Antony and Caesar each had an asp, and each negligently let his asp bite Cleo, injuring her with two separate wounds. The damages would be divisible, and thus joint liability would not apply.

44. Yes. Keeping in mind that rules on indemnity vary from state to state, a situation like this is one where indemnity would likely be applied. If the defendant is liable only because he failed to discover another's misconduct, he will normally be entitled to indemnity. A manufacturer who produces defective goods will generally be required to indemnify a retailer who resells the goods and incurs strict liability (as long as the retailer did not *know* of the defect). Volcano can recover the entire $100,000 from Pompeii.

Note: Where strict liability is involved, all subsequent suppliers can seek indemnity from those before them in the supply chain, so that the manufacturer — or whoever is responsible for the defect — is ultimately responsible as long as the item was in a defective condition unreasonably dangerous to the user or consumer when it left his control. (Strict liability is liability without fault; that is, liability without regard to how careful the defendant was.")

45. Yes. Both Aggressive and Careless were proximate and "but for" causes of the injury to Bystander. Therefore, under the common-law approach they are jointly and severally liable for the damage to Bystander. (The joint-and-several rule applies only where the harm is not capable of apportionment, and a single injury or death is never apportioned.) Because of the joint-and-several liability, Bystander may get a judgment (and collect it) against either Aggressive alone, Careless alone, or both. (However, Bystander may only collect a single time.) See Rest. 2d, §879, and Illustr. 2 thereto. If Bystander collects the full judgment against Aggressive, Aggressive will be entitled to contribution from Careless.

Note, however, that the result would be different in many states today: many states have statutorily abolished joint-and-several liability in many or all contexts, and in such a state Aggressive might be liable for only her pro rata share of the damage (e.g., in a comparative-negligence jurisdiction, her percentage of fault).

EXAM TIPS ON
JOINT TORTFEASORS

Whenever you have multiple tortfeasors, consider whether they will be ***"jointly and severally liable."***

- ☞ General rule: If more than one person is an actual and proximate cause of P's harm, and the harm is indivisible, each D is liable for the ***entire harm.***
- ☞ Often-tested issue: "Was the harm to P ***indivisible?"*** If not, there is no joint-and-several liability. *(Example:* D1 and D2 shoot at P. D1 hits P in the leg, D2 hits him in the eye. If we can apportion the

harm, including pain and suffering — which we can do here — then there's no joint-and-several liability; each D pays only for the harm he himself caused.)

- If the harm is theoretically divisible, but P has no allocation evidence (i.e., P can't show which of two or more Ds was responsible for which harm), the court may put the ***burden of proof on the Ds*** to show this. *(Example:* P shows that D1 and D2, acting separately, poisoned his stream by pollution at different times. If P can't come up with evidence of which harms were due to which D's acts, the court may say that it's up to the Ds to produce such proof, and if they can't they're jointly and severally liable.)

- If joint-and-several liability applies, then P can collect the ***entire amount*** from whichever single defendant he wishes. Alternatively, he may collect some from each. (P is of course limited to one total recovery.)

- Two common contexts for joint-and-several liability:

  - ***Employer/employee*** — each is jointly and severally liable (the employer on a "vicarious liability" theory).

  - Where a ***dangerous product*** injures the consumer, both the ***manufacturer*** and the ***retailer*** will be jointly and severally liable if P recovers in strict product liability.

- Very often tested: The interaction between traditional joint-and-several liability and ***comparative*** negligence.

  - If there is no statute dealing specifically with this interaction, then joint-and-several liability ***persists*** as to that portion of the total fault that is not the plaintiff's. *(Example:* P has total, indivisible, injuries of $100,000. The jury finds that P was 30% at fault, D1 was 50% at fault and D2 20%. The jurisdiction has a comparative negligence statute, but no statute addressing joint-and-several liability. P can only collect $70,000, which he can collect all from D1, all from D2 or in a mix.)

  - Some states now have special statutes limiting joint-and-

several liability in connection with comparative negligence. If your facts are silent about whether such a statute is in force, you might want to give the traditional analysis as in the prior paragraph, and then speculate. *(Example:* "But the state may have a statute, as a number of states now do, abolishing joint-and-several liability for any defendant found to be less than 50% at fault for the accident.")

- Whenever you have multiple tortfeasors, consider whether one has the right to ***contribution*** from the other(s). Contribution is a ***cost-sharing*** in favor of one who has paid ***more than his proportionate share*** of the total liability.
  - Under classic common-law contribution, the court makes each defendant pay an ***equal*** net amount. *(Example:* D1 and D2 are found jointly and severally liable for P's $100,000 in injuries. P collects $70,000 from D1 and $30,000 from D2. Under the common-law approach, D1 can get contribution of $20,000 from D2, since this is the amount needed to equalize their shares.)
  - No contribution right is given to an ***intentional*** tortfeasor (even against another intentional tortfeasor).
  - Most commonly-tested issue: the interaction between contribution and ***comparative negligence.*** Here, most comparative negligence states have statutes requiring contribution ***in proportion to fault.*** *(Example:* P has a $100,000 loss. The jury says that P was 25% responsible, D1 25% and D2 50%. Assume that P recovers the whole $75,000 from D1 (which he can, provided the state doesn't have a statute changing the traditional joint-and-several liability rule in comparative negligence cases). In most states, D1 can get contribution of $50,000 from D2, since that's the amount that would adjust the shares of D1 and D2 in proportion to the jury's finding of fault.)
- Whenever you have multiple tortfeasors, consider whether one has the right to be ***indemnified*** by the other(s). Indemnity refers to a ***complete reimbursement,*** not a cost-sharing. It is usually given where one tortfeasor is clearly less culpable than the other.

☞ Most commonly, the right of indemnity exists where one D is only ***vicariously*** liable, and the other is directly liable. *Examples:*

- □ Employer can get indemnification from Employee (assuming that employer had no direct fault, and his only liability was vicarious).
- □ Retailer can get indemnity from Manufacturer in a strict product liability case. (In fact, anyone in a distribution chain held strictly liable can recover against ***anyone higher up*** in the chain — so Retailer can get indemnity from Wholesaler, and Wholesaler can in turn get indemnity from Manufacturer.)
- □ Where Owner is liable for accident by Driver from having allowed Driver to drive Owner's vehicle (this is the result of Owner consent statute), Owner will get indemnity from Driver.

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1. Whereas contributory negligence is an absolute bar no matter how minor plaintiff's fault is, comparative negligence is an apportionment system where, say, a plaintiff whose negligence accounts for 10% of the total fault by both parties has his recovery reduced by 10%.

CHAPTER 8
DUTY

ChapterScope

This chapter covers several quite distinct scenarios where courts may hold that P cannot recover because D did not owe P any "duty." The main concepts in this chapter are:

- **Failure to act:** The law does not impose any general ***"duty to act."*** Therefore, as a general rule, D cannot be liable for merely failing to give P assistance. (But there are many exceptions.)
- **Effect of a contract:** Where the source of D's duty to P lies in a ***contract,*** courts usually do not allow P to sue in tort for D's failure to perform, and instead require that the suit be brought on a breach-of-contract theory.
- **Mental suffering:** Plaintiffs are sometimes allowed to recover for ***mental suffering*** caused by the defendant's conduct, even where the plaintiff has not suffered physical injuries. Most controversial is whether P should be allowed to recover for mental anguish at seeing a loved one be injured.
- **Unborn children:** D may be liable for injuries inflicted on a ***fetus.***
- **Pure economic loss:** Courts are split as to whether P may recover for ***"pure economic loss,"*** unaccompanied by physical injury or property damage. The modern view is to allow P to recover for such economic loss (e.g., loss of business profits) if P was a member of an "identifiable class" that D knew or should or have known would be likely to suffer economic loss from D's conduct.

I. "DUTY" GENERALLY

A. Introduction: In the list of elements of a negligence cause of action given on p. 98, *supra*, one requirement was that the defendant owe the plaintiff a ***"duty of care".*** In most tort cases, this duty is simply the duty of behaving towards the plaintiff with the degree of care that a reasonable person would exercise in like circumstances. In such cases, the courts devote relatively little attention to this general requirement of

duty, since it is so uniform; instead, they spend most of their energies looking at whether the defendant's conduct met this duty.

1. **Special cases:** There are several classes of cases, however, where the courts have held that the defendant owes the plaintiff something less than or more than the exercise of the degree of care a reasonable person would use. Sometimes, courts have held that the defendant owes the plaintiff no duty at all. For instance, we saw in *Palsgraf*, *supra*, p. 158, that, under the theory of that case, the defendant owed no duty at all to a plaintiff who was outside the scope of the risk imposed by the defendant's negligence. And we have alluded several times to the rules governing common carriers, who are held to a higher standard of care (the obligation to use extreme care) towards their passengers.

2. **Scope of this chapter:** This chapter considers several kinds of cases in which, because of either the nature of the plaintiff (e.g. an unborn child), the type of harm suffered (e.g., pure mental suffering, with no physical effects) or the plaintiff's relation to an occurrence (e.g. mere bystander), the defendant is held to have violated no duty to the plaintiff.

   a. **Conclusory term:** As will be quickly seen in these cases, courts use the concept of "duty" in a highly conclusory manner. That is, because they wish to avoid allowing recovery, they state that the defendant owed no duty to the plaintiff to avoid the harm in question. The concept of duty is thus similar to that of proximate cause, and many of the cases discussed in this chapter could have been treated in the previous one.

      i. **Illustration:** For instance, in a case raising the question whether the plaintiff may recover for emotional suffering not accompanied by physical symptoms (to which the answer is almost always "no"), the case may be decided on the basis of whether the defendant owes the plaintiff a duty to avoid this kind of harm (the approach followed here) or, by contrast, on the basis of whether emotional harm unaccompanied by physical harm can ever be so foreseeable and closely related to the defendant's conduct that the latter should be held to be the

proximate cause of the former.

b. Other examples: Other situations in which the usual standard of duty is modified are considered in other chapters. The most important of these involves ***owners and occupiers of land,*** treated in a separate chapter beginning *infra*, p. 235. ***Vicarious liability*** of employers, car owners, etc. may also be seen as a modification of the general duty of care; such liability is discussed *infra*, p. 313.

II. FAILURE TO ACT

A. No general duty to act: Can a person be liable in tort solely on the grounds that she has ***failed to act?*** The general answer to this question given by the common law, an answer which continues today, is ***"no."***

1. Misfeasance v. nonfeasance: Thus the law distinguishes sharply between ***misfeasance*** (i.e., an affirmative act which harms or endangers the plaintiff) and ***nonfeasance*** (a mere passive failure to take action). All the cases we have seen thus far involved defendant's conduct of the former category. Many of the cases refusing liability for nonfeasance which we will examine here are generally considered absolutely scandalous by commentators, and are a unique product of Anglo-American law with almost no counterpart in other Western countries.

2. Duty to protect or give aid: Most nonfeasance cases arise when the defendant sees that the plaintiff is in danger, and ***fails to render assistance,*** even though she could do so easily and safely. As stated, the rule is that unless there is some ***special relationship*** between the defendant and the plaintiff, the former is ***not liable for her refusal to assist.*** See Rest. 2d, §314.

> **Example:** P is rowing his boat on a lake. P falls off, and while struggling, yells for help. D, a passer-by on the shore, sees this, and could easily throw P a life-preserver from the shore. But D does nothing, because she's late for a tennis game. If P drowns and his estate sues D, D will win — since there was no special relationship between D and P, D had no obligation to assist P no matter how vital and easy-to-give this assistance would have been.

B. Exceptions: Courts have, however, carved out an increasing number of ***exceptions*** to this general rule.

1. Special relationship: One category of exceptions involves situations

where a plaintiff and a defendant have some ***special relationship*** to each other.

a. Common carriers and innkeepers: Thus it has always been the case that certain callings imposed a duty to furnish assistance to patrons. This has been true of ***common carriers*** with respect to their passengers and ***innkeepers*** with respect to their guests.

Example: The Ps are passengers on board a bus operated by D, a public common carrier, when a violent argument erupts among a group of other passengers. The bus driver is notified of the situation but continues to drive the bus and fails to take any measures to protect his passengers. The Ps are injured in the violence, and sue D for negligence.

Held, because of the special relationship between a common carrier and its passengers, D had a duty to use utmost care and diligence to protect the Ps from the assaults. Bus passengers have no control over who enters the bus, and are dependent on the driver to summon help or provide a means of escape if trouble arises. Depending on the situation, this duty of care might be satisfied by a warning to the rowdy passengers, stopping the bus until the trouble subsides, installing a radio to allow contact with the police, or other measures — the point is that the bus company and driver have a duty to do more than merely stand by while passengers are subject to danger. Nor does the fact that D is a public rather than private carrier make any difference — although governments in general, and police departments in particular, are not liable for failing to protect the public against assaults, a common carrier owes such a duty of protection to passengers who have "accepted the carrier's offer of transportation and have put their safety, and even their lives, in the carrier's hands. ..." *Lopez v. Southern California Rapid Transit District*, 710 P.2d 907 (Cal. 1985).

b. Business relationships: In recent years, most courts have extended this rule imposing a duty of care to ***business generally:*** anyone who maintains business premises must use reasonable care to furnish warning and assistance to a business visitor, regardless of the source of the danger or harm. See Rest.2d, §314A.

Example: P, 6 years old, is shopping with his mother in the D Department Store. Through no negligence of D, P's fingers get caught in the escalator and severed. D unreasonably delays calling for an ambulance, thereby aggravating P's injuries.

P will be entitled to damages for the aggravation of his injuries. Since D operated business premises, D and its employees had an affirmative duty to make reasonable efforts to assist anyone who came into peril on the premises.

c. Employer: Similarly, it has been established for a long time that an ***employer*** must give warning and assistance to an employee who is endangered or injured during the course of his employment.

d. Third Restatement has seven categories: The new Third Restatement list seven types of "special relationships" that impose a duty of care " with regard to risks that arise within the scope of the relationship." The list includes these relationships:

[1] "a common carrier with its passengers";

[2] "an ***innkeeper*** with its ***guests";***

[3] "a ***business*** or other possessor of land that ***holds its premises open to the public*** with those who are ***lawfully on the premises";***

[4] "an ***employer*** with its ***employees*** who are: (a) in imminent danger; or (b) injured and thereby helpless";

[5] "a ***school*** with its ***students";***

[6] "a ***landlord*** with its ***tenants";*** and

[7] "a ***custodian*** with ***those in its custody,*** if a) the custodian is required by law to take custody or voluntarily takes custody of the other; and b) the custodian has a ***superior ability to protect*** the other." *(Example:* The duty of a jailer to a prisoner.)

See Rest. 3d (Liab. for Phys. & Emot. Harm) §41.

e. Transient or "ad hoc" relationships: Plaintiffs have sometimes tried to persuade courts to extend the list of "special relationships" that will trigger a duty to render assistance. Some of these suggestions concern ***"ad hoc"*** relationships, i.e. ***transient relationships*** that were formed shortly before the episode in question. By and large, courts have ***resisted*** these suggestions — only the types of relationships typically recognized as having legal significance in other contexts, and arising well before the present occasion, are usually found to trigger a duty of due care. (Notice that all of the seven relationships (listed above) recognized by the third restatement fall into this category.)

i. No relationship based on "witnessing an emergency": For example, some plaintiffs have argued that the court ought to recognize a special relationship as existing between a ***person who faces a sudden life-threatening injury*** and another person who ***witnesses that injury at close proximity*** and has

the ***opportunity to summon help.*** But this argument has generally been ***rejected*** by the courts, on the theory that recognizing this type of relationship as imposing a duty to summon assistance would swallow up the "no duty to assist" general rule, and would present ***no logical stopping point.***

Example: Jennifer Lane and Joshua Cilley have previously been in a romantic relationship, but have since broken up. Cilley visits Lane's trailer, and Lane asks him to leave. Cilley grabs a rifle, and while Lane is not looking, shoots himself, and falls to the floor. Lane does not see any blood, and does not investigate; instead, she visits a friend in a nearby trailer, whom she tells that Cilley has "pretended" to shoot himself in her trailer. The friend goes to the trailer, investigates, sees that Cilley is turning white, and calls 911. Cilley is taken to the hospital, where he dies of a single gunshot wound to his abdomen; the ER doctor concludes that Cilley could have been resuscitated if he had arrived at the hospital five or 10 minutes earlier. Cilley's estate sues Lane for negligently failing to call 911. The estate argues that the court should recognize a new form of "special relationship," that between a person suffering an acute injury and one who witnesses that injury - according to the estate, the witness should be held to have the narrow duty to "contact emergency assistance."

Held, for Lane. The "relationship" identified by the estate — the witnessing of an injury — is "unlike any other relationship recognized as sufficient to create a duty of care." The relationships that have been recognized as triggering such a duty all involve either (1) a close pre-existing relationship between the parties, or (2) some measure of control by the person with the duty over either the endangered person (e.g., employer-employee or parent-child) or the location (e.g., a landowner and an invitee who is endangered while on the premises). The relationship asserted here — based solely on "presence at the opportune moment" — does not have either this pre-existing nature or this element of control. Furthermore, the duty urged by the estate would have no obvious limiting point: "each person would be obligated to contact emergency assistance anytime she witnessed another's injury, which would indeed be a duty without any practical limit." *Estate of Cilley v. Lane*, 985 A.2d 481 (Me. 2009).

Note: Observe that the court in *Cilley* missed a relatively easy "peg" on which to hang on Lane a duty to summon assistance. It's true that Cilley was not Lane's "social guest" at the time of the shooting, since she had asked him to leave, making him a trespasser, not an invitee.[1] But many courts impose on the possessor of land a duty to use due care towards a ***discovered trespasser.*** See, e.g., Rest. 3d (Liab. For Phys. & Emot. Harm), §52(b)(1), placing a possessor of land under a duty to exercise reasonable care where a trespasser "reasonably appears to be imperiled and helpless." Since when Cilley was lying there injured he was on Lane's property, this exception, if recognized in Maine, would seem to have been applicable (at least assuming that Lane recognized or should have recognized Cilley's peril and helplessness). Cf. D,H&B (7th Ed.), p. 501.

2. Defendant involved in injury: A second major category of

exceptions is that the defendant will have a duty of warning and assistance if the danger or injury is ***due to her own conduct,*** or to an instrument under her control. See Rest. 2d §314, Comment d.

a. Negligence vs. innocent acts: Originally, this rule applied *only* where the original danger or injury was the result of the defendant's ***negligence or other fault.***

i. Modern view: But the modern, and certainly more sensible, view is that if the defendant endangers or harms the plaintiff, ***even if she does so completely innocently,*** she must render assistance or warning when she discovers the problem. See Rest. 3d (Liab. for Phys. & Emot. Harm) §39 ("When an actor's prior conduct, even though ***not tortious,*** creates a ***continuing risk of physical harm*** of a type characteristic of the conduct, the actor has a duty to exercise reasonable care to prevent or minimize the harm.")

Example: The Third Restatement gives this example: D non-negligently runs into P, who is hiking at the side of the road. P, who does not have a cell phone, asks D to use D's own cell phone to call for help. D refuses and drives away. Because D has brought about the situation (even though non-negligently), he has a duty to make the call, and is liable for any worsening of P's condition if he doesn't. See Rest. 3d (Liab. for Phys. & Emot. Harm) §39, Illustr. 5.

ii. Hit and run: A number of ***"hit and run"*** driving statutes in various states require a driver to render assistance to one whom he has hit (even if non-negligently); these have sometimes been held to result in negligence *per se,* and civil liability, where the driver does not comply with the statute. See P&K, p. 377.

3. Defendant and victim as co-venturers: Where the victim and the defendant are engaged in a ***common pursuit,*** so that they may be said to be ***co-venturers,*** some courts have imposed on the defendant a duty of warning and assistance. For instance, if two friends went on a jog together, or on a camping trip, their joint pursuit might be enough to give rise to a duty on each to aid the other.

Example: D and his friend, V, try to engage two women in conversation. They follow the women, and the women complain to friends about D's and V's behavior. In response, six young men chase D and V. D escapes; V does not and is beaten severely. Later, D returns to V, puts some ice on V's head, and drives V around for

two hours. He then parks V's car (with V in it, unconscious) at V's grandparents' house. The next morning, V's grandparents find him in the car and take him to the hospital, where he dies several days later. P (V's father) sues D for wrongful death.

Held, for P. D and V were "companions on a social venture." When two people engage in a "common undertaking," they have a special relationship, and each is understood to promise assistance to the other where this can be done without danger. Therefore, since D knew of V's need for help, he had an obligation to give that help. (Alternatively, once D began to give V assistance, under the "assumption of duty" exception he had the obligation to follow through. This exception is discussed further immediately below.) *Farwell v. Keaton*, 240 N.W.2d 217 (Mich. 1976).

4. Assumption of duty ("undertaking"): An additional limitation on the lack of duty to render assistance is that once the defendant ***voluntarily begins*** to render such assistance (even if she was under no legal obligation to do so) she must ***proceed with reasonable care.*** This means that the defendant must make reasonable efforts to ***keep the plaintiff safe*** while he is in the defendant's care, and that she may not ***discontinue*** her aid if so doing would leave the plaintiff in a ***worse position*** than he was in when the defendant began the assistance. See Rest. 3d (Liab. for Phys. & Emot. Harm) §42.

Example 1: P becomes sick in the D department store. D's employees attempt to give aid to P, by putting her in the store infirmary. However, they leave her there for six hours, without medical care, and she dies.

Held, it may be that D owed P no duty of assistance in the first place. But once having undertaken to give such assistance, D had a duty to use due care in doing so. *Zelenko v. Gimbel Bros.*, 287 N.Y.S. 134 (N.Y. Sup. Ct. 1935).

Example 2: D promises P that while P is away on a two-week trip, D will visit P's apartment every day and feed P's dog. D then forgets to do this, and the dog is seriously injured. D is liable to P, because once he made the promise to render the assistance, he was required to fulfill the promise with reasonable care. Cf. Rest. 3d (Liab. for Phys. Harm) §42, Illustr. 3.

a. Preventing assistance by others: In finding that one who has undertaken to give aid must carry through with reasonable care, the courts have often relied on the fact that a voluntary giving of such assistance ***prevents others*** (who might do a better job) from giving aid.

Example: P calls a 911 emergency number operated by the police department of D (the county in which P lives). She reports that a burglar is trying to break into her house, and gives her address as "319 Victoria" in the suburb of Kenmore. D's employee writes the address as "219 Victoria" instead of "319 Victoria." Because of

this error, the police are delayed in arriving at P's premises. By the time they arrive, P is dead of seven knife wounds; there is evidence that had they gone immediately to the correct address, P might have survived.

Held, D is liable to P for her pain and suffering before death. D voluntarily set up the emergency call system, and induced P to rely upon it. Had P not been told by the 911 operator that help was on its way, she would almost certainly have directly dialed her local suburban police, or asked one of her neighbors for help. Therefore, D's negligence increased the risk to P, making D liable for its negligence in carrying out the duty it assumed. *DeLong v. Erie County*, 455 N.Y.S.2d 887 (N.Y. Sup. Ct. 1982).

i. **Other factors:** The prevention of aid by others is only one way in which a defendant who voluntarily undertakes to give assistance may become liable. Even where there is no possibility of assistance by third persons, if the defendant behaves carelessly, and the plaintiff's condition is ***worsened*** as a result, there will be liability. See, e.g., Rest. 3d (Liab. for Phys. & Emot. Harm) §42(a), providing that if D undertakes to help P, then even without reliance on P's part, D must use reasonable care if D's "failure to exercise such care ***increases the risk of harm beyond that which existed without the undertaking."***

b. Pre-employment physical exam: The "assumption of duty" rationale has been used to impose liability on an employer who gives a job applicant or worker a ***physical exam*** — while the employer usually does not owe a duty to a prospective employee to see whether he is physically fit for the job, once the employer assumes the duty to examine the applicant, he is liable if the examination is performed negligently (e.g., it misses a disease).

5. What constitutes undertaking: Because of this exception (which arises out of the old common law distinction between misfeasance and nonfeasance), it becomes important to note when the defendant has actually undertaken to give assistance. In general, very little in the way of affirmative action has been necessary to trigger this action.

a. Past custom: A ***past custom*** of giving warning or assistance has been held to constitute an undertaking, at least where the plaintiff is aware of the custom. Thus in *Erie Co. v. Stewart*, 40 F.2d 855 (6th Cir. 1930), the defendant railroad maintained a watchman at a crossing, who customarily warned motorists when there was a train

approaching. The plaintiff, who was aware of this custom, saw no sign from the watchman, crossed, and was crushed by the oncoming train; the watchman had been otherwise occupied. The defendant was held liable on the grounds that the plaintiff relied on the absence of a warning.

b. Promise to assist: Until recently, it was almost always held that a mere ***promise*** to give assistance, unaccompanied by any overt act, was ***insufficient.*** Thus in the famous case of *Thorne v. Deas*, 4 Johns. 84 (N.Y. 1809), P and D were co-owners of a ship which was about to go on a long voyage. D promised on two occasions to procure insurance on the ship, and P therefore refrained from doing so. The ship was lost at sea; it turned out that D had never obtained the insurance, and D was held not liable — P had no action in contract, because of lack of consideration, and no action in tort, because of the lack of an undertaking (i.e., this was nonfeasance, not misfeasance). See P,W&S (9th) p. 413.

i. Reliance on promise alone: But modern law, both contract and tort law, has begun to show a willingness to allow recovery based ***solely upon a promise to provide assistance,*** even if no overt act of performance ever occurs. In contract law, this has been done under the doctrine of "promissory estoppel"; see Restatement Second of Contracts, §90. In tort law, many courts have simply dispensed with the requirement of an overt act by the defendant, where the plaintiff has relied, to his detriment, on the defendant's unperformed promise of assistance.

Example: P, shopping in D's store, is bitten by D's cat. P asks D to lock the cat up for fourteen days, so that he can be tested for rabies. D promises to do so, but carelessly lets the cat out whereupon it disappears for a month. D is therefore advised by her doctor to undergo a painful and dangerous series of rabies shots. After she completes the treatment, and suffers side effects from it, the cat comes back in perfect health.

Held, D, by his promise to confine the cat, undertook to do so, and therefore had a duty to use at least reasonable care in seeing that this was done. P obviously relied on D's promise, since otherwise, she could have had local health authorities lock up the cat and test it. *Marsalis v. La Salle*, 90 S.2d 120 (La. 1957).

ii. **Restatement's view:** The Third Restatement of Torts agrees that a promise to help will give rise to a duty to furnish that help if plaintiff relies on the problem, even if defendant never carries out an overt act in furtherance of the promise. See Rest. 3d (Liab. for Phys. & Emot. Harm), §42, Comment e: "[A] promise without any action in furtherance of it is [nonetheless] an undertaking subject to the rule [imposing a duty of due care once D makes an undertaking] stated in this section." So the Third Restatement would agree with the result in *Marsalis*, even though D there merely made promises without any overt act.

6. Duty to control others: Nonfeasance may also be tortious where the defendant has undertaken to control ***third persons*** who then injure the plaintiff. Such a duty may arise either because of a special relationship between the ***defendant and plaintiff,*** or a special relationship between the ***defendant and the third person.***

a. Defendant-plaintiff relationship: Such special defendant-plaintiff relationships include ***common carrier-passenger*** (with a duty on the carrier to use reasonable care to protect its passengers from attacks or robberies by strangers as in *Lopez*, *supra*, p. 197); ***innkeeper-guest*** (e.g., the Connie Francis case, where the Howard Johnson hotel chain was held liable for inadequate room security leading to a rape of the singer); ***hospital-patient, school-pupil,*** and ***parent-child.*** See P&K, p. 383.

i. **Business open to public:** In fact, many courts now hold that ***any business open to the public*** must protect its patrons from wrongdoing by third parties who are on the premises. (See the discussion of liability to business invitees, *infra*, p. 244).

> **Example:** D, a storekeeper, fails to take action when X, an obviously deranged man, comes into the store wielding a knife. (Assume that D, because of his martial arts background, could have restrained X with minimal risk to D.) X stabs P, a patron. Most courts would say that D is liable for failing to take reasonable measures to restrain X to prevent the harm to P.

b. Defendant-third party relationship: Alternatively, the relationship between the defendant and the ***third party*** may be such that the defendant has a duty to control that party and prevent him

from harming the plaintiff. This can be so even if the defendant and the plaintiff have no relationship at all.

i. Medical professional: For instance, where D is a ***medical*** or social-work ***professional*** who learns that her ***patient X poses a specific danger to P,*** many courts recognize a duty on D's part to warn P.

Example: The Ds, psychotherapists, have a doctor-patient relationship with Poddar, who tells them of his intent to kill Tatiana, the Ps' daughter. Neither D warns Tatiana or the Ps. Poddar in fact kills Tatiana.

Held, because of this special relationship between the Ds and Poddar, the Ds had a duty to warn the Ps of Poddar's intentions (intentions which Poddar later carried out) if a reasonable person would have done so. (The Ds did not, however, have a duty to the Ps to confine Poddar, because of a state statute granting doctors immunity with respect to this kind of decision.) *Tarasoff v. Regents of* University of California, 529 P.2d 553 (Cal. 1974) (also discussed *supra,* p. 110).

(1) Danger only to patient: On the other hand, if the medical professional only has reason to believe that the patient is dangerous to *herself* (e.g., is suicidal), then the professional has no duty to warn others (e.g., the patient's family) of that danger. And that's true even if the patient commits suicide and a close family member suffers great emotional distress as a consequence.

ii. Other applications: Similarly, the ***owner of a car*** owes pedestrians and other drivers the duty of using reasonable care to see that one who drives the car in her presence does not do so negligently. See Rest. 2d, §318. Likewise, a ***surgeon*** in charge of an operation is responsible for preventing negligence on the part of her assistants.

iii. Only reasonable care required: But the defendant is required only to use ***reasonable care*** to prevent the misconduct of others in this kind of a situation. Thus if she does not know of the danger, she will not be liable (in the absence of some other principle, such as employer liability, *infra*, p. 314, where the liability is essentially without regard to the employer's fault.)

7. Good Samaritan protection for physicians: Because of the

nonfeasance/misfeasance distinction, a ***physician*** who refuses to give emergency aid will never have any liability, whereas one who gives aid leaves herself open to a malpractice charge (made all the more likely because of the usual lack of equipment, nurses, etc. in the typical on-the-street emergency). For this reason, more than forty states have passed so called ***"Good Samaritan"*** statutes, which generally relieve a physician who gives assistance at the scene of an emergency from all liability, or from all liability except for gross negligence. See, e.g., §2144 California Business and Professions Code; P&K, p. 378.

a. "Scene of accident" limitation: Good Samaritan statutes are usually limited to care rendered at the ***"scene of an accident,"*** and do not apply where the emergency care is given at a ***hospital or doctor's office,*** even if the emergency occurs there. Often, the statute contains this limitation explicitly; sometimes, a statute that is silent on this issue is interpreted to exclude such in-hospital help.

III. EFFECT OF A CONTRACT

A. Relation between tort and contract: The borderline between tort law and contract law is not always clear-cut. For instance, P buys a car from D, a dealer. If the car is defective, and injures both P and a bystander, X, are the suits brought by P and X to be in tort or contract? It is not unreasonable for the actions to be in tort, since D may have violated its duty to the world at large not to sell defective products that may foreseeably cause personal injury. On the other hand, especially with respect to the suit by P, the fact that there is a contract between P and D should certainly have some relevance.

1. Practical significance of distinction: The choice between contract law and tort law is not academic. For instance, the Statute of Limitations may have run on a tort action, but not yet on a contract action (which is usually given a longer period). Conversely, the damages available to one suing in tort are likely to be much broader than for one suing on a contract. (In the latter case, they are limited by the rule of *Hadley v. Baxendale;* see Emanuel on *Contracts.*)

B. Traditional distinction between misfeasance and nonfeasance: The common law has traditionally been much more willing to find that,

where a contract exists, there has been a tort if the defendant was guilty of ***"misfeasance"*** rather than merely ***"nonfeasance."*** (The significance of this distinction is also discussed *supra*, p. 196, in connection with a general failure to act by the defendant). Accordingly, our discussion of the effect of a contract focuses on this distinction, first in the case of a suit brought by one party to the contract against the other, and then in the case of a suit brought by a third person, not party to the contract.

C. Party to the contract; nonfeasance: If suit is brought by a party to the contract, and her claim is that the defendant has simply ***failed to perform a promise,*** the plaintiff's suit is unlikely to be found to be a tort claim. For instance, suppose that D contracts to sell P a car, and fails to deliver; because of this failure, P has to walk to her destination, and is run over while she does so. P's suit, since it alleges complete nonperformance by D, will be held to be in contract, not tort.

1. **Exception for utilities:** The only major exception to this rule is that if the defendant is a ***common carrier,*** or other public utility, it may be held to have acted tortiously if it fails to honor a contract with a member of the public. Thus if A bought a ticket to ride on the B bus line, and the driver refused to let her board, this might be a tortious act.

2. **Misrepresentation:** Also, if the plaintiff can show that the defendant, when he made the promise, had ***no intent to perform it,*** she may be able to maintain the tort action of misrepresentation, or deceit *(infra*, p. 438).

D. Party to the contract; misfeasance: Once the defendant ***starts to perform*** his promise, if he fails to complete it, the plaintiff has a much better chance of being able to sue in tort. Consider the common case of a physician, for instance, who is engaged to perform a particular operation. If he performs the operation, but does so negligently, he will be liable in tort (see *supra*, p. 112), notwithstanding that his negligence arose out of a contractual relation between him and the plaintiff.

1. **Election:** Thus the plaintiff may have the ability to sue either in contract or tort. In the case of a physician's malpractice, for instance, the plaintiff might, instead of suing for the tort action of malpractice, want to sue for breach of contract (although this would seldom be of

practical advantage to her.) In many situations, this choice is left completely to the plaintiff, and she simply ***"elects"*** which remedy she wishes to pursue, and may even be able to pursue both at once.

a. Gravamen: But some courts look for the ***"gravamen",*** or gist, underlying the plaintiff's claim, and make their own decision about which one of the two theories of recovery, tort or contract, is involved. In a court favoring this approach, for instance, a lawyer's negligent preparation of a will is likely to be considered a breach of contract, whereas a physician's negligent performance of an operation is likely to be considered the tort of negligence. See P&K, p. 666.

2. Insurer's failure to settle: One increasingly important setting in which a party may be liable in tort for failure to complete a contractual obligation arises where an ***insurance company*** has the opportunity to ***settle*** a claim against its insured, but in bad faith refuses to do so, leading to a recovery against the insured for more than the policy limit.

Example: X falls down the stairs at P's house and sues P. P has insurance coverage of $10,000, and encourages D, her insurance company, to settle. X offers to settle for $10,000 but D only offers $3,000, because D feels that X will not be able to prove that her claimed psychosis was a result of the fall (even though D knows that X has a psychiatrist who will so testify). At trial the jury awards X and her husband $101,000, of which D pays $10,000. P sues D for the $91,000 balance, plus damages for P's mental suffering.

Held, for P. Every liability insurance contract includes a "duty to accept reasonable settlements, a duty included within the implied covenant of good faith and fair dealing." Here, the evidence showed that D knew there was a risk of a recovery substantially beyond the policy limits, and that D considered its own, not P's, interests when it refused to settle for the policy limits. Therefore, D breached its obligations, and is liable for the $91,000 (plus $25,000 for P's mental suffering). *Crisci v. Security Insurance Co.*, 426 P.2d 173 (1967).

3. Breach of duty of "good faith and fair dealing": Nearly all courts hold that each party to a contract has a general duty of ***"good faith*** and ***fair dealing."*** Some plaintiffs have tried to sue in tort for a violation of this duty. In general, courts have ***refused*** to recognize tort liability for breach of this general implied covenant of good faith and fairness. (Cases involving an insurance company's obligation to pay or settle claims fairly, as discussed above, represent the one exception

to this general rule rejecting tort liability for breach of contractual good faith/fair dealing.)

a. Employment relationship: For instance, few if any courts have granted a tort recovery to an ***employee*** who alleges that he has been discharged in violation of the employment agreement. This is true whether the discharge is alleged to be in violation of the express terms of the contract, or in violation of the implied covenant of good faith and fair dealing.

i. At-will contracts: Plaintiffs have often asserted a breach of the duty of good faith and fair dealing when they are fired from ***at-will positions,*** i.e., positions in which there is no term, and either party can terminate the relationship at any time. For these plaintiffs, a tort remedy is especially important, because typically there would be no contract damages at all even if there were found to be a breach of the duty of good faith (since the employer "could have" terminated the employee at any time). But for such "at will" plaintiffs, as for other types of plaintiffs alleging wrongful discharge in the employment context, court have almost always said, "Your remedy, if any, is at contract, not in tort."

ii. Whistle blowers and those who refuse to commit wrongdoing: But there are a couple of ***special situations*** within the employment context where courts may nonetheless allow a tort recovery. When allowed, the recovery is often said to be for the tort of ***"wrongful discharge."*** For instance, many states protect ***whistle blowers*** (those who object to wrongdoing by the employer or by other employees), or those who refuse to engage in ***illegality*** when asked to do so by their boss. An employee discharged under these circumstances might be found to have a claim in tort, not just contract, because of the strong public interest in deterring illegality.

E. Non-party to contract; traditional rule as to nonfeasance: Where the plaintiff is one who is not a party to the original contract, and the defendant is guilty only of ***nonfeasance,*** traditionally the plaintiff has generally found it hard to recover in either tort or contract. She will not

be able to recover in contract unless she is able to show that she is a third party beneficiary (see Emanuel on *Contracts).* As for tort liability, insofar as the courts have traditionally seldom allowed even a party to the contract to sue in tort where there has been nonfeasance, they have been even more reluctant to allow a non-party to sue in tort.

> **Example:** D, a water company, contracts with the city of Rensselaer to supply water to the city, for use in public buildings, fire hydrants, etc. The contract also indicates that service will be furnished to private parties who pay fixed rates. One day a fire starts, and spreads until it has destroyed a warehouse belonging to P. P sues on the theory that D failed to supply adequate water pressure, which would have enabled the fire department to stop the fire before it burned his warehouse. The suit is brought in tort.
>
> *Held,* P has no tort cause of action against D. D's action in this case amounted merely to nonfeasance, not affirmative misfeasance. If P were granted a right of action, then "liability would be unduly and indeed indefinitely extended by this enlargement of the zone of duty. . . . Every one making a promise having the quality of a contract will be under a duty to the promisee by virtue of that promise, but under another duty, apart from contract, to an indefinite number of potential beneficiaries when performance has begun." *H.R. Moch Co. v. Rensselaer Water Co.,* 159 N.E. 896 (N.Y. 1928).
>
> Note: Cases such as *H.R. Moch* have been almost universally criticized by commentators, but they still represent the majority position, that a water company is not liable to private citizens. Observe that D in fact began to perform the contract (it supplied water to most of the city), so it was guilty of misfeasance, not merely nonfeasance. Furthermore, by making the contract with the city, it induced the city and its citizens to forego other opportunities for obtaining an adequate supply of water, and they therefore relied to their detriment (a factor considered in the duty cases discussed *supra,* p. 200).

1. **Non-party to the contract; traditional rule as to misfeasance:** Where the third-party sues on a theory of ***misfeasance,*** rather than nonfeasance, her chance of recovery in tort have traditionally been somewhat better. Nonetheless, courts have historically been reluctant to allow recovery, on the misguided notion that tort recovery is barred because there is no "privity of contract."

F. Non-party to the contract; modern rule as to nonfeasance and misfeasance: But within the last fifty or sixty years, courts have largely ***scrapped*** the requirement that a tort plaintiff whose claim arises out of a contract to which the defendant was a party must have been in privity with the defendant.

1. **Sellers of chattels:** This has been most clearly the case with respect

to sellers of ***chattels*** that cause physical harm to a person who was not in privity of contract with the seller. Most of the chapter on products liability *(infra* p. 347) is devoted to a discussion of how third parties may recover in tort against one who has supplied defective goods.

2. **Services:** Modern courts also now frequently scrap the privity requirement with respect to persons who supply ***services.*** Thus a person, D, who provides services under a contract with *A* may be liable for physical, emotional and even ***economic loss*** suffered by *B* (who is not a party to the contract), if the D-to-*A* contract contemplates that a ***limited group of persons will be benefited*** by D's performance, and *B* is part of that limited group.

   a. **Third Restatement:** The Third Restatement's provisions on economic loss agree with this approach of giving protection to members of a ***"limited group"*** who are intended to be benefited by commercial services performed by the defendant: (1) One who, in the ***course of his business, profession or employment,*** or in any other transaction in which he has a ***pecuniary interest, performs a service for the benefit of others,*** is subject to liability for pecuniary loss caused to them by their ***reliance*** upon the service, if he fails to exercise reasonable care in performing it.
   (2) The liability stated in Subsection (1) is limited to loss suffered

      (a) by the ***person*** or one of a ***limited group of persons*** for whose ***benefit the actor performs the service;*** and

      (b) through ***reliance*** upon it in a ***transaction that the actor intends to influence.***

   Rest. 3d Torts (Liab. for Econ. Harm, Tent. Dr. 2), §6.

   Example: Buyer, a potential buyer of a house owned by Seller, asks Realtor to have the furnace inspected. All parties realize that Realtor is under contract to Seller, not Buyer. But Realtor promises to have the furnace inspected. Realtor negligently selects Amateur to do the inspection, and Amateur fails to discover a defect, and tells the parties that the furnace is in good working condition. Buyer closes, and discovers that the furnace wasn't and isn't working.

      Buyer will be able to recover from Realtor for Realtor's negligent selection of Amateur to do the inspection. Even though Realtor's only contractual obligation was to Seller, Realtor conducted the service (procurement of an inspection) in the course of Realtor's business or profession. And Buyer was "the person or one of a limited group of persons for whose benefit" Realtor was performing the service. Therefore, Realtor had a duty to use reasonable care in

selecting the person who did the inspection. *Id.,* §6, Illustr. 3.

b. Will-drafting by lawyers: *Lawyers'* services in ***drafting wills*** frequently fall within this principle allowing recovery by non-contracting parties who are part of a "limited class that relies" on the service. Thus the ***intended beneficiary under a will*** is likely to be allowed to recover her economic loss from the lawyer who prepared the will, if the beneficiary doesn't receive the bequest because of the lawyer's negligent drafting. Despite the fact that there is no privity between lawyer and beneficiary, courts reason that it is extremely foreseeable (even probable) that negligence in the will-drafting process will cause injury to the intended beneficiaries, and that these beneficiaries form a limited class. Therefore, modern courts say, there is no reason to fear boundless liability to large numbers of claimants, a typical reason for traditionally requiring privity of contract between the plaintiff and the defendant who provided the contracted-for services.

IV. MENTAL SUFFERING

A. Pure mental suffering without physical impact or injury: Suppose the defendant's negligence is the cause in fact of intense ***mental suffering*** to the plaintiff. But suppose further that this suffering has been produced ***without any physical impact*** upon the plaintiff. Does the absence of any physical impact itself bar plaintiff from recovery? As we'll see, the answer is, "not necessarily."

1. Illustration: Here are two examples of situations in which mental suffering without physical impact might occur:

Example 1: P is a pedestrian on the sidewalk. D, a driver who is negligently speeding, loses control and the car goes onto the sidewalk near P, missing P before slamming into a storefront. As D's car is hurtling towards her, P believes she is going to be hit and killed, though the car misses her by an inch. P develops Post-Traumatic Stress Disorder (PTSD) as a result. Can P recover from D for her mental suffering?

Example 2: Same facts as Example 1, except that this time P is walking with her toddler son, S. D's car misses P, but strikes S while P watches, horrified. S barely survives, and P develops PTSD, suffering constant nightmares in which she relives her fear that S is about to be killed. Putting aside S's action against D, can P recover from D for her own mental suffering?

As we'll see below, in most courts today, there are at least some circumstances in which P ***may*** recover for her mental distress negligently caused by D, even though P never

suffered a physical impact. For instance, in most courts, P would likely be able to recover under both of the above examples. But the topic of recovery for mental suffering in the absence of physical impact is a very complicated one, in that: (1) in a given jurisdiction, slightly differing no-impact scenarios often lead to very different litigation outcomes; and (2) states vary tremendously in how they handle this whole category of cases.

2. Several categories: We'll look at several distinct types of scenarios:

[1] P suffers a physical impact or direct physical injury, and seeks to ***"tack on"*** to her claim a recovery for emotional distress (though this is not one of the "pure emotional distress" scenarios). (See Par. B below.)

[2] P witnesses an accident; she ***never fears*** for the physical safety of either herself or anyone else during the episode, but suffers emotional distress anyway, for which she seeks to recover. (See Par. C below.)

[3] P witnesses an accident or near-accident, and is ***sufficiently close*** to the dangerous event herself that she is for a time in ***danger of immediate bodily harm.*** She escapes the bodily harm, but suffers mental distress from the episode. (See Par. D below.)

[4] P witnesses a ***close relative,*** X, suffer a serious bodily injury; P never fears for her own physical safety but nonetheless suffers emotional distress (on account of her concern for X's welfare), for which she seeks to recover. (See Par. E below.)

[5] Same as [4], but the person, X, that P witnesses suffer a serious bodily injury is ***not P's close relative.*** Again, P suffers emotional distress for which she attempts to recover. (See Par. F below.)

[6] P suffers emotional distress without ever being himself at risk, and without directly witnessing serious injury to anyone else, but because of the ***special relationship*** between P and D (or between D and a third person, X, who suffers injury), for policy reasons the courts allow P to recover for his own emotional distress. (See Par. G below.)

B. Mental distress damages "tacked on" to case involving physical impact or injury: First, let's consider a situation that does not really fall into our "pure mental suffering" category, but that we'll want to

compare with the various pure-mental-suffering scenarios we'll be considering. I'm referring to the situation in which D causes an ***actual physical impact*** to P's person, and P suffers not just physical injuries but, in addition, mental distress arising out of the episode.

1. **P may recover:** In this scenario, it's always been clear, in all American courts, that ***D is liable*** not only for the physical consequences of the impact but also for virtually ***all the emotional or mental suffering*** that flows naturally from it. This includes fright at the time of the injury, "pain and suffering" stemming from the injury, anxiety about possibility of a repetition, humiliation from disfigurement, etc. See P&K, pp. 362-63. The mental distress claim is said to be ***"tacked on"*** to the claim for physical injury.

2. **"Parasitic" damages:** Such "tacked on" damages from mental suffering are often called ***parasitic*** — they "attach" to the claim for physical injury, analogously to the way a parasite attaches to the host. The usual reason for allowing parasitic damages is that the existence of a physical injury to P provides sufficient assurance that ***the claim of suffering is not being feigned.***

C. Emotional distress, but no fear of impact on oneself or on others: Next, let's look at the scenario which furnishes probably the ***weakest*** case for allowing P to recover: P ***witnesses*** an accident or near-accident caused by D's negligence, but the danger takes place ***far enough*** from P that she ***never fears an imminent impact*** with her own body, or even with the body of anyone else nearby. Nonetheless, P later suffers mental distress from the episode. In this situation, virtually ***no*** American courts will allow P to recover for her emotional distress, even if that distress has physical manifestations.

Example 1: P is walking in New York City's Times Square. Twenty yards ahead of her, she sees a taxi driven by D speed through a red light, lose control, and crash into a storefront, though miraculously neither D nor anyone else is physically injured. At no time does P believe that she or anyone else is likely to be hit by the cab. Nonetheless, P keeps reliving the near-disaster. She develops nightmares, symptoms of PTSD, and an ulcer. In her suit against D for having negligently inflicted emotional distress on her, P is able to establish that more likely than not, all of these symptoms arose from her having watched this terrifying accident.

It is unlikely that *any* American court would allow P to recover. As we'll see, there are several exceptions to the general rule against "stand-alone" recovery for negligent

infliction of emotional distress (i.e., recovery for pure emotional distress, in the absence of any claim by P for physical injury or property damage). But here, where P never even briefly feared that either she or anyone else was likely to be hit by the cab, none of these exceptions applies.

1. **"Boundless liability" fear:** In part, courts' universal rejection of a stand-alone distress claim like the one in Example 1 stems from courts' fear that if such claims were allowed, there would be a ***flood of litigation,*** with no way for courts to distinguish genuine claims from ***feigned*** ones. Allowing someone like P in our example to recover would raise the possibility that hundreds of similarly-situated people walking or riding in Times Square might bring suit (not to mention thousands of claims from, say, people who later saw the accident on the local TV news and alleged they were similarly traumatized).

   a. **Fear for safety of unknown person:** As we'll see below, p. 214, the same principle of non-liability applies — for the same reason — if the plaintiff never fears for her own safety but sees someone else be injured or nearly injured, where that third person is not a close relative of the plaintiff.

D.P is within the "zone of danger," and suffers distress: Our next category is the situation in which P witnesses an accident or near-accident, and is ***sufficiently close*** to the dangerous event that she herself is at some point in danger of immediate bodily harm. She escapes the bodily harm, but suffers mental distress from the episode. Courts often describe this situation as one in which the plaintiff was ***"within the zone of danger."***

1. **Most courts allow:** In this "zone of danger" scenario, most courts today ***allow*** the plaintiff to recover for her emotional distress, if shows that the distress is ***severe.***

2. **Third Restatement allows:** The Third Restatement, similarly, allows the plaintiff to recover in this zone-of-danger situation. See Rest. 3d (Liab. Phys. and Emot. Harm), §47: "An actor whose negligent conduct causes ***serious emotional harm*** to another is subject to liability to the other if the conduct: (a) places the other in ***danger of immediate bodily harm*** and the emotional harm results from the danger[.]"

Example 2: Same facts as Example 1 above. This time, however, when the taxi driven by D goes out of control, P is standing 2 feet away. She jumps out of the path of the oncoming cab and barely avoids being hit. If P suffers severe mental distress from constantly re-living the near-accident, most courts (and the Third Restatement) will allow her to recover for that distress, because she was within the "zone of danger."

3. **Distress at harm to third person:** As long as the plaintiff is herself within the zone of danger, the court is likely to allow the plaintiff to recover for all of her emotional harm stemming from the episode, even if that harm is a combination of distress at her own nearinjury and her distress at an actual severe injury to someone else present.

   a. **Illustration:** So, for instance, in Example 2 above, suppose that P not only fears that she herself is about to be hit, but watches X, who is standing a few feet away from P, be killed. P will probably be able to recover for the ***entirety*** of her severe emotional distress -- the court will not try to subdivide the distress into separate fear-for-P-herself and fear-for-X components. This means that even though X is a ***stranger*** to P, P's X-related distress will be part of the "package" of damages for which P can recover.

E. P is a "bystander," and sees a close relative suffer bodily injury: Now, let's turn to the first of two categories in which the plaintiff is a ***"bystander"*** who from a position of safety ***watches another person suffer bodily injury*** due to the defendant's negligence. In the present category, the injured third person is a ***close relative of the plaintiff,*** such as the plaintiff's ***parent, sibling*** or ***child.***

As in the above situation illustrated by Example 2 (where the plaintiff was herself within the "zone of danger"), in the present "bystander watching a close relative be injured" scenario, most courts today ***allow the plaintiff to recover*** for her own distress.

1. **Rationales:** There are two rationales for allowing recovery here: (a) we don't have to worry much about ***fraudulent claims,*** since it's highly likely that a person who watches a close relative be injured has indeed suffered great distress; and (b) we don't have to worry about a ***flood of claims,*** since the number of people suffering a bodily injury from a given tortious event will be limited, and therefore the number of close relatives watching those injuries occur will also be limited.

2. **Third Restatement allows:** Again, the Third Restatement agrees that

the plaintiff should be allowed to recover in this "bystander seeing a close relative be severely injured" scenario. See Rest. 3d (Liab. Phys. & Emot. Harm), §48:

> An actor who negligently causes ***sudden serious bodily injury to a third person*** is subject to liability for serious emotional harm caused thereby to a ***person who:***
>
> (a) ***perceives the event contemporaneously,*** and
>
> (b) is a ***close family member*** of the person suffering the bodily injury.

Example 3: P is walking with her 6-year-old son, S, in a cross-walk in Times Square. As P watches, horrified, a taxi negligently driven by D jumps a red light and runs over S, killing him instantly. P suffers severe mental distress from watching the accident and re-living it. Most courts (and the Third Restatement) will allow P to recover against D for her own distress. This recovery is entirely separate, conceptually, from S's estate's right to recover for his bodily injury.

3. **Meaning of "close relative":** Courts vary in ***how close the family relationship must be*** between the bystander/plaintiff and the third person who suffers serious bodily harm.
   a. **Sibling, parent, child, or spouse:** A bystander who is the ***sibling, parent, child,*** or ***spouse*** of the person who suffers the bodily harm is likely to be found to be sufficiently closely-related that the bystander can recover for distress.
   b. **More distant relative:** But if the relationship is even a little more ***distant,*** courts are likely to ***deny*** recovery. Thus one who witnesses the death or serious injury of a ***fiance,*** a ***cohabiting*** significant other, a ***son-in-law,*** or an ***aunt*** or ***uncle*** (even one who has raised the child who suffers the bodily injury) is likely to be ***denied recovery.*** D,H&B Trts, Vol. 2, s. 391, pp. 579-580.
4. **Perception must be "contemporaneous":** Most courts insist that the bystander must***perceive*** the accident (the bodily harm to the bystander's close relative) ***"contemporaneously."*** In other words, it's not enough that the bystander learns of the accident very soon after it occurs. Consider the following two examples, which produce opposite legal outcomes:

Example 4: P, sitting on his front porch, watches a car negligently driven by D strike, and badly injure, P's 6-year-old son, S, in the street in front of P's house. Because P has "contemporaneously" perceived the physical injury to S, P will be entitled to recover for P's own mental distress. Cf. Rest. 3d (Liab. Phys. & Emot. Harm), §48. Illustr. 1 (on

essentially these facts).

Example 5: P is sitting in the kitchen of his house, which looks out only into P's backyard. The doorbell rings, and P's next-door neighbor, X, tells P, "I just saw your son S be hit by a car on the street in front of your house; the ambulance just took S to the hospital." P rushes to the hospital, where he sees S lying badly injured in the ER. In most courts — and under the Third Restatement — P will not be allowed to recover for his emotional distress, because P did not "contemporaneously" perceive the event that caused the harm to P's close relative. Cf. Rest. 3d (Liab. Phys. & Emot. Harm), §48, Illustr. 2 (on essentially these facts).

a. Can "perceive" by another sense: Ordinarily, the contemporaneous "perception" will be by ***sight*** — P observes the accident with his eyes. But ***other senses,*** such as ***hearing,*** may also suffice, as long as the "perception" is "contemporaneous."

Example 6: Same facts as Example 4 above, except that P, while sitting on his front porch, does not have his distance glasses on, and therefore cannot see what is happening in the street with any detail. But P knows that his son S is playing in the street. P then hears the squeal of D's brakes, and hears S's screams after he is run over. P has sufficiently "perceived" (through his sense of hearing) the event that caused the seriously bodily harm to S that he will be permitted to recover for his mental distress. Cf. Rest. 3d (Liab. Phys. & Emot. Harm), §48, Illustr. 4 (on essentially these facts).

b. Perception that occurs remotely rather than in person: It's not clear whether the contemporaneous perception has to occur ***"in person,"*** as opposed to via some ***remote, electronic means.*** For instance, if P is ***video-Skyping*** with X and sees X hit by a car driven by D, has P met the "contemporaneous perception" requirement? There is little if any case law on the issue so far. The Third Restatement doesn't take a position; it leaves this issue for "future development." Rest. 3d (Liab. Phys. & Emot. Harm), §48, Comment e.

5. Bodily harm witnessed must be serious: The bodily harm that the bystander witnesses must generally be ***serious.*** So witnessing a close relative's "death, significant permanent ***disfigurement,*** or l**oss *of a body part or function*** will almost always be sufficient." Id., Comment l. But ***"bruises,*** cuts, ***single simple fractures,*** and ***other injuries that do not require immediate medical treatment*** will ***rarely be sufficient"*** *Id.*

Example 6: Same facts as Example 4 above, except that what P observes is that D's car

knocks S to the ground, causing P to suffer to bloody knees but no other harm. No matter how emotionally traumatized P is from witnessing the scene, the absence of serious bodily harm to S would prevent most courts, and the Third Restatement, from allowing P to recover from D for his distress.

6. **Bodily injury must be "sudden":** The serious bodily harm suffered by the third person in the plaintiff/bystander's presence must occur in a ***"sudden and dramatic manner,"*** at least according to the Third Restatement. Rest. 3d (Liab. Phys. & Emot. Harm), §48, Comment m. ***"Slow deterioration,*** even to a seriously disabling condition or death, is ***insufficient*** to support liability[.]" *Id.* Most courts would likely agree with the Restatement's "sudden and dramatic" requirement.

Example 7: W works for years at a warehouse owned and operated by D. D negligently stores toxic chemicals there, to which W is unwittingly exposed. Over a period of months, W's health gradually deteriorates, and eventually she is left in a coma. Her husband, H, observes the deterioration with horror. When he finally realizes that W has been irreversibly poisoned, he suffers great emotional distress, and sues D for that distress.

Even though H has been a "bystander" who has directly witnessed the serious bodily harm suffered by his wife, W, a court will probably not allow H to recover for distress, because W's bodily harm was not "sudden." Cf. *Vosburg v. Cenex-Land O'Lakes Agronomy Co.*, 513 N.W.2d 870 (Neb. 1994) (similar facts; court denies recovery to the children of the slowly-poisoned worker because the worker suffered her injuries gradually, and the children therefore could not have become aware of their mother's injuries in the required "sudden and shocking" manner).

7. **P need not be in "zone of danger" or fear for own safety:** In the bystander scenario, most courts that allow bystander recovery at all do ***not*** require that the ***bystander himself have ever been in the "zone of danger,"*** i.e., at risk of direct physical harm. In other words, as long as the bystander "contemporaneously perceives" the injury to a close relative, the bystander's own lack of physical danger does not ruin the claim. See Rest. 3d (Liab. Phys. & Emot. Harm), §48, Comment j (bystander who perceives the injury to a close relative can recover "even though the [defendant's] negligent conduct does not cause direct physical impact to the [bystander] or cause [the bystander] to have fear or apprehension for his or her own safety."

Example: Recall Example 4 on p. 212, where P sits on his porch and watches as his son S is struck down by D's car. The fact that P was never in any physical danger himself during the episode does not negate P's distress claim.

F. P is a "bystander," and sees a non-close-relative suffer bodily injury: Now, let's consider the other major category in which a bystander might try to recover: the bystander witnesses serious bodily harm to another person, but this time the bystander and the physically-injured person are ***not close relatives.*** In this scenario, ***few if any courts allow*** the bystander to recover for mental distress — this is one of those situations in which courts fear that allowing recovery will produce a flood of claims, with no easy way to determine which ones are genuine, and no way to avoid subjecting the defendant to potentially boundless liability.

> **Example 8:** Same basic facts as Example 1 on p. 210. Now, however, P sees the runaway cab strike and kill X, a stranger to P. As in Example 1, P is far enough away (20 yards) from the cab that she never fears that she herself will or may be hit by the cab. Virtually all U.S. courts would deny P the right to recover for her mental distress, even if that distress unquestionably stemmed from seeing the accident and resulted in physical manifestations like ulcers. The same fears of boundless liability and false claims that would result in courts' rejection of P's claim in Example 1 would be cited here.

1. **P not within zone of danger:** The fact that the bystander and the physically-injured person are not close relatives makes the most difference when ***the bystander is never within the zone of danger.*** That's because, in most courts, if the bystander *is* himself within the zone of danger, that fact will ***allow*** the bystander to recover for emotional distress from the entire episode — the court will typically not try to distinguish between distress from the bystander's own narrow escape and distress from the injury to the nearby non-relative.[1]

2. **P is an innocent "participant" in the injury:** Suppose that the plaintiff bystander is not just a passive observer of the injury to the unrelated third person, but is instead in some sense an innocent ***participant*** in the injury to the third person caused by the defendant's negligence. Does the fact of the plaintiff's participation — which may well increase the plaintiff's distress — change the rule that a bystander who is not within the zone of danger cannot recover for injuries he witnesses to a third person who is not a close relative? Most courts answer ***"no"*** to this question — lack of a close family relationship between the physically injured person and the bystander is fatal to the bystander's claim, no matter how integrally a part of the

episode the bystander is, and no matter how much the bystander's participation may have served to increase his distress.

Example: P drives a motorboat on a lake, while pulling two tow-ropes behind the boat. The tow-ropes are attached to two tubes, ridden by two of P's daughter's friends, Samantha and Aimee. As P is traveling eastwards towards the shore, he sees a jet ski ridden towards him from the south. At the moment P first sees the jet ski, it is 75 yards away. The jet ski is ridden by a 14-year-old boy, Panek (D1), who has been entrusted with it by its owner, Lewis (D2). P never believes that the jet ski will hit him or the boat (he expects the ski to turn away before that happens), but fears that when the rider turns, he may then hit one of the two tubes P is pulling. Indeed, Panek turns the jet ski and drives it into Samantha's tube, plunging her face-down into the water. At the moment of impact, the tube is about 60 feet from the rear of P's boat. P floats Samantha back to shore, but she is dead. P brings his own suit against D1 and D2, seeking damages for the Post-Traumatic Stress Disorder that he suffers from witnessing the accident and unsuccessfully attempting to rescue Samantha.

Held, summary judgment for the Ds. In Nebraska, if P does not suffer any impact or physical injury, P may recover for negligent infliction of emotional distress only if he shows either (1) that he was a bystander who had an "intimate familial relationship" with a seriously injured victim of the defendant's negligence; or (2) that P was a "direct victim of the defendant's negligence" in that P was in the "zone of danger" of that negligence. Showing (2) does not apply, because the jet ski was never closer than 60 feet from P, and by P's own testimony he always believed that the ski would turn before it could hit his boat; thus P was never himself in the "zone of danger." (If he *had* been, he would be able to recover for his pure emotional distress.) And as to showing (1), the physically-injured victim (Samantha) and P did not have an "intimate familial relationship." Therefore, no matter how foreseeable it may have been that one in P's position would suffer emotional distress from this type of accident, P cannot recover. *Catron v. Lewis*, 712 N.W.2d 245 (Neb. 2006).

G. Special relationship or special activity: Finally, there are a few types of ***"special" situations,*** scenarios that involve either a ***special activity*** or a ***special relationship among the parties,*** such that courts have decided that the general rule against recovery for negligently-inflicted emotional distress should ***not apply*** even though none of the above exceptions to the general no-liability rule applies. In these special categories, courts have concluded that the ***risk*** of emotional harm to the plaintiff is ***so great,*** and the ***number*** of affected plaintiffs likely to be so ***small,*** that the court should not worry about either feigned distress or a flood of claimants.

1. **Two main categories:** There are two main scenarios that courts have long recognized as being "special categories" where pure emotional harm should be recoverable:

a. Mishandling of bodies: One is the scenario in which a ***hospital or funeral home*** negligently ***mishandles a corpse,*** thereby causing emotional distress to a close relative of the deceased.

Example: Hospital negligently misidentifies a corpse (that of X), causing the corpse to be cremated instead of sent to a funeral home for burial. X's immediate family learns of the error, and suffers great distress because of it. Most courts would allow the family to recover against Hospital. See Rest. 3d (Liab. Phys. & Emot. Harm), §47, Comment f and Illustr. 3.

b. Telegrams announcing death or serious illness: The other is the scenario in which a ***telegraph company*** negligently and incorrectly announces that *A* is dead or seriously ill, and the telegraph is delivered to B, A's intimate family member. Id., Comment f. Most courts permit *B* to recover for emotional distress.

2. Extension to other situations: In recent decades, courts have often recognized ***other situations*** that call for allowing an emotional distress claim that does not fall within either of the above categories, or within any of the physical-impact categories we discussed earlier.

a. Factors required: Typically, for a situation to be classified as a special one that calls for recovery, one or both of the following must be present: (a) P and D have a special ***fiduciary or expert*** relationship (with D being the fiduciary or the expert), making it especially likely that if D behaves negligently, P will suffer great emotional distress; or (b) D helps P engage in an ***"activity"*** in which, if D behaves negligently, great emotional distress to P is likely. Here are a few examples, taken from actual cases in which the court declined to rule as a matter of law that P may not recover for distress:

[1] D, a ***medical clinic*** that has run a blood test on P, negligently (and incorrectly) ***informs P that she is HIV positive;***

[2] D, an ***obstetrician,*** negligently mishandles a ***pregnancy*** of P, a patient, leading to a ***stillbirth*** that causes P great emotional harm;

[3] D, a ***fast food chain,*** negligently serves P a hamburger with human blood on the bun.

All of these examples are from cases cited in Rest. 3d (Liab. Phys. & Emot. Harm), §47, Reporter's Note to Comment f.

H. The "at-risk plaintiff": In recent decades, the issue of liability for negligent infliction of purely emotional distress has been raised by a new type of plaintiff, sometimes referred to as the ***"at-risk plaintiff."*** With the increased use of epidemiological and statistical techniques, it is often possible to say that a particular plaintiff, by virtue of his exposure to a certain substance, has suffered an ***increased likelihood of a particular disease*** (e.g., cancer). May such a plaintiff recover for the purely emotional harm of being ***distressed*** by this increased likelihood of illness, assuming that there are no symptoms of the illness itself?

1. **"Cancerphobia":** Cases and commentators often refer to liability for emotional distress due to future illness under the umbrella (and not-always-accurate) term ***"cancerphobia."*** The term is not always accurate, of course, because a person's fear of illness from exposure to a dangerous substance can encompass illnesses other than cancer. But for simplicity, we'll use the term "cancerphobia" in our discussion.

2. **Hard for P to win:** Plaintiffs have ***rarely succeeded i***n recovering for pure cancerphobia, i.e., cases where the plaintiff cannot show that he has actually suffered bodily harm. Courts put various obstacles in the path of cancerphobia plaintiffs — including obstacles summarized in Pars. 3, 4 and 5 below— and it's the rare plaintiff who can overcome all of these obstacles.

3. **Need actual exposure in toxic cases:** Most of the cases raising the issue of recovery for cancerphobia are ***"toxic tort"*** cases, i.e., cases in which the plaintiff has been or may have been exposed to some toxic substance, whether it is the AIDS virus, hazardous environmental waste, or some other damaging substance. In this situation, most courts have insisted, at a minimum, that plaintiff show ***actual exposure*** to the substance, not merely the ***possibility*** of exposure.

   Example: Suppose that D is a physician who has open lesions on his hands and arms, and who examines many patients, including P, while having those lesions. P later learns that at the time D examined her, D knew that he had AIDS. P has not yet developed AIDS, and there is no evidence that she has had HIV virus particles pass into her body. However, P is very frightened that she will develop AIDS from her exposure to D.

   A court would probably hold that P loses on her "fear of AIDS" theory, because she cannot show that she was "actually exposed" to the HIV virus from D. That is, she will lose unless she can show that more probably than not, some virus particles actually

passed from D's body into her own. See Dobbs, pp. 845-846.

4. **Some courts require showing of actual illness:** Some courts have gone even further, and have required that the cancerphobic plaintiff show that more probably than not, he will ***actually contract the illness*** that he is frightened of. In other words, fear of a less-thanprobable illness, no matter how devastating the illness would be if it occurred, will not suffice, in these courts. (In such a court, P in the above example would presumably lose unless she showed not only that she was actually exposed to the HIV virus by D but that she had a greater than 50% chance of contracting AIDS.)

   Example: D (Firestone Tire Co.) sends hazardous waste to a landfill, including two chemicals that are known human carcinogens. The Ps, who live near the landfill, sue D on the theory that although they have no present symptoms of disease, they have suffered emotional distress from the possibility that they may get cancer in the future from their exposure to this hazardous waste.

   Held, for D. Unless the Ps can prove that it is ***more likely than not*** that they will get cancer, they cannot recover. "The tremendous societal cost of . . . allowing emotional distress compensation to a potentially unrestricted plaintiff class demonstrates the necessity of imposing some limit on the class. Proliferation of fear of cancer claims in California in the absence of meaningful restrictions might compromise the availability and affordability of liability insurance for toxic liability risks." *Potter v. Firestone Tire and Rubber Co.*, 863 P.2d 795 (Cal. Sup. Ct. 1993).

5. **Need for danger of "immediate" bodily harm:** Another way that courts often make it hard or impossible to recover for emotional harm from fear of future illness is by insisting that the danger of bodily harm be ***"immediate."***

   a. **Third Restatement:** That's how the ***Third Restatement*** denies recovery for cancer-phobia. As we've seen *(supra,* p. 216), §47 of the Restatement allows P to recover for emotional harm based on negligently-caused physical danger to the plaintiff if and only if the negligent conduct places the plaintiff "in danger of ***immediate bodily harm*** and the emotional harm results from the danger." Comment k to this section explains that the section's requirement that the person be placed in "immediate" danger means that the section ***does not apply to cancerphobia cases.*** And the Comment indicates that this rule is broadly followed by American courts: "[C]ourts deny recovery in cancerphobia cases, at least during the

indeterminate latency period before the person actually suffers bodily injury."

6. **Accompanying physical harm:** But always keep in mind that if there is ***some physical harm*** arising from the episode, the emotional distress will *also* be compensable.

Example: Many workers exposed to ***asbestos*** have developed a lung abnormality known as "pleural thickening." This thickening is not by itself life-threatening, nor does it even directly impair the patient's life. But courts tend to consider as a form of "bodily harm." And it has been statistically linked to a much higher than normal incidence of certain cancers.

A plaintiff who has suffered pleural thickening is likely to be permitted to recover substantial sums from manufacturer of asbestos to which plaintiff was exposed. Such an award would compensate plaintiff not just for his current physical harm from the pleural thickening itself, but also for his distress at knowing that he has a high risk of future harm.

I. Intentional torts: Where the defendant's conduct in imposing emotional distress on plaintiff is ***intentional*** or ***"willful,"*** courts have been ***much more willing*** to allow recovery for pure distress than in the above cases where the defendant was merely negligent. (See the discussion of the tort of Intentional Infliction of Emotional Distress, *supra*, p. 23.) For instance, Rest. 2d, §46(1) allows recovery for pure distress where the defendant's conduct is intentional and "extreme and outrageous."

Example: D commits suicide in P's kitchen. P suffers great shock when she encounters the body, and ongoing distress. P sues D's estate for her distress. At the close of P's case, the trial judge directs a verdict for the estate, in part on the theory that recovery for distress in the absence of physical injury is improper.

Held (on appeal), for P. The estate can properly be held liable for P's shock and distress if D acted "willfully." D's act was "willful" if he either intended to inflict injury (in this case, shock) on P, or recklessly disregarded the risk that injury would occur. On these facts, a reasonable jury could properly find that D acted willfully, so the directed verdict in the estate's favor was improper. *Blakeley v. Shortal's Estate*, 20 N.W.2d 28 (Iowa 1945).

a. Rationale: Courts' more-generous-to-the-plaintiff approach in cases of intentional or willful conduct is probably due to the general tendency of courts to impose a broader scope of liability (see *supra*, p. 10) in cases of intentional torts than in torts of negligence.

V. UNBORN CHILDREN

A. Scope of problem: Can one ever owe a duty of care to a child who is, at that time, ***unborn?*** Until 1946, all courts agreed that the answer was "no". This meant that, for instance, if the defendant injured a mother in a car accident, and the fetus she was carrying was later born with injuries directly sustained in the accident, the infant could not recover. (The mother, however, could recover for mental distress at having an injured child, medical payments required for treatment of the child's injuries, etc.)

B. Modern view: Starting in 1946, one court after another overruled the bar on liability for prenatal injuries. This now appears to have been universally done, and Prosser and Keeton call this overruling "a rather spectacular reversal of the no-duty rule." P&K, p. 368.

1. Viability: A few cases have implied in dicta that for there to be recovery, the child must, at the time of injury, have been ***"viable"*** (i.e., capable of surviving if placed in an incubator). But all courts directly confronted with the issue seem to have permitted recovery even where the fetus was only a few weeks old at the time of injury. The soundness of this is indicated by the Thalidomide disaster, which proved that external forces can cause drastic injury to an embryo that is far from being viable.

a. Restatement cautions: But the Second Restatement, §869, Comment d, notes that the causal link between the defendant's act and injury to a just-recently-conceived embryo can be extremely speculative and unreliable, and suggests that courts require "convincing evidence" of causation in this circumstance.

2. Requirement that child be born alive: Suppose the fetus, after being injured, is ***stillborn.*** May an action for its wrongful death (see *infra*, p. 270-271) be brought? The question usually turns on what the state legislature meant by the use of the word "person" when it provided a statutory right to a wrongful death action on behalf of persons. Most courts have allowed recovery in this situation. But a fair number have not; see, e.g., *Endresz v. Friedberg*, 248 N.E.2d 901 (N.Y. 1969).

a. Restatement view: The Second Restatement, §869(2), would not allow recovery "unless the applicable wrongful death statute so

provides."

3. **Pre-conception injuries:** The above discussion assumes that the injury occurred while the child was *in utero.* Suppose, however, that the injury occurred before the child was even ***conceived,*** but that some effect from the injury is nonetheless suffered by the laterconceived child. This scenario can arise where D manufactures a drug or other product that has the effect of injuring P's mother's (or grandmother's) ***reproductive system*** in some way. Here, courts are ***split*** as to whether the child may recover.

   Example: Patricia Enright's mother takes the drug DES, manufactured by D, while she is pregnant in 1960. The mother gives birth to Patricia in 1960. Patricia, when she reaches adulthood, has several miscarriages, and then gives birth prematurely to a daughter Karen. Karen has cerebral palsy and other developmental disorders. Patricia and Karen both sue D. The issue here is whether Karen can recover from D for injuries caused to her by the drug ingested by her grandmother.

   Held, for D. The court declines to change the traditional view that a child has no cause of action for pre-conception torts committed against the mother. "Public policy favors the availability of prescription drugs even though most carry some risks. . . . [W]e are aware of the dangers of overdeterence — the possibility that research will be discouraged or beneficial drugs withheld from the market. These dangers are magnified in this context, where we are asked to recognize a legal duty toward generations not yet conceived." *Enright v. Eli Lilly & Co.,* 570 N.E.2d 198 (N.Y. 1991).

   Note: But not all courts have agreed with the no-liability approach of *Enright.* See, e.g., *Renslow v. Mennonite Hospital,* 367 N.E.2d 1250 (Ill. 1977), allowing a child to recover where the defendant negligently transfused blood to the mother nine years before the plaintiff's birth.

4. **"Wrongful life":** One issue concerns what might be called ***"wrongful life"*** actions. Suppose a child is born illegitimate, or born unwanted because of a faulty contraceptive, or born with a congenital disease which could not have been prevented, but which, had it been diagnosed *in utero,* could have led to an abortion. In this circumstance, may the child argue that it would have been ***better off not being born at all,*** and is or therefore entitled to damages for life?

   a. **Illegitimacy:** In the case of children born illegitimate, the courts have universally refused to allow an action against the parents, on the grounds that it is better to have been born illegitimate than not to have been born at all.

b. Faulty contraception: If the child is born, healthy but unwanted, due to the defendant's furnishing of a defective contraceptive or performance of a faulty sterilization, courts have sometimes allowed recovery. Apparently no court has allowed the child to recover for "wrongful life." Most courts have, however, allowed the parents to recover. Most courts have limited recovery to the pain, suffering and medical expenses of an unwanted pregnancy, and have denied recovery for the costs of raising a normal child. A minority have allowed even normal child-rearing costs (though these are usually offset by the financial and emotional "benefits" of raising a child). See P&K, p. 372.

c. Congenital defect: The most troubling cases are those in which the child suffers from a severe ***congenital defect or disease*** which, had it been diagnosed during pregnancy, might have led the mother to abort. Here, the impaired child seems to have a much stronger claim that he would be better off never having been born. Apparently, no court has yet explicitly allowed a "wrongful life" recovery in this situation. However, some (but by no means all) courts have allowed ***the parents*** to recover for the medical expenses and emotional distress arising from the child's condition.

VI. PURE ECONOMIC LOSS

A. The problem generally: Suppose that D behaves negligently towards X, in a way that causes X personal injury or property damage. Suppose further that D's conduct also injures P, but P's only loss is ***economic,*** not personal injury or property damage. May P recover in tort from D? As we will see, the traditional general answer is ***"no,"*** but there are some important exceptions.

1. Tacking on of economic loss to personal or property damage: Before we begin examining the "three party" situation referred to in the prior paragraph, let's first consider a simpler "two party" situation: D behaves negligently towards P, and causes P both personal injury and economic loss. In this situation, all courts agree (and have always agreed) that P, in addition to recovering for his personal injury, ***may "tack on" his intangible economic harm as an additional element of damages.***

> **Example:** P owns a retail store, which he personally operates. P is injured by the negligence of D, a careless driver who hits P while P is walking. P can of course recover damages for his physical harm (e.g., his medical bills plus pain and suffering). Once P shows that he has suffered physical harm, he will be permitted to "tack on," as an additional element of damages, his loss of profits from being unable to operate the store. In other words, P's suffering of physical harm qualifies him to recover for the full range of damages which he has suffered, including intangible economic ones.

a. Property damage: Similarly, if P suffers ***property damage*** (even if he does not suffer personal injury), this property damage will qualify him to tack on intangible economic loss as well. Thus suppose, on the facts of the above example, that P's car was struck by D's car, and that as a result: (1) P's car was damaged; (2) P himself was not physically injured; and (3) P lost two days of profits at the store because he could not commute to the store. Once P showed that he suffered direct property damage from P's negligence, all courts would allow him to recover his loss-of-business damages, even though those are purely intangible economic losses.

B. Standard rule disallows pure economic losses: Now, let's return to the three-party situation, in which D's negligence causes physical injury or property damage to X, but only economic loss to *P*. Nearly all courts agree that ***P may not recover anything for his economic losses,*** since he has not suffered any personal injury or property damage. This is true even though D is clearly a tortfeasor (vis-à-vis X), and even though D's negligence has quite clearly, and foreseeably, brought about the injuries to P. As the idea is often put, a person may not recover for unintentionally-caused ***"pure economic loss."***

1. Restatement 3d follows this rule: The Third Restatement of Torts (Liab. for Econ. Harm), §7, follows this general no-recovery principle: except for a few exceptional circumstances:

> a claimant cannot recover for ***economic loss*** caused by (a) ***unintentional personal injury to another party;*** or (b) ***unintentional injury to property*** in which ***the claimant has no proprietary interest.***

2. Rationales: There are some strong ***policy reasons*** behind this general rule barring recovery for pure economic loss. Here are two of the leading rationales:

a. Indeterminate and disproportionate liability: Most importantly, if courts allow recovery for economic loss that is not accompanied by personal injury or property damage to the plaintiff, what is likely to result is ***"indeterminate and disproportionate liability"*** (Rest. 3d (Liab. For Economic Harm) §1, Comment c(1)). Whereas "physical forces that cause injury ordinarily spend themselves in predictable ways [so that] their lifespan and power to harm are ***limited,"*** economic harm is ***not limited*** in this way. *Id.*

Example: Suppose the defendant negligently causes a collision that sinks a ship. This act of negligence will "cause a well-defined loss to the ship's owner; but it may also foreseeably cause economic losses to ***wholesalers*** who had expected to buy the ship's cargo, then to ***retailers*** who had expected to buy from the wholesalers, and then to ***suppliers,*** employees, and customers of the retailers, and so on." Rest. 3d (Liab. For Economic Harm) §7, Comment b. If the courts were to allow claims for all of these types of losses, this would "greatly increase the number, complexity, and expense of potential lawsuits arising from many accidents," and would "result in liabilities that are ***indeterminate*** and ***out of proportion to the culpability*** of the defendant." Id. And it's doubtful (or so courts say) that there would be commensurate benefits to society from imposing such broad liability.

b. Other ways for claimants to protect themselves: Second, courts reason that the victims of economic injury "often can ***protect themselves effectively by means other than a tort suit."*** *Id.* For instance, they may be able to ***buy insurance*** against their losses, or bring a successful contract suit against someone who in turn has a conventional tort claim against the negligent person who caused the loss. *Id.*

Example: Consider the same basic fact pattern as the above example: D, by means of some negligent action, causes a collision that sinks a ship owned by *A.* Assume that *A*'s ship was carrying cargo also owned by *A,* that *A* had contracted to sell this entire cargo to *B,* a wholesaler, and that *B* had in turn contracted to sell some of this cargo to *C,* a retailer. *A,* as the owner of both the ship and the cargo, has an ordinary negligence suit against D, since *A* has sustained property damage from D's negligence and is therefore not affected by the rule against recovery of pure economic loss. But what about B's loss, since he doesn't get delivery of the cargo he contracted to buy?

Well, *B* had the opportunity to buy ***insurance*** against, say, loss of a contracted-for cargo. And *B* may be able to successfully sue *A* for non-delivery (in which case *A* can recover from D, as damages in *A*'s conventional suit against D, the sums that *A* is required to pay to B as contract damages). Ditto for *C,* who may either be insured or able to make a successful contract claim against *B.* Therefore (at least according to courts endorsing the standard "no recovery for pure economic losses" rule), claimants in the position of *B* and *C* won't be left without a remedy.

3. Contexts in which rule is applied: Here are some of the contexts in which the rule barring recovery for pure economic losses is frequently applied:

a. Blocking of highways or streets and thus access to P's business: Where the defendant negligently causes a street, highway or waterway to be closed, business owners whose property is not directly damaged have often sued, seeking recovery for lost business due to customers' inability to get to the owner's premises. Most cases find against the plaintiff, in a straightforward application of the rule denying recovery for negligently-caused pure economic loss.

Example: Due to the negligent construction by D, a builder, of a building on Madison Avenue in the central business district of Manhattan, a wall of the building collapses, covering the street with bricks and mortar. City officials close 15 heavily-trafficked blocks of Madison Avenue for two weeks. The named Ps are retail businesses, none of which suffers physical damage from the collapse or closure; the Ps lose business because shoppers cannot get to these stores during the closure. The named Ps (acting for themselves, and all other businesses similarly affected by the closure) bring a class action against D in tort for their economic losses.

Held, for D. The New York courts "have never held ... that a landowner owes a duty to protect an entire urban neighborhood against purely economic losses." If a particular plaintiff business owner were able to show that (a) D created a "public nuisance" and (b) the particular plaintiff "suffered special injury beyond that suffered by the community at large," the plaintiff would be entitled to a private recovery for public nuisance. But none of the plaintiffs here have suffered the requisite "special injury beyond that of the community." "[E]very person who maintained a business, profession or residence in the heavily populated areas of . Madison Avenue was exposed to similar economic loss during the closure period[]." Therefore, the plaintiffs may not recover for their economic losses, either under nuisance or any other theory. *532 Madison Avenue Gourmet Foods, Inc. v. Finlandia Center, Inc.*, 750 N.E.2d 1097 (N.Y. 2001). See also Rest. 3d (Liab. For Econ. Harm) §7, Illustr. 4, based on *532 Madison.*

b. Toxic torts affecting land or water: In another common scenario, the defendant negligently ***spills toxic substances or pollutants*** onto either a waterway or land, and this "toxic tort" interferes with the economic activities of persons or businesses whose person or property are not directly and physically impacted by the spill. Again, most courts apply the general rule to these non-physically-impacted plaintiffs — unless the plaintiff can show that the defendant negligently created a public nuisance, and that the harm

suffered by the plaintiff is different in kind from the harms suffered by other businesses in the area, the plaintiff may not recover for its "pure economic loss."[1]

Example: Two ships, owned and operated by D1 and D2 respectively, collide in the Gulf area of the Mississippi River. Containers aboard one of the ships are damaged and thrown overboard. The containers leak massive amounts of the toxic chemical PCP into the ocean. All fishing, shipping, land-transport and related activities within a 400-square-mile radius of the accident are suspended for some time. Forty-one different lawsuits are filed by business operators in the area, including marinas, commercial fishers, boat-rental operators, seafood restaurants, business that need to transport their goods by ship, etc. The Ds move for summary judgment, citing the rule against negligence liability for pure economic loss.

Held, for the Ds. With the possible exception of the commercial fishers (an issue not disposed of here), all of the plaintiffs are foreclosed from recovery, since they suffered no direct physical injury or property damage from the spill. If the rule requiring at least property damage to the plaintiff (sometimes called the requirement of a "proprietary interest") were abandoned, courts would have to play a managerial role in adjudicating "wave upon wave of successive economic consequences." It would be left to judges and juries to decide, on the facts of the particular case, whether the losses were too remote. The requirement of direct property damage is preferable, because it is a "bright line rule" whose application can be understood in advance. Furthermore, business operators like the plaintiffs here have the opportunity to procure first-party insurance; a system in which each potential victim of economic loss is encouraged to buy insurance against its own loss is likely to be cheaper and more readily administered than a system under which defendants would have to buy insurance covering "potentially wide, open-ended liability," and the judiciary would have to manage the liability case-by-case via the tort system.

Nor does the Ps' attempt to recover for "public nuisance" change the outcome — plaintiffs cannot recover under standard public nuisance doctrine unless they can show that the harm they suffered was different in kind from that suffered by everyone else affected by the same accident, and this is the very thing that the Ps here cannot show. *Louisiana ex rel. Guste v. M/V Testbank*, 752 F.2d 1019 (5th Cir. en banc, 1985). See also Rest. 3d (Liab. For Econ. Harm) §8, Illustr. 1 and Comment d, stating that Illustr. 1 (denying recovery, even on nuisance grounds, to a beach-front hotel affected by a maritime toxic-chemical spill) is based on *M/V Testbank* among other decisions.

c. Tort against employee or employer causing economic loss to the other: In another scenario, if D ***negligently injures P's employee,*** X, P may not recover for P's economic losses stemming from X's unavailability. And the converse is also true - if D negligently damages X, a business, then P, an employee of X who is deprived of work because of the damage to X ***may not recover lost wages*** from D.

Example: Goalie is a star soccer player with a long-term contract to play for Metro, a professional soccer team. Driver negligently injures Goalie in a car accident, causing Goalie to miss Metro's season. Assume that by the terms of the Goalie-Metro contract, Metro has to pay Goalie his salary for the season despite his unavailability. Even if Metro can demonstrate with near certainty that Goalie's unavailability has cost Metro $1 million in ticket sales for the season, Metro cannot recover anything at all from Driver.

That's because, although Driver's negligence has caused physical injury *to Goalie* (for which Goalie himself can of course recover against Driver), Metro has suffered only economic loss, unaccompanied by personal injury or damage to Metro's "property." (An employee is not considered "property" of the employer for this purpose.) Thus the general rule barring recovery for unintentionally-caused pure economic loss applies. Cf. Rest. 3d (Liab. For Econ. Harm) §7, Illustr. 1 (nearly identical facts).

d. Interruption to power or supplies: Similarly, if D's negligence causes an interruption of the ***flow of goods or services*** that are needed for P's business, but there is no contractual relationship between D and P (and no physical damage to P's property), the general rule prevents P from recovering for its losses.

Example: Contractor, doing excavation work on private property two buildings away from P's factory, negligently severs the power lines that serve the factory, putting P's factory out of business for a day. Assume that the power outage does not cause any damage to P's building or equipment. The rule against recovery for pure economic losses prevents P from recovering from Contractor for these losses. D,H&B Trts. § 647, v. 3, p. 586.

C. Situations that are exceptions or fall outside of the rule: But there are some important situations that are either deemed to fall outside of the scope of the general no-liability-for-pure-economic-loss rule, or to be exceptions to the rule. Two of the more important such situations are (a) where P has a ***"proprietary interest"*** in property that is physically damaged by D's negligence; and (b) where D has created a ***"public nuisance,"*** and P has suffered harm from the nuisance that is "different in kind" from that suffered by other nearby persons. We consider each of these two scenarios in turn.

1. P has a proprietary interest: Since the general rule we're discussing bars recovery only for "pure" economic loss, it's not surprising that a plaintiff can recover economic-loss damages if the plaintiff can also show that ***"property" in which she has a "proprietary" interest*** was damaged by the D's negligence, leading to the economic loss.

a. P owns and possesses the damaged property: If P both ***owns and possesses*** the tangible property damaged by D's negligence, it's easy to see how P can recover for economic losses that stem directly from the property damage.

Example: BargeCo, the owner/operator of a barge, negligently spills chemicals into a harbor. The spilled chemicals flow into the innards of a new custom-designed drill owned by Contractor, a building contractor who is using the drill to finish a construction project owned by Owner at the edge of the harbor. Repair of the drill costs Contractor $10,000, and the process takes a month. Contractor also loses $40,000 because the month's delay causes Contractor to forfeit a "timely completion" bonus in that amount that Contractor would have otherwise received from Owner. (No replacement drill was reasonably available to Contractor sooner because of the drill's custom design.)

Because Contractor suffered direct damage to its tangible property (the drill), Contractor is entitled to recover from BargeCo not only the repair costs, but the intangible economic loss (the $40,000), since that loss stemmed directly from the same negligent act by BargeCo that caused the property damage.

b. P has possession but not ownership; the "proprietary" test: Where P does ***not own*** the property that's physically damaged, but has the right to ***use or possess*** that property, the analysis is more complicated. In this situation, P can recover for economic loss directly resulting from the episode that damages the property if and only if P's arrangement with the owner included at least one (and in some courts both) of the following attributes: (1) ***control*** of the property, and (2) the responsibility for ***maintaining and repairing*** the property. Rest. 3d (Liab. For Economic Harm) §7, Comment c.

Example 1 (right to recover economic loss): P rents one floor of a building from O. D, a contractor working for O on the exterior of the building, negligently causes a wall to cave in, blocking P's employees from work for two weeks. Most courts would say that P, as the tenant of a floor of the building, had enough control of its part of the premises to be deemed to have a "proprietary" interest in those premises. In such a court, P would be permitted to recover its economic losses (lost production) for the period when its employees couldn't come to work.

Example 2 (no right to recover economic loss): P is a railroad that, along with two other railroads, has the right to use a bridge owned and maintained by O. A tugboat owed by D negligently damages the bridge, causing P to have to re-route its shipments for several weeks, at greater cost to P.

A court would probably say that although P had a non-exclusive right to use the bridge, P's lack of complete control (and of the obligation to maintain) the bridge prevented P from having the required proprietary interest in the bridge. If the court so

concluded, the court would probably bar P from recovering its economic losses from D, under the general rule preventing recovery of pure economic losses. Cf. Rest. 3d (Liab. For Economic Harm) §7, Illustr. 6.

2. **Public nuisance with special harm:** Courts generally recognize an exception to the no-recovery-for-pure-economic-losses rule if the defendant's actions create a ***public nuisance,*** but only if the type of economic harm suffered by the plaintiff is ***qualitatively different*** from that suffered by other members of the community. See Rest. 3d (Liab. for Econ. Harm) §8, entitled "Public Nuisance Resulting in Economic Loss": D will be liable if its "wrongful conduct harms or obstructs a public resource or public property," but only if P's losses are ***"distinct in kind*** from those suffered by ***members of the affected community in general."***

   a. **Taken from law of nuisance:** This "exception" is really a recognition that the tort of public nuisance has special features that sometimes call for a private right of action for pure economic loss. (See *infra*, p. 425, for a more detailed discussion of private rights of action for public nuisances.) Normally, the preferred remedy for a public nuisance is an action by the government to have the nuisance abated. But courts often allow private plaintiffs to bring suit for both an injunction and damages, on the theory that such a suit is a valid substitute for a government abatement suit, especially in those cases where there is no single government body standing by ready to bring its own suit.

   b. **"Distinct in kind" requirement:** The requirement for private suits that the plaintiff's losses be ***"distinct in kind*** from those suffered by members of the affected community in general" has quite a lot of bite — where the nuisance has some sort of economic impact on a ***significant number of businesses,*** a plaintiff generally ***won't be able to meet*** the "distinct in-kind" requirement merely by showing that her losses are of ***greater magnitude*** than those of most other community members. Rather, the plaintiff typically has to show that something about her situation -- usually tied to her particular location — makes her losses of a ***"different kind," not just "different magnitude"*** — from other nearby businesses' losses. The following two examples illustrate the kinds of situations that

will or won't meet this "different in kind" requirement.

Example 1 (not different in kind): Recall the *532 Madison Avenue Gourmet* case, *supra*, p. 223, where the collapse of a building negligently constructed by D caused street closings that prevented customers of the Ps (nearby retail stores) from reaching the Ps' premises. The Ps sought to fit within the public-nuisance exception to the no-recovery-for-pure-economic-loss.

But the court found that the Ps had ***not*** shown the requisite "special injury beyond that suffered by the community at large" – ***"[E]very person who maintained a business, profession or residence*** in the heavily populated areas of . Madison Avenue was exposed to ***similar economic loss*** during the closure period[]." (Even if the Ps had shown that their ***dollar losses were greater*** than those of nearly every other person or business in the area, it's unlikely that the court would have found that the "different in kind" requirement was satisfied.)

Example 2 (different in kind): Restaurant is located on the bank of a river. Many of Restaurant's customers arrive by boat, and moor their boat at a dock owned and maintained by Restaurant. Logger floats logs down the river, and negligently allows the logs to become stuck on the river bank near Restaurant's dock, so that restaurants customers can no longer arrive by boat. (The log blockage is not located at or immediately adjacent to any part of Restaurant's property.) No other person or business is affected by the blockage.

A court would likely find that Restaurant has suffered the requisite "distinct in kind" harm. If the court so concluded (and if the court also concluded that the stock logs constituted a public nuisance), the court would allow Restaurant to recover damages for its lost business from logger. Cf. Rest. 3d (Liab. For Economic Harm) § 8, Illustr. 4 (same facts, but assuming, without deciding, that Restaurant's losses are "special," and concluding that on that assumption Restaurant may recover for its pure economic losses).

c. Commercial fishers as a special case: Some courts allow ***commercial fishers*** to recover their lost business when the defendant wrongfully pollutes the waterway in which the fishers have been fishing. The Third Restatement says that these cases "are usually, and correctly, understood as ***suits to remedy a public nuisance."*** Rest. 3d (Liab. for Econ. Harm) §7, Comment e(b). In such suits, the courts typically conclude that the fishers have met the requirement of showing that their harm is "different in kind" from the losses suffered by the community in general. *Id.*

D. Some courts reject basic rule: A few courts seem to have simply ***rejected the basic rule*** barring recovery for economic damages where the plaintiff has not suffered personal injury or property damage. The case in the following Example is the most prominent such case.

Example: D, a railroad, negligently performs the "coupling" of one rail car with another, allowing ethylene oxide to escape and to ignite. Municipal authorities, responding to the fire, evacuate an area within a one-mile radius surrounding the fire. P (People Express), an airline whose airport operations are within the evacuated zone, is forced to close for 12 hours and loses business. P sues D for these lost-business damages.

Held, P may maintain its suit. If P had suffered property damage or other physical harm, P could unquestionably tack on its intangible economic losses. The traditional requirement that a plaintiff first suffer physical harm "capriciously showers compensation along the path of physical destruction, regardless of the status or circumstances of individual claimants. Purely economic losses are borne by innocent victims, who may not be able to absorb their losses." Instead, the court now holds that "a defendant owes a duty of care to take reasonable measures to avoid the risk of causing economic damages, aside from physical injury, to ***particular plaintiffs or plaintiffs comprising an identifiable class*** [who] defendant knows or has reason to know are ***likely to suffer such damages*** from its conduct."

The phrase "identifiable class," however, does not mean simply a "foreseeable class." "An identifiable class of plaintiffs must be ***particularly foreseeable*** in terms of the type of persons or entities comprising the class, the certainty or predictability of their presence, the approximate numbers of those in the class, as well as the type of economic expectations disrupted." So, for instance, "persons travelling on a highway near the scene of a negligently-caused accident . . . who are delayed in the conduct of their affairs and suffer varied economic losses" are ***not*** an "identifiable class" even though they are a "foreseeable" one; therefore, such people would not be permitted to recover. But here, P's operations were ***permanently located*** right next to D's activities; D knew that any accident and consequent evacuation would be likely to cause P economic losses; and D knew or should have known of the dangerous properties of the chemicals it was handling. Therefore, P may recover lost profits and economic loss, if it can prove these with sufficient certainty. *People Express Airlines, Inc. v. Consolidated Rail Corp.*, 495 A.2d 107 (N.J. 1985).

1. **Rare:** But rejection of the general principle barring recovery for pure economic loss is ***relatively rare,*** and seems not to be becoming more common. (Note that *People Express*, the leading case rejecting the general rule, is now over 30 years old.) See, e.g., Rest. 3d (Liab. for Econ. Harm) §7, Reporter's Note to Comment a, saying that as to §7's general rule barring recovery for pure economic loss, "contrary positions have been taken ***only occasionally*** in the case law," and citing *People Express* as one of only two such cases.

E. Special statutes: The "rule" barring liability for pure economic losses is, of course, just a ***common-law*** principle - in other words, it is a judge-made doctrine, and as such can be overruled by a legislature for all or certain scenarios. And, indeed, there are some important contexts in which state and federal statutes overturn the common-law no-recovery

rule.

1. **Oil spills and the OPA:** For instance, Congress has enacted a special statute that in large part reverses the standard no-recovery-for-pure-economic-losses rule for persons who suffer economic loss as the result of an ***oil spill.*** In the ***Federal Oil Pollution Act of 1990 ("OPA"),*** 33 U.S.C. §2702 et seq., Congress gave many persons who suffer economic loss from a spill of oil into navigable waters and onto shorelines the right to recover lost profits caused by the spill, even if the plaintiff did not herself own property that was damaged by the spill.

   Example: Suppose Hotel is located near (but not on) a beach that is fouled by an oil spill, and Hotel loses business because customers cancel their visit when they realize they won't be able to use the beaches. Hotel and its employees can probably both recover under OPA. See 30 Miss. C. L. Rev. 335, 374 (2011), saying that OPA probably gives a loss-profits claim to "the hotel owner who loses profits because neighboring beaches and waters that his customers tend to use are polluted, and the employee of that hotel who loses wages because of the hotel's loss of business."

   a. **2010 Gulf of Mexico oil spill:** Thus following the 2010 Deepwater Horizon oil-drilling spill in the Gulf of Mexico, thousands of claimants who suffered only economic harm from the spill filed various sorts of claims against BP, the well operator. As of April 2015, BP had paid out $10 billion in claims to people and businesses in five states who lost income, profit or property because of the spill, much of it on claims that did not involve physical damage to the claimant's property. www.ibtimes.com, April 16, 2015. It seems likely that BP's willingness to make such large payments for pure-economic-loss was due to OPA's overriding of the standard no-recovery-for-pure-economic-losses regime.

F. Other contexts involving pure economic loss: Here, we've talked about just one aspect of courts' reluctance to award damage to a plaintiff who has suffered only economic loss — the "three party" scenario in which D tortuously causes personal injury or property damage to *A*, but only economic loss to B, who nonetheless sues. But there are a number of ***other scenarios*** that similarly raise the issue of whether a plaintiff who has suffered only economic loss may recover including scenarios in which the defendant has behaved tortiously only to one person (the one

who is now bringing suit). These other scenarios — where the court may or may not award liability for pure economic loss — include negligent performance of a contract for services *(supra*, p. 207), misrepresentation *(infra*, p. 438), products liability *(infra*, p. 358), and interference with contract *(infra*, p. 502). As you will see, judges' fears of unbounded liability surface in these other economic-loss scenarios, too, but those fears are often countered by a judicial instinct to allow recovery where there is only a small class of affected victims.

Quiz Yourself on
DUTY (Entire Chapter)

46. Benedict Arnold, diplomat, is out riding, and sees his friend, George Washington, slumped beside a tree. Washington has caught a chill, and Arnold helps him up and takes him back to the Arnold home. There, Arnold applies leeches to Washington, which Arnold believes will suck out Washington's "bad blood" and cure him. Arnold's not a doctor, but he remembers hearing that applying leeches sucks out a sick person's "bad blood." In fact, however (and as most people know), antibiotics are the only proper way to treat a chill, and leeches are dangerous. Arnold's treatment worsens Washington's condition. When Washington sues him, Arnold defends on the grounds that he was under no duty to act at all, so he can't be liable. Who's correct? _____

47. Patricia is walking with her five-year-old son, Colin, across the street. Doug, driving dangerously fast, is unable to come to a full stop, and lightly hits Patricia. Patricia is knocked to the ground, and suffers minor bruises. She suffers many sleepless nights mentally replaying the accident, and is afraid to cross any of the busy streets in her neighborhood anymore. She sues Doug not only for the bruises but for her emotional distress arising out of the accident. May she recover for this distress? _____

48. Paula and Pam, who are friends, are out on a walk with Paula's 12-year-old daughter Sheila. While Sheila is walking 10 yards ahead of the two women, she starts to cross the street at a cross-walk. Dan, speeding, goes through a red light and strikes Sheila, knocking her down and paralyzing her from the waist down. Paula and Pam watch the whole event,

horrified. Neither ever feels personally in danger of being hit, but both suffer symptoms of Post-Traumatic Stress Disorder for years afterward, with constant nightmares in which they relive seeing Sheila be terribly injured. Paula and Pam each sue Dan for their emotional distress. Under the majority approach to the relevant issues:

(a) Can Paula recover? _____

(b) Can Pam recover? _____

49. DrillCo is an oil company that drills for oil off the shore of Hilton Head, South Carolina. Due to DrillCo's negligence in performing the drilling, a large blow-out occurs, and oil is spread onto the shore. Some direct beachfront owners have oil wash up onto their property with harmful direct results to the land. Peg owns and runs a hotel that is two blocks from the waterfront; no part of the hotel is directly touched by the spill, and no guest or member is physically injured. Because the beach is rendered unsightly for a oneyear clean-up period, occupancy at Peg's hotel (like that of most local hotel keepers) diminishes by 60%, leaving her with a loss of $100,000 in profits compared with the profits in a normal year. Assume that the facts constitute an actionable public nuisance. Under prevailing modern law, may Peg recover $100,000 in damages from DrillCo? (Assume there are no statutes on point.) _____

Answers

46. **Washington.** Initially, Arnold was under no duty to act — when he first saw Washington, he could have left him as he found him, without incurring liability. But once he took an affirmative act in an effort to help (in torts lingo, once he "undertook" to help), he then had the obligation to do so in a reasonable, non-negligent way. Consequently, he is liable for using a treatment method that an ordinary citizen of reasonable care would have known was unsafe.

47. Yes. If the defendant's negligence has caused a physical impact with the plaintiff's person, the defendant is liable not only for the physical consequences of that impact but also all the emotional or mental suffering which flows naturally from it. Thus Patricia, like any physically injured negligence plaintiff, may recover for "mental

suffering" — these mental damages are said to be "parasitic" ones, i.e., ones which attach to the physical injury.

48. (a) Yes. Most modern courts allow a bystander to recover for pure emotional distress, if the bystander watches a close relative be severely injured. See, e.g., Rest. 3d (Liab. Phys. & Emot. Harm), §48, which says that a defendant who "causes ***sudden serious bodily injury to a third person"*** will be liable for "serious emotional harm" caused to a plaintiff who ***"perceives the event contemporaneously"*** and who is a ***"close family member"*** of the third person who suffers the bodily injury. Since the person that Paula watched suffer the "sudden serious bodily injure" was her daughter, Paula meets the "close family member" requirement, and can recover for her pure emotional distress. And that's true even though Paula was never herself within the "zone of danger," i.e., never close enough to the speeding car that she feared that she herself would be hit.

(b) No. If Pam had herself been at some point within the "zone of danger" from the speeding car, most courts would allow her to recover her emotional distress, both distress at the danger to Pam herself and distress at the actual injury to Sheila. But since Pam was never physically in danger, a different rule applies. Under the rule described in sub-paragraph (a) above, Pam would be able to recover for distress at seeing Sheila be injured only if Pam was a "close family member" of Sheila. Since Pam is not a close family member of Sheila, neither the above rule nor any other rule would furnish an exception to the general rule that one may not recover for emotional distress at witnessing, from a safe position, a severe injury to another.

49. No. As a general rule, tortfeasors are not liable to plaintiffs for negligently-caused ***pure economic loss,*** i.e., loss that does not occur in conjunction with any property damage or physical injury to that plaintiff. See, e.g., Rest. 3d of Torts (Liab. for Econ. Loss), §7, stating the general rule that "a claimant cannot recover for economic loss caused by (a) unintentional personal injury to another party; or (b) unintentional injury to property in which the claimant has no proprietary interest." This rule applies here, because the facts tell us that DrillCo has negligently caused oil damage to the property of certain beach-front owners, but that there has been no direct property damage to any

property in which Peg has a "proprietary interest." (There's no indication that she has any financial interest in any of the beach-front property that was physically affected by the spill.) Therefore, the Restatement — and most courts — would not allow Peg to recover for her pure economic loss, despite the fact that DrillCo's negligence was the factual and proximate cause of that loss. There are some exceptions to this general principle of "no recovery for pure economic loss," but none of those exceptions applies here.

Note, by the way, that the question tells you to assume that there are ***no statutes*** on point. This is an important assumption, because in fact, there *is* a federal statute on point: the federal Oil Pollution Act, 33 U.S.C. §2702 et seq, gives many people and businesses who suffer economic losses from a negligently-caused oil spill into a navigable waterway the right to recover those losses, even if the claimant did not own property that was physically damaged by the spill. So under the OPA, Peg *would* be able to recover her lost profits.

Exam Tips** on **DUTY

Be on the lookout for three special types of situations: (1) D ***fails to act;*** (2) P claims ***"mental suffering"*** without physical impact; and (3) D suffers solely ***"intangible economic harm."***

- Look for situations where D ***fails to act.***
  - The core rule, of course, is that a person generally has ***no duty to assist another,*** even where he could do so easily. Occasionally, this general rule is tested — you can spot it because the facts will typically involve a complete stranger who happens to pass by to observe P's peril. *(Example:* D jogs by, sees P drowning, doesn't pull P out or call for help. D is not liable.)
  - Much more often, however, the ***exceptions*** to the general rule of "no duty to render assistance" are what are tested. The most

important exceptions are:

- Any ***owner of business premises*** has a duty to help one who is on the premises, regardless of the source of the danger. *(Example:* If P is choking in D's store, D must attempt to help P even if the choking has nothing to do with D's conduct.)
  - A sub-rule: ***Common carriers*** have a special duty to help passengers, including protecting them from third-party wrongdoers.
  - Similarly, most courts now recognize a special ***university-student*** relationship (so that the university must give assistance to a student it knows or should know is in danger, whether the danger is from drug use or from, say, a poorlyl it parking lot).
- D has a duty to help if ***D's conduct created the danger*** (even if D did not behave negligently). *(Example:* D's car hits P when P darts into the street. Even if D drove completely carefully, D has a duty to get medical assistance for P.)
- D has a duty to render assistance if he ***"undertakes"*** to furnish assistance. "Undertaking" clearly includes the situation where D starts to render assistance, and then doesn't follow through. *(Example:* D drives P partway to the hospital, then puts P off at the side of the road.)
  - Testable issue: Does D's mere ***promise*** to render assistance bind D? Most courts today find that a promise alone can be an undertaking, if it induces detrimental reliance by P or others (e.g., others declined to help P thinking D is already giving help).
  - But there's only liability on an "undertaking" theory when D leaves P ***worse off*** than had there been no undertaking ("detrimental reliance"). *(Example:* D passes by, sees P lying injured, and says, "I'll get help." If no one else comes along, until X comes along and gets help, probably D is not liable because he didn't worsen P's status.)

- Look for situations where P may have a claim for ***"mental suffering."***
  - First, remember that the courts usually don't allow recovery for ***"pure"*** mental suffering, without any ***physical manifestations.*** Thus if P suffers no physical impact ***and*** doesn't get physical symptoms from her asserted suffering (headaches, nausea, etc.), the court is likely to hold that the mental suffering did not merit compensation.
  - Also, remember that if P has ***direct physical injuries,*** the mental suffering can in all courts be ***"tacked on"*** as an additional element of recovery. *(Example:* P gets a broken leg from a car accident; P can also recover for suffering the pain from the break.)
  - Mental suffering thus is an important issue just in those cases where there is ***no direct physical injury.*** There are two major fact patterns that pop up on exams:
    - First, P is ***herself in physical danger,*** and is frightened solely for her own safety. Here, all courts allow P to recover. *(Example:* P is about to be run over and jumps out of the way. P can recover for her mental distress, both at the moment and reliving the near-accident.)
    - Second (and more commonly tested), P ***witnesses an accident*** to another person, and P's mental suffering is mainly her fear ***for the other's*** safety. Here, your analysis should go through several stages:
      - □ If P was within the ***"zone of impact"*** or ***"zone of danger,"*** virtually all courts will allow P to recover for mental suffering, both for her fear for her own safety and her fear for the safety of any ***relative*** who may have been hit or almost hit. So if the facts tell you that P was walking alongside of her husband X (or "standing next to" X), and X is run over or otherwise hurt, then P can recover for mental suffering.
      - □ If P was ***not*** within the zone of impact/danger, but was "present" and ***viewed*** an accident to another, ***some*** (but probably not yet most) courts have abolished the "zone of

impact" requirement, and ***allow*** P to recover for fear for the safety of the injured person. However, these courts almost all require that the injured person be a ***close relative,*** and also require that P suffer ***serious*** emotional distress. So on these facts, say that P can recover "if the jurisdiction has abolished the zone-of-impact requirement." (Usually, the facts won't make it clear whether the jurisdiction has abolished the requirement.)

Note: In courts that have abolished the "zone of impact" requirement, P can recover not only where she is, say, outside and within a few feet of the accident site, but also where she is ***inside*** and sees the accident through a ***window.***

□ If P ***does not see*** the accident at all, but merely hears about it later (even just a few moments later), no court seems to let P recover for mental distress, even if the injured person (call him "X") is P's close relative. So be on the lookout for a fact pattern reading, "A few moments after the accident, P, X's mother, came on the scene . . . ," or "A neighbor rushed to tell P about the accident to X . . . " — there is ***no recovery*** for P's distress in these scenarios. If X is badly hurt or killed, P can recover for loss of consortium — but in this chapter, we're talking about situations where X is either not badly hurt, or not hurt at all, and P has merely suffered fear, not permanent loss.

☛ Look out for situations where D suffers pure ***"intangible economic harm"*** (e.g., ***lost business profits),*** as distinguished from physical harm or property damage.

☞ First, look for the situation where D suffers intangible economic harm ***in addition to*** physical injury or direct property damage. Here, all courts agree that P may "tack on" his economic loss to the other elements of harm. *(Example:* P gets a broken leg, and can't operate his store for six months. P can collect the profits he would have made operating the store.)

☞ More difficult (and more likely to be tested) is the situation where P suffers ***only*** intangible economic harm, with no personal injury or property damage.

- ☞ First, check that *someone* has suffered personal injury or direct property damage. If there is no such person, then in all courts it's clear that P can't recover for the economic losses.

- ☞ Assuming that the person or tangible property of someone other than P was directly injured, then you have an issue about whether P can recover for his pure economic loss from the same episode.

  □ Under the ***majority view,*** D can't recover at all, because courts fear open-ended liability. *(Example:* P operates a brokerage business. D negligently drives into an electric transformer on the street, knocking out the power to P's business and all others within a 300 yard radius. P can't operate the business for a day, and loses money. Under the majority view, P can't recover, because he has suffered no personal injury or property damage, and his damages are purely economic.)

  □ In a few courts, there is no longer any per se rule against recovery of pure economic losses. However, even these courts require that P be part of a relatively small ***"identifiable class"*** that could be foreseen to suffer losses from an act like D's. *(Example:* Under the above brokerage example, P might be able to recover in a few courts, because any business in the relatively small area served by the transformer could be identified in advance as being one that would be economically damaged by D's conduct.)

☞ Contexts where the issue of intangible economic harm is likely to arise:

□ D launches some ***"public health hazard"*** (e.g., some disease, or some toxic chemical into the air, or some pollutant into the water). *(Example:* The Gulf Oil Spill scenario, where D negligently causes the spill and claims are brought by P, a hotel operator who suffers no direct physical injury or property damage, but loses profits because customers stay away. Under the majority view, absent a statute P cannot recover for this pure economic loss.)

□ D cuts off some ***vital public service*** (e.g., a bridge or highway,

electric or water service, etc.).

□ D negligently injures X, a human, and P, X's ***employer,*** loses the benefits of X's services for a time, and thus loses profits. (P can't recover from D for P's pure economic losses, even though *X* can recover his lost wages as well as for pain and suffering, medical bills, etc.)

☞ The "intangible economic loss" problem arises both where the claim is based on negligence, and also where it's based on ***strict product liability*** or ***abnormally dangerous activity.*** (But it does not arise where the tort is intentional, since here the liability is wide-sweeping, and probably all courts will give recovery for pure intangible economic loss.)

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1. If Cilley *had* been an invitee, the case would likely have turned out differently, since many courts treat the landowner/invitee relationship as being one of the special relationships creating a duty on the landowner to render reasonable assistance.

1. For instance, go back to Example 3 on p. 212, where the runaway cab comes within two feet of striking P, who jumps out of the way. Now, assume that at the same moment the cab just misses P, it strikes and kills X, P's friend, who is nearby. Since P was in the zone of danger, she will likely be able to recover for the full extent of her mental distress — the court will probably not try to apportion damages to distinguish between P's distress at her own near-injury and her distress at seeing her friend killed.

1. But as I discuss shortly below, some courts apply a special rule to ***commercial fishers,*** who are allowed to recover.

CHAPTER 9
OWNERS AND OCCUPIERS OF LAND

ChapterScope

This chapter summarizes the various common-law rules dealing with the obligations of owners of land, and the more modern rules that have sometimes replaced the common-law ones.

- **Duty to those outside the premises:** A landowner has a general duty to prevent an unreasonable risk of harm to persons ***off*** the land from ***artificial conditions*** on the land. (Traditionally, the owner has no duty to remove a ***natural*** condition that poses risk to those off the land.)
- **Trespassers:** As a general rule, the landowner owes ***no duty to a trespasser*** to make her land ***safe,*** to ***warn*** of dangers on it, or to protect the trespasser in any other way. But there are important exceptions to this rule.
  - **Children:** Most significantly, the owner owes a duty of reasonable care to a trespassing ***child*** if certain conditions are met.
- **Licensees:** The common-law recognizes a limited set of duties that a landowner owes to a ***"licensee."***
  - **Definition:** A licensee is a person who has the owner's ***consent*** to be on the property, but who does ***not have a business purpose*** for being there. The main class of persons who qualify as licensees are ***"social guests."***
  - **Duty:** The landowner does ***not*** owe a licensee any duty to ***inspect for unknown dangers,*** or to ***fix*** any known danger. However, the owner does have the duty to ***warn*** the licensee of any danger that the owner ***knows*** of.
- **Invitees:** At common law, the owner owes a greater set of duties to an ***"invitee."***
  - **Definition:** An invitee, under the modern view, includes: (1) persons who are invited by the owner onto the land to conduct ***business*** with the owner; and (2) those who are invited as members of the ***public*** for purposes for which the land is held ***open to the public.***

- □ **Duty:** The landowner owes an invitee a duty of ***reasonable inspection to find hidden dangers.*** Also, the owner must take reasonable efforts to ***fix*** a dangerous condition.

- **Rejection of categories:** Some (but not yet most) courts have ***rejected*** the categories of trespasser, licensee and invitee, in favor of a single "reasonable person" standard of landowner liability.

- **Lessors and lessees:**
  - □ **Lessee:** A ***tenant*** is treated ***as if she were the owner,*** for liability purposes.
  - □ **Lessors:** In general, a ***lessor*** (landlord) is ***not*** liable in tort once he transfers possession to the lessee. However, there are some important exceptions.

I. HISTORICAL INTRODUCTION

A. Landowner tort law historically: The common law, up through the nineteenth century, was strongly influenced by the primarily agrarian and rural nature of both the English and American economies. These societies, being sparsely settled as they were, were able to nurture the view that an individual's land was his to do with as he pleased. Consequently, a number of detailed, specialized rules arose concerning the duties of owners and occupiers of land towards other persons, both on and off the premises. These rules were not merely clarifications of what constituted "due care," but were on the contrary rules sharply reducing the duties of landowners and occupiers, holding them to a standard of care markedly lower than that which, to our modern eyes, would be shown by the typical "reasonable person."

1. About this chapter: This chapter summarizes these various common law rules, and also shows the process whereby modern courts have liberalized and, in some cases, abandoned, these principles in favor of a more general duty of due care.

II. OUTSIDE THE PREMISES

A. Natural v. artificial conditions: Whatever socio-economic reasons there have been for imposing a low standard of care upon landowners vis-à-vis persons upon their land, these reasons are less compelling

when the landowner's conduct has effects ***outside*** of his property. Landowners have therefore generally been held liable for conditions upon their land which pose an unreasonable risk to persons outside of it. See Rest. 2d, §§364, 365. There are, however, some exceptions to, as well as special clarifications of, this rule. The most important of these is the distinction between naturally existing hazards and artificially created ones.

1. **Natural hazards:** Where a hazardous condition exists ***naturally*** upon the land, it has almost always been held that the property owner has ***no duty*** to remove it or guard against it, even if it poses an unreasonable danger of harm to persons outside the property. See Rest. 2d, §363(1).

   Example: A boulder sits at the edge of D's property, adjacent to (and higher than) P's property. (The boulder has naturally come to that position, without human intervention.) Even though it's obvious to D for some time that the boulder might fall onto P's property, he does nothing. In a strong windstorm, the boulder falls onto P's house, damaging it. Under the traditional rule, D is not liable to P, because the hazardous condition existed naturally on the land, and D therefore had no duty to remove it or guard against it.

   a. **Trees:** One frequent setting in which the "natural hazard" issue arises involves ***trees.*** Traditionally, courts have distinguished between thickly-settled and rural areas. In thickly-settled urban and suburban areas, owners have generally been required to prevent trees on their property from posing an unreasonable risk of harm to persons on the public roads. This means not only that owners must remove rotten trees where they know of the danger, but also that they probably have an affirmative duty to ***inspect*** to discover such defects. See Rest. 2d, §363(2). In less-densely-populated rural areas, by contrast, owners have generally been held not to have any duty to remove rotten trees or to inspect for defects.

   b. **Rural/urban distinction rejected:** But some modern decisions have rejected the rural/urban distinction in fallen-tree cases. In one case, for instance, this distinction was abandoned in favor of a general requirement that the landowner exercise ***"reasonable care to prevent an unreasonable risk of harm."*** *Taylor v. Olsen*, 578 P. 2d 779 (Or. 1978).

2. **Artificial hazards:** Where the hazardous condition is ***artificially*** created, however, the owner has a ***general duty to prevent an unreasonable risk of harm*** to persons outside the premises. This includes not only man-made structures, but also living things which have been artificially placed on the land (e.g. shrubs) as well as changes in the physical conditions of the land (e.g. excavations). Rest. 2d, §363, Comment b.

   a. **Danger to persons on highway:** Most of the cases falling under this rule have involved danger to persons on an ***adjoining public road*** (usually called a "highway," even if only a seldom-travelled public street).

   b. **Foreseeable deviations:** This duty is owed not only to those who use the public road, but also those who, while using it, predictably ***deviate slightly*** from it onto the owner's land. Thus a property owner will be liable where she places an unreasonably dangerous excavation next to a public side walk, and the plaintiff unwittingly falls into it. Similarly the defendant will be liable if he places a building next to the sidewalk, with a side door in it which is not locked and which opens into a steep drop to the basement, injuring a person who leans against the door. The issue is whether the plaintiff's deviation is "reasonably foreseeable"; it is usually held that deviations by children are more foreseeable than those by adults.

   c. **Telephone poles and other above-the-ground objects:** But where a property owner maintains a necessary ***above-the-ground object,*** such as a ***telephone pole*** or ***mailbox,*** courts are reluctant to impose liability when a person using the adjoining road collides with the object.

B. **Conduct of others:** The landowner's duty of reasonable care may require her to ***control the conduct of others,*** whose behavior on her property may cause injury to those off it.

   1. **Employees:** This is of course true with respect to the owner's ***employees*** under the doctrine of *respondeat superior* (discussed *infra* p. 314).

2. **Contractors:** Similarly, the landowner may be responsible for the negligence of an ***independent contractor,*** if the contractor's work is inherently dangerous to those off the premises (see *infra*, p. 317).

3. **General rule:** But even more generally, the owner is responsible for preventing the activities of anyone on her property if she knows or should know there is danger to outsiders. Thus the owner of a hotel was liable to a passer-by who while on the adjoining sidewalk was hit by an object thrown by a drunken Junior Chamber of Commerce conventioneer staying at the hotel; *Connolly v. Nicollet Hotel,* 95 N.W.2d 657 (Minn. 1958). Similarly, the owner of a baseball park was liable for injury to a pedestrian arising from one of a continual series of foul balls hit by the players; the court asserted that the public has "a right to the free and unmolested use of the public highways," and that the owner was required to take reasonable precautions (e.g., a higher fence) to guard against such injuries. *Salevan v. Wilmington Park, Inc.*, 72 A.2d 239 (Del. 1950). See Rest. 2d §318.

III. INJURIES ON THE PREMISES GENERALLY

A. Detailed rules: It is where injuries occur ***on*** the owner's premises that the detailed and restrictive rules on liability referred to at the beginning of this chapter take effect.

1. **Possessor v. owner:** These common law rules were designed to encourage the full exploitation of land. Therefore, the beneficiary of the rule is the ***possessor*** of the land, not the abstract legal owner. The most important consequence of this fact is that when a ***tenant*** takes possession of property, even if only for a very short period, he is the one who gets the benefit of these specialized rules. The lessor, once he gives up possession, loses the benefit of these rules, although there are other rules (discussed *infra*, p. 249) which also curtail the degree of care which he is required to show.

2. **Family and employees of possessor:** The benefits available to the possessor are also shared, according to most courts, by members of the possessor's ***household*** as well as persons working on the land for his benefit either as ***employees*** or ***independent contractors.*** See Rest. 2d, §384.

3. The term "owner" used for convenience: In this outline the terms "landowner" or "property owner" are used, for convenience, to designate the person who, as possessor of the land, has the benefit of these special rules.

B. Three categories: The common law evolved a rigid series of categories of plaintiffs, as to each of which the landowner owed a sharply differing duty of care. The three principal classes were ***"trespasser", "licensee"*** and ***"invitee".*** The "trespasser" was one who had no right at all to be on the land; the "licensee" was one who came on the land with the owner's consent, but as a social guest (not a business visitor), and the "invitee" was one who came with a business purpose. The owner's duty of care with respect to the "trespasser" was the least, and that with regard to the "invitee" the greatest.

1. Present significance: As is discussed *infra*, p. 248, the significance of these three rigid categories, and the duties relative to each, have been rejected or modified by at least some modern courts, but most courts continue to apply them. Therefore, the highly formalistic rules for determining which category a particular plaintiff falls into must be carefully studied.

IV. TRESPASSERS

A. General rule as to trespassers: The general rule is that the landowner owes ***no duty to a trespasser*** to make her land safe, to warn of dangers on it, to avoid carrying on dangerous activities on it, or to protect the trespasser in any other way. The theory behind this view is that a property owner should be entitled to use her land as she wishes, without worrying about the safety of those who have no right to be on it. See Rest. 2d, §333.

> **Example:** P trespasses along D Railroad's track. His foot gets caught in the track bed, and he is run over by one of D's trains, which fails to stop in time P alleges both that the roadbed was negligently maintained, and that D's employees were negligent in not stopping in time.
>
> *Held*, since P was a trespasser, D owed him no duty of maintaining the roadbed, train brakes or other equipment in a safe condition, or of running the train at low enough speeds to be safe. D may have owed P a duty of reasonable care once his presence was discovered (one of the exceptions discussed below), but as to this duty, the evidence is that D's employees met this standard. *Sheehan v. St. Paul & Duluth Ry. Co.*, 76 F. 201 (7th Cir. 1896).

1. **Invitee who goes beyond scope of invitation:** Keep in mind that a person who starts out being an invitee (one who is on the premises for a business purpose; see *infra*, p. 244) or a licensee (one who has the owner's consent but not a business purpose; see *infra*, p. 242) can become a trespasser by ***failing to stay within the scope of the area*** in which the premises owner has invited him.

   a. **"Employees only" or "Keep out":** Thus a customer or patron who goes into an area of business premises marked "private" or "employees only" or "keep out" will be a trespasser once she does so, and the owner will no longer owe the customer any duty of reasonable care if the owner is not aware of the customer's presence or peril.

      Example: P is a customer of D, a department store. P sees a door marked, "Men's Room," which bears a sign "Employees only. Customers, please use bathroom on main floor." P enters anyway (unbeknownst to D's employees), and slips on a wet floor. A court will probably hold that although P started by being an invitee, P became a trespasser when he entered the bathroom. In that event, D will be found to have not owed P any duty of care to keep the floor non-slippery.

B. Exceptions: There are a number of exceptions to this general absence of a duty of care to trespassers. The more important of these are as follows.

1. **Constant trespass on limited area:** If the owner has reason to know that a ***limited portion*** of her land is ***frequently used*** by various trespassers, as a crossing or path, she must use reasonable care to make the premises safe, or at least, to warn them of dangers which they would probably not otherwise discover. Rest. 2d, §§ 333, 334.

   a. **Railroad crossing:** This principle has been most frequently applied in cases of persons injured while using a well-travelled path across or along a ***railroad;*** it is held that the trains must be operated with reasonable care (e.g., with warning whistles) to protect the trespassers. See, e.g., Rest. 2d, §334, Illustrations 1-3.

2. **Discovered trespassers:** The most important exception to the general rule of non-liability to trespassers is that once the owner has ***knowledge*** that a particular person is trespassing on her property, she is then under a duty to exercise reasonable care for the latter's safety. Rest. 2d, §§ 335, 336.

a. **Natural conditions:** This exception clearly applies where the danger to the discovered trespasser arises from the owner's physical activities (e.g., running a train), or from "artificial conditions" on the land (e.g., an excavation). Where the condition is a purely ***natural*** one, however, (e.g., a hidden bog), it is not clear whether the exception will apply; see Rest. 2d, §337, Comment b stating that the exception should, in theory, apply.

b. **What constitutes discovery:** the duty of reasonable care is triggered not only when the owner ***actually*** learns of the trespasser's presence, but also, when she is confronted by evidence which ***should*** reasonably lead her to the conclusion that a trespasser is present and in danger.

c. **"Wanton and willful" requirement:** Some courts have held that the defendant is liable only if, following the discovery of the trespasser, she disregards the latter's safety ***"wantonly and willfully".*** But this standard has either been rejected by most courts in favor of a simple due care standard, or interpreted in such a way that lack of due care following discovery of a trespasser is automatically deemed "wanton." See P&K, p. 397.

d. **Sufficiency of warning:** The defendant will often be able to satisfy her burden of due care merely by ***warning*** the trespasser; this will be so where the owner reasonably believes that the trespasser will respond to such a warning.

   i. **Warning ignored:** But once it becomes apparent that the warning will not be respected (e.g., where the trespasser makes no move to leave the train tracks following the engineer's blowing of the whistle), the duty then becomes to use other means to avoid harm.

3. **Trespassing children:** More liberal (to the plaintiff) rules have arisen where the trespasser is a ***child.*** This is due to several factors: a child is usually less able to appreciate the dangers posed by strange conditions than an adult; children trespass more frequently than adults and therefore danger to them is more foreseeable; and courts are naturally sympathetic to injured children.

a. "Attractive nuisance": Originally, a child plaintiff got the benefit of a more lenient rule only where his case fell within the so-called ***"attractive nuisance"*** doctrine. This doctrine imposed liability upon a landowner who maintained an injurious condition on her land which, because it made an enticing plaything, induced children onto the land.

b. Modern view: But most modern courts reject the requirement that the child have been attracted by the particular condition which ends up injuring him. However, there are a number of special conditions which must be met before there will be liability to a trespassing child (assuming this is not one of the situations in which there would also be liability to a trespassing adult, such as the "continued trespass upon a limited area" exception, discussed above). These requirements are set forth in an influential Restatement provision, Rest. 2d, §339:

i. Likelihood of trespass: First, the owner must have reason to know that the condition in question is in a place on her land where ***children are likely to trespass;***

ii. Danger: The owner must also have reason to know of the condition, and have reason to know that it poses an ***unreasonable risk*** of serious injury or death to trespassing children;

iii. Children ignorant of risk: The injured child must, because of his youth, either not have discovered the condition or not ***realized the danger*** posed by it;

iv. Utility: The ***benefit*** to the owner of maintaining the condition in its dangerous form must be ***slight*** weighed against the risk to the children, and;

v. Lack of reasonable care: The owner must fail to use ***reasonable care*** to eliminate the danger or protect the children.

Example of Restatement doctrine: P1, who is five years old, enters the backyard of D, P1's next-door neighbor. D's yard has a previously-drained swimming pool that now contains 6 feet of accumulated rainwater; D has removed the fence that previously enclosed the pool. The rainwater in the pool

has become pond-like, with tadpoles and frogs in it. P1 drowns, and P2 (P1's mother) also drowns while trying to save him. D defends on the grounds that since P1 was a trespasser, D owed him only a duty to refrain from wanton and willful misconduct, not a duty of reasonable care.

Held, for the Ps: Ohio hereby adopts the attractive nuisance doctrine of Rest. 2d §339. This doctrine "effectively harmonizes the competing societal interests of protecting children and preserving property rights." Therefore, P1 can recover for negligence even though he was a trespasser, if he can show that: (1) D knew or had reason to know that children were likely to trespass into his yard, (2) D knew the pool/pond posed an unreasonable risk to such children, (3) P1 because of his youth did not realize the risk, (4) the utility to D of maintaining the pond-like pool (or the burden to him of eliminating the condition) was slight compared to the risk; and (5) D failed to use a reasonable care to eliminate the danger. (If P1 makes this showing, P2 can also recover, because she was reasonably attempting to rescue P1 from the negligently-caused danger.) *Bennett v. Stanley*, 748 N.E.2d 41 (Ohio 2001).

c. Other issues: Several issues have frequently arisen in connection with the "trespassing children" doctrine.

i. Age of children: How ***young*** must the child be to gain the benefit of the rule? Originally, many courts imposed a firm rule that the child had to be under twelve. But the modern view seems to be that the child must simply be so young that he is unable to appreciate the risk of the particular condition. This means that where the risk is a familiar one, such as that of drowning in a body of water, a relatively young child may be expected to understand the risk. A power cable, on the other hand, may pose such a sophisticated danger that even a child of sixteen will not be expected to be on his guard, and may recover. See P&K, p. 410.

(1) Subjective and objective aspects: The question apparently has both a subjective and objective aspect. That is, requirement (ii) above in the above list of Restatement requirements is met if the owner has reason to believe that the condition is dangerous to children of the age who are likely to trespass (even if the child who is injured is of a different age category). That's an objective standard. But as to requirement (iii), the actual injured child must not have appreciated the danger, and will be barred from recovery if, say, he had particular knowledge, unusual for one so young,

of the danger. That's a subjective standard. (So for instance, a nine-year-old who is the son of a railroad engineer, and has been warned many times of the dangers of railroad turntables, but nevertheless injures himself, doesn't meet requirement (iii). See Rest. 2d, §339, Illustr. 8.)

ii. **Natural conditions:** The rule recited in the Restatement applies only to "artificial conditions" on the land. As to "activities" carried on upon the land (e.g., the running of a railroad), trespassing children receive no greater protection than adults (and must fall within one of the above exceptions to recover). Where the danger comes from a "condition," but from one which is ***"natural"*** rather than "artificial", the rule is unclear. The Restatement, in §339, has a caveat on this issue, stating that most of the existing cases denying liability for natural conditions are ones where the child ought to have been familiar with the risk (e.g., a body of water), and also, generally, where the condition would have been unreasonably expensive to protect against.

d. General negligence standard: The various requirements of Rest. 2d, §339, really amount to imposition of what is ***almost the usual "reasonable person" standard*** of negligence. Thus in most courts, "child trespasser law [is] viewed as essentially ordinary negligence law," with a few exceptions. P&K, p. 401. This means that the owner does not have to make her premises "child-proof", but must merely take "reasonable measures" to prevent harm; a warning, for instance, may often suffice.

e. Child invitees and licensees: What if the child is not a "trespasser", but a "licensee" or "invitee"? It is universally agreed that such a child should have at least the benefit of the above "child trespasser" rules. Furthermore, she may gain even greater protection by virtue of the rules governing invitees and licensees discussed below; these, however, do not generally make special allowances for children.

f. No duty of inspection: The child trespasser rules do not generally impose any ***duty of inspection*** upon the landowner. She is not

required to inspect in order to determine whether children are likely to trespass, nor is she required to inspect to see if there are any dangerous conditions of which she otherwise would not have any reason to know. See Rest. 2d, §339, Comment g.

V. LICENSEES

A. Significance of being a "licensee": The next step up from the lowly "trespasser" is the socalled ***"licensee".*** A licensee is a person who has the owner's ***consent*** to be on the property, but who does ***not have a business purpose*** for being there, or anything else entitling him to be on the land apart from the owner's consent. See Rest. 2d, §330. As is outlined below, the licensee is the beneficiary of a somewhat higher standard of care than is the trespasser, but a lower standard than would be owed to a business visitor or other "invitee."

B. Social guests: The main class of persons who qualify as licensees are ***"social guests."*** Such a guest, even though he is "invited" by the owner, is not an "invitee", since that term applies only to business guests and other persons identified *infra*, p. 244.

1. **Incidental services:** A social guest will not become an "invitee" even by gratuitously doing ***incidental services*** (e.g., washing dishes). Nor, generally, has the fact that the guest and host have been involved in cultural or fraternal activities been sufficient to make the guest an invitee; only those activities which devolve to the host's ***economic benefit*** have generally been sufficient for this purpose.

2. **Rationale:** The principle difference between the duty owed to a licensee and that owed to an invitee is that as to the licensee, there is ***no duty to inspect for unknown dangers*** (see *infra).* Accordingly, the rationale for holding that a social guest is only a licensee is that such guests commonly understand that the owner will not take any special precautions for their safety. That is, the guest understands that he takes the premises on the same footing as the owner herself. This theory may not be in accord with how hosts and guests usually act, but the conclusion drawn from it, that social guests are not "invitees," is well-established. See Rest. 2d, §330, Comment h(3).

3. **Duties to licensee:** Since, as just noted, courts presume that the

licensee takes the premises on the same footing as the owner, the owner is required to use reasonable care to place him in the same position of relative safety as herself. This means in particular that where the owner ***knows*** of a ***dangerous condition,*** which she should reasonably anticipate that the licensee may not discover, she must ***warn*** him of that danger. (But a warning of the danger is all that is required; the owner is not required to remedy what she knows to be a defective condition.)

a. Natural conditions: This general duty to warn includes dangers arising from ***natural conditions,*** (even though such conditions are exempted where owner liability to persons outside the premises or to child trespassers is concerned). See P&K, p. 417.

b. No duty to inspect: But very significantly, the owner is ***not required to take affirmative action*** to make the premises safe. This means that she has ***no duty to inspect the premises*** to find any hidden dangers. Nor is she liable if the premises are unsafe because of faulty construction. See Rest. 2d, §342, Comment d.

C. Dangerous activities: Most courts now distinguish between passive conditions on the land (discussed above), as to which the owner has no duty of inspection, and ***activities*** carried out by her on the land, as to which an affirmative obligation of due care to licensees is required. Thus if the owner runs trains on her property, she has an affirmative obligation to do so with reasonable care for the safety of any licensee; reasonable care in a particular situation may require that the owner actively keep an eye out for licensees, even if she does not know of their presence. (Her duty is thus higher than it is to trespassers, as to whom there is no obligation until they are actually discovered.)

D.Automobile guests: A ***guest passenger*** in an automobile is sometimes held to be bound by the same rules as a licensee upon land. As was noted previously, *supra*, p. 115, the status of an automobile guest is regulated by statute in some states, but where there is no statute, courts have frequently held that the guest (assuming that he is a social, rather than business, guest) is owed no duty of inspection. See P&K, p. 489

1. Consequence: This means that if the owner/driver carelessly fails to inspect the car's brakes, and the guest is injured, there will be no

liability, on the theory that the defective condition was like a passive condition upon land.

VI. INVITEES

A. Significance of distinction from licensees: As noted, the major difference between "invitees" and "licensees" is that only to the former does the owner owe a duty of reasonable inspection to find hidden dangers, and of affirmative action to remedy such conditions. What she must do to satisfy this burden is discussed below.

B. Who is invitee: The modern view, shared by most courts as well as Rest. 2d, §332, is that the class of "invitees" consists not only of persons who are invited by the owner onto the land to conduct (directly or indirectly) ***business*** with him, but also those who are invited as ***members of the public*** for purposes for which the land is held ***open to the public.*** The former are called by the Second Restatement *(ibid)* "business visitors" and the latter "public invitees".

1. Old view: A number of courts formerly held that there ***had*** to be some business purpose in the plaintiff's visit before he could be an invitee. However, this led courts following this view to stretch to unreasonable lengths to find some kind of indirect business purpose.

2. The modern view: The majority position today includes within the class of invitees ***members of the public who come onto land held open to them*** and who do so for the ***purpose for which the land is held open.*** This majority view relies on the fact that such persons ***reasonably expect that the premises have been made safe for them.***

a. Scope of "business visit: " Where the plaintiff tries to come under the "business visitor" branch of invitee status, it is not required that he have engaged in business at the time of his injury, or even on the visit in question, as long as he has a ***general business relationship*** with the defendant.

Example: D runs a cigar stand in a building. P, who has been D's customer for many years, loiters in front of the stand one day for fifteen minutes, without making a purchase, and then goes to use a toilet in the building. On the way, he falls into an open trapdoor in a dark hallway. D, argues that P was not an invitee, since he made no purchase on the day in question, and since the toilet was not open to the public (but was intended just for D's employees).

Held, P had been allowed to use the toilet many times in the past, and there was no indication that it was not a public toilet. Furthermore, P is not blocked from obtaining invitee status merely because he made no purchase on the day in question; anyone who enters a store with the present or future intention of being a customer is an invitee, since the owner implicitly invites him for a potential business purpose. *Campbell v. Weathers*, 111 P.2d 72 (Kan. 1941).

b. Salespeople and job-seekers: Even in the case of business visitors, the test is whether these visitors reasonably believe that the premises have been held open to them for the ***particular purpose*** on which they enter. Thus a job- applicant at a department store is an invitee, even if the store rejects his application, as long as the applicant reasonably believes that there is a possibility of employment. The same is true of a salesperson who calls on business premises, in a situation where she reasonably believes that such door-to-door salespeople are sometimes received. But a salesperson paying an unsolicited call to a ***private home*** is not an invitee at the outset; this is because she cannot reasonably anticipate that the premises have been especially made safe for her. (But if she is invited in, she then becomes an invitee.) See Rest. 2d, §332, Comment b.

3. Scope of invitation: Since the theory behind expanded liability to invitees is that the premises have been made safe for such persons and held out to them, it follows that a visitor who is an invitee as to one part of the premises may become a licensee or even a trespasser if he goes to other parts of the premises ***beyond his invitation.***

a. Implied invitation: However, the test is always what ***reasonably appears*** to the visitor; if it reasonably seems to him that the premises are open to the public, he will not cease to be an invitee merely because, unknown to him, the owner intends that portion to be off limits to anyone except employees. Thus in *Campbell*, *supra*, the plaintiff continued to be an invitee when he went to the toilet, since he had never been informed in the past that it was not for public use.

b. Private portion used with owner's consent: Suppose the invitee receives the owner's explicit authorization to go into a portion of the premises not usually open to the public. If the visitor does so purely for his ***own benefit,*** he will generally not be an invitee when

he does.

Example: P buys some cigarettes in D's grocery store. P then asks for an empty box for his son, and is told that he can find some in the back room. The back room is unlit, and he falls down a stair well.

Held, P was only a licensee once he went into the back room. In doing so, he was not furthering the business for which he was originally implicitly invited onto the premises (i.e., to make a purchase). *Whelan v. Van Natta*, 382 S.W.2d 205 (Ky. 1964).

c. Time period: Similarly, a guest will cease to be an invitee if he remains on the premises for a longer ***period of time*** than reasonably necessary for the business purpose for which he has been invited.

C. Duty of due care: The owner must exercise reasonable care for the safety of her invitees. Her duty is in theory no different from that of, say, a driver towards pedestrians. But in the case of land, specific rules define what constitutes reasonable care.

1. Duty to inspect: Most importantly, the owner may not impose unreasonable risks of harm upon his invitee, even from dangers as to which the owner is ***unaware.*** This means that the owner has a ***duty to inspect*** her premises for hidden dangers. This does not mean that she must, as an absolute matter, find all hidden dangers; it merely means that she must use ***reasonable care*** in making her inspection. Rest. 2d, §343.

a. Construction defects: The owner may be liable even for dangers stemming from an original ***faulty construction or design,*** if it poses unreasonable danger to her invitee. And this may be true even if the condition existed ***before the owner ever came into ownership*** or possession of the property. P&K, p. 426.

2. Effect of warning: Will a landowner's ***warning*** of a peril negate the owner's liability to an invitee if that peril comes to pass? The general answer is ***"no"*** — a duty to warn about a danger, and a duty to take affirmative steps to prevent the danger from causing harm, can, and often will, ***co-exist*** as independent forms of the duty to use reasonable care to protect invitees.

a. Torts by third persons: This principle is sometimes tested by scenarios in which a third person commits a tort against P while on D's premises. Recall *(supra*, p. 110) that one of the ways a

premises owner can fail to render due care to protect an invitee is by failing to provide reasonable security against the torts of third persons that the owner should anticipate. Generally, this duty to protect is ***not negated*** by the fact that the owner has warned its invitees against the kind of third-party tort in question.

Example: D runs a convenience store that is open 24 hours per day, in an area of town where there are frequent muggings. D posts a sign in the lot, "Warning, there are often thieves in the parking lot; walk here at your own risk." P, a customer, is mugged in the lot at night. The fact that D gave this warning doesn't negate D's obligation to supply a higher level of security (e.g., better lights or a guard) if it would have been reasonable for an owner or operator in D's position to supply that greater security.

3. **Duty varies with use:** What constitutes "reasonable care" on the part of an owner will vary with the use of the premises. Thus the owner of private home, who invites a travelling salesperson in for a consultation, owes a lesser duty of inspection than the owner of a major department store, who must anticipate the thousands of customers whose safety may be at stake. See Rest. 2d, §343, Comment e.

   a. **Sufficiency of warning:** The owner's duty of exercising "reasonable care" will often be satisfied by the mere giving of a ***warning*** of a dangerous condition. This would certainly be true, for instance, of the homeowner/travelling salesperson situation, where a warning "Be careful of the baby's toys" would suffice and it would be unnecessary to clean up the mess instead.

   b. **Sometimes insufficient:** But there are situations in which the owner should know that a warning will ***not suffice to remove the danger;*** if so, she must take other affirmative action to protect the invitee. This may be the case where the owner should realize that the warning (e.g., a posted sign) will not be noticed, or that even if noted, the invitee will still be subject to unreasonable danger.

      i. **Distraction:** One common situation in which a warning is not sufficient is where a storekeeper should know that there is a good chance that a customer will be ***distracted*** from the danger by goods placed on display. See, e.g., Rest. 2d, §343A, Illustration 2.

   c. **Knowledge by invitee:** The same rules apply if the invitee ***knows***

of the danger through his own observation, even in the absence of a warning from the defendant. That is, the defendant normally has no further duty in this situation, but she will have a duty to obviate the danger if even a visitor aware of the danger would be subjected to unreasonable risks. For instance, a train passenger confronted with an icy platform might have no choice except to confront the danger or forego the use of the train; if so, the railroad might be liable for the icy conditions despite the passenger's knowledge of the danger, if the platform could not be crossed with reasonable safety. See Rest. 2d, §343A, Illustrations 6 and 8.

d. Control over third persons: Reasonable care by the owner may require that she exercise ***control over third persons*** on her premises. A storekeeper may, for instance, be required to take reasonable ***security measures*** to ***prevent attacks or thefts*** against her customers. See P&K, p. 428. Similarly, a merchant may be required to at least warn his customers where independent contractors are doing work on the premises which the merchant should know may pose danger to nearby persons.

D. Firefighters and other public-safety personnel: What is the status of ***firefighters, police officers*** and other ***public-safety officials*** who come onto private property in the performance of their duties? Under the common-law ***"firefighter's rule,"*** such workers are treated as ***mere licensees,*** so that the owner does not owe them a duty to inspect the premises or to make the premises reasonably safe. The most common application of the common-law doctrine is that a firefighter who is injured while fighting a blaze cannot recover from the owner of the premises, ***even if the owner's negligence caused the fire.***

1. Rationale: Courts recite several justifications for the firefighter's rule. One is that the firefighter or other public servant is ***aware of the risks*** inherent in his chosen profession, and should therefore be deemed to have ***assumed the risk.*** Another rationale is that the injured worker will generally be compensated through workers' compensation, and allowing tort recovery would allow ***double recovery.*** See *Minnich v. Med-Waste, Inc.,* 564 S.E.2d 98 (S.C. 2002) (reciting these rationales, but then concluding that South Carolina ought not to follow the firefighter's rule).

2. **Status of rule:** A number of states have in recent years expressed dissatisfaction with the firefighters rule. Some have ***eliminated*** it by statute (e.g., Florida and New Jersey) or by judicial decision. Dobbs & Hayden (5th), p. 368. Others have limited it to the case of firefighters, and have refused to extend it to other rescue workers (e.g., paramedics). Id. Still others limit it to suits against ***landowners,*** terming it a rule of "premises liability," not a broad rule against suits by rescue workers. *Id.*

   a. **Most apply:** But most states ***continue to apply the rule,*** at least in the core case: a firefighter injured fighting a fire may not recover against a negligent fire-setter who owns the premises where the injury occurred. Dobbs & Hayden (5th), p. 366.

   b. **Exceptions:** Even in states following the common-law firefighter's rule, courts recognize several situations in which the rule ***does not bar recovery*** by the public servant against the wrongdoing landowner:

      □ The rule does not prevent recovery against a wrongdoer who acts ***intentionally*** or ***"willfully"*** rather than negligently. So, for instance, a firefighter who is injured fighting a blaze may recover against a person who set the fire ***intentionally.***

      □ The rule does not prevent recovery against a defendant who commits his act of negligence ***after learning of the officer's presence.*** *(Example:* D, the homeowner, sees P, a uniformed police officer, at P's door. P is there to investigate a missing neighbor. D negligently allows D's dog to run free and bite P while P is on the property. The firefighter's rule would not bar P from recovering from D, because D's act of negligence occurred after D was aware of P's presence.)

      □ The rule does not prevent recovery for ***risks that are not part of the reason for the officer's presence.*** *(Example:* Same facts as above example, involving D's dog. A second reason for denying D the protection of the firefighter's rule is that danger from a dog was not part of the reason for P's presence.)

   See Dobbs & Hayden (5th), p. 367.

3. **Non-emergency public employees:** ***Non-emergency*** public

employees, such as ***safety inspectors, trash collectors, postal carriers,*** etc., are usually deemed to be ***invitees.*** The theory behind this treatment is that since the visits of such persons are ***foreseeable*** (at least in general, if not in the sense of anticipation of a particular visit on a particular day), the owner can reasonably be expected to keep his premises safe for them. P&K, p. 428-29.

VII. REJECTION OF CATEGORIES

A. Rejection of categories: A number of courts in the last few decades have ***rejected*** the rigid categories of trespasser, licensee, and invitee, in favor of a general single ***"reasonable person"*** standard of liability.

> **Example:** P is a social guest in D's apartment. P asks to use the bathroom, and while doing so severs part of his hand on a broken faucet. It turns out that D was aware of the defective faucet, but failed to warn P.
>
> *Held*, by the California Supreme Court, the plaintiff's status as trespasser, licensee or invitee will *not be dispositive* as to the duty of care owed to him. Instead, the test will be "whether in the management of his property [the owner] has acted as a reasonable person in view of the probability of injury to others, and, although the plaintiff's status as a trespasser, licensee, or invitee may in light of the facts giving rise to such status have some bearing on the question of liability, the status is not determinative." *Rowland v. Christian*, 443 P.2d 561 (Cal. 1968), *infra*, p. 252.
>
> **Note:** In the vast majority of jurisdictions, as noted previously, the owner has a duty to warn a licensee of known defects which the licensee may not discover. But California had never, up to the time of *Rowland*, accepted this rule. Therefore, the plaintiff in *Rowland* could not have won if the court had not rejected the invitee/licensee distinction.

1. Half the states give social guests benefit of duty of due care: *Rowland* has turned out to be very influential, at least as to ***social guests.*** "By 2004, about half the states had either ***included social guests in the invitee category*** or had completely or partially ***abolished the categories,*** with the result that ***all or most non-trespassing entrants upon land are entitled to reasonable care under the circumstances."*** Dobbs & Hayden (5th), p. 371.

a. Not followed as to trespassers: But most states have been ***unwilling*** to follow *Rowland*'s "reasonable care / abolish the categories" rule when it comes to ***trespassers.*** Thus the Iowa Supreme Court, in recently reaffirming the common-law rule as to undiscovered trespassers (no duty except to refrain from

maliciously injuring them), noted that "Only one court in the last 27 years has abandoned the common-law trespasser rule, [so that] the so-called 'trend' to adopt a universal standard of care for premises liability has clearly lost momentum." *Alexander v. Medical Assoc. Clinic*, 646 N.W.2d 74 (Iowa 2002).

VIII. LIABILITY OF LESSORS AND LESSEES

A. Lessee: A lessee of real estate (usually called a "tenant") becomes the possessor of the property. As such, he is treated as if he were the owner, and all the rules of owner liability discussed previously in this chapter apply to him.

1. **Liability:** This can produce liability where the non-lawyer might not expect it. For instance, an apartment tenant who inherits a dangerous condition from the landlord which the tenant has not discovered (e.g., a faulty ceiling), but which defect could have been discovered by reasonable care, may be liable to an invitee (e.g. a door-to-door salesperson invited in to demonstrate his goods) if the ceiling falls. For this reason, such tenants should have liability coverage in their "homeowner's" insurance policy. (The landlord may also be liable in such a situation, as will be discussed below.)

2. **Common areas:** But the tenant is only liable for those areas as to which he is in actual possession. Thus ***common areas,*** such as stairways, elevators, corridors, outside grounds, etc., are usually deemed to remain within the control of the landlord, at least where the building is a multiple dwelling, office building, or other structure with multiple tenants. The tenants therefore can have no liability for defects in these areas (except perhaps for a non-possession-related liability for failing to warn of the defect to a person to whom they had a duty of due care, such as a social guest. In this situation, the liability would be based upon general principles).

B. Lessor's liability: Since the lessee is treated as the owner for most purposes, courts generally relieve the lessor of most liability once she transfers possession to the lessee. This is true both as to dangerous conditions existing prior to the lease, and conditions arising thereafter. There are, however, a number of important exceptions to this general rule of non-liability.

1. **Danger unknown to lessee which should be known to lessor:** The lessor will be liable to the lessee (and to the lessee's invitees and licensees) for any dangers existing at the start of the lease, which the lessor ***knows or should know about,*** and which the lessee has no reason to know about. Rest. 2d, §358.

    a. **No duty of inspection:** This rule is ***not*** usually interpreted as requiring the lessor to make an ***inspection*** of the premises. It generally means merely that if she either knows of a hidden danger, or knows of other facts which should reasonably lead her to learn of the danger (e.g. she knows of similar defects in other apartment units in the same building), she must warn the tenant. Rest. 2d, §358, Comment b.

2. **Rented property to be held open to public:** If the lessor has reason to believe that the lessee will ***hold the premises open to the public,*** and she also has reason to believe that this may occur before a condition which the lessor knows is dangerous has been repaired, the lessor will be liable. The reason for this rule is that where the safety of the public at large is at stake, the lessor has a higher duty than where only casual visitors are expected; the lessor should not be allowed to freely transfer this responsibility onto the lessee.

    a. **Duty of inspection:** Here, it is usually held that the lessor has an affirmative duty to inspect the premises to find and repair dangers. P&K, p. 437.

    b. **Defect must exist prior to lease:** This rule applies only where the dangerous condition exists at the time the lessee takes possession. Thus if the premises are turned over in good condition, and due to the lessee's negligence the structure deteriorates to a dangerous point, the lessor has no liability even if she is aware of the condition. Rest. 2d, §359.

    c. **Lessee's promise to repair:** The lessor is only liable under this rule if she has reason to believe that the lessee will admit the public prior to repair of the dangerous condition. But the lessor does not automatically escape liability merely because the lease contains a promise by the lessee to make the repairs.

i. **Express promise:** But if the lease contains an express promise by the lessee that he will ***not admit the public*** until he has made the repairs, this will generally be enough to relieve the lessor of liability. Rest. 2d, §359, Comment i.

3. **Common areas kept under control of lessor:** As noted previously, the ***common areas*** of a structure, such as its corridors, stairwells, etc., frequently remain within the landlord's control, particularly where the building has several tenants. As to such a common area, the lessor has a general duty to use reasonable care to make the area safe. If she does not do so, she will be liable not only to an injured tenant, but also to a member of the tenant's household, a social guest, a business invitee, or anyone else who uses the common area with the tenant's or landlord's permission. Rest. 2d, §360.

   a. **Natural conditions:** A majority, but not a large one, of courts hold that the landlord's duty applies even where the condition is a ***"natural"*** one, such as snow or ice on the front steps of the building. P&K, p. 441.

4. **Lessor contracts to repair:** If the lessor ***contracts,*** as part of the lease, to keep the premises in good repair, courts are not in agreement about whether breach of this duty will give rise to a tort action. The tenant himself, of course, can sue in contract for such a breach, but damages in such an action have sometimes been restricted to the reduction in the rental value of the premises due to the breach, with damages for personal injury not allowed. P&K, p. 443.

   a. **Restrictive rule:** Until fairly recently, most courts have ***not*** permitted an action in tort either by the tenant or anyone else; this means that a member of the tenant's family, a licensee, or anyone else not a party to the original lease would have no recovery against the landlord based on the failure to repair.

   b. **Majority view:** A majority of courts, however, has held that the landlord's breach of her covenant to repair does give a tort claim to anyone injured. But such courts have required the plaintiff to show not only that the landlord failed to perform her contract, but that she failed to use ***reasonable care*** in performing it. See Rest. 2d, §357(c). Thus the landlord is generally only required to correct the

condition within a reasonable time after being notified of it. P&K, p. 443.

5. **Repairs negligently undertaken:** Even if the landlord has no contractual duty to make repairs, she may incur liability if she gratuitously ***begins*** to make repairs, and either performs them unreasonably, or fails to finish them. Where the landlord, by doing this, has made the danger actually ***worse,*** or has lulled the tenant into a false sense of security, most courts agree that the tenant, or anyone else injured while on the premises with the tenant's consent, may recover. P&K, p. 445; Rest. 2d, §362. To avoid liability, however, the land-lord does not necessarily have to finish the repairs, or correct them, but merely exercise reasonable care for the safety of persons on the property; a warning may be enough. P&K, *ibid.*

   a. **Condition not worsened:** But if the danger is not worsened by the landlord's negligent or abandoned repairs, the courts are divided. In some instances, no liability of the lessor has been found, whereas other courts have held that "the mere failure of the lessor to exercise reasonable care under the circumstances is enough for liability." P&K, p. 445.

   b. **Knowledge of lessee:** Most courts have also held that the landlord is liable only where the lessee does not know that the repairs were negligent or abandoned. See Rest. 2d, §362, Comment d. That is, in the majority view the action is essentially one for "deceit" on the part of the landlord. This means that even a third person (e.g., a social guest) may lose his right to sue the landlord, where the tenant has failed to pass on his knowledge of the landlord's negligence.

      Example: P is a social guest in a house rented by X from D. Water continually drips from the roof of the house onto the front steps, and D begins to fix this problem by repairing the roof. However, he does not finish the repair by installing guttering, and X is aware that the repairs have not been finished. He fails to warn P about the whole problem, and P slips on ice caused by the freezing of the run-off.

      Held, D "could reasonably assume that [X] would inform his guest about the icy condition on the front steps" and D is therefore not liable. *Borders v. Roseberry*, 532 P.2d 1366 (Kan. 1975).

   c. **Repairs done by independent contractor:** Suppose the lessor hires an ***independent contractor*** to perform repairs. Is she liable for

the contractor's negligence? There is dispute about the extent to which the landlord ***delegate*** her responsibility for safe repair. Therefore, if the landlord would be liable for negligent repair work done personally by her, in some situations she will be equally liable for the contractor's negligence. See *infra*, p. 320.

i. **Limitation of liability:** But the trend is to limit the owner's liability to situations where the control of the premises is ***not completely entrusted*** to the contractor. Most courts would thus deny liability if, say, the repairs were done after the owner had turned over the daily details of the work to the appropriately-selected and appropriated-instructed contractor. The new Third Restatement follows this approach. See Rest. 3d (Liab. for Phys. & Emot. Harm), §62, Comment e and Illustr. 2 thereto, discussed infra, p. 320. See also P&K, pp. 445-46.

6. **Duty of protection:** Does the lessor have the duty to attempt to make the premises safe for her tenants, by the taking of ***security precautions?*** Most courts have held historically "no." But this attitude seems to have changed over the last several decades, as is evidenced by the following example.

Example: P is a tenant in a combination office-apartment building owned by D. At the time she became a tenant, the building had a doorman, but D thereafter ceased to furnish one. P is assaulted and robbed in the hallway of the building one night, and sues D. There is evidence that there had been an increasing number of assaults and thefts in the building.

Held, D had a duty to use reasonable care to protect its tenants from "foreseeable criminal acts committed by third parties." D was in a much better position to take such steps than its tenants; furthermore, it had notice of the dangers. And P was led to "expect that she could rely upon" protection, since there was a doorman when she moved into the building. D is not necessarily required to maintain a doorman, if other procedures (e.g., a tenant-controlled intercom/latch system) could provide the same relative degree of security as that which P relied on. (The court analogized to the duty of innkeepers, discussed *supra*, p. 197, to protect their guests against similar attacks.) *Kline v. 1500 Massachusetts Ave. Apartment Corp.*, 439 F.2d 477 (D.D.C. 1970).

7. **Persons outside the premises:** It was noted previously, *supra*, p. 236, that owners' liability for harm to persons ***outside*** of the premises is somewhat broader than that involving harm to persons on the premises. This is similarly true as to lessor's liability to such offthe-premises plaintiffs.

a. Danger at time of lease: The lessor is liable for unreasonably dangerous conditions that exist on the premises at the time she turns them over to the lessee (e.g., holes in the sidewalk). P&K, p. 437.

b. Conditions arising after lease: Where the dangerous condition does not arise until after the start of the lease term, the lessor is usually not liable unless she has contracted with the lessee to keep the premises in repair, and has unreasonably breached the contract. See Rest. 2d, §§377, 378.

c. Activities carried on by tenant: If the tenant carries on ***activities*** that are unreasonably dangerous to persons off the leased premises (e.g., blasting operations in a quarry), the lessor is liable only if she had reason to believe, ***at the time of the lease,*** that the activity would occur, and reason to believe that it would be dangerous to such persons. Rest. 2d, §379A.

8. General negligence standard for lessors: Just as some courts have now imposed a ***general negligence standard*** on occupiers of land (see *Rowland*, *supra*, p. 248), so a few courts have imposed a similar general requirement of due care upon lessors.

> **Example:** P, who is assisting D's tenant, is hurt when he leans against a dry-rotted balcony railing which collapses.
>
> *Held*, D owed ordinary care to his tenant and to others on the premises with permission. Since modern social conditions no longer support special tort immunity for occupiers of land, there is no logical basis for a general rule of non-liability for landlords either. "It would be anomalous indeed to require a landlord to keep his premises in good repair as an implied condition of the lease [see Emanuel on *Property]*, yet immunize him from liability for injuries resulting from his failure to do so." *Pagelsdorf v. Safeco Ins. Co. of America*, 284 N.W.2d 55 (Wis. 1979).

9. Strict liability for latent defects: One court has even imposed ***strict liability*** on a lessor, where a latent defect in the property resulted in personal injury. In *Becker v. I.R.M. Corp.*, 698 P.2d 116 (Cal. 1985), the California Supreme Court held that P could recover for injuries he incurred when he broke a shower door in an apartment leased to him by D, even though the average person in D's position inspecting the glass would not have seen that it was of a dangerous "untempered" variety, and even though the glass was already part of the premises

when D acquired them.

a. Rationale: The California court summarized its holding this way: "A landlord engaged in the business of leasing dwellings is strictly liable in tort for injuries resulting from a latent defect in the premises when the defect existed at the time the premises were let to the tenant." The court relied on the fact that the landlord is in a better position to inspect for latent defects, and on the general rationale — derived from product liability cases, see *infra,* p. 359 — that one who markets a product must bear the cost of injuries resulting therefrom.

IX. VENDORS AND VENDEES

A. Vendor's liability: Generally, a ***seller*** of land is released from tort liability to persons on the property once he has turned over the property to the buyer. But there are exceptions. All these exceptions involve ***artificial conditions*** that exist on the day of the sale, as to which the seller ***knew or should have known*** of the danger. The exceptions can apply to a person injured either on the property or outside it. We consider the on-the-property and outside-the-property scenarios separately.

1. Danger to one on the property: First, let's assume that the accident happens to one ***on the property*** (e.g., a tenant of the new buyer). You only have to worry about an exception (i.e., post-closing liability of seller to persons on the property) if the seller ***knew or should have known*** of the condition and its dangerousness. If that condition is satisfied, then the duration of the seller's post-closing liability varies depending on whether the seller actively ***concealed*** the danger.

a. Seller actively conceals: If the seller ***actively concealed*** the condition, her liability persists after sale until the buyer ***actually discovers*** the condition and has a reasonable opportunity to correct it (whether the buyer takes the opportunity or not). So here, there's no cut-off if the buyer negligently fails to discover (or fix) the problem.

Example: *S* sells a house to *B* on April 1. Prior to the sale date, *S* is aware of a rotten step in the back, and puts wood-colored putty over the rot rather than fix it. Assume that *B* should have immediately, after closing, inspected the step and would have

discovered the rot had she done such an inspection. However, *B* never inspects or fixes the step. On Nov. 1, *B* rents to *T*. *T* falls through the step. *S* will be liable, because: (1) he actively concealed the condition; and therefore (2) his liability for negligence to persons on the land persisted until *B* actually learned of the danger (not merely "should have learned"), which had not happened by the time of the accident.

b. Seller doesn't conceal: If the seller ***didn't actively conceal*** the condition, the seller's liability continues only until the buyer "has had ***reasonable opportunity to discover"*** the condition and correct it. In other words here, the seller's liability is ***cut off*** as soon as the buyer ***should have*** discovered and fixed the problem, even if the buyer negligently failed to actually discover it.

Example: Same basic facts as above example. Now, however, assume that *S* knew of the danger but didn't putty it over or actively try to prevent *B* from learning of it (e.g., *S* didn't give *B* false assurances of the step's safe condition). For any accident after the date on which *B* should have learned (but didn't) of the condition prior to *T's* accident, *S* won't be liable to *T*

As to both concealment and non-concealment, see Rest. 2d, §353.

2. Danger to one outside the property: Essentially the same rules apply to a seller's post-closing liability to one ***outside the property,*** except that the seller has longer liability not only for active concealment but for having ***created*** the artificial condition. Rest. 2d, §373. Thus:

a. Seller conceals or created: If the seller ***actively concealed*** the condition, ***or originally created*** the condition, her liability persists after sale until the buyer actually discovers the condition and has a reasonable opportunity to correct it (whether the buyer takes the opportunity or not). So here, there's no cut-off if the buyer negligently fails to discover (or fix) the problem.

Example: In 2013, *S* puts a new roof on his house. *S* should have known that several slates were dangerous lose, and risked falling on passersby on the public sidewalk running next to and near the house. *S* sells the property to *B* on Feb. 1, 2014. *S* makes no mention to *B* of the roof's condition, and doesn't attempt to conceal the existence of the loose slates. *B* never inspects or discovers the loose slates, though it is negligence for *B* not to inspect and thus discover the problem. On Sept. 1, 2014, a slate falls off and injures *P*, a passerby on the sidewalk.

S is liable to P, because: (1) *S* created the hazardous condition; and (2) *S* therefore had liability until *B* actually discovered the condition and had an opportunity to fix it (even though it was negligent of *B* not to have discovered it prior to *P*'s

accident). *B* would also be liable to *P* in this situation, for having failed to use reasonable care to discover and fix dangers to persons outside the property.

b. Seller doesn't conceal or create: If the seller *neither* actively concealed the condition nor created it, the seller's liability continues only until the buyer "has had ***reasonable opportunity to discover"*** the condition and correct it. In other words, here the seller's liability is cut off as soon as the buyer should have discovered and fixed the problem, even if the buyer negligently failed to even discover it.

B. Builder-vendors: Where the vendor of a house is the company that ***built it,*** some courts are now applying general principles of negligence, and holding the vendor liable for *all* injuries by analogy to cases involving negligence in manufactured goods. And others are imposing ***strict liability*** in this situation, again by analogy to those cases holding a manufacturer of defective goods liable without regard to negligence. The subject of builder-vendor liability is discussed further *infra*, p. 394.

Quiz Yourself on
OWNERS AND OCCUPIERS OF LAND (Entire Chapter)

50. Herman Hermit owns property secluded deep in the woods. Tris Passer, a trespasser, enters Hermit's property and stumbles into a snake pit, which Herman has dug as a home for his pet snakes. It is full of thorny plants and disgusting, writhing snakes. When Tris finally escapes, terrified, she sues Herman for negligence. At common law, will she succeed? _____

51. A housing inspector arrives at the home of Snow White and the Seven Dwarfs. He's heard that more than four unrelated people live there, which is a violation of the local housing code. He asks to examine the basement, which is accessible via an unlit stairway. Snow White and the Dwarfs have been out picking apples, and unbeknownst to them a few of the apples are strewn about the stairway. The inspector trips on one of the apples, falls, and breaks his leg. Are Snow White and the Dwarfs liable for the inspector's injuries? _____

52. The Heerr Chick-Chick Fried Chicken Store is on premises rented from the Stately Real Estate Company. Heerr stages a publicity stunt whereby

it hires a helicopter to drop chickens over the parking lot, foolishly anticipating that the chickens will drop harmlessly to the ground. The chickens fall, Splat! on the parking lot. One chicken lands on Renee Katzendogs, injuring her. Will Heerr be liable to Renee? _____

53. Farmer owns a relatively small (20-acre) farm. If Farmer had inspected his property even casually after buying it, he would have known that there was an abandoned mine shaft in one corner of it, leading hundreds of feet down with no easy way back to the surface. But because Farmer is a "weekend farmer" who bought the property for its appreciation potential, Farmer has never conducted such an inspection, and thus does not know of the shaft's existence. Had such an inspection been made and the mine shaft discovered, it would have cost very little to fence in the shaft. Farmer in fact knows that children from neighboring farms frequently trespass on his property to play in his barn. Paulette, who is six, comes onto Farmer's property to play in the barn, happens to walk into the mine shaft after dark, and is killed. Her estate sues Farmer. Can the estate recover? _____

54. As the result of snow and rain a day earlier, a platform owned by Railway Co. is covered with ice. Railway has previously posted a prominent sign saying, "Mind your step — platform is icy," but has not removed the ice (which could have been done at reasonable cost). Harried, who is running late for his commuter train, slips on the ice and cracks his skull. He sues Railway for damages. Can Harried recover? _____

Answers

50. No. Negligence requires duty, breach, causation, and damages. The key here is duty, and to what extent Herman as a landowner owed Tris a duty. Tris was a trespasser, of which there are two types: discovered and undiscovered. The facts suggest (though they don't conclusively establish) that Tris was an "undiscovered trespasser." If so, under the common-law rule Herman owed Tris *no duty at all.* An undiscovered trespasser represents the very lowest category — in terms of the owner's duty to him — of individuals who enter land. (The rule which imposes a

duty on landowners for natural conditions which the owner has *altered* applies only to people *outside* the land, so it doesn't apply here.)

RELATED ISSUE: A *"discovered"* trespasser is owed the duty of reasonable care for the trespasser's safety, which is generally satisfied by a warning (e.g., a sign) of dangers that are known to the landowner and that are unlikely to be discovered by the trespasser.

Note: Had the hazard been natural (instead of man-made), no liability would attach even if Tris had been discovered. The most common exception to the "no liability for natural conditions" rule is the case of urban landowners, who must inspect and maintain trees on their property to ensure the trees will not fall on others' property or on a public highway.

51. **Yes, probably — it depends on whether the inspector was an invitee.** If the inspector was a "licensee" (one who enters the land with owner's consent but without a business purpose), the only duty owed to him was to warn him of known dangerous conditions. So if he's considered a licensee, Snow White & Co. aren't liable for his injuries because they didn't know about the apples. If, however, he was an "invitee" (one who enters by express or implied invitation to conduct business with the owner, or enters for purposes for which the land is held open to the public), he could reasonably expect that the owner had made the premises safe for him. So if he was an invitee, Snow White's duty was to inspect for dangerous conditions *and* warn or make safe (a warning being sufficient under most circumstances). Thus if the inspector is considered an invitee, Snow White & Co. will be liable for his injuries. Most courts treat those who visit during normal hours and under normal circumstances, like this, as *invitees*, making it likely that Snow White & Co. will be liable.

    Note: If the condition is so obvious that the invitee/licensee should have been aware of it, there is no liability on the landowner (since a warning is superfluous).

52. **Yes.** Lessees of property are liable to the same extent as landowners. Thus, since Renee is an invitee, Heerr must warn her of known dangers ("Warning: Falling Chickens") and inspect the premises to make them safe for her. Dropping a chicken on her head would constitute a breach

of Heerr's duty.

53. No. Even where all of the conditions are satisfied for imposing on the landowner a duty to use reasonable care to protect trespassing children, the landowner has no affirmative duty to ***inspect*** his land to discover whether hazardous conditions exist; he merely has the duty to protect against such conditions if he knows or should know that they exist, and knows or should know of the danger to trespassing children. See Rest. 2d, §339, Comment h.

54. Yes. Harried was an invitee, since he was on the premises for business purposes. Therefore, Railway had the obligation to make the premises reasonably safe for him. While a warning may in many situations be enough to make the premises safe, here this was not the case — it was quite foreseeable that a patron might be running late, and would either not see or disregard the sign, especially where no safe alternative way was made available by Railway. See Rest. 2d, §343A, Illustr. 8.

***Exam Tips** on*
OWNERS AND OCCUPIERS OF LAND

Nearly every torts exam contains at least one question involving the obligation of ***owners of land.***

- Remember that a landowner has a duty to prevent an unreasonable risk of harm to persons ***off the land*** from ***artificial conditions*** on the land. *(Example:* D burns trash on his land, causing smoke that distracts a driver on the adjacent road; D is probably liable.) Older cases hold that there is no duty to prevent an unreasonable risk from ***natural*** conditions on the land (e.g., a tree), but modern cases, especially ones from urban states, may disagree.

- Many exam questions involve the owner's duty to ***trespassers.***

  - The general rule is that the owner owes ***no duty*** to a trespasser to make the land safe, or even to warn the trespasser of known

dangers. But there are some exceptions.

- ☞ If O has ***knowledge*** of the trespasser's presence, most courts require O to use reasonable care for the trespasser's safety. Usually a ***warning*** of a specific danger will suffice (but the posting of a general "no trespassers" sign will not).
- ☞ Most commonly tested is the duty to trespassing ***children.*** Here, O will be liable if five requirements are met: (1) O knows or should know that children are ***likely to trespass*** on that particular part of his land; (2) O knows or should know that a condition on that part of the land poses an ***unreasonable risk*** of serious injury to trespassing children; (3) the child has not ***discovered*** the condition or ***does not realize the danger*** because of his youth; (4) the utility in maintaining the condition is ***outweighed*** by the danger to children; and (5) O fails to use ***reasonable care*** to eliminate the danger or to protect the children. (The list probably applies only to ***"artificial"*** conditions on the land, not to "natural" conditions; it's not clear whether it applies to "activities" carried out by O on the land.)
- ☞ Examples where O may be liable to trespassing children:
  - □ O maintains a gravel heap which he knows children sled ride down, with the risk that they'll go onto the adjacent roadway and get run over;
  - □ O maintains a high-tension wire at the top of a pole. The pole has spikes for climbing, and O knows that children from the nearby school often trespass and climb the pole.

☛ Many questions require you to distinguish between ***"licensees"*** and ***"invitees."***

- ☞ A ***"licensee"***is typically a ***"social guest."***An ***"invitee"***is one who is either invited by O to conduct ***business*** on the premises, or is a member of the ***public*** coming onto the land for the purposes for which the land is held open to the public.
- ☞ The key difference between licensee and invitee is that O has ***no*** affirmative duty to ***make the premises safe*** for the licensee, including no duty to ***inspect*** for hidden dangers.

- Commonly-tested: If P is a police officer, fire fighter or other public ***emergency worker,*** under the common-law "firefighter's rule" P is probably a licensee, and can't recover for dangers that O should have known about but didn't. *(Example:* O doesn't know there's a loose step on the way to his basement, and P, a fire fighter going to the basement to check out a blaze, falls. O is not liable even if it was negligent of him not to have discovered and fixed the step.)
- Key point: Even to a licensee, O has an obligation to ***warn*** of hidden dangers ***known*** to O. *(Example:* On above example, if O knows the stair is loose, he's got an obligation to warn P, the fire fighter, assuming there's time.)

- By contrast, O ***does*** have an affirmative duty to an ***invitee*** to ***inspect the premises*** for hidden dangers, and to ***make the premises reasonably safe.***
  - This obligation often includes a duty to protect against wrongdoing — including crimes — by third parties. *(Example:* If O runs a hotel, O probably has a duty to supply reasonable security in the hotel and its parking lot, and O is liable to a business visitor who is attacked by a third person if reasonable security would have prevented the attack.)
  - Keep in mind that even to an invitee, O is ***not an insurer,*** merely a person having an obligation to behave "reasonably." For instance, if there have been few or no assaults on O's premises previously, O probably isn't liable for failing to have a security officer when an attack finally occurs.
  - Common issue relating to invitee: When O hold his business open to the public, is a P who comes there just to ***browse*** (without making or intending to make a purchase) an "invitee"? Answer: probably "yes," because O could hope to get economic benefit from P either on that or some later occasion.
  - Similar issue: Is a ***worker*** or other ***independent contractor*** engaged by O to work on the premises (e.g., painter or

plumber) an "invitee"? Answer: again, probably "yes," because he gives an economic benefit to O.

- ☞ In any discussion where you mention the trespasser/licensee/invitee distinction, you should allude to the possibility that the jurisdiction has (as many jurisdictions now have) ***abolished*** this distinction. Say something like: "If the jurisdiction has abolished the distinctions between trespasser, licensee and invitee, it probably imposes a single standard of 'reasonableness under all the circumstances.' In that event, we must consider the foreseeability of P's presence on the premises and the foreseeability of danger to him. O probably would [or would not] be found liable because. . . ."

- ☛ Questions sometime involve the liability of a ***lessor.*** The general rule is that the lessor is off the hook once possession is transferred to the lessee.

  - ☞ But there are numerous exceptions, including these three big ones: (1) the lessor is liable to the lessee and to the lessee's invitees/licensees for failure to ***warn*** about any hidden dangers which the lessor ***knows of*** at the beginning of the lease (but the lessor has no duty to inspect to find hidden dangers); (2) the lessor remains responsible for ***common areas*** (e.g., an apartment lobby, stairway, elevator, etc.); and (3) some courts now impose a general duty of reasonable care on landlords as to all who come onto the premises (including the licensees/invitees of tenants).

CHAPTER 10
DAMAGES

*ChapterScope*_____

Every personal injury lawyer knows that having "good damages" in a case is as important as having "good liability." This chapter examines the various components of damages that may be recovered in a persona injury action. The key concepts are:

- I **Actual injury required:** In a negligence action, P must generally show that he suffered some sort of ***physical*** harm (so that he cannot recover damages if he suffered only mental harm with no physical symptoms, and cannot recover nominal damages). But once physical harm has been proven, a variety of damages may be recovered, including the value of any loss of bodily functions, out-of-pocket economic losses, pain and suffering, "hedonistic" damages, and more.
- **The collateral source rule:** Under the ***"collateral source rule,"*** P is entitled to recover her out-of-pocket expenses, even if she was ***reimbursed*** for these losses by some third party (e.g., an insurance company).
- **Mitigation:** P has a ***"duty to mitigate."*** That is, P cannot recover for any harm which, by the exercise of reasonable care, he could have ***avoided*** (e.g., any harm caused by P's failure to seek prompt medical assistance). Some courts also deny P recovery where he fails to take ***advance safety precautions*** that worsen his injuries (e.g., he doesn't wear a seat belt).
- **Punitive damages:** ***Punitive*** damages can be awarded to penalize a defendant whose conduct is peculiarly ***outrageous.*** In a negligence case, D's conduct must generally be "reckless" or "willful and wanton."
- **Recovery by spouse or children:** Most states allow the ***spouse, parent*** or ***child*** of an injured person to recover for the losses that they have suffered. (For instance, a spouse of the injured person may recover for loss of companionship or loss of sex; this is called "loss of consortium.")
- **Wrongful death and survivor actions:** Most states provide that

when an accident victim dies, his estate may sue for those elements of damage that the victim himself could have sued for (a ***"survival"*** action); such actions typically include the decedent's pain and suffering before death. Most states also have ***"wrongful death"*** statutes, which allow a defined group (typically the decedent's spouse and children, or if she has none, her parents) to recover for the losses they have sustained by virtue of the decedent's death.

I. PERSONAL INJURY DAMAGES GENERALLY

A. Actual injury required: In any action based on negligence, the existence of ***actual injury*** is a requirement. Unlike intentional tort actions (e.g. trespass), therefore, ***nominal damages*** may not be awarded. See Rest. 2d, §907, Comment a.

1. **Physical injury required:** Furthermore, in the usual negligence case, the plaintiff must show that he suffered some kind of ***physical*** harm. We have already seen *(supra,* p. 216), for instance, that the plaintiff may not recover where he has sustained only mental harm, with no physical symptoms.

2. **Elements of damages:** But once physical harm has been proven, a variety of damages may be recovered by the injured plaintiff. In addition to compensation for the physical harm itself (e.g., $100,000 for the loss of a leg), the important general categories of damages are as follows:

   a. Economic loss: The plaintiff can recover his direct out-of-pocket losses stemming from the injury. These include ***medical expenses, lost earnings,*** and the cost of any labor required to do things that plaintiff can no longer do himself (e.g. a housekeeper).

   b. Physical pain: The plaintiff may also recover for actual ***physical pain*** suffered from the injuries. (As discussed below, this aspect of damages, like the others, may include both suffering sustained up to the time of the trial as well as an estimate of the suffering which will occur during the future.)

   c. Mental distress: Finally, the plaintiff may recover for various mental consequences of the injury, including:

i. ***fright and shock*** at the time of the injury;

ii. ***humiliation*** due to disfigurement, disability, etc.; see "hedonistic damages," *infra;*

iii. unhappiness and depression at being ***unable to lead one's previous life*** (e.g. inability to enjoy sex, work, play sports, etc.); see "hedonistic damages," *infra;*

iv. ***anxiety*** about the future (e.g. anxiety about the plaintiff's unborn child).

d. Blurred categories: Observe that the various categories blend together. For instance, compensation for the physical injury itself (e.g. loss of a leg) is practically indistinguishable from compensation for mental distress due to the loss, and may be closely related to physical pain suffered as a result of having a stump. However, the precise allocation of the damages is generally of little importance, since the jury is usually required to give a single figure representing combined damages.

3. Maximum possible verdict: One situation in which allocation of the injuries to the various categories becomes significant is when the court attempts to decide whether the jury's verdict is so unreasonable that it must be set aside as a matter of law (either for being too high or too low). Most of the time, the issue is whether the verdict is too high, and the judge decides this question by evaluating the ***"maximum possible reasonable award",*** on an item-by-item basis.

B. Hedonistic damages: Most courts now allow a jury to award ***hedonistic damages,*** i.e., damages for the loss of the ability to ***enjoy life.*** This is a type of damage that is, conceptually at least, distinct from pain-and-suffering.

> **Example:** Suppose that P, injured in an accident, loses the ability to run, and thus the ability to play tennis. P earns her living as an office worker, so the injury does not in any way diminish her earning capacity. Furthermore, the injury does not involve any pain. Nonetheless, if P can show that she played tennis frequently, loved the game, and is distraught at never being able to play again, most courts will allow her to recover damages for loss of the ability to enjoy this aspect of life.

1. Consciousness required: Probably the major question concerning hedonistic damages is whether the plaintiff must be ***conscious*** of the

loss in order to be able to recover these damages. In other words, may a plaintiff who as the result of the defendant's fault is rendered permanently ***comatose*** recover damages for the loss of the ability to enjoy life? Courts are ***split*** on this issue.

a. *McDougald* case: The most important decision to date is that of the New York Court of Appeals in *McDougald v. Garber*, 536 N.E.2d 372 (N.Y. 1989), where the court held that ***"cognitive awareness is a prerequisite*** to recovery for loss of enjoyment of life." The court recognized that its holding would lead to "the paradoxical situation that the greater the degree of brain injury inflicted by a negligent defendant, the smaller the award the plaintiff can recover in general damages." But the court felt that its no-recovery-without-consciousness rule was required in order to further the interest of tort law in compensating victims rather than punishing offenders.

C. Recovery for future damages: The rules of civil procedure require that a plaintiff bring only ***one action*** for a particular accident, and that he recover in that accident for not only his past damages, but for ones he can be expected to ***sustain in the future.*** Rest. 2d, §10.

1. Absolute certainty not required: Obviously future losses cannot be exactly calculated. All the plaintiff has to do, however, is to show the ***approximate*** amount of damages, which, ***more likely than not,*** he will sustain in the future. Such future damages can include future pain and suffering, future mental distress, future lost earnings, future medical expenses, etc.

2. Expert testimony: To prove his future damages, the plaintiff will usually use various kinds of expert testimony. First, he will try to show that the physical injuries will probably be permanent, or at least long-lasting; expert medical testimony would be relevant on this point. Then, he will try to show facts about what his future prospects would have been had there been no injury. He may use ***actuarial tables*** to show, for instance, that he has a life expectancy of, say, thirty-five years (assuming that his life expectancy is not shortened by the injuries), and that he must therefore be compensated for thirty-five years of anticipated pain and suffering.

a. Lost income: Also, if the plaintiff is no longer able to work, he

may produce an expert in economics to testify about what his income from working would likely have been.

b. Shortened life expectancy: In many states, the plaintiff may also show that his ***life expectancy*** has been shortened. This will entitle him to recover for the anticipated "value" of these lost years, as well as for the lost income that could have been earned during them.

3. Present value: Future damages are, by definition, compensation for losses which the plaintiff will not suffer until some time in the future. The plaintiff is therefore getting, in a sense, a windfall by collecting now for future losses. To offset this windfall, courts generally instruct the jury to award the plaintiff only the ***"present value"*** of these losses, at least where lost future earnings and future medical expenses are concerned (though not in the case of damages for physical impairment, pain and suffering, or mental distress). The effect of this discounting is that the defendant receives "interest" on his advance payment. See Rest. 2d, §913A.

> **Example:** Suppose that the jury concludes that P has a life expectancy of twenty-five years, and that he will have anticipated medical expenses during the rest of his life of about $10,000 per year. The jury will be instructed not to award the annual amount times the number of years (i.e. $250,000), but rather, the present value of a $10,000 payment in each of the next twenty-five years. The defendant would be permitted to introduce statistical tables showing that, assuming an interest rate of, say, 6%, the present value of a stream of twenty-five annual payments is only $127,833, not $250,000.

4. **Effect of inflation:** When the jury calculates the plaintiff's anticipated lost earnings or anticipated medical expenses, many courts don't allow the jury to consider the effect that ***inflation*** would have on these sums. Where this is the case, some courts have similarly refused to require that the award be discounted to present value, on the assumption that inflation and discounting cancel each other out.

5. Periodic payments: One way in which states are increasingly dealing with the problem of inflation is by use of ***periodic payments*** of judgments. That is, the plaintiff's recovery is paid in ***installments*** over many years, rather than in a lump sum immediately following the judgment. The payments can be indexed to account for inflation. In this way, the plaintiff can be assured of having a constant level of

purchasing power over the rest of her life, in a way that will more closely approximate replacement of earnings than would a lump sum payment.

a. Required: The parties have always been free to agree on such treatment, and the phrase "structured settlement" is frequently used to describe such consensual periodicpayment arrangements. But as part of the "tort reform" movement, some states now allow one party to ***force*** the other to accept periodic payments, in certain situations. This has happened most commonly in ***medical malpractice*** cases. See, e.g., N.Y. C.P.L.R. §§5031-5039, providing that in medical malpractice cases, where the judgment is for more than $250,000, the judgment may be used (even over the plaintiff's objection) to purchase an annuity for her.

b. Terminates on death: One possible advantage to the defendant of periodic payments is that they can be, and usually are, arranged to ***terminate upon the death*** of the plaintiff. (The New York medical malpractice statute cited in the prior paragraph is of this sort: to the extent that the judgment covers health care costs and non-economic damages, such as pain and suffering, the payments end on the plaintiff's death.) Suppose, for instance, that a 30-year-old man is permanently disabled. Instead of a lump sum of, say, $1 million, he can be given an inflation-adjusted annuity which has a net present value of $1 million. If he lives to be 90, he will have a guaranteed income, whose net present value will turn out to have been more than $1 million. If, by contrast, he dies five years after the injury, he will have received much less.

i. Disadvantage for plaintiff: In general, periodic payments are more popular with defendants than with plaintiffs. Plaintiffs don't like the idea that if they die prematurely, they can end up having received less than the amount the jury awarded them, and their heirs receive nothing. Also, the plaintiff takes the risk that the party making the periodic payments (typically an insurance company from whom the defendant has purchased an annuity) may go bankrupt. Finally, the plaintiff has no discretion about how to invest the judgment amount, since the investing is in effect done by the insurance company — for

instance, the plaintiff is deprived of his ability to use the lump-sum to open a business.

ii. **Advantage for plaintiff:** But there are some potential benefits to plaintiffs, as well: The plaintiff is less likely to "outlive" his income, he is perhaps better protected against inflation, and with an insurance company on the scene he is in theory getting the benefit of professional investment management without paying for it.

6. **Per-diem calculation:** How is the jury to go about fixing a value for pain and suffering, particularly pain and suffering which is prospective in nature? In an effort to give the jury guidance (and to increase the resulting figure), plaintiffs' lawyers often attempt to use what is called the ***per-diem*** argument. That is, the lawyer suggests to the jury that a particular amount for each day, hour or minute of suffering (e.g. $2.00 per hour) would be fair. The lawyer then multiplies out this figure by the number of days or hours of anticipated suffering (usually the plaintiff's life expectancy) and emerges with a very precise, and large, figure. (For instance, $2.00 per hour, based on a twenty-four hour day, amounts to $525,600 if the plaintiff has a thirty year life-expectancy!)

   a. **Majority rule allows *per-diem* argument:** Most courts ***allow*** the *per-diem* argument, "assuming that defendant's counsel can point out any flaws in the argument and that the jury will not be misled." P,W&S, p. 536, n. 17. But a substantial minority refuse to allow per diem calculations.

D. Effect of taxation: A special section of the Internal Revenue Code,§104, makes any recovery or settlement for personal injuries ***tax-free.*** This is true even if the damages represent lost past or future earnings (which, of course, would have been taxed). This exemption has given rise to two related questions, on which the courts have been in dispute.

1. **Calculation based on net, not gross, earnings:** First, should the jury be instructed to base its award for lost past and future earnings on what the net, ***after-tax,*** amount of these earnings would have been?

a. Ordinary taxpayer's future earnings: Most courts hold that lost ***future*** earnings should be calculated on a ***gross, not after-tax, basis.*** These courts point to the uncertain future course of federal taxation, and to other factors in the personal injury litigation system (e.g., the fact that plaintiffs must pay their lawyers out of the award) as reasons for not worrying about this relatively minor windfall.

i. Past earnings: But where the plaintiff seeks ***past*** lost earnings, the amount of tax which would have been paid on these earnings can be calculated with some precision. Therefore, many courts require the jury to award only the ***after-tax*** lost earnings.

ii. Restatement view: The Second Restatement, in §914A, provides that future earnings of ordinary taxpayers should not be calculated on an after-tax basis, but has a caveat expressing no opinion as to whether past earnings, and future earnings of high-bracket taxpayers, should be so calculated.

2. Telling the jury about non-taxation of the award: The second question is whether the ***jury should be told*** that any award would not be taxable. Proponents of telling the jury are afraid that otherwise, the jury will assume that the award would be taxable, and will award a larger sum so that the plaintiff will come out with a "fair amount" after subtraction of the imaginary tax.

a. General rule: Courts are split on what, if anything, should be said to the jury. But it seems fair to say that most appellate courts at least permit the trial judge to tell the jury that the award would not be taxable. Some appellate courts even hold that it is reversible error *not* to tell the jury about this.

E. Reimbursement by third persons: As we have seen, the plaintiff is entitled to recover her out-of-pocket expenses, including expenditures for medical care, lost wages, etc. This is so even though the plaintiff is ***reimbursed*** for these loses by some ***third party*** (e.g. health insurance). The general common-law rule is that as long as payment for any aspect of harm is not made by the defendant or someone acting on his behalf (e.g. the defendant's insurance company), the plaintiff's recovery from

the defendant is ***not diminished*** by the amount of these payments. See Rest. 2d, §920A.

1. **Collateral source rule:** This principle is commonly called the ***"collateral source rule."*** It applies in the following common situations, among others:
   a. **Employment benefits:** If the plaintiff misses work, she can recover the wages she would have earned, even if these are reimbursed through ***sick pay*** furnished by the employer (either voluntarily or under a contract or collective bargaining agreement), statutory disability benefits (e.g. workers' compensation), etc.
   b. **Insurance:** Any losses covered by the plaintiff's insurance may nonetheless be recovered.
   c. **Social security and welfare payments:** Payments by the government under social welfare programs (e.g. social security disability benefits, welfare payments, etc.) also do not count against the plaintiff's recovery.
   d. **Free services:** And even more surprisingly, if the plaintiff receives ***free services*** (e.g., free medical services from a friend, or free home-care services by her own family), the plaintiff may recover the ***reasonable value*** of these services.
2. **Rationale:** There are three major rationales for the collateral source rule.
   a. **Payment by plaintiff:** First, many of the kinds of benefits listed above are ones for which the plaintiff has indirectly paid. For instance, if she receives payments under a disability or life insurance policy, she has paid the premiums on these policies previously; similarly, if she receives free care from her family, she has contributed to the support of her family. It would be unfair to strip her of the benefits of her investment.
   b. **Aiding wrongdoer:** Second, courts feel that it is unfair to allow benefits received by the plaintiff (whether she indirectly paid for them or not) to go to the benefit of the tortfeasor, who is obviously the more culpable of the two.

c. Subrogation: Finally, in many cases the person making the payments is ***subrogated*** to the rights of the plaintiff,[1] or has a right of reimbursement against her out of any judgment; in this situation, there is no double recovery at all.

3. **Attack on rule:** The collateral source rule has been subject to a great deal of attack since the 1980s. In fact, nearly half the states have ***modified*** the common-law collateral source rule in one way or another, generally as part of the 1980s "tort reform" movement. (See ALI Study, v. II, p. 167.) Critics of the collateral source rule argue that it leads to duplicate recovery for some plaintiffs. Furthermore, in cases where subrogation is allowed (see prior paragraph), the collateral source rule simply gives a windfall to the insurer or other person making prior payment to the plaintiff, at the expense of the defendant's insurance company. For these reasons, the ALI Study, v. II, p. 179, recommends the rejection of the collateral source rule. (But the ALI would give the plaintiff a credit for the last two years worth of premiums paid on medical insurance, and would prevent most subrogation claims.)

F. Mitigation: A tort plaintiff, like a contract plaintiff, may not recover any damages which he could reasonably have avoided. This idea is sometimes expressed by saying that the plaintiff has a ***"duty to mitigate"*** In particular, this means that the plaintiff cannot recover for any harm which would probably have been avoided had he sought ***adequate medical care.***

1. **Only reasonable care required:** But the plaintiff is only required to use reasonable effort and care, and courts are very lenient in construing this. Furthermore, the burden of proof is on the defendant to show that the plaintiff's harm could reasonably have been avoided.

2. **Seat belt defense:** Most states apply the "duty to mitigate" rule only to conduct by the plaintiff after the accident. But a few apply it also to some ***safety precautions*** which the plaintiff should have taken before the accident. In these states, for instance, it may be held that where the plaintiff has failed to wear a ***safety belt*** or ***motorcycle helmet,*** injuries which he suffers that would not have been sustained had he taken such precautions are avoidable damages, for which there can be

no recovery. See Nutshell, p. 311. (In other jurisdictions, the failure to use a seat-belt can be contributory or comparative negligence — see *infra*, p. 286.)

a. Seat belt law: At least 32 states have ***laws*** that ***require*** drivers and/or passengers to wear a ***seat belt.*** Failure to wear a seat belt in violation of such a law is somewhat more likely to be considered a failure to mitigate damage than where there is no such law. See *infra*, p. 288.

3. Effect of comparative negligence: The mitigation-of-damages doctrine is much less important today than formerly, because most states that have adopted comparative negligence no longer apply the mitigation rule, and instead merely treat P's failure to mitigate as a form of fault that reduces but does not eliminate her recovery. See *infra*, p. 285.

G. Caps on pain-and-suffering awards: In the 1980s, a number of groups (especially doctors and insurance companies) warned of a "tort law crisis," and lobbied extensively for reform. These groups were strikingly successful in persuading legislatures to put a ***cap*** on ***pain-and-suffering*** awards. By 1990, over half the states had enacted some sort of cap on pain-and-suf-fering damages. See Dobbs, pp. 773-777. Many of these statutes protect only a certain type of defendant (e.g., doctors), but others apply across the board.

1. Medical malpractice: The most common type of statute protects ***doctors and hospitals*** against large pain-and-suffering awards in ***medical malpractice*** cases. For instance, Cal. Civ. Code §3333.2 sets a $250,000 limit on pain-and-suffering damages for any malpractice action against a "health care provider," including doctors and hospitals.

2. General: Other statutes have set a cap on pain-and-suffering awards regardless of who the defendant is. See, e.g., Md. Ann. Code, Ct. & Jd. Proc. §11-108, setting a $350,000 limit on awards for "non-economic damages" in personal injury cases, regardless of the identity of the defendant.

3. No federal right: Few if any decisions have found pain-and-suffering

caps to be a violation of the ***federal*** Constitution.

II. PUNITIVE DAMAGES

A. Punitive damages: Punitive damages (as noted *supra*, p. 10) are sometimes awarded to penalize the defendant, and deter similar wrongdoers, where the defendant's conduct is particularly outrageous.

1. Negligence cases: In cases of negligence, as opposed to intentional torts, punitive damages are usually awarded only where the defendant's conduct was ***"reckless"*** or ***"willful and wanton."***

a. Product liability suits: Punitive damages are now more and more commonly awarded in ***product liability suits.*** One who sells a defective product may be held "strictly liable," even without negligence. (See *infra*, p. 359.) If all that the plaintiff shows is that the product was defective, and he does not demonstrate negligence, punitive damages are highly unlikely. But if the defendant is the manufacturer, and the plaintiff shows that the defendant ***knew*** of the defect, and made the product anyway, an award of punitive damages will often be made and sustained. See, e.g., *Fischer v. Johns-Manville Corp.*, 512 A.2d 466 (N.J. 1986).

b. Effect of possible multiple suits: Observe that in the product liability context, if every jury which awarded compensatory damages were also to award significant punitive damages, the defendant might well be bankrupted. This might in turn mean that ***later plaintiffs*** would be unable even to recover compensatory damages. For instance, early large punitive damages awards have probably contributed to the insolvency of several asbestos manufacturers, including most spectacularly Johns-Manville Corp. Plaintiffs exposed to asbestos produced by Manville and other manufacturers appear, on average, to have gotten smaller awards the later their cases were tried.

i. No outright ban: Even in product liability cases where allowing multiple punitive damages would, as described above, risk of bankrupting the defendant before all later plaintiffs are compensated, courts have rarely if ever used this as a ground for flatly refusing to allow punitive damages.

However, some courts have held that the possibility of repeated awards, and the defendant's financial condition, may be taken into account in fixing the amount of punitive damages in the earlier cases, so that individual awards are lowered to preserve funds for later claimants.

2. **Punitive damages against corporation:** A corporation, like any employer, is generally liable for the torts of its employees acting within the scope of their employment (see *infra*, p. 326). Where an employee commits a tort of a nature which would permit punitive damages to be awarded against her, may such damages be awarded against the ***employer?*** Again, the courts are split. Many follow a "middle" ground, expressed by Rest. 2d, §909. That section allows punitive damages against an employer only where the employer had some personal culpability (either by authorizing the act, recklessly hiring the worker despite his unfitness, or approving the act after the fact) or where the worker was employed in a ***managerial capacity.***

3. **Constitutional limits:** As punitive damages awards have risen in frequency and amount in recent years, defendants have begun attacking the ***constitutionality*** of such awards. Present law can be summarized by saying that the Constitution does place some limits on how and in what amount punitive damages may be awarded, but that only in extreme cases will the award be overturned on federal constitutional grounds.

   a. **"Grossly excessive" standard:** An award will violate the ***due process clause*** of the federal constitution's Fourteenth Amendment if it is ***"grossly excessive."*** *BMW of North America v. Gore*, 517 U.S. 559 (1996).

   b. **Ratio of actual to punitive:** One of the most important factors in whether an award of punitive damages violates due process is the ***ratio*** of the ***punitive damages*** to the ***compensatory damages.*** The Court has said that **"few *awards*** [significantly] exceeding a ***single-digit ratio*** between punitive and compensatory damages ... will satisfy due process." ***State Farm Mut. Automobile Insur. Co. v. Campbell,*** 123 S.Ct. 1513 (2003).

      i. ***Campbell* case:** For instance, in *Campbell, supra,* the Court

found that a punitive damages award of $145 million ***(145 times*** the $1 million compensatory award) violated the defendant's due process rights.

(1) Facts: In *Campbell*, D (an insurance company) refused to settle a case in Utah against the Ps (the policy holders) for the policy limits, even though there was (the Supreme Court later concluded) a "near-certain probability that by taking the case to trial, a judgment in excess of the policy limits would be awarded." The Ps suffered emotional distress from facing a judgment of $136,000 in excess of the policy limit (though D ultimately paid this whole sum before the Ps-vs.-D suit, thus sparing the Ps from actual financial loss). The trial court in the Ps-vs.-D suit allowed in evidence of 20 years worth of assorted alleged wrongdoing by D in states other than Utah, most of which had nothing to do with the refusal-to-pay-valid-claims practice at issue in the case itself.

(2) **Ratio too high:** As noted, in striking the award the Court relied heavily on the fact that there was a 145-to-1 ratio between punitive and compensatory damages, far higher than the single-digit ratios that the Court said would usually be the appropriate limit.

(3) **Irrelevant wrongdoing:** But the Court also objected to the trial court's consideration of evidence of other wrongdoing that ***"had nothing to do with"*** the type of refusal-to-settle wrongdoing at issue in the case itself. One of the key factors in the due process analysis is the ***reprehensibility*** of the defendant's conduct, and, the Court said, only conduct that is ***"similar*** to that which harmed [the plaintiffs]" may be considered in determining reprehensibility.

ii. *Exxon Shipping* case: In *Campbell, supra,* the Supreme Court was deciding whether a punitive damages award was so high that under the circumstances it violated the defendant's federal *constitutional* rights. But occasionally, the Supreme Court sits as a ***common law*** court, whose function is to decide what the

proper measure of punitive damages ought to be as a matter of ***public policy.*** In one such recent case, ***Exxon Shipping Co. v. Baker,*** 128 S.Ct. 2605 (2008), the Court decided that punitive damages ought not to be ***greater than the amount of compensatory damages*** properly awarded in the case. In other words, for the type of case for which the Court was setting a non-constitutional standard — federal maritime cases involving oil spills — the Court set a ***maximum ratio of 1 to 1*** between compensatory damages and punitive damages.

4. **Legislative reform:** Defendants and insurance companies have been more successful in combatting punitive damages in the legislatures than in the courts. Since the late 1980s, at least 15 states have attempted to put statutory controls on punitive damages. These statutes follow several approaches, including:

   □ ***Limits on the amount*** that may be awarded. (For instance, in Texas, four times the actual damages or $200,000, whichever is greater, unless the tort is intentional; Tex. Civ. Prac. & Rem. Code §§41.001-009);

   □ Payment of some of the award ***to the state*** instead of to the plaintiff, to reduce the incentives to seek such awards (e.g., 75% of a punitive damages award in product liability suits, adjusted for litigation expenses, is paid to the state; Ga. Off. Code Ann. §§51-12-5.1(e)(2)); and

   □ Tightening of the ***standard of proof*** beyond the usual "preponderance of the evidence" standard (e.g., requiring proof "beyond a reasonable doubt," as Colorado Rev. Stat. Ann. §13-25-127(2) does, or proof by "clear and convincing evidence.") .

   a. Constitutional attacks: These legislative efforts to curtail punitive damages have often been attacked by plaintiffs on the grounds that the curtailment violates some ***constitutional*** provision, typically a provision of the *state* constitution. These constitutional attacks have sometimes succeeded, as occurred in Illinois, Ohio, Oregon and Kentucky. See PWS (10th), p. 1226.

      i. Right of state to keep award as a "taking": One feature of state reform statutes that plaintiffs have often attacked on

constitutional grounds is the requirement (the second one listed above) that ***some portion of the award go to the state*** instead of to the plaintiff. These attacks, usually made on the basis of a state or federal constitutional ban on ***"takings"*** without due process, have generally ***failed.*** See, e.g., *Cheatham v. Pohle*, 789 N.E.2d 467 (Ind. 2003).

III. RECOVERY BY SPOUSE OR CHILDREN OF INJURED PARTY

A. Historical action for husband: The old English common law viewed the husband-wife relationship as a master-servant one. Accordingly, if anyone injured the wife, the husband had a claim for "loss of services" (or ***"loss of consortium").*** These lost services might include companionship, sex, housework, earnings outside the home, etc.

1. No remedy for wife: But the wife, being essentially a chattel, had no right to "services" from her husband. Therefore, if he was injured, she could not recover anything at common law; all recovery had to be in his name.

2. Modern view: Today, nearly all states treat the sexes equally with respect to recovery by a spouse. This has occurred through a variety of means, including evolution of the common law and Equal Protection attacks on statutes giving only husbands the right to recover for injuries to a spouse. (A few courts have fostered sexual equality by not allowing *either* sex to recover for injuries to a spouse.) See P&K, pp. 931-33.

a. Double recovery: Where the physically injured party and his or her spouse are both allowed to sue, there is obviously a danger of double recovery. For instance, where it is the woman who is injured, she might recover her medical expenses in one action, and her husband might recover these same expenses in his own action, on the theory that he was really the one paying for them. For this reason, the civil procedure rules of a number of states require that the two actions be brought together, so that double recovery can be guarded against; even where no rules require this, as a practical matter both actions are almost always brought jointly. See Nutshell, p. 316. See also P&K, p. 933.

b. Unmarried co-habitants: Starting in the late 1990's, some courts have allowed ***unmarried co-habitants*** to bring loss-of-consortium claims. Dobbs & Hayden (5th), p. 584, n. 6. Similarly, some states allow ***domestic partners*** or persons joined by a ***civil union*** to bring such claims. So far, however, few if any courts have allowed ***gay or lesbian partners*** to bring loss of consortium claims (though Vermont's statute allowing same-sex couples to enter civil unions expressly changes this result, and Massachusetts' 2003 judicial decision allowing gay marriage may also do so).

3. Parent's recovery where the child is injured: Similarly, nearly all jurisdictions allow a ***parent*** to recover ***medical expenses*** incurred due to an injury to the child. Also, since the common law rule that a parent is entitled to the ***services and earnings*** of his minor child has never been repudiated, a parent can recover for loss of these items.

a. Loss of companionship: An increasing number of courts now allow a parent to recover, in addition to the above items, damages for loss of the child's ***companionship*** or ***affection.*** Normally, such damages will exist only if the child dies (but they might also be appropriate if the child suffers brain damage). See *infra*, p. 272.

4. Child's action where parent injured: Where it is the ***parent*** who has been injured no courts, prior to 1980, allowed the child to recover for loss of companionship or guidance.

a. Rationale: Courts denying recovery for loss of a parent's companionship have stressed the difficulty of measuring loss, and the problem of duplicative claims.

i. *Borer* case: For instance, recovery for loss of a parent's companionship was denied by the court in *Borer v. American Airlines*, 563 P.2d 858 (Cal. 1977). There, Patricia Borer was the mother of *nine* children who all brought suit for damages for loss of society and companionship after Ms. Borer was injured. The court emphasized the difficulty of placing a value on this type of injury, and "the inadequacy of monetary compensation to alleviate [the] tragedy. . . . "

b. Modern developments: However, since 1980 a few courts have

allowed children to recover for the loss of society and companionship stemming from the parent's injury. For example, Massachusetts now allows such damages if the child is both: (1) a ***minor*** and (2) ***dependent*** on the parent for nurture and development. *Ferriter v. Daniel O'Connell's Sons, Inc.,* 413 N.E.2d 690 (Mass. 1980).

5. Defenses: In such third-party actions, it is usually held that any defense which could have been asserted in a suit by the injured party may be asserted against the plaintiff. For instance, in a suit by a husband for loss of companionship and intercourse due to injuries to his wife, the defendant may assert that the wife was contributorily negligent. See P&K, p. 937.

a. Defenses against plaintiff: Furthermore, there are defenses that can be asserted against the plaintiff himself. For instance, if Husband and Wife are driving together, and Wife is injured in a collision, the defendant to Husband's suit for loss of services can win by showing that Husband drove negligently. See P&K, p. 937.

IV. WRONGFUL DEATH AND SURVIVOR ACTIONS

A. Consequences of injured party's death: At common law, when a person who was physically injured by the defendant's negligence died from these injuries, his death had two important consequences with respect to legal recovery. First, the decedent's own tort action was extinguished. Second, third persons injured by his death (e.g., his spouse and children), lost their right to recover, due to an early illogical holding that "in a civil court the death of a human being could not be complained of as an injury". *Baker v. Bolton,* 170 Eng. Rep. 1033 (Eng. 1808).

1. Modern statutes: By not allowing any recovery for death, the result was that "it was cheaper for the defendant to kill the plaintiff than to injure him. . . . " P&K, p. 945. This was remedied in England by the passage of Lord Campbell's Act in 1846; similar statutes were enacted in the U.S. To prevent the injured party's own action from being lost due to his death, all states have enacted what are called "Survival" statutes under which damages are awarded to the deceased's estate. And to give a cause of action to the spouse and

children of the decedent, "Wrongful Death" statutes have been passed.

2. **Common-law modification:** Occasionally, also, courts have supplemented the statutory process by granting common-law relief. For instance, in *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970), the Supreme Court held that the heirs of a seaman killed on board ship could recover for his wrongful death, notwithstanding the lack of a statute, and despite prior case law holding that he could not. The Court noted that in recent years, every state had enacted a wrongful death statute, and that whatever public policy reasons were originally perceived to make such recovery undesirable no longer existed.

B. Survival statutes: Every state has passed a ***survival statute*** to modify the common law rule in at least some respects. In about half of them, the decedent's claim for ***personal injuries*** survives, whether or not the injury was caused by the defendant. P&K, p. 942. (The other statutes sometimes allow continuation only of those actions for injuries which did not lead to death, or for damage to personal or real property, or based upon similar distinctions.)

1. **No claim for death itself:** In many states, survival actions are accompanied by a separate wrongful death action. Where this is so, there is obviously a danger of double recovery. For this reason, where there are two statutes the survival action generally is restricted to recovery for ***pain and suffering*** by the decedent prior to his death, lost earnings prior to death, actual medical expenses, etc. (i.e., only losses occurring prior to the death). This means that if death is ***instantaneous,*** generally there is no survival action at all in such states, since all damages are sustained on account of or after the death. See Rest. 2d, §926, Comment a.

2. **Survival of action against dead defendant:** Most survival statutes, regardless of what torts they apply to, hold that just as the plaintiff's action may be maintained after his death, so an action may be maintained after the ***defendant*** has died, or even instituted after his death. Rest. 2d, §926.

C. Wrongful death statutes: As noted, most states have special ***wrongful***

death statutes which allow a defined group of persons (usually the decedent's spouse and children, and sometimes parents if the decedent has no spouse or children) to recover for the loss they sustained by virtue of the decedent's death. Normally, the decedent's executor or administrator brings the action, but the proceeds go directly to the beneficiaries, with each one generally receiving what the court finds as being his own pecuniary loss from the decedent's death.

1. **Who are proper parties:** Since the wrongful death action is usually considered to be exclusively a statutory one, courts have been ***strict*** in construing all aspects of the statute, including the ***class of allowable beneficiaries.*** Thus it has been held, for instance, that a ***step-child*** is not an "heir" of the decedent and is thus not permitted to recover anything, even though the child may have suffered tangible losses of economic support and moral guidance from the death.

   a. **Cohabitants, including same-sex couples:** Where the wrongful death statute gives a right of recovery to the "surviving spouse," generally the decedent's unmarried ***"cohabitant"*** (live-in lover) will ***not*** have any rights under the statute. Dobbs & Hayden (5th), p. 618, n. 5. However, if the state permits ***civil unions,*** the surviving member of such a union may have the right to bring a wrongful death action. Vermont, for instance, not only provides that same-sex couples may enter into civil unions, but also expressly provides that a survivor of such a union has the right to bring a wrongful death action (as well as an action for loss of consortium). See 15 Vt. Stat. §§ 1204(a) and 1204(e)(2).

2. **Elements of damages:** Elements of damages in a wrongful death action are generally similar to those allowed in actions by a spouse or parent for injuries not leading to death *(supra,* p. 269). Thus, the beneficiaries may recover for the ***economic support*** they would have received had the accident, and death, not occurred, or for the pecuniary value of ***household services*** which the decedent performed.

   a. **Recovery for grief:** It is usually held that recovery under these wrongful death statutes can be had only for items having a "pecuniary value." In recent years, the list of items having pecuniary value has been extended so that it usually includes the

companionship, sexual intercourse, and ***moral guidance*** of the decedent. P&K, pp. 951-53. A number of states also allow ***grief*** or other mental suffering of the survivors as an element of damages, though most do not. See P&K, p. 952.

b. Recovery by parent where child is dead: Where a ***child*** has been fatally injured, it is hard to establish true pecuniary loss on the part of the parents, since the cost of raising and educating a child is generally more than any earnings he could be expected to bring home. However, many, if not most courts, are now willing to allow a substantial award for loss of the "companionship" of the child. Although the rule in a few jurisdictions, most notably New York, is to explicitly refuse to allow such non-pecuniary damages, denial of such damages has been the target of severe criticism, and it is likely that fewer and fewer courts will persist in disallowing them. Some courts, in fact, have awarded such damages to the parent of an ***adult*** child, and even to a parent who had ***abandoned*** the now-dead child.

i. Post-majority support: Other courts have held, along similar lines, that since damages may be recovered based on what the beneficiary reasonably ***expected*** to receive from the decedent, not what the decedent was legally bound to provide, support which the decedent child would have given to her parents in their ***old age*** (after her own emancipation) may be considered.

3. Defenses that could have been asserted against decedent: There is a lot of dispute about what ***defenses*** a defendant may assert in a wrongful death action. It is generally agreed that the defendant may assert any defense which he would have been able to use against the ***decedent,*** if the decedent was still alive and suing in her own name. Thus the decedent's ***contributory negligence*** (assuming that defense is applicable in the jurisdiction in question), ***assumption of risk, consent,*** etc., will all bar an action for wrongful death by the survivors. See P&K, pp. 954-55.

a. Statute of limitations: If the decedent originally had a cause of action, but did not sue while alive until the statute of limitations on this action had run, most courts hold that the wrongful death action

is ***not necessarily barred.*** These courts take the view that the wrongful death action begins to run only from the date of death (and that the applicable statute of limitations on wrongful death actions is the only thing that matters). P&K, p. 957.

b. Settlement by or judgment for or against decedent: Suppose the injured person brings her own action, and settles it, wins it, or loses it before dying. Will any of these things bar the beneficiaries from bringing a wrongful death action? Most courts have held that each of these things will bar the action, on the theory that settlement or judgment dissolves the decedent's claim, and any wrongful death action must "derive" from a live claim on the part of the decedent.

4. Defenses against beneficiaries: A second cluster of issues relates to defenses that may be asserted against the ***beneficiaries.***

a. Effect on individual claims: Most wrongful death statutes are for the benefit of a defined class of beneficiaries (rather than for the estate itself). Where such a statute is involved, it is usually held that a defense that would be valid against a particular beneficiary (e.g., that beneficiary's contributory negligence, assumption of risk, etc.) bars recovery of the pecuniary loss that that person has suffered. If there is only one beneficiary, against whom there is a defense, this obviously forecloses the action. If there are several beneficiaries, and only some are subject to such a defense, the majority rule now seems to be that their damages may not be recovered as part of the overall wrongful death award, but that the other beneficiaries may recover for their own pecuniary losses. See P&K, pp. 958-59.

D. Variety of statutes: Most of the above discussion of survival and wrongful death statutes has focused upon the usual statutory scheme, in which there is both a survival action and a wrongful death action (with actual losses incurred prior to death allocated to the survival action, and all other losses allocated to the wrongful death one). But there are many other statutory schemes in the various states.

1. No survival action allowed: For instance, some states do not allow a survival action at all where the defendant is the cause of the death; instead, the wrongful death action includes recovery for any lost earnings due to shortening of the decedent's life expectancy (without

regard to whether these earnings would have been passed on to the decedent's heirs). See Rest. 2d, §925, Comment b(3).

2. **Examine particular statute:** Thus it is extremely important to examine the particular statutory set-up in the state in question.

***Exam Tips** on*
DAMAGES

Damages issues can and usually will appear as part of virtually every torts essay exam. Here are some things to look for, especially where the question mainly involves a negligence action:

- Be on the lookout for applications of the ***"collateral source"*** rule.
  - Remember that under this rule, D doesn't get a ***discount*** to reflect the fact that P may have been ***reimbursed*** for her out-of-pocket expenses associated with the accident from some third party (e.g., a health insurer who pays P's medical bills).
  - For a collateral source issue to be present, the fact pattern will have to tell you that P has received insurance or some other reimbursement payment (e.g., public disability payments, or sick pay from P's employer).
  - Often, a collateral source issue will be ***joined*** with a comparative negligence and/or joint-and-several liability issue. Don't be distracted — unless the facts tell you otherwise, assume that the common law collateral source rule is in effect, and therefore don't take into account any reimbursements in figuring out who can recover what from whom.

    Example: P's total damages are $100,000. He is reimbursed by a health insurance company for $20,000, representing his hospital bills. The jury says that P is 25% responsible, D1 25% and D2 50%. In a comparative negligence jurisdiction, with no other relevant statutes, how much can P collect from each defendant? Answer: up to a total combined limit of $75,000 from each of D1 and D2. This answer is the same as it would be if P had not gotten any reimbursement.

- ☞ You might want to allude to the possibility that the state has abolished or cut back on the collateral source rule, as some states have done. *(Example:* "Assuming that the state has not abolished the common law collateral source rule, P's recovery will not be reduced. . . .")

☛ Be on the watch for places to apply the plaintiff's ***"duty to mitigate"*** her damages.

- ☞ In the garden-variety situation, P fails to seek ***prompt medical attention,*** and his problem (caused initially by D) worsens. Under the duty-to-mitigate rule, P can't recover for any damages that would not have been suffered if P had sought prompt medical aid.
- ☞ More likely to be tested: P fails to take some ***advance safety precaution.*** Here, some (but not most) courts hold that P has violated the duty to mitigate, and is completely blocked from recovery for those injuries that would have been prevented by the precaution. (Note that this defense is a total one, whereas if P's failure to use the device is treated as comparative negligence P's recovery will be only partly reduced.) *(Examples:* P doesn't wear a seat belt; P doesn't wear a hard-hat while walking in a construction site; P doesn't wear a mask or gloves while working in a hospital.)

☛ Occasionally, you will want to note that ***"punitive"*** damages are or may be appropriate.

- ☞ If the suit is for an ***intentional*** tort (including defamation or invasion of privacy, as well as the intentional torts against the person), punitive damages will often be appropriate. This is especially true where D's conduct is "outrageous," such as where the tort is intentional infliction of mental distress.
- ☞ In ***negligence*** cases, note the possibility of punitive damage only where you conclude that D was ***"reckless"*** or ***"willfull"*** in his conduct. Usually, this means that D disregarded what he knew to be a substantial risk of injury to P or others, rather than merely being "inattentive."
- ☞ If the fact pattern tells you that punitive damages awarded by a jury are many times greater than the compensatory damages awarded,

you should mention the possibility that the large punitive award violates D's federal ***due process*** rights because it is ***"grossly excessive."***

- ☛ You should also have a catalog of various *types* of damages in mind, ready to select from as appropriate in the fact pattern. Here is a partial list:
  - □ Value of a ***lost body function*** (e.g., loss of an arm).
  - □ ***Pain and suffering.***
  - □ ***Lost earnings.***
  - □ ***Mental distress.***
  - □ ***Hedonistic damages.*** (These apply where P loses the ability to engage in a pursuit she enjoyed; courts are split about whether this is allowable where P is in a coma.)
  - □ Loss of ***consortium.*** (These apply where the spouse, parent or child of a person who has a physical injury loses some aspect of companionship — thus where H is injured and his wife, W, can't have sexual relations with him, W gets a recovery for the loss of consortium.)
  - □ ***Survival*** action. (Even though P is dead, his estate is allowed to recover for his pain and suffering, his medical expenses before death, etc.)
  - □ ***Wrongful death*** action. (Survivors, such as a spouse, children or — if there is no spouse and child, parents — get recovery for their grief, their loss of money that the decedent would have earned and given to them as support, etc.)

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1. Under the doctrine of subrogation, one who makes payments to or on behalf of another — such as an insurer making payments to or for an insured — succeeds to the insured's rights against the wrongdoer who brought about the need for payment. So in a suit that appears to be by the victim V against the tortfeasor D, the real party in interest on the plaintiff's side may well be V's insurance company, which advanced to V medical expenses, lost wages, etc., and which has now in return been subrogated to (i.e., has succeeded to) V's right to recover for these items, at least up to the amount of the payments made by the insurer to V.

CHAPTER 11
DEFENSES IN NEGLIGENCE ACTIONS

ChapterScope

This chapter examines various defenses that can be asserted by a defendant in a negligence action. The most important concepts are:

- **Contributory negligence:** At common law, the doctrine of ***contributory negligence*** applies. The doctrine provides that a plaintiff who is negligent, and whose negligence is a proximate cause of his injuries, is ***totally barred*** from recovery.
  - **Last Clear Chance:** The doctrine of ***"Last Clear Chance"*** acts as a limit on the contributory negligence defense. If, just before the accident, D had an ***opportunity to prevent the harm,*** the existence of this opportunity (the last clear chance) ***wipes out*** the effect of P's contributory negligence.
- **Comparative negligence:** Most states have replaced contributory negligence with ***"comparative negligence."*** The comparative negligence system rejects the all-or-nothing approach of contributory negligence, and instead divides the liability between P and D in proportion to their ***relative degrees of fault.*** P's recovery is reduced by a ***proportion*** equal to the ratio between his own negligence and the total negligence contributing to the accident.
- **Assumption of risk:** P is said to have ***"assumed the risk"*** of certain harm if she has ***voluntarily consented*** to take her chances that the harm will occur. Where such an assumption is shown, the plaintiff is, at common law, completely barred from recovery.
  - **Express and implied:** P can assume the risk either "expressly" or "implicitly." The latter occurs when P indicates ***by her conduct*** (rather than by her express words) that she knows of the risk in question, and agrees to bear that risk herself.
  - **Effect of comparative negligence statute:** The existence of a ***comparative negligence*** statute eliminates certain types of assumption of risk, but maintains the "core" variety as a defense. Thus if P's voluntary agreement to bear a certain risk prevents D from ever having any duty to P at all, the existence of a

comparative negligence statute does not change this.

- **Immunities:** The common law recognizes certain ***immunities*** from negligence actions, including: (1) various ***intra-family*** immunities (e.g., between spouses, and between parent and child); (2) immunity of ***charities;*** and (3) ***sovereign*** immunity, i.e., immunity possessed by governmental entities. Each of these immunities has been abolished today in most states.

I. CONTRIBUTORY NEGLIGENCE

A. Nature of contributory negligence defense: The contributory negligence defense is much loved by defendants, particularly insurance companies, who fondly refer to it as "contrib". The essence of the defense is that a plaintiff who is negligent (in the sense of not taking reasonable care to protect his own safety), and whose negligence contributes proximately to his injuries, is ***totally barred from recovery.*** The defense is thus a complete one — it shifts the loss totally from the defendant to the plaintiff, even if the plaintiff's departure from reasonable care was much less marked than that of the defendant. Rest. 2d, §467.

1. Diminishing importance: Contributory negligence is of much ***less importance*** today than previously. As we'll see *(infra*, p. 282), more than 90% of the states have replaced it with comparative negligence, an apportionment-of-fault device that is much less damaging to plaintiffs.

B. Historical emergence: The defense is of judge-made origin. It first appeared in *Butterfield v. Forrester*, 103 Eng. Rep. 926 (K.B. 1809). In *Butterfield*, the defendant had blocked part of a road with a pole; the plaintiff, riding his horse rapidly at twilight, ran into the pole. The court held that plaintiff was barred from recovery, since had he been riding at a reasonable speed and looking out with reasonable care, he would have seen the obstruction and avoided it.

1. Practical explanation: The best explanation for the development of the contributory negligence doctrine is probably that at the time the defense evolved, courts were afraid that juries left with a free hand would give unduly large awards, and would impair the growth of

industry. An additional factor is that in a comparative negligence system (the major alternative to contributory negligence, by which the plaintiff's recovery is reduced by the relative extent of his own negligence compared with that of the defendant — see *infra*, p. 281), it is necessary to apportion damages between two sources, a process whose complexity scared nineteenth century courts.

C. Burden of pleading and proof: In all states still applying contributory negligence, the defendant must ***specifically plead*** contributory negligence as a defense. Furthermore, she must bear the ***burden of proof*** on it; thus if there is no evidence at all (or evenly weighted evidence on both sides) as to the existence of contributory negligence, the defense does not apply. P&K, p. 451.

D. Standard of care: The plaintiff is held to essentially the ***same standard of care*** as the defendant, i.e., the care of a "reasonable person under like circumstances." Rest. 2d, §464. See also Rest. 3d (Apport.) §3: "Plaintiff's negligence is defined by the applicable standard for a defendant's negligence."

1. **Possible difference:** Of course, it is possible that the care a reasonable person will exercise to protect his *own* safety might in some circumstances be *less* than that person would reasonably use to protect the safety of others. But such situations should be rare — generally, if conduct would be negligent were the party to do it as a defendant, it is likely to be negligent if done when the party is a plaintiff.

2. **Child plaintiffs:** Where the plaintiff is a ***child,*** the standard of care to which he is held is that of a reasonable child with similar age, intelligence and experience. This is, in essence, the same "subjective" standard as is applied where the child is a defendant. (See *supra,* p. 105).

3. **Issue left to jury:** In any event, the issue of what constitutes reasonable care on the part of the plaintiff is left to the jury in all but a very few cases.

E. Proximate cause: The contributory negligence defense only applies where the plaintiff's negligence ***contributes proximately*** to his injuries.

In general, the rules for determining actual and proximate causation are the same as those discussed previously in the context of defendants' conduct. (See *supra*, p. 143.)

F. Avoidable consequences: The defense of contributory negligence must be distinguished from that of ***avoidable consequences as mitigation,*** discussed *supra*, p. 265. The latter is generally held to apply only to conduct by the plaintiff ***after the accident*** which unreasonably fails to mitigate his damages. Contributory negligence, on the other hand, applies to the plaintiff's conduct ***prior to the accident.*** Hence, although both the doctrines of contributory negligence and avoidable consequences rest on the policy of requiring the plaintiff to exercise proper care to protect himself, the rule of avoidable consequences is usually held to come into play only after a legal wrong has occurred but while some damages can still be averted.

1. **Apportionment:** Observe that where the avoidable damages doctrine is applied the result is usually an ***apportionment*** of damages, part to the plaintiff (those that could have been avoided) and the remainder to the defendant. Contributory negligence, on the other hand, is almost by definition a refusal to apportion damages between two causes or two parties.

2. **Exceptions where apportionment allowed:** But there are nonetheless a few situations in which the damage caused by the plaintiff's negligence and that caused by the defendant's are so distinguishable from each other that apportionment ***will*** be allowed. This might be the case, for instance, if both the plaintiff and the defendant polluted the same stream. See P&K, p. 459.

   a. **Seat belt defense:** Perhaps the most interesting context in which the apportionment issue has arisen is that of the ***"seat belt defense"*** In this defense, the defendant argues that the plaintiff's injuries from a car accident could have been reduced or entirely avoided had the plaintiff worn a seat belt. An increasing number of states — though probably not yet a majority — reduce the plaintiff's damages in some way to reflect the fact that the plaintiff's injuries would have been less if he had worn a seat belt. This topic is discussed more extensively *infra*, p. 286.

b. Excessive speed: A similar apportionment issue is presented by accidents in which the plaintiff's car is traveling at an ***excessive speed.*** If the speed has not increased the risk of the accident, but does increase the damage which results to the plaintiff from it, what is the consequence? Again, as with seat belts, some courts have tried to apportion the damage, and others have not. See P&K, p. 459.

G. Conscious exposure to danger: One way in which the plaintiff may fail to use due care for his own safety is if he ***consciously*** puts himself in a position of unreasonable danger (as opposed to merely unwittingly and "casually" doing so). For instance, one who agrees to be a passenger in a car driven by a person he knows to be ***drunk*** may be contributorily negligent. Such conscious exposure to risk also usually gives rise to the defense of "assumption of risk," discussed *infra*, p. 289.

1. Giving up of right by plaintiff: Suppose the plaintiff has a ***legal right*** to act in a certain way, but the defendant's negligence renders that act dangerous. In this situation, the plaintiff's insistence on exercising his right is contributorily negligent only if he acts unreasonably; in making this determination, the social value of what he is trying to do will be weighed against the burden of not doing it, and the probability of harm, as in a case involving the defendant's own negligence. (See the Learned Hand test, *supra*, p. 99.)

a. Highway travel: Thus even though the plaintiff has a legal right to make use of a highway, it may be contributory negligence for him to insist on using it in a situation where the defendant's negligence has blocked the highway and made its use unreasonably dangerous. Whether the danger is "unreasonable" will depend on, among other things, the existence of alternate routes, the importance of plaintiff's trip, etc. See Rest. 2d, §473, Comment b.

H. Claims against which defense not usable: The contributory negligence defense, based as it is upon general negligence principles, may be used as a bar only to a claim that is itself based on negligence.

1. Intentional torts: Thus, the defense may not be used where the plaintiff's claim is for an ***intentional tort.*** P&K, p. 462.

2. **Willful and wanton tort:** Similarly, if the defendant's conduct is found to have been "willful and wanton" or "reckless", the contributory negligence defense will not be allowed. Prosser and Keeton (P&K) suggest (p. 462) that this is in reality a rule of comparative negligence, with the court "refusing to set up the lesser fault against the greater."

   a. **Gross negligence:** But if the defendant's negligence is merely "gross" (i.e., differing in degree from that of the plaintiff, but not in kind), contributory negligence will be allowed. Obviously it may sometimes be hard to distinguish between negligence that is merely "gross", and that which is "willful". But the idea is that the latter applies to conduct by the defendant which disregards a ***conscious*** risk.

      i. **Plaintiff's similar conduct:** In any event, even if the defendant's conduct is "willful" or "reckless", contributory negligence will be allowed if the defendant shows that the plaintiff's conduct was also "willful", etc.

3. **Strict liability:** For a discussion of the use of contributory negligence as a defense to ***strict products liability*** actions, see *infra*, pp. 399-405.

4. **Negligence per se:** Contributory negligence can generally be asserted as a defense even to the defendant's ***"negligence per se",*** i.e., his negligence based on a statutory violation. (See *supra*, pp. 116, 121.) Rest. 2d, §483.

   a. **Exceptions where responsibility placed on defendant:** But there are some statutes which are enacted solely for the purpose of protecting a class of which the plaintiff is a member, and which show an intent to place all responsibility for violations upon the defendant. Where the plaintiff shows a violation of such a statute, contributory negligence may ***not*** be asserted as a defense.

      Examples: One kind of "special protection" statutes are child labor laws; an employer who hires a child under the legal age may not assert contributory negligence if child is injured. A statute prohibiting the sale of guns to minors might also fall in this category, as do many statutes whose purpose is to protect employees against occupational hazards. See P&K, p. 461.

I. Last clear chance: The most significant limitation on the contributory

negligence defense is a rule called the ***"last clear chance"*** doctrine. While the doctrine may or may not apply in a variety of specific situations, the general impact of the rule is as follows: If, just before the accident, the defendant has an ***opportunity to prevent the harm,*** and the plaintiff does not have such an opportunity, the existence of this opportunity (i.e, this last "clear chance") ***wipes out*** the effect of the plaintiff's contributory negligence, leaving the defendant liable if she does not take advantage of that last opportunity.

1. **Rationale:** The doctrine is usually supported by the argument that the defendant's failure to exercise her last opportunity to avoid the harm acts as a ***superseding cause,*** preventing the plaintiff's negligence from being the proximate cause of the accident.

   a. **Dislike of defense:** But a more realistic explanation of the doctrine is that courts recognize the harshness and frequent unfairness of the contributory negligence defense, and have taken this route, among others, to lessen its use. Rest. 2d, §479, Comment a.

2. **Plaintiff helpless, defendant discovers danger:** The clearest case for applying last clear chance is where the plaintiff is ***helpless*** to avoid his predicament, and the defendant ***discovers*** that predicament but negligently fails to use her opportunity to avoid the danger. In this situation, ***all contributory-negligence courts*** (even those purporting to reject the last clear chance doctrine) hold that the plaintiff is not barred from recovery. Rest. 2d, §479.

   Example: P negligently attempts to jay-walk across a busy street. He falls, and is unable to move. D, seeing P lying on the street, attempts to hit the brakes, but instead negligently hits the accelerator and runs P over. P's contributory negligence in jaywalking will not bar his recovery, because he was a "helpless plaintiff", and D discovered his predicament, but negligently failed to avoid it.

II. COMPARATIVE NEGLIGENCE

A. Rejection of "all or nothing" approach: Contributory negligence is, of course, an "all or nothing" system — either the plaintiff is not contributorily negligent, in which case he recovers his full damages, or he is, in which case he gets nothing. In recent years, courts and legislatures have come increasingly to feel that such a system is less fair than one which makes an attempt to apportion damages between the

plaintiff and the defendant according to their relative degree of fault.

1. **Jury behavior:** Furthermore, as every tort lawyer knows, juries frequently reject the all or nothing approach, and in effect apportion damages, no matter how clearly the trial judge's instructions attempt to prevent them from doing so. Thus a plaintiff with $200,000 in damages, who the jury believes to have been somewhat contributorily negligent, will frequently be awarded, say, $100,000.

B. Comparative negligence defined: A so-called ***"comparative negligence"*** system rejects the all-or-nothing approach, and instead attempts to divide liability between plaintiff and defendant, in proportion to their ***relative degrees of fault.*** As the idea is often expressed in statutes, the plaintiff is not barred from recovery by his contributory negligence, but his recovery is reduced by a proportion equal to the ratio between his own negligence and the total negligence contributing to the accident (i.e., if there is just one plaintiff and one defendant, their combined negligence).

> **Example:** P suffers damages of $100,000. A jury finds that P was 30% negligent and that D was 70% negligent. P will recover, under a comparative negligence system, $70,000 (i.e., $100,000 minus 30% x $100,000).

C. Historical emergence: Comparative negligence, in certain kinds of cases, has been around for a long time. English courts have applied it in ***admiralty*** (i.e., maritime) cases since 1700, and the U.S. Federal Courts, in the exercise of their exclusive admiralty jurisdiction, have followed it. Several Federal statutes have also applied comparative negligence; the most important of these is the Federal Employer's Liability Act (F.E.L.A.), which as early as 1908 applied comparative negligence to any suit for injuries brought by an employee of an interstate railroad against the railroad.

1. **State statutes:** A few states tried comparative negligence early in this century. Mississippi, for instance, did so by statute in 1910, first as to all personal injuries, and then even in suits for property damage. Wisconsin is also an old-time comparative negligence state, having applied the doctrine to all negligence actions since 1913. See P&K, p. 471.

2. **Explosion during 1970's:** But it was not until the 1970's that a

virtual explosion of comparative negligence in the state courts began. The number of states with general (i.e., applicable to all or most negligence claims) comparative fault systems went from six in 1963 to ***46*** by the mid-1990's. "As of the early 21st century, only Alabama, North Carolina, Maryland [and] Virginia [as well as] the District of Columbia [had] failed to adopt comparative fault rules. In those jurisdictions, the plaintiff's contributory fault remains a complete bar." Dobbs & Hayden (5th), p. 276.
Of the 46 states that have adopted comparative negligence, most have done so by statute, but some have done so by judicial decision.

a. California: The most important of the judicial decisions instituting comparative negligence as a matter of common law was that of the California Supreme Court in ***Li v. Yellow Cab Co. of California,*** 532 P.2d 1226 (Cal. 1975), infra, p. 284.

i. "Pure" applied: The court in *Li* decided that a ***"pure,"*** rather than a "50%," comparative negligence system should be applied. In a "pure" system, the plaintiff is allowed to recover (but at a reduced level) even if his fault is greater than the defendant's. In a "50%" system, by contrast, the plaintiff is allowed partial recovery only if his negligence is (depending on the exact wording of the statute or decision) either less than, or no greater than, the defendant's. If he is as negligent or more negligent than the defendant, under such a system he recovers nothing. (As is noted below, most states have adopted this kind of system.) The *Li* court asserted that a 50% system "simply shifts the lottery aspect of the contributory negligence rule to a different ground."

D. "Pure" vs. "50%" systems: Only ***13*** states employ a "pure" form of comparative negligence. These are: Alaska, Arizona, California, Florida, Kentucky, Louisiana, Mississippi, Missouri, Michigan, New Mexico, New York, Rhode Island and Washington. See *McIntyre v. Balentine, supra.*

1. Various modified systems: The remaining comparative negligence states have applied one of two basic cut-offs beyond which ***the plaintiff may not recover at all.*** Most states bar the plaintiff's claim

as soon as his negligence is ***"as great"*** as the defendant's. The remainder bar him when his negligence is ***"greater"*** than the defendant's. Obviously these two systems differ only as to their treatment of the "50-50" case, but given the tendency of juries to regard the negligence of both sides as about the same, this 50-50 case is of considerable importance as a practical matter.

E. Multiple parties: Where there are only two parties, a plaintiff and a defendant, the various comparative negligence systems are easy to administer. But what if there is more than one defendant?

1. All parties before court: If both (or all) defendants are joined in the same lawsuit, and the system is a "pure" one, the solution is simple. If the total negligence of all parties is determined to be, say, 20% due to P, 50% to D1, and 30% to D2, P recovers 80% of his damages.

a. Not pure: But what if all the defendants are before the court, and the jurisdiction is one in which the plaintiff may recover only if his negligence is less than, or not greater than, that of the defendants? If the plaintiff's negligence is less than that of all the defendants combined, but greater than that of some particular defendant, can the plaintiff recover? Most state statutes leave this question unanswered. It would, however, seem highly unfair to deny a plaintiff all recovery where he is 26% negligent, and three defendants constitute the remaining 74% negligence.

2. Not all parties before the court: If not all defendants are before the court in a single action, the problems become even greater. The biggest question relates to ***joint-and-several liability.*** May the defendant(s) before the court who is found to be only partly responsible for plaintiff's loss, be required to pay for the whole loss aside from that caused by plaintiff's own fault? Under traditional "joint-and-several liability" principles (see *supra,* p.181), the answer would be "yes."

Example: P, a pedestrian who is jaywalking, is injured when a car driven by D and a car driven by X collide. P is able to locate D, and sues him in a "pure" comparative negligence jurisdiction. X, a hit-and-run driver, is never found. In the P-D action, the jury finds that P was 20% responsible, D 30% responsible and X 50% responsible. P's damages total $1 million. It is clear that P can collect at most $800,000 total. The question is, may P collect the full $800,000 from D, or only $300,000? Under traditional "joint-and-several liability" rules applicable to joint tortfeasors, P would be

allowed to collect the full $800,000 from D. But this would be, at least on the surface, quite unfair to D, who is responsible for only 30% of the total fault.

a. Tort reform statutes: In the 1980s, the "tort reform" movement led to modification of traditional joint-and-several liability principles (at least in situations where comparative fault applies) in most states.

i. Total abolition: About 16 states have ***completely abolished*** the doctrine of joint-and-several liability in comparative negligence cases. In these states, all liability is "several." That is, each defendant is only required to pay his or her own share of the total responsibility.

ii. Hybrid: Most states that have replaced traditional joint-and-several liability, however, have enacted some sort of ***"hybrid"*** approach, which blends aspects of joint-and-several liability and aspects of several liability. These hybrids — which include the reallocation, threshold and damage-type variants — are discussed in detail *supra*, p. 182.

F. How percentage is determined: In most of the comparative negligence systems, the percentage of fault assigned to the plaintiff seems to be based on the ***relative degree to which his conduct deviated from the standard of care, not*** the relative ***contribution*** his negligence made. Thus if the plaintiff is only slightly negligent, and the defendant grossly so, the plaintiff will have a relatively small percentage assigned to him, even though, in a causal sense, each person's negligence was clearly a *sine qua non* of the accident. Thus the Third Restatement takes into account "the nature of the person's risk-creating conduct, including any ***awareness*** or ***indifference*** with respect to the risks created by the conduct and any ***intent*** with respect to the harm created by the conduct[.]" Rest. 3d (Apport.) §8(a).

1. Contrary view: But some cases have held that the relative directness of the causal link between negligence and damage may also be considered in assigning the plaintiff his percentage. And even the Third Restatement, after the passage quoted above emphasizing the degree of fault, says that the court may also take into account "the ***strength of the causal connection*** between the person's risk-creating

conduct and the harm." Rest. 3d (Apport.) §8(b).

G. Last clear chance: Does the doctrine of ***last clear chance*** survive in a comparative negligence jurisdiction, allowing the entire loss to be thrust upon the defendant? Courts are split.

1. ***Li solution:*** In California, the doctrine does not survive. The court in *Li*, *supra* p. 282, held that "when true comparative negligence is adopted, the need for last clear chance as a palliative of the hardships of the 'all-or-nothing' rule disappears and its retention results only in a windfall to the plaintiff in direct contravention of the principle of liability in proportion to fault."

2. **Opposing view:** But other jurisdictions have ***continued to apply*** the doctrine, sometimes on the theory that where the defendant has had a "last clear chance" to avoid the accident, the plaintiff's conduct is not the proximate cause of the accident. P&K, p. 477.

3. **Restatement:** The Third Restatement ***rejects*** the last-clear-chance rule in comparative-negligence cases. See Rest. 3d (Apport.) §3, Comment b.

H. Willful and wanton misconduct by defendant: We saw (*supra* p. 280) that in many jurisdictions, where the defendant's conduct is "willful and wanton" or "reckless", contributory negligence does not apply. In a comparative negligence jurisdiction, does this kind of willful or reckless conduct by the defendant prevent the plaintiff's damages from being reduced in proportion to his own fault?

1. **Usual approach:** Generally, the statutes have been interpreted to mean that the plaintiff's damages may nonetheless be reduced in this situation (although since the plaintiff's wrongdoing is being compared with the defendant's severe wrongdoing, the percentage of fault assigned to the former will generally be quite low). See Nutshell, p. 111.

2. **Intentional torts:** If the defendant's tort is ***intentional,*** some jurisdictions do not apply their comparative negligence statute ***at all,*** under theory that a plaintiff's "mere negligence" should not reduce the significance of the defendant's volitional conduct. But the Third Restatement essentially rejects this view: comparative negligence

doctrines ***apply even where the defendant's tort is an intentional one.*** See Rest. 3d (Apport.) §1, Comment c. Indeed, the Restatement speaks in terms of comparing the plaintiff's negligence to all parties' "responsibility" (not negligence), in part to reinforce the concept that comparative-fault applies in intentional-tort cases. See Rest. 3d (Apport.), §7.

I. Assumption of risk: What about the doctrine of ***assumption of risk,*** discussed beginning on p. 289; does it survive? There is no clear single answer; the subject is discussed on p. 291 (express assumption) and 294 (implied assumption).

J. Mitigation of damages: Recall that the doctrine of ***mitigation of damages*** (*supra*, p. 265) says that P cannot recover for any harm which she could reasonably have avoided. The classic example is the plaintiff who is injured due to D's negligence and who then worsens her injury by ***failing to get medical attention*** or to follow the doctor's advice. Does the mitigation of damages doctrine survive in a comparative-negligence jurisdiction?

1. Most courts abolish doctrine: Most comparative negligence states seem to have ***abolished*** the mitigation-of-damages doctrine, either by statute or decision. As long as D's negligence and P's failure to take reasonable precautions have combined to produce an ***indivisible harm,*** most comparative-negligence jurisdictions would probably apply a comparative-fault allocation rather than permitting D to escape liability completely by means of the mitigation-of-damages doctrine.

a. Third Restatement agrees: This is the approach of the new Third Restatement, which says in commentary that the general rule of comparative negligence "applies to a plaintiff's unreasonable conduct that aggravates the plaintiff's injuries. No rule about mitigation of damages or avoidable consequences categorically forgives a plaintiff of this type of conduct or categorically excludes recovery." Rest. 3d (Apport.) §3, Comment b.

Example: D negligently causes P's leg to be broken. P then negligently fails to take antibiotics as prescribed by P's doctor. The leg gets infected, and P is forced to miss two weeks of work, resulting in lost wages of $1,000. The leg would not have gotten infected had P taken the antibiotics (and P would not have missed any work).

Under the traditional mitigation-of-damages rule, P would not be entitled to recover any of the lost wages, because she would have avoided this harm entirely had she behaved non-negligently. But under the majority (and Restatement Third) approach to comparative negligence, B will be permitted to recover for the lost wages, though her recovery will be reduced by her percentage of fault. See Rest. 3d (Apport.) §3, Illustr. 4, so concluding on essentially these facts.

K. P's negligence creates the need for D's services: Now consider what might be thought of as the flip-side of the mitigation-of-damages problem: ***P's negligence causes him to need services,*** which D then negligently renders. Can D successfully argue that P's recovery should be reduced by P's comparative fault in bringing about the occasion for D's negligence? Most courts have answered ***"no."***

1. Need for medical attention: The most common illustration of the problem is where P's negligence causes him to ***need medical attention*** from D, a doctor or hospital — most courts have said that P's "antecedent negligence" ***does not reduce his recovery*** in this scenario.

Example: P gets drunk, and then crashes his car. He receives a minor concussion and several facial fractures, and is taken to the D hospital. There, he is put on a respirator to assist his breathing. While P is on the respirator, a nurse for D negligently lets the oxygen run out from the respirator, and P suffers permanent brain jury. D argues that P's recovery should be reduced on a comparative fault basis, because it was P's negligence (driving while drunk) that brought about the occasion for P to need the medical services that resulted in his brain damage.

Held, for P. "[M]ost jurisdictions have held that a patient's negligence that provides only the occasion for medical treatment may not be compared to that of the negligent physician. ... We ... agree that 'patients who may have negligently injured themselves are nevertheless entitled to subsequent non-negligent medical treatment and to an undiminished recovery if such subsequent non-negligent treatment is not afforded.'" *Mercer v. Vanderbilt Univ.*, 134 S.W.3d 121 (Tenn. 2004).

2. Third Restatement agrees: The Third Restatement agrees with the result in cases like *Mercer, supra.* See Rest. 3d (Apport.) §7, Comment m: "[I]n a case involving negligent rendition of a service, including medical services, a factfinder does not consider any plaintiff's conduct that created the condition the service was employed to remedy."

L. Violation of safety statute by defendant: Where the defendant violates a safety statute, giving rise to ***negligence per se,*** we saw that contributory negligence will normally apply. But we also saw that if the

statute is construed to protect members of the plaintiff's class against their own negligence, and to place all responsibility on the defendant, contributory negligence will not apply. In this latter situation, in a comparative negligence jurisdiction, may the defendant obtain apportionment?

1. **General view:** Most courts have held that this distinction between the various kinds of statutes is no longer necessary, in the absence of contributory negligence, and that therefore the defendant may obtain apportionment; see Comment to §1 of the Uniform Act.

M. Seat belt defense: The ***"seat belt defense"*** is increasingly ***accepted*** in comparative-negligence jurisdictions. In this defense, the defendant argues that the plaintiff's injuries from a car accident could have been reduced or entirely avoided had the plaintiff worn a seat belt; the plaintiff's damages should therefore be reduced, the defendant argues.

1. **Contributory negligence jurisdictions:** Before we examine how the seat belt defense has fared in comparative negligence jurisdictions, let us first briefly discuss how the defense has fared in traditional ***contributory*** negligence jurisdictions. There are three plausible alternatives:

   a. **Complete bar:** In theory, a court could hold that failure to wear a seat belt amounts to garden-variety contributory negligence, thereby entirely barring the plaintiff from recovering. However, virtually no cases have taken this approach. Since the accident would have occurred anyway, and the plaintiff would have sustained ***some*** damages even if he had been completely careful (by wearing a seat belt), it seems very unfair to give the defendant a complete windfall, so courts don't do it.

   b. **Apportionment:** Some courts have ***apportioned*** plaintiff's damages. These courts hold that failure to wear the belt does not bar recovery entirely, but that damages must be apportioned between those which would have occurred anyway and those which could have been avoided. The plaintiff is then permitted to recover only for damages which would have occurred anyway. A number of states, but probably only a minority of those that have considered the issue, have followed this approach. See, e.g., *Spier*

v. Barker, 323 N.E.2d 164 (N.Y. 1974).

c. No apportionment: In most contributory-negligence jurisdictions, courts have refused to allow the seat belt defense at all. That is, plaintiff's failure to wear a seat belt has not been counted against his recovery in any way.

2. Comparative negligence jurisdictions: In the more than 40 states that have now adopted comparative negligence, the seat belt defense has been more successful. In general, courts seem to feel that making a partial reduction of the plaintiff's damages for his "fault" in not wearing a seat belt comports with the overall scheme of reducing a plaintiff's damages by a percentage equal to his fault. In the comparative-negligence area, there are at least four ways of handling the seat belt defense:

a. Defense rejected: Some states continue to reject the seat belt defense, just as they did in contributory-negligence times. However, fewer comparative-negligence jurisdictions seem to reject the defense than did so under contributory negligence.

b. Causal apportionment: Some states hold that D can be liable for all of the injuries that would have occurred even had the plaintiff worn a seat belt, but ***not at all*** for injuries that would have been avoided. This is the "causal apportionment" approach.

Example: D, while speeding, collides with a car driven by P. P is not wearing his seat belt. P suffers a fractured leg, which leads to $20,000 of total damages. P also suffers a brain injury when his head slams into the steering wheel; this results in $80,000 worth of damages. Evidence shows that if P had worn a seat belt, he still would have suffered the fractured leg, but would not have suffered the brain injury. The jury also finds that P was 30% at fault and D 70% at fault.

Under the "causal apportionment" approach, P may recover the full $20,000 for the fractured leg (since P's "fault" did not worsen this injury in any way), but may not recover any of the brain injury damages. Thus P would recover $20,000.

c. Comparative fault without causal apportionment: Alternatively, D can be held liable for all injuries, with a reduction equal to the percentage of P's fault. Under this approach, no attempt is made to distinguish between damages that would have been suffered anyway and those that would have been avoided had the belt been worn.

Example: Under this "comparative fault without causal apportionment" approach, on the facts of the above example, P would recover $70,000 ($100,000 total damages, less 30% for P's comparative negligence). No attempt is made to distinguish between the fractured leg which would have happened anyway, and the brain injury which would have been avoided by wearing a belt.

d. Comparative fault after causal apportionment: Finally, D can be held liable for both injuries, but P's fault reduces his recovery for those injuries that would have been avoided.

Example: On the facts of our above example, P would recover the full $20,000 for the fractured leg, since his fault did not increase that injury at all. However, P would recover only $56,000 for the brain injury ($80,000 times 70%), since P's 30% negligence played a part in bringing that brain injury about.

i. View of Third Restatement: This approach — D is liable for both injuries, but P's fault reduces his recovery for the injury that would have been avoided by seat-belt use — seems to be the approach of the new Third Restatement. See Rest. 3d (Apport.) §3, Illustr. 3, saying that P's failure to wear a seat belt is "relevant in determining whether [P] was negligent and, if so, in assigning percentages of responsibility for the portion of the plaintiff's injuries caused by the failure to wear the seat belt."

e. Effect of statute: Many states have ***statutes*** requiring drivers and passengers to wear seat belts, *supra*, p. 265. But these statutes generally don't help defendants who want to use the seat belt defense — just the contrary. Of the 32 mandatory-seat-belt use statutes in effect as of 1989, 16 explicitly prohibited the seat belt defense completely, and four made the defense almost valueless by setting a small limit on the reduction of damages permitted. See generally 102 Harv. L. Rev. 925, 929, n. 37.

N. Strict liability: For the effects of comparative negligence upon ***strict liability,*** see *infra*, pp. 399-405.

O. Imputed comparative negligence: Occasionally, the fault of one person (call her A) may by ***imputed to another*** *(B),* to as to reduce *B*'s recovery.

1. "Both ways" rule: But under the so-called ***"both ways" rule,*** this imputation will happen ***only*** if *B* would be vicariously liable (see

infra, p. 313) for A's torts. As the Third Restatement puts it, "The negligence of another person is ***imputed*** to a plaintiff ***whenever the negligence of the other person would have been imputed had the plaintiff been a defendant[.]"*** Rest. 3d (Apport.), §5.

a. Employer/employee: This means that if suit is brought by an ***employer*** for damages arising out of an accident involving the employer's ***employee,*** any fault by the employee will be imputed to the plaintiff employer, thereby reducing that plaintiff employer's recovery.

Example: Company hires Worker to drive a delivery truck for Company's business. (Assume that Company is not negligent in selecting or training Worker for this role.) Worker has a collision with a car driven by Dave, which damages Company's truck. Company sues Dave for the damage to the truck. If Worker was negligent in driving the truck, this negligence will be imputed to Company under the "both ways" rule. That's because, if Company were the defendant in a suit by Dave, Company would have been vicariously liable for Worker's negligence under the *respondeat superior* doctrine. (See Rest. 3d (Apport.), §5, Illustr. 1, reaching this conclusion on exactly these facts.) Therefore, in a comparative-negligence jurisdiction, Company's recovery will be reduced by the percentage of fault attributable to Worker.

b. Not attributed from parent to child: The "both ways" rule will often apply to a situation in which a ***child is the plaintiff,*** the child's parent has contributed to the accident (e.g., by a ***failure to supervise)*** and some third party has also been negligent. The negative aspect of the both-ways rule means that any fault attributable to the child's parents ***won't be imputed to the child, and therefore won't reduce the child's recovery against the third person.***

Example 1: Kid, riding in a car driven by his father Dad, is injured when the car collides with a car driven negligently by Drive. Kid suffers $10,000 of injuries. Kid was not properly seat-belted. If he had been, he would have had only $5,000 of injuries. Assume that Dad's failure to fasten the seat belt violated a statute designed to prevent or minimize just this sort of injury. Assume also that Dad would not be immune from suit by Kid in the jurisdiction. Kid sues Drive.

Kid can recover all $10,000 of damage from Drive. The recovery won't be reduced by Dad's negligence per se in failing to fasten Kid's seat belt. That's because: (1) Dad's fault won't be attributed to Kid (since Kid wouldn't be liable for Dad's torts, so under the both-ways rule Dad's fault won't be imputed to Kid); and (2) therefore Dad and Drive are each tortfeasors, and are jointly-and-severally liable. If Drive has to pay for more than his percentage of fault (computed by taking as the numerator Drive's fault and the denominator Drive's plus Dad's fault), Drive will be

able to get contribution from Dad.

Example 2: Kid is injured in a playground accident, due in part to Guard's failure to supervise rough playing between Kid and Ted, another child. The accident is also due in part to a negligent failure of supervision by Dad, Kid's father, who is also present. Kid has suffered $10,000 in damages, and sues Guard for this sum.

Kid can collect the entire $10,000 from Guard, without reduction for any percentage of fault due to Dad. That's because: (1) Dad would not be vicariously liable for Kid's negligence if Kid were a defendant in an action brought by Ted (since parents are not vicariously liable for their children's torts; see *supra*, p. 109); (2) consequently, under the "both ways" rule, Dad's fault won't be attributed to Kid, and can't reduce Kid's recovery against either Guard or Dad; and (3) therefore, Dad and Guard are jointly and severally liable, and Guard can be required to pay the whole amount. (Guard could then seek contribution from Dad.)

III. ASSUMPTION OF RISK

A. Nature of the doctrine: A plaintiff is said to have ***assumed the risk*** of certain harm if she has voluntarily consented to take her chances that that harm will occur. Where such an assumption of risk is shown, the plaintiff is, under traditional common law principles, completely barred from recovery.

1. Cutting back of doctrine: However, as will be discussed *infra*, p. 294, most courts which have adopted comparative negligence now hold that assumption of risk is no longer an absolute defense, but merely a consideration to be taken into account in making an apportionment of harm. Furthermore, some states now refuse to accept assumption of risk as a separate doctrine distinct from contributory negligence, and have in effect abolished it.

B. Classes of assumption of risk: There are several very distinct kinds of situations in which the plaintiff is said to have "assumed the risk" of harm. For purposes of our discussion here, these will be divided into two basic categories, ***"express"*** and ***"implied"*** assumption.

C. Express assumption: If P ***explicitly*** agrees with D, in advance of any harm, that P will not hold D liable for certain harm, P is said to have ***"expressly"*** assumed the risk of that harm. An express assumption of risk (also called a ***"contractual limitation of liability")*** is generally ***enforceable,*** in which case it will completely bar P from recovery.

Example: P wants to go bungee jumping at D's amusement park. P signs a release given to him by D in which P agrees to "assume all risk of injury" that may result

from the bungee jumping. Assuming that none of the exceptions to express-assumption-of-risk (see below) applies, if P is injured he will not be able to sue D, because he has expressly assumed the risk.

1. **Exceptions:** There are three important ***exceptions*** to the general enforceability of express agreements to assume risk:
   - □ first, when the party protected by the clause (typically the defendant) either ***intentionally causes*** the harm, or else brings about the harm by acting in a ***reckless or grossly negligent*** way;
   - □ second, when the ***bargaining power*** of the party protected by the clause is ***grossly greater*** than that of the other party, typically a status the court finds to exist only when the good or service being offered is ***"essential"*** (e.g., the services of public carriers or public utilities);
   - □ finally, where the court concludes that there is some ***overriding public interest*** which demands that the court refuse to enforce the exculpatory clause. (Typically, this category overlaps with the above "unequal bargaining power because the good or service is essential" category.)

Cf. Seigneur v. National Fitness Institute, Inc., 752 A.2d 631 (Ct. Spec. App. Md. 2000).

   a. Private companies: Where a good or service is offered by a relatively ***unregulated private company,*** and there are a ***number of competitors*** offering the plaintiff substantially the same good or service, the court will typically find that an exculpatory clause in the contract should be ***enforced*** to bar claims for negligence. That's because in this situation, generally none of the three exceptions discussed above will be found applicable.

Example: P signs a contract with D (the operator of a chain of fitness clubs), in which P agrees that D "shall not be liable to me for any ... injuries ... to my person or property[.]" P is injured while working out, and sues. *Held,* for D: None of the above exceptions to the enforceability of express assumptions of risk applies, so P is deemed to have assumed the risk of injury. *Seigneur v. National Fitness Institute, Inc., supra.*

2. **Reduction of liability:** Even in the case of a utility or other regulated public service industry (i.e., in contrast to the "unregulated private company" scenario just discussed), if the defendant makes an honest attempt to ***fix a reasonable value*** for damages in advance (i.e., liquidated damages), and allows the plaintiff to pay a ***graduated fee***

based on the value fixed, this arrangement will be upheld. P&K, pp. 482-83.

   a. **Parking lots, baggage storage:** Where the defendant is a parking lot or garage, baggage storage concession, or other private business which because of its location is the only one available to the plaintiff, there is a tendency to apply the same rules. That is, a blanket waiver of liability is against public policy, but graduated fees based upon declared value in advance will be upheld. P&K, p. 483.

3. **Fine print:** The defendant must also show that the terms of the liability limitation were brought home to the plaintiff. This means that the plaintiff must have been actually ***aware*** of the limitation, or at least that a reasonable person in the plaintiff's position would have been. Thus if a limitation of liability is buried in fine print on the back of a railroad ticket, and the plaintiff reasonably fails to become aware of this clause, it will not be binding on her. P&K, pp. 483-84.

4. **Intentionally or willfully negligent misconduct:** Normally, a waiver of liability for the defendant's "negligence" will be construed so as not to include liability for ***"willful and wanton"*** or ***"gross"*** negligence, and certainly not for intentionally tortiously conduct. These may sometimes also be included in the waiver, but only if this is spelled out clearly, and is shown to have been understood by the plaintiff. Rest. 2d, §496B, Comment d.

5. **Health care:** In some contexts, courts simply refuse to allow the plaintiff to assume the risk even if her action is quite voluntary, she is well-informed about what she is doing, she is paying less because of this willingness, etc. The prime example is ***medical care:*** few courts would uphold even a carefully negotiated contract between doctor and patient in which patient agrees, "In consideration for your charging me a lower fee, and with full awareness of the consequences, I agree to waive any claim I might have against you for malpractice concerning the treatment you are about to give me." See Epstein, pp. 325-28; see also *Obstetrics & Gynecologists v. Pepper*, 693 P.2d 1259 (Nev. 1985) (patient's agreement with clinic that patient will arbitrate any injury claims not enforceable).

6. **Effect of comparative negligence:** What effect should a state's decision to adopt ***comparative negligence*** have on this principle that express assumptions of risk will be enforced? Virtually all courts, and the new Restatement, agree that the answer is ***"none."*** See Rest. 3d (Apport.) §2, Comment b: "[A] valid contractual limitation on liability, within its terms, creates an absolute bar to a plaintiff's recovery from the other party to the contract. A valid contractual limitation on liability does not provide an occasion for the factfinder to assign a percentage of responsibility to any party or other person."

   Example: Before attending D's skydiving school, P reads and signs a waiver that states, "I understand that skydiving is highly dangerous, and agree not to seek to recover damages from D even in the event that D behaves negligently." On the plane, P receives a visibly torn parachute from D, but negligently fails to heed D's instructions, "Check your chute for any tears, and ask for a new one if you find any." The chute fails, P freefalls and dies, and his estate sues D. Under the Third Restatement (and in virtually all courts), the fact that the jurisdiction has enacted comparative negligence would *not* lead the court to allow the jury to allocate fault between P and D so that P might receive a partial recovery. Instead, the court will enforce the liability-waiver as written under the doctrine of express assumption of risk, and P as a matter of law will be completely precluded from recovering.

D. Implied assumption of risk: Even if the plaintiff never makes an actual agreement with the defendant whereby risk is assumed by the former, she may be held to have assumed certain risks ***by her conduct.*** In this situation, the assumption of risk is said to be ***implied.***

1. **Requirements for implied assumption:** For the defendant to establish such implied assumption of risk, he must show that the plaintiff's actions demonstrate that she ***knew of the risk in question*** and ***voluntarily consented to bear that risk herself.*** This consent may be shown by the fact that the plaintiff has chosen to enter a certain place, to remain in a certain place, to work with certain machinery, etc.

   Example: D is dangerously setting off fireworks near a public street. P watches at close range, even though she is aware of the danger of doing so, and is injured by a stray rocket. P has assumed the risk of being injured, and cannot recover. See Rest. 2d, §496C, Illustr. 1.

   a. **Distinguished from contributory negligence:** The plaintiff's conduct in assuming risk may also, in many cases, constitute contributory negligence. The connection between these two

defenses is discussed *infra*, p. 294.

2. **Knowledge of risk:** For implied assumption of risk to apply, the plaintiff must, as noted, have had ***knowledge of the risk.*** This requirement is usually quite ***strictly construed.***

   a. **Subjective standard:** For instance, the risk must be one which was ***actually*** known to the plaintiff, not merely one which "ought to have" been known to her.

      i. **Particular risk:** Furthermore, P must have actually known of the ***particular type of risk that eventuated,*** not some other vaguely-similar risk. So, for instance, in the case of an argument by D that P voluntarily assumed the risk of an absent safety precaution, D must show that P actually knew that the precaution was missing, as well as knew of the specific risk that eventuated.

      Example: P, a young woman, agrees to go for a pleasure drive with D, a 21-year-old man. D asks P whether she wants him to drive fast on a "roller coaster" road. She says yes. P does not realize that D is a very inexperienced driver, even as compared with other 21-year-old drivers. D drives at 89 mph, and loses control as the car goes over a bump, resulting in a crash into a side guardrail that a more experience driver would probably not have had even at high speed. The crash causes P to become a quadriplegic.

      P's recovery will probably not be reduced at all by virtue of her consent. That is, P will not be found to have impliedly assumed the risk of such a crash. By her consent, P may have implicitly assumed certain risks, such as the risk of hitting her head against the roof of the car during a bump. But she did not know of, or consent to, the specific risk of D's being an inexperienced driver who might lose control under circumstances in which another driver would not. Cf. Rest. 2d, §496C, Illustr. 7.

   b. **Risk of unknown dangers:** Generally, as stated, the plaintiff must have understood the particular risk in question. But there are a few situations in which, by her conduct, she indicates her consent to ***unknown risks.*** Thus ***automobile guests*** have often been held to assume the risks of unknown defects in their host's car; see P&K, p. 489. (But many of these holdings have been or will be overruled by more general holdings that, particularly in comparative negligence jurisdictions, there is no separate defense of assumption of risk.)

3. Voluntary assumption: The requirement that the plaintiff have consented to the risk ***voluntarily*** is also strictly construed in implied-assumption scenarios.

a. Duress: For instance, there is no assumption of risk if the defendant's conduct has left the plaintiff with ***no reasonable choice*** but to encounter a known danger.

Example: P is D's tenant in a building with an outhouse. One day when she is using the privy, she falls through a hole or door in the floor, and has to be taken out with a ladder.

Held, P did not assume the risk of the defect in the floor. She "had no choice, when impelled by calls of nature, but to use the facilities placed at her disposal by the landlord. . . . She was not required to leave the premises and go elsewhere." *Rush v. Commercial Realty Co.*, 145 A. 476 (N.J. 1929).

i. Existence of reasonable alternative: But if, despite the defendant's conduct, the plaintiff is left with a ***reasonable alternative*** to submitting herself to the danger in question, and she voluntarily declines to follow this alternative, she may have assumed the risk. For instance, in the above example, if there had been another outhouse on the property, which, although slightly less convenient (e.g., further away), was feasible to use and safe, the plaintiff might have been held to have assumed the risk when she used the dangerous one (assuming that she knew of the danger).

ii. Determining reasonableness of alternative: Whether the alternative is a reasonable one or not depends on such factors as the dangerousness of the course finally followed by the plaintiff, the degree of inconvenience in using the alternative, the importance of the interest being pursued by the plaintiff, etc. See Rest. 2d, §496E, Comment d. Thus a person whose house is burning down might be held to have assumed the risk if he dashes in to save his hat, but not if he dashes in to save his son; in either case, he has the alternative of not doing anything, but this is a reasonable alternative only in the former case. The weighing of factors in determining "reasonableness" is much the same as is done when the contributory negligence of the plaintiff is at issue.

iii. **Choice not created by defendant:** Where it is not the ***defendant's fault*** that the plaintiff has really no choice except to expose herself to risk, this is not enough to vitiate the voluntary nature of the plaintiff's act, and the defense will apply.

Example: P is injured in an accident, bleeding badly, and needs immediate medical help. He has no other means of transportation, so he asks D to drive him to the hospital, knowing that D's car has bad brakes. P assumes the risk of injury due to an accident caused by the bad brakes. This is so because P's dilemma (risk of bleeding to death or risk of bad brakes) is not the result of D's wrongdoing. Rest. 2d, §496E, Illustr. 1.

b. Public accommodation: Where the accident takes place in a place of ***public accommodation*** (e.g., a ***store),*** the court is unlikely to conclude that P impliedly assumed the risk of a negligently-caused accident — there are a limited number of stores or other places of accommodation, so even if P was aware of the risk, this choice is unlikely to have been truly voluntary.

Example: Store, a convenience store, has a parking lot where muggings have often occurred. Store places a sign on the lot saying, "Use this lot at your own risk. Muggings often occur in this lot." P reads the sign, but parks anyway, and is assaulted by X on the way to the inside of Store. P sues Store for negligence. If Store could easily have provided better security, it's very unlikely that P's recovery will be reduced by virtue of implied assumption of risk — P's consent to the risk of being assaulted wasn't truly voluntary, since P had limited places in which to shop.

4. Statutory violation by defendant: Where the defendant's negligence consists of the violation of a statute ***("negligence per se"),*** most courts have allowed assumption of risk as a defense in those same situations where contributory negligence would be a defense. That is, it is allowed in all cases except those in which the statute is found to have been intended principally for the benefit of a class unable to protect itself (of which the plaintiff is a member), and the purpose of the statute would be defeated by allowing the defense. Rest. 2d, §496F.

5. Effect of comparative negligence: In a state that has enacted comparative negligence, what should be the effect of that enactment on implied assumption of risk? Most courts, and the Third Restatement, say that implied assumption of risk is ***merged into*** — and thus ***replaced by*** — comparative negligence.

Example: P goes to a baseball game at a stadium owned by D (the team). He sits in a portion of the stands where there is no screen preventing foul balls from going into the seats, as there is in other parts of the stadium. P is hit by a foul ball, and sues D for negligence in not installing a screen. D asserts that P impliedly assumed the risk of getting hit by a foul ball. The jurisdiction applies comparative negligence.

A court would very likely hold that the doctrine of implied assumption of risk has been ***merged*** into comparative negligence, so that the significance of P's fault, if any, in choosing to sit in an unscreened seat will reduce his recovery, ***not eliminate it.*** See Rest. 3d (Apport.) §3, Illustr. 6, so indicating on these facts.

a. D may be reasonable in relying: However, keep in mind that D may so clearly and reasonably believe that P understands the risks (and that P is voluntarily choosing to expose herself to those risks) that this belief ***prevents D from being negligent at all.*** In that case, ***neither assumption of risk nor comparative negligence matters.*** As the Third Restatement puts it, "Whether the defendant reasonably believes that the plaintiff is aware of a risk and voluntarily undertakes it may be relevant to whether the defendant acted reasonably. The defendant might reasonably have relied on the plaintiff to avoid the known risk[.]" Rest. 3d (Apport.) §3, Comment c.

Example: On the facts of the above foul ball example, suppose that (a) D has made available many good seats that *are* screened from foul balls; (b) D has placed large signs in the unscreened portions of the stands urging patrons to watch out for foul balls; and (c) P turns down a perfectly good screened seat because he doesn't like having the mesh of the screen interfere with his view of the field. On these facts, a court would probably hold that D was *simply not negligent at all*, because it reasonably believed that a patron who sat in the unscreened seats was knowingly and voluntarily agreeing to assume the risk of being hit by a foul ball. Cf. Rest. 3d (Apport.) §3, Illustr. 6 ("If [D] could reasonably assume that [P] and other fans are aware that balls are occasionally hit into the stands, this fact is also relevant to whether [D] acted reasonably in relying on [P] to watch out for balls instead of constructing a screen or providing warnings.")

Note on "primary vs. "secondary" assumption of risk: In this type of situation — where D simply ***never has any duty to P*** to avoid the risk because D reasonably believes that P understands that risk and is voluntarily submitting to it — courts sometimes say that the case involves ***"primary*** assumption of risk," and that primary assumption of risk is a ***complete barrier to recovery*** even in a comparative negligence jurisdiction.

By contrast, if D ***owes*** a duty of care to P but P knowingly encounters a risk posed by D's breach of that duty, courts sometimes call this ***"secondary*** assumption of risk." These courts then say that secondary assumption of risk is ***subsumed into ordinary comparative negligence principles.***

b. P is reasonable in encountering the risk: You should also keep in mind, conversely, that sometimes P's decision to ***place herself in particular danger*** is ***reasonable.*** In that event, P's conduct will simply not be negligent at all, and her recovery will ***not be reduced*** even in a comparative negligence jurisdiction.

Example: Landlord negligently allows Tenant's premises to become highly flammable, and a fire occurs. Tenant returns to the premises to find them ablaze, with his infant trapped inside. Tenant rushes in to retrieve the child, and is injured. (We shall assume that the state is one which imposes upon landlords a duty of ordinary care for the safety of tenants and others on the premises with permission; see *supra*, p. 252). Under traditional assumption of risk doctrine, Tenant would be barred from recovery, because he assumed the risk, even though he did so reasonably. But in most states that have enacted comparative negligence, Tenant's conduct would be viewed solely from the perspective of comparative fault, not assumption of risk. Since his conduct was reasonable, it is not negligence, and his recovery would not be reduced at all.

However, now assume that Tenant dashes in not to save his child, but to save his favorite hat. Tenant's conduct will be reviewed to see whether his conduct was negligent. Tenant's conduct is clearly negligent, since a reasonably prudent person would not risk serious injury in order to save a relatively unimportant object. Therefore, in most comparative-negligence states Tenant's recovery will be ***reduced*** (but, in a "pure" comparative negligence state, not completely eliminated) by the proportion of his culpability. See *Blackburn v. Dorta*, 348 So.2d 287 (Fla. 1977) (reciting this hypothetical situation, and reaching this conclusion).

c. Danger from other participants: Within the context of ***sports*** and recreation, special problems are posed when ***one participant injures the other.*** If the risk of this sort of inter-participant injury is found to be "inherent" in the sport or activity, then even in a comparative negligence jurisdiction the plaintiff will not be allowed to recover against the one who injured him, on the theory that the defendant owes no duty to the plaintiff to avoid that sort of risk.

Most courts now hold that in such co-participant sports, ***ordinary carelessness*** is ***inherent*** in the game (and thus covered by "primary" assumption of risk), so that an injured co-participant may recover only if the injury was ***intentional*** or so ***reckless***ly inflicted as to be ***totally outside the range of ordinary activity in the sport.*** For a more extensive discussion, see *supra*, p. 65.

E. Burden of proof: Normally, the ***burden of proof,*** and the burden of ***pleading,*** as to assumption of risk are upon the ***defendant,*** as they are in the case of contributory negligence. Rest. 2d, §496, Comment g.

IV. STATUTE OF LIMITATIONS

A. Discovery of injury: A frequent defense in tort actions, as in most other legal actions, is the ***statute of limitations.*** A general discussion of this defense is beyond the scope of this outline. However, there is one aspect of it that has troubled courts for a long time, and as to which the rules are rapidly changing: When the plaintiff does not ***discover*** his injury until long after the defendant's negligent act occurred, does the statute of limitations start to run at the time of the act, or at the time of the discovery?

1. Medical malpractice: The question arises most frequently in ***medical malpractice*** cases. Suppose, for instance, a surgeon leaves a surgical sponge in his patient. If the relevant statute of limitations is four years, and the patient does not discover the sponge until five years after the operation, is he barred by the statute?

a. Former view: Until the early 1970s or so, it was almost always held that the statute started to run as soon as the negligent act was committed, and if the plaintiff did not discover his injury until after the statute had run, that was his hard luck.

b. Recent view: But many courts have recently refused to continue this injustice. Several approaches to the problem have been used:

i. Termination of treatment: Some courts have held that the statute begins to run when the doctor-patient relationship terminates, even if the plaintiff has not discovered his injury. This gives him at least some extra time.

ii. Only for objects left in body: Other courts have applied a time-of-discovery rule, but only where the claim involves an object left in the patient's body, not where the case involves a mistaken diagnosis, or surgery that is negligently performed without leaving an object. P,W&S, p. 617, n. 8.

iii. All surgical cases: Many states now apply the time-of-discovery rule to all surgical cases, whether involving foreign objects or not. See, e.g., *Teeters v. Currey,* 518 S.W.2d 512 (Tenn. 1974), holding that the statute begins to run "when the patient discovered, or in the exercise of reasonable care and

diligence for his own health and welfare, should have discovered, the resulting injury."

iv. **Discovery of legal claim:** Some courts have even held that the statute of limitations does not begin to run until the plaintiff has (or should have) discovered not only the injury but the fact that it may have been ***caused by the defendant's negligence.*** (Thus if P develops a disease, but does not immediately discover that it was probably due to improper treatment by his doctor, the claim does not start to run until the latter discovery, in these courts.) See P&K 1988 Pocket Part, p. 25.

v. **Statutory solutions:** A number of states have dealt with the limitations problem by statute. New York, for instance, has shortened the statute for medical malpractice from three years to two and one-half years, but provides that the statute does not begin to run until the date of last treatment (if the treatment is for the same illness as that which gave rise to the malpractice); also, where the claim involves a foreign object left in the body, the patient has ***one year*** to sue starting with the time the injury was or should have been discovered. As to all other malpractice, the statute runs from the time of injury. C.P.L.R. §214-a.

2. **Other professionals:** A similar issue arises frequently in the case of malpractice by other professionals, particularly lawyers, architects and engineers. The time-of-discovery rule has sometimes been applied in such cases. P,W&S, pp. 617-17, nn. 9, 10.

3. **Sexual assaults:** An especially controversial use of the "discovery" rule for tolling the statute of limitations has recently arisen in a quite different context: that of ***sexual assaults.*** Suppose that a father sexually abuses his daughter when she is five. Suppose that the relevant statute of limitations for a civil battery action is three years, and that under general limitations principles the time to sue is tolled until the plaintiff reaches 18. The plaintiff would be entitled to sue between the ages of 18 and 21, and would thereafter be barred. But suppose that the plaintiff has ***repressed*** her memory of abuse until she undergoes, say, psychotherapy at the age of 30, at which time the

memories rush to the surface and she relives the episode. Should some variant of the discovery rule be employed so that the plaintiff may sue, 25 years after the original event and nine years after the limitations period would otherwise have expired? An increasing number of courts have given at least a partial ***"yes"*** answer.

a. Repression plus corroboration: A court is most likely to apply the discovery rule where both of the following conditions are satisfied: (1) the abuse occurred during the plaintiff's minority and the episode was completely repressed until it was discovered sometime within the statutory period (e.g., less than three years before suit, in a state that has a three year limitation period on battery actions); and (2) there is some independent ***corroboration*** that the assault actually occurred. See D&H, pp. 286-290.

V. IMMUNITIES

A. Definition of immunity: An immunity is a defense to tort liability that is given to an entire ***class*** of persons based on their relationship with the prospective plaintiff, the nature of their occupation, their status as a governmental or charitable entity, etc. The common law created a number of virtually complete immunities, but all of these are beginning to break down at least to some extent, either by statutory reform or judicial overruling.

B. Intra-family immunity: The common law recognized two immunities from suit growing out of the family relationship: that between ***spouses,*** and that between ***parent and child.***

1. Husband and wife: At common law, the husband and wife were considered as one person (and, as was often noted, that person was the husband). Therefore, it was considered illogical to allow the husband to bring a tort suit against his wife, or vice versa. Married Women's Acts, passed in the late nineteenth century, giving women property rights and legal identity, were held to allow at least suits between husband and wife regarding ***property interests.***

a. Personal injury suits: But the inter-spousal immunity continued with respect to suits for personal injury. This meant that a wife who was injured while a passenger in a car driven negligently by her

husband could not sue him; nor could a battered wife recover for her abuse.

b. Most states now allow: But over half the states have now completely ***abolished*** the inter-spousal immunity, even for personal injury suits. See P, W&S, p. 622, n.1. See also Rest. 2d, §895G.

c. Partial abolition: In those states that have not completely abolished the immunity, a number of ***limitations*** on it are commonly applied.

i. Termination of marriage: If the marriage has been ***terminated*** before the suit, the immunity will usually not apply. This is true not only where there has been a divorce, but also where one spouse has died. For instance, the estate of a deceased spouse might sue the surviving spouse in a wrongful death action. See Rest. 2d, §895G, Comment d.

ii. Tort before marriage: Similarly, if the tort occurred ***before*** the parties were married, some courts do not apply the immunity. Rest. 2d, *ibid.*

iii. Intentional personal injury: If the personal injury derives from an intentional tort (e.g., assault or battery), some courts do not allow the immunity.

iv. Automobile suits: A number of states have abolished the immunity, as to ***automobile accident*** suits.

d. Vicarious liability: Almost all states that have not abolished the immunity nonetheless permit a husband or wife to sue one who is ***vicariously liable*** for the other spouse's torts, even if the spouse himself could not be sued. Thus if a husband and wife work for the same employer, and the husband negligently injures the wife in a car crash while they are on a joint business trip, the wife could sue the employer under the doctrine of *respondeat superior* (see *infra*, p. 314), even though the inter-spousal immunity might bar her from suing her husband directly. See Nutshell, p. 353-55.

2. Parent and child: In the United States (but not in England), a common law immunity also developed to bar suit by a ***child against his parents*** or vice versa. Except for the "oneness" of husband and

wife, the same justifications for inter-spousal immunity were usually given to support the parent-child immunity.

a. Partial abolition: States have been much slower to abolish parent-child immunity than to abolish spousal immunity. But about a dozen states have completely abolished the immunity (in addition to another seven that never had it). P,W&S (12th), p. 656, n. 1 and 2.

b. Abolition by some states: Beyond the 19 or so states that don't presently recognize parent-child immunity at all, another substantial group have ***partially*** abolished the immunity, by making it inapplicable to ***automobile accident suits.*** Cf. P,W&S (12th), p. 657, n. 3(E). In the auto-accident context, those favoring abolition stress that nearly everyone has liability insurance, so that in economic terms such suits usually are not really between members of the family, but between the family and the insurance company.

c. Exceptions: As in the case of inter-spousal immunity, a number of states that have not completely abolished the doctrine have developed ***exceptions*** to it. Common exceptions include the following:

i. Emancipation: If the child has been legally ***emancipated*** (i.e., of legal age or where other circumstances indicate that the parent has renounced his right to the child's earnings);

ii. *In loco parentis:* Where the defendant is a ***step-parent or guardian;***

iii. Relationship terminated by death: Where the parent-child relationship has been terminated by the ***death*** of one or the other prior to the suit;

iv. Wrongful death of other spouse: Where the plaintiff-child is suing his parent for the wrongful death of the other parent;

v. Intentional or willful: Where the tort is ***intentional,*** or in some cases "willful";

vi. Property rights or pecuniary loss: Where the action is for something other than personal injury (i.e., property loss,

pecuniary loss);

vii. Business activity: Where the injury occurred during the course of ***business activity*** by the defendant;

See generally, P,W&S, p. 630; Rest. 2d, §895H, Comments d-i.

d. Duty of supervision: A big problem with completely abolishing the parent-child immunity is that courts will then have to decide whether to allow children to sue their parents for ***negligent supervision*** that results in injury to the child. If the jurisdiction decides to allow such suits, there is a risk that courts will find themselves ***interfering with traditional parental decision-making.***

i. No suit allowed: Therefore, the vast majority of courts, even ones that have partially or completely abrogated the parent-child immunity, do ***not*** allow a child to sue her parent for negligent failure to supervise. See, e.g., *Zellmer v. Zellmer*, 188 P.3d 497 (Wash. 2008) ("The overwhelming majority of jurisdictions hold parents are not liable for negligent supervision of their child[.]")

(1) Three theories: Often the no-liability-for-negligent-supervision rule is carried out by keeping the parent-child immunity in place for negligent-supervision suits. But there are two ***alternative*** ways that courts often implement a rule against a child's recovery for negligent supervision:

[1] First, some jurisdictions give the parent a special ***privilege*** to exercise judgment about how closely to supervise her child. See, e.g., Rest. 2d §895g, taking this approach.

[2] Second, the court can hold that a parent has ***no affirmative duty*** to supervise her child. Such an approach brings the child's failure-to-supervise suit within the general rule, discussed *supra*, p. 196, that a person will ordinarily not be liable for a failure to act.

These three methods — based on immunity, privilege and no-duty — all produce the same practical result: a child who is injured cannot recover against the parent (or the parent's insurance company) by arguing, "You

> negligently failed to supervise me, and if you had properly supervised me, I wouldn't have been injured."

3. **Siblings:** There is no immunity between ***siblings.*** See Rest. 2d, §895I. Nor is there any other family relationship (e.g. ***grandparent***-grandchild) as to which there is immunity.

C. Charitable immunity: ***Charitable organizations,*** as well as educational and religious ones, received immunity at common law.

1. **Rationale:** Two principal reasons have been given for this:

   a. **Trust fund:** First, the charity holds the donations it receives in trust, and the donor has not given these funds with the intention that they be used to pay tort claims.

   b. **Implied waiver:** Second, the beneficiary of charity (e.g. one who uses a charitable hospital) has "impliedly waived" his right to sue in tort, by virtue of having accepted this benevolence.

2. **Overruling:** By now, more than thirty states have abolished charitable immunity. See Rest. 2d, §895F.

3. **Limitations:** Those states which have not abolished the immunity completely have carved out a number of limitations upon it:

   a. **Abolished as to the hospitals:** Some have abolished it as to charitable hospitals, but have kept it concerning religious or educational institutions.

   b. **Beneficiaries:** Others have maintained the immunity where the plaintiff is a beneficiary of the charity (e.g. a patient at the charitable hospital), but not where she is an employee, stranger, or other non-beneficiary. The theory behind this is presumably that the "implied waiver" doctrine applies only to beneficiaries.

   c. **Liability insurance:** Still other courts deny liability where a judgment would have to be satisfied out of trust funds, but not where there is liability insurance. This result is reached by recognizing the validity of the trust fund argument, but cutting it back to those cases where it applies directly to the facts. See generally, Rest. 2d, §895F.

D. Governmental immunity: At English common law, "sovereign

immunity", i.e., immunity of the king, developed. The doctrine, which was connected to the divine right of kings, was sometimes expressed by saying that "the king can do no wrong."

1. **United States:** Early American courts applied the English rule to hold that the ***United States*** could not be sued without its consent. The first major and meaningful consent by the United States to tort claims was embodied in the 1946 Federal Tort Claims Act (FTCA). Because this Act continues today to be dispositive of almost all possible tort claims against the government, its provisions are worth looking at in some detail.

   a. **General provision:** The FTCA provides generally that money damages may be recovered against the United States " . . . for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment", if the claim is such that the U.S. could be sued if it were a private person. This means that in any situation in which the doctrine of *respondeat superior* (see *infra*, p. 314) would apply if the tortfeasor were a private employee, the U.S. may be sued by use of that same doctrine. 28 U.S.C.A. §1346(b).

   b. **Exceptions:** However, several exceptions substantially limit the scope of federal tort liability. The most important of these are as follows:

   c. **Intentional torts:** The U.S. is ***not*** liable for "any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights." However, this clause was recently amended to provide that assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution, where committed by ***"investigative or law enforcement officers"*** of the federal government, may be sued upon. Thus a police brutality claim might be brought against the government for a battery committed by an F.B.I. agent, for instance.

   d. **Execution of statute or regulation:** Another exception to the

U.S.'s liability is where a government official, using due care, carries out a ***statute or regulation*** which later turns out to be invalid. 28 U.S.C.A. §2680(a).

e. Discretionary function: But the most important exclusion, which sometimes seems to swallow the whole Act, is that no liability may be "based upon the exercise or performance or the failure to exercise or perform a ***discretionary function*** or duty on the part of a Federal agency or an employee of the Government, ***whether or not the discretion involved be abused."*** 28 U.S.C.A. §2680(a). This section was designed to insure that the Government was not prevented from exercising its leadership and planning functions by the institution of tort suits attacking the manner in which this was done.

i. Discretionary v. operational functions: "Discretionary" functions are generally contrasted with "operational" ones. What occurs at the planning stage is usually discretionary, whereas the ***carrying out*** of the plans is usually held to be operational, and thus not within the exclusion for discretionary functions. Nonetheless, the distinction can be very hard to draw in a particular case.

ii. *Berkovitz:* In a Supreme Court case, *Berkovitz v. U.S.*, 486 U.S. 531 (1988), the Court spoke about this distinction between discretionary and operational functions. The case illustrates that much of the work done by federal health or safety agencies will be deemed to be "operational." Only those governmental actions and decisions that are ***"based on considerations of public policy"*** will be deemed ***"discretionary."*** More specifically, a federal agency's decision to set up a certain kind of testing or inspection program may be "discretionary," but once such a program is enacted, the agency's failure to ***follow that program*** will be deemed "operational," not discretionary, and the government can be liable for that failure.

Example: P takes a dose of oral polio vaccine, and contracts severe polio. P's parents sue the U.S., asserting that the U.S. wrongfully approved the release of the particular privately-manufactured lot that injured P. They assert that the FDA

had made a policy decision to test each batch of vaccine, but that the batch here was released without having been tested.

Held, for P. The "discretionary function" exemption applies only to activities involving the "permissible exercise of policy judgment." The FDA's decision about what sort of testing program to use would be protected as a "discretionary" function. But once the FDA decided to test each batch, the subsequent decision of an official to release a particular batch without testing did not involve discretion, and can give rise to liability. *Berkovitz, supra.*

2. **State governments:** ***State governments*** have traditionally had a similar sovereign immunity. This immunity too, however, has been largely removed.

   a. **Generally waived at least in part:** Nearly all states have now ***waived*** their comonlaw sovereign immunity, both for the state itself and for state ***agencies*** (e.g., hospitals, prisons, etc.). Dobbs, § 268, p. 716. States have typically replaced the common-law immunity with special tort-claims ***statutes*** that give ***partial*** immunities.

      i. **Still immunity for discretionary decisions:** Many states have statutes that are similar to the Federal Tort Claims Act *(supra*, p. 301), in that the state waives immunity for its negligence in carrying out its day-to-day functions, but maintains immunity for ***discretionary*** decisions, i.e., decisions that are about ***public policy.*** Dobbs, § 268, p. 717.

      ii. **Caps on liability:** States have also often placed ***dollar caps*** on their tort liability as part of their tort-claim statutes. Thus Florida caps its liability at $100,000 per claimant (see Fl. Stat. Ann. § 768.28(5)) and Pennsylvania has a $250,000 per person cap (Pa. Consol. Stat. § 8528). See Dobbs, § 268, p. 718.

      iii. **Notice of claim:** States also usually impose special ***procedural requirements*** on people who sue a state entity in tort. For instance, states usually require the plaintiff to give a ***written notice of claim*** before filing suit, and the time limits for giving such a notice are often shorter than the general-purpose statute of limitation.

   b. **Courts, legislatures and policy-makers:** Where the immunity has been judicially or statutorily abolished, there will nonetheless

almost never be liability for acts of the ***courts*** of the state, or its ***legislature.*** Nor will there be liability for administrative actions which involve a "basic ***policy decision".*** See Rest. 2d, §895B(3).

3. Local government immunity: Units of ***local government*** have generally had at least partial immunity. Thus a city, school district, local public hospital, etc., when it conducts activities of a governmental nature, has been immune. But where such local units (often called "municipal corporations") perform functions that could just as well be performed by private corporations, there has traditionally ***not*** been immunity. The distinction is between ***"governmental"*** and ***"proprietary"*** functions.

> **Example:** Operation of a hospital is likely to be considered a "proprietary" function. Therefore, a city that operates a hospital typically won't have sovereign immunity from suits alleging that the hospital behaved negligently.

a. Governmental functions: Police and fire departments, school systems, health inspectors, and the like, are usually held to be involved in governmental functions. Thus even if a police officer beats up the plaintiff without any excuse, suit cannot be brought against the department or city (assuming that there has been no abolition of local government immunity, as discussed below).

b. Revenue-producing activities: But activities which produce ***revenue*** for the government, such as gas or water utilities, airports, garages, etc. are generally held to be proprietary. See P&K, pp. 1053-54.

c. General abolition: Partly because of the difficulty of distinguishing between "governmental" and "proprietary functions," many courts have abolished the general local government immunity, and at least fifteen others allow suit where liability insurance has been purchased. But legislative and judicial functions continue to be immune, as are administrative policy decisions. Rest. 2d, §895C(2).

d. Extent of duty: Assuming a municipality no longer has immunity, what duties does it owe its citizens? In general, the answer has been that the duties are ***narrower*** than they would be if the defendant were a private corporation. This is due partly because of courts'

desire not to second-guess the discretionary and policy decisions made by administrative officials.

Example: P, a young woman, is repeatedly threatened by a suitor, X (a lawyer!), that if she will not marry him, he will fix it so "no one else will want you". P repeatedly asks the police of D (New York City) for protection, which they refuse. X then hires a thug to throw lye in P's face, partially blinding her.

Held, D has no duty to provide police protection to any particular member of the public. If such duty were recognized, and enforced by the courts, this would "inevitably determine how the limited police resources of the community should be allocated and without predictable limits."

A dissent argued that the police's denial of protection to P was not a "conscious choice of policy" but simply "garden variety negligence", which should be actionable. "No one is contending that the police must be at the scene of every potential crime or must provide a personal bodyguard to every person who walks into a police station and claims to have been threatened. They need only act as a reasonable man would under the circumstances," said the dissent. *Riss v. City of New York*, 240 N.E.2d 860 (N.Y. 1968).

i. **Broadening liability:** But even this "de facto" immunity, stemming from courts' desire not to second-guess administrative officials, seems to be ***disappearing*** year by year. For instance, a New York court held a county liable for negligence in operating its 911 emergency number service, in *DeLong v. Erie County*, 455 N.Y.S.2d 887 (N.Y.Sup.Ct. 1982), discussed more extensively *supra*, p. 201.

4. **Government officials:** In addition to the immunity sometimes conferred upon governments, ***public officials*** in their private capacity may also have tort immunity. Such immunity is of common-law origin, and may also exist even where sovereign immunity has been abolished as to the tort in question.

   a. **Rationale for immunity:** The principal rationale for granting at least partial immunity to public officials is that, otherwise, the fear of "vexatious suits" (most of them without merit) will prevent officials from making the necessary decisions and carrying out the duties of government. See Rest. 2d, §895D, Comment b.

   b. **Legislators and judges:** ***Legislators*** and ***judges*** receive ***complete immunity,*** as long as their act is within the broad general scope of their duties. This is so even if such an official is clearly motivated

by malice, greed, corruption, etc. The only exception to the rule is that there is no immunity where the act is "wholly beyond the jurisdiction" of the official. But this is true of few acts.

c. **Administrative officials:** High administrative officials, in many states, receive a similar complete immunity for torts committed within the general scope of their duties. In the other states, however, even such high officials have only a limited immunity, which will not protect them if it is shown that they acted in ***bad faith.*** P, W&S, p. 656.

d. **Lower officials:** Low-ranking officials, on the other hand, generally receive no immunity at all where the act in question is "operational", as opposed to "discretionary". If the act is discretionary, they usually receive the same treatment as higher officials, whatever that treatment is in the jurisdiction in question. The distinction between operational and discretionary acts is generally done on the same basis as it is with respect to local government immunity (see *supra*, p. 303).

e. **Statutory treatment:** Several Federal statutes directly affect public officials' immunity in certain kinds of actions.

   i. **Civil Rights:** The Civil Rights Act of 1871 (42 U.S.C.A. §1983), provides that any person who, "under color of any statute, ordinance, regulation . . . of any state" violates the Federal civil rights of any person, "shall be liable to the party injured in an action at law. . . . " This statute applies to state and local officials, and a similar judge-made rule probably applies to Federal officials. See Rest. 2d, §895D, Comment i.

   ii. **Federal Tort Claims Act:** Conversely, the Federal Tort Claims Act provides that in the case of any injury arising out of a Federal employee's operation of a ***motor vehicle,*** the ***only*** liability is against the government, and the employee is immune, 28 U.S.C.A. §2679(b).

5. **Government contractors:** Government contractors (independent contractors who perform services for or provide supplies to the government) are not directly protected by the immunity of

government officials. In certain situations, however, they are entitled to defenses which in effect draw on the immunity granted to governments. For example, if a military contractor supplies defectively-designed goods to the government, which injure a soldier, the contractor will probably be able to avoid liability if he can show that the design was approved by the government and the product was manufactured according to that design. See *Boyle v. United Technologies Corp.*, discussed *infra*, p. 380.

Quiz Yourself on
DEFENSES IN NEGLIGENCE ACTIONS (Entire Chapter)

55. The Hit & Run Railroad Company has tracks running adjacent to Old MacDonald's Farm. It negligently fails to erect fences on either side of the tracks; as a result, Old MacDonald is worried that if he lets his cows graze in the fields surrounding the tracks, they'll wander onto the tracks. But he lets them graze there anyway (he has nowhere else for them to graze), and one of them wanders onto the tracks and is struck by an oncoming train. Old Mac sues Hit & Run; Hit & Run asserts assumption of the risk as a defense. Who wins? _____

56. Al Bundy drives his car to the Mr. Walletwrench Service Station to get the oil changed. He drives the car into the garage, fumbles around in the back seat to get a newspaper, and opens the door to get out. He does not realize that the car has been hoisted ten feet into the air to facilitate the oil change; he steps into midair, falls to the ground, and is injured. He sues the station for negligence in hoisting the car with him in it. Mr. Walletwrench defends on contributory negligence grounds. (The jurisdiction applies this doctrine.) Who wins? _____

57. Diamond Jim Potluck visits the N-Palatable Diner. As he walks to the counter, he studies the menu board on the wall, looking for the meatloaf of the day. He does not notice that the cellar door, which opens out of the floor, is open. He falls in, injuring himself. Assuming the Diner was more negligent in leaving the cellar door open than Diamond Jim was in failing to notice it, in a contributory negligence jurisdiction will the Diner be liable for Jim's injuries? _____

58. Paul Revere and William Dawes are each on a casual midnight

horseback ride. They run into each other; each is thrown from his respective horse and each is injured. Each sues the other for negligence. Revere suffers $20,000 in damages and is found to be 25% at fault for the accident. Dawes, who was riding faster, is found to be 75% at fault and suffers $30,000 in damages. Who owes what to whom, under a comparative negligence statute holding that a plaintiff who is more negligent than the defendant cannot recover?_____

59. Perry, an avid hiker, negligently wears very thin-soled shoes, which are inadequate protection for the sharp stones on the mountain trail that he plans to navigate. About halfway up the trail, Perry badly gashes his foot, and passes out in the middle of the trail from lack of blood. Donna, riding a trail bike, arrives at the same point in the trail, sees Perry, negligently believes that she (Donna) has enough room on the trail to get by Perry without hitting him, and because of her miscalculation runs over Perry's foot, crushing it. Perry sues Donna for the crushed foot. Donna raises the defense that Perry's contributory negligence was the proximate cause of Perry's injury, since if Perry had worn proper shoes, he would never have gashed his foot, would therefore not have been lying in the middle of the trail unconscious, and could not have been run over by Donna. The jurisdiction follows the common-law approach to contributory negligence.

(a) What doctrine should Perry assert to rebut Donna's defense? _____

(b) May Perry recover?_____

60. Jay Walker, a pedestrian who is in a hurry, crosses a busy street from between two parked cars in the middle of the street, rather than at a crosswalk. Although this is an act of negligence, it is widely (and properly) perceived as only slightly negligent on this particular street, since crosswalks are few and far between and drivers generally know to be on the lookout for pedestrians doing this. Hard Driver, a hard-driving executive, is driving down the street at 70 m.p.h. in a 40 m.p.h. zone. She never even sees Jay, just slams into him. Jay never even knows that he is in danger, because Hard's car simply comes on too suddenly. Jay is killed in the collision. His estate sues Hard. There are no applicable statutes, and all relevant common-law doctrines are in force. May Jay's

estate recover? _____

61. The courts of New York have held that, as a common law matter, any operator of a baseball stadium must furnish each patron with a screened seat so that that patron will not be hit by batted balls. Fan, who is knowledgeable about baseball and the risks associated with it, attends a New York Yokels baseball game at Yokels Stadium. A particular seat sold to Fan by the Yokels is an unscreened seat, and Fan is aware of this fact. The ticket says nothing about the risk of foul balls. Fan sits in the seat, and is hit in the face by a foul ball. The jurisdiction still applies common-law contributory negligence. May Fan recover in a negligence suit against the Yokels? _____

Answers

55. **Old MacDonald.** Assumption of the risk requires that plaintiff voluntarily and knowingly undertake a risk. In this instance, Old Mac did know the danger, and subjected his cows to it; however, the element missing is the voluntariness. Old Mac has a right to a moo-moo here and a moo-moo there, here a moo, there a moo, everywhere a moo-moo on his own farm, and Hit & Run can't deny him this right.

56. Mr. Walletwrench. Contributory negligence bars recovery where plaintiff doesn't behave reasonably to protect himself from injury, and he is injured as a result. Here, reasonable behavior would include "looking before you leap," so to speak. Since Bundy didn't do so, and this was a substantial factor in his injury, Mr. Walletwrench won't be liable.

57. No. Under contributory negligence, any negligence on plaintiff's part bars recovery, regardless of how insignificant it is compared to defendant's negligence.

58. Dawes owes Revere $15,000. Revere is only entitled to the portion of his damages caused by Dawes. Since he was 25% responsible, he is entitled to 75% of his damages: .75 x 20,000 = $15,000. Dawes gets no offset by virtue of his own claim: under this "modified" comparative negligence statute (P can't recover anything if he's more negligent than

D), Dawes-as-plaintiff is more negligent than Revere-as-defendant, and so collects nothing on his claim. Therefore, Dawes must write Revere a check for $15,000.

COMPARE: Suppose the state had had a "pure" comparative negligence statute (i.e., one in which P can recover from D even if his fault is much greater than D's). In that event, Dawes would be entitled to 25% of $30,000 (or $7,500), which would be subtracted from Revere's $15,000, leaving Revere a net recovery of $7,500.

59. (a) Last clear chance. By the doctrine of *"last clear chance,"* if the plaintiff is helpless to avoid his peril, and the defendant discovers that peril and negligently fails to avoid it, the defendant's subsequent negligence (her squandering of her last clear chance to avoid the accident) wipes out the effect of the plaintiff's contributory negligence.

(b) Yes. Perry was helpless to avoid the peril (since he was unconscious), and Donna knew of the peril and negligently failed to avoid it. So the last clear chance doctrine applies, and wipes out the effect of Perry's negligence.

60. **No.** This is a classic situation in which Jay's contributory negligence would completely bar him from recovery, even though his degree of fault is much less than that of Hard. Also, last clear chance does not apply, because virtually no courts apply the doctrine in this "inattentive plaintiff, inattentive defendant" situation.

61. No. The defendants would be successful in asserting that Fan ***assumed the risk,*** and was thus barred from recovery. A plaintiff will be barred by the doctrine of implied assumption of risk if he understands a risk of harm to himself, and nonetheless voluntarily chooses to accept that risk, assuming that no strong public policy forbids application of the doctrine. Here, Fan understood the risk of foul balls, and voluntarily chose to expose himself to that danger (rather than either requesting a different seat, or simply declining to attend the game). Also, probably no strong public policy prevents the application of the implied assumption of risk doctrine to foul ball dangers. Therefore, Fan would be barred from recovery. See Rest. 2d, §496C, Illustr. 4.

***Exam Tips** on*
DEFENSES IN NEGLIGENCE ACTIONS

Whenever you identify a negligence issue, be sure to look for two very common defenses: (1) contributory/comparative negligence; and (2) assumption of risk.

- Always be on the lookout for application of the doctrine of ***contributory negligence*** (CN).
  - Remember the core principle of common law CN: it's an ***absolute defense,*** and wipes out P's claim even if D's negligence is much greater than P's.
  - Unless the fact pattern tells you that comparative negligence is used, assume that you must identify and discuss situations where CN would apply. Therefore, examine the behavior of everyone you've identified as a potential plaintiff, and ask, "Did he/she behave with reasonable care?"
    - Usually, CN will consist of P's failing to notice, or disregarding, danger to ***himself*** (not P's imposition of an unreasonable risk to others). There are two types: (1) P should have noticed the danger, and didn't; and (2) P noticed the danger, and unreasonably decided to encounter it anyway.
      - Type (2) above will also constitute "assumption of risk." (The same conduct can be both CN and assumption of risk, and you should say it's both.) Where P notices the danger and disregards it, remember that this isn't ***necessarily*** CN — perhaps P's need was so great that P was ***reasonable*** in subjecting himself to the risk. *(Example:* P needs to get to the hospital, and takes a ride from a somewhat drunk driver — P's conduct may have been dangerous but reasonable, in which case it's not CN.)
      - Look out for situations where P ***couldn't have known*** of

the danger — it's not CN to fail to protect oneself against unknown danger, and the fact that P "could have protected herself if she had known of the danger" is irrelevant.

- ☞ Sometimes the facts will tell you that a certain danger is "in plain view." That's a tip-off for the probable existence of CN.

- ☞ If the facts don't tell you whether the jurisdiction has CN or comparative negligence, discuss ***each.*** *(Example:* "If the jurisdiction has common law contributory negligence, then P will get no recovery because. . . . If the jurisdiction has comparative negligence, then P's claim will be reduced by the proportion of his fault. . . .")

- ☞ Many fact patterns involve ***children.*** Remember that the standard is, "What's the reasonable level of care for a child of that age and experience?" Even a child under 10 can be contributorily negligent if he's less careful than an "ordinary" child of that age.

- ☞ Don't forget that CN is only a defense if P's negligence was a ***cause*** (both cause in fact and proximate cause) of P's injuries. *(Example:* P doesn't wear his seat belt, and crashes due to D's negligence. If P would have died anyway even with a seat belt on, the failure to wear the belt wasn't a cause in fact of P's injuries, and CN will not apply.)

- ☞ Frequently-tested: Can CN be a defense where D's liability is based upon a ***statutory*** violation (negligence per se)? Answer: yes — negligence per se is just a special form of negligence by D, so P's CN will be a defense just as in any other negligence case.

- ☞ In any case where you think CN may apply, consider whether the doctrine of ***"Last Clear Chance"*** (LCC) may undo the effect of CN.

  - ☞ Remember that under LCC, if P has negligently put himself in a position of risk, and D then sees (or should see) P's peril in time to avoid the problem, D is said to have had a "Last Clear Chance" to avoid the peril, and that LCC wipes out P's CN.

- Always be on the lookout for opportunities to discuss ***comparative*** negligence.
  - Since about 90% of the states have replaced contributory negligence with comparative, you should talk about comparative whenever the facts indicate that P may have been negligent. Assuming the facts don't say whether the jurisdiction has contributory or comparative, you should talk about ***both*** scenarios, one after the other.
  - Don't forget that comparative negligence can only apply where the main claim is based on ***negligence.*** Thus there is no comparative neg. where P's claim is based on fraud (intentional misrepresentation), strict product liability, breach of warranty, etc.
  - If the facts don't say what type of comparative statute the jurisdiction has, you should probably mention that the statute could be either ***"pure"*** or ***"modified,"*** and say how this would affect the outcome. Remember that this distinction only makes a difference where P's negligence is ***at least half*** the total negligence. Thus if P is found 60% responsible for the accident and D 40%, in a "pure" jurisdiction P collects 40% of her total damages, whereas in a "modified" or "50%" jurisdiction, P gets nothing.
    - If the fact pattern gives you the actual statutory language, you should be able to tell whether the statute is a pure or modified one. You should recognize a "pure" statute by the fact that it doesn't say anything about P's negligence being "as great as" or "greater than" D's. A modified or 50% statute will have to deal specifically with this "as great as" or "greater than" case.
  - Wherever P has failed to use some ***available safety device*** (e.g., seat belt or helmet), raise the issue of what effect the existence of a comparative negligence statute might have. Courts vary so much on this issue that it's hard to say what the effect might be — the most likely effect is that P's failure to use the device will be just one type of "fault," and that failure will be thrown into the hopper with everything else in computing P's "percentage of fault," which will then be applied to all the injuries.

- If you're covering the comparative scenario, you need to look out for possible applications of ***Last Clear Chance.*** You should say that courts are split about whether the doctrine applies in a comparative negligence situation. Probably a majority would say that the doctrine no longer applies, so that P's recovery is reduced by her fault even if D had a Last Clear Chance to avoid the accident.

- You also need to worry about the interaction between comparative negligence and ***multiple defendants.*** There are two main things to worry about:

  - First, once P's recovery has been reduced by his amount of fault, does P still have the right to recover all the "reduced" award from any ***single*** defendant? That is, does joint-and-several liability persist under comparative negligence?

    □ If all Ds are before the court and are solvent, the answer is clearly "yes."

    □ But if one or more Ds were absent or judgment-proof, courts are split on the effect of comparative negligence.

    Example: Assume P 25% at fault, D1 25% and D2 50%; total damages equal $100,000. Assume D2 is judgment-proof. Some courts would allow P to collect the full $75,000 from D1 — so common law joint-and-several liability persists, and D1 suffers the full brunt of D2's unavailability. Other courts say that P and D1 split the burden of D2's unavailability *pro rata*, so that P would collect $50,000 from D1 (i.e., P and D1 would each "suffer" a $25,000 loss from D2's unavailability). Still other courts make the allocation depend on whether P's losses are economic or non-economic, or on some other factor.

    Probably you should just indicate that not all courts honor joint-and-several liability under comparative negligence, if one or more defendants are absent or judgment-proof.

- The second issue is each D's right of ***contribution*** against other Ds under comparative neg. Here, it depends on whether the state has passed a special statute. If no special statute has been passed, then the existence of comparative doesn't change each D's common-law right to "equal" contribution from the fellow tortfeasors. But many comparative negligence states have passed statutes applying comparative fault to contribution. *(Example:* Assume $100,000 in total injuries, no fault by P, D1 is found to be 40% at fault and D2

60% at fault. Assume P collects the entire $100,000 from D1. If the state has by statute applied comparative fault to contribution, D1 will be allowed to collect $60,000 contribution, not $50,000, from D2.)

- Be prepared to discuss briefly the doctrine of ***"imputed comparative negligence."*** Most important scenario: Parent fails to supervise Child; Child gets hurt due to the negligence of D (but the accident wouldn't have happened if Parent had supervised reasonably). Older view: contributory or comparative negligence is "imputed" to Child, barring (or in a comparative negligence state reducing) Child's recovery. But the prevailing view today is that there's ***no*** imputed comparative negligence here — so Child can recover in full from D, and it's up to D to get contribution from Parent.

- ***"Assumption of risk" (AOR)*** is one of those important issues that's quite possible to miss on an exam, because it can be easily hidden in the fact pattern. For this reason, it's often tested.

  - First, keep the basic definition of AOR in mind: "P may be barred from recovery when an injury results from a danger of which P was ***aware*** and that P ***voluntarily*** encountered." *(Example:* D offers P a ride home. P knows that D is slightly drunk. P has other ways to get home, but this way is a little easier. If D crashes because of being drunk, then at common law P is barred from recovery by AOR.)

  - So look for situations where P knows about a danger in advance, and nonetheless decides to go forward.

  - Distinguish between ***"express"*** and ***"implied"*** AOR. In express, P and D make an explicit agreement that P is taking the risk (e.g., P signs a ***waiver*** form). In "implied," P's conduct, not his words or documents he signs, establish that he voluntarily and knowingly took the risk.

    - For ***"express,"*** the general rule is that P is ***bound*** by his agreement to assume. (But there are exceptions, such as where D's ***bargaining power*** is grossly greater than P's, or where D ***intentionally or recklessly*** caused the danger).

    - For "implied," P is bound as long as the circumstances

demonstrate that he ***knowingly and voluntarily*** assumed the risk.

- Most frequently tested issue (mainly in "implied" cases): Was the risk truly ***known*** to P?
  - The test is "subjective" — did P ***actually*** know of the risk. It's irrelevant that P ***should*** have known. *(Example:* P is driving on a road. D, who is stopped on the road to fix a flat, has put flares 100 feet before his car. If P sees the flares and understands that they are meant to slow down motorists, then if P drives at regular speed he's bound by AOR because he "knows" of the risk of D's vehicle. But if through inattention or otherwise P doesn't see the flares, he doesn't "know" of the risk, even though a reasonably careful driver would know — AOR does not apply.)
- Also, P's knowledge of the risk must be fairly ***specific.*** *(Example:* D offers P a ride, and P agrees. P is aware that D is an "average" driver who might get in an accident. P has not assumed the general risk of an accident, because his knowledge is not specific enough.)
- Questions sometimes test the effect of ***comparative negligence*** on AOR.
  - In general, comparative negligence has no effect on the ***"express"*** case (the rules summarized above still apply).
  - But in most courts comparative negligence causes ***implied*** AOR to ***disappear*** as an independent defense, and to instead be merged into comparative fault analysis. (That is, if P is unreasonable in taking the risk, his unreasonableness is taken into account in fixing his percentage of fault, and AOR has no independent significance.)
- Don't forget that there still has to be a ***causal link*** between P's AOR and the harm to P. *(Example:* If P agrees to drive with D knowing D has bad brakes, and an accident happens because D makes a turn and fails to see another car, AOR doesn't apply — the risk assumed by P, failure to be able to stop, wasn't the cause in fact of the accident.)

- ☞ If the suit is in ***strict products liability,*** most courts say that AOR ***applies.*** Most common scenario: P knows the product lacks a particular ***safeguard*** that D could have put onto it (e.g., roll bars). Majority rule here: P is stuck with AOR.

☛ Questions concerning ***immunity*** from tort don't arise very often.

- ☞ The most you will probably have to do is to spot the occasions when common-law immunity might have applied: (1) ***intra-family*** immunity (one spouse sues the other, and child sues parent); (2) ***charitable*** immunity; and (3) immunity of ***governmental bodies ("sovereign*** immunity").
  - ☞ If you spot a situation in which one of these three immunities might have applied at common law, you should probably say something like: "At common law, the suit would have been blocked by [intra-family] [charitable] [sovereign] immunity, but nearly all states today have abolished this immunity." (If your fact pattern involves the ***federal*** government as defendant, and the claim relates to the government's failure to handle some discretionary or policy-making activity reasonably, you may wish to say that the Federal Tort Claims Act would block the suit because of the ***"discretionary function"*** exception contained in that statute.)

CHAPTER 12
VICARIOUS LIABILITY

ChapterScope

This chapter examines several doctrines which may cause one person to become liable for the acts of another. When one person is made liable for the torts of another, we say that the former is "vicariously liable." The most important ways this can happen are as follows:

- **Employers:** An ***employer*** is normally vicariously liable for torts committed by his ***employees.***
  - **Who is an "employee":** *A* will be deemed *B's* employee if *B* gets to ***control the details*** of how *A* does his work.
  - **Scope of employment:** The employer is only liable for torts committed by the employee "during the ***scope*** of the employment." Normally, this means that there will be liability only when the employee is acting ***in furtherance of the employer's business interests.***
- **Independent contractors:** Normally, a person who engages an ***independent contractor*** is ***not*** liable for torts committed by the contractor.
  - **Unusually dangerous:** But there is an exception: if the work to be done by the contractor is ***unusually dangerous,*** then the person engaging the contractor will be vicariously liable.
- **Joint enterprise:** When two or more people engage in an activity "in concert," each can be held liable for the other's torts. This is the ***"joint enterprise"*** doctrine.

I. VICARIOUS LIABILITY GENERALLY

A. Nature of doctrine: The doctrine of ***vicarious liability*** provides that in some situations, the tortious act of one person may be imputed to another, because of some special relationship between the two. As a result, the latter will be held liable, even though his own conduct may have been completely blameless. The most frequent situation in which vicarious liability exists is that involving tortious acts (usually negligent

ones) committed by an ***employee;*** under appropriate circumstances, the employer is held vicariously liable for the tort.

1. **Other relationships:** In addition to the employer-employee situation, vicarious liability may exist because of an employer-independent contractor relationship, a "joint enterprise" relationship, a family relationship (where a "common family purpose" is involved), etc.

2. **Imputed negligence:** Furthermore, where such a relationship exists, a doctrine known as "imputed negligence" may apply. This doctrine (discussed *supra*, p. 288) provides, roughly, that where a plaintiff would be liable to a defendant for the tortious acts of a third person, the negligence of that third person will be imputed to the plaintiff, reducing the plaintiff's recovery.

II. EMPLOYER-EMPLOYEE RELATIONSHIP *(RESPONDEAT SUPERIOR)*

A. *Respondeat superior* doctrine: If an employee commits a tort during the ***"scope of his employment"*** his employer will (jointly with the employee) be liable. This rule is often described as the doctrine of ***"respondeat superior"*** (which means, literally, "Let the person higher up answer").

1. **Rationale:** Many explanations are given for this doctrine. But the most convincing is that accidents which arise directly or indirectly out of an enterprise ought to be paid for by the entrepreneur in question, as a cost of doing business. As the idea is sometimes put, the employer often has a ***"deep pocket,"*** whereas the employee is frequently judgment-proof. Furthermore, the employer is in a better position to obtain insurance against work-related accidents than is the employee.

2. **Applies to all torts:** The doctrine applies to ***all*** torts, including ***intentional*** ones and also those situations in which ***strict liability*** exists. But the tort must have occurred during the scope of the employee's employment, a requirement discussed below. Particularly in the case of intentional torts, the employer is often able to avoid liability by showing that the employee was acting completely for his own purposes, not his employer's.

B. Who is an "employee": Vicarious liability applies more frequently to torts committed by employees than to those committed by independent contractors (see *infra*, p. 317). Therefore, it is important to be able to tell whether a particular tortfeasor was an employee or independent contractor.

1. Distinction: While no single factor is dispositive in all cases, the main idea is that an employee is one who works ***subject to the detailed control*** of the person who has hired him. An independent contractor, on the other hand, although he is hired to produce a certain result, is not subject to the detailed control of the one who has hired him while he performs his work. He is, in a sense, his own boss.

a. Prosser's test: As Prosser puts the idea, a person is an employee (or a "servant" as older cases call him) "when, in the eyes of the community, he would be regarded as a part of the employer's own working staff. ..." P&K, p. 501.

b. Control over physical details: The "control" required to make a person an employee rather than an independent contractor is usually held to be control over the ***physical details*** of the work. It is not enough that the employer exercises control over the general manner in which the work is carried out. See, e.g., *Murrell v. Goertz*, 597 P.2d 1223 (Okla. Ct. App. 1979) (where newspaper publisher sets general rules for a newspaper carrier like route boundaries and time for performance, but leaves details about how to do the deliveries to the carrier, carrier is an independent contractor of the publisher, not an employee).

c. Contractual label not dispositive: The fact that a tortfeasor and his employer have a ***contractual agreement,*** and that that agreement calls the tortfeasor an "independent contractor" of the employer, will not change their relationship, so the employer can nonetheless be held liable under the *respondeat superior* doctrine. In other words, it is the real working relationship that counts (e.g., the extent to which the employer controls the physical details of the tortfeasor's work), not the ***label*** applied to the relationship in the employment contract.

C. Scope of employment: The most difficult question in the entire area of

respondeat superior is whether, in a particular case, the employee was acting ***"within the scope of his employment"*** when the tort occurred. In general, the tort is within the scope of employment if the tortfeasor was acting with an ***intent to further his employer's business purpose,*** even if the means he chose were indirect, unwise, and perhaps even forbidden. And he will be within the scope of his employment even if his intent to serve his employer is coupled with a separate personal purpose.

> **Example:** Fruit, an insurance salesperson, attends a convention in Alaska run by his employer, the D Insurance Co. He is encouraged to "mix freely" with out-of-state insurance experts who are also at the convention, in order to learn about "sales techniques." One night, after the day's convention activities are over, he goes to a bar in order to look for some out-of-state colleagues, sees that they are not there, and heads back to his hotel. En route, he negligently collides with P.
>
> *Held*, Fruit was acting within the scope of his employment at the time of the accident. In going to the bar, he was motivated at least in part by a desire to socialize with these experts, whom he had been encouraged to get to know. *Fruit v. Schreiner*, 502 P.2d 133 (Alaska 1972).

1. **Trips from home:** Most courts hold that where an accident occurs where the employee is travelling ***from her home*** to work, she is not acting in the scope of her employment; this conclusion is often based on the theory that the employer has no "control" over the employee at that time.
   a. **Returning home:** Where the employee is ***returning home*** after her business activities, courts are divided, although most would probably deny liability on the employer's part here as well.
2. **Side trip:** It frequently happens that, while on a business trip, the employee makes a short ***"side trip"*** for her own purposes.
   a. **Frolic/detour distinction:** Traditionally, courts have distinguished between a ***"frolic"*** and a ***"detour."*** In courts making this distinction, a "frolic" is "the pursuit of the employee's personal business as a ***substantial deviation*** from or an abandonment of the employment," whereas a "detour" is "a deviation that is ***sufficiently related to the employment*** to fall within its scope." *O'Shea v. Welch*, 350 F.3d 1101 (10th Cir. 2003). Under this analysis, accidents occurring during a ***"frolic"*** do ***not*** trigger *respondeat*

superior, but ones occurring during a ***"detour"*** *do* trigger it.

b. Modern emphasis on "slight deviation" test: Many modern courts have replaced the ambiguous term "detour" with the more descriptive term ***"slight deviation"*** — if the employee was making only a slight deviation from the tasks required by the employment when the accident occurred, the employer *will* be liable.

i. What determines whether deviation is "slight": What, then, determines whether a deviation is "slight"? Courts rely on a number of factors, including (1) the employee's ***intent or purpose*** in making the deviation; (2) the ***"nature, time, and place"*** of the deviation; (3) the ***time consumed*** by the deviation; (4) the ***type of work*** for which the employee was hired; (5) whether the act was ***incidental*** to the work, as reasonably expected by the employer; and (6) how much ***freedom*** was allowed the employee in performing his job responsibilities. *O'Shea v. Welch*, *supra.*

As you would expect, the use of these factors means that the ***longer*** the deviation took, the ***farther*** from the path dictated by the job the employee was when the accident occurred, the ***further*** the deviation was in ***nature*** from the kind of thing that the employer would reasonably have expected the employee to do, or the ***smaller the freedom*** the employee had on-the-job, the more likely it is that the deviation will be found to be ***substantial*** rather than "slight," and thus not appropriate for vicarious liability.

c. Foreseeability standard: Many modern courts have boiled the scope-of-employment problem down to a vague ***"foreseeability"*** standard — the employee is deemed to have been acting within the scope of business if and only if the deviation was ***"reasonably foreseeable."*** Cf. P&K, pp. 504-05. This standard usually produces pretty much the same result as the six-factor test described above. For instance, the shorter the deviation was in terms of physical distance, the more "foreseeable" it will be deemed to have been, and thus the more likely to trigger *respondeat superior*.

i. Smoking and other personal objectives: A similar

"foreseeability" test is often applied to other acts done by employees which are not specifically in furtherance of their employer's business interest. Thus an employee who ***smokes on the job,*** or who is on her way to the ***toilet,*** would probably be held by most modern courts to be engaged in an activity so foreseeable that it was done within the scope of employment. P&K, pp. 503-04.

3. **Acts prohibited by employer:** Since the whole idea behind *respondeat superior* is that the employer is liable completely ***irrespective of his own negligence,*** it follows that employer liability will exist even if the acts done were expressly ***forbidden*** by the employer, as long as it is found that they were done in furtherance of the employment. For instance, even if a storekeeper expressly orders his clerk never to load a gun while showing it to a customer, there will be liability if the clerk does so, since he is furthering the general business purpose of selling the gun. P&K, pp. 502-03.

   a. **Relevant to scope of employment:** But the fact that a particular activity is forbidden by the employer may be *evidence* that that is not what the employee was hired to do at all, and thus was not for a business purpose.

4. **Intentional torts:** *Respondeat superior* may, as noted, apply to intentional torts. Generally, "[T]he master is held liable for any intentional tort committed by the servant where its purpose, however misguided, is wholly or in part to further the master's business." P&K, p. 505.

   a. **Debt collection:** Thus the employer will be liable if his employee attempts to ***collect a debt*** owed to the employer by assault, battery or false imprisonment.

   b. **Personal motives:** But if the employee acts purely from ***personal motives*** (e.g., a violent dislike of a customer), the employer will not be liable. P&K, p. 506.

      i. **Special duty owed by employer:** But even in this "personal motive" situation, the employer may still be liable if he owes an independent duty of protection to the victim. We saw, for

instance *(supra*, p. 203), that a common carrier owes its passengers a duty of reasonable care to protect them against torts by third persons. Therefore, if a railroad conductor attacked a passenger, even though solely for his own motives, the railroad would still be liable, on the grounds that it breached its direct duty of care. P&K, pp. 506-07.

c. Lost temper: If the employee gets into an ***argument*** during a business transaction, and then loses his temper and commits an intentional tort, most courts hold that the employer is not liable. But a growing minority hold that such a tort really arises out of the employment, and that the employer is therefore liable. P&K, p. 507.

5. Dangerous instrumentalities: If the employer entrusts his employee with a ***"dangerous instrumentality"*** (e.g. dynamite, vicious animals, etc.) a few cases hold that he will be liable even if the employee goes out and uses the instrument for his own purposes. See P&K, p. 507.

6. Employer's own liability: Keep in mind that in addition to the vicarious liability being discussed here, the employer is also liable for his own direct negligence. It may for instance, be negligence on the part of the employer to hire an employee who the employer should realize is unfit and poses a risk to others. See P, W&S, p. 664, n. 6.

D. Torts by non-employees (e.g., guests and customers): Don't be fooled into thinking that a tort by a ***customer*** of the defendant triggers vicarious liability on the defendant's part. Vicarious liability occurs only when there is an employment relationship (or, occasionally, an independent contractor relationship; see *infra*, p. 317) between the defendant and the tortfeasor. So a defendant can't be vicariously liable for the torts of a customer, or of some ***non-employee*** on the defendant's premises. (The defendant may be liable for not having adequate security, or for having negligently allowed the tortfeasor to come on the premises, but that's direct liability, not vicarious liability.)

Example: While P is shopping at a department store owned by StoreCo, P is assaulted by X, a person who purports to be a customer. StoreCo won't be vicariously liable for X's tort; only if StoreCo is found to have been directly negligent (e.g., by not having adequate security) will StoreCo be liable to P.

III. INDEPENDENT CONTRACTORS

A. No general liability: As a very general "default" rule, a person who ***hires an independent contractor*** is ***not*** generally liable for the torts of that person. P&K, p. 509. However, there are a number of significant ***exceptions*** to the no-liability general rule, and our discussion of liability for torts of one's independent contractors is essentially the discussion of these important exceptions.

1. Distinguished from employee: An independent contractor is one who, although hired by the employer to perform a certain job, is not under the employer's immediate control, and may do the work more or less in the manner he himself decides upon. See the discussion of the distinction between independent contractors and employees *supra*, pp. 314-315.

B. Exceptions to non-liability: Two of the more important exceptions to the rule that an employer is not liable for the torts of his independent contractor involve cases where (1) the employer has ***direct liability*** for her *own* negligence in her handling of the relationship with the contractor; and (2) the employer has ***vicarious liability*** for the contractor's own negligence in doing the work. We discuss each of these areas in turn, even though only the latter (vicarious) liability is a form of the "strict liability" that we are generally covering in this chapter.
By the way, the area of an employer's liability (both direct and vicarious) for torts associated with an independent contractor has been extensively recodified in 2011 in the ***Third Restatement*** of Torts (Liab. for Phys. & Emot. Harm), references to which are included below.

1. Employer's own liability: First, if the employer is ***herself*** negligent in her own dealings with the independent contractor, this can give rise to employer liability. Rest. 3d (Liab. for Phys. & Emot. Harm) §55 and 56.

a. Two common ways: Here are the two most common the ways in which the employer might be directly negligent in dealing with the contractor:

[1] **Negligent selection:** The employer ***negligently selects*** an inappropriate contractor, given the requirements of the work — for instance the contractor does not have adequate

experience in doing the type of project ***safely.***

Example: Employer selects Contractor to do certain construction renovation work in Employer's store. A reasonable initial investigation by Employer of Contractor's credentials and work experience would have demonstrated that Contractor was not reasonably qualified to do the work safely. Contractor does the work negligently, and the negligent work causes physical injury to P.

Employer is directly liable for negligently tasking Contractor to do the work, and will therefore be responsible for P's damages.

[2] **Negligent instruction:** The employer ***negligently instructs*** (or negligently fails to instruct) the contractor about ***how to do the work.***

Example: Employer non-negligently selects Contractor to do construction work in Employer's retail store. The work consists of replacing a skylight. Employer knows that the replacement work has to be done in a special non-obvious way because of difficulties with how the nearby section of roof handles hard rains. Contractor does the work non-negligently (based on Contractor's limited understanding of the requirements as poorly specified by Employer), but because of the lack of instructions, the skylight weakens and falls, injuring P.

Employer will be directly liable for P's injuries, because Employer negligently failed to instruct Contractor adequately, and the negligently-given instructions were an actual cause of the injuries.

Rest. 3d (Liab. for Phys. & Emot. Harm) §55, including Illustr. 1 and 2; §56, Comment b.

2. Vicarious liability for non-delegable duties: Second, there are some duties of care that are deemed so important that the delegator is liable for negligence by an independent contractor the delegator hires, even if the delegator used all due care in selecting that particular contractor. These are called ***"non-delegable duties,"*** and the delegator/employer is ***vicariously liable*** for the contractor's negligent performance of those non-delegable duties.

a. Most important scenarios: Here are the most important situations in which the duty will be non-delegable and will thus lead to vicarious liability on the employer's part:

[1] **"Peculiar risk" of harm:** The work is likely to involve a ***"peculiar risk"*** of physical injury or property damage to others unless special precautions are taken. Rest. 3d (Liab. for Phys. & Emot. Harm), §59.

Example: D owns a private football stadium and the semi-professional team that plays in it. D hires Contractor to install new high-voltage lighting poles in the parking lot. D is not negligent in picking Contractor for this job, since Contractor has adequate experience and safety credentials. Contractor negligently does the work, leaving a pole in such an uninsulated condition that if someone were to touch it, he would be likely to get a high-voltage shock. P, a patron, touches the pole and is shocked.

Since there is a "peculiar risk" (i.e., a risk of a non-typical type of injury) from high-voltage electrical work that is done without adequate precautions, D will be vicariously liable for Contractor's negligence, in a suit brought by P against D. Cf. Rest. 3d (Liab. for Phys. & Emot. Harm), §59, Illustr. 2.

Note: "Peculiar risk" as used here is not the same as "abnormally dangerous activity" (another vicarious-liability category, discussed next below). Abnormally-dangerous liability applies only where the activity couldn't be done with perfect safety no matter how careful the actor was. There will often be "peculiar risk" from an activity even though it *could* be done with utter safety if the right precautions had been followed, which they weren't.

Thus in the above example, installing insulated high-voltage electrical lighting poles is not abnormally dangerous (it can be done perfectly safely), but such installation poses a particular risk of electrocution if the installation is not done properly. So it triggers "peculiar risk" vicarious liability for the person who engages the contractor.

[2] **Abnormally dangerous:** The work is ***abnormally dangerous*** (i.e., ultrahazardous), so that the employer would be strictly liable if he did the work himself (see *infra*, p. 332) rather than via the independent contractor. Rest. 3d (Liab. for Phys. & Emot. Harm), §58.

Example: O owns land that needs to have trees cleared from it. O hires Contractor to use dynamite to blast away the tree stumps. Contractor uses dynamite, in a non-negligent manner, to blast the stumps. The shock waves damage the plaster of Neighbor's adjacent home. O is vicariously liable in Neighbor's suit against O and Contractor, since blasting is an ultra hazardous activity under the usual "cannot be done with absolute safety no matter how carefully the actor behaves" rules for such activities, *infra,* p. 332.

[3] **Land possessor:** The employer is a ***possessor or lessor of land,*** and owes a duty of care to the ***public.*** If because of that duty the employer would be liable for negligence in altering or repairing the property himself, the employer will be vicariously liable for comparable negligence committed by the contractor he selects. Rest. 3d (Liab. for Phys. & Emot. Harm), §62.

Example: O owns a department store. O hires Contractor (properly credentialed) to replace a broken skylight. Contractor does the work negligently. Two months after Contractor turns the repaired area back to O, the skylight falls, injuring P, a patron.

O as the owner of premises open to the public owed a duty of reasonable care to ensure the safety of customers. O will therefore be vicariously liable for the actual negligence of Contractor, since O would have been directly liable for his own negligence if O had done the work himself. Cf. Rest. 3d (Liab. for Phys. & Emot. Harm), §62, including Comment e and Illustr. 3 thereto.

Note about while work is being done: But there's an important clarification to the above rule: it doesn't apply to the contractor's negligence during the period when the contractor is ***actively doing the work,*** and has ***taken over the details of handling of the job*** from the owner.

Example: Same facts as above example. Now, however, assume that Contractor has negligently installed the skylight, but is still in physical possession of, and has responsibility, for the skylight area. (O has let Contractor deal with the details of how the work is to be done safely.) P, a customer, wanders in from an area not under Contractor's control, and is injured when the skylight falls on him. Contractor has also not posted any warning signs.

Since Contractor, not O, was in control of the daily work at the time of the accident, O won't be vicariously liable for Contractor's negligence. (Rationale: We want O to delegate the daily care to the person actually doing the work, and we don't want to encourage micromanagement and meddling by O in that work.) Cf. Rest. 3d (Liab. for Phys. & Emot. Harm), §62, Comment e and Illustr. 2 thereto.

[4] **Public place:** The work is done in a ***"public place,"*** such as a road, sidewalk, park, etc. Rest. 3d (Liab. for Phys. & Emot. Harm), §64, Comment g and Illustr. 3 thereto.

Example: LightingCo hires Contractor to repair a street light (on a public street) that LightingCo. owns and is responsible for illuminating. Contractor negligently does the work, and the streetlight fails soon after. P steps in a pothole which he would have seen had the streetlight been working. Since LightingCo. had the responsibility for maintaining the streetlight in a public place, it is vicariously liable for Contractor's negligence in doing the contracted-for maintenance work. *Id.*, Illustr. 3.

IV. JOINT ENTERPRISE

A. Nature of joint enterprise relationship: Another relationship which may give rise to vicarious liability is that frequently called ***"joint enterprise".*** A joint enterprise is like a partnership, except that it is generally for a very short and specific purpose (e.g., a ***trip).*** Once the various requirements for the existence of a joint enterprise are met, the

negligence of one "joint enterpriser" (or "joint venturer" as he is sometimes called) is imputed to the other.

1. **Use in auto cases:** The doctrine almost always arises in ***automobile accident cases,*** in which the negligence of the driver is imputed to the passenger (either to allow the occupant of a second car to recover against the passenger, or, under the doctrine of imputed comparative negligence, discussed *supra*, p. 288 to reduce the passenger's recovery against the negligent driver of the other car.)

B. Requirements for joint enterprise: There are usually held to be four requirements for a joint enterprise: (1) an ***agreement,*** express or implied, between the members; (2) a ***common purpose*** to be carried out by the members; (3) a ***common pecuniary interest*** in that purpose; and (4) an equal right to a ***voice*** in the enterprise, i.e., an equal ***right of control.*** Rest. 2d, §491, Comment c. Most litigation has revolved around the third and fourth requirements.

1. **Pecuniary interest:** In courts requiring a common pecuniary interest, the result is that a mere ***social trip,*** or a trip in which each member is pursuing his own ***independent business interest,*** is not a joint enterprise.

   a. **Sharing expenses:** The fact that two parties taking a social trip, or pursuing separate business interests while travelling together, ***share expenses*** of the trip, is not by itself enough to establish that they have a "common pecuniary or business purpose". Rest. 2d, §491, Comment i.

2. **Mutual right of control:** The requirement that each joint venturer have a partial right of control over the enterprise generally means, in the case of an automobile trip, that each must have some say in how the car is to be driven. Where the occupants of the car have the "common business" purpose referred to above, it is usually found that they have at least a theoretical right of control over the car as well. This does not mean that each has the right, at any time, to grab the wheel and steer; it simply means that each is understood to have something like an equal say in how fast the car will travel, what the route will be, etc.

a. Social purpose: But where only a social trip is involved, courts often find that the passenger has no right of control over the driver.

b. Joint ownership: Many courts used to hold that the mere fact that the automobile was ***jointly owned*** (e.g., by a husband and wife) meant automatically that the passenger/co-owner had a right of control over the driver/owner. But this is no longer the rule. See P&K, pp. 520-21.

3. Passenger v. driver: Incredible as it may seem, a few courts have constructed, in effect, their own judicial "automobile guest statutes" by holding that where driver and passenger are joint venturers, the passenger may not sue the driver when the latter negligently causes a crash. The driver's negligence is said to be imputed to the passenger, who is then contributorily negligent and thus barred from recovery against the driver. This rule is on the wane. See P&K, p. 521. (But the driver's negligence may still be imputed comparative negligence by the passenger in a suit against the driver of another vehicle, as discussed *supra,* p. 288.)

V. AUTO CONSENT STATUTES, THE "FAMILY PURPOSE" DOCTRINE AND BAILMENT

A. Bases for automobile liability: Courts and legislatures have tried particularly hard to find a solvent defendant in car accident cases. To do this, they use a number of vicarious-liability techniques, which vary from state to state.

B. Consent statutes: About one quarter of the states have enacted statutes, called ***"automobile consent statutes,"*** which provide that the owner of an automobile is ***vicariously liable*** for any negligence committed by one using the car with the owner's ***permission.***

1. Scope of consent: Since the liability is based upon the "consent," if the use by the borrower (or "bailee" as he is usually called) goes clearly ***beyond*** the scope of that consent, there is no liability. For instance, if the owner expressly forbids the bailee to drive on the highway, such use would probably so exceed the scope of consent as to render the statute inapplicable.

C. Automobile insurance omnibus clause: The need for automobile

consent statutes is eliminated, in many states, by the fact that the standard ***automobile liability insurance policy*** covers not only the named insured (usually the head of household, who is also generally the owner or co-owner of the automobile), but also any member of the named insured's household, and any other person who uses the automobile with the consent of the insured. See generally P&K pp. 592-96. The effect of this is to make the user of the car financially responsible himself, so that liability on the part of the owner is unnecessary (at least up to the policy limits).

D. Judge-made doctrines: Apart from consent statutes and compulsory-insurance requirements, a number of ***judge-made doctrines*** accomplish the same objective of making the car owner vicariously liable for the negligence of one she permitted to use the car.

1. **Joint enterprise:** Often the ***joint enterprise*** doctrine *(supra*, p. 321), can be used to make one member of the enterprise (e.g., the vehicle owner) vicariously liable for the negligence of another member (e.g., the driver).

2. **Family purpose doctrine:** Another important judge-made doctrine is the ***"family purpose doctrine."*** The doctrine, in force in about 12 states, provides that a car owner who lets ***members of her household*** drive her car for their own personal use has done so in order to further a "family purpose" or family objective, and is therefore vicariously liable. (The doctrine is also sometimes called the ***"family car"*** doctrine.)

   a. **Car financed but not owned by D:** Some cases have extended the family purpose doctrine to cover situations in which the defendant head of household does ***not own*** the car, but has made the driver's use of the car possible by giving the family-member/ driver the ***funds*** with which to buy and/or ***maintain*** the vehicle.

   b. **Abandonment:** In states adopting consent statutes, discussed above, the family purpose doctrine is usually unnecessary, since the owner is liable for the negligence of whomever she allows to use the car, whether a member of her household or not, and whether there is a family objective or not.

E. Bailments: In the absence of a consent statute (and assuming the family purpose doctrine doesn't apply), the mere existence of a ***bailment*** does ***not*** make the bailor vicariously liable for the bailee's negligence.

> **Example:** D lends his shotgun to X. X, while hunting in the woods, negligently fires without noticing P nearby. Even though D is a bailor (he has lent his personal property to X), D does not thereby become vicariously liable for X's negligent use of the bailed property.

1. Negligent entrustment by bailor: But the bailor may, of course, be negligent herself in entrusting a potentially dangerous instrument to the bailee where she ***should know that the latter may use it unsafely.*** In this situation, the claim is directly against the bailor for ***"negligent entrustment,"*** and there is no vicarious liability.

> **Example:** In the above example, if D knew that X often hunted while drunk, D's act of entrusting the shotgun to X might itself be negligent, in which case D would be directly (not vicariously) liable to P for the injuries caused by X.

Quiz Yourself on
VICARIOUS LIABILITY (Entire Chapter)

62. Harvey Bangbang owns the Shoot 'M Up Gun Store. He strictly instructs his employees not to load guns before demonstrating them to customers. One employee, Annie Oakleaf, is having a hard time selling a gun to a customer, Long John Silver. She loads a gun and fires at a target on the wall. She accidentally shoots Silver's leg off in the process. Will Harvey be liable for Annie's negligence? _____

63. The Plen-Tee O'Food Company organizes and runs country fairs. For the Lonornament County Fair, Plen-Tee contracts with Circe du Lune, a highly respected holiday-light-show company, to run a laser-guided light show at night. Due to Circe's negligent running of the show, Patron, an audience member, is blinded. A light show of this sort is perfectly safe if proper techniques are used, which they weren't here. Circe is jugment proof. Will Plen-Tee be liable for Patron's blindness? _____

64. Allnever Tell gives his four-year-old son, Willie, a real bow and arrow set for Christmas. Willie takes it outside and fires an arrow at his neighbor, Captain Hook, hitting him in the arm. Will Allnever be liable? _____

65. Cosa Nostra Collectors, Inc. runs a debt collection service. All employees of Cosa are instructed that they should never use violence, or even threats of violence, in attempting to collect a debt. Vincent ("Big Vinny") Testarosa, one of Cosa's collectors, attempts to collect a $10,000 debt owed by Potter to a Cosa client, Carla. Potter refuses to pay even though (as Vincent knows) Potter has the money. In order to soften Potter's resistance, Vincent disregards his employer's instructions, and with an unlicensed pistol fires a slug through Potter's left kneecap, crippling him for life. Potter then pays the money. Potter (after assuming a new identity and state of residence) brings suit against Cosa for battery, under the doctrine of *respondeat superior.* Can Potter recover? _____

Answers

62. Yes, even though Annie had strict instructions not to load the gun. Since the tort occurred within the scope of the employment relationship, and Annie was serving Harvey's objectives (albeit in a prohibited way), Harvey will be liable. To decide otherwise would undermine vicarious liability in general, since employers would almost always escape liability by giving their employees careful instructions.

Note: However, an employee's doing what he is expressly told not to do will often be evidence (but non-dispositive) that he was acting outside the scope of employment.

63. **Yes.** Although employers are in general not vicariously liable for the torts of their independent contractors, they *are* liable in a number of special situations. One of those situations is where the work being delegated to the independent contractor poses a "peculiar risk" of physical harm if not properly done. That's the case here. So even though this was not an ultra-hazardous activity (and Circe would be liable only if negligent, as it was), the mere fact that the activity posed a particular risk of harm if not conducted properly means that Plen-Tee is vicariously liable for the negligence of its independent contractor, Circe. Notice that this result occurs even though Circe was apparently well-qualified for the job when picked by Plen-Tee (so that Plen-Tee was not

directly negligent in its own behavior regarding the contractor).

64. Yes. As a general rule, parents are not vicariously liable for their children's torts. However, parents can be *directly* liable for their children's torts under certain circumstances. One such circumstance exists here: when a parent allows the child to use a dangerous object which the child lacks the maturity and judgment to use safely, the parent will be liable for torts committed with the object. It's clearly unreasonable to give a four-year-old a real bow and arrow. That makes Allnever negligent, and makes him liable for Hook's injuries.

65. Yes. Even if the tort committed by servant is an intentional one, the master will be held liable for it under the doctrine of *respondeat superior*, provided that the tort was committed in some sense ***in furtherance of the employer's business.*** According to most courts, it does not matter that the method or action used was expressly forbidden by the employer, as long as it was done in furtherance of the employment. Since Vincent, when he fired the slug into Potter's kneecap, was attempting to collect the debt (and indeed the slug helped him succeed), a court would almost certainly find that Vincent was acting in furtherance of his employment with Cosa, so that Cosa would be liable under *respondeat superior.*

***Exam Tips** on*
VICARIOUS LIABILITY

Vicarious liability is tested amazingly frequently, out of all proportion to the number of pages it takes to describe the rules governing it. By "vicarious liability" we mean all of the doctrines which may cause one person to become liable for the acts of another, including: (1) liability of an ***employer*** for acts of her employees; (2) the occasional liability for the acts of an ***independent contractor*** whom one has engaged; (3) liability under the theory of ***"joint enterprise";*** (4) liability pursuant to an ***automobile consent*** statute; and (5) the now mostly-outmoded doctrine of "imputed contributory negligence." Here's how to handle each of these:

- Most of all, look out for places to apply ***"respondeat superior" (RS).***
  - You should be thinking RS whenever you have an employee doing something during the course of his job. The most-typical context: the employee is driving a car or truck for the employer. But there can be many odd-ball contexts (e.g., Employee, while on the job, incorrectly answers a question asked by a customer).
  - Remember the two-part test for when RS will apply: (1) D2 must be the ***"employer"*** of D1, which means that D2 must have the right to ***control the details*** of D1's performance; and (2) D1 must be acting within the ***scope of the employment*** at the time he commits the act in question.
  - RS applies not only to negligence by the employee, but also to ***intentional torts*** committed by the employee within the scope of employment. *(Example:* Employee is a truck driver, who gets into a fist-fight with P when P won't move his car so Employee can make a delivery.) Of course, the fact that the tort is intentional may make it less likely that the tort is in fact committed within the scope of employment, but if it ***is*** within the scope, it's covered by the RS doctrine.
  - Most-tested issue: the distinction between an employee (where RS applies) and an ***independent contractor*** (where RS does not apply, though other forms of vicarious liability may, as discussed below). The main test is whether the "employer" had the right to ***control the details*** of how the "employee" did the job. Quick rule of thumb: *A* is an employee of *B* if, in the eyes of the community, *A* would be regarded as part of B's ***"regular working staff."*** The real working relationship, not the contractual label, is what counts. Some examples:
    - Where Finance Co. hires Repoman to repossess cars, and Repoman owns his own tow truck, sets his own hours, and does pick-ups for other companies as well as Finance Co., probably Repoman is an independent contractor.
    - Where Auto Rental Co. sends cars to Repairman to be fixed, and Repairman has his own garage and tools, and buys the

repair parts with his own cash (even though Auto Rental reimburses), Repairman is probably an independent contractor — Auto Rental is not controlling the details of Repairman's work.

- ☞ Where Parents hire Babysitter and pay by the hour, giving the details of what to do (e.g., "put Baby to bed at 8:00 p.m."), probably Babysitter is an employee, not an independent contractor, even if Parents don't withhold from her pay, or report it, for tax purposes.

☞ Also much tested: Was the act within the ***scope*** of the employee's employment? (If it's not, the employer is not liable under RS, even though the tortfeasor was clearly an employee.) Main test: Was the employee acting to ***further his employer's business purposes?*** If so, the act is within the scope of employment even though the means chosen were unwise or even ***forbidden.*** Some examples:

- ☞ Part of Employee's job is to test drapes hanging in apartments for fire-resistance. Employer's instructions say, "Never test the drapes while they are in place. Always take them down." Employee is rushing and tests while drapes are hanging, burning down a building. Employee is within the scope of her employment, because she was furthering Employer's purposes (testing of drapes) even though the way she did it was forbidden by Employer.

- ☞ Employee puts in unpaid overtime at the office on the weekend, working on an invention that Employee thinks will help Employer. Employee burns down the building. Employee is probably working within the scope of employment.

- ☞ Employee, while driving to make pick-ups of packages for Employer, makes a one-hour detour to visit her doctor to get pills for her allergies. An accident occurs while Employee is in the doctor's parking lot. This is probably not within the scope of employment, but is rather a "deviation" that doesn't trigger employer liability (i.e., a ***"frolic" or "detour."***) (But if the detour is brief, and is of the sort employees frequently and foreseeably do within their working day, then a court might

find it to be within the scope of employment even though it did not, strictly speaking, benefit the employer.)

- ☞ Keep in mind that the employ***ee*** is not released from liability merely because the employer is covered by RS — both employer and employee are jointly and severally liable.

- ☞ Also, remember that if RS applies, the employee owes ***indemnity*** (full reimbursement) to the employer.

☛ If you conclude that the tortfeasor is an ***"independent contractor"*** rather than an "employee," the general rule is that the person who engaged him is ***not*** vicariously liable for the contractor's torts. But there are ***exceptions,*** where the person hiring the contractor is deemed to have a ***non-delegable duty:***

- ☞ Most important: if the work is ***unusually dangerous*** (either "inherently"/"unavoidably" dangerous, or poses "peculiar risks" where not done with appropriate skill and precautions), then the person engaging the independent contractor ***will*** be vicariously liable.

  Example: D1, a homeowner, hires D2 to dig a hole for a swimming pool to be put in D1's back yard. D2 doesn't put up barriers, and P, a neighboring child invited to be there, falls in. Probably D1 is vicariously liable, since the nature of the work being done (excavation of a large hole in a residential neighborhood) is dangerous if not accompanied by barriers.

- ☞ Other exceptions: (1) D is a ***landowner*** who has a duty to ***keep the premises safe*** (the above example would qualify for this exception, too); (2) D is causing the contractor to do work in a ***public place*** (e.g., D is a city that hires a contractor to do work on a public road; D is vicariously liable for the contractor's negligent work).

☛ Be on the lookout for ***"joint enterprise"*** liability. When two or more people engage in an activity ***"in concert"*** and for shared aims, each can be held liable for the other's torts.

- ☞ Most common application: Two people go on a ***car trip*** together, sharing driving and/or expenses. The passenger is vicariously liable for the driver's negligence, because they were "joint venturers" or members of a "joint enterprise."

- ☞ Other contexts are possible for "joint enterprise," especially ***recreational*** activities.
  (Example: Golfers who engage in a "long-driving" contest; hot-rodders; a water skier and the driver of the boat.)
- ☞ A ***manufacturer*** of goods, and the ***retailer*** who sells the item to the consumer, are usually ***not*** found to be in a joint enterprise, or otherwise liable for each other's torts. Thus if Manufacturer is negligent in designing a product, Retailer is not vicariously liable. (Retailer may have strict product liability for selling a defective and dangerous product, but that's direct rather than vicarious liability, and is not related to anyone's negligence.)

☛ If a driver of a car gets into an accident, consider the possibility that the vehicle's ***owner*** may be vicariously liable even if the owner was not present. Some states have ***"Automobile Consent"*** statutes, whose purpose is precisely to make the owner liable for torts committed in the car by anyone who used the car with the owner's consent. But in a state without such a statute, the ***mere loan*** of one's car to another person does ***not*** make the owner liable. (Remember that the owner may have ***direct*** liability if the owner should have known that the driver was not competent, as where the driver was drunk or unlicensed.)

CHAPTER 13
STRICT LIABILITY

ChapterScope

The liability we have seen thus far has been based either upon intent or upon negligence. We examine in this chapter certain situations, particularly those involving ***animals*** and ***abnormally dangerous activities,*** in which liability is imposed even where neither intent nor negligence is present. Such liability is sometimes called "liability without fault" or "absolute liability." However, the more commonly-accepted term, and the more descriptive one, is "strict liability." The key concepts in this chapter are:

- **Basis for:** The basis for strict liability is that those who engage in certain kinds of activities do so ***at their own peril,*** and must pay for any damage that foreseeably results, even if the activity has been carried out in the most careful possible manner. Our society has made the judgment that such activities should "pay their own way." This judgment stems in part from the belief that it is generally easier for the defendant to bear the loss (probably through liability insurance) than for the injured plaintiff to do so.
- **Animals:** Court impose strict liabilities on the keepers of certain ***animals.*** If an animal is ***"wild,"*** there is strict liability for any damage that results from a "dangerous propensity" of that species. If an animal is ***"domestic,"*** there is only strict liability where the owner knows or has reason to know of the particular animal's dangerous characteristics.
- **Abnormally dangerous activities:** One who carries out an ***abnormally dangerous*** (or "ultra-hazardous") activity is strictly liable — liable without regard to whether he is at fault — for any damage that proximately results from the dangerous nature of the activity.
- **Workers' compensation:** All states have enacted "Workers' Compensation" statutes. These statutes basically establish a strict liability scheme for on-the-job injuries: in essence, the employer must pay specified "damages" for any on-the-job injury suffered by the employee, even if this occurs completely without the employer's fault. Payments provided by the WC statute are generally less than

would be awarded by a court in tort, and do not allow anything for pain and suffering. The WC remedy is the employee's ***sole*** one — in return for not having to prove fault, she must be content with a lower level of recovery, whether she wants to make this trade-off or not.

I. STRICT LIABILITY GENERALLY

A. Generally: Apart from the special situation of defective products (see *infra*, p. 358), there are three major contexts in which D can have ***"strict liability"*** — that is, liability regardless of D's intent and regardless of whether D was negligent. We examine those contexts in this chapter. They are:

- ☐ strict liability for keeping ***wild or other dangerous animals;***
- ☐ strict liability for carrying out ***abnormally dangerous*** (or ***"ultrahazardous") activities;*** and
- ☐ strict liability on the part of an employer for the ***employee's on-the-job injuries,*** a liability that is enforced by ***"workers compensation"*** statutes enacted in all statS.

II. ANIMALS

A. Trespassing animals: The English common law rule has apparently always been that the owner of livestock or other animals is liable for property damage caused by them if they ***trespass*** upon another's land. This liability existed even though the owner exercised utmost care to prevent the animals from escaping. However, the rule applied only to animals of a sort likely to roam and do substantial damage. Thus cattle, horses, sheep and goats were included but "household" animals like dogs and cats were not. See P,W&S, p. 683.

1. American rule: In most American jurisdictions, this English rule of strict liability (with its exception for dogs and cats) applies. P&K, p. 539. This is particularly likely to be the rule in the populous eastern states.

a. Western states: A number of western states, however, whose economy still depends on raising of livestock, have never adopted a broad rule of strict liability. "Fencing in" statutes in some states provide that an animal owner is not strictly liable if he attempts to

fence in his animals, but that he is strictly liable if he does not. Conversely, "fencing out" statutes provide that if the plaintiff properly fences his land, he has a strict liability claim against one whose animals break in. P&K, p. 540.

b. Use of highway: Even in the eastern states, if the defendant is using a ***public road*** to transport his animals to market, he will not be strictly liable if they wander onto the land immediately adjoining the road. P&K, *ibid.*

B. Non-trespass liability: Strict liability also sometimes exists for damage other than trespass (e.g. personal injury). There is strict liability for harm done by ***"dangerous animals"*** kept by the defendant. But the definition of a "dangerous animal" depends in turn upon whether the animal is of a species that is regarded as "wild" or "domesticated".

1. Wild animals: A person who keeps a ***"wild"*** animal is strictly liable for ***all damage*** done by it, provided that the damage results from a ***"dangerous propensity"*** that is typical of the species in question (or stems from a dangerous tendency of the particular animal in question of which the owner is or should be aware). Rest. 2d, §507.

> **Example:** D keeps a lion cub, which has never shown any violent tendencies. One day, the cub runs out on the street and attacks P. Even if D used all possible care to prevent the cub from escaping, he is liable for P's injuries, because lions are wild animals, and the damage resulted from a dangerous propensity typical of lions, that they can attack without warning.

2. Domestic animals: But injuries caused by a ***"domestic"*** animal such as a cat, dog, cow, pig, etc., do ***not*** give rise to strict liability, except where the owner ***knows*** or has ***reason to know*** of the animal's dangerous characteristics. P&K, p. 542-43. This does not mean that "every dog is entitled to one free bite," an often-repeated incorrect statement. For an owner may have reason to know of his pet's dangerous tendencies because it has ***unsuccessfully*** attempted to bite someone in the past, or seems to have a generally vicious temperament, etc.

> **Example:** D keeps a dog in the backyard. The dog escapes, and bites P, the mail carrier, in the street in front of D's house. If the dog has never attempted to bite anyone before, D is not subject to strict liability, since dogs are a domesticated rather than wild species. But if D knew or had reason to know that the dog sometimes

attacks people, she would be strictly liable.

3. **Distinguishing wild from domesticated:** A domesticated species is one which "is by custom ***devoted to the service of mankind"*** in the community in question. Rest. 2d, §506(2). Thus bees, bulls, and stallions are all generally held to be domesticated, even though they can be and often are very dangerous. The basis for this classification is obviously that ownership of these animals serves a social use, and should not be discouraged by excessive liability. P&K, pp. 542-43.

   a. **Fear of humans is factor:** In deciding whether a wild animal's "dangerous propensities" caused the damage in question, the fact (if true) that the ***average person fears animals of that species*** would be part of what makes the animal dangerous. So don't assume that a defanged, declawed, or generally-docile animal that is part of a wild species hasn't caused the damage, if the damage stems from the ***plaintiff's panic*** over the animal's presence.

      Example: D keeps a very tame bear in his backyard. Without negligence by D, the bear escapes, and walks into P's backyard 1/2 mile away. P, who is barbecuing, is so frightened by the bear that he suffers a fatal heart attack. The bear would not have attacked or otherwise harmed P. D is nonetheless strictly liable for P's death, because humans' fear of unrestrained bears is part of what makes bears a dangerous species.

   b. **Injury from factor that is not part of species' dangerousness:** On the other hand, if the accident or injury occurs on account of a factor that is ***unrelated*** to the ***"dangerous propensities"*** that are typical of the species in question, then there will ***not*** be strict liability.

      Example: D is a retired animal trainer who keeps a small tame bear that previously appeared with him as part of D's circus act. The bear is old, slow-moving, almost blind, and the size of a small dog. D keeps the bear in the fenced yard alongside his house. P is a thirteen-year-old girl who delivers newspapers to D. One day, P comes to D's home to collect for the past week's deliveries. Since she knows the bear, P opens the gate and calls the animal so that she can pet him. The bear bounds toward the place from which the sound has come, but because he is almost blind, he bumps into P. P falls to the ground, fracturing her ankle.

      P will not be able to recover against D in strict liability. Strict liability is imposed on the keeper of a wild animal, but only for harm which proximately results from a dangerous propensity that is characteristic of wild animals of that particular class. Rest. 2d, §507(2). Bears are dangerous because they bite or attack. The risk that they may clumsily knock someone over is not one which makes them more dangerous than a dog or other domestic animal, so strict liability does not apply in this scenario.

C. Defenses: The defenses which may be asserted in an action based on strict liability for animals are discussed *infra*, p. 337, in the general treatment of strict liability defenses.

III. ABNORMALLY DANGEROUS ACTIVITIES

A. The doctrine of *Rylands v. Fletcher:* The path to strict liability for ***"abnormally dangerous"*** activities was begun in the English case of ***Rylands v. Fletcher,*** L.R. 3 H.L. 330 (1868).

1. Facts of *Rylands:* The defendants hired an independent contractor to construct a reservoir on their property. When the reservoir was filled up, water broke through from it into some abandoned mine shafts on the property, and then flooded into adjacent mine shafts owned by the plaintiffs. The defendants themselves were not aware of the abandoned shaft, and were therefore not negligent (although the contractor probably was).

2. Lower holding: After the lowest court denied liability, the case came before the Exchequer Chamber, in effect an intermediate appeals court. The court reversed, holding that there was liability because " . . . the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape." The court analogized to the rules conferring strict liability for trespassing cattle (see *supra*, p. 330).

3. House of Lords: The case then went to the House of Lords, the final appellate tribunal. The holding of the Exchequer Chamber was affirmed, but was significantly cut back. Liability existed because, the court said, the defendants put their land to a ***"non-natural*** use for the purpose of introducing [onto it] that which in its natural condition was not in or upon it", i.e., a large quantity of water. If, on the other hand, the court said, the water had entered during a "natural use" of the land, and had then flowed off onto the plaintiff's land, there would have been no liability.

B. America's slow adoption: During the first years after *Rylands*, American courts frequently misconstrued it and purported to reject it.

They focused on the Exchequer Chamber version, which would have imposed liability for escaping forces even where the land is put to a natural use. P&K, p. 548. Eventually, however, the ***vast majority of American courts accepted*** at least the practical ***result*** of *Rylands*, even if not the case by name. P&K, p. 549. The rule has in fact been extended to include most activities that are extremely dangerous.

> **Example:** D, an exterminator, puts hydrocyanic acid gas in the basement of a commercial building one midnight, in order to kill cockroaches. The next morning, P, walking in the lobby, is almost fatally poisoned by the gas.
>
> *Held*, D's activity was "ultra-hazardous," and was not a matter of "common usage" (even though it may be common among exterminators). Therefore strict liability applies, and D must pay even though he may have exercised all due care. *Luthringer v. Moore*, 190 P.2d 1 (Cal. 1948).

C. Second Restatement's rule: The Second Restatement has, roughly speaking, codified the rule of *Rylands v. Fletcher*, to impose strict liability in cases of ***"abnormally dangerous"*** activities. Rest. 2d, §519.

1. Various factors: Rest. 2d, §520, lists ***six factors*** to be considered in determining whether an activity is "abnormally dangerous":

a. High degree of risk: "Existence of a ***high degree of risk*** of ***some harm*** to the person, land or chattels of others";

b. Risk of serious harm: "Likelihood that the harm that results from it will be ***great";***

c. Cannot be eliminated even by due care: *"Inability to eliminate the risk* by the exercise of ***reasonable care";***

d. Not a matter of common usage: "Extent to which the activity is ***not a matter of common usage";***

e. Appropriateness: *"Inappropriateness* of the activity to the ***place*** where it is carried on"; and

f. Value: "Extent to which its ***value*** to the community is ***outweighed*** by its ***dangerous*** attributes."

2. Requirement of unavoidable danger: A key requirement (factor (c) above) is that the activity be one which ***cannot be carried out safely, even with reasonable care.***

a. Nuclear reactor: One kind of activity which would almost definitely be held to fulfill the "unavoidable danger" requirement is the running of a ***nuclear reactor.*** Thus suits filed in the wake of Three-Mile-Island sought, *inter alia*, strict liability recovery. See *infra*, p. 336. However, Federal statues impose a maximum total liability for a single "nuclear incident" of $560,000,000. See 42 U.S.C.A. §2210(e).

3. Value to community: One of the factors suggested by the Restatement as working against a finding that an activity is abnormally dangerous is that it has ***"value to the community".*** Thus in most parts of states such as Texas and Oklahoma, the reliance on the energy industry is sufficiently great that there is usually no strict liability for accidents arising out of oil and gas wells. (The "inappropriateness of the activity to the place where it is carried on," another Restatement factor, also leads to this result.)

a. Not dispositive: But "value to the community" is not dispositive, and an extremely valuable enterprise may nonetheless have to "pay its own way" if the dangers created by it are sufficiently great.

D. Third Restatement's rule: The new Third Restatement ***reduces the number of factors*** for determining whether an activity is abnormally dangerous and thus worthy of strict liability. The Third Restatement deems an activity abnormally dangerous if it satisfies ***two conditions:***

[1] the activity "creates a ***foreseeable*** and ***highly significant risk*** of ***physical harm*** even when ***reasonable care is exercised by all actors'"*** and

[2] the activity " is ***not one of common usage."***

Rest. 3d (Liab. for Phys. & Emot. Harm) §20.

1. Differences from Second Restatement: Despite the apparently-large reduction in factors from the Second to the Third Restatement, there are only a couple of significant differences between the two:

□ Most important, the last two of the six Second Restatement factors — the ***"inappro-priateness*** of the activity to the place where it is carried on" and the "extent to which [the activity's] ***value*** to the community is ***outweighed*** by as dangerous attributes — are

eliminated in the Third Restatement. The commentary points out that strict liability is relevant only when the defendant ***does not have negligence liability.*** Therefore, strict liability "rests on the assumption that the activity's advantages are apparently substantial enough as to render reasonable the defendant's choice to engage in the activity" (otherwise the defendant's mere choice to conduct the activity would itself be negligent). Rest. 3d (Liab. for Phys. & Emot. Harm) §20, Comment k. Consequently, the commentary concludes, "the point that the activity provides substantial value or utility is of little direct relevance to the question whether the activity should properly bear strict liability." Id.

□ Second, the Third Restatement collapses the first two of the Second Restatement factors — existence of a "high degree of risk of some harm" and "likelihood that the harm that results ... will be great" — into a ***single factor,*** a ***"foreseeable and highly significant risk of physical harm."*** But the commentary to the new Restatement makes it clear that this is only a change in phrasing: "Both the likelihood of harm and the severity of possible harm should be taken into account in ascertaining whether an activity entails a highly significant risk of physical harm." Rest. 3d (Liab. for Phys. & Emot. Harm) §20, Comment g.

□ Finally, the Third Restatement specifies that in deciding whether the activity is one that is risky even when reasonable care is exercised, one should assume that reasonable care is exercised ***" by all actors,"*** not merely by the defendant. This has the effect of ***narrowing*** strict liability's scope — if reasonable precautions by persons in the ***victim/plaintiff's position*** (or by ***third persons)*** could make the activity not abnormally dangerous, there will be no strict liability even though no amount of care by the defendant (the person carrying out the activity) alone could nullify the highly significant risk. Rest. 3d (Liab. for Phys. & Emot. Harm) §20, Comment h. (This means that if the situation is appropriate for *res ipsa loquitur*, it's *not* appropriate for strict liability — *res ipsa* applies only where the accident usually doesn't happen in the absence of negligence, and strict liability conversely applies only where the accident might well have happened even in the absence of negligence.)

Example: Many accidents happen involving the transmission of natural gas through underground lines. But most of these accidents occur through the negligence of parties other than the gas company who have access to the lines (e.g., other utilities doing excavation work). Therefore, the Third Restatement points out, most courts properly hold that the gas company is not strictly liable, because the use of reasonable care by *all* parties (not just the gas company) probably *would* be enough to avoid "a foreseeable and highly significant risk of physical harm." Id.

E. Some contexts: Here are some special contexts in which strict liability might be imposed:

1. Use and storage of explosives: A party who uses or stores ***explosives*** is generally held strictly liable for any damages that may result.

Example: D stores 80,000 lbs. of explosives in a building in the suburbs of Anchorage. The building is more than half a mile from the nearest building not used for storing explosives. Thieves break into the building, and set off an explosion, causing property damage within a two-mile radius and beyond, including damage to P's property.

Held, D is strictly liable for the damage caused. Storage of explosives, like use of them in blasting operations, should be subject to a *per se* rule of strict liability, regardless of whether the place of storage was geographically appropriate, or any other factor. *Yukon Equipment, Inc. v. Fireman's Fund Ins. Co.,* 585 P.2d 1206 (Alaska 1978).

Note: The court in *Yukon* expressly rejected the Second Restatement's six-factor balancing test, discussed *supra.* Instead, as noted, the court applied a *per se* rule for explosive-storage cases.

The court also briefly addressed an interesting additional issue: was the act of the thieves, in breaking into the storage place and setting off the explosives, a ***superseding intervening cause,*** that would relieve D of liability? The court found that the building had been illegally broken into at least six times, usually involving the theft of explosives. Since D had knowledge of these break-ins, this particular break-in and detonation (which apparently occurred in order to cover up a prior theft) was not superseding.

2. Crop dusting: Strict liability is generally imposed for damage caused by ***crop dusting*** or ***spraying.***

3. Airplane accidents: There has been much controversy about the extent to which strict liability should be applied in cases of ***airplane accidents.***

a. Suit by passenger against carrier: In suits by passengers (or their estates) against the airlines, courts have almost always held that there is ***no strict liability.*** See, e.g., Rest. 3d (Liab. for Phys. &

Emot. Harm) §20, Reporter's Note: "[A]viation does not fit the formal Restatement criteria for an abnormally dangerous activity." It is therefore necessary for the plaintiff to show negligence, either on the part of the pilot, the maintenance crew, the manufacturer, etc.

i. **International flights:** By the way, liability for ***international*** flights is governed by the Warsaw Convention, which limits the carrier's liability to its own passengers to $8,300. A 1966 Montreal agreement modifies the Convention, in cases of carriers operating in the U.S., to raise the limit to $75,000, and to impose a ***modified form of strict liability.*** See Epstein, 5th Ed., pp. 560-61.

b. Ground damage: But most courts ***do*** impose strict liability for ***ground damage*** from airplane accidents. That's true for both objects that fall from aircraft, and for damage done by a crashing aircraft itself. Both the owner and the operator of the aircraft are strictly liable. Rest. 2d, §520A. (But if the owner or operator are held strictly liable, they may be entitled to indemnity from someone higher up in the distribution channel — such as the plane manufacturer — if the accident was due to a defective product; see *supra*, p. 190.) This is a variety of strict liability for ultrahazardous activities.

Example: D operates an aircraft that crashes into P's building, causing property damage. P can recover from D (or his estate), even if D operated the aircraft without negligence.

4. Toxic chemicals and flammable liquids: The ***storage and transport*** of ***toxic chemicals*** and ***flammable liquids*** often, but not always, gives rise to strict liability. For instance, transporters of ***gasoline*** and ***propane*** have sometimes been held strictly liable for spills and explosions. See, e.g., *Siegler v. Kuhlman*, 502 P.2d 1181 (Wa. 1973) (spillage of gasoline from truck). But some courts have denied strict liability in this situation, either on the grounds that the activity is not all that ***unusual,*** or on the grounds that the risk could be eliminated by the exercise of reasonable care. See, e.g., *Indiana Harbor Belt Co. v. American Cyanamid Co.*, discussed *infra*, p. 337 (holding that a negligence standard would adequately handle the problem of spillage

of flammable materials during transportation).

5. **Nuclear reactor:** The running of a ***nuclear reactor*** probably gives rise to strict liability. See *supra*, p. 333.

6. **Use of firearms:** The use of***firearms*** is sometimes held to trigger strict liability. But as firearms have become more and more pervasive throughout our society, and as techniques for using them safely have become more widespread, activities involving firing of firearms are more likely to be found ***not*** to be abnormally dangerous.

7. **Construction activities:** Similarly, ***construction activities*** will generally ***not*** be ultra-hazardous, even if they are somewhat dangerous.

   Example: Building an office tower in the downtown part of a densely populated city, using a crane to add each new story, is probably not ultrahazardous. That's because such activities are common in cities, the risk can be almost completely reduced by using careful precautions, and the activity is appropriate for a downtown commercial area. So if a crane operated by D falls on P, P (or his estate) will have to prove negligence by D.

8. **No strict liability for common carrier:** Although a ***common carrier*** has a special relationship with its passengers, placing upon the carrier the obligation to make reasonable efforts to protect them (see *supra*, p. 197), the common carrier is ***not strictly liable*** for harm to passengers. In other words, the common carrier merely has to act non-negligently.

F. Incentives and economic analysis: One of the main purposes of our tort law system is to produce ***economic efficiency*** (see *supra*, p. 1). That is, where an activity may injure others, we want to produce the "right" amount of it, by neither under-deterring or over-deterring it. The general regime of negligence in theory does this: if people are liable for damages stemming from their "negligence," and if we define "negligence" by balancing the costs and benefits of the defendant's conduct (see the Learned Hand formula on p. 100, *supra)*, then defendants will engage in a "right" or "economically efficient" amount of dangerous activity. One corollary is that strict liability will normally "over-deter," and should therefore be imposed only where a negligence scheme will ***not*** be sufficient to produce the "right" amount of the activity. This is true even though there may be some irreducible danger

from the activity.

> **Example:** D manufactures 20,000 gallons of liquid acrylonitrile, and puts it into a railroad car that it has leased. It then causes the X Railroad to transport this substance to a railroad yard owned by P, located in the Chicago metropolitan area. Acrylonitrile is a hazardous and flammable substance. While the car is in P's railroad yard, it leaks. Authorities require P to decontaminate the soil at a cost of nearly $1 million. P sues D, arguing that even if D exercised reasonable care in maintaining the rail car and putting the chemical into it, D should be strictly liable because the chemical is by its nature ultra hazardous.
>
> *Held*, for D. "We have been given no reason . . . for believing that a negligence regime is not perfectly adequate to remedy and deter, at reasonable cost, the accidental spillage of acrylonitrile from rail cars. . . ." Even though the substance is toxic and flammable, it will not leak from a properly maintained rail car. The accident here was, therefore, caused by carelessness (though it is not clear whose carelessness). Since this type of accident can be completely eliminated by the use of due care on the part of all concerned, there is no reason to make rail transport of the chemical more expensive by imposing strict liability on one party, the shipper/manufacturer. While P claims that it is unduly dangerous to ship toxic or flammable materials through a congested metropolitan area, most railroad routes involve "hubs" that are in metropolitan areas, and routing such cargo around metro areas would be prohibitively expensive and might involve other risks (e.g., the use of poorer tracks). The emphasis is and should be on "picking a liability regime (negligence or strict liability) that will control the particular class of accidents in question most effectively, rather than on finding the deepest pocket and placing liability there." For this type of activity, that liability regime is negligence. *Indiana Harbor Belt R.R. Co. v. American Cyanamid Co.*, 916 F.2d 1174 (7th Cir. 1990).
>
> **Note:** The author of *Indiana Harbor Belt* was Judge Posner, who before taking the bench was a law professor well known for advocating the application of economics to law. The case illustrates an increasing judicial awareness that when a wider rule of liability is imposed than necessary, costs (in this case, shipping costs) will go up, and that the narrowest rule of liability sufficient to give actors adequate incentive to control risks is all that should be used.

IV. LIMITATIONS ON STRICT LIABILITY

A. Limitations generally: Despite the fact that the liability is "strict", the plaintiff does not win her case merely by showing that injury resulted from an abnormally dangerous activity or dangerous animal. One set of limitations on strict liability corresponds to the "proximate cause" limitation on negligence actions. Another set relates to the plaintiff's activities. Most of the discussion below relates to abnormally dangerous activities, though similar principles apply to dangerous animals.

B. Scope of risk: Generally, there will be strict liability only for damage which results from the ***kind of risk*** that made the activity abnormally

dangerous. For instance, even though it may be an abnormally dangerous activity to transport dynamite by truck through city streets, a pedestrian run over by such a truck will not be able to claim strict liability, since the risk of hitting pedestrians is not one of the things which makes such transportation abnormally dangerous. Rest. 2d, §519, Comment e.

1. **Abnormally sensitive activity by plaintiff:** A related rule is that the defendant will not be liable for his abnormally dangerous activities if the harm would not have occurred except for the fact that the plaintiff conducts an ***"abnormally sensitive"*** activity. Rest. 2d, §524A.

   Example: D conducts blasting operations, which frighten female mink owned by P, who kill their young in reaction to their fright.

   Held, D is not strictly liable. The thing that makes blasting operations unusually dangerous is "the risk that property or persons may be damaged or injured by coming into direct contact with flying debris, or by being directly affected by vibrations of the earth or concussions of the air." Here, since P's mink ranch was more than two miles away from the blasting, and there was no unreasonable interference with any other landowners at that distance, the "exceedingly nervous disposition of mink" must be held responsible for the damage, not the blast itself. Strict liability does not protect against "harms incident to the plaintiff's extraordinary and unusual use of land." *Foster v. Preston Mill Co.*, 268 P.2d 645 (Wash. 1954).

2. **Manner in which harm occurs:** In the context of negligence, we saw *(supra*, p. 155) that where the harm which occurs is the kind of danger which made the defendant's conduct negligent, but that harm occurs in an ***unforeseeable manner,*** the defendant will generally not be released from liability. But in cases of strict liability, this does not seem to be the case: The defendant will usually be relieved of liability if an unforeseeable cause intervenes, even though the damage is of the same nature as that which made the activity extraordinarily dangerous.

   a. **Act of God:** Thus the intervention of an **"Act *of God"*** is often enough to relieve the defendant of strict liability. For instance, in *Rylands v. Fletcher* itself, the opinion in the Exchequer Chamber stated that the defendant could escape liability by showing that the accident occurred because of "vis *major*, or the act of God" (e.g. a storm of unprecedented severity).

   b. **Restatement view:** But the Second Restatement rejects the "Act of

God" exception, as well as any exception for harm caused by the "innocent, negligent or reckless conduct of a third person" (assuming that the harm is of the sort that makes the activity abnormally dangerous). Rest. 2d, §522.

3. **Scope of liability compared with negligence cases:** In summary, most jurisdictions seem to impose liability for a narrower range of consequences in cases involving strict liability, than in cases involving negligence. See P&K, pp. 559-60. (And as previously noted, the scope of liability in negligence is generally narrower than that where an intentional tort is concerned; see *supra*, p. 10.) But the Restatement view referred to above would impose liability for at least as broad a range of consequences as in negligence cases.

C. Plaintiff's contributory negligence no defense: Ordinary ***contributory negligence*** by the plaintiff will usually not bar her from strict liability recovery. This is certainly true in those situations where the plaintiff's contributory negligence consists of being ***inattentive,*** and not discovering a risk which she should have discovered. In such a situation, the courts simply make a policy decision to place "the full responsibility for preventing the harm resulting from abnormally dangerous activities upon the person who has subjected others to the abnormal risk." Rest. 2d, §524, Comment a.)

1. **Unreasonable assumption of risk:** But if the plaintiff ***knowingly, voluntarily*** and ***unreasonably*** subjects herself to the danger, this will be a defense even to strict liability. Here, the plaintiff's conduct is that variety of contributory negligence which is also ***assumption of risk;*** see *supra*, p. 289.

   Example: Driver sees signs warning her that blasting operations will take place ahead, and that she should take a detour. She nonetheless voluntarily (and unreasonably) decides not to take the detour and is injured by the blast. Her voluntary and unreasonable assumption of the risk bars her from recovery. But if she had merely been inattentive, and had missed the sign, this ignorant contributory negligence would not have been a bar. See Rest. 2d, §524, Comment b.

2. **Assumption of risk:** As just noted, that brand of contributory negligence which is also assumption of risk (i.e., an unreasonable assumption of danger) bars the plaintiff from recovery. Beyond this, assumption of risk which is ***reasonable*** will nonetheless ***also bar*** the

plaintiff.

> **Example:** P, an independent contractor, agrees to transport dynamite for D, in a truck owned by P. P understands that dynamite can sometimes explode spontaneously. If such an accident occurs and injures P, P cannot recover from D in strict liability, because P has assumed the risk; this is true whether P acted reasonably or unreasonably. Rest. 2d, §523, Comment d.

3. **P's comparative negligence will reduce recovery:** Furthermore, in a ***comparative negligence*** jurisdiction, the court will probably ***reduce*** P's recovery even in a strict-liability action by P's degree of negligence or other fault. For instance, the Third Restatement, in its sections on apportionment, says that comparative-fault principles apply to any person "whose ***legal responsibility*** has been established," and the comments make it clear that the comparative-fault allocation system should be applied even though D's liability is premised upon strict liability and P's conduct is being evaluated under a fault system. See Rest. 3d (Apport.) §8, and Comment a thereto.

> **Example:** D conducts blasting operations near a highway, and posts "Keep away — Blasting Danger" signs. P negligently fails to notice the signs, parks at the side of the road, and wanders into the blasting area back to bird watch. In a comparative negligence jurisdiction, P's negligence in disregarding the signs will reduce his recovery from D even if his claim against D is based on strict liability.

V. WORKERS' COMPENSATION

A. Generally: We consider now a type of strict liability that is completely statutory in nature: the workers' compensation statute. All states now have adopted such statutes, which basically compensate the employee for ***on-the-job*** injuries without regard either to the employer's fault or to the employee's. A full treatment of workers' compensation (WC) statutes is beyond the scope of this outline; indeed, most law schools offer a separate course on the subject. However, we cover here some of the most important aspects of these statutes.

1. **No fault:** Essentially, the employer is liable for on-the-job injuries even though these occur ***completely without fault*** on the part of the employer. Thus an employer who has a perfect past safety record, puts warnings on every machine, gives extensive worker training, etc., will still be liable if an employee gets his arm caught in a piece of machinery. Conversely, even considerable negligence by the

employee will not reduce the statutory benefits at all — there is neither comparative nor contributory negligence, nor even assumption of risk, under the typical statute. For this reason, employers typically purchase ***insurance*** against WC liability.

2. **"Arising out of employment":** The typical statute covers all injuries "arising out of and in the course of employment." Thus activities which are purely personal are not covered.

3. **Exclusive remedy:** Both employer and employee gain something and give up something by virtue of the WC statute. The employer, as we have already seen, sacrifices the ability to assert her own non-negligence, and the ability to defend on the grounds of the employee's negligence or assumption of risk. But the employee sacrifices too: the WC statute is his ***sole remedy*** against the employer, and he generally receives payments that are substantially less than could be recovered in a common-law tort suit. Most significantly, the employee cannot recover anything for ***pain and suffering.***

   a. **No choice:** In any event, the employee gets no choice: nearly all employees are ***required*** to use the WC rather than tort-law scheme for workplace injuries, whether they want to or not.

B. Scope of coverage: Much litigation under WC statutes relates to whether the injury is covered at all, i.e., whether it "arises out of and in the course of employment."

1. **Pure personal activities:** Purely personal activities, that are not in any sense "required" by the job, are not covered. For instance, if the employee is injured while at lunch, off the employer's premises, this would probably not be covered.

2. **"To and from":** Injuries suffered by the employee while travelling ***to or from*** work — in other words, injuries while commuting — are typically ***not*** covered. This is generally true even if the employee has done work at home, and is transporting work-related materials from home to work, or vice versa. See, e.g., *Wilson v. Workers' Compensation Appeals Board*, 545 P.2d 225 (Cal. 1976) (teacher who was transporting work done at home to school at the time of a car accident, was not covered; "Because applicant performed work at

home for her own convenience, transporting work-related materials to facilitate her work there was also for personal convenience, furnishing no basis for exception from the going and coming rule").

3. **Attacks by third parties:** Increasingly, compensation statutes are interpreted to cover injuries sustained when the employee is ***attacked by third parties*** while on the job. This is now generally true even when the employee is not given the duty of dealing with the third party as part of his job, and even if the attack occurs after hours, as long as it is somehow related to the job. For instance, if a worker saw a third party carrying company property which the worker reasonably believed to be stolen, and the worker was injured while attempting to reclaim the property, there would probably be coverage even though the rescue effort took place after hours, and even though property-recovery was not an aspect of the worker's job. See *Martinez v. Worker's Compensation Appeals Board*, 544 P.2d 1350 (Cal. 1976).

4. **Worker fault:** As noted, the worker's own ***fault*** is generally ***not*** a ground for denying him coverage of the WC statute. However, most statutes have some exceptions:

   a. **Drunkenness:** Most statutes deny compensation for an injury caused by the ***intoxication*** of the injured employee. See, e.g., Cal. Lab. Code, §2600.

   b. **Illegality:** Similarly, many statutes provide that if the employee is engaged in ***illegality,*** he will not be covered. But in recent years many courts have narrowed this exclusion in coverage. For instance, if the employer knows of and tolerates that type of illegality, then the exclusion may be found not to apply. See, e.g., *Matter of Richardson v. Fiedler,* 493 N.E.2d 228 (N.Y. 1986) (roofer who fell to his death while engaged in stealing copper from the building where he was working is covered, because the employer knew about this illegal activity and tolerated it).

   c. **Disregard of safety rules:** About 20 states reduce or bar the worker's remedy if the accident is brought about because the worker willfully disregards ***safety regulations.*** See Epstein, p. 1029. For instance, a worker who was repeatedly told to wear his safety goggles while welding, and who was then blinded when he

refused to wear them, might well be denied recovery in one of these 20 states. (But "ordinary" negligence, as noted, will almost never bar recovery.)

C. Benefits: An injured worker recovers "benefits," which are tightly defined by statute. The worker is almost never allowed to recover for pain and suffering, only for direct expenses and loss of earning power. "[A]ll workers' compensation awards have a statutory base which is geared not to the severity of the claimant's injuries as such but only to its [sic] resulting "disability," that is, the degree to which it impairs the worker's earning capacity. The worker who is able to carry on without loss of income notwithstanding some physical impairment may be injured, but has not ordinarily sustained any compensable disability under the statutes." Epstein, p. 1035.

1. Limit on maximum recovery: Nearly all statutes place an upper limit on how much can be recovered. A typical scheme ties recovery into the ***average wage*** of a ***typical worker*** ("average weekly wage" or AWW). Then, the statute awards some portion of this AWW, for some specified length of time. In most states, a permanently and totally disabled worker receives a figure equal to about two-thirds of the AWW for the rest of the claimant's life (if she remains disabled). Epstein, p. 1036. Most states have special tables for death (typically, 400-500 times AWW). *Id.* Where the worker has lost an organ or limb, the tables also typically specify an award (e.g., 288 times AWW for loss of a leg, in New York).

D.Exclusivity of remedy: Probably the most important aspect of WC law, at least for our purposes, is that such compensation is the ***exclusive remedy*** of the employee against the employer. Thus even if the employer is clearly negligent (e.g., it permits very unsafe conditions, in violation of occupational health and safety laws), and even if the employee is completely blameless, the WC statute provides the employee's sole remedy. Since recovery under the WC statutes is typically lower than where the employee has a valid common law claim against the employer, plaintiffs' attorneys typically try to find a way around the "exclusive remedy" nature of the WC statute. Finding such "work arounds" is a burgeoning area of tort law.

1. **Intentional wrongs:** The "exclusive remedy" rule is almost always limited to ***non-intentional*** wrongs by the employer. In other words, if the plaintiff can show that the employer intentionally injured him, the employee may pursue a common-law action.

   a. **Safety regulations:** The most controversial question is whether an employer's knowing violation of ***safety regulations*** can, by itself, constitute an "intentional tort," thus allowing the employee to bring a common law suit against the employer.

      i. **Suit allowed:** A few cases have allowed such suits where the employer has willfully disregarded safety regulations, even though the employer did not desire to harm the worker.

      ii. **Majority rule:** But most courts hold that the exception is limited to ***"true*** intentional torts." Epstein, p. 1042-44. The majority rule is that the employer's failure to observe safety regulations, or to repair equipment — even if that failure is "knowing" — does not transform her wrongdoing into an intentional tort, and thus does not permit the employee to escape WC as his sole remedy.

         (1) **"Substantially certain injury" not enough in some courts:** Suppose the plaintiff worker can show that the employer not only knowingly failed to follow some safety procedure, but knew that an injury was ***"substantially certain"*** to occur because of the failure. Under traditional principles of intentional torts, being substantially certain that one's acts will cause a forbidden result is the equivalent of contending that result (see *supra*, p. 8). But courts interpreting state WC statutes have split as to whether mere knowledge of a substantially certain result — as opposed to desiring to bring about that result — qualifies for the intentional-wrong exception. The case set forth in the following statute finds that under the Kentucky statute in question, substantial certainty is not enough.

            Example: The Ds operate a uranium enrichment plant on behalf of the federal government. The Ds never disclose to the Ps (the plant's employees) that dangerous radioactive byproducts of this process are being stored at the plant. The Ps sue the Ds for the exposure, pointing out (correctly) that the Kentucky

workers compensation statute does not supply the exclusive remedy where the injury occurs through the "deliberate intention of [the] employer to produce [the] injury." The Ps argue that if, as they claim, the Ds acted with knowledge that their conduct was substantially certain to produce the injury, the deliberate-intention exception applies.

Held, for the Ds. Under the Kentucky statute, "deliberate intention to produce injury" occurs only when the employer has a *specific intent* to injure an employee — "substantial certainty" may be enough to constitute intent under general tort law, but not under the statute. *Rainer v. Union Carbide Corp.*, 402 F.3d 608 (6th Cir. 2005).

2. **Third parties:** Although the WC statute is supposed to be the "exclusive remedy" of the worker, the remedy is exclusive only as against the employer. In other words, the WC statute virtually never prevents the worker from suing a ***third party*** who, under common-law principles, would be liable for the worker's injuries.

Example: P, while in the employ of X Corp., is injured by a defective drill press sold to X Corp. by D. Although all courts would hold that P is barred from suing X by virtue of the WC statute, P may nonetheless bring a strict product liability action, under common-law principles, against D. The theory behind allowing a suit between P and D is that P's give-up of his right to bring a common-law action against X is the result of a "contract" between P and X (with X purchasing insurance coverage under the WC statute), and D is not an intended beneficiary of that contract.

E. Application to other areas: The "no fault" approach of workers' compensation has been so successful overall that some commentators have recommended extending it to other, non-industrial, accidents, and governments have sometimes done so.

1. **Automobile no-fault:** In the area of ***automobile accidents,*** about half the states have enacted some limited form of no-fault. Epstein, p. 1048. The statutes vary radically, but most seem to have these elements: (1) for less serious accidents (measured either by lack of serious/permanent injuries, or by low dollar value of property damage or medical expenses), P is entitled to receive limited compensation, generally not including pain and suffering damages, without proving that D was at fault; (2) P usually recovers from his own insurance company first, and that insurance company recovers from D's insurance company; and (3) more seriously-injured plaintiffs keep their conventional tort remedies.

2. **Childhood vaccines:** Another instance in which no-fault has been

adopted is the area of vaccines. The National Childhood Vaccine Injury Act of 1986, 42 U.S.C. §§ 300aa-10 to 300aa-33, gives no-fault recovery to children injured by ***childhood vaccines.*** Plaintiffs' cases are heard by a special master appointed by a federal judge. A plaintiff who can show that she took a vaccine listed in the act, suffered a malady listed as a possible side effect from that vaccine, and experienced the adverse reaction within a specified time of taking the vaccine, gets the benefit of a strong presumption of liability. In other words, P does not have to show causation directly, and does not have to show that the product was "defective".

a. Recovery: P recovers actual medical expenses, cost of rehabilitation, and compensation for lost earning power. But pain and suffering is limited to $250,000, and punitive damages are not available. After going through this administrative procedure, P can reject the special master's award and sue in tort, but the Act makes a tort award somewhat difficult to obtain (e.g., an appropriate warning is a complete defense, and punitive damages are not allowable). The program design has been quite successful in inducing vaccine injury victims to accept the compensatory award and forego their right to sue in tort.

3. Victims of 9/11: One last instance of a federal no-fault scheme is the system set up by Congress to compensate ***victims of the 9/11 terrorist attacks.*** In the Air Transportation Safety and System Stabilization Act (ATSSSA), 49 U.S.C. §40101 et seq., Congress established an optional no-fault administrative-law system for victims who were killed or physically injured in the 9/11 attacks. About 97% of all eligible families decided to participate in the plan.

Quiz Yourself on STRICT LIABILITY (Entire Chapter)

66. Bugs and Daffy are neighbors. Bugs keeps a Tasmanian Devil as a pet — a mean, vicious beast with slavering jaws. Bugs keeps the Devil in a heavy steel cage in the basement. One day, the Devil chews his way through the bars, tunnels out of the house, and goes to Daffy's house, biting him on the leg. When Daffy sues Bugs, Bugs claims he's not

liable because he didn't realize the Devil's dangerous propensities, since the Devil had never escaped before. Who wins? _____

67. Guy Fawkes carefully burns a pile of leaves in his backyard; he moves all flammable objects away from the area, keeps a fire extinguisher on hand, and douses the flames occasionally to keep them under control. However, a strong gust of wind blows up, carrying sparks 50' to a neighbor's shed, setting it afire. The neighbor sues Guy, claiming he's strictly liable for the damage here. Is the neighbor correct? _____

Answers

66. Daffy. Owners of *wild* animals are strictly liable for the damage caused by their animals, regardless of the owner's knowledge of the animal's dangerous propensities. Injuries caused by *domestic* animals (dogs, cats, cows, pigs, etc.) do not give rise to strict liability unless the owner *knows or has reason to know* of the particular animal's dangerous propensities. (The concept is very loosely expressed by the not-reallycorrect saying "every dog is entitled to one free bite.") Here, the Devil is a "wild" animal (not domesticated, i.e., not "used in service to mankind"), so Bugs is strictly liable.

DISTINGUISHING WILD ANIMALS FROM DOMESTIC ONES: Consider customs in the community, and the utility of keeping the animal.

67. No. The use of fire is not considered an abnormally dangerous activity, and thus not a source of strict liability. Therefore, the neighbor would have to prove Guy was negligent. Since the facts here indicate he was careful, the neighbor will not recover.

***Exam Tips** on*
STRICTLIABILTY

It's easy for an issue of "strict liability" to be hidden in the fact pattern — D isn't doing anything careless, and isn't trying to hurt anyone, so you can miss the fact that D is engaging in an activity as to which strict liability might attach. In this chapter, we're only worried about two types of activity calling for strict liability: (1) the keeping of animals; and (2) "abnormally dangerous" activities.

- Whenever your fact pattern mentions an ***animal*** that does some harm, consider the possibility of strict liability.
  - If the animal is ***"wild,"*** there's strict liability for any damage that results from a "dangerous propensity" of the ***species.*** *(Example:* If D keeps a leopard as a pet, and the leopard bites a neighbor, strict liability applies, even if this particular leopard had never attacked anyone before. This is so because the tendency to attack is characteristic of the species of leopard, and the species is wild rather than domesticated.)
    - If the wild animal customarily ***causes humans to be scared,*** then an injury caused by P's fright *will* trigger strict liability, since fear-causing would be one of the "dangerous propensities" of the species. *(Example:* D's bear gets loose, and frightens P into having a heart attack. Even if the bear would never have hurt P, fear-causing is one of the species' "dangerous propensities," making D strictly liable.)
  - If the animal is ***"domestic,"*** then there's only strict liability where the owner ***knows*** or has ***reason to know*** of the ***particular animal's dangerous characteristics.*** *(Example:* Suppose a dog or a horse bites a neighbor. Since both these species are domesticated, there is no strict liability unless the owner knew that this particular animal had a tendency to bite or otherwise attack, in which case the liability is not truly without regard to fault.)
    - Don't say, "Every dog gets one bite free." If D knew that the dog had ***tried*** to bite or attack someone before and failed, D is now liable when the dog succeeds.
- Most questions relating to this chapter concern ***"abnormally dangerous"*** activities (ADA) (also known as ***"ultra-hazardous"***

activities).

- ☞ The general principle, and a good definition to quote on an exam: "One who carries out an abnormally dangerous activity is strictly liable (that is, liable without regard to fault) for any damage that proximately results from the dangerous nature of the activity."
- ☞ Common issue: Is the activity in fact ***"abnormally dangerous"?***
  - ☞ Try to remember this list of factors:
    - □ Existence of a ***high degree*** of risk of ***some*** harm.
    - □ Likelihood that if harm does result, that harm will be ***great.***
    - □ The ***inability*** to ***eliminate*** the risk by use of ***reasonable care.***
    - □ The ***unusualness*** of the activity.
    - □ The ***inappropriateness*** of the activity to the ***place*** where it is carried out.
    - □ The extent to which the activity's ***value*** to the community is ***outweighed*** by the activity's dangerous attributes.
  - ☞ Some activities that are usually considered abnormally dangerous:
    - □ Blasting or other use of ***explosives.***
    - □ Operation of a ***nuclear power plant.***
    - □ The conducting of research into contagious viruses, biochemical weapons, etc.
    - □ Possibly, the ***transporting*** of ***flammable*** or very ***toxic*** liquids (e.g., propane).
- ☞ Most frequently-tested ADA issue: Did the type of harm that occurred result from the ***type of risk*** that made the activity abnormally dangerous in the first place? If not, then strict liability for ADA does ot apply. *(Example:* D uses explosive to blast through rock. The blasting frightens nearby cattle, who stampede and hurt themselves. Probably the risk of frightening animals isn't one of the special risks that makes the use of explosives abnormally dangerous. If so, D is not strictly liable for the damage to the cattle.)

- ***Assumption of risk*** is a defense to strict liability (whether for ADA or keeping of wild animals). *(Example:* If P sees a sign saying, "Blasting, Keep Out," and P enters anyway and gets hurt, he's probably barred by assumption of risk.)

- But ***contributory negligence*** is ***not*** a defense to strict liability. *(Example:* On the above example, if P negligently failed to read the sign about blasting, and didn't know blasting was going on, his carelessness would not eliminate his recovery in a contributory-negligence state.)

  - On the other hand, in a ***comparative negligence*** jurisdiction, P's negligence probably *will* reduce his recovery even in a suit based on strict liability. *(Example:* On the above blasting example, P's recovery probably will reduce his recovery in a comparative-negligence state).

- ***Workers' compensation*** statutes are rarely tested. But if P is injured during the course of his employment by D, you should briefly mention that any recovery by P against D will probably be limited by the terms of the WC statute (and that P will not have to prove D's negligence in order to recover this limited amount).

  - Remember that the WC statute usually provides the ***exclusive*** remedy for the employee against the owner — the employee does not have the option of suing, proving that the employer was negligent, and recovering traditional tort damages.

  - But also remember that most WC statutes provide an ***exception*** where the employer's wrongdoing is ***intentional.*** (However, most courts hold that the employer's failure to observe ***safety precautions*** does ***not*** transform the employer's wrongdoing into an intentional tort, so that WC applies even in this situation.)

CHAPTER 14
PRODUCTS LIABILITY

ChapterScope

"Products liability" refers to the liability of a seller of a chattel which, because of a defect, causes injury (usually personal) to its purchaser, user, or sometimes, a bystander. The term is used here to include both situations where P purchased the item directly from D and those where there was no contractual relationship between P and D.

- **Importance:** Products liability is the fastest-growing, and probably now the most economically significant, branch of tort law.
- **Three theories:** There are three main theories under which a seller of a chattel can be liable to one who is injured: (1) ***negligence;*** (2) ***warranty;*** and (3) ***strict liability.***
- **Negligence:** The general rules of ***negligence*** apply to one who sells a product. Most commonly, negligence theory is used to make a manufacturer liable where he failed to use reasonable care in designing, manufacturing or labeling the product.
  - **Privity:** A negligent manufacturer is liable to a ***"remote"*** purchaser (one who bought from some intermediary in the distribution channel), or to a "user" or "bystander." In other words, ***"privity"*** is ***not*** required. The only requirement is that P have been in some sense a "foreseeable" victim, a requirement that is usually satisfied.
- **Warranty:** There are two main ways in which a seller of goods may be liable under a ***warranty*** theory when the item causes injuries:
  - **Express warranties:** A seller may ***expressly*** warrant that her goods have certain qualities. If the goods turn out not to have these qualities, the purchaser (or, possibly, other affected persons) may sue for this breach of warranty. Most commonly, a seller breaches an express warranty by making a false claim about the product's attributes in advertising or on the label.
  - **Implied warranty:** Alternatively, an ***implied*** warranty about the quality of the goods can come into existence from the mere fact that the seller has offered the good for sale.
    - **Merchantability:** Most importantly, a merchant in goods of a

particular type is held to automatically warrant that they are ***"merchantable"*** (i.e., "fit for the ordinary purposes for which such goods are used").

- □ **Fitness for particular purpose:** Also, a seller may be found to implicitly warrant that the goods are ***"fit for a particular purpose"*** — this warranty arises where the seller knows that the buyer wants the goods for a particular purpose, and the buyer relies on the seller's recommendation of a suitable product.

- **Strict liability:** Virtually all states apply the doctrine of ***"strict product liability."*** Under that doctrine, a seller of a product is liable ***without fault*** for personal injuries (or other physical harm) caused by the product if the product is sold: (1) in a ***defective condition*** that is (2) ***unreasonably dangerous*** to the user or consumer.
  - □ **Non-manufacturer:** Strict product liability applies not only to the product's manufacturer, but also to its ***retailer,*** and any other person in the distributive chain (e.g., a wholesaler).
  - □ **Unavoidably unsafe products:** A product will not give rise to strict liability if it is ***"unavoidably unsafe."*** For instance, if a prescription drug causes side effects or allergies in some patients, and there is no way to avoid these, the drug is "unavoidably unsafe" and thus not "defective."
  - □ **Warnings:** A product may become "defective" because D has failed to issue a ***warning*** concerning its use. In general, even if a product is properly designed and properly manufactured, D must give a warning if there is a ***non-obvious*** risk of person injury from using the product. Similarly, D must give instructions concerning correct use, if incorrect use would create a danger.
- **Who may be a plaintiff:** The three theories differ as to who may be a plaintiff. The main area of controversy relates to ***"bystanders,"*** i.e., one who is neither a purchaser nor user of the product, but who is injured merely because he happens to be nearby. Generally, the negligence and strict liability theories protect any bystander who is "reasonably foreseeable," but courts are split as to whether the warranty theories protect such a bystander.
- **Who may be a defendant:** Courts differ in the details of who may be liable under the various theories. Special questions arise, for instance,

with respect to sellers of used goods, lessors of goods, and suppliers of services used in conjunction with a good.

- **Interests that may be protected:** Special rules also apply where P's damages consist only of property damage, or solely of "intangible economic harm" (e.g., lost profits).

I. NEGLIGENCE

A. Negligence and privity: There is no reason why the general principles of negligence, discussed previously, could not apply in a case in which personal injury has been caused by a carelessly manufactured product. Historically, however, the use of negligence theory for such purposes was drastically limited by the requirement of ***privity,*** i.e., the requirement that, in order to maintain an action, the plaintiff must show that he contracted ***directly*** with the defendant.

1. ***Winterbottom v. Wright:*** The privity requirement stems from an 1842 English case, ***Winterbottom v. Wright,*** 152 Eng.Rep. 402. In *Winterbottom,* the driver of a mail coach was injured when the coach broke down due to a lack of repair. He sued the defendant, who had contracted with the post office to keep the coach in good condition. The court held that since the defendant's original duty of repair arose out of a contract, that duty extended only to the other contracting party (the post office). Since the plaintiff never contracted with the defendant, his lack of privity meant that he could not recover, ***either in contract or tort.***

B. Historical development: During the seventy years following *Winterbottom,* the courts modified that rule to permit negligence suits without privity where personal injury occurred from an "inherently dangerous" defective product. A consumer who was made sick by contaminated food, for instance, could sue the manufacturer, even though she had made her purchase from a retailer; the food was said to be "inherently" or "imminently" dangerous.

1. ***MacPherson v. Buick:*** Determining whether a product was "inherently dangerous", however, was difficult and uncertain. In 1916, Judge Cardozo rejected the "inherent danger" requirement in negligence actions, in the landmark case of ***MacPherson v. Buick***

Motor Co., 111 N.E. 1050 (N.Y. 1916), *infra*, p. 372.

a. Facts of *MacPherson:* The defendant in *MacPherson*, Buick Motor Co., made a car which it sold to a retail dealer. The dealer in turn sold it to the plaintiff. Due to defective spokes in one of the wheels, the car collapsed and injured the plaintiff. Although Buick had purchased the wheel from someone else, there was evidence that Buick could have discovered the defect by reasonable inspection.

b. Holding: Judge Cardozo held that the plaintiff could recover for negligence, despite the fact that he was not in privity with the defendant. His right of recovery arose out of tort law imposed by the court, not out of contract. Furthermore, it was not necessary for the plaintiff to show that cars are in general "inherently dangerous". Instead, the test should be whether the product was "reasonably certain to place life and limb in peril when negligently made. . . ." If so, a negligence action may be brought even without privity.

c. Significance: *MacPherson* thus established the general principle that once the plaintiff shows that the product will be unreasonably dangerous ***if defective,*** he may sue in negligence without privity. The effect of this holding was virtually to abolish the rule of *Winterbottom* in a case where a negligently made product caused personal injury.

2. Acceptance of *MacPherson: Every state* has now accepted *MacPherson.* It is therefore universally the rule that ***one who negligently manufactures a product*** is liable for ***any personal injuries proximately caused by his negligence.*** See Rest. 2d, §395.

a. Property damage: Furthermore, most courts now allow negligence recovery where it is only ***property damage,*** not personal injury, which results. See P&K, p. 683.

b. Economic harm: However, if the plaintiff suffers ***only economic harm*** (e.g., lost profits suffered because a defective machine does not work), the courts are split as to whether he may recover for this harm from a remote seller. The subject is discussed more extensively *infra*, p. 398.

c. Bystanders: Where the plaintiff is a ***casual bystander*** (as opposed to a purchaser or other user of the product), he can recover in negligence if he can show that he was a ***"foreseeable plaintiff".*** For instance, a pedestrian who is injured when a defectively made automobile crashes into him could recover if can show the manufacturer's negligence, since it is reasonably foreseeable that a defective automobile may injure a pedestrian.

C. Classes of defendants: Not only manufacturers, but also ***retailers, bailors,*** and other suppliers may have negligence liability.

1. Manufacturers: The manufacturer is of course the person in the distribution chain most likely to have been negligent. His duty of due care includes the following aspects:

a. Design: The obligation to use due care to ***design*** the product in a reasonably safe way. (See *infra*, p. 372.)

b. Manufacture: The duty to set up reasonably error-free ***manufacturing procedures.***

c. Inspection and testing: The duty to perform reasonable ***inspections*** and ***tests*** of the finished products.

d. Packaging and shipping: The duty to ***package*** and ***ship*** the product in a reasonably safe way. See generally, Rest. 2d, §395, Comments e and f.

e. Assembly of parts made by another: If the final "maker" of the product produces it by assembling ***components*** made by others, he may be negligent if he does not take reasonable care to obtain them from a reliable source. Also, he probably has an obligation to make a ***reasonable inspection*** of the components (or at least samples) before he incorporates them. See Rest. 2d, §395, Comment g.

f. Manufacturer of component assembled by another: Conversely, the ***componentpart manufacturer*** will be liable if he fails to use reasonable care to design a safe product, even though that product is not sold directly to the public, but is instead incorporated into a larger unit. See the discussion of component parts manufacturers *infra*, p. 393.

2. **Third person's failure to inspect:** Suppose the manufacturer negligently makes the product, and someone further along in the distribution chain (e.g. the retailer) has an obligation to inspect the product, and fails to do so adequately. Does this negligence in inspection let the manufacturer off the hook? The answer is almost always "no." Thus a car maker which tried to absolve itself of liability for negligent manufacture on the grounds that its dealer had the duty to make a final inspection for obvious defects would lose; see *Vandermark v. Ford Motor Co.*, 391 P.2d 168 (Cal. 1964). See Rest. 2d, §396; see also *supra*, p. 173.

   a. **Effect on manufacturer's liability:** Although the mere failure of the retailer to make an inspection (even one he is obliged to make) will not by itself relieve the manufacturer of liability, if the retailer ***does*** make such an inspection and learns of a defect, or actually learns of a danger through some other means, and fails to warn the customer, many courts hold that this conduct is so gross that it ***breaks the chain of causation,*** and absolves the manufacturer of liability.

3. **Retailers:** A retailer who merely resells the product manufactured by another is much less likely than the manufacturer to be successfully charged with negligence. The mere fact that she has sold a negligently manufactured or designed product is not by itself enough to show that she failed to use due care, since she may have had no duty to inspect, or even if she had, no chance of finding the defect. For this reason, ***suits against retailers are now generally brought on warranty*** *(infra)* or ***strict liability*** *(infra,* p. 358) theories, rather than negligence. There are, nonetheless, a few situations in which the retailer may be negligent.

   a. **Reason to know of danger:** If the retailer knows, or should know, that the product is unreasonably dangerous, she is negligent if she does not at least ***warn*** her customers. Rest. 2d, §401.

   b. **Duty to inspect:** In the absence of a particular reason to believe that the product may be dangerous, the retailer ordinarily has ***no duty to inspect*** the goods. Rest. 2d, §402. This is true even if there is a defect which ***could have been discovered*** by a very simple and

superficial examination.

i. Minority view: But a minority of courts impose on the retailer a duty to make at least such a simple superficial examination, and if she does not do so, she is liable in negligence for any defect which she would have discovered. See Pr. L. Nut., p. 54. This is particularly likely to be the case where the retailer is a ***car dealer*** (either of new or used cars), where the effect of a defect is likely to be severe, and the retailer is likely to have much greater expertise in inspection than the buyer. Pr. L. Nut., *ibid.*

c. Sales to minor, etc.: A seller may have negligence liability if she fails to use reasonable care to avoid selling a product to a person ***incapable of using it safely.*** Selling weapons to a child would be an example of such negligence. P&K, 1988 Pocket Part, p. 93.

4. Other suppliers: Other classes of defendants may also have negligence liability. For instance, bailors of real property (e.g., rent-a-car companies), sellers and lessors of real estate, and suppliers of services (e.g., blood transfusions) may all be negligent. The general products liability status of these persons (including their status under warranty and strict liability theories) is discussed *infra*, p. 391.

II. WARRANTY

A. Historical importance of warranty: Historically, a purchaser of goods has always been able to sue his immediate seller on the grounds that the goods were not as they were contracted to be. Such an action was generally brought under the name "breach of warranty". If the buyer could show that the seller made representations, or warranties, either expressly or implicitly, about the quality of the goods, and that these representations turned out to have been false, the buyer could win, ***even in the absence of negligence*** on the part of the seller. Thus the fact that the seller reasonably and honestly believed her representations to be true, and in fact could not possibly have discovered the defects in the product, was irrelevant; furthermore, the fact that the defects were due to someone else's negligence (or to no one's negligence at all) was also irrelevant.

1. **Hybrid between tort and contract:** Since warranties arose, at common law, only in situations where there had been an actual contract of sale, the action had many contract law aspects to it. For instance, the contract statute of limitations usually applied, as did the contract measure of damages (including damages for purely economic loss, which was not true in negligence actions).

2. **Tort aspects:** But certain aspects of tort law have also been grafted onto warranty law. Perhaps the most notable instance of this is the tendency of the last twenty years to dispense, partially or completely, with the requirement of ***privity.*** As is discussed below, many if not most states today allow a suit for breach of warranty to be brought against the seller by one other than the person who made the immediate purchase from that seller.

3. **Confused state of the law:** Warranty law is made even more confused by the fact that the Uniform Commercial Code (UCC), in effect in every state except Louisiana, attempts to deal statutorily with warranties. Yet the case law of warranty has gone its own way, often ignoring the UCC statutory language.

4. **Scope of discussion:** The treatment of warranty which follows addresses primarily the rules of the UCC. However, where case law has departed from the UCC, these departures are indicated.

5. **Express v. implied warranties:** There are two general sorts of warranties, "express" and "implied" ones. Because the rules governing the two classes differ in important respects, they are treated separately.

B. Express warranties: A seller may ***expressly represent*** that her goods have certain qualities. If the goods turn out not to have these qualities, the purchaser (or, possibly, other affected persons — see the discussion of privity below) may sue for this breach of warranty.

> **Example:** P buys a Model A Ford from St. John Motors, a Ford dealer. Before the sale, Ford had given its dealers brochures, one of which describes the Model A's windshield as "Triplex, shatter-proof glass ... So made that it will not fly or shatter under the hardest impact." While P is driving the car, a pebble hits the windshield, making the glass shatter, in turn damaging P's eyes.
>
> *Held*, Ford expressly warranted that the glass was shatter-proof, and P had a right

to rely on these representations, particularly since their falsity was not readily apparent. Furthermore, P may recover from Ford for breach of the warranty even though he purchased not from Ford, but from a dealer. *Baxter v. Ford Motor Co.*, 12 p. 2d 409 (Wash. 1932). See *infra*, p. 437, p. 453.

1. **UCC version:** The UCC section governing express warranties is §2-313. It provides that an express warranty may be produced by an ***"affirmation of fact or promise"*** about the goods, by a ***description of the goods*** (e.g., "shatter-proof glass"), or by the use of a ***sample or model*** (e.g., a TV store's use of a floor model would be an express warranty to a customer that any set of the same model has the same general characteristics).

   a. **Reliance:** Under original common law warranty theory, the plaintiff had to show that he actually ***relied*** on the warranty. But the UCC, and most modern non-UCC case law, have watered down this requirement; under UCC §2-313 the only requirement is that the warranty be "part of the basis of the bargain".

   b. **Privity:** Persons not in privity with the defendant-seller, may recover for breach of express warranty. In order to do so, it is probably not necessary for the non-privity plaintiff to show that ***he himself*** was even aware of the express warranty. See Pr. L. Nut., pp. 27-28.

      i. **Representation expected to reach plaintiff:** Some courts hold that a plaintiff not in privity with the seller must be at least a member of a class that the seller ***intended to reach*** with her express warranty. For instance, if the defendant could show that she made the warranty to a particular purchaser, in response to the purchaser's own needs, and that there was no expectation that the product would ever be re-sold, the second buyer would not be protected.

      ii. **Warranties to public:** But many express warranties (e.g., the warranty of shatter-proofness in *Baxter)* would probably be held to be addressed to the public at large, and a remote buyer, user, or even passer-by, might be held to be part of the general class to which the warranty was addressed.

2. **Strict liability:** Observe that a defendant's liability for breach of an

express warranty is in reality a kind of ***strict liability,*** i.e. liability without regard to fault. As long as the plaintiff can show that the representation was not in fact true, it does not matter that the defendant reasonably believed it to be true, or even that she could not possibly have known that it was untrue.

3. **Restatement "misrepresentation" claim:** The Second Restatement establishes a tort action that is quite similar to a breach of express warranty claim. §402B imposes strict liability on a seller who "makes to the public a misrepresentation of a material fact" about the product.

C. 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 good for sale.

1. **Warranty of merchantability:** The UCC imposes several implied warranties as a matter of law. The most important of these is the ***warranty of merchantability.*** §2-314 (1) provides that " . . . a warranty that goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind."

   a. Meaning of "merchantable": The Code offers no simple explanation of what makes goods "merchantable." But one of the factors listed by §2-314(2) is that to be merchantable, the goods must be ***"fit for the ordinary purposes for which such goods are used."***

   Example: A car which, because of manufacturing defects, has a steering wheel that does not work, is not "merchantable," since it is not fit for the ordinary purpose — driving — for which cars are used. Therefore, if such a car made by Manufacturer and driven by Owner hits Pedestrian, Pedestrian may recover from Manufacturer for his injuries on a breach-of-implied-warranty theory.

   i. Packaging: To be merchantable, the goods must also be "adequately contained, packaged, and labeled. ..." (§2-314(2)(e)). And they must conform to any "promises or affirmations of fact" that are made on the label (§2-3143(2)(f)). (If they do not, this would also be a breach of express warranty, as discussed above.)

   b. Requirement that seller be a "merchant": The implied warranty

of merchantability arises, under the Code, only if the seller is a ***"merchant with respect to goods of that kind."*** This requirement imposes two important practical limitations:

i. **Requirement of businessperson:** First of all, the seller must be, in effect, a businessperson.

ii. **Regular sale of that kind of goods:** Second, he must regularly sell the kind of goods in question. Thus a businessperson who is selling a piece of equipment which he once used but no longer needs makes no implied warranty of its merchantability, since he does not regularly deal in that kind of machine.

c. Used goods: It is not clear whether there can ever be an implied warranty of merchantability for ***used goods,*** even if the seller deals in goods of that kind (e.g., a used car lot). Liability of such used goods dealers, including possible strict liability, is discussed *infra,* p. 392.

d. Food and drink: The UCC merchantability warranty applies explicitly to "the serving for value of food or drink to be consumed either on the premises or elsewhere". §2-314(1).

e. Services: But the Code itself does not apply to ***services,*** real estate transactions, or bailments. Some courts have applied portions of warranty theory to such transactions by analogy; this is discussed *infra*, p. 394.

f. Retailers: A retailer who did not manufacture the product is nonetheless held to have impliedly warranted its merchantability, simply because she has sold it (assuming that she deals in goods of that kind).

i. **"Sealed container" doctrine:** However, a few jurisdictions have carved out an exception to the Code, known as the ***"sealed container" doctrine.*** That doctrine provides that a retailer who resells a "sealed container" does not warrant the merchantability of the contents. This is usually justified on the grounds that the retailer has no ability to inspect; but since warranty liability is not based on failure to inspect or other

fault anyway, it is hard to see how this exception makes sense. Georgia, Mississippi and Tennessee are among the states applying the doctrine. Pr. L. Nut., pp. 55-56.

2. **Warranty of fitness for a particular purpose:** A seller may also implicitly warrant that the goods are ***"fit for a particular purpose".*** This warranty arises, under UCC §2-315, when the seller knows that the buyer wants the goods for a particular (and not customary) purpose, and the buyer ***relies on the seller's judgment*** to recommend a suitable product. The warranty is that the goods are in fact suitable for that special purpose.

   Example: Consumer tells Shoe Dealer that he wants a pair of shoes for mountain climbing. Dealer recommends Brand X, on the grounds that they have good traction. If the shoes turn out not to have good traction, and Consumer falls, he can sue Dealer for breach of the implied warranty of fitness for a particular purpose.

3. **Privity:** Breach of warranty, as noted, started out as basically a contract action. Courts were therefore reluctant to permit a plaintiff to recover for breach of implied warranty against a manufacturer, or other person within the distributive chain, with whom the plaintiff had not directly contracted.

   a. **Food cases:** However, as with negligence actions, courts developed exceptions to the privity requirement. For instance, in cases of defective food, the manufacturer was held to impliedly warrant that his products were of reasonable quality, and this warranty "ran with the goods", so that anyone who consumed them could sue.

   b. ***Henningsen v. Bloomfield Motors, Inc:*** Then in 1960, the case of ***Henningsen v. Bloomfield Motors, Inc.,*** 161 A.2d 69 (N.J. 1960), *infra*, pp. 356, 357 drastically restricted the privity requirement in warranty cases in almost exactly the same way as *MacPherson v. Buick (supra*, p. 349) had restricted the privity requirement for negligence actions.

      i. **Facts of *Henningsen:*** The defendant, Chrysler Corporation, produced a car with a defective steering mechanism. One of its dealers, Bloomfield Motors, sold the car to Mr. Henningsen, who gave it to his wife. She was injured when the steering failed.

ii. **Holding:** The court held that Mrs. Henningsen could recover from Chrysler for breach of the implied warranty of merchantability (imposed by the then-effective Uniform Sales Act, a predecessor of the UCC). She could recover notwithstanding the fact that she never contracted with Chrysler directly.

iii. **Similarity to food cases:** The court saw no reason not to apply to this case the rationale of the food cases, referred to above, and not to require privity. "The unwholesome beverage may bring illness to one person; the defective car, with its great potentiality for harm to the driver, occupants and others, demands even less adherence to the narrow barrier of privity."

iv. **Consumer is cultivated:** Furthermore, the court said, it is clear that under modern mass merchandising techniques, the ultimate "consumer", not the initial dealer, is the person being cultivated by advertisements. It is therefore not unfair to impose on the manufacturer responsibility to this ultimate consumer.

v. **Disclaimer ineffective:** The contract that Mr. Henningsen had signed with Bloomfield Motors contained a disclaimer of all warranties (except for a limited agreement to repair defective parts). The court held that this disclaimer was an ***"adhesion contract",*** and resulted from "the gross inequality of bargaining positions" between the manufacturer and the consumer. Therefore, the disclaimer was ruled invalid. See the further discussion of disclaimers *infra,* p. 357.

vi. **Non-purchaser status of Mrs. Henningsen:** Mrs. Henningsen failed to be in privity with Chrysler in two ways: First, as noted, Chrysler had sold the car through its dealer. Second, the actual purchase was made by Mr. Henningsen, and given as a gift to his wife. The court held that this second lack of privity was no more a barrier to recovery than the first. Mrs. Henningsen was "a person who, in the reasonable contemplation of the parties to the warranty, might be expected to become a user of the automobile." Therefore, she

was covered by it.

Note on vertical v. horizontal privity: Some courts have distinguished between the lack of "vertical" privity, and the lack of "horizontal privity". Mr. Henningsen failed to be in vertical privity with Chrysler, because there was an intermediate seller. Mrs. Henningsen failed to be in horizontal privity even with the dealer, because she was merely a user, and member of the same household, as the actual purchaser from the dealer. The distinction was formerly of importance, but the general abandonment of privity requirements in warranty cases (except in cases of purely economic loss — see *infra*, p. 397) renders it of only minor significance today.

c. Reaction to *Henningsen:* Almost all states have now accepted both aspects of the privity part of *Henningsen.* That is, they hold that a manufacturer's (or other distributor's) warranty extends to remote purchasers further down the line, and they also hold that once the final purchaser is covered by the warranty, the warranty also applies to, at least, members of the household who may reasonably be expected to use the goods.

i. Strict liability: However, many of the decisions rejecting privity have been in ***strict liability*** suits. In general, warranty suits have been used less and less as strict liability has increased, because many of the "sales law" aspects of warranty, (e.g. the requirement that notice of the breach be given by the injured person) are really unsuited for personal injury cases.

d. UCC privity rules: The original 1962 version of the UCC, in §2-318, provided that if the final purchaser was a beneficiary of a warranty, any member of his family or household, and any houseguest, was also covered, "if it is reasonable to expect that such person may use, consume or be affected by the goods", and was personally injured by the breach.

i. Vertical privity not mentioned: This provision thus in effect abolished the "horizontal" privity requirement, at least for family members, houseguests, etc. But it did not say anything about vertical privity; that is, it left completely unanswered (intentionally) the question of whether a manufacturer's warranties extended to a remote purchaser. For instance, if *Henningsen* had occurred under the UCC, nothing in the Code would have indicated to the court whether Mr. Henningsen

was covered by Chrysler's warranty.

ii. **Left to case law:** Instead, resolution of this "vertical" privity question was left to case law. And, as noted, nearly every jurisdiction abolished the "vertical" privity requirement, at least in cases of personal injury.

iii. **Rejection of Code limitations:** Most courts simply ignored the vertical privity limitations imposed by the original version of §2-318. For instance, they held that an employee of the purchaser of a defective product, or a bystander injured by the driver/purchaser of a defective car, could recover. Some courts also rejected that section's limitation to personal injury cases, and held that a person who suffered only property damage could recover in warranty against a remote seller.

e. 1966 Amendments: In response to this fast-moving case law, two new alternative versions of §2-318 were officially promulgated in 1966. The original §2-318, discussed above, is now called "Alternative A".

i. **All foreseeable users:** "Alternative B" extends warranty protection to "any natural person who may reasonably be expected to use, consume or be affected by the goods and who is injured in person by breach of the warranty." Thus, the employee of the purchaser, or even a casual bystander injured by a defective car, may both sue the manufacturer for warranty, under this section.

ii. **Property damage:** "Alternative C" goes even further. It protects all the people that Alternative B protects, and also allows them to recover even if they suffer ***only property damage.*** Furthermore, a ***corporation*** or other non-natural person may sue.

f. Adoption by states: Most states still have Alternative A on their books (although, as noted, courts have simply ignored its limitations in many situations). But a significant number have now adopted either Alternative B or C. New York, for instance, changed to Alternative B in 1975.

g. Summary on privity: In summary, virtually all states would allow one who has actually purchased goods to recover on implied warranty, even though her purchase was made from a dealer, not the defendant. Furthermore, many if not most states, either by statute or case law, would permit a non-purchaser whose use of (or presence near) the product is foreseeable, to recover against the manufacturer or other person in the distributive chain, at least if personal injury is involved.

D. Warranty defenses: Most defenses to products liability claims are discussed in a separate section *infra*, p. 399. Here, we consider three defenses that are virtually unique to warranty claims: disclaimers, limitation of remedies, and notice-of-breach requirements.

1. Disclaimers: A seller may, under the UCC, ***disclaim*** both implied and express warranties.

a. Disclaimer of merchantability: A seller may make a written disclaimer of the warranty of merchantability, but only if it is ***"conspicuous".*** UCC §2-316(2). This is usually interpreted to mean that the disclaimer must be in capital letters or bold print, not hidden in the fine print. Furthermore, the word "merchantability" must be specifically mentioned.

i. Implied limitations: Apart from this express disclaimer of the warranty of merchantability, the circumstances may occasionally give rise to an ***implied*** disclaimer. The most common situation is when used goods are sold ***"as is".*** See UCC §2-316(3).

b. Federal warranty act: Federal law now limits disclaimers in written warranties. The Magnuson-Moss Federal Trade Commission Improvement Act of 1974, 15 U.S.C. §2301, *et. seq.*, provides that if a written warranty is given to a consumer, there cannot be any disclaimer of any implied warranty. The manufacturer does not have to make a written warranty at all, but once he does so, the warranty must include the implied warranty of merchantability.

2. Limitation of consequential damages: Rather than (or in addition

to) disclaiming implied warranties, a seller may often try to ***limit the remedies*** available for breach. Frequently, for instance, the seller will provide that any remedy is limited to ***repair or replacement*** of the defective product, and that there shall be no liability for consequential damages.

a. Code restrictions: However, the Code restricts the ways in which the seller may do this. The most important of these, at least in personal injury cases, is given by §2-719(3), which states that "limitation of consequential damages for injury to the person in the case of consumer goods is *prima facie* ***unconscionable.*** ..." In other words, if the product is designed for personal (as opposed to business) use, any provision limiting remedies to repair or replacement will not be upheld by the court, if personal injury has resulted. Thus had the UCC been in effect in New Jersey at the time of *Henningsen*, the court could have knocked out the "liability limited to repair or replacement" clause without resorting to common law principles.

i. Commercial loss: That same Code section, §2-719(3), also provides that where the loss from a breach of warranty is "commercial" (i.e., intangible economic loss in a business setting), a limitation of damages is ***not*** unconscionable.

3. Notice of breach: Under the UCC, the buyer must "within a reasonable time after he discovers or should have discovered any breach", ***notify the seller*** of the breach. UCC §2-607(3).

a. Plaintiff not in privity: But if the plaintiff is not in privity with the defendant, this notice-of-breach requirement is ***frequently not enforced.*** This is particularly likely to be the case where the plaintiff was not a purchaser of the goods at all, but rather, a user or bystander.

E. Phasing out of warranty suits: A plaintiff not in privity with the defendant seller may therefore, in many situations, bring a warranty claim without being barred by the disclaimer, limitation-of-remedies, or notice-of-breach defenses. But once these defenses are eliminated from warranty actions, the warranty case (at least where based on an implied, rather than express, warranty) is virtually ***identical*** to a ***strict tort***

liability claim, discussed below. For this reason, the use of implied warranty claims in this situation has decreased in recent years.

1. **Useful cases:** But there are still a few non-privity situations where it may be to the plaintiff's advantage to sue on implied warranty rather than strict liability.

   a. **Pure economic harm:** Some states may allow a plaintiff who has suffered ***only economic harm*** to recover in implied warranty against a remote seller, where this would not be allowed in strict liability. See *infra*, p. 397.

   b. **Statute of limitations:** Warranty actions are usually held to fall within the contract statute of limitations. In UCC cases, this is four years. Strict liability cases, on the other hand, generally fall within the tort limitations period, which is usually shorter, often two or three years. Assuming that the two statutes start to run at about the same time (not always a correct assumption), the plaintiff may therefore still have a warranty claim after his strict liability claim has been barred.

2. **Privity action:** And where the plaintiff has dealt ***directly*** with the defendant, he will often be much better off suing under implied warranty. For one thing, he will have no trouble recovering a broad range of consequential damages, including lost profits and other intangible economic harm.

III. STRICT LIABILITY

A. Historical emergence: Implied warranty suits, as noted, provide for "liability without fault", in the sense that negligence by the defendant does not have to be proven. However, these actions have many contract aspects that are illogical where there is no privity between the plaintiff and the defendant. For this reason, many courts, starting with the case set forth in the following example, have abandoned the language of "implied warranty," and have allowed recovery for ***"strict tort liability."***

> **Example:** D1 manufactures, and D2 retails, the "Shopsmith," a power tool that can be used as a saw, drill, or wood lathe. P sees one on display, and has his wife buy it for him. While he is using it as a lathe, a piece of wood clamped to the machine flies out and hits him on the head, severely injuring him. P does not give timely notice of breach of warranty to D1, as is required in warranty actions by California law.

Held, by Justice Traynor, P's failure to give notice of breach does not bar his action, since D1 is strictly liable in tort. "A manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect which causes injury to a human being." The law of sales warranties is not a good way to protect consumers like P, because of requirements (like the notice-of-breach requirement) that are suitable only for commercial transactions. (The liability of D2 was not discussed.) *Greenman v. Yuba Power Products, Inc.*, 377 P.2d 897 (Cal. 1963).

B. Restatement Second §402A: In 1965, two years after *Greenman*, a similar doctrine of strict tort liability was embodied by a Tentative Draft of the Second Restatement, in §402A. This section has become far and away the most famous and influential provision of the entire Second Restatement. Its importance is so great that we set it out here in full:

§402A. Special Liability of Seller of Product for Physical Harm to User or Consumer:

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

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

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

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

1. **Popular acceptance:** Section 402A "literally swept the country." P,W&S, pp. 733. It is probably safe to say that a substantial majority of American jurisdictions have adopted, if not the precise rules set forth there, at least the general theory of strict tort liability for dangerously defective products.

2. **Non-manufacturer:** Observe that §402A applies not only to the product's manufacturer, but also to its ***retailer,*** and any other person in the distributive chain (e.g., a wholesaler) who is in the business of selling "such a product." Non-manufacturer liability is discussed further *infra*, p. 391.

C. Third Restatement on Products Liability: In the 30-plus years after

Rest. 2d §402A was published, the law of product liability underwent massive evolution and expansion. The drafters of Restatements (the American Law Institute) decided to draft an entirely new Restatement to deal with this evolution. Therefore, a full-volume portion of the Third Restatement of Torts, a portion known as the ***Restatement Third of Torts: Products Liability,*** was published in 1997. (We call it the ***"Third Restatement"*** here, for short.) This set of provisions represents a dramatically new approach to products liability. We reproduce the two central sections of the Third Restatement's product-liability provisions here:

> *§1 Liability of Commercial Seller or Distributor for Harm Caused by Defective Products*
>
> One engaged in the ***business of selling or otherwise distributing products*** who sells or distributes a defective product is subject to liability for ***harm to persons or property caused by the defect.***
>
> *§2 Categories of Product Defect*
>
> A product is ***defective*** when, at the time of sale or distribution, it contains a ***manufacturing defect,*** is defective in ***design,*** or is defective because of ***inadequate instructions or warnings.*** A product:
>
> (a) contains a ***manufacturing defect*** when the product ***departs from its intended design even though all possible care was exercised*** in the preparation and marketing of the product;
>
> (b) is ***defective in design*** when the ***foreseeable risks of harm posed*** by the product ***could have been reduced or avoided by the adoption of a reasonable alternative design*** by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the ***omission of the alternative design renders the product not reasonably safe;***
>
> (c) is ***defective*** because of ***inadequate instructions or warnings*** when the ***foreseeable risks of harm*** posed by the product ***could have been reduced or avoided by the provision of reasonable instructions or warnings*** by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the ***omission*** of the instructions or warnings ***renders the product not reasonably safe.***

1. **Our approach:** In the discussion that follows, we'll be talking about the approaches of both the Second Restatement (§402A) and the Third Restatement. Because the Third Restatement's product-liability provisions have been around for less than 20 years as of this writing, the Second Restatement's provisions have been subjected to a much wider range of judicial opinions. But the Third Restatement is

becoming extremely influential, and we therefore talk about it a lot.

D. What products meet the test: Under the approach of the Second Restatement, the principal issue is often whether the product is ***"defective"*** and ***"unreasonably dangerous."***

1. Term of art: The Comments to Rest. 2d §402A do not define the term "defective condition" apart from the term "unreasonably dangerous." Instead, the overall phrase "defective condition unreasonably dangerous" is used as a term of art. The basic idea seems to be that a product is in a "defective condition unreasonably dangerous" if it is "dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics." (§402A, Comment i).

a. "Viewpoint of the consumer" test: In other words, if a reasonable consumer, knowing the true characteristics of the product, would nonetheless use it, the product is not "in a defective condition unreasonably dangerous."

2. Third Restatement drops "unreasonably dangerous" requirement: The Third Restatement drops the requirement that to be defective, a product must be "unreasonably dangerous," at least with respect to manufacturing (as opposed to design or warning) defects. §1 of the Restatement says that "one engaged in the business of selling or otherwise distributing products who sells or distributes a defective product is subject to liability for harm to persons or property caused by the defect." §2 then defines what constitutes a "defective product," by breaking down defects into manufacturing defects, design defects or instruction/warning defects. A "manufacturing defect" is said to exist "when the product ***departs from its intended design*** even though all possible care was exercised in the preparation and marketing of the product." §2(a). So a manufacturing defect exists whenever the product does not live up to the design, and there is ***no need for the plaintiff to show*** that the product was ***"unreasonably dangerous"*** (or even "dangerous" at all), as the Second Restatement required.

a. Design and warning defects: But the Third Restatement does ***not***

abandon the concept of unreasonable dangerousness in the case of ***design*** defects or ***warning*** defects. In these latter two situations, the defect is only deemed to exist if the design or omission of warnings "renders the product not reasonably safe." Rest. 3d (Prod. Liab.) §§ 2(b) and 2(c). This is part of the Third Restatement's decision to insert negligence-based concepts, and a risk-utility approach, into the design and warning contexts. See *infra*, p. 372 (design) and p. 381 (warnings).

E. Unavoidably unsafe products: Some products might be thought of as being ***"unavoidably unsafe."*** These are products that conform to their design, and essentially do what the consumer expects them to do, yet are by their very nature ***inherently dangerous.*** Here are some products usually thought to be unavoidably unsafe:

- ☐ ***prescription drugs*** that, in order to perform their therapeutic functions, have inevitable ***side effects.***
- ☐ ***cigarettes,*** which in order to give the smoking satisfaction that customers expect, will inevitably ***cause disease*** in many users.
- ☐ ***handguns,*** which in order to be capable of being fired in the way users expect, pose some risk of ***firing unintentionally.***

Courts and commentators have struggled for decades about the appropriate product-liability treatment for such unavoidably unsafe products.

1. Second Restatement's exemption: The Second Restatement, in the well-known Comment k to §402A, effectively ***exempted*** unavoidably-unsafe products from the general rule of strict liability. Under Comment k, so long as a product could not be made safe without ***changing its fundamental characteristics,*** sale of the product would not lead to product liability if the seller supplied an adequate warning of the dangers.

a. Rabies vaccine example: Comment k gave the example of ***rabies vaccine:*** the vaccine often leads to serious side effects, yet has great value since it helps prevent an otherwise invariably-fatal disease. "Such a product, properly prepared, and accompanied by proper directions and warning, is not defective, nor is it unreasonably dangerous."

b. Criticism: However, the approach of Comment k — giving a blanket exemption to any product that could not be made safe — has been frequently criticized, on the grounds that some unavoidably unsafe products are so dangerous that society would be better off if the product was not sold at all, rather than being sold with immunity from tort liability.

2. **Third Restatement takes risk-utility view:** The Third Restatement takes a quite different approach to the problem of the unavoidably-unsafe product. To understand this approach, first understand that the problem posed by the unavoidably-unsafe product is essentially a ***design*** problem: there is no manufacturing problem (the particular cigarette or gun or drug conforms to its design), and instead the problem is that the product's design makes it inherently unsafe. But the Third Restatement does not impose strict liability at all for design defects (see *infra*, p. 373); instead, the Restatement imposes a ***risk-utility*** approach, under which a product is defective in design "when the ***foreseeable risks of harm posed*** by the product ***could have been reduced or avoided by the adoption of a reasonable alternative design*** by the seller ... and the omission of the alternative design renders the product not reasonably safe." Rest. 3d (Prod. Liab.) §2(b). It then follows that "no separate rule about unavoidable dangers is required under the [Third] Restatement. Instead, the question is ***whether the product is reasonably safe."*** Dobbs, p. 989.

   a. Whether utility outweighs risks: Under the Third Restatement's approach, it still makes *some* difference that the product is unavoidably unsafe. But the equation becomes a direct balancing of utility versus danger, with no consideration of any alternative design (because, by hypothesis, there *is* no alternative design that would reduce the risks while keeping intact the essential benefits of the product). So as one commentator summarized the effect of the new Restatement's approach to unavoidably unsafe products, "If the utility of [these] products outweighs these irreducible risks, they are *not* defective. If dangers outweigh the unavoidable risks, the logic of the risk-utility is that they *are* defective." Dobbs, p. 989 (emph. added). (But keep in mind that the product will also be deemed defective if it is not accompanied by a reasonable warning

where one is feasible. See *infra*, p. 383.)

Example: Suppose that P is injured when she dives into a plastic above-the-ground swimming pool made by D. The injury occurs because the plastic bottom of the pool is slippery, and P's hands slip apart as they touch the bottom, causing her head to slam into the bottom. Assume that it is in the inherent nature of above-the-ground plastic swimming pools that their surfaces are slippery, and that there is no good way to design around this problem while still using plastic.

A court following the Third Restatement's approach would simply ask whether the utility of such a plastic pool outweighs the unavoidable danger inherent in the design. If so, P would not be permitted to recover on a defective-design theory, since the product would be deemed non-defective (assuming that all reasonable warnings were given and that there was no manufacturing defect). If, on the other hand, the court decided that the social utility of such a pool was so low that its dangers outweighed that utility, then the design would be deemed defective even though the danger was unavoidable in all above-ground plastic pools.

3. Prescription drugs and medical devices: ***Prescription drugs and medical devices*** present a special case of the unavoidably-unsafe problem. Such drugs and devices are usually of very high social utility, yet often have very serious, completely unavoidable, side effects. Courts have always tended to give an automatic or near-automatic ***exemption*** from liability for such drugs and devices, assuming that they have been approved by the FDA and further assuming that the warnings given with them are adequate.

a. Special Third Restatement rule: The Third Restatement has a special rule for prescription drugs and medical devices. To understand why, first notice that ordinary products have essentially the same utility, and pose the same risks, to *all* consumers. Therefore, in judging such ordinary products the court can reasonably do a *single* risk-utility balance. But drugs and devices are very different: person *A* may respond very differently to a particular drug than person *B*, so the risk-reward computation would be very different for *A* than for B. Consequently, the Third Restatement says that a defective-design claim can be brought in the case of a prescription drug or medical device only "if the foreseeable risks of harm posed by the drug or medical device are sufficiently great in relation to its foreseeable therapeutic benefits that reasonable healthcare providers, knowing of such foreseeable risks and therapeutic benefits, would not prescribe the drug or

medical device for ***any class of patients."*** Rest. 3d (Prod. Liab.) §6(c). In other words, if there is even a ***single group*** of patients for whom the drug or device could sensibly be prescribed, then ***no patient*** (even a member of a different class) may bring a design-defect against the maker. The Comments to this part of the Restatement say that "given this very demanding objective standard, liability is likely to be imposed only under unusual circumstances." Comment f to §6.

Example: D, a pharmaceutical company, sells PregLast, a prescription drug designed to prevent premature pregnancies. The company has learned from its testing that in a small number of cases, users of the drug will suffer significant heart damage for which they will require open-heart surgery. Although P is not at especially high risk for giving birth prematurely, her doctor prescribes PregLast for her. P develops heart damage caused by the drug. She sues D, alleging that the drug was defectively designed, in that its side effects outweigh its utility.

In a court following the Third Restatement's approach, D will win as long as it can show that there is *some* group of patients for whom a reasonable doctor would conclude that the medical benefits from the drug outweigh the side effects. Cf. Rest. 3d (Prod. Liab.) §6, Illustr. 1. The fact that P may not have been a member of such a group will be irrelevant. (All of this assumes that D supplied P's doctor with adequate warnings of the side effects — if not, P will be able to prevail on a failure-to-warn theory; see *infra,* p. 381.)

i. Consequence: Notice how revolutionary the Third Restatement's drug rule is. It "seems to mean that manufacturers of drugs and related products ***need not exercise reasonable care under a risk-utility balance to make a safer drug.*** To get this protection, the drug must provide benefits in excess of harms, but it still need not be as safe as it could be with reasonable cost or effort." Dobbs & Hayden (5th), p. 728, n. 7.

ii. Courts reject Restatement's approach: The first courts to consider the Restatement approach (promulgated in 1998) have ***rejected*** it. See, e.g., *Bryant v. Hoffman-La Roche, Inc.*, 585 S.E.2d 723 (Ga.App. 2003), rejecting the approach, criticizing it for "the fact that a consumer's claim could easily be defeated by expert opinion that the drug had some use for someone, despite potentially harmful effects on a large class of individuals," and stating that to date, no court had adopted

it. See also Dobbs & Hayden (5th), p. 728, n. 7.

F. Unknowable dangers: Related to the ***"unavoidably unsafe"*** problem is the "unknowably unsafe" problem. Suppose that at the time a product is designed and manufactured, given the state of technology there is simply ***no way*** (at least at acceptable expense) for the manufacturer to ***discover*** that a particular danger lurks within the product. Suppose further that had the manufacturer somehow known of the danger, an alternate design could have been selected. When the unforeseen danger finally strikes, may the manufacturer be held liable for defective design, or for that matter failure to warn of the unknown defect?

1. **Most courts answer "no":** The substantial majority of courts that have considered the question have answered ***"no"*** — there is ***no duty to either design around, or warn against, a danger that could not reasonably have been foreseen*** at the time of design and manufacture. Dobbs, p. 991. As the idea is sometimes (though ambiguously) expressed, the manufacturer may assert a ***"state of the art"*** defense. See, e.g., *Vassallo v. Baxter Healthcare Corp.*, 696 N.E.2d 909 (Mass. 1998) ("[W]e hereby revise our law to state that a defendant will not be held liable under an implied warranty of merchantability for failure to warn or provide instructions about risks that were not reasonably foreseeable at the time of sale or could not have been discovered by way of reasonable testing prior to marketing the product.")

2. **Third Restatement agrees:** The Third Restatement agrees with this prevailing approach. A design defect exists only "when the ***foreseeable*** risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design" (§2(b)); an unknowable danger by definition does not pose a "foreseeable risk of harm," and thus cannot cause a design to be defective. Similarly, a defect due to failure-to-warn exists only "when the ***foreseeable*** risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings" (§2(c)); here, too, the unknowable danger does not pose a "foreseeable risk of harm," so the failure to warn about it does not constitute a defect. (For more about warnings of unknowable dangers, see *infra*, p. 385.)

Example: D manufactures and sells fire-resistant roof construction materials, exposure to which turns out, decades later, to materially increase the risk of a particular type of Acute Lymphocytic Leukemia (ALL). Assume that this risk was not reasonably foreseeable to one in D's position at the time D sold the product to Contractor, who installed it in P's house. Years later, P gets ALL that can be traced to his exposure to the material sold by D. If P brings a suit for either product defect or failure to warn, in most courts (and under the Third Restatement), P will not prevail, because D had no duty to warn of a risk, or avoid dangers from a risk, that was not, at the time of sale, foreseeable.

G. Food products: Courts have struggled with whether there should be a separate standard for ***food products:*** how should the "defectiveness" of food be measured?

1. **Foreign/natural distinction:** Some courts have made a distinction between ***"foreign"*** material and ***"natural"*** material in the food. Under this approach, there is strict liability for "foreign" matter found in food (e.g., a piece of metal inside a can of tuna fish), but no strict liability for the vendor's failure to remove a naturally-occurring substance from the food (e.g., bone fragments in canned tuna, or pits in cherries). See, e.g., *Mexicali Rose v. Superior Court*, 822 P.2d 1292 (Cal. 1992) (no strict liability for chicken bone in enchilada, because the injury-producing substance "is natural to the preparation of the food served, [and therefore] was reasonably expected by its very nature [so that] the food cannot be determined unfit or defective.")

2. **The majority's "consumer expectation" standard:** Most courts, however, have applied a ***"consumer expectations"*** test, under which the food product is defective if and only if it contains an ingredient that ***a reasonable consumer would not expect it to contain.*** This is also the approach of the Third Restatement; see §7, stating that "a harm-causing ingredient of the food product constitutes a defect if a reasonable consumer would not expect the food product to contain that ingredient."

   Example: Consider the chicken enchilada at issue in *Mexicali Rose, supra.* The Third Restatement's commentary says that "although a one-inch chicken bone may in some sense be 'natural' to a chicken enchilada, depending on the context in which consumption takes place, the bone may still be unexpected by the reasonable consumer, who will not be able to avoid injury, thus rendering the product not reasonably safe." Comment b to Rest. 3d (Prod. Liab.) §7.

H. Warning: A product may be held to be defective and unreasonably

dangerous partially because it does not carry an ***adequate warning*.**

1. **Negligence aspects:** While failure to give an adequate warning is sometimes treated as giving rise to strict liability, it has strong overtones of negligence (i.e., would a reasonable person give a warning, and if so, what would she say in the warning?). The duty to warn is therefore discussed in a separate section, where both negligence and strict liability aspects are treated. See *infra*, p. 381.

I. Obvious dangers: Suppose the product's dangerousness is ***obvious*** to the consumer. Does this very obviousness itself prevent the product from being defective? Courts have struggled mightily with this question. The answer has usually depended on just how the court defines "defect."

1. **Second Restatement's "consumer expectation" standard may bar recovery:** Many courts follow the Second Restatement's approach to meaning of "defect," and that approach makes it hard to recover for an obvious danger. Under Rest. 2d §402A, a product is defective if, considering its reasonably foreseeable use, it is in an unreasonably dangerous condition "not contemplated by the ultimate consumer." Rest. 2d §402A, Comment g; see also Dobbs, p. 981. If that ultimate consumer can easily see that the product is dangerous in a particular way, the manufacturer has a strong argument that the product is not defective under this definition. And, indeed, many courts following the "consumer expectations" test have held that a danger that is obvious to any reasonable consumer cannot constitute a defect.

   Example: To virtually any adult member of American society today, cigarettes are obviously dangerous, in that they cause cancer, heart disease, etc. Therefore, a court following the "consumer expectations" test might well reason that regardless of whether a safer version of the ordinary cigarette might be designed, the standard version produced today cannot be defective because its dangers are well-known. See Dobbs, p. 983.

2. **Third Restatement's approach:** The tendency of the consumer-expectations test to make obviousness a fatal bar to recovery has been much criticized, especially in design cases. In a design case, the consumer may know of the product's dangers, but not necessarily know that there are safer alternatives; in this situation, "the consumer's ignorance of safer designs hardly seems like a good reason to deny liability if a safer design is in fact cheap and useful,

but the consumer expectation test has been used in just that way." Dobbs, p. 983. Therefore, the Third Restatement takes a different approach, in which obviousness is ***merely one, non-dispositive, factor*** on the issue of defectiveness. That Restatement's handling of the obviousness problem varies depending on whether the defect is a defect in manufacturing, design or warnings.

a. Manufacturing defects: The problem of obvious defects will rarely matter in the case of a ***"manufacturing"*** defect, under the Third Restatement. A product contains a manufacturing defect "when the product departs from its intended design," (§2(a)) and that seems to be so even if the departure is or should be obvious. (However, in a jurisdiction applying comparative fault, plaintiff's recovery might be reduced on account of her failure to notice an obvious defect. See Rest. 3d (Prod. Liab.) §17, Comment d.)

b. Design defects: It is in design-defect cases that the Third Restatement's handling of the obviousness problem is most likely to be different from the Second Restatement's consumer-expectations test. The comments to the Third Restatement's definition of design defects say that the definition "does not recognize the obviousness of a designrelated risk as precluding any finding of defectiveness. The fact that a danger is open and obvious is ***relevant*** to the issue of defectiveness, but ***does not necessarily preclude a plaintiff*** from establishing that a reasonable alternative design should have been adopted that would have reduced or prevented injury to the plaintiff." Comment d to Rest. 3d (Prod. Liab.) §2.

Example: Suppose that P smokes cigarettes made by D for 20 years, then gets lung cancer as a result. Under the Third Restatement approach, even if D can show that at all times P knew that cigarettes frequently cause lung cancer, P would not necessarily lose on the issue of whether the cigarettes were defective. For instance, suppose P can show that D knew that a cigarette with satisfactory taste could be developed that would be much less likely to cause cancer and that could be manufactured for the same price. If so, under the Third Restatement P might be able to convince the court that D's standard cigarettes were defective despite the obvious risk they posed.

c. Failure to warn: In ***failure-to-warn*** cases, by contrast, even under the Third Restatement the obviousness of the danger makes it very likely that the lack of a warning will ***not*** constitute a defect. The

Restatement commentary says that "in general, a product seller is ***not*** subject to liability for failing to warn or instruct regarding risks and risk-avoidance measures that ***should be obvious to, or generally known by, foreseeable product users."*** Comment j to Rest. 3d (Prod. Liab.) §2. The comments explain that warnings of an obvious or generally known risk "will not provide an effective additional measure of safety," and may even have the bad consequence of "diminish[ing] the significance of warnings about non-obvious, non-generally-known risks." *Id.*

i. **Cigarette suits:** One context in which the duty to warn of arguably obvious dangers arises is that of ***cigarettes.*** For years, smokers have been suing the tobacco companies, arguing that cigarettes are defective. Many of these suits have been brought on a failure-to-warn theory, and the industry has defended them by asserting, among other things, that the dangers were obvious, and that product-label warnings were in any event adequate. Since the beginning of the 21st century, however, the tobacco industry has not infrequently lost or settled these failure-to-warn suits.

J. Proving the case: The plaintiff in a strict liability case must prove a number of different *prima facie* elements. The things she must prove are not very different from those she would have to prove in a negligence case, particularly a negligence case relying on *res ipsa loquitur*. It is true that the plaintiff does not have to prove that the manufacturer (or retailer) failed to exercise due care, but she must still establish the following elements, each of which we'll consider in more detail:

☐ that the item was ***made or sold by the defendant;***

☐ that the product was ***defective;***

☐ that the defect ***caused*** the plaintiff's injuries; and

☐ that the defect ***existed*** when the product ***left the defendant's hands.***

1. **Manufacture or sale by defendant:** The plaintiff must show that the item was in fact manufactured, or otherwise placed in the stream of commerce, by the defendant. (Strict liability applies to anyone in the business of selling goods of the type in question, whether or not she is the manufacturer — see *infra*, p. 391.)

2. **Existence of defect:** The plaintiff must show that the product was ***defective;*** the difficulties of showing this are discussed above, and also in the treatment of design defects *infra*, p. 372.

   a. **Subsequent remedial measures:** To prove that the product was defective, particularly in cases of alleged design defect, the plaintiff will often try to show that the defendant subsequently ***redesigned*** the product to make it safer. Most courts apply a general rule that such evidence is ***inadmissible*** to prove the defectiveness, on the grounds that to allow it would discourage manufacturers from doing such redesigning. This rule developed in negligence cases, prior to the adoption of strict liability.

      i. **Refusal to apply to strict liability:** The California Supreme Court, in a strict liability case, refused to apply a statute barring such redesign evidence, holding that the statute was intended to apply only to negligence cases. *Ault v. International Harvester Co.*, 528 P.2d 1148 (Cal. 1975).

      ii. **Admissible to show cost:** Other courts have held that despite the general rule against such evidence, the fact that the defendant made a redesign can be admitted for the limited purpose of rebutting the defendant's argument that the product is not "defective" because to remove the danger would be unduly costly, and the product is really therefore "unavoidably unsafe". Thus in *Incollingo v. Ewing*, 282 A.2d 206 (Pa. 1971), a case alleging that a drug manufacturer failed to give an adequate warning of the dangers of its drug, the plaintiff was permitted to introduce the fact that subsequent packaging contained a more detailed warning, for the limited purpose of showing that the increased warning "was not costly or burdensome to [the defendant] in relation to the risk or danger involved."

   b. **Res-ipsa-like inference:** When P is trying to prove that there was a defect, she will often get the benefit of a res-ipsa-like inference, if the accident was of a type that usually doesn't occur except on account of a product defect. This inference is discussed further *infra*, p. 370.

c. Toxic torts: In the increasingly-important category of cases called ***"mass toxic torts,"*** it is often especially difficult for the plaintiff to prove that the product was "defective." Here are two examples of fact patterns presenting this problem: (1) the defendant manufactures "Agent Orange," used as a defoliant in Vietnam, and Vietnam Veterans claim that they have gotten cancer years later from ingesting the substance; and (2) the defendant drug manufacturer makes a prescription drug, DES, used by pregnant women, whose children then later claim to have been injured by the drug.

i. Epidemiological proof: Human beings get sick from a wide variety of causes, so it will generally be hard to say that Agent Orange, DES, or some other allegedly toxic substance in fact damages human beings. Controlled experiments on human beings will generally not be possible. Therefore, the plaintiff is left with two possible methods in most instances: (1) she can present the results of animal studies; or (2) she can introduce ***epidemiological*** evidence of defectiveness. Since substances often do not affect animals the same way they affect people, courts and juries take proof based on animal studies somewhat skeptically. Therefore, the plaintiff will often have to show defectiveness by epidemiological studies, which rely on statistical techniques. That is, the plaintiff typically offers expert testimony by an epidemiologist that, say, the daughters of women who took DES in pregnancy have five times the incidence of the cancer adenocarcinoma between the ages of 15 and 30 than do similar women whose mothers did not take the drug. A court is likely to hold that such expert testimony — based not on a showing of *how* the product harms people, but merely on the statistical proof that the condition is more prevalent when the substance is used — is enough to allow the jury to find that the product is "defective."

By the way, two terms — ***"general causation"*** and ***"specific causation"*** — have evolved to differentiate between a substance's tendency to increase the risk of a given illness, and the substance's having caused that illness in a particular individual. Thus the Third Restatement explains that "

'general causation' exists when a substance is ***capable of causing a given disease*** [whereas] ***'specific*** causation' exists when exposure to an agent ***caused a particular plaintiff's disease."*** Rest. 3d (Liab. Phys. & Emot. Harm) §28, Comment c. (See *infra*, p. 371 for more about the general/specific distinction.)

3. Causation: The plaintiff also has to show that the product, and its defective aspects, were the ***cause in fact,*** and the ***proximate cause,*** of her injuries.

a. Rebutting alternative causes: This means that she may have to rebut the defendant's suggestion that alternative events were the sole cause in fact of the accident, or that they were ***superseding causes*** that prevented the defect from being a proximate cause. The issue arises most frequently in the case of the defendant's allegation that the plaintiff, or some third person, was ***negligent.*** However, most courts are quite liberal about letting the plaintiff at least get to the jury on this issue.

Example: P accidently tries to start his Oldsmobile by turning the ignition while the automatic transmission selection lever shows "drive"; the car starts, leaps forward, and injures P and his family. P sues the manufacturer of the automobile, GM. At trial, he produces an expert who testifies that, after the accident, he tested the car and found that it would start in the "drive" position, and that the front wheels accelerated almost immediately.

Held, the jury could properly find that the car did indeed start in the "drive" position, and that this was a defect which existed at the time of manufacture. The trial judge's direction of the verdict for the defendant was therefore erroneous. *Friedman v. General Motors Corp.*, 331 N.E.2d 702 (Ohio 1975).

b. Intervening acts: In determining whether an ***intervening act*** is superseding or not, the courts seem to be applying pretty much the same rules in strict liability cases as in negligence ones. Thus if the occurrence of the intervening act is reasonably foreseeable, or it is unforeseeable but causes the same type of harm as made the product dangerous, the intervention will probably not be superseding. See Prod. L. Nut., p. 250.

i. Slightly stricter test: However, because strict liability does not depend on any fault by the defendant, the courts may be

slightly quicker to find a superseding cause than in negligence cases, particularly where that cause is the ***negligence or recklessness of the plaintiff or a third person.***

ii. **Misuse of product:** Negligence by the plaintiff or a third person may also provide the defendant with an argument that the product was "misused", and therefore not defective at all. This defense is discussed *infra*, p. 403.

c. **"Toxic" torts:** Causation is especially important in one category of cases, those involving a plaintiff's claim that exposure to a ***toxic substance*** made or sold by D caused a disease or illness in plaintiff. Such "toxic torts" frequently require the plaintiff to use epidemiological proof of causation. For more about such proof, see *infra*, p. 370.

4. **Defect existed when in hands of defendant:** As a final element of proof, the plaintiff must show that ***the defect existed at the time the product left the defendant's hands.*** In the case of a suit against a manufacturer, where the product has gone through several intermediate suppliers and has then been used for a time by the plaintiff before the accident, this can be a very hard thing to do.

a. **Lenient courts:** But here, as in the case of showing that a defect was the proximate cause of the accident, the courts are frequently lenient to the plaintiff. For instance, in *Friedman, supra,* testimony by the dealer who had sold plaintiff the car to the effect that no one had adjusted the transmission after the car left the factory, and plaintiff's own testimony that he had never tried to start the car in "drive" (thus affording no opportunity to discover the defect) were enough to allow the jury to conclude that the defect existed when the car left the factory.

b. ***Res ipsa* inference:** In many strict liability cases, an inference similar to that of ***res ipsa loquitur*** is permitted. That is, from the fact that the product did not behave in the usual way, plus evidence that the accident was of a kind that usually happens as the result of a product devect, plu general evidence that no one tampered with the product after it left the defendant's hands, the jury may be allowed to conclude that the product was defective, and that the

defect existed when the goods left the defendant's hands.

i. **Third Restatement agrees:** The new Third Restatement agrees that juries should be allowed to make this res-ipsa-like inference. Rest. 3d (Prod. Liab.) §3, entitled " Circumstantial Evidence Supporting Inference of Product Defect," says that "It may be ***inferred*** that the harm sustained by the plaintiff was caused by a product defect existing at the time of sale or distribution ... ***without proof of a specific defect,*** when the incident that harmed the plaintiff: (a) was of a kind that ***ordinarily occurs as a result of product defect;*** and (b) was **not,** in the particular case, solely the result of ***causes other than product defect*** existing at the time of sale or distribution." This section functions in a way that is almost perfectly analogous to *res ipsa:* P is relieved from proving the specific defect as long as she shows that the accident is one that would ordinarily not happen without a defect, and there is no affirmative evidence pointing to other causes.

Example: The Restatement gives this example: P buys a new car and drives it 1,000 miles without incident. When she is stopped at a red light, the seat suddenly collapses backwards, causing P to hit the accelerator, so that the car is propelled into traffic and hit by another car. The collision causes a fire that consumes the seat assembly. On these facts, the Restatement asserts that "the incident resulting in the harm is of a kind that ordinarily occurs as a result of product defect," and then concludes that consequently, P does not need to establish that the seat assembly contained either a manufacturing defect or a design defect. Rest. 3d (Prod. Liab.) §3, Illustr. 3.

K. Epidemiological proof: In ***mass toxic tort*** cases, it is likely to be especially difficult for the plaintiff to prove that the substance made by the defendant was the ***cause in fact*** of the plaintiff's injuries. As with respect to proving whether the product was "defective" at all *(supra,* p. 367), the plaintiff is likely to use ***epidemiological*** evidence in an attempt to show that the substance made by the defendant was the cause in fact of the plaintiff's own particular injuries. First, of course, P must show she used a substance made by D. Then, if P can find an expert epidemiologist to testify that a particular medical condition is, say, 10 times as likely to occur when a person uses the defendant's product than where she does not, the court may permit the jury to infer that this evidence, if believed, sufficiently establishes cause in fact.

1. **Victories by defendants:** Conversely, if the plaintiff cannot come up with epidemiological evidence in her toxic tort case, or if the defendant's evidence is more convincing, the defendant may well prevail even though the plaintiff used the defendant's product and got very sick. For example, many cases have been brought against Merrell Dow Pharmaceuticals alleging that the anti-nausea drug Bendectin, made by Merrell Dow, when taken during early pregnancy, causes birth defects. Yet, Merrell Dow has won the vast majority of these cases, because plaintiffs have been unable to come up with credible epidemiological evidence that the children of women who took the drug early in pregnancy have materially more birth defects than those who did not. More and more frequently, courts will even overturn a jury verdict for the plaintiff, on the grounds that the plaintiff's expert epidemiological testimony was not credible.

   a. **Victory by plaintiffs:** But it is now somewhat easier than before for a plaintiff to prove that the defendant's product was the cause in fact of the plaintiff's injuries, at least in federal cases. In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S.Ct. 2786 (1993), a Bendectin case, the Supreme Court ***lowered the standard*** for epidemi-ological and other scientific evidence when used in federal trials. According to *Daubert,* a scientific theory ***need not be "generally accepted" to be admissible,*** and even the fact that the theory or evidence has never been published or peer reviewed is not fatal — so long as the evidence is, loosely speaking, "scientific knowledge," in the sense that it has been or is capable of being "tested," it may be admitted. See the fuller discussion of *Daubert*, *supra*, p. 147.

2. **General causation used to prove specific causation:** Exactly how does epidemiological evidence work to establish "cause in fact"? Before we analyze this question in detail, recall (see p. 368) the terms ***"general causation"*** and ***"specific causation"*** — general causation is a substance's tendency to increase the general incidence of a given disease, and specific causation is the substance's having caused plaintiff's own disease. Courts normally require ***proof of specific causation*** as part of the plaintiff's prima facie case. However, if plaintiff's only direct proof on the causation issue is proof of general

causation, courts will nonetheless permit the jury to infer specific causation if the proof of general causation is sufficiently strong, so long as there is also some evidence that the plaintiff was actually exposed to the agent.

3. **The "doubling" rule:** So how much proof of general causation ought to be required before the jury will be permitted to infer specific causation? That is, how much must the agent be shown to have raised the general incidence of the disease before the jury will be permitted to infer, if it wishes, that the agent caused the plaintiff's own disease? Many courts have imposed the so-called ***"doubling rule":*** the jury will be permitted to infer specific causation if and only if P shows that the agent ***more than doubles the incidence of the disease*** in the population as a whole. These courts reason that without a doubling, it is not "more likely than not" (the relevant preponderance-of-the-evidence standard) that the agent caused P's particular disease.

   a. **Criticism of the doubling rule:** But the doubling rule has been heavily ***criticized.*** Indeed, the Third Restatement explicitly ***rejects*** the doubling rule, stating that depending on other factors (like whether P has been exposed to other agents that also increase the risk of the disease in question) "an increase of the incidence of disease ***less than a doubling may be sufficient*** to support a finding of causation, while in another case, even an ***increased incidence greater than two may not be sufficient."*** Rest. 3d (Liab. Phys. & Emot. Harm) §28, Comment c(4).

L. Bystanders and other non-user plaintiffs: Any *person who is injured* due to a dangerously defective product may recover, even if the plaintiff never bought the product. Thus ***family members of buyers, bystanders,*** even ***rescuers,*** may all recover if their injuries are proximately caused by the defect in the product. As the idea is sometimes put, ***"privity"*** is ***not required*** for strict product liability.

> **Example 1:** Consumer buys a car from Dealer. The steering wheel fails due to a manufacturing defect, causing the car to swerve and hit Ped, a pedestrian walking on the sidewalk. Ped can recover from Dealer in strict product liability, because his physical injuries were proximately caused by a defective product sold by Dealer. The fact that neither Ped nor any member of his family ever purchased the product in question doesn't matter.

Example 2: X buys a sport parachute from SportsStore, a sporting goods retailer. Due to a manufacturing defect, the parachute opens 2 seconds too late during a sky dive by X. X hits the ground in a remote mountainous location and breaks his leg. (He would have landed on the target, and with no injury, had the chute opened on time.) P, a paramedic, hikes with two others into the mountains to rescue X. While doing so, he falls into a crevasse and is injured.

P can recover from SportsStore in strict product liability — the defect in the product sold by SportsStore proximately caused P's injury (it was reasonably foreseeable that a parachute's failure to operate properly due to defective manufacture would cause a rescue effort in which the rescuer might be injured), so the fact that P wasn't a user, and wasn't injured directly by the product, won't matter. Nor will it matter that SportsStore had no way to know of the existence of the defect.

IV. DESIGN DEFECTS

A. Design defects distinguished from manufacturing ones: There are two fundamental kinds of product defects. One might be termed a "manufacturing defect"; this is the case where the particular item that injures the plaintiff is different from the other ones manufactured by the defendant, because something went wrong with the manufacturing process. For instance, the defective spokes in *MacPherson v. Buick, supra*, p. 349 and the defective steering gear in *Henningsen, supra*, p. 354, are manufacturing defects.

1. Design defect defined: The other major kind of defect is usually called a ***"design defect":*** All of the similar products manufactured by the defendant are the same, and they all bear a feature whose design is itself defective, and unreasonably dangerous.

B. Aspects of negligence: Most design defect claims have heavy negligence aspects, even though they may be couched in strict liability terms. Normally, the manufacturer either is actually, or should be, aware of the safety attributes of his design. The manufacturer of a power mower, for instance, which does not have a guard shielding the user's foot from the blade, ought to be aware of the potential for harm. A suit against that manufacturer, therefore, whether phrased in negligence or strict tort, would involve substantially identical issues, i.e., whether the defendant chose a design that posed an unreasonable danger to the plaintiff, in view of the burdens of using some other design (e.g., a full guard).

1. Alternative tests: Both California and New Jersey, in fact, apply a

combined negligence and strict liability test for design defects. There will be a design defect if ***either*** (1) the design's dangers ***outweigh its utility*** (negligence or risk-utility analysis) or (2) the design does not perform ***as safely as a reasonable consumer would expect,*** when used for an intended or reasonably foreseeable purpose (strict liability or "consumer expectations" test, see *supra* p. 360). *See Barker v. Lull Engineering Co., Inc.*, 573 P.2d 443 (Cal. 1978) (also discussed *infra*, p. 378), and *O'Brien v. Muskin*, 463 A.2d 298 (N.J 1983).

a. "Consumer expectations" test: The ***"consumer expectations"*** test, as set out by the *Barker* court, is noteworthy for two reasons. First, it defines the "defectiveness" of a design in terms of the ***consumer's expectations;*** a product is defective if it fails to perform as safely as an ordinary consumer would expect. Secondly, the issue is the safety of the product when used ***either*** in the intended way or in a ***"reasonably foreseeable"*** way. Thus where the use ought to have been reasonably foreseen by the manufacturer, the manufacturer cannot defend on the ground that that use was not the "intended" one.

C. Third Restatement's approach: The Third Restatement adopts a ***risk-utility test*** as the ***sole*** test for defective design. Because the Third Restatement approach has already had considerable influence in the few years since its publication, we consider it in some detail here.

1. Text of definition: The Third Restatement defines a product as being "defective in design" "when the ***foreseeable risks of harm posed*** by the product ***could have been reduced or avoided by the adoption of a reasonable alternative design*** by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the alternative design ***renders the product not reasonably safe."*** Rest. 3d (Prod. Liab.) §2(b).

2. Based on negligence: You can see that this definition is essentially a negligence-like, ***risk-utility-balancing,*** standard: the "foreseeable risks of harm" posed by the defendant's design are to be measured against a "reasonable alternative design" that could have been used.

a. Represents trend away from strict liability: This emphasis on negligence represents a ***trend*** in design-defect cases. "Recent years

have seen a shift, reflected in the [Third Restatement] and in some case law, ***away from strict liability for design defects."*** Dobbs & Hayden (5th), p. 729.

3. **The "reasonable alternative design" (RAD):** Ordinarily, the plaintiff will have to prove that there indeed existed a ***"reasonable alternative design"*** (we'll abbreviate it ***"RAD")*** that would have been materially safer. (There are a couple of quasi-exceptions which we'll discuss below.) This is a necessary but not sufficient condition to plaintiff's recovery: the plaintiff loses if she doesn't show the existence of an RAD, but does not necessarily win even if she does show an RAD (she still has to show that the existing design is so unsafe that failure to use the RAD "renders the product not reasonably safe").

   a. **What P must prove:** It's not clear just how specific the plaintiff's proof of an RAD must be. The comments to the Restatement say that it "does ***not*** . . . require the plaintiff to produce a ***prototype*** in order to make out a prima facie case." Comment f to Rest. 3d (Prod. Liab.) §2. So probably fairly ***general*** evidence about how the product could have been made safer will usually suffice.

      i. **Other products' safety features:** One of the best ways for plaintiff to show the existence of a reasonable alternative design, of course, is for her to show that ***similar products*** from ***other manufacturers*** already have such an alternative design.

      Example: Suppose that P is badly injured in a car accident, when the car she is driving hits a barrier and rolls over; the roof crumples, crushing P's skull. P's claim against the manufacturer, D, is based on the theory that it is foreseeable for cars to roll over in collisions, and that a safer design would be one that included crash-resistant "roll bars" embedded in the roof. If P can show that many cars of the same general price, type and model year as P's have such an embedded roll bar, this showing will probably meet the requirement of a reasonable alternative design.

      ii. **Cost and utility:** It is clear that the ***cost*** and ***utility*** of the RAD proposed by the plaintiff are to be considered. If using the RAD would result in a doubling of the price of the whole product, for instance, that fact weighs heavily against a conclusion that the RAD is indeed a "reasonable alternative." Similarly, if the safety feature that the RAD contains causes

the product to be much less useful to the category of users at whom the original product was aimed, this, too, will weigh heavily against a finding that the alternative is reasonable.

Example: D, a manufacturer of bullet-proof vests for law-enforcement, offers two models. Model A covers only the back and front of the wearer's torso, and costs $200. Model B covers not only the wearer's back and front, but also his side, and costs $400. Model A weighs three lbs, and is sufficiently flexible that the wearer can easily run and twist his torso. Model B weighs seven lbs., and makes it hard for the wearer to either run or twist. P, a police officer, is severely wounded when he is shot in the side while wearing a Model A vest. He sues D on a defective-design theory, arguing that Model B is a reasonable alternative design whose mere existence demonstrates that Model A is defective and unreasonably dangerous in its failure to provide side cover.

A court following the Third Restatement approach would almost certainly conclude that P has *not* demonstrated that Model A is defective. Model B's much greater cost and weight, and its reduction of the wearer's mobility, prevent it from being a reasonable alternative design whose mere existence renders Model A defective and unreasonably dangerous. Cf. Rest. 3d (Prod. Liab.) §2, Illustr. 10 (based on similar though not identical facts).

iii. Consumer choice: When the reasonable-alternative-design analysis is carried out, the court will pay attention to the ***value of consumer choice*** — the fact that some other design might appeal more to *some* consumers on a cost-benefit analysis does not mean that the design under litigation is defective, because consumers don't all agree on the package of benefits and costs that they find most desirable. For instance, on the facts of the above Example, even though some police officers might prefer Model B on the theory that the greater safety is worth the extra cost and weight, other officers might still conclude that Model A is a better deal. As the Third Restatement says in its commentary on an illustration whose facts are similar to the above Example, "[t]o subject sellers to liability based on [the more expensive and cumbersome] design would unduly restrict the range of consumer choice among products." *Id.*

4. Consumer-expectation test not dispositive: Under the Third Restatement approach, ***consumers' expectations*** are a factor, but ***not a dispositive one,*** in determining whether a design is defective. The ultimate test is the risk-benefit analysis. The fact that the product does

or does not meet "reasonable consumer expectations" is certainly a factor in the court's assessment of whether the product's risks so outweigh its benefits, compared with alternative possible designs, that the product should be regarded as defective. But the mere fact that most consumers find a particular product to meet their expectations certainly does not preventing a finding that, say, a particular safety feature (which the average consumer may never have thought about) could have provided so much benefit at so little cost that its absence makes the product defective. See Comment g to §2 (design-defect definition "rejects conformance to consumer expectations as a defense").

a. Significance: So under the Third Restatement, even if a product does exactly what it was intended to do — and exactly what a reasonable consumer would expect it to do — a plaintiff who is injured when the product does what it is expected to do might still recover.

i. Guns as illustration: The design of ***firearms*** provides a good illustration of how the Third Restatement prevents satisfaction of the consumer's expectations from giving an automatic defense to the manufacturer.

Example: Suppose that handguns can be equipped with any of several readily-available devices that would make the gun more child-resistant, such as a heavy trigger pull and/or a child-resistant manual safety. Suppose further that D chooses to manufacture the Model A revolver, which has none of these child-safety features, and which is designed for the "home self-defense in emergencies" market, where a gun's ability to be easy-to-fire at all times is "a feature, not a bug." Assume that P, a young child of the gun's owner, shoots himself.

Under the pure consumer-expectation test, as long as D can demonstrate that any reasonable consumer who read the Model A's packaging and bought the gun would know that it did not have any child-resistant features, D would be entitled to an automatic dismissal — the gun does what a reasonable consumer would expect it to do (fire easily), and that would be the end of the matter. But under the Third Restatement's risk-utility standard, D would probably *not* get the automatic dismissal — P would still be able to prove that the gun was defective (by showing that the utility of including child-resistant features outweighed the risks or burdens from including such features), even though the gun matched reasonable consumer expectations.

(1) Rejected by some courts: The Third Restatement's rejection

of the defendant's right to argue that satisfying consumer expectations automatically makes the product non-defective has itself been ***rejected*** by a number of courts, including at least one court in the handgun context. See *Halliday v. Sturm, Ruger & Co.*, 792 A.2d 1145 (Md. 2002) (D markets a pistol without certain child-proofing features like a heavy trigger-pull; court continues to apply the "consumer expectations" test, under which D has no design-defect liability because an ordinary consumer who bought the gun would expect that it would lack these child-proofing features).

5. **"State-of-the-art" defense allowed:** Notice that because of the Third Restatement's focus on the availability of a reasonable alternative design, the so-called ***"state-of-the-art"*** defense is in effect ***recognized.*** That is, if the defendant can show that at the time the product was manufactured, the state of the art did not allow for production of a safer product at an acceptable price, the product will be found to be non-defective.

   a. **Safest on market at the time:** In fact, even if the defendant merely makes a lesser showing — that the product design it used was the safest ***actually being sold at that time*** — this lesser showing will probably, though not necessarily, be enough to demonstrate that the product was not defective. As the Restatement commentary says, "When the defendant demonstrates that its product design was the safest in use at the time of sale, it may be difficult for the plaintiff to prove that an alternative design could have been practically adopted. The defendant is thus allowed to introduce evidence with regard to industry practice that bears on whether an alternative design was practicable." Comment d to Rest. 3d (Prod. Liab.) §2.

      i. **Not dispositive:** But such evidence that no other product was safer is ***not dispositive.*** "If the plaintiff introduces expert testimony to establish that a reasonable alternative design could practically have been adopted, the trier of fact may conclude that the product was defective notwithstanding that such a design was not adopted by any manufacturer, or even considered for commercial use, at the time of sale." Id.

6. **Strict liability for reseller:** When a defective-design suit is brought against the manufacturer, the suit is not really in strict liability if the Third Restatement's approach is used — the Restatement's focus on risk-utility and foreseeability mean that negligence standards are really being used. But when the suit is against a ***distributor*** or ***retailer,*** there *is* in a sense strict liability against that reseller. That is, the reseller's liability will depend on whether the manufacturer (not the reseller) failed to achieve a good risk-utility trade-off in designing the product.

   Example: Suppose that Pete buys a hot water heater from a Sears store. The heater was manufactured by Heatco, sold by Heatco to Distribco, a distributor, and then sold by Distribco to Sears. If Pete is injured by the heater and brings a suit based on Third Restatement principles against Sears, Sears will in effect face strict liability, because whether it is liable will not depend at all on its own conduct. Instead, Sears' liability will depend on whether Heatco, in designing the heater, failed to use an alternative reasonable design that would have been materially safer. (But if Sears is held liable, it will be entitled to indemnity from Heatco. See *infra*, p. 391).

D. Types of design defect claims: Most cases claiming design defects fall within three general categories, which sometimes overlap: (1) structural defects; (2) absence of safety features; and (3) suitability for unusual purposes. We'll discuss each of these in turn immediately below.

E. Structural defects: The plaintiff may be able to show that because of the defendant's choice of materials, the product has a ***structural weakness,*** which caused it to break or otherwise become dangerous. A chair built out of lightweight materials, for instance, which is likely to collapse whenever a person of more than average weight sits on it, might be held to be structurally defective.

1. **Test:** The test is usually whether the product is less durable than a reasonable consumer would expect, taking into account, among other things, the price of the product. A $10 chair would not have to have the same durability as a $100 one, in order to avoid structural defectiveness.

   a. **Length of product's life:** A related question is ***how long the product should last*** before breaking. It is often said that the seller does not undertake to provide a product which will never wear out. But if it wears out too quickly, in relation to its cost, it may be held defectively undurable.

2. **Most durable design not required:** It must be kept in mind that the defendant's obligation is not to provide the ***most*** durable design, but simply one which is not unreasonably flimsy.

F. Lack of safety features: It may be the case that a ***safety feature*** could be installed on a product with so little expense, compared with the cost of the product and the magnitude of the danger existing without the feature, that it is defective design not to install it.

1. **Defenses:** The defendant to such a claim often attempts to show that competitive products similarly lack the safety feature, that the feature would be unduly expensive to install, or that it would prevent the product from being put to its intended use. At least the latter two defenses are often successful.

   a. **As safe as competition's product:** But more and more courts are refusing to allow the defendant's showing that his design was ***as safe as the competition's*** to be a complete defense. Such courts often point to Judge Hand's statement in *The T.J. Hooper*, *supra*, p. 107, that custom is not dispositive on the issue of negligence because an entire industry may have lagged in the installation of safety devices. This principle seems equally applicable to strict liability claims.

   b. **Restatement view:** The Third Restatement agrees that the fact that no safer product is on the market is not dispositive — plaintiff always has the opportunity to convince the trier of fact that a reasonable alternative design, containing the safety feature in question, was practicable. See the discussion of the "state of the art" defense *supra*, pp. 376-376.

2. **Obvious defects:** The defendant may also contend that she had no obligation to install a safety device because the danger was ***"obvious."*** It is true that the obviousness of the danger may be a factor bearing on the degree of danger, and hence the need for protection (since a concealed danger is, all other things being equal, more likely to cause harm than an obvious one against which the plaintiff can protect himself).

   a. **Not dispositive:** But most courts now generally ***reject*** any *per se*

rule automatically eliminating the need for protective devices to guard against an obvious defect.

b. Restatement agrees The Third Restatement agrees that the "obviousness" of the design danger is not dispositive. See *supra,* p. 366.

3. Subsequently discovered precaution: What if no economically sensible safety feature exists at the time the product is manufactured, but one has been found by the time of trial? Most courts would probably allow proof of the post-manufacture solution as evidence of a feasible alternative. But the question is clearly "Was the original design reasonably safe ***as of the time of manufacture and sale to plaintiff?"*** Consequently, the manufacturer may show that the alternative was not in use at that time as evidence that that alternative was not yet feasible.

G. Suitability for unintended uses: Suppose a product's design poses no unreasonable dangers when the product is used for the use intended by the manufacturer, but does pose such danger when the product is put to ***some other use.*** Does the manufacturer have any duty at all to guard against the dangers from such uses?

1. Unforeseeable misuse: If the misuse of the product is ***unforeseeable,*** courts generally agree that the manufacturer has no duty to design the product so as to protect against it.

a. Third Restatement agrees: The Third Restatement agrees. To begin with, a design is defective only when "the ***foreseeable*** risks of harm imposed by the product could have been reduced or avoided by the adoption of a reasonable alternative design. ..." Rest. 3d (Prod. Liab.) §2(b). Then, the commentary to this section says that it "impose[s] liability only when the product is put to uses that it is reasonable to ***expect a seller or distributor to foresee.*** Product sellers and distributors are ***not*** required to foresee and take precautions against ***every conceivable mode of use and abuse*** to which their products might be put." Comment m to §2.

2. Foreseeable misuse: But where the "misuse," or other use not intended by the manufacturer, is ***reasonably foreseeable*** by it, most

modern courts require it to take at least reasonable design precautions to guard against danger from that use. See, e.g., *Barker v. Lull Engineering Co., supra,* p. 373.

a. Unreasonable use: However, even if the misuse is somewhat foreseeable, courts may hold that it is so ***unreasonable*** that the mere unreasonableness should result in a finding that the seller had no duty to design against it. See, e.g., Rest. 3d (Prod. Liab.) §2, Comment p ("The post-sale conduct of the user may be so unreasonable, unusual, and costly to avoid that a seller has no duty to design or warn against [it].")

Example: D, a furniture manufacturer, makes the "BarMaster" oak chair. The back of the BarMaster consists of four horizontal wooden bars in the contour of a human back. P puts the back of a BarMaster up against a bookcase, and climbs onto the top bar to reach the highest shelf of the bookcase. The chair tips, and P falls and is injured. P sues D on a design-defect theory, alleging that the chair should have had either enough stability to support him when he stood on it or a different back that would not have permitted him to stand on it. On essentially these facts, the Third Restatement says (and virtually all courts would agree) that P's "misuse of the product is so unreasonable that the risks it entails need not be designed against." Rest. 3d (Prod. Liab.) §2, Illustr. 20.

Note: Notice that the answer to this chair hypothetical does ***not*** turn on the ***unforeseeability*** of the misuse, merely on its unreasonableness: even if D was on notice that people often stand on the backs of the BarMaster, a re-design would almost certainly not be required (though a warning might be).

b. Warning: Whether or not a re-design is required to avoid liability, a ***warning*** against the danger from the foreseeable misuse will often be required. See *infra,* p. 381.

3. Second collision cases: The most common "unintended but foreseeable use" cases involve automobile manufacturers' duty to provide a ***"crashworthy"*** vehicle. The plaintiff's theory in such cases is that, although the manufacturer is of course not liable for a car accident itself, it should be liable for not taking reasonable precautions to minimize the injuries to passengers once the accident occurs. As the idea is sometimes put, the manufacturer should take design precautions against the so-called ***"second collision",*** i.e. the collision between the passenger and the inside of his own automobile following the initial accident.

a. Recent view: The first courts to consider this issue held that the car manufacturer had no such obligation, since collisions were not an "intended" use, and also because there was simply no duty to make a crash-proof car. But most courts that have recently considered the issue have held that the manufacturer ***does*** have an obligation to take reasonable precautions to make the car reasonably safe in an accident.

i. Industry custom: Industry custom (e.g., the fact that all other manufacturers have the same lack of special safety features) is admissible on the question of reasonableness. But the existence of the custom is not dispositive and, indeed, the custom itself may be held to be negligent.

b. Obvious design feature: In determining whether a vehicle is unreasonably unsafe in an accident, it may only be compared with other vehicles of ***similar general type.*** Thus a Volkswagen van, with the engine in the rear and very little metal in front of the driver to absorb the force of a collision, is not defective merely because it is less safe than a typical passenger car which does have a whole engine compartment to absorb the impact of a collision. *Dreisonstok v. Volkswagenwerk, A.G.*, 489 F.2d 1066 (4th Cir. 1974).

i. Obvious danger: Another way of reaching the same result is to say that a design is defective only if it is "hidden", rather than "obvious". Thus almost anyone who thought about the matter would realize that a Volkswagen van will subject its driver and front seat passenger to greater injuries from a head-on collision than would a Cadillac. (But obviousness is not usually an automatic bar to a design-defect claim, merely one factor considered by the court. See *supra*, p. 377.)

4. Contributory negligence defense: The defendant in a "product misuse" claim will, in addition to arguing that he had no duty to guard against misuse, also frequently argues that the plaintiff was contributorily negligent. This defense is discussed *infra*, p. 399.

H. Unavoidably unsafe categories: Normally, when the plaintiff is alleging a design defect, she is implicitly saying to the jury, "There was

a way of designing this product so that it would have been acceptably safe." But a few courts have allowed plaintiffs to say, in effect, "Even if the current design cannot be improved on, the design of the product (perhaps the design of the whole ***category*** of product) is such that its risks outweigh its utility. Therefore, the product should not be sold." A few courts have ***allowed*** plaintiffs to make this kind of argument.

> **Example:** P dives into an above-the-ground plastic swimming pool made by D. When his hands touch the bottom, they slip, and he injures his head. P claims that the vinyl liner making up the bottom of the pool was defective because of its extreme slipperiness. In P's strict liability suit against D, D shows that there was no way to make a less-slippery bottom for above-ground pools.
>
> *Held* (on appeal), a jury could reasonably find that despite the lack of alternative feasible designs, above-ground pools are simply so hazardous that their risk outweighs their utility, so that D's design is "defective." *O'Brien v. Muskin*, 463 A.2d 298 (N.J. 1983).

1. **Third Restatement's view:** The Third Restatement similarly recognizes at least the possibility that a particular product may have such a hazardous design that the design should be deemed unreasonable even if no alternative design containing the same essential features is feasible. The Restatement hypothesizes the case of a toy gun that shoots hard rubber pellets with enough velocity that children are injured. If the realism of the toy gun, and its capacity to cause injury, are viewed as essential product features, then no less-dangerous alternative, by hypothesis, would be available. In that event, the Restatement commentary says, the court could conclude that the design is unsafe and defective even though no reasonable alternative exists. Rest. 3d (Prod. Liab.) §2, Comment e.

I. Military products sold to and approved by government: If a product is ***sold*** to the ***U.S. government*** for ***military use,*** and the government approves the product's specifications, the manufacturer will generally be immune from product liability even if the design is grossly negligent. The Supreme Court so held in *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988), *supra*, p. 305.

1. **Facts:** The application of this immunity is shown by the facts of *Boyle*. P, a U.S. Marine helicopter pilot, was killed when his helicopter (manufactured by D) crashed into the ocean. P survived the impact, but drowned when he was unable to escape from the cockpit;

his estate argued that the escape hatch was defectively designed by D.

2. **Holding:** By a 5-4 vote, the Supreme Court held that states cannot impose liability for design defects in military equipment if: (1) the U.S. approved ***"reasonably precise specifications";*** (2) the equipment ***conformed*** to those specifications; and (3) the supplier warned the U.S. about any dangers in the equipment that were known to the supplier but not to the U.S.

J. Regulatory compliance defense: The "product sold to the government for military use" situation, discussed in the prior paragraph, is actually a sub-problem of a more general issue: should the fact that the manufacturer has ***complied with federal or state regulations*** governing the design of the product absolve it of faulty-design liability? The traditional common-law answer is ***"no"*** — regulatory compliance is an item of evidence that the jury may consider, but it is not dispositive.

1. **Labeling:** Most often, the issue arises in connection with federal ***labeling*** requirements. That is, Congress requires that some substance (cigarettes, drugs, alcohol, etc.) be labeled in a particular way. P then brings a suit for failure-to-warn *(infra,* p. 381), and argues that even though the product bore a congressionally-mandated warning, the jury should be free to find that a greater warning was required. The general rule is that unless Congress ***intended*** to ***preempt*** the states from requiring stricter or different warnings, the defendant's compliance with the federal labeling requirement does ***not immunize the defendant*** from failure-to-warn liability. This topic is discussed *infra,* p. 408.

2. **Design or manufacture:** Where the government regulation relates to ***design*** or ***manufacture,*** rather than to labelling, the general rule is the same: in most states, the manufacturer can show compliance as an ***item of evidence,*** but the jury is still free to conclude that the defendant should have used an alternative, safer design. Thus an airplane manufacturer whose design meets FAA standards, for instance, is probably not immune from a claim that a safer design was required.

3. **Restatement makes compliance non-dispositive evidence:** The Third Restatement ***agrees*** with the prevailing rule that ***compliance***

with government regulation does not preclude liability for design defects. See Rest. 3d (Prod. Liab.) §4(b): "A product's compliance with an applicable product safety statute or administrative regulation is ***properly considered*** in determining whether the product is defective with respect to the risks sought to be reduced by the statute or regulation, but such compliance ***does not preclude as a matter of law*** a finding of product defect."

4. **Statutes:** Several states have enacted statutes making regulatory compliance a defense, either generally or in specific contexts. For instance, New Jersey has such a statute for FDA-approved drugs and drug labels. See N.J. Code §2A:58C-4.

5. **Preemption:** Even under the traditional common law rule disallowing a regulatory-compliance defense, a court may still find that a federal regulation has ***preempted*** the alternative design that the plaintiff argues should have been used. Preemption is discussed more fully *infra*, p. 405.

V. DUTY TO WARN

A. How the duty to warn may arise: The presence or absence of a ***warning*** as to the possible dangers of a product may have a great bearing on whether the product is "defective" or "unreasonably dangerous," as may the quality of the ***directions for use*** given by the manufacturer.

1. **Negligence aspects predominate:** However, in determining what warnings or instructions are needed, a predominantly negligence standard is usually used, as in the case of what kind of a design is adequate (see *supra).* We discuss the negligence aspect of the duty to warn *infra,* p. 383.

B. Significance of duty to warn: The "duty to warn" is essentially an ***extra*** obligation placed on a manufacturer. In other words, a manufacturer who has otherwise produced a defective product cannot render the product un-defective by giving an adequate warning. On the other hand, a product that is not defectively designed and not defectively manufactured may nonetheless be treated as "defective" if warnings are required for its safe use, and those warnings are not given. To see how

the "duty to warn" works in a general sense, let's consider three alternative scenarios:

1. **Manufacturing defect:** First, consider the product that is ***defectively manufactured.*** That is, a particular ***instance*** of the product has a defect not shared by the other copies made by the defendant, and this manufacturing deviation causes P's injury. In this situation, ***no warning can save D from strict liability.***

   Example: D, a soup manufacturer, knows from its own quality control inspections that about one in one million cans of soup produced by it will have a small piece of glass in the soup. By spending much more money on new equipment, D could eliminate this risk of glass, but it has chosen not to do so, because it cannot afford that expense. Instead, D puts on every can of soup the following warning, in big and bold letters: "There is a .0001% chance of glass or other foreign objects in this can of soup." P happens to be the unlucky one who buys the one-in-a-million can, and cuts her gums on hidden glass.

   P will be able to recover in strict liability against D, despite D's warning — since the defect here is a manufacturing defect (i.e., D has failed to make every can of soup match the "standard" can), D's warning will be of no avail to it. (If no amount of money today could eliminate this risk, D might be able to argue that the product was "unavoidably unsafe," but this argument has rarely been accepted outside of the prescription-drug context.)

2. **Design defect:** Now, consider a product whose ***design*** is defective. Here, too, a warning ***will almost never shield D*** from product liability.

   Example: D designs a low-cost toaster. One of the ways D saves money is by not insulating the wires coming out of the toaster. The toaster retails for $7, whereas the cheapest properly-insulated toaster sells for $14. The toaster contains a large, bold warning, "To keep this toaster affordable, we have failed to insulate the wires coming out of it. Use rubber gloves when you plug in this toaster, and don't step in any water while touching the appliance." P fails to follow these directions, and is electrocuted. P shows that a conventional toaster (with insulation) would not have given P a shock. The warning will not save D from product liability.

   a. **Restatement agrees:** The Third Restatement agrees that a warning will not shield D from liability for a defective design. See Comment l to Rest. 3d (Prod. Liab.) §2 ("Warnings are not, however, a substitute for the provision of a reasonably safe design.")

3. **Properly manufactured and designed product:** Now, consider the third category, the only one in which the giving of a warning might

shield the maker from liability. This is the category where the product is ***properly designed,*** and ***properly manufactured.*** If, despite the proper manufacture and design, there remains a ***non-obvious*** risk of personal injury, the defendant will be liable if he does not warn. Similarly, if a reasonable consumer might ***misuse*** the product in a foreseeable way, ***instructions concerning correct use*** must be given, and D will be liable if these instructions are not given.

Example 1: DES is a drug given to prevent nausea in pregnant women. D, the manufacturer, knows (or should know based on the state of science at that time) that there is a small risk that the fetus will be born with birth defects caused by DES, if DES is taken early in the pregnancy. D does not put, either on the product itself, or in material furnished to doctors, any warning of this risk. P, whose mother takes the drug in early pregnancy, is born without limbs.

Even though the particular pills taken by D's mother were not manufactured defectively (i.e., they were the same as all other DES pills), and even though DES could not have been designed any differently (that is, the particular chemical compound that produces the anti-nausea effect inevitably produces some birth defects), D will be liable for its failure to warn of these risks.

Example 2: D manufactures lawn mowers. D's lawn mowers are all properly manufactured, and their design is proper (in the sense that they cannot be made safer without increasing the production costs to an unreasonably high level). The mower is perfectly safe as long as one stands behind it, to the right of it, or in front of it. However, if one stands to the left of the mower, where grass cuttings are ejected, one may be injured by stones thrown free. An ordinary consumer might not realize this danger. D did not place anywhere on the mower any warning that the proper way to use it is to remain behind it. P, a 10-year-old, stands to the left of the mower while his father pushes from behind. P is struck in the eye by a stone thrown loose, and is blinded. D's failure to warn of the danger from walking to the left of the mower will render D strictly liable for P's injury.

C. Risk-utility basis for warnings liability: Some courts have implicitly treated the duty to warn as a type of strict liability. But most courts have applied ***negligence-like principles*** to the duty. That is, in determining whether a particular accident could have been avoided by a particular type of warning, most courts apply a ***risk-utility analysis,*** and balance such factors as the foreseeability of the harm, its severity, the cost of giving a warning, and the likelihood that the warning would be heeded.

1. Third Restatement agrees: The Third Restatement agrees that liability for failure-to-warn should be based on a risk-utility analysis. A product will be deemed defective on account of "inadequate instructions or warnings" "when the ***foreseeable risks of harm***

imposed by the product could have been reduced or avoided by the provision of ***reasonable instructions or warnings*** ... and the omission of the instructions or warnings renders the product ***not reasonably safe."*** Rest. 3d (Prod. Liab.) §2(c). Several aspects of the Restatement's treatment of warnings are worth noting:

a. Longer warning is not necessarily better: ***Longer*** warnings are ***not necessarily better.*** As the Restatement commentary notes, "In some cases, excessive detail may detract from the ability of typical users and consumers to focus on the important aspects of the warnings. . . ." Rest. 3d (Prod. Liab.) §2, Comment i.

b. Warnings to users who are not purchasers: While an otherwise-required warning must normally be given to the purchaser, in some instances ***persons other than purchasers*** may also need warnings. For instance, where a machine is designed to be used by a business, it will often be the case that the manufacturer must see to it that ***employees who will be using the machine*** are warned, so that a warning to the employer-owner will not suffice; in that instance, a warning sign that is ***attached to the machine itself*** is likely to be necessary.

c. Warning against inherent risks: The fact that a particular danger is ***inherent*** in the use of the product (i.e., "unavoidable") does not mean that the danger need not be warned against. In inherent-danger situations, "such warnings allow the user or consumer to avoid the risk warned against by making an informed decision not to purchase or use the product ***at all.*** . . ." Rest. 3d (Prod. Liab.) §2, Comment i. (See also *Liriano v. Hobart Corp.*, *infra*, p. 387, making this same point.)

D. Drug cases: The most common category of failure-to-warn cases involves ***prescription drugs.***

1. "Learned intermediary" defense: Most courts, and the Third Restatement, recognize a defense that makes the manufacturer's duty to warn in prescription drug cases easier-to-satisfy: the ***"learned intermediary"*** defense. Where the defense is allowed, the manufacturer's duty is generally limited to warning the ***prescribing physician*** rather than the patient. The physician is viewed as a

"learned [i.e., highly trained] intermediary" between the manufacturer and the user; the rationale is that the physician is, in most cases, in the best position to decide whether a drug should be prescribed and when and how its risks should be disclosed.

a. Restatement adopts: The Third Restatement basically ***applies*** the learned intermediary rule as the default rule (but subject to an important exception). Rest. 3d (Prod. Liab.) §6(d)(1), imposes failure-to-warn liability on a drug or medical device maker only if ***"reasonable instructions or warnings*** regarding foreseeable risks of harm" are ***not provided*** to ***"prescribing and other health-care providers*** who are in a position to reduce the risks of harm in accordance with the instructions or warnings."

i. Exception: But the Third Restatement includes an important exception to this general acceptance of the learned intermediary defense: The language quoted above indicates that if health-care providers will *not* be a position to pass on warnings, the manufacturer has a duty to give the warnings and instructions ***directly to the patient.*** Rest. 3d (Prod. Liab.) §6(d)(2). So, for instance, if the product is sold over-the-counter to consumers with a mass-media campaign, then warnings must be made to the consumer (e.g., via packaging inserts and/or on TV ads), not just to physicians who might recommend the item to patients.

b. Exceptions: Most courts that accept the learned intermediary doctrine recognize several ***exceptions*** to it. The most important one is the one mentioned above in connection with the Restatement: if the health-care provider for that drug will typically not be in a position to pass on the manufacturer's warnings (e.g., because the prescriber will generally not be meeting with the patient about that particular drug), then the doctrine does not apply and the manufacturer must see to it that warnings actually reach the end-user.

c. Doctrine sometimes rejected: A ***minority*** of courts have ***rejected*** the learned intermediary doctrine. In these courts, a manufacturer must make serious efforts to get the information ***directly to the***

patient, or be potentially liable for failure to warn. The following case illustrates this minority approach. See, e.g., *State v. Karl,* 647 S.E.2d 899 (W. Va. 2007): in West Virginia, "manufacturers of prescription drugs are subject to the ***same duty to warn consumers*** about the risks of their products as other manufacturers."

2. **Adequacy of warning:** When a warning directly to the end-user is required, the manufacturer must provide, in language comprehensible to a lay person, a warning conveying a fair indication of the ***nature, gravity and likelihood*** of the known or knowable risks of the drug.

   a. **Intensity:** A warning may be inadequate because it is not ***intense*** enough. Lack of intensity may result not only from the text of the warning itself, but also from the surrounding ***advertising and publicity campaign*** for the drug (which obscure the effect of the warning).

3. **Main basis for liability:** In the usual situation where a prescription drug is of net benefit to some class of patients, ***defective-design*** liability will not exist. (See *supra*, p. 363). In these situations, therefore, failure-to-warn is the *only* basis for liability. Indeed, most product liability suits brought against drug companies are premised upon the failure to warn.

E. Cigarettes: A number of cases have been filed since the 1980s against ***tobacco*** companies, contending that ***warnings on cigarette packs*** were not adequate.

1. ***Cipollone* case:** However, with respect to sales after 1966, this argument is ***pre-empted*** by federal law. That is, the Supreme Court has held that a cigarette smoker's state common-law damage claim for failure to warn is pre-empted by the federal Cigarette Labelling and Advertising Act of 1965. See *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608 (1992).

F. Duty to warn of unknown and unknowable dangers: If the defendant can show that it neither ***knew*** nor, in the exercise of reasonable care, ***should have known*** of a particular danger at the time of sale, the vast majority of courts hold that there was ***no duty to warn*** of the unknowable danger. (Liability for such ***"unknowable"*** risks is

sometimes called ***"superstrict*** liability." See Dobbs & Hayden (5th), p. 736.)

1. **Restatement agrees:** The Third Restatement agrees that there is no duty to warn of unknowable risks. The commentary says that "in connection with a claim of inadequate design, instruction, or warning, plaintiff should bear the burden of establishing that the risk in question was ***known or should have been known*** to the relevant manufacturing community. The harms that result from ***unforeseeable risks*** — for example in the human body's reaction to a new drug, medical device, or chemical — ***are not a basis of liability."*** Rest. 3d (Prod. Liab.) §2, Comment m.

2. **Testing required:** Notice that it's not enough for the manufacturer to show that it was not in fact aware of the defect — it must further be the case that the manufacturer ***should not*** have been aware. "A seller is charged with knowledge of ***what reasonable testing would reveal.*** If testing is not undertaken, or is performed in an inadequate manner, and this failure results in a defect that causes harm, the seller is subject to liability for harm caused by such defect." *Id.*

3. **Compare to defective design:** Just as courts generally hold that there is no duty to *warn* against an unknowable danger, they also hold that there is no duty to *design* against an unknowable danger. See the discussion of unknowable design risks and the "state of the art" defense, *supra*, p. 364.

G. Effect of government labeling standards: The scope of the defendant's duty to warn may be affected by the fact that the ***government*** imposes certain ***labeling*** requirements.

1. **Evidence:** Where a defendant can show that it has complied with a federal or state labeling requirement, most courts permit this to be shown as ***evidence*** that the warning was adequate. This evidence is not dispositive: the jury is always free to conclude that even though the government requirement was complied with, a reasonable manufacturer would have given a more specific (or different) warning.

2. **Federal pre-emption:** Where the labeling requirement is imposed by

the ***federal government,*** the fact that the defendant has complied with that warning requirement is likely to be more significant than where the labeling is prescribed by state law. This is because of the doctrine of federal ***pre-emption*** of state law. When the doctrine of pre-emption is applied, the federal law takes priority over state law dealing with the same subject, because of the U.S. Constitution's Supremacy Clause.

a. Pre-emption generally: The mere fact that federal law prescribes detailed warning labels does not by itself mean that state law has been pre-empted. The pre-emption doctrine is only applied where the court finds that Congress ***intended*** to pre-empt more demanding state labeling rules.

b. Preemption found: On the other hand, if the court finds that Congress *did* intend to preempt the states from imposing additional or different warnings, then the preemption doctrine will help the defendant immensely: under the federal constitution's Supremacy Clause, if the state was not permitted to require different or additional warnings, the state is also blocked from ***awarding tort damages*** for the defendant's failure to warn. The net effect is that once the court finds that Congress intended that its own warning scheme preempt state law, a defendant who has complied with the federal scheme cannot be sued for failure-to-warn. For more about this, see the discussion of preemption in cases involving warning labels on prescription drugs, *infra*, p. 408.

H. Danger to small number of people: If the manufacturer knows that the product will be dangerous to a ***small number*** of people, may it make the decision that the need for a warning is not sufficiently great? This will usually turn on the ***magnitude*** of the danger; if the danger is great enough, even a small number of potential bad results will require a warning. See Rest. 3d (Prod. Liab.) §2, Comment k ("The more severe the harm, the more justified is a conclusion that the number of persons at risk need not be large to be considered 'substantial' so as to require a warning.")

> **Example:** Even though a person getting an inoculation against polio has only a one-in-one-million chance of contracting polio from the vaccine, that chance is still great enough that the vaccine manufacturer had a duty to warn of the danger. *Davis v.*

Wyeth Laboratories, Inc., 399 F.2d 121 (9th Cir. 1968).

I. Obvious danger: If the danger is ***obvious*** to most people, this will be a factor reducing the defendant's obligation to warn. But many recent decisions are reluctant to hold that the mere obviousness of the danger automatically means that there is no duty to warn, at least where there is evidence that some substantial minority of people, including the plaintiff, were not aware of the danger.

1. Chance to use alternatives: Why is this so? Well, even where the danger is obvious to the particular plaintiff, it does not follow that a warning is valueless. There are ***two quite distinct functions*** that a product warning may play: a notification of danger, but also an ***explanation of the existence of a safer alternative.*** Since even a warning about an obvious danger may give useful information about the existence of a safer way, courts increasingly hold that obviousness is not an automatic defense to a failure-to-warn claim.

Example: P, a 17-year-old immigrant, works for Super, a grocery store. Super has bought a meat grinder made 30 years before by Hobart. Hobart manufactured the grinder with a safety guard, but Super has removed the guard. The grinder does not contain any warning that use of the machine without the guard might be dangerous. P uses the grinder without the guard, and loses his right hand and lower forearm when the hand gets caught inside the machine. P sues Hobart for product liability, claiming *(inter alia)* that Hobart violated its duty to warn. Hobart defends on the grounds that even if the modification by Super did not absolve Hobart of any duty to warn, the danger was so obvious that absence of a warning could not have caused the accident.

Held, for P. "[A] warning can convey at least two types of messages. One states that a particular place, object, or activity is dangerous. Another explains that people need not risk the danger posed by such a place, object, or activity in order to achieve the purpose for which they might have taken that risk. . . . A jury could reasonably find that there exist people who are employed as meat grinders and who do not know . . . that it is feasible to reduce the risk with safety guards. . . . Moreover, a jury can also reasonably find that there are enough such people, and that warning them is sufficiently inexpensive, that a reasonable manufacturer would inform them that safety guards exist and that the grinder is meant to be used only with such guards. Thus, even if New York would consider the danger of meat grinders to be obvious as a matter of law, that obviousness does not substitute for the warning[.]" *Liriano v. Hobart Corp.*, 170 F.3d 264 (2d Cir. 1999).

J. Warning against misuse: Just as modern cases may require the defendant to *design* to protect against ***foreseeable misuses*** of the product, so he may have to ***warn*** against such misuses.

Example: D manufactures a step-ladder that is not designed to hold loads greater than 350 lbs. D fails to give a warning against using the ladder for loads greater than 350 lbs. If the ladder collapses while holding P, who weighs 300 lbs. and is carrying a 75-lb. sack of cement, D's failure to warn can give rise to strict product liability

1. **Warning against removal of safety devices:** A related problem is the manufacturer's duty to warn against ***removal of safety devices*** that the manufacturer has installed on a piece of equipment. If a manufacturer installs a safety device on the equipment, and a third person (e.g., an employer who owns the equipment) removes the device, this third-party "tampering" is an intervening cause that probably shields the manufacturer from design-defect liability. But the manufacturer in this situation may nonetheless be liable for failing to ***warn*** the ultimate user that using the equipment without the safety device is dangerous.

Example: Same facts as *Liriano v. Hobart, supra*, p. 387. As an alternative defense, Hobart points out that Super removed the safety guard that Hobart had supplied. Hobart therefore asserts that a manufacturer has no duty to warn against substantial alterations made by third parties.

Held, for P. It is true that a manufacturer is not liable on a design-defect theory for injuries caused by substantial alterations to the product by a third party that render the product defective or unsafe. But it does not follow that a third party's substantial alteration also removes the manufacturer's duty to *warn.* "The burden of placing a warning on a product is less costly than designing a perfectly-safe tamper-resistant product." Therefore, under New York law P should be permitted to reach the jury on the question whether Hobart violated its duty to warn. *Liriano v. Hobart Corp.,* 92 N.Y. 2d 232 (N.Y. 1998). (In this decision, the New York court was answering a question about New York law certified to it by the federal Second Circuit, where the case was pending; that Second Circuit panel issued the decision quoted *supra.)*

K. Post-sale duty to warn: To what extent does a manufacturer have a duty to make a ***post-sale*** warning about dangers of which the manufacturer was not aware at the time of manufacture? Courts' answers have varied.

1. **Duty to warn when manufacturer learns of the risk:** The most common approach is to hold that at least where the manufacturer eventually ***learns about the risk,*** it has an ***obligation to give a post-sale warning*** if the risk is great and the user of the product can be identified. In this situation, a duty to warn probably exists even though the defect was ***not knowable at the time of manufacture.***

a. Third Restatement adopts: The Third Restatement follows this approach. Rest. 3d (Prod. Liab.) §10(a) says that one who sells a product commercially has a duty to issue a post-sale warning "if a reasonable person in the seller's position would provide such a warning." §10(b) then says that a reasonable person in the seller's position would provide a post-sale warning if:

- □ the seller ***"knows or reasonably should know*** that the product poses a ***substantial risk of harm[;]"***
- □ those to whom a warning might be provided "can be ***identified*** and can reasonably be assumed to be ***unaware*** of the risk of harm";
- □ A warning can be ***"effectively communicated*** to and ***acted upon*** by those to whom a warning might be provided"; and
- □ the risk of harm is ***sufficiently great to justify the burden*** of providing a warning."

Example: D makes a Model 123 power drill. Three years after putting the product on the market, D learns that under conditions of extreme use, the drill can overheat and break, badly injuring the user. The danger comes to light only because one particular drill is used on an alloy that did not even exist at the time the Model 123 was first sold. Assume that D could not reasonably have foreseen the development of the alloy, or the overheating problem, at the time the drill was manufactured. (This means that the drill was not "defective" when manufactured.)

Once D learns of the danger, it will have a duty to warn about it to users that it can identify. This is true even though the drill was not defective at the time it was sold to that user. Cf. Rest. 3d (Prod. Liab.) §10, Illustr. 1.

b. Duty to monitor: Some courts have held that the manufacturer has a duty not only to warn about dangers or defects that it learns about, but also an affirmative duty to ***"keep abreast of the field"*** by ***monitoring the performance and safety*** of its products after sale. Such an affirmative duty of monitoring and testing is most likely to be found in cases involving ***prescription drugs.*** Dobbs Hrnbk, §368, p. 1020. See also Rest. 3d (Prod. Liab.) §10, Comment c ("With regard to one class of products, prescription drugs and devices, courts traditionally impose a ***continuing duty of reasonable care to test and monitor after sale*** to discover product-related risks.")

i. Non-drug cases: Outside of the prescription drug area, most

courts seem not to impose an affirmative duty to test and monitor post-sale, except where the manufacturer happens first to learn about a particular risk. See Rest. 3d (Prod. Liab.) §10, Reporter's Note to Comment c: "In non-drug cases there appears to be no practical post-sale duty to investigate or test a product not [originally] defective unless information comes to the attention of the product seller is that there is a problem attendant to its use."

c. Warning about originally-defective product : Notice that if the product was ***defective at the time it was manufactured,*** then the existence of a post-sale duty to warn doesn't matter very much. That's because the manufacturer will be liable for making the defective product in the first place, and a duty to warn — whether that duty existed at the time of manufacture or came into existence thereafter — won't add much to the plaintiff's case as a practical matter. So the existence of a post-sale duty to warn therefore really matters only in cases where the product itself was not defective at the time of manufacture (perhaps because its dangers were not only unknown but reasonably unknowable), but the manufacturer learned of significant dangers post-sale.

d. Safety measures: Some cases go even further than imposing a post-sale duty to warn; they impose a duty to inform the user about a ***newly-discovered safety technology*** (e.g., a newly-available guard on a dangerous machine tool).

e. Product recalls: Can a manufacturer have separate liability for ***failing to recall*** a product that it discovers, post-sale, to be defective? Where no statute or regulation requires the recall, most courts have answered ***"no."***

i. Third Restatement: The Third Restatement agrees with this general no-liability rule. Assuming that there is no statute or regulation requiring the maker to recall the product, the Restatement imposes liability for a failure to recall only if the maker ***"undertakes*** to recall the product" and then ***fails to carry out the recall in a reasonable way.*** Rest. 3d (Prod. Liab.) §11.

Example: D, to avoid a government-mandated recall, agrees to make a voluntary recall. D then fails to give notice to most of the owners whose identities it possesses. Even under the limited Restatement rule, D will be liable for the failure to follow through on the promised recall. Id., Illustr. 4.

L. Allergies: A manufacturer may have a duty to warn of possible ***allergic reactions.*** There are actually two different sorts of warnings that may, depending on the case, be needed: (1) a warning that the product ***contains a particular ingredient;*** and (2) a warning that the ingredient ***may cause an allergic reaction.***

1. **"Commonly known" exception:** Most courts do not require a warning of allergy-related dangers that are ***generally known*** to consumers. This may remove the need for one or both of the above types of warnings in a particular case. As the Third Restatement puts it, for there to be a duty to warn, "The ingredient that causes the allergic reaction must be one whose danger or whose presence in the product is not generally known to consumers. When the presence of the allergenic ingredient would not be anticipated by a reasonable user or consumer, warnings concerning its presence are required. Similarly, when the presence of the ingredient is generally known to consumers, but its dangers are not, a warning of the dangers must be given." Rest. 3d (Prod. Liab.) §2, Comment k.

   Example: D produces an over-the-counter nonprescription medicine containing aspirin. D is aware that many consumers are allergic to aspirin. D may reasonably assume that most consumers who are allergic to aspirin are aware of their allergy. D may further reasonably assume that a consumer who is not aware of having the allergy would not be helped by a warning. Therefore, although D must warn that the product contains aspirin, it need not warn that aspirin can cause allergies. Rest. 3d §2, Illustr. 13.

2. **Balancing test:** Recent cases have adopted the same "balancing test" approach to allergy warning issues as they have in other kinds of warning cases. Thus if the plaintiff's allergic reaction, and the foreseeable reactions of others, are of only mild severity, a greater percentage of the overall population will have to be susceptible before liability is found.

3. **Hypo-allergenic claim:** If the defendant markets its product as ***"hypo-allergenic",*** this may be held to be an ***express warranty*** that the product will not cause an allergic reaction. This would be true

even if the seller neither knew or should have known of the possibility of allergy. See Prod. L. Nut., p. 215. See also the discussion of express warranties, *supra*, p. 352.

M. Hidden causation issue: In any failure-to-warn scenario, be sure to check that the requirement of a ***causal link*** between the failure to warn and the resulting injury is satisfied. If the provision of a warning ***would not have prevented the accident*** from occurring, then the defendant will ***not*** be liable for failing to warn.

1. Plaintiff who does not read warnings or ignores them: For example, in a case in which the injured plaintiff is the one who was the user of the product, and the claim is based upon the defendant manufacturer's failure to place a warning label on the product, evidence that the plaintiff ***never read any warning labels*** would prevent failure-to-warn liability. Similarly, if there is evidence that even had plaintiff read the warning, plaintiff would have ***ignored the warning*** and used the product in the same way so that the accident would have happened anyway, failure to warn will not be the basis for liability.

> **Example:** D manufacturers a hand-operated power saw that is sold to P, a professional carpenter. P cuts off one of the fingers of his left hand while holding the saw with his right hand only. The saw contains a bold-faced warning label, but the warning label does not specify that the saw should only be operated with two hands. P sues D in strict product liability, alleging that the failure of the warning label to specify a need for two-handed operation rendered the product dangerously defective. D presents evidence at trial that P had over his career used many similar hand saws, that most of them had a label warning against one-handed use, and that P very frequently ignored such warnings by operating the saws with one hand only.
>
> If the jury is convinced that P would have ignored a two-hands-only label had one been present, then P will not be permitted to recover for failure to warn.

VI. WHO MAY BE A DEFENDANT

A. Cases involving chattels: In the true "product" liability case (i.e., a case involving a "good" or "chattel"), both strict and warranty liability will apply to ***any seller*** in the business of selling goods of that kind. See Rest. 3d (Prod. Liab.) §1; UCC §2-314(1).

1. Retail dealers: This means that a ***retail dealer*** who sells the good, but has not manufactured it, will have strict liability as well as warranty

liability, even though there is nothing she could have done to discover the defect. It is in the area of retailer liability that strict liability produces a markedly different result from negligence.

a. Restatement agrees: This principle that retailers (and other non-manufacturers) who sell defective goods are strictly liable is embedded in the new Third Restatement's general rule of strict product liability. The Restatement does not distinguish between a manufacturer and a "downstream" wholesale or retail seller: "One engaged in the business of selling or otherwise distributing products ***who sells or distributes a defective product*** is subject to liability for harm to persons or property caused by the defect." Rest. 3d (Prod. Liab.) §1.

b. Must be in business of selling goods: Both strict and warranty liability are triggered only if the seller is "in the business" of selling goods. Thus a private individual who sells his car has neither liability, since he does not make a business of such sales. Similarly, a businessperson who makes a sale outside of the usual course of his business (e.g. he sells all his furniture because he is relocating his office) will not have liability.

i. Sales need not be major part: But as long as the sale is part of the business, it will give rise to liability even if it is not the predominant or even an important part; thus strict liability applies to "a motion-picture theater's routine sales of popcorn or ice cream, either for consumption on the premises or in packages to be taken home." Rest. 3d (Prod. Liab.) §1, Comment c.

c. Indemnity: If the retailer is held liable in this way, she will be entitled to ***indemnity*** from the manufacturer or wholesaler, as long as the retailer was not herself negligent.

Example: Manuf makes an electric heater, and sells it to Wholesaler. Wholesaler sells the heater to Retailer. Retailer sells to Consumer. Due to a manufacturing defect, the heater catches fire, and burns Consumer badly. Consumer sues Retailer. As noted, Consumer will be able to recover against Retailer for selling a defective product, even without showing that Retailer was negligent.

Then, however, Retailer will be able to obtain indemnity from either Manuf or Wholesaler, as long as these are unable to show that Retailer was negligent in failing

to spot or warn of the danger. See Rest. 3d (Apport.) §22(a)(2)(ii), giving a person indemnity where "the indemnitee . . . was not liable except as a seller of a product supplied to the indemnitee by the indemnitor and the indemnitee was not independently culpable."

Note: Also, if in the above example Consumer recovers from *Wholesaler,* Wholesaler will be entitled to indemnity from Manuf. In other words, a faultless seller who has to pay a products-liability claim can always obtain indemnity from an upstream supplier.

2. Used goods: There is much controversy about whether there can be strict or warranty liability upon the seller of ***used goods,*** particularly used cars. A number of courts, probably a majority of those that have considered the question, have held that there is ***no such liability.***

Example: P1 and P2, young children, are walking home from school when they are hit by a used car. A suit claiming that the car's brakes were defective is brought against the driver and the used car dealer.

Held, strict liability will not be imposed upon the used car dealer, absent a showing that the defects were created by him. Otherwise, "the used car dealer would in effect become an insurer against defects which had come into existence after the chain of distribution was completed, and while the product was under the control of one or more consumers." *Peterson v. Lou Bachrodt Chevrolet Co.,* 329 N.E.2d 785 (Ill. 1975).

a. Restatement generally has no strict liability: The Third Restatement agrees, in most instances, that there is ***no strict liability for used goods.*** In the typical situation where a reasonable consumer in the buyer's position would expect the used product to present a ***somewhat greater risk of defect*** than if the product were new, there will be no liability in the absence of negligence. See Rest. 3d (Prod. Liab.) §8 and Comment b thereto (stating that the section "subject[s] commercial sellers of used products to liability without fault only under special circumstances.")

i. Consumer expectation: So if the used product sells for a significantly lower price than a comparable new product, or is marked "as is," or is obviously quite old, under the Restatement these factors will be deemed to put the buyer on notice that the risk of defect is greater than in the case of the new product, and will prevent strict liability from occurring.

Example: D1, a commercial seller of snow blowing equipment, sells a used snow blower to P. The blower was manufactured by D2. The blower is five years old and has obviously been extensively used. The price charged by D1 is 1/3 less

than the price for a new blower with comparable specs. The blower is marked "sold as is." Because of a manufacturing defect (which may have existed at the time the blower was originally manufactured), P is injured by using it. Assuming that P cannot show negligence on the part of D1 (e.g., in failing to spot the particular defect) or D2, he cannot recover against either. Cf. Rest. 3d (Prod. Liab.) §8, Illustr. 15, on approximately these facts.

ii. **Sold as "nearly new":** On the other hand, if the goods are sold as being ***remanu-factured*** or ***"nearly new,"*** so that a reasonable consumer in the buyer's position would be justified in believing that the risk of the dangers defect would be ***no greater*** than if the product were new, then the seller *will* be strictly liable. See Rest. 3d (Prod. Liab.) §8(b).

Example: D is a car rental company. It advertises that the average car in its fleet is only six months old. D makes a three-day rental of a car to P. The odometer reading on the car at the time of lease is 8,000 miles. P is injured when a defect in the car causes him to crash. D will be strictly liable, because the situation would have led a reasonable consumer in P's position to believe that the risk of a defect would be no greater than in the case of a new car. Cf. Rest. 3d (Prod. Liab.) §8, Illustr. 19. (Lessors of personal property are generally held to strict liability on the same terms as sellers; see *infra,* p. 393.)

3. **Component manufacturers:** The manufacturer of a part which is defective, and which is then ***incorporated*** as a ***component*** in a larger product, will be strictly liable if the defect causes injury. See Rest. 3d (Prod. Liab.) §5(a) ("One . . . who sells or distributes a component is subject to liability for harm . . . caused by a product into which the component is integrated if: (a) the component is defective in itself . . . and the defect causes the harm[.]")

   a. **Warranty:** The same result should follow where the suit is brought for breach of implied warranty. See Prod. L. Nut., pp. 47-48.

B. Lessors of goods: Courts usually impose strict liability upon a ***lessor*** of defective goods. Thus a number of ***car rental*** companies have been held strictly liable when defective cars they rented have injured the lessee, a passenger in the car, or a pedestrian. See P,W&S, p. 787, n. 3. However, the lessor must be in the "business" of leasing.

1. **Third Restatement:** The Second Restatement's strict item liability provisions apply only to "sellers," and are silent about lessors. But the Third Restatement expressly ***applies*** to people who do not sell but who "otherwise distribute" a product, including lessors. See Rest. 3d

(Prod. Liab.) §20(b).

2. **Negligence liability:** The lessor may, of course, also be liable for negligence in failing to discover the defect. See *supra*, p. 351.

3. **Warranty:** A court might also allow recovery on an implied warranty theory by analogy to the UCC.

C. Sellers of real estate: Sellers of ***real estate*** have also, again by analogy, sometimes been subjected to strict and warranty liability when the property turns out to have been defective.

1. **Third Restatement:** Thus the Third Restatement allows the possibility of strict liability on the part of sellers of real estate, saying in its section defining "Product" that "Other items, such as real property ... are products when the context of their distribution and use is ***sufficiently analogous*** to the distribution and use of tangible personal property that is ***appropriate*** to apply" the strict-product-liability rules. Rest. 3d (Prod. Liab.) §19. The Comments to this section explain that courts have traditionally resisted holding real estate sellers strictly liable, but that this has begun to change, so that at least, a building contractor who ***sells a building*** that contains ***appliances*** or other ***manufactured equipment*** will likely be held to be a seller of these products and thus strictly liable if they are defective. *Id.*, Comment e to §19.

   a. **Building itself:** In fact, the Third Restatement indicates that the seller of a building may be strictly liable for defects ***in the building itself*** in two situations: (1) where the building is ***"prefabricated"*** (e.g., manufactured housing, such as a trailer); or (2) if the buildings are dwellings that are built, even on-site, "on a ***major scale,*** as in a ***large housing project."*** *Id.*

2. ***Schipper* case:** The best-known case imposing strict liability on a seller of real estate is *Schipper v. Levitt & Sons, Inc.*, 207 A.2d 314 (N.J. 1965). There, the defendant, a mass-producer of homes, was held strictly liable for breach of an implied warranty of "habitability" when the infant plaintiff was injured by the house's defective hot-water system.

3. **Privity requirement:** In *Schipper*, the plaintiff was not the purchaser

of the house, but the purchaser's child. Many courts, however, although willing to recognize an "implied warranty of habitability", or strict liability, have applied it only where the plaintiff is the actual contracting party.

a. Remote purchaser: This has been particularly true where the injured person was not even a family member of the original purchaser, but instead, a ***subsequent purchaser,*** or a member of that person's family.

4. Seller who did not build house: Another limitation frequently imposed is that the defendant must be the ***actual builder,*** not merely a prior occupant. Such a result can be justified because defendant-homeowner is not in the "business" of selling homes, and should not bear "enterprise liability" for defects as a mass-producer should.

a. Concealment of known dangers: But even such an "amateur" seller may be liable if there were defects of which he was aware, and which he actively concealed. See *supra*, p. 253.

D. Lessors of real property: ***Lessors of real estate*** have also, in a few cases, been held to impliedly warrant the habitability of the premises. But in many states, the lessor does not even have full negligence liability, let alone strict or warranty liability. See the discussion of negligence *supra*, p. 249.

E. Services: One who sells ***services,*** rather than goods, does not fall within the Second or Third Restatement's strict liability provisions, nor within the UCC implied warranties (except that sales of food and drink in a restaurant are within the Code). See, e.g., Rest. 3d (Prod. Liab.) §19(b): "Services, even when provided commercially, are not products."

1. Electric utilities: Electric utilities, and others who ***supply electricity*** as some aspect of the service they sell, are good examples of this "no strict liability for services" principle. At least where the electricity has not yet been delivered to the customer (e.g., at the time of the accident it's passing through a telephone pole or power station maintained by the utility), a plaintiff bystander who gets ***electrocuted*** will have to show that the utility or service provider behaved negligently.

Example: Utility puts up a wooden pole next to the street, containing high-voltage

power lines. Due to a defect in the insulation on a bolt that Utility fastens at shoulder height onto the pole, the bolt carries a high-voltage charge. When P, a passerby, touches the bolt, he is electrocuted.

P will not be able to recover in strict product liability against Utility, because Utility sold a service (electricity), not a defective product (the pole or the bolt). (Operation of high-voltage lines might conceivably be held to be an ultrahazardous activity leading to strict liability on that count, but that wouldn't be strict "product" liability. Also, if the electricity had already passed into the house of a customer before the accident, a court might hold that the electricity had become a "product" that could give rise to strict product liability.)

2. Construction workers: Another good illustration of the principle that service providers won't have strict product liability is ***construction work.*** Suppose a construction company (call it Contractor) does work using a construction product that is not being "sold" by Contractor to the customer, and some bystander is injured. Contractor won't have strict product liability, because it didn't sell the defective product.

Example: Contractor does tiling in Customer's apartment. In doing so, Contractor uses a high-temperature torch made by Manco. The torch, due to a design defect, sprays its flame too widely, and ignites a piece of pre-existing wall. The resulting fire releases toxic fumes that leak into the neighboring apartment, injuring Neighbor. Neighbor won't be able to recover against Contractor in strict product liability, because Contractor didn't "sell" the torch, making the fact that the torch was defective irrelevant. (But Neighbor could recover in strict product liability against *Manco,* because the torch was defective, was at some point in the distribution chain sold by Manco, and proximately caused the injury to Neighbor.)

3. Product incorporated in service: However, if a product is furnished ***in combination with a service,*** then most courts (and the Restatements) will apply strict liability if the product turns out to be defective. See, e.g., Rest. 3d (Prod. Liab) §20(c), making the standard product-liability provisions of the Restatement applicable to one who "provides a combination of products and services."

Example: P goes to D's beauty parlor to get a permanent. D uses a solution made by a cosmetics company, X, which is defective and causes acute dermatitis on P's scalp. Most courts would allow P to recover against D for either breach of implied warranty or strict liability for supplying a defective product, even though D also supplied a service together with the product.

a. Services by professionals: But where the services are rendered by a ***health professional,*** she will almost never be liable in either strict tort or warranty, even if she uses a product which is defective. See,

e.g., *Magrine v. Krasnica*, 227 A.2d 539 (N.J. 1967), aff'd 241 A.2d 637 (1968) (D, a dentist, not strictly liable for using a defective needle on P's jaw).

i. Hospitals: Similarly, courts have generally declined to make ***hospitals*** strictly liable for medical devices that they (or doctors operating inside the hospital) supply to patients. See, e.g., *Hector v. Cedars-Sinai Medical Ctr.*, 225 Cal. Rptr. 595 (Ct. App. Cal. 1986) (hospital not strictly liable for injuries from implantation of a defective pacemaker performed in the hospital, because such liability would raise medical costs, and because the hospital does not select the pacemaker so is in a poor position to protect itself by testing, using a different brand, etc.).

VII. INTERESTS THAT MAY BE PROTECTED

A. Property damage: Products liability is generally involved with ***personal injury,*** and the rules discussed previously in this chapter were generally formulated in such cases. But the plaintiff's damages in some cases may consist of ***property damage.*** If so, may he recover on the same basis as if there were personal injuries?

1. Recovery allowed: The answer is generally "yes", assuming that the court finds that the damage in question really was ***"property damage",*** as opposed to what might be called ***"intangible economic harm"*** (e.g., ***lost profits),*** discussed below.

a. Restatement view: Thus the Third Restatement makes its standard rules of product liability applicable to "harm to persons ***or property*** caused by the defect." Rest. 3d (Prod. Liab.) §1. For instance, if a defect in a wood-burning stove causes it to catch fire and burn down the plaintiff's house, the plaintiff can recover for the loss of the house.

b. Negligence: The same result would follow under negligence theory, assuming that the defendant's failure of due care could be demonstrated.

c. Warranty: But a plaintiff not in privity with the defendant might have trouble suing on an implied warranty; such a suit against a

remote seller does not fall within the versions of UCC §2-318 in force in most states, i.e., Alternatives A and B. Those sections both apply only where the non-privity plaintiff is injured "in person" by breach of the warranty.

i. **Exceptions:** But Alternative C does not contain this limitation. Furthermore, case law in a particular state may give protection for such property damage, even though this is not within the language of Alternative A or B.

2. **Property damage defined:** Courts have not always agreed on what kind of harm falls within this "property damage" class, as opposed to intangible economic harm.

   a. **P's property apart from the product itself:** Clearly, sudden destruction of ***plaintiff's property apart from the defective product itself*** qualifies. Thus in our earlier hypothetical of a defective stove that burns down P's house, the house is obviously "property apart from the defective product," so P can recover for its value in strict liability.

   b. **Damage to the product itself:** What if the defect causes the ***defective product itself*** to be ***destroyed?*** Here, courts are split — some treat this as "property damage" and allow strict-liability recovery, but most view it as intangible economic loss (see *infra*, pp. 397-398), for which contractual and warranty recovery, not strict product liability, are the appropriate forms of relief.

      i. **Restatement does not allow recovery:** The Third Restatement follows the latter view, disallowing strict-product-liability for damage to the product itself. The commentary to the Restatement says that in the case of damage to the product itself, "a majority of courts have concluded that the [contract] remedies provided under the Uniform Commercial Code — repair and replacement costs and, in appropriate circumstances, consequential economic loss — are sufficient." Rest. 3d (Prod. Liab.) §21, Comment d.

      Example: D Rubber Co. sells a conveyor belt to P, an automobile manufacturer. P installs the belt on an assembly line, on which it is making its hot new car model. The belt breaks due to a manufacturing defect, and this belt causes the

entire line to be inoperable for several days, until a substitute belt can be installed. P loses many days of production at a time when the new model has just started appearing in showrooms. In P's strict liability suit against D, expert witnesses testify for P that the breakdown cost P $1 million in profits that P will never recoup.

Most courts, and the Third Restatement, would agree that P should not be permitted to recover its lost profits on a strict-liability theory, because P has suffered no physical injury, and the only property damage has suffered is damage to the defective product itself. Therefore, P will have to recover on a warranty theory or not at all. Cf. Rest. 3d (Prod. Liab.) §21, Illustr. 3, posing essentially these facts, and concluding that because P's losses do not derive from injury to persons or to property other than the defective item itself, P cannot recover under the Restatement's product-liability rules.

c. Loss of bargain: Now, suppose the plaintiff's damages stem from the fact that his product simply ***doesn't work*** because of the defect, or is ***worth less*** with the defect than it would be without it. Here, too, courts are in dispute. Most would treat this as intangible economic harm, for which strict liability will generally ***not*** be allowed. See P,W&S (9th), p. 774, n. 1.

i. Warranty: Where the plaintiff claiming a loss of bargain is not allowed to recover in strict liability, her recourse will generally be to use a ***warranty*** theory. But disclaimers and problems with privity usually make warranty law less attractive. See *supra*, p. 351.

B. Intangible economic harm: Where the plaintiff's damages are found to be solely ***intangible economic*** ones, as opposed to personal injury or property damage, the plaintiff will have a much harder time recovering, particularly if he is not suing his immediate seller. The profits lost by a businessman when a piece of equipment failed to work because it was defective would, for instance, be such an intangible economic loss.

1. Direct purchaser: If the plaintiff is suing the person who sold the goods to him, his best bet is suing for breach of ***implied or express warranty.***

a. Measure of damages: Whether the warranty breached is express or implied, the direct purchaser can recover the difference between what the product would have been worth had it been as warranted, and what it is in fact worth with its defect. (UCC §2-714(2)). He can also recover consequential damages, (e.g. ***lost profits)*** if these

result from "general or particular requirements and needs of which the seller at the time of contracting had reason to know. . . ." (§2-715(2)).

b. Strict liability and negligence: Since the measure of damages in warranty is quite generous to the plaintiff in this position, it is rare that he would want to assert a strict liability or negligence claim. This might, however, happen if the seller had some UCC warranty defense (e.g., a ***disclaimer of liability).*** In that event, a court would almost certainly hold that the plaintiff is not entitled to recover on a strict liability or negligence theory for the intangible economic harm.

Example: Recall the example on p. 397, where a defective belt brings P's assembly line to a halt. Since P has suffered only intangible economic harm, P may not recover in strict liability (or negligence), and must recover on a warranty theory if at all.

2. Remote purchasers and non-purchasers: Where the plaintiff is suing not his own seller, but a remote person (e.g., the manufacturer) he will find it difficult to recover anything if his only harm is an intangible economic one.

a. Warranty: A few courts might allow him to recover on implied warranty, particularly states in which Alternative C to §2-318 is in force (although that section may be limited to economic harm resulting from "property damage," not intangible harm). Most courts, however, would probably deny the implied warranty claim, on the grounds that the plaintiff must sue his own immediate seller for such breaches. See, e.g., W&S, p. 395-398 ("We agree with the courts that have refused to allow recovery of consequential economic loss to remote buyers.")

i. Express warranty: Of course, if the plaintiff could show that the remote seller or manufacturer had made an ***express warranty*** and breached it, and that he, the plaintiff, was within the class of persons expected to be reached by the warranty, he would have a good chance of recovering under the UCC, even if his harm was only economic. Thus in *Seely v. White Motor Co.*, 403 P.2d 145 (Cal. 1965), the plaintiff purchaser of a farm truck was permitted to recover from the defendant

manufacturer for lost profits, as well as part of the purchase price, when the truck did not live up to the business uses that the defendant had expressly warranted it for. (However, the court indicated that had the plaintiff been suing merely on a strict liability theory, he would not have been permitted to recover for lost profits; since the law generally prevents disclaimers of strict tort liability, it would be unfair to force every manufacturer to be responsible for its ultimate customers' loss of business profits.)

b. Strict liability: The remote buyer will not recover for his economic harm in ***strict liability,*** in almost all courts that have considered the question. See, e.g., Rest. 3d (Prod. Liab.) §21, Comment a: "Some categories of loss, including those often referred to as 'pure economic loss,' are more appropriately assigned to contract law and the [warranty] remedies set forth in . . . the Uniform Commercial Code."

i. Non-buyers: This rule applies not only to remote purchasers who are suing people further up the distribution channel with whom they have no direct contractual relationship, but also to ***non-purchasers*** who have suffered economic harm as a result of injury to the person or property of ***someone other than themselves.***

Example: P owns a restaurant, located next door to an office building that is owned by X Corp. and occupied exclusively by X Corp's employees. D manufactures a faulty boiler, which it sells to X Corp. The boiler explodes, damaging X Corp's building extensively. The building damage causes X Corp. to suspend operations for one month while repairs are made. During that month, P's restaurant loses 50% of its revenues, and all its profits, due to the absence of X Corp. employees as customers.

Even though the defective boiler has caused property damage to X Corp. (for which X will be able to recover on a strict liability theory), *P* will not be permitted to recover in strict liability (or, for that matter, in negligence) because she has suffered only intangible economic harm. Cf. Rest. 3d (Prod. Liab.) §21, Comment d ("[A] defective product may destroy a commercial business establishment, whose employees patronize a particular restaurant, resulting in economic loss to the restaurant. The loss suffered by the restaurant generally is not recoverable in tort and in any event is not cognizable under product liability law.")

c. Combined with other harm: On the other hand, if the plaintiff *can*

show that he has received either physical injury or "property damage," he may then be able to "tack on" his intangible economic harm as an ***additional*** element of damages. This would certainly be the case in a negligence action (e.g., profits lost by the plaintiff-businessman when he can't work due to physical injury). It might also be true in a strict liability or warranty action, although this is less likely.

VIII. DEFENSES BASED ON THE PLAINTIFF'S CONDUCT

A. Introduction: Since courts began recognizing strict product liability in the 1960s, they have struggled with the significance that should be given to "bad" conduct by the plaintiff. What happens if the plaintiff negligently fails to notice that the product is defective? What happens if the plaintiff knowingly continues to use the product after consciously realizing that it is unsafe? What if the plaintiff misuses the product, putting it to a use which she knows or should know is not intended by the manufacturer? Courts have always varied tremendously in how they answer these questions, and the "majority" rule on a particular issue, if one ever existed at all, has tended to change over time. The student will not find much certainty in this area.

B. The Second Restatement and early decisions: When the Second Restatement formulated the concept of strict product liability in 1965, that concept focused on manufacturing defects, as opposed to design defects and failure-to-warn. At that time, contributory negligence was an absolute bar to a plaintiff's recovery in virtually every state. Given this absolute bar, if the Second Restatement had allowed contributory negligence to be a defense to a strict product liability action, the advance of strict liability — and the shifting of the risk of non-negligent manufacturing defects from consumer to manufacturer — would have been nearly stopped in its tracks.

1. Contributory negligence no defense: Therefore, the Second Restatement adopted the view that ***contributory negligence*** — at least in the sense of the plaintiff's ***failure to discover a product's defects*** — was ***not*** a defense to a strict liability action. See Comment n to Rest. 2d §402A ("The user's negligent failure to discover a defect, or to take precautions against the possibility of its existence, is not a

defense to a strict liability action.")

2. **Assumption of risk:** On the other hand the Second Restatement *did* recognize the defense of ***assumption of risk,*** even in a strict-liability action. If the plaintiff knowingly, voluntarily and unreasonably subjected himself to a particular product risk, this would be a complete bar to strict-liability recovery. Rest. 2d §402A, Comment n. (We'll talk more about assumption of risk *infra*, p. 401.) (The Second Restatement seems to have implicitly assumed that all plaintiff misconduct can be classified as either failure-to-discover-the-defect or knowing-assumption-of-risk; as we'll see below, there are in-between situations that are important.)

3. **Courts agreed:** In the first decades of the rise of strict liability, most courts agreed with the Second Restatement's approach of disallowing the plaintiff's negligence to be a defense, except in the case of knowing assumption of risk.

4. **Problems with the Second Restatement approach:** But in the late twentieth century, comparative negligence replaced contributory negligence nearly everywhere. (See *supra*, p. 282.) Furthermore, courts began to see that even in many actions denominated "strict" liability, there were large negligence components; this was true, for instance, in virtually every design-defect and failure-to-warn claim. Since plaintiff's negligence would merely reduce rather than eliminate recovery, and since the defendant was usually being evaluated based on quasi-negligence rather than strict-liability criteria, the Second Restatement's practice of completely eliminating plaintiff's negligence as a defense seemed increasingly ***inappropriate.***

C. The Third Restatement / modern approach recognizes comparative fault: Consequently, most modern decisions ***allow the plaintiff's negligence to be asserted as a defense in product liability actions.*** Epstein Tbk, §16.15, p. 430. The Third Restatement agrees with this approach: *whatever* the jurisdiction's standard method of dealing with plaintiff's negligence is (typically comparative negligence of one sort or another), ***that method applies to product-liability actions.*** See Rest. 3d (Prod. Liab.) §17(a): "A plaintiff's recovery of damages for harm caused by a product defect may be reduced if the conduct of the plaintiff

combines with the product defect to cause the harm and the plaintiff's conduct fails to conform to generally applicable rules establishing appropriate standards of care." The commentary notes that "[a] strong majority of jurisdictions apply the comparative responsibility doctrine to products liability actions." Comment a to Rest. 3d §17.

There are a number of different ways in which a plaintiff might behave negligently with respect to a product. Therefore, to see how the modern approach works, we need to consider each of these ways separately.

1. **Failure to discover the risk:** First, the plaintiff might ***"negligently" fail to discover that there is a defect at all.*** Here, the modern approach essentially agrees with that of the earlier Second Restatement: if the plaintiff's only fault is to fail to discover the defect, this is probably not really "negligence" at all, since a person is normally entitled to assume that a product is not defective. Therefore, in the ordinary case plaintiff's failure to discover the defect will not cause any reduction in her recovery.

   Example: P opens a can of tuna fish manufactured by D. Absent-mindedly, P takes a large forkful of the tuna without looking at it. Had P looked, he would have seen a large, sharp, metal sliver, which he would not have put in his mouth. P's mouth is slashed, and he brings a strict-liability action against D.

   Even though a consumer of ordinary attentiveness might well have looked at his food before eating it, and would have discovered the risk, most courts will not apply comparative negligence to reduce P's recovery, on the theory that a consumer is entitled to expect that a product will not contain a manufacturing defect. See Rest. 3d (Prod. Liab.) §17, Comment d ("In general, a plaintiff has no reason to expect that a new product contains a defect and would have little reason to be on guard to discover it.")

2. **Knowing assumption of risk:** Second, the plaintiff might be fully aware of a product's defectiveness (whether of a manufacturing or design nature), yet voluntarily and unreasonably decide to "assume the risk" of that defect. In this situation, the modern trend is to ***treat assumption-of-risk as a form of comparative negligence:*** to the extent that the plaintiff's decision to use the product in the face of the known risk was unreasonable, it will cause plaintiff's recovery to be reduced proportionately (and will ***not*** serve as an ***absolute bar*** to recovery).

   Example: P is driving a new car manufactured by D. A warning light suddenly

flashes, saying "Overheated engine. Stop immediately." As it happens, P has just carefully read the car's instruction manual, and knows that an overheated engine can often lead to an explosion, with consequent physical danger. P then looks under the hood, and sees that a water hose has ruptured, causing the engine to receive too little water. (Assume that this rupture constitutes a manufacturing defect for which D will be liable under standard strict-liability doctrine.) Nonetheless, P continues to drive for 100 more miles in 90 degree temperatures, even though he is merely taking a pleasure drive. The engine explodes, injuring P.

Under the traditional Second Restatement approach, P's conduct would be viewed as assumption of risk, and he would probably be completely barred from recovery. But under the Third Restatement and modern approach, P's conduct — though it consists of a voluntary encountering of a known risk — will be treated the same as any other type of plaintiff's negligence. In a pure comparative negligence jurisdiction, therefore, P's recovery will be reduced by an amount representing P's portion of the combined "responsibility" of P and D, but P will still be allowed to make some recovery.

a. Complete bar in some courts: But a minority of courts still treat a plaintiff's voluntary encountering of a known product defect to be assumption of risk, and to be a complete bar to recovery. Thus on the facts of the above example, some courts would find that P was not entitled to recover anything, because his continuing to drive after knowing of the danger of an explosion constituted an assumption of risk.

3. Conduct that is high-risk apart from defect: There are some types of culpable plaintiff behavior that fall in between the "negligent failure to discover the defect" and "intentional assumption of the risk from the defect" situations that we've discussed so far. One of these occurs where the plaintiff ***knowingly pursues*** an activity that would be ***high-risk even in the absence of a defect,*** and the activity ***combines with a defect*** to create an accident, or to make an accident worse. In this situation, as in the prior two situations, the modern approach is to simply treat plaintiff's behavior as being one sort of negligence that is to be thrown into the comparative-fault hopper, and weighed against the manufacturer's culpability.

Example: P buys a new car made by D. P drives the car while intoxicated, and hits a guardrail while traveling at 40 mph. Had P not been intoxicated, the collision would probably not have occurred. Immediately following the collision, P is thrown against the drivers-side door. Due to a defective latch on that door, the door opens, and P is thrown into the roadway, where he is hit by another car and seriously injured. Had the latch not been defective, the door would probably not have opened, P would not have been thrown out, and his injuries would have been much less severe.

A court following the modern / Third Restatement approach will treat P's driving-while-intoxicated on a comparative-fault basis. Assuming that the jurisdiction applies pure comparative negligence (or that it applies modified comparative negligence, but that P's responsibility is found to be less than D's responsibility) P's recovery will be reduced by his percentage of the total responsibility, but will not be eliminated. Implicit in this result will be the conclusion that P's driving while intoxicated and D's manufacture of the defective latch were both proximate causes, and causes in fact, of P's injury. (To the extent that D can demonstrate that some of P's injuries would have occurred even had the latch not failed, P will recover nothing for those injuries, since the defective latch did not in any way cause those injuries.)

4. Ignoring of safety precaution: Another "in between" situation arises where P ***consciously fails to use an available safety device,*** and is then injured by a product defect that would not have led to injury had the safety device been used. In some situations, the safety device is one provided by the manufacturer of the defective product; in other cases, it is provided by a third party. The analysis is pretty much the same in both types of situations — in most courts the plaintiff's failure to use an available safety device is generally fault that ***reduces*** (but does ***not eliminate)*** plaintiff's recovery.

Example: P, a consumer, purchases a Slicer-Dicer made by D. The Slicer-Dicer is designed to slice, dice, chop, and puree a variety of household products. The Slicer Dicer comes with a hand guard, which when installed prevents the user's hand from getting near the cutting blades. The hand guard is purposely designed to be removable for easy cleaning; the device and its instruction manual both contain a bold-faced warning that the device should not be operated without the hand guard. P removes the hand guard because he finds it easier to use the machine without it; he realizes that there is a greater danger of cutting his hand, but decides to risk it. P's hand slips, and is severely cut by the blades. P sues D on the theory that D's permitting the guard to be removed for separate cleaning constituted a design defect.

In a modern comparative-negligence jurisdiction the court would probably hold that P's use of the product without the guard should reduce, but not eliminate, his recovery.

Note: However, P's "misuse" of the product by permanently removing the guard might cause the court to invoke one of several doctrines that might prevent P's recovery *entirely.* For instance, the removal might be found to be such a misuse of the product that it constituted a ***superseding cause.*** Alternatively, the court might conclude that such a removal was so ***unforeseeable*** that the temporarily-removable design was ***not defective at all.*** See *infra,* immediately below, for a discussion of the various ways that product misuse might affect the outcome in a litigation.

D. "Misuse" of the product: Courts sometimes speak of ***"product misuse"*** as if it were a single defense or doctrine that could defeat a plaintiff's claim. But the reality is that plaintiff's misuse of a product is

merely a description of facts, not an independent doctrine or defense. Dobbs, p. 1026. The plaintiff's misuse of the product can lead to at least three different legal consequences, depending on the precise facts:

[1] it may lead to a ***reduction in plaintiff's recovery,*** under comparative-fault principles;

[2] it may indicate that the product was ***not defective at all;*** and

[3] it may prevent the defect from being deemed to be the ***proximate cause*** of plaintiff's injuries.

We consider each of these possible effects in turn.

1. **Reduction in recovery:** The misuse will often, of course, constitute ***"fault"*** on the part of the plaintiff, which will then under comparative-fault principles result in a reduction in the amount of the plaintiff's recovery. This is the type of consequence which we have discussed extensively *supra* (e.g., the overheated-engine, drunken-driver and Slicer-Dicer examples on pp. 401, 402 and 402-403 respectively.)

2. **Indication that product was not defective at all:** In some circumstances, the fact that the accident came about only after the plaintiff's misuse may indicate that the product was ***never defective in the first place.*** This is especially likely to be so in the case of a ***design-defect*** claim. Recall that a design is defective only if it fails to reduce the risks of ***foreseeable*** harms, and that there is no duty to design a product that will remain safe when used in unforeseeable manner. (See *supra*, p. 378.) It follows that if plaintiff's misuse was so unusual as to be considered unforeseeable, the fact that the accident occurred will say very little about whether the product was defective.

   Example: Recall the example from p. 378, in which P climbs up the back of a chair made by D in order to reach the top of a bookshelf. On these facts, the Third Restatement concludes that the chair is not defectively designed, because P's "misuse of the product is so unreasonable that the risks it entails need not be designed against." Rest. 3d (Prod. Liab.) §2, Ilustr. 20.

   a. **Foreseeable misuse:** But remember that if the misuse is ***reasonably foreseeable,*** and could be designed against without undue cost or sacrifice of product features, a design that does not

prevent the misuse may well be defective. The classic example is a car: speeding may in some sense be a "misuse" of the product, but if the car's maker does not make at least reasonable efforts to design a car that will be crashworthy in the event of a high-speed collision, the lack of crashworthiness is likely to be found to be a design defect.

b. Unavoidably unsafe: However, you cannot assume that merely because a particular type of misuse is foreseeable, a product whose design does not protect against that misuse is necessarily defective. Remember that a design defect exists only where an ***alternative reasonable design exists,*** such that the dangers of the design actually chosen by the defendant outweigh the benefits of that design. (See *supra*, p. 373-374). A design that fails to guard against a particular type of misuse may nonetheless be non-defective under this risk-utility analysis — this typically happens in the case of "unavoidably unsafe" products.

Example: Suppose that D, a liquor manufacturer, makes a particular brand of 100-proof rum in 40-ounce bottles. (Assume that rum is commonly sold in such a 100-proof version, though less potent variations are also often sold.) P chug-a-lugs an entire 40-ounce bottle, and dies of acute alcohol poisoning. P's estate sues D on the theory that D should have designed the rum differently by reducing its alcohol content.

P is unlikely to prevail, because the court is likely to conclude that uncontaminated 100-proof rum is simply not defective — its alcoholic content is characteristic of this type of rum, and a reduction in the alcohol content would have turned it into a different product materially less attractive to consumers. In other words, it cannot be said that the 100-proof version had dangers that outweighed its benefits, viewed in the context of alternative types of rum.

3. Misuse as superseding cause: Finally, the plaintiff's (or someone else's) misuse of the product may be a ***superseding cause,*** i.e., a cause that prevents the defect from being deemed to be a ***proximate cause*** of the harm. (See our discussion of superseding causes in general negligence cases *supra*, p. 162.) When this occurs, the plaintiff will be ***completely barred*** from recovery, since the usual tort rules on proximate cause apply: D cannot be required to pay anything on account of an injury for which its conduct was not a proximate cause.

a. Foreseeability of misuse: Generally, the proximate cause issue revolves around ***fore-seeability:*** if the misuse was foreseeable, it is not a superseding cause, but if it was unforeseeable, it *is* superseding. Dobbs, p. 1029.

i. Extreme misuse required: This foreseeability standard means that it takes a ***very extreme misuse*** to be superseding in a strict product liability case. So, for instance, the mere fact that the defendant ***warned against*** a particular use won't be enough to establish misuse when the plaintiff engages in that use. And in any event, courts will narrowly construe warnings.

Example: D manufactures an all-electric sports car that can go from 0 to 90 mph in 4.7 seconds. The user's manual states in bold letters on the cover, "Using the full acceleration capability of this car is dangerous. Do not accelerate faster than 0-80 in 5.0 seconds, because any faster rate will impose G-forces in excess of 2, which may cause neck and spine injuries." P reads the manual, doesn't focus on this cover language, and figures, "Let's see how fast this can accelerate." P floors it, and his head snaps back when he accelerates at 3 G-forces. Due to a lack of a head rest that would accommodate the accelerations of which the car is capable, P's neck is fractured. He sues D in strict product liability, claiming that the lack of a proper head rest was a design defect.

A court would be *unlikely* to hold that P's conduct, including the ignoring of the warnings, constituted misuse of the sort that would be superseding. Since the car was manufactured in a way capable of acceleration more rapid than the head rest could support, P's use of that rapid-acceleration capability would be "foreseeable," and thus not superseding. Therefore, any misconduct by P would be classified as comparative negligence that will reduce his recovery, not as a superseding cause that would negate recovery entirely.

b. Removal of safety device by employer: If the misuse is unforeseeable, it may be superseding even if done by a ***third person*** rather than by the plaintiff. The most common illustration is an ***employer's removal of a safety device*** from a machine: where the removal is deemed to be unforeseeable, it will be superseding, and will block even a completely innocent user from recovering against the manufacturer.

Example: D makes a commercial meat grinder with an integrated hand guard that cannot easily be removed. The machine is sold to X, a supermarket. In an attempt to increase productivity, X hires a machine shop to remove the hand guard by use of a blowtorch and other specialized tools. P, an employee of X, loses three fingers when his hand slips while using the guard-less grinder. Had the guard been present, the accident would not have occurred. P sues D on a design-defect theory, alleging that the grinder should have been designed so that if the guard was removed, the machine

would become inoperable.

The court will first determine whether removal of the hand guard was reasonably foreseeable. On these facts, is likely that the court will conclude that the removal was not reasonably foreseeable. In that event, X's conduct in removing the guard will probably be deemed to be a superseding cause, relieving D of all liability to P. If, however, the court decided that the removal *was* reasonably foreseeable (e.g., because there was evidence that, prior to the manufacture of this particular unit, D had heard that other users were removing the guard for productivity reasons), the removal by X would not be superseding, and P *would* be permitted to recover if he proved that D's design was defective. (Even here, however, it would be hard for P to show that D's failure to make the machine inoperable without the handguard present constituted a design defect.)

IX. DEFENSES BASED ON FEDERAL REGULATION, MAINLY THE DEFENSE OF PREEMPTION

A. Preemption: The federal government regulates many aspects of products. For instance, the design, marketing and labeling of medical devices are heavily regulated, as are the advertising and labeling of tobacco products. This federal regulation can have an important impact on consumers' state product-liability rights. In particular, under the doctrine of ***"preemption,"*** federal regulatory action may ***limit the states' freedom to apply their usual rules of tort liability*** to cases involving the regulated product.

1. The Supremacy Clause: The concept of preemption is based on the ***Supremacy Clause*** of the U.S. Constitution. That clause says, in essence, that federal law ***takes priority over conflicting state law.***

2. Preemption, generally: The rules of preemption, then, are simply rules about how to apply the Supremacy Clause to state action that's alleged to be inconsistent with federal action. Here is a brief summary of how preemption works in the context of product-liability law.

a. Express preemption: First — and usually easiest to apply — is ***"express"*** preemption. This occurs when Congress explicitly says that it intends to take away the states' ability to regulate in a particular way. When it is clear that Congress has meant to do this, the Supremacy Clause nullifies any attempt by a state to do what Congress has said the state may not do.

i. Express preemption in medical-device cases: Express preemption is likely to be found, for instance, where the Food

and Drug Administration ***pre-approves*** a newly-developed ***medical device*** such as a pacemaker or heart valve. Once this happens, a user of the device will generally not be permitted to recover under state tort law for the device's defectiveness. That's because the court will likely conclude that the federal approval expressly preempts a state from awarding tort damages premised on the device's defectiveness. See, e.g., *Riegel v. Medtronic Inc.*, 128 S.Ct. 999 (2008) (where FDA gives pre-market approval to a particular medical device, this fact preempts states from hearing common-law claims alleging that the product is unsafe or ineffective).

b. Implied preemption: Most real-life controversies involving preemption in tort law, however, involve ***"implied"*** rather than express preemption. That is, Congress (or a federal agency acting under direction from Congress) does not explicitly tell the states that they may not take a particular tort-related action. Instead, Congress or the federal agency enacts a statute or regulation, and a litigant (usually the manufacturer of the product) argues that the federal enactment should be interpreted as displacing a particular state tort-law rule. There are two different ways in which implied preemption can occur in a tort-law context — a ***direct conflict*** and a federal decision to ***occupy*** an ***entire field.***

i. Direct conflict: Sometimes analysis of the federal law and the state law shows that the two are in ***direct conflict.*** When this happens, as you'd expect, the state law must yield. The direct conflict can be of two sorts:

(1) it is ***impossible*** for the maker of a product to ***comply simultaneously*** with the federal regulation and the state regulation; or

(2) the ***objectives*** behind the federal regulation and the state regulation are ***inconsistent.***

Example of (1) (compliance with both is impossible): Suppose that Congress says that every package of cigarettes must contain a label stating, "the Surgeon General has determined that smoking may be hazardous to your health." Suppose then that North Carolina, a tobacco-growing state, passes a statute saying "No health warnings are required in this state on any package of cigarettes."

Obviously there is a direct contradiction between the federal and state regulatory schemes — a given cigarette package cannot comply with both. Therefore, the state regulation is invalid.

Example of (2) (conflicting objectives): Suppose that Congress says, "it is the desire of Congress that auto manufacturers be encouraged to install airbags in every automobile produced after the date of this act." To further that objective, Congress gives auto manufacturers a $200 tax credit for every car that is made with an airbag. Texas then passes a statute saying, "in any tort litigation in which the occupant of a vehicle alleges that he or she has been injured by the inappropriate inflation of an airbag, the burden of proving the non-defec-tiveness of the airbag shall be placed upon the manufacturer." A court might well hold that in view of the strong federal interest in encouraging airbag installation, the Texas statute has a sharply conflicting objective — making airbag installation more burdensome to manufacturers — and that the Texas statute should therefore be deemed impliedly preempted by the federal legislation.

ii. Occupation of entire field: The second form of implied preemption occurs where the federal government is found to have ***intended to occupy an entire field of regulation.*** If such an intent is found, then even a state law that does ***not directly conflict*** with the federal law will be preempted.

Example: Congress has given the Food and Drug Administration (FDA) full power to license most types of medical devices, and to prescribe how such devices may be marketed. Assume that as to a particular device, the FDA has not actively examined or approved the device (making the situation different from *Riegel*, *supra*, p. 406, where the FDA explicitly pre-approved the device). A state then imposes additional licensing requirements on that device. A court would likely hold that because Congress intended to occupy the *entire field* of licensing that type of device, the additional state requirements are preempted even though the state requirements don't conflict with any actual federal requirement.

(1) Need for uniformity: When a court is deciding whether Congress intended to occupy the entire field, the court will give special weight to indications that Congress perceived a need for a ***uniform national rule,*** rather than varying state rules. So, for instance, in the medical-device-labelling field, the need for manufacturers to have a ***single nationwide system of labels*** (not state-by-state variations) would be an important factor pointing a court towards the conclusion that Congress intended to occupy the entire field.

c. Implied preemption of state common-law tort remedies: The most interesting and controversial question involving preemption occurs when a manufacturer argues that federal regulation preempts

the states from allowing a plaintiff to recover for a ***common-law tort.*** In this scenario, there is no explicit state "regulation" — the state is not passing a statute or enacting an administrative regulation that is alleged to be inconsistent with the federal approach. Instead, the defendant manufacturer is typically making the argument that merely ***allowing a plaintiff to recover in tort*** would itself constitute an ***implicit*** sort of "regulation" that is inconsistent with the federal regulatory scheme. So these are cases of "implied" (rather than express) preemption of state law by federal law.

i. Needs direct conflict or impeding of federal enforcement: It is not easy for a manufacturer to defeat a common-law tort claim by use of an implied preemption defense. As a good rule of thumb, the manufacturer (D) will win with such a defense *only* if it can show that *either:*

[1] the conduct that P argues D was required to take under state common-law rules ***conflicts*** with the federal regulation; or

[2] allowing the tort recovery sought by P ***would impede enforcement*** of the federal regulatory scheme.

Dobbs, § 373, p. 1037. Manufacturers will often have a tough time making either of these showings.

ii. Implied preemption in prescription-drug cases: Cases involving ***prescription drugs*** will often be found to involve only ***"implied"*** preemption. Although Congress has given the FDA authority to regulate prescription drugs just as it allowed the agency to regulate medical devices like the one in *Riegel (supra*, p. 406), Congress has ***not expressly dealt with preemption*** in the prescription-drug context. Therefore, prescription-drug cases are harder for the defendant manufacturer to win on a preemption theory than are medical-device cases, because an impliedpreemption defense tends to be harder to establish than an express-preemption one.

Example: P receives an anti-nausea drug, Phenergan, made by D. The warnings on the label for Phenergan had been approved by the FDA. There are several ways to administer Phenergan, one of which is by putting it directly into the

patient's vein (the "IV-push" method). The IV-push method is the most dangerous, because if the drug is mistakenly put into an artery instead of a vein, it is likely to cause gangrene. That's what happens to P, who ends up having her arm amputated. P claims that the drug was improperly labeled by D, in that D should have instructed practitioners to avoid the IV-push method.

D makes two sorts of preemption claims in defense: (1) that since the FDA had already given pre-market approval of D's labelling, it would have been *impossible* for D to *simultaneously comply* with the federally-imposed requirements and with any state-law duty to warn against the dangers of the IV-push method (dangers that apparently didn't become known until after the pre-market approval by the FDA); and (2) the *purposes* of the FDA regulatory scheme would be impeded by allowing state common-law recovery based on the label.

Held (by the Supreme Court 6-3), no implied preemption occurred here. As to the impossibility defense, "impossibility preemption is a demanding defense," and D hasn't shown that the FDA wouldn't have retroactively approved D's revision of its label to include strengthened warnings (a process that the FDA regulations generally allow).

As to the inconsistent-purposes defense, Congress knew how to expressly forbid state-law suits where it thought such suits posed a danger to congressional objectives, as Congress had long done in the case of medical devices (as in *Riegel, supra).* So in the context of prescription drugs, the fact that Congress remained silent rather than enacting such a ban indicates that Congress did not view such suits as being inconsistent with its objectives. Consequently, Congress has not impliedly preempted state-law suits. *Wyeth v. Levine,* 129 S.Ct. 1187 (2009).

B. Compliance with government standards: Don't confuse the defense of federal preemption of state law with a separate defense, the so-called ***"regulatory compliance"*** defense. The latter defense asserts that because a product complies with a particular government regulation scheme, that compliance automatically means that the product is not defective. Most jurisdictions do *not* accept this defense — the plaintiff is free to show that even though the product meets the relevant federal regulatory requirements, the product is nonetheless defective. (However, nearly all states at least allow the fact that the product meets federal regulatory requirements to be admitted as non-dispositive *evidence* of non-defectiveness.) The regulatory compliance defense is discussed *supra*, p. 380.

Quiz Yourself on
PRODUCTS LIABILITY (Entire Chapter)

68. Slip ‘N’ Slide Floor Polish, which is poisonous, looks like Flopsy Cola, a popular soft drink, and comes in a soda-like bottle with an easily removable lid. The bottle has a warning, reading: “This product is poisonous. Keep out of reach of children.” Little Bobo, three years old, finds a bottle of polish under the kitchen sink, pops the lid off, and drinks the contents of the bottle, making himself seriously ill in the process. Could Slip ‘N’ Slide be strictly liable for Bobo’s injuries? _____

69. Count Dracula enters the hospital for an operation to correct internal hemorrhaging. During the operation he receives a transfusion of blood infected with the HIV virus, and as a result he contracts AIDS. Can he successfully sue the hospital in strict product liability? _____

70. Americus Gothic is justly famous in his neighborhood for his delectable acorn jelly. He’s not in the retail business, but occasionally he sells a jar to a lucky neighbor. Although Gothic is careful, one batch of his jelly is contaminated and, when his neighbor, Uneeda Purifyre, buys a jar and eats some, she becomes violently ill. Can Uneeda hold Gothic liable in strict liability? _____

71. Scrubby Dubdub Inc. manufactures equipment for automatic car washes. Spit ‘N’ Polish reconditions old car wash equipment, rebuilds it, and resells it. The Hot Wax Car Wash buys reconditioned equipment from Spit ‘N’ Polish. The equipment fails as Lydia Puttputt is getting her car washed. The brushes go crazy and smash her car. She is seriously injured as a result. She sues Scrubby Dubdub in strict liability. Could Scrubby Dubdub be liable? _____

72. Campfire Soup Company is in the business of making canned soups. It uses only the latest, state-of-the-art machinery to blend, cook, and can the soups; it maintains high safety standards; and it conducts rigorous inspections constantly. A particular can of the company’s Cream of Snail soup is sold to Wholesaler, who is a distributor for Campfire’s products. Wholesaler resells the can to Retailer. In Retailer’s store, it is bought by Charles, a consumer. Charles prepares the soup, and serves it to Gaia, a houseguest and friend of his. As Gaia is eating the soup, she bites down, and sufferes a terrible gash in her gum. The gash turns out to have been caused by a small fragment of glass in the soup. All available

evidence suggests that the glass was in the soup at the time the can was opened by Charles. The glass is a type used in Campfire's canning equipment, and the most likely (though still somewhat speculative) explanation is that there was a once-in-a-million breakage of the machinery during the making of the batch that included this can. Gaia has sued all people concerned (Campfire, Wholesaler, Retailer, and Charles). Against which of them can she recover, assuming that she produces no evidence other than that already described in this question?

_____

73. Frieda is driving her 1999 Newmobile when she is struck from the side by a speeding driver who drives away and is never found. The impact on Frieda's car is great enough that it causes the car to go through a barrier at the side of the road, where it tumbles over and falls into a seven-foot-deep ravine. The car finally lands on its roof, and Frieda is seriously injured. Medical evidence shows that the only serious injuries to Frieda occurred when the car landed on its roof, the pieces of steel supporting the roof buckled, and the roof therefore collapsed onto Frieda's head and neck. The evidence also shows that had a "roll bar" been installed in the car to maintain the structural integrity of the passenger compartment in a rollover accident, Frieda would not have sustained her injuries. There is evidence that other manufacturers of similar cars have installed roll bars for this reason.

Frieda sues Newmobile in strict product liability. Newmobile defends on the grounds that a manufacturer of a defective product only has liability when the product is put to its intended use, and that collisions and roll-overs are not the intended use for cars. Will Newmobile prevail with this defense? _____

74. United Automobile Corp. manufactures a 1998 Weep four-wheel-drive vehicle, and sells it to Dealer, who resells it to Tim. The car comes with no express warranties by United, and with whatever implied warranties are implied by law in such sales. Tim, after using the car for a year, sells it to Peggy. One day, due to a defect in the design of the Weep's radiator, the radiator becomes clogged, the engine temperature heats up to an unbearable extent, and the engine catches fire. (There is no evidence that United was negligent in the way it designed the radiator — the flaw in design only became apparent long after Peggy's Weep was

made, after a couple of fires like the one in Peggy's car.) Peggy escapes the car without injuries, but the car is completely destroyed by the fire. Can Peggy recover for the value of the car against United? If so, on what theory? _____

Answers

68. Yes. Strict liability applies to products in a defective condition unreasonably dangerous to consumers. Here, it is foreseeable that children will find the bottle, and Slip 'N' Slide designed theirs to look like soda pop. As such, Slip 'N' Slide will likely be strictly liable. The warning won't exculpate Slip 'N' Slide -- a reasonable warning is an additional requirement, added to the requirement that a product not be sold in a defective/unreasonably dangerous condition.

RELATED ISSUE: Slip 'N' Slide would probably also be liable in negligence, since it is unreasonable to put a poisonous product in a container like Slip 'N' Slide's. (Furthermore, it is easy for Slip 'N' Slide to redesign the bottle with a childproof top and different shape.)

69. No. Strict liability can only be imposed for the sale of defective products, not services. Blood transfusions are generally considered a service, not a product, and as a result strict liability cannot be imposed for infusion with infected blood.

70. **No.** Strict liability can only be imposed against one who is in the *business* of selling goods of the type in question. A casual transaction between neighbors, like this, cannot be the basis of strict liability. Instead, the seller must be a manufacturer, wholesaler (or other middleman), or person in the business of retailing.

71. No. The equipment was substantially altered after it left Scrubby Dubdub — Spit 'N' Polish rebuilt it. Strict liability requires that there be no substantial change in the product after it leaves defendant. Thus, Scrubby Dubdub will not be liable.

72. Campfire, Wholesaler, and Retailer, but not Charles. Campfire, Wholesaler, and Retailer will all have ***strict product liability*** — each sold a product that was both defective and unreasonably dangerous.

Since they did so, it does not matter that they may all have behaved with more than reasonable care. It does not even matter that Wholesaler and Retailer had absolutely no chance to discover the defect no matter how diligent they were — since they were in the business of selling products of this type, they became liable for dangerous defects in the product without reference to their level of care. But the same is not true of Charles — since he was not in the business of selling soups, he can be liable only for his negligence, and the facts do not suggest that he was negligent here. (But if he should have noticed the glass and through inattention did not, then he would be liable to Gaia for negligence). See Rest. 2d, §402A, and Illustr. 1 thereto.

73. No. Strict product liability will be found whenever the product is dangerously defective if used in a ***"foreseeable"*** way, not merely when used in an "intended" way. Since it is quite foreseeable that a car may be involved in an accident, including a roll-over accident, Newmobile is unlikely to prevail with this defense. (Newmobile might prevail by showing that installation of a roll bar would be prohibitively expensive in light of the infrequency with which it would prove beneficial, but this is another matter.)

74. Yes, probably, but only on a warranty theory. Most courts (and the Third Restatement) would say that since the damage here consists solely of damage to the defective product itself, strict products liability does not apply. That is, most courts would treat this as a form of intangible economic loss, not "property damage," and strict products liability generally doesn't apply to intangible economic loss. In such a court, Peggy will have to proceed on a warranty theory (since by hypothesis there was no negligence.) The problem is that United didn't sell directly to Peggy but rather to Tim, who re-sold to Peggy. States vary in whether they find that the implied warranty of merchantability (which would probably cover this fact pattern) applies to a subsequent purchaser — Peggy will probably win in a state following Alternative C to UCC §2-318 but not in a state that follows Alternatives A or B (since the only non-privity plaintiffs who are covered by those Alternatives are ones who are injured "in person" by breach of the warranty).

***Exam Tips** on*
PRODUCTS LIABILITY

You'll almost always know when you've got a products liability issue — in the typical situation, some "product" will be sold, and someone will be injured when the product does not perform the way a consumer would expect it to. The hard things to do are: (1) to articulate the various theories on which P can recover; (2) to structure your answer into a sensible order; and (3) to spot and analyze the various sub-issues (e.g., Can a bystander recover? Was the product unavoidably unsafe? Was there a design defect? Was there a failure to warn?).

☛ As to structure, you may want to organize your answer into the following order:

(1) At the top level, arrange it by plaintiff-defendant pair (all claims by P1 against D1, then those by P1 against D2, P2 against D1, etc.);

(2) Then talk about the theories that could be used in each P-D pair. *(Example:* "P1's suit against D1 could be based either on strict product liability, negligence or breach of express and implied warranty. Probably P1's best results will come from the strict liability theory, because...");

(3) Then, talk about each special issue presented by the fact pattern, discussing all theories of recovery in the context of that special issue. Thus do a complete discussion of the failure to warn (as to negligence, strict liability and warranty), followed by a complete discussion of, say, design, and so on. *(Example:* "Was the product properly designed? For the negligence claim, the issue is whether the design was done with 'reasonable care.' For the strict product liability theory, the issue is whether the product was designed 'defectively,' which most courts interpret to mean 'designed in such a way as to satisfy the expectations of a reasonable consumer about how the product would perform...'")

- Whenever you have injuries caused by a "product" (as distinguished from a service or an activity), remember that there are ***three main theories*** on which liability might be founded:

  (1) ***Negligence*** (the manufacturer's or retailer's failure to use reasonable care in the design, manufacture, labelling or marketing of the product).

  (2) ***Breach of warranty*** (which can come in three types: express warranty, implied warranty of merchantability, and implied warranty of fitness for a particular purpose).

  - "Misrepresentation" is an offshoot of warranty, applicable mainly to cases of inadequate labelling or false advertising.

  (3) ***Strict product liability*** (imposed without regard to fault, for a "defective" and "unreasonably dangerous" product).

  Note: You should be sure to list and discuss *each of these theories in each instance,* if there's any chance that it might be applied. (Even if the theory won't be successful, it's probably worthwhile to say why it won't be.) *(Example:* "Because the facts tell us that Manufacturer could not have found the manufacturing defect even through the exercise of due care, probably a recovery against it based on negligence will not be possible.")

- In considering recovery for ***"negligence,"*** here are the main things to look for:

  - Remember that the ordinary rules of negligence apply — there's nothing very special about negligence in the product context.

  - ***"Privity"*** doesn't matter — as long as P was a "reasonably foreseeable" plaintiff, the fact that she was a remote purchaser, or even a bystander, doesn't prevent her from a negligence recovery against a negligent manufacturer. This is true even if the product went through several different sellers (wholesaler, retailer, original purchaser, etc.).

  - Your analysis will differ depending on the particular defendant's place in the ***distribution channel.***

    - Where D is the ***manufacturer,*** the question is always, "Did D use reasonable care in making the product?" This includes component-selection, design, manufacture, post-manufacture

inspection, and labelling. Generally, negligence theories are most useful against the manufacturer (as opposed to people further down in the distribution chain).

- ☞ Where D is the ***retailer,*** a negligence claim is much less likely to succeed. In the typical case of a manufactured product shipped in a sealed package, the only ways the retailer is likely to be negligent are: (1) he saw or should have seen from the outside of the package that something was wrong; or (2) he knew or should have known that this particular manufacturer was likely to be producing bad goods (e.g., a safety recall is in place, which the retailer ignores or negligently fails to know about).
  - ☞ Most important: the retailer has ***no duty*** to ***inspect*** the goods he sells, so the fact that an inspection would have disclosed a problem is irrelevant.
  - ☞ Also, the manufacturer's negligence is ***not imputed*** to the retailer.
- ☞ Where D is a lessor, bailor, or user (i.e., a "non-seller"), negligence may be your best theory of recovery (because warranty and strict product liability are not always imposed on non-sellers).

- ☞ ***Contributory (or comparative) negligence*** can be a defense to a negligence product liability claim, as in other types of negligence cases. *(Example:* If P should have noticed that a food product made or sold by D was rotten from its smell, it's probably contributory/comparative negligence for P to eat it.)

☛ Be sure to mention ***breach of warranty*** whenever you analyze a product situation. This is the theory of recovery that students most frequently omit.

- ☞ One type of breach of warranty is breach of ***express*** warranty. This occurs where the product fails to live up to explicit statements that D has made about it. In the product context, this comes in two main forms: (1) D ***advertises*** the goods as having a certain characteristic (e.g., "doesn't cause drowsiness"); or (2) the ***labelling*** contains

statements about the product.

- Also, the manufacturer's use of a ***picture*** or ***model*** can be an express warranty. *(Example:* If the box containing a helmet shows a person riding a motorcycle with the helmet on, that's probably an express warranty that the helmet is suitable for use as a motorcycle helmet.)
- A ***retailer*** is deemed to have "made" any express warranty that is contained on the product (and probably to have made any warranty contained in the manufacturer's advertising).
- The warranty is ***"strict"*** — it doesn't matter that D used all reasonable care to make the product conform to the warranty, or reasonably thought the product did conform.
- Whenever a label or advertising is incorrect, also mention that P can sue for common-law ***misrepresentation.*** Cite to Rest. §402B, establishing liability for one who "makes to the public a misrepresentation about a material fact" concerning the product. This theory is useful if the state's warranty law (controlled by the UCC) is narrower than usual (e.g., it allows a disclaimer that would not block misrepresentation liability, or it applies a narrow version of privity cutting off bystanders).

- When a product is sold by a ***"merchant"*** (one in the business of selling goods of that kind), the merchant is deemed to make an ***implied warranty*** that the goods are ***"merchantable."***
  - In your discussion of merchantability, you should define the term: "Goods are 'merchantable' if they are 'fit for the ***ordinary purposes*** for which such goods are used.'" There will often be an issue about whether the goods breached this warranty. *(Example:* P has a rare allergic reaction to a drug. Probably this does not make the drug "unmerchantable," because the "ordinary person" doesn't have this rare allergy.)
  - Normally, the merchantability suit is against the retailer. But the suit can also be against the manufacturer, as long as the manufacturer was in the business of selling goods of that kind.

- ☞ Sometimes tested: Can a merchantability suit be brought against one who ***"leases"*** rather than sells the goods? Answer: most courts allow warranty liability here.

☞ Occasionally, you should mention the implied warranty of ***fitness for a particular purpose.*** Look for this fact pattern: D (almost always the retailer, not the manufacturer) knows that P has ***special requirements,*** and makes a ***recommendation*** of a particular make and model, which P follows. (The existence of a warranty of fitness for a particular purpose does not displace the warranty of merchantability — both apply.)

☞ For all three types of warranty (express, merchantability, and fitness for a particular purpose), you generally don't have to worry much about ***privity.***

- ☞ All of these warranties are now generally held to extend to a ***remote purchaser*** ("vertical" privity).
- ☞ In virtually every state, every member of the purchaser's ***household*** is also covered. In most states, users who didn't buy, and even ***bystanders,*** are covered — but since a few states don't extend the warranties this far, you should mention this as an issue if the injured person is a bystander or other non-purchaser.

☞ Warranties can be ***disclaimed.*** Most-often tested: a product is marked ***"AS IS."*** This marking generally serves to disclaim the two implied warranties (merchantability and fitness); it's not clear whether the marking wipes out an express warranty contained elsewhere on the product's labelling, though a handwritten notation probably does disclaim any implied warranties on the pre-printed label.

☞ If P's sole damages are ***intangible economic harm*** (e.g., lost profits), warranty theory may be P's best bet. P's claim for economic harm is strongest where P bought the item directly from D under an express warranty; it's weakest where P sues on implied warranty and was not a purchaser (e.g., P is a "bystander" whose business is interrupted when the product explodes and cuts off

electrical service in the neighborhood).

- The bulk of your analysis will typically concern ***strict*** product liability, since most of the time this furnishes P with the best overall chance of recovery.
  - Start your analysis of strict product liability with a definition. A good one is from the Rest. 3d: "One engaged in the ***business of selling or otherwise distributing products*** who sells or distributes a defective product is subject to liability for ***harm to persons or property caused by the defect."***
  - Here is a ***checklist*** of requirements for the strict liability doctrine:
    - □ D must be a ***"seller";***
    - □ D must have been in the ***business*** of selling or distributing products ***of this type;***
    - □ The product must be ***"defective";***
    - □ The product must have been expected to, and did, reach the consumer ***without substantial change*** in its condition;
    - □ P must have suffered ***personal injury or property damage*** (not just economic loss); and
    - □ The product (and in fact its defectiveness) must have been the ***cause in fact,*** and the ***proximate cause*** of the damage to P.
  - Two major things to keep in mind:
    - In the usual case of a manufacturing defect, it doesn't matter that D ***used all possible care*** in designing and manufacturing the product;
    - The doctrine applies to non-manufacturers who sell, most notably ***retailers*** (even though they couldn't possibly have known of the defect or danger).
  - Commonly-tested: Was the product in fact ***"defective"?***
    - For manufacturing defects, quote the Rest. 3d's test: "A product contains a ***manufacturing defect*** when the product ***departs from its intended design even though all possible care was exercised*** in the preparation and marketing of the

product."

- ☞ If the product is ***food,*** anything ***"foreign"*** is probably a dangerous defect if it could cause physical injury. *(Example:* Slivers of metal in canned tuna fish.) Anything ***"natural"*** to the food before processing (e.g., in bones in canned salmon) may or may not be a defect — some courts say that natural items in food can never be a defect, but most now say that anything a consumer ***wouldn't expect to find*** in that type of food is a defect, even if it's "natural."

- ☞ If the product ***breaks*** or ***wears out*** before a reasonable consumer thinks it would/ should, this can be a defect.

- ☞ ***"Design defects"*** are the most commonly-tested type of defect. Here are the general principles:
  - □ Quote the Rest. 3d's definition: "A product is ***defective in design*** when the ***foreseeable risks of harm posed*** by the product ***could have been reduced or avoided by the adoption of a reasonable alternative design*** by the seller or other distributor ... and the ***omission of the alternative design renders the product not reasonably safe."*** Notice that this is essentially a ***negligence-based,*** risk-utility standard.
  - □ Availability of a ***safer*** design is important evidence that the design actually used was "defective."
  - □ The fact that "everyone else in the industry designs it this way" is probative, but not binding, on whether the design was defective.
  - □ D's failure to include a cost-effective technologically-available ***safety feature*** will often be a design defect. *(Example:* If the technology exists to make a car not start when the seat belt is not attached, it may well be a design defect not to include this feature.)
  - □ The ***"state of the art"*** defense will be accepted in design cases — if at the time of manufacture technology did not yet exist (or wasn't cost-effective) to design the device a certain way, the fact that this design became feasible later

(before trial) is irrelevant.

- In any design-defect or failure-to-warn case, be on the lookout for a possible ***preemption*** defense: if the particular design or warning-label that P says was faulty was imposed by ***Congress,*** and the court finds that Congress intended to ***preempt*** the states from requiring stricter or different designs or warning labels, then D has a defense. Remember that this is always a question of ***congressional intent:*** did Congress intend, by imposing the requirement, to block the states from allowing strict product liability against a D who followed the federal rules?

- ***"Unavoidably unsafe"*** products often turn up on exams. There are two different problems:

  - *Case 1:* The defect slips in during the manufacturing process, and no better production process, and no amount of inspection, would prevent this particular unit from being "broken" (different and more dangerous than the "standard" one off the assembly line), or allow D to separate that item from the non-broken ones. Courts are split as to whether the product here is "unavoidably unsafe," but the Rest. 3d's view is that the unavoidability of the defect is ***no defense.***

  - *Case 2:* Here, ***each*** copy is unsafe, in the sense that the items are all the same, and each poses the same dangers. Here, "unavoidably unsafe" is usually a defense, at least if the product's overall benefits outweigh its overall dangers.

    - In this category, the most common example is ***prescription*** drugs. Even if the drug has rare side effects, or causes allergic reactions in a few people, as long as D gives adequate warnings and the drug produces a net benefit to *some* group of patients, then at least according to the Third Restatement the drug is not defective, and the particular P who is injured cannot recover. (But note that most courts *disagree* — even in prescription drug cases, these courts let P win on a strict liability theory if D did not at least make reasonable efforts to make the

drug as free from side-effects or allergic reactions as it could.)

- ☞ Be sure that the product was defective ***when it left D's hands.*** Often-tested: the product is OK when it leaves Manufacturer's plant, but because of bad shipping, bad handling by retailer or bad care by purchaser, its condition changes to a dangerous condition. *(Example:* A bottle leaves Manufacturer's plant OK, gets broken in transit, and P gets glass in her mouth. Manufacturer is not strictly liable.)

- ☞ Many questions involve ***"failure to warn."*** The duty to warn is basically an ***extra*** obligation.

  - ☞ Thus if the product is basically dangerous either because of a manufacturing defect or a design defect, D can't cure this defect by warning of the dangers.

  - ☞ Even if the product is designed in a "non-defective" way, D still has a duty to warn of any ***non-obvious*** dangers. Failure to carry out this duty is evaluated in a way that has aspects of both negligence and strict liability.

    □ Commonly-tested: D must warn that certain ***uses are not appropriate.*** *(Example:* If a ladder can't take more than a certain amount of weight, and a reasonable consumer would think that it could take more stress than it really can, it's a violation for the manufacturer not to warn of the real limit.)

    □ Usually, failure-to-warn arises in connection with the ***label.*** So if the fact pattern tells you something about what the label says, that's a tip-off to look for a failure-to-warn problem.

    □ Be especially on the lookout for failure-to-warn in ***prescription drug*** cases — there's almost always some side effect or allergy potential, and courts today say that virtually any risk (however small) must be warned of.

    □ Common scenario: The warning booklet (or box containing the warning) is part of the package when the product leaves the manufacturer, but it's ***lost*** in shipping or lost by the retailer. The manufacturer is protected here by the "when it

left defendant's hands" rule, except for situations where the danger is so great that a reasonable exercise of the duty-to-warn required putting the label right on the product itself instead of on packaging. *(Example:* A power mower probably needs a warning on a metal plate attached to the mower, not just on the box.)

- □ But remember the ***"learned intermediary"*** defense for drug makers. Where the defense is allowed (as it is in most states), the manufacturer's duty is generally limited to warning the ***prescribing physician*** rather than the patient. So if the manufacturer warned the physician, but the physician didn't adequately warn the patient, the manufacturer is off the hook in a state that allows the intermediary defense.
- □ If the danger wasn't ***knowable*** at the time of manufacture, most courts say there's no duty to warn of it. This is the ***"state of the art"*** defense. *(Example:* If after all reasonable testing, a prescription drug manufacturer doesn't know that a particular side effect can happen, it's not a violation to fail to list this effect.)
- □ But if the manufacturer ***later learns*** of the danger, most courts will impose on it a ***post-sale duty to notify*** the prior buyer or user of the danger, if that person's identity is known.

☞ There is no duty to warn of a danger that would be ***obvious*** to an ordinary person. *(Example:* It is obvious that a kitchen knife can cut someone, or that the user of a ladder might fall off. Manufacturers therefore do not have to warn of these dangers.)

☞ Don't forget ***causation,*** especially ***proximate*** cause. Even in strict liability (and warranty), these elements must still be proved. So the "defect" (not just the product) must be the proximate cause of D's injuries.

☞ Most common scenario: Purchaser ***misuses*** the product in a way that is virtually ***unforeseeable.*** This constitutes a

superseding cause. *(Example:* P tries to cut his hair with a lawnmower.) But ***foreseeable*** misuse is ***not*** superseding, and most misuse these days is found to be "foreseeable."

- ☞ If the manufacturer warns against a particular misuse, and P (or whoever is using the product) ***consciously disregards*** the warning, that's probably superseding. (But P's negligent failure to notice the warning is not superseding.)

- ☞ Causation is especially important in ***failure-to-warn*** cases. Most important context:
  - ☞ If D can show that P ***wouldn't have read*** a warning even if one had been given (or would have ***ignored*** the warning if it had been given and P had seen it), then the failure to warn wasn't the proximate or "but for" cause of the accident, and D won't be liable.

- ☞ A ***reaction*** to an initial danger is often foreseeable, and thus not superseding. *(Example:* P1 is injured, and P2 tries to help, or just panics. Either way, if P2 gets injured, that's probably a foreseeable response, and thus not superseding.)

- ☞ If Manufacturer discovers a problem and tries to ***recall*** the product to fix it (at Manufacturer's cost), Owner's refusal to allow this is probably superseding. *(Example:* Manufacturer recalls cars at its own cost; O1 refuses to cooperate; O1 sells to O2; O2 crashes into P when the car breaks. P loses here, because Manufacturer got off the hook once O1 refused to cooperate with the recall.) But if Manufacturer ***charges*** for the attempt to fix, it's not clear whether O's refusal is superseding. (Certainly that refusal is not superseding if Manufacturer's charges for the fix were unreasonably high.)

☞ Consider some possible defenses to strict product liability:

- ☞ Courts vary on whether ***contributory and comparative negligence*** are defenses to strict product liability. The modern/Rest. 3d view is that these defenses ***apply the same way*** as they would in a negligence action.

- ***Assumption of risk*** is a defense, if P acted ***unreasonably*** in encountering the danger. *(Example:* If Manufacturer warns against using a ladder to hold more than 200 lbs., and P knowingly puts 250 lbs. on, P has assumed the risk.) But if P is reasonable in ignoring the warning, and the warning unfairly limits the product compared with what a reasonable consumer would expect, P probably is not bound by AOR. *(Example:* If the reasonable consumer expects a step-ladder to hold at least the weight of an average 175-lb.-man, a warning not to put more than 100 lbs. on probably won't be effective to trigger AOR if P disregards the warning.)

- ***Compliance*** with ***governmental safety regulations*** is usually ***not*** a defense.

  - Watch out for the possibility that the federal government has ***pre-empted*** the area. For instance, if the federal government has prescribed warning labels, this may mean that the feds have occupied the entire field of labelling. In that case, states cannot impose failure-to-warn liability if the federal labelling rules have been followed. (This is clearly now true for cigarettes — makers who conform to federal cigarette labelling guidelines can't be sued for failure to warn.)

- Regardless of the theory of recovery, examine carefully whether P falls within the class of ***persons who may sue.***

  - Where P is a ***"remote"*** purchaser (he bought, but not directly from D), P can probably recover. At least where physical injury occurs, this lack of "vertical" privity is never a defense today, whether the suit is based on warranty (express or implied), negligence or strict product liability.

  - Where P is a "user" who is ***not*** a purchaser, P is again clearly covered under strict product liability and negligence. Whether she's covered under warranty depends on the precise version of the UCC in force in the state (with some states limiting warranty recovery to purchasers and to members of the purchaser's family).

- If P is a ***"bystander"*** (neither a purchaser nor a user), the question is closer. Bystander liability is the most commonly tested aspect of who may sue.
  - Under negligence, the bystander may recover if he was ***"reasonably foreseeable,"*** which he will usually be found to be. *(Example:* If a plane crashes into P's house due to a manufacturing defect, P will be allowed to recover, because it is foreseeable that someone on the ground might be hurt by a defective plane.)
  - Under warranty, P's right to recover depends on state law (as it does for "users" who didn't purchase, discussed above).
  - Under strict liability, most courts protect virtually any bystander. *(Example:* People injured when a defective car or plane crashes, or when defective scaffolding falls down on them as they walk by, are all permitted to recover.)
    - If the way a bystander gets hurt is really strange, consider the possibility that proximate cause is not present because the manner of harm was too unforeseeable. *(Example:* D makes a prescription drug, and doesn't warn users of possible drowsiness. X uses the product, gets drowsy, drives his car and crashes the car into a pole, knocking it down; when the pole falls it hits a propane truck, starting a fire, that injures P, a nearby pedestrian. Probably this was not a foreseeable risk from the mislabelling, in which case there would be no strict liability for D.)

- Be careful to examine whether *D* is the sort of person ***who can be liable*** under the particular theory.
  - If D is a ***retailer,*** strict liability and warranty, not negligence, are the best theories.
  - If D has sold ***used*** goods (e.g., used cars), courts are split. Most courts say that D is not liable in strict liability or implied warranty. But there can still be negligence liability (e.g., D fails to warn of what he knows to be a defect in the item).

- If D is a ***lessor*** of goods, courts differ about whether to apply strict liability and warranty. The trend is probably to cover this situation. Certainly D can be liable in negligence under ordinary principles.
- If D is a supplier of ***services,*** with the product used by D only as a ***tool*** during provision of the service, strict liability and warranty do not normally apply. *(Example:* D, a tattoo artist, uses special needles in doing the tattooing. D would not be strictly liable or liable under warranty, because he was not selling needles. But the manufacturer of the needle could be liable.)
  - Where ***title*** to the item is ***transferred*** to P as part of the service, courts are split. In cases involving ***health-care professionals,*** most courts ***don't*** recognize strict liability or warranty liability. *(Example:* D, a surgeon, puts a pacemaker into P. If the pacemaker breaks, D is probably not strictly liable or liable under warranty, since the dominant aspect of his performance was as supplier of services, not as reseller of goods.)
- If D is a ***"user"*** of goods, rather than a seller, D has no strict liability to a bystander. This is an often-tested aspect.

  Example 1: D is a carpenter using power tools. As P passes by, a part of the tool flies off and hits him. D is not strictly liable, because D wasn't making any sale. But the manufacturer of the tool could, of course, be strictly liable.

  Example 2: D is a store owner who causes an escalator to be installed. P, a customer, is injured on the device. D is not strictly liable because he didn't sell the item to P.

- If D is a ***gift-giver,*** he is not strictly liable. *(Example:* D buys a teddy bear, and gives it to P as a gift. P chokes on a button from the teddy bear. D is not strictly liable, because D did not make a sale.)
- If D sells the item, but sells as an ***"amateur"*** (i.e., not one in the business of selling goods of that kind), D is not strictly liable. *(Example:* D owns a candy store. D sells a slightly-used lawn mower that she has used a few times to cut the grass in front of the store. Since D is not in the business of selling goods of this type, D is not strictly liable to the buyer if the mower is dangerously defective.)

- Don't overlook ***damages.***
  - For negligence and strict liability, there must normally be some ***physical impact or injury.***
  - If there's only ***emotional*** damage, then probably the same ***"zone of danger"*** rule applies to strict liability as to negligence, whatever that rule is. *(Example:* In a state maintaining the zone-of-danger rule for negligence cases, Wife sees Husband mangled by a power mower 30 yards away. Even in strict liability, Wife probably can't recover against the manufacturer of the mower, because she was not physically at risk.)
  - P can probably recover for ***property damage*** under all three theories (though a few states don't allow recovery for property damage under a warranty claim, if there's no physical injury).
  - If the only damage suffered by P is ***"intangible economic harm"*** (e.g., lost profits) then the choice of theory makes a difference.
    - For ***negligence,*** not all courts allow recovery for intangible economic harm, and those that do require P to be a member of an "identifiable class."
    - For ***implied warranty,*** P can recover if he was a direct purchaser. (In this situation, implied warranty is clearly superior to negligence or strict liability as a theory.) If P was a remote purchaser, courts are split. If P was a bystander, most courts do not allow recovery for pure economic harm.
    - For ***strict liability,*** most courts ***don't*** allow recovery for pure economic harm. *(Example:* Dentist buys a new drill made by Maker. The drill breaks as it's being used on a patient. If Dentist suffers a loss of reputation leading to lost profits, he can't recover in strict liability against Maker.)
- If P can recover against a retailer under warranty or strict liability, the retailer may obtain complete ***indemnity*** from the manufacturer.
- Look for the possibility that federal law has ***preempted*** state common-law tort recovery.

- ☞ This is especially likely in ***labeling*** cases, where, say, if the maker follows FDA drug or device labeling rules, it can't at the same time follow state common-law failure-to-warn rules requiring extra or different warnings. State common-law recovery is preempted in this situation.

CHAPTER 15
NUISANCE

ChapterScope

The term "nuisance" refers not to a type of tort, but to a ***type of injury*** which P has sustained. There are actually two types of nuisance: "public nuisance" and "private nuisance."

- **Public nuisance:** A ***"public*** nuisance" is an ***interference with a right common to the general public.*** If D releases noxious odors or harmful chemicals into the air, cuts off the use of a public road, or maintains an unlicensed business, all of these may be public nuisances.
- **Private nuisance:** A ***"private*** nuisance" is an ***unreasonable and substantial interference*** with P's ***use and enjoyment of his land.***
  - **Requirements:** The plaintiff in a private nuisance action must show two things: (1) that he has an ***interest in land*** that has been substantially and unreasonably interfered with; and (2) that D behaved in a ***negligent, abnormally dangerous*** or ***intentional*** manner.

I. NUISANCE GENERALLY

A. Confusion surrounding the term: Although courts often use the term "nuisance" as if they were talking about a particular tort, the term really refers to a ***kind of injury*** which the plaintiff has sustained. In the case of "public nuisance," this injury is the loss of any right that the plaintiff has by virtue of being a "member of the public." In cases of private nuisance, the plaintiff's injury consists of interference with his ***use or enjoyment of his land.*** See generally P&K, pp. 616-19.

1. Significance of nuisance: Therefore, instead of viewing the rules set forth in this chapter as circumstances under which the "tort" of nuisance may be maintained, you should instead think of them as definitions of what constitutes sufficiently great damage to the plaintiff that he is entitled to sue. The suit itself may have as a basis any of the types of culpable defendant behavior we have examined so

far: (1) intentional interference with the plaintiff's rights; (2) negligence; or (3) abnormally dangerous activities or other conduct giving rise to strict liability.

> **Example:** A gas well being drilled by D explodes, throwing noxious chemicals on P's property. In order to show the kind of damage required for "private nuisance," P must show that his use and enjoyment of his property have been substantially impaired (which he will almost certainly be able to do). But he must also show that D's conduct was either intentional (e.g., D knew that the well was substantially certain to interfere with P's property), negligent (e.g., D carelessly neglected to take adequate safety precautions) or abnormally dangerous.

II. PUBLIC NUISANCE

A. Definition of public nuisance: A "public nuisance" is an interference with ***"a right common to the general public."*** (Rest. 2d, §821B(1)).

1. Lack of more definite rule: We talk more below about what is a right "common to the general public." See *infra*, p. 424. Generally, activities that interfere with ***public waterways, air purity,*** or ***public roads and facilities*** are the most likely to be found to satisfy this standard.

2. Factors: The factors which will be looked at in determining whether something is a public nuisance include "the ***type of neighborhood,*** the nature of the thing or wrong complained of, its proximity to those alleging injury or damage, its frequency, continuity or duration, and the damage or annoyance resulting. ..." *Culwell v. Abbott Constr. Co., Inc.*, 506 P.2d 1191 (Kan. 1973).

a. Substantial harm required: A public nuisance will not be found to exist unless the harm to the public is ***substantial.***

3. Statutes and ordinances: In addition to types of conduct that are commonly recognized by courts as giving rise to "common law" public nuisance (the examples in (1) above are instances of this), particular ***statutes and ordinances*** in each jurisdiction may make certain things public nuisances (e.g., "black currant plants" — see P,W&S, p. 802).

4. Need not be crime: Traditionally, it was generally held that for conduct to be actionable as a public nuisance, it must also be a ***crime.*** See P,W&S, p. 802. But the Second Restatement (in §821B) and most

modern decisions no longer impose such a requirement (although the fact that conduct ***is*** a crime will make it more likely to be held a public nuisance.)

B. "Right common to general public": As we noted above, the key element of a claim of public nuisance is that the right that is being unreasonably interfered with must be a "right that is ***common to the general public."*** (Rest. 2d, §821B(1)).

1. Has impact: This requirement of a right common to the general public has considerable ***impact,*** in that it prevents many widespread harms from being eligible to be considered public nuisances. As the Second Restatement puts it, to be a right common to all members of the general public the right must be ***"collective in nature*** and *not* like the *individual* right that everyone has not to be assaulted or defamed or defrauded or negligently injured." Id. at Comment g.

a. What qualifies: As one court has put it, the term "public right" is limited to those ***"indivisible resources shared by the public at large,*** such as ***air, water, or public rights of way."*** *State of Rhode Island v. Lead Industries Association, Inc.*, 951 A.2d 428 (R.I. 2008).

i. Interference with just some people: Even if the interference *is* with a shared resource like air or water, the interference won't qualify if by its nature it affects ***only a few isolated landowners, not the public at large.*** Thus the Restatement says, "the pollution of a stream that merely deprives 50 or 100 lower riparian owners of the use of the water for purposes connected with their land does not for that reason alone become a public nuisance. If, however, the pollution prevents the use of a public bathing beach or kills the fish in a navigable stream and so deprives *all members of the community* of the right to fish, it becomes a public nuisance." Rest. 2d, §821B(1), §Comment g.

ii. Interference that takes place within individual properties: The "common right" requirement means that typically, a claim that a product has had a particular effect on a piece of ***privately-owned real estate not accessible to the public*** at

large will ***fail*** the common-right test. Thus claims that manufacturers have infiltrated ***guns*** into neighborhoods, or that manufacturers of ***paints*** have failed to remove lead from buildings painted with those paints, thus injuring children living there, have tended to fail the "common right" standard.

C. Requirement of particular damage in private suits: Courts sometime say that a ***private citizen*** may ***recover for his own purely economic damages*** stemming from a public nuisance, but only if he has sustained financial damage that is different in ***kind,*** not just degree, from that suffered by the public generally. However, it's not clear how much impact this so-called requirement has anymore; many newer decisions seem to ignore it.

> **Example:** P is a tenant of a small novelty store on the boardwalk of a famous beach which contains hundreds of merchants. D, an oil exploration company, negligently causes an offshore oil spill that fouls the beach for the entire summer, causing P's profits to drop 50% or $20,000, and doing approximately the same to hundreds of the other merchants. It's likely that P can recover from D in public nuisance for his lost profits, notwithstanding that hundreds of other merchants have suffered the same sort of harm to their collective right to an unfouled beach.

1. Injunction: Even in courts still requiring a a "different kind" of harm, the requirement will ***not*** necessarily be imposed in suits for an ***injunction,*** as opposed to one for damages. Rest. 2d, § 821C, indicates that an injunction may be obtained not only by a plaintiff who could obtain damages, but also by a public official, and by a private citizen who has "standing to sue as a representative of the general public, or as a citizen in a citizen's action or as a member of a class action." (These standing requirements are determined by the local court's civil procedure standing rules.)

D. Within "control" of defendant at time of harm: For public nuisance, courts require that the defendant have had ***control over the instrumentality*** at the ***time of damage*** — it's ***not*** enough that defendant had control at some ***earlier*** point (e.g., at the time of a sale of a product).

> **Example:** A state, acting on behalf of children injured by ingesting lead-based paint used in apartments, sues the Ds, who manufactured the paint. *Held,* for the Ds, in part because the state has not shown that when the children were ingesting the lead, the Ds still had the right to abate the nuisance by removing the paint. The fact that the Ds had control of the contents of the paint at the time of the much *earlier* sales to the building owners is irrelevant — the "control at the time of the harm" requirement is not

satisfied. *State of Rhode Island v. Lead Industries Assoc., Inc.*, 951 A.2d 428 (R.I. 2008).

III. PRIVATE NUISANCE

A. Nature of private nuisance: A ***private nuisance*** is an unreasonable interference with the plaintiff's ***use and enjoyment*** of his land. See Rest. 2d, §822.

1. Distinguished from trespass: Whereas trespass is an interference with the plaintiff's right to ***exclusive possession*** of his property, nuisance is an interference with his right to use and enjoy it. For instance, a condition near the plaintiff's property that interferes with her peace of mind (e.g., explosives stored in a dangerous way) would be a nuisance, since it interferes with her use and enjoyment, but not a trespass, since nothing physically enters her property.

a. Overlap: However, it frequently happens that conduct by the defendant is both a nuisance and a trespass. For instance, if the defendant conducts blasting operations near the plaintiff's land, the noise, threat of harm, and vibrations, will all be aspects of nuisance, while the throwing of rocks onto the plaintiff's land (and, in a few courts, even the shock waves themselves — see *supra*, p. 45) will be trespasses.

2. Must have interest in land: The critical thing to remember is that plaintiff can sue based on a private nuisance only if he has an ***interest in land*** that has been affected. For instance, the fishermen in *Burgess, supra*, could not have sued for private nuisance, because although their livelihood was affected, no interest in land that they held was affected.

a. Tenants and family members: But the interest in land does not have to be a "fee simple." ***A tenant*** may have such an interest; also, ***members of the family*** of the owner or tenant may sue, on the grounds that they have a *de facto* interest in using and enjoying the land. See Rest. 2d, § 821E.

3. Elements of the case: The plaintiff must demonstrate two principal elements in order to recover for private nuisance: (1) that his use and enjoyment of his land was interfered with, in a ***substantial way;*** and

(2) that the defendant's conduct was either negligent, abnormally dangerous, or intentional.

B. Interference with use: The interference with the plaintiff's use and enjoyment must be ***substantial.*** Recovery for nuisance is therefore very different from that for trespass (at least where the term "trespass" is used in its modern-day sense to include only intentional invasions) — the trespass plaintiff may recover nominal damages, even where she has suffered no substantial harm (see *supra,* p. 43).

1. Inconvenience: If the plaintiff is personally injured, or her property receives physical damage, the interference will always be "substantial." But if the plaintiff's damage consists in her being ***inconvenienced*** or subjected to unpleasant smells, noises, etc., this will be substantial damage only if a person in the community of ***normal sensitivity*** would be seriously bothered.

a. Abnormally sensitive plaintiff: So a ***"hypersensitive plaintiff"*** will ***not*** be able to recover for nuisance no matter how great the harm to the plaintiff's use and enjoyment, if an ordinarily sensitive person would not be unduly bothered. Rest. 2d, §821F, Comm. d and Illustr. 1.

Example: P is an invalid who is thrown into convulsions by the ringing of a nearby church bell, the sound of which would not be disturbing to an ordinary member of the community whose house was located the same distance from the church as P's. P cannot recover for nuisance, because he is hypersensitive. Rest. 2d, §821F, Illustr. 1.

b. Nature of locality: What constitutes a "substantial interference" will generally depend in part on the ***neighborhood.*** For instance, a plaintiff living in a residential neighborhood will be required to submit to less noise, industrial smells, etc., before these are substantial, than one who lives over a store-front in a busy commercial neighborhood. This is really the same kind of balancing that goes on in determining whether the defendant's conduct is unreasonable (see *infra).*

C. Defendant's conduct: There is ***no general rule of "strict liability" in nuisance.*** In other words, the plaintiff must show that the defendant's conduct fell within one of the three principal classes that we have examined thus far, i.e., ***negligence, intent,*** or ***abnormal dangerousness.***

Example: D, a public electric utility, is charged with spewing pollutants into the air, which damage cars being processed and stored by P. No claim is made that D's conduct is abnormally dangerous.

Held, unless D's conduct is shown to have been intentional (in the sense that D intentionally injured P's enjoyment of his property, or knew that the injury was substantially certain to result), or was negligent in causing the injury, D is not liable. *Copart Industries, Inc. v. Consolidated Edison Co. of New York, Inc.*, 363 N.E.2d 968 (N.Y. 1977).

1. **Negligence:** If the plaintiff wants to base her nuisance claim upon the defendant's negligence, she must meet the same requirements of proof as in any other negligence action. Thus she must show that the utility of the defendant's conduct was outweighed by the harm to the plaintiff (i.e., that the defendant's conduct was ***"unreasonable").***

2. **Abnormally dangerous:** The plaintiff may be able to show that the defendant's conduct was an "abnormally dangerous activity", giving rise to, in effect, "strict nuisance liability". For instance, if she can show that the defendant had stored explosives near the plaintiff's property in a residential area, this may be sufficient.

D. Intentional: Most nuisance claims arise out of conduct by the defendant that can be called ***"intentional."*** This does not mean that the defendant has ***desired*** to interfere with the plaintiff's use and enjoyment of her land, but simply that he ***knows with substantial certainty*** that such interference will occur.

Example: D operates a coal-burning electric generating plant. The plant spews 90 tons of sulphur-dioxide gas into the atmosphere each day; this gas settles on the fields of local farmers (including the Ps), causing damage to crops and other harms. D claims that it has used due care in the construction and operation of its plant, and that it is therefore not negligent. Consequently, it argues, it cannot be held liable for nuisance.

Held, the emissions from D's plant constitute a nuisance for which D must compensate the Ps. The nuisance here was intentional: "[A] continued invasion of a plaintiff's interest by non-negligent conduct, when the actor knows of the nature of the injury inflicted, is an intentional tort, and the fact that the hurt is administered non-negligently is not a defense to liability." (Also, the fact that the economic and social utility of the operation of the plant may have been greater than the utility of the Ps' farming operations is irrelevant — D must still compensate the Ps for the damage to their property.) *Jost v. Dairyland Power Cooperative*, 172 N.W.2d 647 (Wis. 1970) *infra*, p. 428.

1. **Unreasonableness requirement:** In nuisance cases based on

negligence or abnormal danger, a requirement that the degree of interference with the plaintiff's interests be "unreasonable" is built-in, because of the very definition of negligence and of abnormal dangerousness (see *supra*, p. 332). But where the defendant's conduct is intentional, the courts have ***also imposed a requirement that the interference with plaintiff's interests be unreasonable.*** P&K, p. 623.

a. Significance: This means that even if the defendant intentionally interferes with the plaintiff's rights, he will have a kind of "privilege" to do so, as long as the interference is not unreasonable. "Life in organized society, and especially in populous communities, involves an unavoidable clash of individual interests. Practically all human activity, unless carried on in a wilderness, interferes to some extent with others. . . . It is an obvious truth that each individual in a community must put up with a certain amount of annoyance, inconvenience, and interference, and must take a certain amount of risk in order that all may get on together. . . ." Rest. 2d, §822, Comment g.

b. Balancing test: To determine whether the interference is "unreasonable," courts have traditionally done a simple ***balancing test,*** weighing the utility of the defendant's conduct against the harm to the plaintiff. In some cases, this has meant that the plaintiff cannot get damages, ***no matter how substantial the harm to her,*** as long as the utility of the defendant's conduct was greater.

c. Rejected by Restatement: The Second Restatement has rejected the "balancing test" as the sole test for "reasonableness." Instead, the interference will be deemed unreasonable if ***either:*** (1) the harm to the plaintiff outweighs the utility of the defendant's conduct; ***or*** (2) "the harm caused by the conduct is substantial, and the financial burden of compensating for this and other harms does not render infeasible the continuation of the conduct." Rest, 2d, §826. This idea is rephrased in Rest. 2d, §829A, which states that the interference is unreasonable if it is substantial and ***"greater than the [plaintiff] should be required to bear without compensation."***

i. Significance: To put it another way, once the plaintiff shows that the harm is substantial, then no matter how meritorious

and socially useful the defendant's activity, the defendant will have to pay for the harm to the plaintiff if it is "unfair" that such payment not be made. The only exception to this is that if there are so many people situated in the same position as the plaintiff that to pay damages to all these people would make it impossible for the defendant to continue his activity, and the utility of that activity outweighs the harm it causes, the defendant will not have to pay.

ii. **Pollutants:** The Restatement approach ("pay for the damage even if your activity is socially useful") is illustrated by *Jost v. Dairyland Power Cooperative*, *supra*, p. 427. Even though the operation of the electric utility was socially beneficial, and even though that plant's social utility probably outweighed the harm to the farmers, the utility was nonetheless required to pay for the damage it caused.

2. **Nature of neighborhood:** One important factor in determining whether the defendant's interference is "unreasonable" is the ***kind of area or neighborhood*** in which the defendant and plaintiff are located. The ***zoning*** of the area is likely to be important in this respect.

   a. **Supermarket operation:** For instance, in *Winget v. Winn-Dixie Stores, Inc.*, 130 S.E.2d 363 (S.C. 1963), the court held that the defendant's operation of a ***supermarket*** was not a nuisance as to plaintiff's residence. The court relied on the fact that the store was located in an area of the city zoned for such use. (The plaintiff's house was just on the other side of the zoning border, in a residential neighborhood, but this was treated as practically irrelevant by the court.) However, the court held that the ***manner*** in which the defendant conducted its business (e.g., air conditioning fans directed towards the plaintiff's shrubbery, and use of floodlights after closing hours) was unreasonable.

3. **Action taken for spite:** An action taken by the defendant for ***spite*** — that is, an action of ***little or no benefit to the defendant,*** and taken for the ***purpose*** of ***annoying or injuring*** the plaintiff — is especially likely to be found to be unreasonable and thus a nuisance.

Example: P and D, who are neighbors, quarrel. Out of anger at P, D then puts up bright lights and a large "spite fence," both of which are of little benefit to D and a major detriment to P's enjoyment. The cost/benefit analysis, coupled with D's harmful intent, will likely lead the court to conclude that D's conduct was "unreasonable." If so, D will be found to have created a nuisance.

E. Interference with water: Where a landowner has a stream, lake, pond, or other ***water*** on or adjacent to her property, she has a right to be free of interference with her continued use and enjoyment of that water. Interferences are evaluated by reasonableness rules similar to those applicable to nuisance.

1. Restatement test: Thus the Restatement evaluates one landowner's interference with another's use and enjoyment of water use by considering such nuisance-like factors as:

- □ the ***purpose*** of the competing uses;
- □ the ***suitability*** of the uses to the stream, lake, etc.;
- □ the ***economic value*** of the uses;
- □ the ***social value*** of the uses;
- □ the practicality of ***avoiding the harm*** by ***adjusting the use or quantity*** being made by one owner or the other;
- □ the need to ***protect the existing value*** of land; and the like. Rest. 2d, §850A.

Example: A stream runs from D's property to P's property next door, and has done so for years. Both are vacation homes. P has never physically entered the stream, but enjoys looking at it. Recently, D built a dam that created an ornamental pond on D's land, but that completely stopped the flow of water to P's property.

A court will likely enjoin the dam (i.e., require D to remove it), on a nuisance-like theory that D has unreasonably interfered with P's use and enjoyment of her property.

F. Remedies: The plaintiff may have one or more of three possible ***remedies*** for private nuisance.

1. Damages: If the harm has already occurred, she can recover ***compensatory damages.*** If it is not clear whether the harm will continue in the future, she can usually recover only for the damages sustained up till the time of suit, and she must bring successive actions for subsequent harm. But if it appears that the nuisance will probably be a permanent one (e.g., a polluting factory that is likely to

stay in business), she can and must recover all damages, past and ***prospective,*** in one action.

2. **Injunction:** If the plaintiff can show that damages would not be a sufficient remedy, she may be entitled to an ***injunction*** against continuation of the nuisance. (Since courts typically regard every parcel of land as having a unique use, the plaintiff will frequently be able to make this showing that compensatory damages are not an adequate remedy).

   a. **Balancing test:** But there is one crucial difference between the showing that the plaintiff must make to get an injunction and that required for damages. Under the new Restatement approach summarized above, the plaintiff can get damages as long as she can show that it is "unfair" for her to bear the harm without payment, even if the utility of the defendant's conduct outweighs the harm to the plaintiff. But to get an injunction, the plaintiff must show that the harm to her (probably added to the harm to others similarly situated — see Rest. 2d, §827, Comment b) actually ***outweighs*** the utility of the defendant's conduct.

Example: D operates a large cement plant, which employs 300 people, and which cost more than $45 million. Ps, neighboring landowners, sue for nuisance, because of dirt, smoke and vibrations from the plant. A lower court finds that the damage to the Ps totals $185,000.

Held, an absolute injunction against D should not issue, in view of the great disparity between the economic consequences to D and its employees (as well as the local economy) in closing down the plant, and the consequences to the plaintiffs in allowing it to continue. However, it is fair to require D to pay for the harm it causes, regardless of the utility of the plant. Therefore, a temporary injunction will be issued, to be suspended if D makes payment of permanent damages to the Ps. *Boomer v. Atlantic Cement Co., Inc.*, 257 NE.2d. 870 (N.Y. 1970).

A dissent contended that the court's holding amounted to "saying to the cement company, you may continue to do harm to your neighbors so long as you pay us a fee for it." Also, the dissent noted, once the damage was repaired, the incentive to find a cure for the pollution would disappear.

3. **Self-help abatement:** In some situations the plaintiff may have the right to use the ***"selfhelp"*** remedy of ***"abatement".*** That is, she may have the right to enter the defendant's land to remove the nuisance. But she may use only reasonable force to do this, and must ordinarily first complain to the defendant and wait for the latter to refuse to

remedy the condition himself. See P&K, p. 642.

G. Defenses: The defendant may raise a number of affirmative defenses to a private nuisance claim. In particular, we examine here situations in which the ***plaintiff's conduct*** may give rise to the defenses of contributory negligence or assumption of risk.

1. **Contributory negligence:** Where the claim is based on the defendant's ***negligent*** maintenance of a public or private nuisance, contributory negligence will normally be a defense.

2. **Assumption of risk:** The defense of ***assumption of risk*** is similarly applicable where the defendant behaved negligently, and possibly where his maintenance of the nuisance was a combination of intent and negligence, as described above. The defense may also apply where the defendant conducted an abnormally dangerous activity (e.g., the plaintiff refuses to heed the defendant's sign that it is conducting blasting activities and that bystanders should stay out).

   a. "Coming to the nuisance": One controversial aspect of the assumption of risk defense is whether a plaintiff will be barred if he has ***"come to the nuisance",*** i.e., purchased his property with advance knowledge that the nuisance exists.

      i. Restatement view: Older decisions sometimes treat "coming to the nuisance" as an absolute defense. But the modern view, exemplified by §840D of the Second Restatement, is that the fact that the plaintiff has come to the nuisance is merely "a factor to be considered" in determining whether the plaintiff wins.

      ii. Locality: The court is much more likely to hold that "coming to the nuisance" is a defense if the defendant's activity is suitable for the area where it occurs, and the plaintiff's own use is out of step with that area.

Example: D has operated a cattle feedlot (producing "over a million pounds of wet manure per day") for many years, in a completely rural area outside Phoenix. P, a developer, builds a development called "Sun City", one portion of which adjoins the feedlot. The flies and odor make this portion of the development unhealthy and almost unusable for residential purposes.

Held, P has "come to the nuisance", and if its interests were the only ones at

stake, it would not be entitled either to damages or to an injunction. But since the rights of innocent third parties (the inhabitants of Sun City) are also involved, D will be enjoined from operating the feedlot, and forced to move. However, again because it has come to the nuisance, P will have to ***indemnify*** D for its costs in moving. *Spur Industries, Inc. v. Del E. Webb Development Co.*, 494 P.2d 700 (Ariz. 1972).

Quiz Yourself on NUISANCE (Entire Chapter)

75. Gore 'N Guts Byproducts opens a factory in which it processes entrails into pet food. Next door is the home of Charles Nifferoo, a fragrance analyst with a necessarily ultra-sensitive nose. Gore does what it can to control the smell associated with its product, but mildly foul odors occasionally emanate from the plant. While most of the neighbors find it a little unpleasant, it drives Charles' sophisticated nostrils crazy. Can Charles recover for private nuisance? _____

76. Ghosts have become a serious problem to society, including Phantasm Town. The town is happy when the Ghostbusters open up their ghost collection facility there, primarily because it creates jobs for 500 people, and the town is a victim of high unemployment. One of the unfortunate (and unavoidable) by products of ghost collection is that neighboring property occasionally gets "slimed." When Amelia Nebbish's nearby property is slimed, it causes $100,000 in permanent damage. She sues Ghostbusters for private nuisance, seeking damages and an injunction. What likely result? _____

77. Eyyon, a large oil refiner, owns a large tanker, the SS Eyyon. As the SS Eyyon, filled with oil, is approaching the port of Zedlav, its captain fails to notice a large iceberg in the ship's path. The SS Eyyon slams into the iceberg, and discharges tens of thousands of gallons of oil into the bay surrounding Zedlav. Evidence later shows that the captain was seriously intoxicated at the time of the accident. The oil kills nearly all fish in the bay. The economy of Zedlav is a diversified one, but commercial fishers make up a significant (though minority) chunk of its local industry. The fishers bring a class action against Eyyon Corp. for their losses.

(a) On what tort theory should the fishers sue? _____

(b) Will they recover? _____

Answers

75. No. A private nuisance requires creation of a condition which poses an unreasonable, substantial interference with plaintiff's use or enjoyment of his property. This is an objective test: the interference would have to be offensive, annoying, or inconvenient to an average member of the community; and it would have to be substantial. Since most people are only mildly bothered by the smell, and Charles is driven crazy only because he's ultrasensitive, Gore will win.

COMPARE: Torts like battery, where defendant takes plaintiff "as he finds him," sensitivities and all.

76. Yes to the damages, no to the injunction.

A private nuisance is an unreasonable interference with the use and enjoyment of land, caused by deliberate, negligent, or hazardous conduct. If damages would not be an adequate remedy, plaintiff may be entitled to an injunction, if the harm to plaintiff outweighs the utility of defendant's conduct. The wrinkle in these facts is the *social value* of Ghostbusters' conduct — you're told in the facts how valuable it is, due to the number of jobs it creates. Because shutting the plant down would do serious harm, a court would probably not enjoin its operation. However, since the harm created is serious and there's no indication that paying the damages will shut it down, the damages are likely to be awarded. Rest. 2d §826(b).

77. (a) They should sue on a "public nuisance" theory. That is, they should sue Eyyon for having "unreasonably interfered with a right common to the general public" (see Rest. 2d, §821B(1)). In this case, the right common to the general public would be the right to an unpolluted waterway.

(b) Yes, probably. The fishers must show, in addition to the fact that Eyyon unreasonably interfered with a right common to the general public, that Eyyon's conduct fell within one of the three usual classes of tortious behavior (intention, negligent or abnormally dangerous activity). Here, the fishers' best hope is to show that Eyyon was

negligent — the captain was clearly negligent in failing to see the iceberg, and his negligence will be imputed to Eyyon by the doctrine of *respondeat superior*. The most significant issue is whether the fishers suffered a "harm of a kind different from that suffered by other members of the public..." as is required for public nuisance suits by the Restatement (see Rest. 2d, §821C(1)) and some courts. Probably the fishers will meet this test if it applies, since the subject matter of their livelihood — the fish — was directly killed by Eyyon's creation of the nuisance.

***Exam Tips** on NUISANCE*

It's easy to miss a "nuisance" issue, because it can seem like a number of other torts (e.g., trespass, abnormally dangerous activity, negligence, etc.). In fact, any fact pattern that can be nuisance might also be one or more of these other torts (though usually, the other torts will involve a direct physical impact and nuisance will usually not.)

- The name of the tort is a good clue to what type of fact pattern you should be looking for: if in colloquial usage what D is doing would be called a "nuisance" by a lay-person, then the tort of nuisance is worth at least thinking about. Look mostly for fact patterns where D has ***not*** caused a ***physical impact*** with P's person or property.
- You have to distinguish between public and private nuisance, of course (more about the distinction below). But the ***same types*** of activity by D tend to characterize the two types of nuisance. Here is a representative sampling of D's conduct that might be either a public or private nuisance:
  - □ D makes persistent ***loud noises.***
  - □ D releases ***noxious odors.***
  - □ D releases ***harmful chemicals*** into the air.
  - □ D cuts off the use of a ***public road.***

□ D cultivates ***disease-ridden animals.***

□ D maintains an ***unlawful business*** that lowers the local quality of life (e.g., an unlawful bar, gambling parlor or brothel).

□ D interferes with ***water*** that flows onto P's property (e.g., D dams a stream, preventing it from flowing onto P's property).

☛ You need to distinguish between public and private nuisance. It's the nature of ***P's interest*** that distinguishes the two. Public nuisance is an interference with a right "common to the general public." Private nuisance is an interference with P's use and enjoyment of his land. The same act by D can be both a public and private nuisance. Normally you should analyze whether the act is a private nuisance first (since that's the better claim for P), and then go on to public nuisance if you conclude that it's not a private one.

☛ For ***private*** nuisance, check for three main things: (1) does P have an ***interest in land*** that has been interfered with?; (2) is that interference ***"unreasonable"*** and ***"substantial"?;*** and (3) was D's conduct ***negligent, abnormally dangerous*** or ***intentional?***

☞ The most commonly-tested aspect is the requirement that P have an ***"interest in land"*** that has been affected. *(Example:* P is a fisherman whose livelihood is ruined because D discharges pollution into the coastal waters. P can't recover in private nuisance because his interest in land hasn't been affected. This is true even if P owns land near the coast, because his ***use*** of the land he owns hasn't been affected by D's wrongdoing.)

☞ The interest of a ***tenant*** (or of a ***landlord*** who has leased out the premises to someone else) suffices.

☞ If P does own an interest in land that has been interfered with, there's no requirement of "particular harm," i.e., no requirement that P's interest be different from that of others (as there is for public nuisance). *(Example:* If D discharges odors into the air, each local landowner who gets substantial smells on his property has met the "interest in land" requirement, and can sue.)

☞ The requirement that the interference with P's use be ***"substantial"***

is also often tested.

- If the interference causes ***personal injury*** to P, or ***direct injury*** to his property, the injury is by definition "substantial." *(Example:* Pollutants that cause house paints to become discolored, or that cause plants to die, are by definition a "substantial" interference.)

- If the interference doesn't cause physical injury or property damage, it's only "substantial" if a person of ***normal sensitivity*** in the community would be seriously bothered. For instance, ***noises*** or ***smells*** will be measured by this "normally sensitive person" standard. This ***"ultra-sensitive plaintiff"*** issue is often tested. *(Example:* D makes noise. P raises horses that are easily frightened by this noise level, which would not upset the average non-horse-raising owner in the community." P is probably an "ultra-sensitive plaintiff," in which case D won't be liable to P for private nuisance.)

- D's conduct must be ***"unreasonable."***Courts consider the magnitude of the interference with P's interests. Some also consider the ***social utility*** of D's conduct. *(Example:* D runs a large factory that employs many people, and that cannot stop releasing unpleasant smells and noises without prohibitively costly measures. Some courts are more likely to find a private nuisance here than where D's interests are less "weighty." Other courts ***only*** consider the magnitude of the interference with P's interests, not the size of D's countervailing interests.)

- D's conduct must be shown to be either ***negligent, abnormally dangerous*** or ***"intentional."*** In other words, there is no general strict liability for nuisance.

  - Most nuisance conduct is "intentional," meaning that the interference was ***known*** to D to be ***substantially certain*** to occur (not that D "desired" that interference). *(Example:* D runs his factory carefully. Unbeknownst to him, the factory one day sends out non-dangerous but annoying pollutants that interfere with P's property. This is not private nuisance, because D has not acted negligently or abnormally

dangerously, and did not know with substantial certainty that the interference would occur. But if P complained repeatedly, and D didn't change his practice, then D's knowledge that the interference was occurring would turn the interference into an "intentional" one.)

- ☞ Lastly, the defense of ***"coming to the nuisance"*** is sometimes raised. Look for this whenever the fact pattern tells you that D was engaging in his activity ***before P moved in.*** Usually, the fact that P "came to the nuisance" is ***not an absolute defense,*** merely one non-dispositive factor in deciding whether D's conduct was unreasonable.

- ☛ For ***"public nuisance,"***there's no really tight definition, only the vague "interference with a right common to the general public" standard. Typically, anything that an entire community would find dangerous or annoying, but that does not result in a direct physical impact, is a candidate.

  - ☞ Requirements: (1) there must be an interference with rights common to the ***public at large*** (not just P's interests); (2) the interference with the public's interest must be ***"substantial";*** and (3) in some courts, P's own harm must be ***different in kind*** from that suffered by the public at large (the requirement of ***"particular harm").***

  - ☞ Overwhelmingly, the most commonly-tested aspect is the ***"right common to the public"*** requirement. Every time you have a possible public nuisance issue, you should discuss whether the harm involved a right common to the general public.

    Example: Where Ds (manufacturers of lead-based paint) didn't remove the paint from buildings in which young children later ate the paint, freedom from lead poisoning wasn't a "right common to the public at large," so an individual child who ate lead couldn't recover.

CHAPTER 16
MISREPRESENTATION

ChapterScope

The independent tort of "misrepresentation" usually describes a situation where a misstatement causes intangible pecuniary loss. There are two types of misrepresentation, "intentional misrepresentation" and "negligent misrepresentation."

- **Intentional misrepresentation (deceit):** To recover for ***"intentional misrepresentation"*** (also called ***"deceit"*** or ***"fraud"),*** P must establish the following elements:
  - □ **Misrepresentation:** A ***misrepresentation*** by D;
  - □ **Scienter:** ***Scienter*** (i.e., a culpable state of mind — either knowledge of the statement's falsity or reckless indifference to the truth);
  - □ **Intent:** An ***intent to induce P's reliance*** on the misrepresentation;
    - □ **Third-party recovery:** Even if D did not intend to influence P, however, P can recover if she can show that she is a member of a ***class*** which D had reason to expect would be induced to rely, and the transaction is of the same sort that D had reason to expect would occur in reliance.
  - □ **Reliance:** ***Justifiable reliance*** by P; and
  - □ **Damage:** ***Damage*** to P, stemming from the reliance.
- **Negligent misrepresentation:** Today, most courts also allow recovery for ***"negligent*** misrepresentation," even where P suffers only intangible economic harm.
  - □ **Same requirements:** Most requirements for a negligent misrepresentation action are the same as for intentional misrepresentation.
  - □ **Business relationship:** However, most courts add the requirement that D's statements be made in the course of his ***business or profession,*** and that D have had a ***pecuniary interest*** in the transaction.
  - □ **Liability to third persons:** The maker of a negligent

misrepresentation is liable to a much ***narrower class*** of third persons than is the maker of a fraudulent statement. In most courts, D is liable for negligent misrepresentations only to a ***"limited group of persons"*** whom D either: (1) ***intends to reach*** with the information; or (2) knows the ***recipient intends to reach.***

- **Strict liability:** Generally, a person has no liability for an "innocent" misrepresentation — that is, there is no strict liability. But there are some exceptions (e.g., where two parties are involved in a sale transaction, and one makes a representation to another).

I. INTRODUCTION

A. Misrepresentation generally: Misrepresentation has been discussed in the context of several of the torts we have already examined. For instance, where a negligent representation leads to physical harm (e.g., a truck driver carelessly signalling a motorist to pass him when it is unsafe), an ordinary negligence action may be brought; see *supra,* p. 98. Similarly, if a seller of products makes an express warranty about them, and this warranty turns out to be false (e.g., car with "Shatter-proof" windshield — see *Baxter v. Ford Motor Co.*, *supra*, p. 352), a products liability action may be brought. In these situations, the misrepresentation is simply one aspect, one method of accomplishing, the more general tort of negligence, strict liability, etc.

1. About this chapter: In this chapter, we are concerned with misrepresentations that cause only ***intangible pecuniary loss.*** Because courts have always been more reluctant to impose liability for this kind of loss than for direct physical injury or property damage, special rules have grown up governing those misrepresentations that have this effect. Most of this chapter will be devoted to intentional misrepresentation, which corresponds to the common law action of "deceit". The growing willingness of courts also to impose liability for negligent misrepresentation, and, in some cases, for innocent misrepresentation (i.e., strict liability) is also discussed.

II. INTENTIONAL MISREPRESENTATION ("DECEIT")

A. Common law action: The common law action of ***"deceit",*** or ***"fraud",*** corresponds to what we would call today "intentional"

misrepresentation.

1. **Elements of cause of action:** To recover for intentional misrepresentation, the plaintiff must establish the following elements:

   a. A ***misrepresentation*** by the defendant;

   b. ***Scienter*** (i.e., a culpable state of mind, either knowledge of the statement's falsity or reckless indifference to the truth);

   c. An ***intent to induce the plaintiff's reliance*** on the misrepresentation;

   d. ***Justifiable reliance*** by the plaintiff; and

   e. ***Damage*** to the plaintiff, stemming from the reliance. See P&K, p. 728.

B. Misrepresentation: The defendant must make a misrepresentation to the plaintiff. Normally, this will be in ***words,*** (e.g., "The lot that I am selling consists of 26 acres").

1. **Actions:** But the defendant's ***actions*** may also constitute a misrepresentation. For instance, if a used car dealer turns back the odometer on a car from 60,000 to 18,000 miles, he is making a misrepresentation as to the mileage. Rest. 2d, §525, Illustr. 1.

2. **Concealment:** Furthermore, if the defendant intentionally ***conceals*** a fact from the plaintiff, he will be treated the same way as if he had affirmatively misstated that fact. Rest. 2d, §550.

   Example: D, the owner of a Cadillac, trades it in to P, a car dealer, as part payment on a new car. Previously the engine block cracked, and prior to the trade-in D has a service station paint over the cracks to conceal them.

   This is a positive act of fraudulent concealment. Therefore, D will be liable for fraud.

3. **Nondisclosure:** Suppose the defendant simply ***fails to disclose*** a material fact (as opposed to taking positive steps to conceal it).

   a. Common law: At common law the defendant was almost ***never liable*** for fraud in the "mere nondisclosure" scenario. This was particularly true in cases involving business transactions, where the rule was pretty much "every man for himself" and "caveat emptor."

b. Modern rule: Today, the ***general rule*** remains that ***failure to disclose by itself does not constitute misrepresentation.*** (But as we'll see below, there are important exceptions.)

Example: D proposes to buy a parcel of rural land from its absentee owner, P. D, who is a petroleum engineer, knows that oil has recently been discovered beneath adjacent lands. P does not know this. D offers a price about equal to the market value the land would have as farmland, which is far below what an oil company would now pay given the local oil discoveries. D says nothing about the discoveries, nor makes any other statement about the value of the land. P agrees to sell, closes on the sale, and then discovers that D knew about the oil discovery. P sues D for intentional misrepresentation.

P will lose. This scenario falls within the general rule that one party to a proposed transaction ordinarily has no duty to make disclosure to the other about a material fact which the former knows and the other does not. There are exceptions (see *infra)* but none applies here. (But if D said, "I'm an oil engineer, and I can tell you that no oil has been or is likely to be discovered around here," that's an affirmative misrepresentation that *would* be the basis for liability.)

c. Exceptions: But there are some important ***exceptions*** to the general rule that nondisclosure will not trigger liability for deceit. The Second Restatement, in §551(2), lists several situations in which one party to a business transaction has an obligation to make disclosure to the other. Among these are the following:

i. Fiduciary relation: Matters which must be disclosed because of a ***fiduciary relationship*** between the two (e.g., a bank and its depositor);

ii. Half-truth: Matters which must be disclosed in order to prevent a ***partial*** statement of the facts from being misleading (discussed below);

iii. Subsequent information: ***Newly-acquired*** information which, if not disclosed, would make a ***previous statement*** misleading; and

iv. Facts basic to transaction: Most importantly, ***facts basic to the transaction,*** if the party with knowledge "knows that the other [party] is about to enter into [the transaction] under a mistake as to them, and that the other, because of the relationship between them, the customs of the trade, or other objective circumstances, would ***reasonably expect a***

disclosure of those facts." (§551(2)(e)).

(1) Termite cases: The duty to disclose is frequently invoked in ***"termite"*** cases. A homeowner selling his home today is often held liable to the purchaser for his failure to tell the latter that the house has had termites. This modern rule represents a change in doctrine.

d. Rescission: Although the plaintiff's ability to get ***damages*** for non-disclosure is even today, as noted, somewhat limited, he has always been able to obtain ***rescission*** (i.e., a cancelling of a contract) for nondisclosure of a material fact. Thus if the plaintiff in *Swinton* had brought an equitable action to rescind the contract, he probably would have won.

e. Extension to other defects: Courts have become more lenient in what they consider a ***"basic fact"*** required to be disclosed. Thus a real estate developer who sold lots without indicating that the land had such a heavy salt content that shrubbery or trees could not be grown on it, was held to have failed to disclose a basic fact, and was therefore liable. *Griffith v. Byers Constr. Co. of Kansas, Inc.*, 510 P.2d 198 (Kan. 1973).

f. Non-disclosure by buyer: Courts are less likely to hold that a ***buyer*** has a duty to disclose (even if he knows that the item is much more valuable than the seller thinks it is) than to hold that a seller has such a duty. See P&K, p. 739. The oil-in-the-ground example on p. 439 is an illustration.

C. Scienter: To maintain the common law action of deceit, the plaintiff must show that the defendant had that culpable state of mind called ***"scienter."***

1. What constitutes scienter: The defendant acted with scienter if he either:

a. ***knew*** or ***believed*** that he was not telling the truth; or

b. did not have the ***confidence*** in the accuracy of his statement that he ***stated or implied*** that he did; or

c. knew that he did not have the ***grounds*** for his statement that he

stated or implied that he did. See Rest. 2d, §526.

2. Negligence not enough: The main function of the *scienter* requirement is to prevent merely ***negligent*** misrepresentations from being actionable. This rule was derived from the well-known case of ***Derry v. Peek,*** set forth in the following example.

> **Example:** Ds, who are directors of the Plymouth, Devonport & District Tramways Co., issue a prospectus in order to obtain capital for the company. The document states that the company has obtained, by special Act of Parliament, the right to use steam power to run a tramway, and that this will make the line more efficient than ones operated by horses. P buys shares in reliance on this prospectus. It turns out that the consent of the Board of Trade is necessary for use of steam power, and the Board refuses to allow steam over most of the line. The company goes bankrupt, and P sues the Ds in deceit.
>
> *Held*, "In order to sustain an action of deceit there must be proof of fraud, and nothing short of that will suffice. . . . Making a false statement for want of care falls far short of, and is a very different thing from, fraud, and the same may be said of a false representation honestly believed though on insufficient grounds." Since there was evidence that the Ds expected to receive the approval of the Board of Trade as a matter of course, their representation was not fraudulent. (But, it was noted, if the Ds had "shut [their] eyes to the facts", they would have lacked an actual belief in the truth of their statements, and would be liable for deceit.) *Derry v. Peek*, 14 App. Cas. 337 (Eng. 1889), *infra*, pp. 441, 449.

a. Why negligence action not used: Since the plaintiff in *Derry* could have shown that the directors made their representations negligently, one might wonder why he did not bring an ordinary negligence action. The answer is that until recently, recovery was not allowed in ordinary negligence actions for pure intangible economic loss, without any personal injury or other direct physical damage. (This rule also has implications in products liability, which are discussed *supra*, p. 397.)

i. Rescission: If the plaintiff, instead of bringing a deceit action, merely wants to ***rescind*** a contract which she has been induced to make by means of misrepresentations, she has a much easier task. In this situation, the courts have always been willing to allow rescission merely on a showing of ***negligent*** misrepresentation. Thus even the *Derry* court itself noted that "Where rescission is claimed it is only necessary to prove that there was misrepresentation; then, however honestly it may have been made, however free from blame the person who

made it, the contract, having been obtained by misrepresentation, cannot stand."

3. **Stating belief as knowledge:** If the defendant says that he knows something to be the case when in fact he ***doesn't know whether it is the case or not,*** this will furnish the necessary scienter.

4. **Negligent and innocent misrepresentation:** Many courts have now either relaxed or abandoned the strict scienter requirement, and allow recovery for negligent misrepresentation, and even in some instances for innocent misrepresentation (i.e., strict liability). These theories of recovery are discussed *infra,* pp. 449 and 452, respectively.

D. Right of third persons to recover: Can a plaintiff ever recover if the fraudulent misrepresentation was made not to her, but to some other person?

1. **Common law rule:** The traditional common law rule has been that the defendant is only liable to those persons whom he has ***intended*** to influence by his misrepresentation, and not to others, even though their reliance may have been foreseeable.

2. **Relaxation of rule:** However, this rule requiring intent to induce reliance has been ***relaxed*** substantially in recent years. The Second Restatement recognizes a number of circumstances in which a person will be liable for misrepresentations to one other than the recipient, even though not made for the purpose of inducing the plaintiff to rely. The most important of these are the following two:

   a. **Use in commercial document:** One who incorporates a misstatement in a ***commercial document*** (e.g., a product label) is liable to anyone who suffers loss through his justifiable reliance on the truth of the statement. For instance, a company which markets clover seed in bags intentionally labelled "alfalfa seed" would be liable to anyone who planted the seeds in reliance on the label, and suffered loss, whether the company "intended" to reach that person or not. Rest. 2d, §532, Illustr. 2.

   b. **"Reason to expect":** The defendant is liable to any member of a "class of persons" whom he has ***"reason to expect"*** will ***learn of and rely on*** the misrepresentation, if the reliance occurs in the

"type of transaction" in which he has reason to expect them to engage because of such reliance. Rest. 2d, §§531, 533. In other words, the plaintiff to whom no misrepresentation has been directly made must, in order to recover under this section, show two things:

i. that she is a member of a class which the defendant had ***reason to expect*** would be induced to rely; and

ii. that the transaction is of the ***same sort*** that the defendant had reason to expect would occur in reliance.

c. Change from former law: The Restatement's position is thus more liberal than that of most earlier cases, such as *Peek v. Gurney*.

i. Not same as foreseeability: But even the Restatement's test is not the same as one based on "foreseeability." The reliance by the third person must be more than foreseeable; it (or other reliance by other similarly situated plaintiffs) must be "expectable." (The Restatement leaves a Caveat to §531 as to whether there may be circumstances in which mere "foreseeability" will be enough.)

d. Negligent misrepresentation: In jurisdictions recognizing the possibility of an action for ***negligent*** misrepresentation, most courts have understandably been even more reluctant to find liability to persons with whom the defendant has not dealt directly. But a few decisions have held the speaker (e.g. an auditor) liable to anyone who foreseeably relied on the representation. See the discussion of this question, including the treatment of *Ultramares v. Touche Niven & Co.*, *infra*, p. 450.

E. Justifiable reliance: The plaintiff must also show, to establish deceit, that he in fact ***relied*** on the misrepresentation, and that his reliance was ***justifiable.***

1. Causal question: With respect to the "reliance in fact" aspect of this requirement, the principal issue is whether the plaintiff has relied when he has made an additional ***investigation*** on his own, and his action is the product of reliance both on the misrepresentation and on his own investigation.

a. Misrepresentation need not be sole factor: In this situation, it is

generally held that the plaintiff has met the reliance requirement, as long as the defendant's misrepresentation was a ***substantial factor*** in inducing his reliance, despite the fact that his own investigation also was a substantial factor. See Rest. 2d, §546, Comment b and Illustr. 2.

i. Reliance solely on investigation: But if, after receiving the defendant's misrepresentation, the plaintiff makes his own investigation, and ***relies totally*** or almost totally upon this investigation, he will be held not to have met the reliance requirement. Rest. 2d, §547(1).

2. Justifiability of reliance: The plaintiff must also show that his reliance was ***justifiable.*** Many of the cases involving the justifiability of reliance involve opinions, statements of "law," and predictions and statements of intention; these subject areas are discussed at various places later in this chapter.

a. Duty to inspect: Apart from these issues, the principal question is whether it is ever unreasonable for the plaintiff to rely on the defendant's representation without making an ***independent investigation*** of his own.

i. No general duty to investigate: In general, the plaintiff has ***no duty to investigate*** on his own, even where an investigation could be easily done, and would disclose the falsity of the defendant's statements.

(1) Disbelief by court: However, in some cases the court may simply disbelieve the plaintiff's claim that the representation in question was made, or his claim that he relied on it. In such situations, for procedural reasons courts may hold that the plaintiff could so easily have investigated that his failure to do so made his reliance unreasonable.

ii. Obvious falsity: Although the plaintiff seldom has a duty to investigate, he does have a duty not to overlook the ***"obvious."*** Thus Rest. 2d, §541, Comment a, makes the plaintiff's reliance unjustified if the representation's falsity "would be patent to him if he had utilized his opportunity to

make a cursory examination or investigation."

(1) **Contributory negligence:** But the plaintiff's ***contributory negligence*** is not by itself a defense to a deceit action. The fact that a person of reasonable prudence would not have believed the defendant's misrepresentation is irrelevant, as long as its falsity is not obvious.

3. Materiality: The plaintiff must also show that the fact he relied on was ***material*** to the underlying transaction. For instance, if the defendant, acting as agent, sells the plaintiff a tract of land, and in so doing falsely states that his principal is left-handed, the plaintiff will not be able to recover in deceit, since the representation was not material. (See P,W&S, p. 1048, note 6.)

a. What is material: Generally, a representation is material if a "reasonable man would attach importance to [its truth] in determining his choice of action in the transaction in question." Rest. 2d, §538(2)(a).

i. Special knowledge by defendant: In addition to this, if the defendant has some reason to know that the plaintiff attaches a particular importance to the fact in question, even though a reasonable person would not do so, the representation will be treated by the court as material. Rest. 2d, §538(2)(b). For instance, if the defendant knew that the plaintiff believed in astrology, and induced him to buy stock in a particular company by falsely stating that the horoscopes of all the company's officers predicted success, the representation would be held to be material. Rest. 2d, §538, Illustr. 1. (Observe the Restatement's implicit position on the reasonableness of believing in astrology!)

F. Opinion: Courts have always been reluctant to allow a plaintiff to recover based on any statement that could be called an ***"opinion."***

Example: D sells P some farm land by saying that it contains "about" 150 acres of timber, that the timber can be sold for $4 per cord, and that the land can be cultivated so as to produce 100 bushels of potatoes per acre. P sues D for fraud. *Held*, for D: these statement were merely "speculative expressions of opinion", and "mere trade talk"; they are therefore not actionable. This is so even though D may have known perfectly well that there were less than 150 acres of timber, that the wood would not

bring $4 per cord, or that an acre would never produce 100 bushels of potatoes. *Saxby v. Southern Land Co.*, 63 S.E. 423 (Va. 1909).

1. **More liberal rule:** Today, courts are somewhat more willing to allow suit based on a false expression of opinion than they were in the time of *Saxby*. It is still generally true that even if the defendant says that something is his opinion, when it is really not his opinion, the plaintiff cannot recover in deceit. However, in a few situations, discussed below, modern courts are sometimes willing to recognize the possibility that reliance may be justified.
2. **Opinion of adverse party:** Where the defendant was an ***"adverse party"*** to the plaintiff at the time of the misstatements (e.g., buyer and seller, or any other pair of negotiating parties), Rest. 2d, §542, lists the following situations in which the plaintiff may be justified in relying on the defendant's expression of opinion:
   a. **Special knowledge:** The defendant "purports to have ***special knowledge*** of the matter" that the plaintiff does not have;
      i. **Jewelry dealer:** Thus a jewelry dealer who tells an ignorant customer that a particular stone is worth $2,000 could be sued, on the theory that he "purports to have special knowledge" as to the value of stones.
   b. **Fiduciary relationship:** The defendant "stands in a ***fiduciary*** or other similar relation of trust and confidence" to the plaintiff;
   c. **Confidence:** The defendant "has successfully endeavored to secure the ***confidence"*** of the plaintiff;
   d. **Other:** There is some other "special reason" to expect that the plaintiff will rely on the defendant's opinion.
      i. **Defendant knows of plaintiff's gullibility:** For instance, if the defendant knows that the plaintiff is particularly ***gullible*** or unintelligent, and therefore has reason to believe that the plaintiff will be misled by a false statement of opinion, this will be actionable. This would be a "special reason" to expect the plaintiff to rely; see Rest. 2d, §542, Comment i.
3. **"Puffing" still not actionable: *"Puffing",*** or ***"trade talk,"*** is still not

actionable under the Restatement test. Thus if a car dealer says, "This is the best little two-door car you're gonna find for the money anywhere on the market," the plaintiff can't sue even if he can prove that the dealer doesn't really believe that the car is a particularly good one. Rest. 2d, §542, Comment e.

4. **Opinion of apparently disinterested person:** Where the opinion is expressed not by one of the parties to a business deal, but by someone whom the plaintiff reasonably perceives as being ***"disinterested,"*** courts are much more willing to find the plaintiff's reliance on it reasonable.

   a. **Rationale:** Whereas in the "adverse party" situation discussed above, the plaintiff is presumed to understand that her adversary is likely to stretch the truth to make the deal, this factor is not present where the defendant seems to be disinterested. See Rest. 2d, §543.

   Example: P buys a pair of shoes manufactured by D1. When she wears the shoes on her vinyl kitchen floor, she slips, and hurts herself. She sues not only D1, but also D2, a publisher who publishes Good Housekeeping Magazine, which has given the "Good Housekeeping Seal of Approval" to the shoes. D2 is on record as stating that it has satisfied itself that products receiving the Seal of Approval are "good ones".

   Held, for P against D2. Since D2's purpose in granting Seal of Approval to products was to induce people to buy them, it will not be heard to say that its representation that the product was a "good one" was merely opinion. D2 "held itself out as a disinterested third party which had examined the shoes, found them satisfactory, and gave its endorsement. By the very procedure and method it used, [D2] represented to the public it possessed superior knowledge and special information concerning the product it endorsed." Therefore, D2 can be liable for negligence. *Hanberry v. Hearst Corp.*, 81 Cal. Rptr. 519 (Cal. Ct. App. 1969).

5. **Opinion implying fact:** The above discussion applies only to those opinions which are "pure opinion", and which do not state or imply concrete facts. There are, however, many opinions which do either ***express or imply facts.*** When such an opinion is given, the plaintiff may be able to establish that his reliance on such expressed or implied facts is reasonable.

   a. **Lack of knowledge of inconsistent facts:** Thus an opinion will often contain an implied statement that its maker knows of no facts ***incompatible with*** that opinion. If the plaintiff can show that the defendant was in reality aware of facts incompatible with his

opinion, he may be able to recover. See Rest. 2d, §539(1)(a).

b. Line between opinion and fact: Also, it does not take much to cross over the line from opinion to statement of fact. Thus while a simple ***statement of value*** (e.g. "This land is worth $5,000 per acre") is an opinion, "Land just like this is selling for $5,000 across town", "I paid $4800 for this land last year", and "I've already been offered $4950 for this acre" are all statements of fact, and the plaintiff can sue and win on a deceit theory if he can show that the defendant knew they were false. See P&K, p. 758. See also P, W&S, p. 1050.

Example: D, the manufacturer of a vacuum cleaner line, sells P equipment for making the vacuum cleaners, and the patents to them. D claims that the machines are "absolutely perfect in even the smallest detail", that they will last a lifetime, that their use of water power is the most efficient form of cleaning, etc. D also represents that these vacuum cleaners have never before been sold on the market. After the deal is done, P comes to disagree with this evaluation, and sues for deceit.

Held, the claims of quality are mere "puffing" or "dealers' talk", and are not actionable. This is so because P, as purchaser of the business, had ample opportunity to check out the claims. (A similar result, the court indicated, might not be reached if P were merely a consumer buying one machine.) However, the statement that no cleaners had been sold previously went beyond the realm of opinion, and P is entitled to recover if he can prove that sales were made. *Vulcan Metals Co. v. Simmons Mfg. Co.*, 248 F. 853 (2d Cir. 1918).

G. Statements as to law: Statements as to ***questions of law*** were almost always held to be opinions, and therefore not to be relied upon, at common law.

1. Modern view: But today, statements involving legal principles are generally treated the same as any other kind of statement. For instance, if the statement is fairly read as being solely an opinion, it may be relied on only in those limited circumstances discussed *supra,* p. 443. Rest. 2d, §545(2).

a. Implied factual statement: The most important consequence of this more liberal rule is that if the defendant's representation of law includes an implied statement as to ***factual matters,*** the plaintiff may rely upon this implied statement as he could upon any other factual representation. Rest. 2d, §545(1).

Example: D, when he sells a house to the Ps, tells them that it meets all "minimum

code requirements," such as those for electric wiring, plumbing, and sewage disposal. When this turns out not to be the case, Ps sue for fraud.

Held, although the representations had a legal aspect, they were essentially statements as to a factual matter (i.e., whether work was of a certain quality). "The plaintiffs are not relying on their ignorance of the law but of the facts, and the alleged representations carried with them the implication that the facts were otherwise than the evidence shows them to have been." Therefore, a fraud action may be maintained. *Sorenson v. Gardner*, 334 P.2d 471 (Or. 1959).

H. Prediction and intention:

1. **Prediction:** If the defendant ***predicts*** that a certain thing will happen, this will almost always be held to be merely an opinion, and is at best something that can relied upon only in those situations where other opinions could be relied on (e.g., a fiduciary relationship between defendant and plaintiff). Thus if the defendant, trying to sell the plaintiff a piece of land, says "The value of this parcel is bound to increase 20% a year for the next ten years", the plaintiff will almost certainly be unable to establish that his reliance was justifiable.

   a. **Defendant's lack of knowledge of contrary facts:** But as with other opinions, such a prediction generally contains an implicit statement that the maker knows of no facts inconsistent with it. Thus if the defendant landseller mentioned above knew that the property was likely to be condemned, or to sink in a marsh, her statement about value would probably be held to be actionable. (In any event, plaintiff could also probably show "fraudulent concealment"; see *supra*, p. 438.)

2. **Intention:** But where the defendant, instead of making predictions about things beyond her control, makes a statement as to her own ***intentions,*** plaintiff's reliance will often be justifiable. As one well-known statement put it, "The state of a man's mind is as much a fact as the state of his digestion." *Edgington v. Fitzmaurice*, L.R. 29 Chi. Div. 359 (Eng. 1882).

   a. **Means of avoiding contract defenses:** One party to a contract will often try to avoid various ***contract defenses*** by suing on a theory that the other party never intended to keep the contract, and therefore fraudulently misstated his intent to do so. Where the necessary intent can be shown, most courts hold that neither the

Statute of Frauds, the parol evidence rule, the illegality of the transaction, lack of consideration, or any other contract defense will bar liability. See P,W&S, p. 1060.

Example: As part of a transaction, D promises P that he will pay a $500 mortgage so that P will not have to pay it. He fails to do so, and P sues on the theory that D never intended to keep the promise, even at the time he made it. (P couldn't sue for breach of contract, because of the Statute of Frauds).

Held, if D never intended to keep the promise, this was a fraudulent misrepresentation which is actionable. Furthermore, the Statute of Frauds does not bar the suit. *Burgdorfer v. Thielemann*, 55 P.2d 1122 (Or. 1936).

b. Statement as to intent of others: Essentially the same rules apply to statements as to the present intentions of ***others;*** if the plaintiff can show that the defendant has knowingly misstated these intentions, he will have an action for fraud.

I. Damages:

1. Proximate cause: Once the plaintiff has met the requirements for deceit, he may recover any damages which are found to have been ***proximately caused*** by the defendant's misrepresentations. He must show that he sustained actual damages, and may not recover nominal ones (as he could for other intentional torts; see *supra*, p. 10).

a. Decline in value: The issue of proximate cause arises most frequently in situations where the plaintiff has purchased stocks or bonds in reliance on a misrepresentation about them, and their market value declines due to causes entirely ***unrelated*** to the misrepresented matters. Despite the fact that the misrepresentation is the "but for" cause of plaintiff's loss in this situation (i.e., if there had been no misrepresentation, the plaintiff would not have purchased, and would not have been in a position to suffer losses), such recovery is generally ***not allowed,*** on the grounds that the loss was not a "reasonably foreseeable" result of the misrepresentation. See Rest. 2d, §548A, Illustr. 1.

2. Measure of damages: Courts have applied essentially two different ***measures*** of damages: (1) one which attempts to put the plaintiff in the position he was in before the misrepresentation (which in contract law would be called the ***"reliance"*** measure — see the Emanuel Law

Outline on *Contracts);* and (2) one which, where the plaintiff and defendant have made a contract, puts the plaintiff in the position he would have been in had the misrepresented facts been true (in contracts, the ***"benefit of the bargain"*** or "expectation" measure).

a. Reliance measure: About 12 courts consistently apply the reliance measure in all deceit actions. (P&K, pp. 767-68.) Thus if the defendant fraudulently induces the plaintiff to buy an object for $10,000, and it is really worth only $7,000, the reliance or "out of pocket" recovery is $3,000. This is so regardless of whether the entire $3,000 discrepancy is due to the fact that the object was not as warranted, or is rather due in part to this but also in part to the fact that the plaintiff would have made a bad bargain anyway, even without the misrepresentations (e.g., by paying $10,000 for something worth only $9,000).

b. Benefit of the bargain: A ***majority*** of American courts, however, give the plaintiff his ***"benefit of the bargain"*** or ***"expectation"*** damages, at least in those situations where the defendant is someone with whom he has made a contract. These courts reason that even though the deceit action is not on the contract, it is fair to give the plaintiff the contract measure of damages, and to punish the defendant. Thus if the plaintiff paid $10,000 for something worth $7,000, and the thing would have been worth $15,000 if the misrepresentations about it had been true, the plaintiff will receive damages of $8,000 from these courts (i.e., the difference between what the item was worth in reality, and what it would have been worth if it had been as represented).

  i. Repair bill as estimate of expectation damages: The plaintiff seeking the benefit of his bargain will often have a hard time showing what the actual value of the product was (as opposed to what it would have been worth if it had matched the representations made about it). In this situation, he will sometimes be able to recover the costs of ***repairing*** it to bring it up to the condition it was represented to be in.

c. Restatement view: The Second Restatement, in §549(2), allows the "benefit of the bargain" measure where expectation damages

are "proved with reasonable certainty."

d. Where reliance damages greater: In some situations the reliance measure will be ***greater*** than the expectation measure (as where the plaintiff has made such a bad bargain that even if the item had been as represented, it would still not have been worth what he paid for it). In this situation, all courts agree that the plaintiff has the option of choosing to recover reliance damages. That is, he will receive the difference between what he paid and what the product was really worth.

e. Consequential damages: The plaintiff may also recover ***consequential*** damages. For instance, where the plaintiff was sold a horse which was represented to be gentle, and which kicked him, he was allowed to recover for his injuries. *Vezina v. Souliere,* 152 A. 798 (Vt. 1931). See P,W&S, p. 1063, n. 7.

f. Financial loss required: Most courts say that plaintiff can recover ***only*** for ***pecuniary*** (i.e., ***financial)*** loss for the deceit.

i. No recovery for emotional distress: Thus plaintiff ***cannot*** recover for ***emotional distress*** that resulted from the deceit.

> **Example:** D, offering to sell P D's rural land for $100,000, tells P that oil has been discovered on nearby parcels. P knows that this would be a cheap price if oil had really been discovered nearby. P gets very excited about his wonderful prospective purchase. Before signing a contract, P performs due diligence, and discovers that no oil has been discovered nearby, and that D knowingly misrepresented that oil had been discovered. P suffers great emotional distress at the loss of the opportunity he thought he had. P never signs a contract for the land, but sues D for deceit.
>
> P cannot recover, because he has suffered no pecuniary loss, and damages for emotional distress (as distinguished from pecuniary loss) may not be recovered in a deceit action.

III. NEGLIGENT MISREPRESENTATION

A. Historical view: *Derry v. Peek, supra*, p. 440, established that the action of deceit could not be used for a misrepresentation that was merely negligent, rather than intentional.

1. Direct physical damage required: Nor, until recently, could the victim of a negligent misrepresentation bring an ordinary negligence action when only his intangible economic interests had been harmed.

That is, to bring a conventional negligence action, the plaintiff had to suffer either personal injury or direct property damage, not mere intangible economic harm (e.g., lost profits, or a bad contract).

2. **Changing view:** But in the last 20 or so years, most American courts have begun to allow some kind of recovery for ***negligent misrepresentation,*** even where only intangible economic harm is suffered. Some courts have done this by allowing a special action for "negligent misrepresentation" analogous to deceit; others have simply assimilated the intangible-harm case into the conventional negligence action.

   a. **Same requirements:** In either case, most requirements for the action are generally the same as for a deceit action. For instance, the plaintiff must show that his reliance was justifiable, and the standards for justifiability are at least as strict as in deceit.

B. Business relationship: The courts have been most willing to allow recovery for negligent misrepresentation where the defendant's statements are made in the course of his ***business or profession,*** and he had a ***pecuniary interest*** in the transaction.

> **Example:** P, an importer, is expecting goods to come in by ship to be stored by D. P wants to insure the goods, so he calls D, and asks whether and where they are stored; he is told that they have been docked and are stored at "Dock F, Weehauken". He gives this information to the insurance company to get insurance. It turns out that the goods have not yet arrived; when they do, they are stored at Dock D, not F, and are then destroyed by a fire. P can't collect on the insurance because of the misdescription, so he sues D.
>
> *Held*, P may recover for this negligent misrepresentation. P and D were not strangers; instead, they had a bailor/bailee business relationship. This relationship was enough to give D the burden of exercising due care in his statements. *International Products Co. v. Erie R.R. Co.*, 155 N.E. 662 (N.Y. 1927).

1. **Direct compensation not required:** Most courts, and the Second Restatement, hold that it is not necessary for the plaintiff to show that the defendant ***directly*** received compensation in the transaction giving rise to the misstatements. See Rest. 2d, §552, Comment d. For instance, if a prospective client comes to a lawyer's office, and as part of a "free first consultation", is negligently given incorrect advice, she may sue, despite the fact that she has not paid for the services.

a. Curbstone opinion: But where a statement is made totally outside of the defendant's usual business or professional work, there is no liability. Thus in the case of a ***"curbstone opinion",*** "as when an attorney gives a casual and offhand opinion on a point of law to a friend whom he meets on the street", there is no liability. Rest. 2d, *ibid.*

C. Liability to third persons: The maker of a ***fraudulent*** misstatement will be liable not only to the recipient of the statement, but to any person who the maker has "reason to expect" may rely on it. *(Supra,* p. 442.) But the maker of a negligent misrepresentation is liable only to a ***much narrower class of third persons.***

1. Persons intended to be reached: The Second Restatement, in §552(2), makes the defendant liable to a ***"limited group of persons"*** whom the defendant ***intends to reach*** with the information, or whom he knows the ***recipient intends to reach.*** That is, whereas the fraudulent misrepresenter is liable to anyone whom he should have "reason to expect" will learn about the statement and rely on it, the negligent misstater is liable only to a limited group, and that group must be composed of persons whom the defendant either intends to reach or knows that the recipient intends to reach.

Example: D, a firm of accountants, negligently prepares a certified audit of the books of X Corp. D is aware that the results of this audit will be shown to banks, factors, and other persons from whom X wants to borrow money (but is apparently unaware of the precise identity of any of these potential creditors.) In reliance on the audit, P, a factor, lends money to X, which goes bankrupt. P sues D for negligent misrepresentation.

Held, D had no duty of care to P, and therefore cannot be liable. Otherwise, "a thoughtless slip or blunder, the failure to detect a theft or forgery beneath the cover of deceptive entries, may expose accountants to a liability in an indeterminate amount for an indeterminate time to an indeterminate class." Also, this would make the scope of liability for negligence as great as it is for actual fraud, which would be illogical. (But, the court noted, if the members of D lacked even a genuine ***belief*** that the audit was correct, they could be found to have made a fraudulent misrepresentation, and their liability would extend to creditors, like P, who relied.) *Ultramares Corp. v. Touche, Niven & Co.*, 174 N.E. 441 (N.Y. 1931).

a. Restatement view of *Ultramares:* The Second Restatement accepts the result of *Ultramares;* Rest. 2d, §552, Illustr. 10. But under the Restatement, if the defendant was aware that the

representation would be passed on to a ***limited number*** of people, he may be liable to one or more of those people, even if he didn't know their precise identities. For instance, if an accounting firm's client says that he will use a certified statement to negotiate "a bank loan," and does not mention a particular bank, the accountants will be liable to whatever bank is finally approached by the client and suffers loss. Rest. 2d, §552, Illustr. 7. Other instances in which the defendant may be liable to a limited class whose precise members are unknown include:

i. **Information supplied to bidders:** Information supplied by engineers to the owner of a construction project, who passes it on to ***bidders*** on that project; if a bidder then suffers loss as a result of the information's incorrectness (e.g., by submitting too low a bid for excavation work based on an unduly favorable soil engineer's report), the engineer will be liable.

ii. **Abstractors:** Abstractors of title who furnish a ***title report*** on a piece of property to the owner, knowing that it will be given to prospective purchasers;

iii. **Surveyors:** Land surveyors who should know that their ***surveys*** will be given to prospective purchasers;

iv. **Lawyers:** A ***lawyer*** who drafts a will which negligently cuts out certain ***intended heirs.***

v. **Public duty:** Persons having a ***public duty*** to give correct information; (e.g., a government food inspector who negligently stamps a seller's beef as "Grade A" when it is inferior, and which is then bought by the plaintiff; see Rest. 2d, §552, Illustr. 18.)

D. Contributory negligence: The plaintiff's ***contributory negligence*** will be a defense to an action for negligent misrepresentation to the same extent that it would be a defense to any other kind of negligence action. See Rest. 2d, §552A.

E. Damages limited to pecuniary harm: Damages for negligent misrepresentation are limited to ***pecuniary harm.*** This principle has several important consequences:

[1] **Emotional harm:** Plaintiff ***cannot*** recover for ***emotional harm*** suffered as the result of the misrepresentation.

Example: D offers P a contract to purchase stock in D's new startup company, telling P that D is about to sign a large and profitable contract with the U.S. government. P signs the contract, and anticipates making millions of dollars on his investment. Before P has closed on the contract or paid money to D, the U.S. government rejects the proposed deal. D honestly (but negligently) believed that the deal would go through when he made the statement to P. D allows P to rescind the agreement. P suffers severe emotional distress from having his hopes of profit dashed. If the contract had gone through, P would indeed have made an enormous return on his investment.

P cannot recover for negligent misrepresentation, because he has suffered only emotional, not pecuniary, loss.

[2] **Benefit of bargain:** Plaintiff ***cannot*** recover for the ***"benefit of her bargain."*** That is, if the misrepresentation relates to a contract, P may not recover the difference between the actual value received by P and the value that P would have received that the facts been accurately stated.

Example: On the facts of the above example, P cannot recover the difference between the price of the stock he contracted to buy and the value the stock would have had if D's representation about the government contract had been true.

[3] **Reliance damages:** But plaintiff ***can*** recover the difference between the ***value*** of what P has ***received*** and what P ***paid*** in purchase price or other value. So P gets, in effect, ***"reliance damages."***

Example: On the facts of the above Example, if P had paid $100,000 for the stock, and without the government contract the stock was worthless, P would be entitled to a return of the $100,000 as damages for negligent misrepresentation.
See generally Rest. 2d, §552B.

IV. STRICT LIABILITY

A. Increasing willingness to allow: Just as courts were reluctant to recognize a cause of action for negligent misrepresentation until fairly recently, so they have been even less willing to impose ***strict liability*** for "innocent" misrepresentations. But there are now at least two kinds of situations in which a substantial number (perhaps even a majority) of courts allow recovery for losses due to a misrepresentation that is neither intentional nor negligent.

B. Sale, rental or exchange: If two parties are involved in a ***sale, rental*** or ***exchange*** transaction, and one makes a material misrepresentation to the other in order to close the deal, he will be liable even if the misrepresentation was not negligent or fraudulent. Rest. 2d, §552C(1).

> **Example:** D, a developer, induces the Ps to buy a particular house by giving them a survey which shows that the house is 20 feet from a particular boundary of the lot, as is required by local zoning laws. After Ps move in, they discover that in fact the house is less than 2 feet from that boundary, and that not only is this a violation of local zoning laws, but a trespass on their neighbor's property occurs every time anybody goes in or out of the house.
>
> *Held*, even if D's misrepresentation was completely innocent (as opposed to negligent), D is liable. *Richard v. A. Waldman & Sons, Inc.*, 232 A.2d 307 (Conn. 1967).

1. **Comparison with warranty:** In the vast majority of cases in which such a recovery based on misrepresentation made in a sale, rental or exchange is available, plaintiff could also sue on an implied or express ***warranty*** theory. But one big difference between warranty recovery and strict tort liability is that in warranty suits, a number of contract defenses, including most importantly the ***parol evidence rule,*** may be asserted. In strict tort, they may not be.

   a. **Illustration:** Thus in the above example, the plaintiffs had taken title by a deed, which under the parol evidence rule dissolved any warranties which had been given in the contract of sale or orally. The court held that this did not bar the plaintiffs from suing for innocent misrepresentation.

2. **Service transactions:** A few courts have been willing to apply strict liability where the transaction between plaintiff and defendant involves a ***service*** rather than a sale, rental or exchange. For instance, if an insurance company agent told the plaintiff that the policy he was buying would cover him against a certain kind of liability, and it didn't, the plaintiff might be able to recover in strict liability, without showing negligence on the part of the agent.

3. **Must be privity:** The sale, rental or exchange must have been directly between plaintiff and defendant. For instance, if a manufacturer makes a representation to a retailer, who passes it on to the plaintiff to induce her to buy, there will be no strict liability under

Rest. 2d, §552C. See Comment d to that section.

C. Misrepresentation by seller of chattels to consumer: A seller of goods who makes any misrepresentation on the label, or in public advertising, will be strictly liable for any ***physical injury*** which results, even if the injured person did not buy the product from the defendant. Rest. 2d, §402B. This provision is essentially part of products liability law, and is similar to the "express warranty" provisions of the UCC. See, e.g., *Baxter v. Ford Motor Co.*, *supra*, p. 352, which was decided on substantially the theory of §402B.

Quiz Yourself on
MISREPRESENTATION (Entire Chapter)

78. Noah and Judas are neighbors, who frequently do each other favors. One night, Judas is visiting Noah, and, as he leaves, Noah says: "I'll come out with you as far as the barn. It looks like rain, and I want to make sure the unicorns are securely shut in the barn." Judas says, "Forget it. I'll check on my way home." Judas has no intention of checking, figuring Noah's just being a worrywart. In fact, the unicorns are not securely penned, and they run away and drown in the subsequent flood. Had they been penned, they would have survived. Noah sues Judas for misrepresentation. Judas claims he didn't misrepresent a past or present fact, so the claim will not lie. Who's correct?_____-

79. Betty Omen is considering buying passage on the first voyage of the Titanic. She is at a cocktail party and sees Captain Smith, who is going to command the voyage. Betty walks over and asks the Captain, "Is the Titanic safe?" He responds, "Madame, the Titanic is capable of surviving any impact whatsoever — missiles, nuclear weapons, icebergs, you name it." In fact, Smith doesn't know if this is true; he hasn't seen the ship itself or any technical specifications. Her worries calmed, Betty buys a ticket. The Titanic sinks, but Betty survives. She sues Smith, who has also survived, for intentional misrepresentation. Will she win? _____

80. Nysen Shiny, travelling cookware salesman, knocks on the door of the Gingerbread House, where Wicked Witch lives. She invites him in. When he tells her he sells cookware, she says, "Oh, good. Do you have a

pot large enough to hold two small children?" He responds, "Oh, yes. Our HG pot is the one for you." He excuses himself to make a phone call, and Witch rifles through his briefcase, finding a spec sheet which shows that the HG pot is clearly not large enough to hold two children, and in fact there aren't any that can. However, when Nysen returns, Witch sweetly orders the HG pot, figuring a pot big enough for one kid at a time will have to suffice. The pot arrives, and Witch sues Nysen for misrepresentation. Assume that Witch suffered financial loss from the fact that she could boil only one kid at a time (lower productivity, translating to loss of revenue from sale of magic potions made from the boiled children). Can Witch recover? _____

81. E. F. Mutton, the hottest stock broker in New Zealand, is at a cocktail party in the U.S. Yves Dropper, another guest at the party, overhears Mutton telling a third guest, Little Lamb, that, based on his confidential sources, the Embraceable Ewe Sweater Company is about to announce a huge quarterly profit, and it's a great time to invest. In fact, Mutton knows that Embraceable Ewe lost big bucks, and Mutton is just trying to buy time in which to unload his own shares. Relying on his statement, Yves invests, and takes a "bleating" when the market drops. Is Mutton liable to Yves for deceit? _____

82. Darlene owns a five-story apartment building in Pound City. Darlene offers the building for sale to Percy. She gives Percy a sheet she has prepared, which states, "The current rent roll is $5,000 per month, consisting of ten apartments at $500 each." She does not disclose to Percy a fact well known to her, namely, that under the Rent Stabilization ordinance in force in Pound, the highest rent properly chargeable for any of the apartments is $400, and that any tenant who becomes aware of his rights can sue to have the rent reduced to that amount. Percy is aware that the Rent Stabilization ordinance exist, and is also aware that there are records at the Pound City Hall showing, for each apartment building, the highest rent that can be charged per apartment. Percy decides that Darlene looks honest, so he neglects to check the town records, even though he could easily do this. He buys the building at a price that appears economically sensible to him based on a $5,000 per month rent roll, but that he would not have paid had he known the legal rent roll was only $4,000.

Shortly after the closing, the tenants discover their rights, bandd together, and successfully sue to have each person's rental reduced to $400. Percy sues Darlene for fraudulent misrepresentation and/or non-disclosure. Darlene defends on the grounds that: (1) she has no liability for what was essentially non-disclosure; and (2) in any event, Percy was not justified in relying, because he could have easily performed his own investigation which would have disclosed the true facts. Which, if either, of these defenses has merit? _____

83. Pia is contemplating the purchase of a painting which the seller represents to be by the great master Rubens. Pia brings the painting to her friend Dimitrius, who Pia knows to be one of the world's great experts in Old Masters paintings. Pia asks Dimitrius to give his opinion on whether the painting is really by Rubens. Dimitrius looks at the painting, and said, "Yes my dear, I'm nearly certain that it really was painted by Rubens himself." In fact, Dimitrius is very unsure whether the painting is by Rubens or rather by one of his students, but he is too embarrassed to tell Pia (whom he longs after romantically) of his uncertainty. Pia buys the painting, and suffers financial loss when it is later conclusively shown to have been by one of Rubens' students. Pia sues Dimitrius for fraudulent misrepresentation. Dimitrius defends on the grounds that he was only stating, as Pia knew, his own opinion. May Pia recover?_____

Answers

78. Noah. Statements of intention are treated just like statements of fact for misrepresentation purposes. Thus, they can be the source of justified reliance. Here, Noah is justified in modifying his conduct based on Judas' statement of intent. *Note that Noah would have to prove that Judas didn't intend to follow through with his stated intent when he made the statement.*

RELATED ISSUE: It's *predictions* which typically cannot be misrepresentations, as long as the speaker knows nothing to prevent the prediction from coming true.

NOTE: For intentional torts, an intervening cause (like a flood) is much

less likely to break the chain of causation, relieving defendant of liability, than in a negligence claim. If Noah's claim were based on negligence (e.g., Judas negligently forgot to check the unicorns), the flood would probably be considered a superseding cause as an unforeseeable "Act of God" breaking the chain of causation from Judas to the loss of the unicorns, such that it would relieve Judas of liability.

79. Probably. Misrepresentation requires a misrepresentation, knowledge of falsity or reckless disregard for the truth (scienter), intent to induce reliance, actual, justified reliance and damages. Here, Smith didn't know whether the Titanic was sinkable or not (and knew he didn't know), but he assured Betty it wasn't. Thus he satisfies the "scienter" requirement with a reckless disregard for the truth, and, as Captain of the ship, his assurance induces justified reliance.

Note: Were the Captain merely negligent — offering an opinion based on unreliable information — he could be liable for negligent misrepresentation.

80. **No.** Misrepresentation requires proof of the misrepresentation itself, knowledge of falsity or reckless disregard for the truth (scienter), intent to induce reliance, actual, justified reliance and damages. Here, Witch investigated and found the fraud and hence didn't rely on the misrepresentation. That means that the actual reliance (causation) element of intentional misrepresentation is missing. Although she was under no duty to investigate, once she did so she was not justified in relying on Nysen's statement.

81. No. Deceit (a/k/a intentional misrepresentation) requires proof of the misrepresentation itself, knowledge of falsity or reckless disregard for the truth (scienter), intent to induce reliance, causation, justified reliance and damages. Here, Mutton did not intend to induce reliance in Yves, so the "intent" requirement of misrepresentation is not satisfied.

RELATED ISSUE: Say that Mutton *did* intend that Yves rely on his statement. Then he *would* be liable, even though his statement is not a statement of fact and therefore not a source of justified reliance. However, here Mutton would be liable, since he has superior knowledge which Yves does not share; furthermore, he knows facts that indicate his opinion is wrong. These elements mean Yves *could* pursue a

misrepresentation claim against him.

82. Neither. First, Darlene has not merely failed to disclose; she has made a material (and fraudulent) misrepresentation in the form of a "half truth." That is, she has told Percy that the current rent roll is $5,000, but has not given him the additional facts (that the current rents being charged are illegal) necessary to make the statement that she did make not misleading. See Rest. 2d, §529, Illustr. 2. Second, it is not a defense to a fraudulent misrepresentation action that the other party failed to perform an investigation which he could reasonably have performed — a party to a transaction has no duty to investigate, even if his failure to do so is unreasonable and thus amounts to contributory negligence. See Rest. 2d, §540. So Percy will recover for fraud.

83. Yes. A statement of opinion will not usually give rise to liability for intentional misrepresentation. However, courts are quicker to find liability for an opinion when the opinion is expressed by one who is not an "adverse party" to the listener, i.e., where the two parties are not on opposite sides of a business transaction. Here, Dimitrius and Pia were not on opposite sides, as they would have been had Dimitrius been trying to sell the painting to Pia; therefore, a court will be quicker to find Dimitrius liable than if he were the seller. Also, the courts are quicker to find liability even for an opinion, where the other party believes that the speaker has reason to know special facts which the listener does not. Here, Pia reasonably understood Dimitrius to be implying that he knew facts sufficient to lead him to his opinion of the genuineness of the painting. Therefore, Dimitrius will be liable since he knew that he did not have such facts. See Rest. 2d, §539, Illustr. 3.

***Exam Tips** on*
MISREPRESENTATION

Whenever one party in your fact pattern ***makes a statement*** to another, and the statement turns out to be ***untrue,*** be on the lookout for a "misrepresentation" claim. A misrepresentation issue is usually not one of the

major torts contained in a complex multi-issue fact pattern; it's usually hidden away as one of the more minor issues.

- When you talk about "misrepresentation" as an independent tort, you're generally looking for misrepresentations that cause only ***intangible pecuniary loss.*** For misrepresentations that cause personal injury or property damage, usually the general tort of negligence (if the falsehood was unintentional) is the better tort to concentrate on.

- Remember, of course, that the tort of misrepresentation can be committed intentionally (the action called "fraud" or "deceit," as well as "intentional misrepresentation" — we'll use "fraud" here for shorthand) or, in some states, negligently. For each misstatement, first analyze and discuss whether fraud has been committed, and go on to discuss negligent misrepresentation only if you conclude that fraud hasn't (or may not have been) committed.

  - For the most part, the requirements for fraud and negligent misrep. are the same. We'll talk about most exam issues here under "fraud," and under negligent misrep., we'll just focus on the elements that are different.

- Here's what to look for on ***fraud:***

  - Memorize this list of requirements (it's easy to forget one):
    - □ A ***misrepresentation*** by D;
    - □ ***Scienter*** (culpable state of mind by D, essentially either ***knowledge*** of falsity or ***reckless indifference*** to the truth);
    - □ An intent to ***induce P's reliance*** (or at least a reason to expect that the class of which P is a member would be likely to rely);
    - □ ***Justifiable reliance*** by P; and
    - □ ***Damage*** (usually pecuniary) to P stemming from the reliance.

  - Don't forget to check that the representation was ***false.*** This won't always be obvious. *(Example:* Insurer says to Claimant, "You have no legal case against us." Claimant settles. It's not clear that this representation was false, so you should discuss the falsity issue.)

    - Remember that an affirmative act to ***conceal*** a fact from P is the same as asserting the non-existence of the fact. *(Example:*

Seller repaints a cracked engine block in his car. He then sells to Buyer. That's misrepresentation to Buyer concerning the status of the engine block.)

- ☞ Also, ***silence*** can occasionally (though not usually) be the equivalent of an assertion of fact. The most important situations where silence will be an assertion: (1) D has a ***fiduciary relationship*** to P *(Example:* Lawyer to Client); or (2) D knows that P is mistaken about some ***fact basic to the transaction*** *(Example:* Buyer says to Dealer, "I'm paying you $100,000 because I know that's a Picasso"; Dealer stays silent knowing that the picture is a fake or by a lesser artist. Dealer's silence equals misrepresentation because P's mistake is about a fact basic to the transaction.)

- ☞ The fact that D has ***more knowledge*** about the situation than P is not by itself enough to turn D's silence into misrepresentation, especially where D is the buyer. *(Example:* Buyer is a jeweler; Seller is an amateur owner; Seller thinks the going rate for used diamonds is $2 per carat when Buyer knows it's $3 per carat — Buyer's silence is not a misrepresentation.)

- ☞ Look out for statements of ***intention*** where D ***promises*** to do something; the fact that D doesn't keep the promise, doesn't alone make it a misrepresentation. But if D ***never intended*** to keep the promise, this is misrepresentation.

- ☞ Also, look out for statements of ***opinion.*** A statement of opinion isn't normally a "representation."

  - ☞ But in some situations, it is a misrepresentation for D to say that something is her opinion when it's not. In an "adverse party" situation (P and D are on opposite sides of a proposed transaction), the main example of misrepresentation of present opinion occurs where D has ***special knowledge*** that P doesn't. *(Example:* "As an art dealer, it's my opinion that this is a Picasso" — if Dealer doesn't really believe this, it's a misrepresentation because of Dealer's supposed special knowledge.)

- ☞ Statements of ***law*** are often held to be non-actionable statements of opinion. But if a statement includes an implied statement concerning the underlying facts, that implied statement can be a misrepresentation. *(Example:* "This house conforms to the zoning code's set-back requirements" — that's an actionable statement of fact, not opinion, about how the house is positioned on the lot.)

- ☞ Check that D had ***scienter.*** In essence, D must either ***know*** the statement was false, lie about ***how much knowledge*** as to the statement's truth, or ***recklessly disregard*** the fact that he doesn't know the truth.

- ☞ Check that D meant to ***induce P to rely.*** If the statement is made directly to P, usually this isn't a problem.

  - ☞ D is also liable to ***third persons*** if they are members of a ***class*** which D had ***"reason to expect"*** would rely, and the transaction is of the ***sort*** that D should foresee would or might occur in reliance. *(Example:* If D knowingly mislabels goods, D is liable to anyone, even a non-purchaser, who reads the label and relies.)

  - ☞ Common test issue: D makes a statement to X, who ***repeats*** it to P. Here, D is not liable, if he had no reason to expect the statement to be repeated to P or relied on by a class of which P is a part.

  - ☞ Often, exams test the ***"overheard"*** remark (addressed to X, but overheard by P) — normally, the speaker turns out not to be liable, because she had no reason to expect the overhearing. *(Example:* Art Expert falsely says to Friend at Dealer's store, "That's a Picasso." Customer overhears, and offers to buy from Dealer without disclosing that she overheard Expert's statement. Expert isn't liable, because he had no intent to induce Customer to rely, and Customer wasn't a member of a class Expert should have expected to rely.)

  - ☞ An ***endorser*** can have fraud liability to a member of the buying public. *(Example:* Olympic Champion says, "I made

money with my BurgerQueen franchise." Any member of the buying public who relies by buying a franchise can probably sue Champion if Champion knew his statement was false.)

- ☞ Check two aspect's of P's ***reliance:*** (1) that there was "actual" reliance; and (2) that the reliance was justifiable.
  - ☞ P must have ***actually*** relied. Often-tested: P ***spots the untruth*** but does the transaction anyway. Here, P couldn't have relied. *(Example:* D sells P a car, saying that it was never in an accident. In fact, the engine block was cracked in an accident, and had been painted over. P inspects closely and spots the broken engine block, but says nothing, and buys. P has not "actually relied" on the misrepresentation.)
  - ☞ P's reliance must be ***"justifiable."*** So if the falsity would be ***"obvious"*** to an ordinary person in P's position, P can't recover. But P has ***no duty to investigate,*** and P's ***contributory negligence*** is ***not*** a defense so long as the falsity is not obvious.
- ☞ If you conclude that P can recover for fraud, discuss the ***measure of damages.*** In the usual case where P has bought something based on the misrepresentation, courts differ about the measure: (1) some courts give P ***"expectation damages,"*** a/k/a the ***"benefit of the bargain"*** (the difference between what the item was really worth and what it would have been worth if it had been as represented); (2) other courts limit P to ***"reliance"*** damages (difference between the amount paid and the real value, without reference to what it would have been worth if it had been as represented). *(Example:* D says, "That's a Picasso worth $200,000, but you can buy it for $150,000." It's really a fake worth only $1,000. Some courts give P $199,000, in expectation damages, whereas others give $149,000, in reliance damages.)
  - ☞ Whichever measure of damages is to be used, don't forget to subtract the ***actual value*** of what P got. (P doesn't get to tender the item back to D in return for not having this subtraction.)

- ☞ Also, look for ***consequential damages.*** *(Example:* If a car said to be in working order breaks down while P is going to an important meeting, and P has to rent a replacement car, P can recover the cost of the rental as an additional item of damages on top of expectation or reliance.)

☛ If you conclude that P can't recover for fraud, consider a recovery for ***"negligent misrepresentation"*** (NM).

- ☞ Not all courts allow NM where there's only intangible economic harm, and not personal injury or property damage. Point this out in your answer.
- ☞ The differences between an action for fraud and one for NM: (1) D's mental state must be merely negligent, not "intentional" or "reckless"; (2) D must have made the statement ***during the course of his business*** and with a ***pecuniary interest*** in the transaction; and (3) P must be a person or member of a ***"limited group"*** that D ***intended to reach, or who D knows a recipient*** of the information intended to reach.
- ☞ A ***"re-publisher"*** can be liable for NM. *(Example:* X tells Newspaper, "There's no danger of salmonella from chicken as long as it is cooked for at least five minutes at 300 degrees." If Newspaper prints this as a quotation without checking its accuracy, Newspaper may be liable for NM, at least if we ignore the "who may sue" issue discussed below.)
- ☞ Most commonly-tested issue in NM: D must make the statement in the course of his ***business or profession,*** and have a ***pecuniary interest*** in the transaction.
  - ☞ The "pecuniary interest" requirement knocks out ***"curbstone opinions,"*** i.e., statements by professionals that take place outside the office and outside of a paid professional relationship. *(Example:* Attorney gives unpaid advice to a friend at a cocktail party.)
  - ☞ The "pecuniary interest" requirement also knocks out situations where D is speaking to a customer, but on a subject that is outside of the business relationship with the customer.

(Example: Storekeeper, owner of a hardware store, gives Customer advice about how to make a will. Since the advice has nothing to do with the sale of any product by Storekeeper, probably Storekeeper will be held to have had no pecuniary interest in the transaction.)

- ☞ A person making an NM is liable to a ***narrower group*** than the defrauder: he is not liable to those whom he has "reason to expect" will rely, but merely to a ***"limited group"*** that he either ***intended*** to reach, or that he knew the ***recipient*** intended to reach. *(Example:* D, a newspaper, negligently reports greater earnings by X Corp. than really occurred. Reader buys the stock, and loses money. Because the readership of a general newspaper is not a "limited class," probably Reader may not recover for NM.)
- ☞ ***Contributory negligence*** is a ***defense*** to NM. So if a reasonable person would investigate, P loses if he didn't. (Contrast this with the "no duty to investigate" rule for fraud.)

☛ For both fraud and NM actions, pay attention to the ***measure of damages:***

- ☞ P can only recover ***pecuniary*** damages, not damages for ***emotional distress*** (e.g., disappointment that the representation turned out not to be true).
- ☞ P can't usually recover the ***"benefit of her bargain,"*** i.e., the amount by which P would have profited had the representation been true.

☛ Very occasionally, ***strict liability*** for misrep. is tested. Most common situations: P and D are parties to a sales or service transaction. Since these situations must involve privity (P and D dealt face-to-face), strict liability here is based as much in contract as in tort.

- ☞ Also, a seller who ***mislabels*** a product has, in effect, strict liability for misrepresentation for any ***physical injury*** that results. Cite to Restatement §402B on this labelling issue.

CHAPTER 17
DEFAMATION

ChapterScope

A person's interest in his ***reputation*** is protected by the tort actions for ***"libel"*** and ***"slander,"*** collectively called ***"defamation."***

- **Libel vs. slander:** ***Libel*** is caused by a ***written*** statement, and ***slander*** is caused by an ***oral statement.*** Most of the rules governing the two tort actions are identical.
- **Defamation generally:** To establish a case for either libel or slander, P must prove:
  - □ **Defamatory statement:** A ***false*** and ***"defamatory"*** (i.e., reputation-damaging) statement concerning P;
  - □ **Publication:** A ***communicating*** of that statement to a person other than P (a "publication");
  - □ **Fault:** ***Fault*** on the part of D, amounting to at least negligence if D is a media defendant, and either knowledge of falsity or reckless disregard of the truth if P is a "public official" or "public figure";
  - □ **Special harm:** In the case of certain types of slander, ***"special harm,"*** i.e., harm of a pecuniary nature.
- **Constitution:** Some of the above rules are imposed by the U.S. Constitution. Most importantly, Supreme Court decisions interpreting the First Amendment are the source of the rule that where P is a public figure or public official, he must show that D acted with either knowledge of the statement's falsity or reckless disregard of whether it was true or false.

I. GENERAL PRINCIPLES

A. Prima facie case: To establish a prima facie case for either libel or slander, the plaintiff must prove the following elements:

1. **Defamatory statement:** ***A false*** and ***defamatory*** statement concerning him;
2. **Publication:** A ***communicating*** of that statement to a person other

than the plaintiff (a ***"publication");***

3. **Fault:** Fault, amounting at least to ***negligence,*** on the part of the defendant (except perhaps if the defendant is not part of the media), and in some instances, a greater degree of fault;

4. **Special harm:** Either ***"special harm"*** of a pecuniary nature, or actionability of the statement regardless of the existence of such special harm. See generally, Rest. 2d, §558.

II. DEFAMATORY COMMUNICATION

A. Injury to reputation: To be defamatory, a statement must have a ***tendency to harm the reputation*** of the plaintiff. Rest. 2d, §559.

1. **Special activity of plaintiff:** The particular business carried on by the plaintiff may be significant in determining whether a statement about him is defamatory. For instance, it would be defamatory to say that a kosher meat dealer sells bacon; see P&K, p. 776.

2. **Reputation not actually injured:** For the statement to be defamatory, it is not necessary that it have ***actually*** injured the plaintiff's reputation; it must simply be the case that, if it had been believed, it would have had this effect. Thus even if the defendant can show that everyone who heard the statement believed that it was false, this will not prevent the statement from being defamatory.

   a. **Special damage:** However, in most cases of slander, and in cases of libel where the defamatory meaning is not apparent from the face of the statement, the plaintiff will generally have to prove "special damage", i.e., that his reputation was ***in fact*** damaged, and that he suffered a pecuniary harm from this; see *infra*, p. 468. But this special damage requirement does not have anything to do with whether the statement itself is defamatory; it is simply an additional requirement in certain kinds of cases.

B. Effect limited to one segment of public: Certain allegations will, if believed, diminish a person's reputation only in the eyes of ***certain segments*** of the community. It is usually held that a statement is defamatory as long as a significant and "respectable" minority of persons would draw an adverse opinion of the plaintiff from it, even if most people would not. Rest. 2d, §559, Comment e.

Example: D, a magazine, prints a piece in which P, a lawyer, is referred to as having been a "legislative representative for the Massachusetts Communist Party."

Held (in an opinion by Judge Learned Hand), the allegation is defamatory, regardless of whether "right-thinking" people would hold it against P if he were a Communist Party member or sympathizer. "It is enough if there be some, as there certainly are, who would feel so, even though they would be 'wrong-thinking' people if they did." *Grant v. Reader's Digest Ass'n,* 151 F.2d 733 (2d Cir. 1945).

1. **Element of disgrace:** But there must nonetheless be an element of ***"disgrace"*** connected with the allegation. If a Democrat were called a Republican, "it is quite probable that unpleasant feelings would be aroused against him in the minds of some other Democrats; but [this statement] can scarcely be regarded as defamatory." P,W&S, p. 840, n. 4.

2. **"Respectable" group:** Also, the minority who might draw an adverse opinion must be ***"respectable."*** For instance, if the plaintiff is accused of having ***informed*** to the authorities as to the activities of his former partners in crime, this would probably be held not to be defamatory, on the grounds that only criminals would draw an adverse inference.

C. Meaning to be attached to statement: Many statements can be interpreted in more than one way. Where this is the case, the statement is defamatory if ***any one*** of the interpretations is one which a reasonable person might make, and the plaintiff shows that at least one of the recipients did ***in fact*** make that interpretation.

1. **Judge-jury allocation:** It is up to the court to determine whether the statement has ***at least one possible, reasonable, meaning that is defamatory.*** If the court decides that it ***does,*** it is then up to the jury to decide whether ***at least one recipient took this interpretation.*** Rest. 2d, §614.

   a. Recipient's belief in statement's truth not required: However, as noted, it is not required that the recipient have ***believed*** the statement to be true, either in its defamatory sense or otherwise. For example, suppose that in a libel case against a magazine publisher, P, produces a witness who said "I read the article, and I thought the author was accusing P of dishonesty, but I didn't believe a word she said against him"; the jury can find that the statement was libelous.

D. Reference to plaintiff: The plaintiff must show that the statement was reasonably interpreted by at least one recipient as ***referring to the plaintiff.*** At common law, there had to be a formal allegation in the complaint that the statement was so interpreted; this allegation was called the ***"colloquium".***

1. **Defendant's intent irrelevant:** But the plaintiff does not necessarily have to show that the defendant ***intended*** to refer to him, rather than to someone else. Until recent constitutional decisions, in fact, there was essentially strict liability, and it was completely irrelevant whether the plaintiff was the person to whom the defendant intended to refer; see *infra*, p. 473.

2. **Groups:** The defendant's statement may concern a ***group,*** rather than an individual. If the plaintiff is a member of this group, the statement will generally be defamatory as to him only if the group is a ***relatively small one.*** Rest. 2d, §564A. It is unlikely that the plaintiff could recover if the group were larger than, say, about 25 persons. Thus a statement such as "All lawyers are shysters" would not be defamatory as to any particular lawyer (in the absence of other evidence indicating that the statement was intended to refer to the plaintiff in particular).

   a. **Reference to part of class:** If the statement by its terms applies to only a ***part*** of a class, the plaintiff's chances of recovering are even smaller. In addition to showing that the group is sufficiently small, the plaintiff probably has to show that a substantial portion of the group has been included. For instance, a statement that one person out of a group of 25 has stolen an automobile would not defame any particular member of that group; see Rest. 2d, §564A, Comment c.

3. **Reference need not be by name:** If a non-explicit reference to the plaintiff is reasonably understood as in fact referring to him, it is not important that the plaintiff is referred to by a ***different name*** or characterization. Nor will recovery be denied merely because the publication is labelled as a ***"novel"*** or ***"fiction."*** (again, assuming that a reader will reasonably understand the reference to be to the plaintiff).

a. Some changing of the facts: In fact, as long as some reasonable readers or viewers would think that is the plaintiff who is being referred to, the fact that the publisher has ***changed some of the facts to deviate*** from the plaintiff's actual life won't furnish a defense. So, for instance, if D portrays a supposedly fictitious character who has a strong resemblance to P, but D attributes to the character some disreputable traits, the fact that P doesn't really have those traits not only won't furnish a defense, but may itself constitute a libel.

Example: D, a movie studio, releases a movie based on a nonfiction book by Coyle about Coyle's experiences as a Little League coach in Chicago. The movie's credits say that the movie is inspired by actual events, but is itself fictitious and does not portray any actual persons or events. One character in the movie, called "Conor O'Neill," has many traits closely patterned upon the traits of P, a real-life Little Leage Coach in Chicago. The matching traits include that O'Neill dropped out of college after his father's death, had used illegal drugs, had driven a blue station wagon, had a bar fight that resulted in a scar on his left hand, and had spoken at the funeral of one of his players who'd been killed in a gang shooting. But other aspects of the O'Neill character deviate from P's real life, such as that O'Neill has been unable to break his drinking habit, is a gambler, has sometimes committed thefts, and has falsely represented himself as a broker; these aspects serve as the basis for P's defamation suit. (P argues that these aspects constitute defamation per se, for which no actual damage needs to be proved; see *infra*, p. 469). D seeks summary judgment on the grounds that the many differences between the O'Neill character and P's life (as well as the credits' description of the movie as fiction) demonstrate that a reasonable viewer could believe that the O'Neill character was not based upon P, in which case the portrayal of O'Neill is subject to a reasonable non-defamatory construction and is therefore not libellous.

Held, for P: summary judgment denied. It's true that, as D argues, under Illinois defamation law if a statement is capable of two reasonable constructions, one innocent and one defamatory, the innocent one will prevail. But in this case, P "may be able to show [at trial] that no one could think that anyone but him was meant, and [that] the changes to 'his' character, far from supporting an innocent construction that O'Neill is a fictional or different person, only serve to defame [P.]" If so, P will be entitled to recover for defamation per se (for which no actual damage needs to be proven), since the O'Neill character commits crimes and is portrayed as lacking integrity in his trade or business, putting the case within two of the defamation-per-se categories. *Muzikow-ski v. Paramount Pictures Corp.*, 322 F.3d 918 (7th Cir. 2003).

E. Truth: A statement is not defamatory if it is ***true.*** At common law, it was generally held that the ***defendant*** had the burden of proving truth.

1. Effect of constitutional decisions: However, Supreme Court decisions limit a state's ability to put the burden of proving truth on

the defendant:

a. **Matter of public interest:** If the statement involves a matter of ***"public interest,"*** the First Amendment requires that the ***plaintiff bear the burden*** of proving that the statement was false, at least where the defendant is a ***media*** organization. *Philadelphia Newspapers v. Hepps*, 475 U.S. 767 (1986). This is true even though the plaintiff is a ***private figure.*** (If the plaintiff is a ***public*** figure, she too must clearly bear the burden of proving falsity, since the statement will probably by virtue of the plaintiff's public figure status alone be of "public interest.")

b. **Private figure, no public interest:** If the statement is ***not*** of public interest, and the plaintiff is a private figure, it is not clear whether the state may require the defendant to bear the burden of proving truth. Thus on facts such as those in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.* (discussed more fully *infra*, p. 470), a state may be allowed to make the defendant credit reporting company bear the burden of showing that its credit report of P's bankruptcy was true.

c. **Non-media defendant:** Also, it is possible that a ***non-media*** defendant may be required to bear the burden of proving the truth of his statement, even if the statement relates to a matter of public interest. The Court in *Hepps* explicitly declined to decide this question.

d. **Where defendant's statement not specific:** There may be times when the defendant's allegedly defamatory statement is so ***vague*** that it would be unfair to require the plaintiff to come forward with evidence proving its falsity. For instance, if the defendant has stated that the plaintiff is a storekeeper who short changes his customers whenever he gets the chance, how can the plaintiff prove the falsity of this statement unless the defendant first comes forward with specific instances when this is supposed to have occurred? See Rest. 2d, §613, Comment j.

2. **Substantial truth:** For truth to constitute a barrier to recovery, it is not necessary that the statement be ***literally*** true in all respects. Instead, it must merely be ***"substantially"*** true. See Rest. 2d, §581A,

Comment f.

> **Example:** Suppose that D writes that P "was convicted of larceny in connection with the theft of $10,000 from his previous employer." Assume that in reality, D was convicted of embezzlement in connection with the theft of $11,000 from that employer. Almost certainly, a court would find that P may not recover against D, because what D wrote was "substantially" true even though it was not true in all respects.

a. Proof of different offense: On the other hand, if the defendant has made one charge of wrongdoing against the plaintiff, he may not establish truth by proving a ***materially different*** charge. If the defendant has stated that the plaintiff stole a watch from A, "It is not enough to show a different offense, even though it be a more serious one, such as stealing a clock from A, or six watches from B." P&K, p. 841. See, e.g., *Kilian v. Doubleday & Co.*, 79 A.2d 657 (Pa. 1951) (where D accused P of having knowingly encouraged the mistreatment of American soldiers, the fact that D was convicted of mere neglectful "permitting" of such mistreatment was not enough to establish the defense of "substantial truth").

F. Opinion: Can a person's expression of ***"opinion"*** constitute defamation? The brief answer today is that a statement of ***"pure opinion"*** cannot be defamatory, but a statement of opinion that implies an assertion of an ***underlying fact*** can trigger defamation liability for that assertion of fact. Let's look at these principles in more detail:

1. Pure opinion: A ***"pure"*** expression of opinion cannot be defamatory. That is, where the statement of opinion does not also make an express or implied statement about some ***fact*** that supports the opinion, there can be no liability. The reason is that a defamation action can only exist for a "false" statement, and a pure expression of opinion is neither "true" nor "false." As the Supreme Court has expressed the idea, the statement must be ***"provable*** as false."*Milkovich v. Lorain Journal Co.*, discussed *infra.*

> **Example:** If D were to write in the local newspaper, "In my opinion, Mayor Jones shows his abysmal ignorance by accepting the teachings of Marx and Lenin," this could not be a defamatory statement (at least assuming that Mayor Jones really does accept the teachings of Marx and Lenin, and the only dispute is over whether the Mayor is "abysmally ignorant" in doing so). (This hypothetical, and this analysis of it,

are from the Supreme Court's decision in *Milkovich, infra.)* The reason is that the teachings of Marx and Lenin are neither "probably true" nor "provably false," and therefore the assertion that acceptance of these teachings is "abysmally ignorant" is also neither provably true nor provably false.

2. **Implied assertions of fact:** But where a statement of opinion implies the assertion of ***underlying facts,*** and those underlying facts are provably false, then the statement of opinion ***can*** give rise to liability for defamation. The Supreme Court so decided in *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990).

   a. **Holding:** The Court in *Milkovich* conceded that to be defamatory, a statement must be "provable as false." But, the Court said, this does not mean that there should be a "wholesale defamation exemption for anything that might be labeled 'opinion.'" If a statement ***implies an assertion of objective fact,*** then there can be defamation liability for that implied assertion of fact if it is false.

      i. **Illustration:** The Court gave the following illustration: the statement, "In my opinion Mayor Jones is a liar" contains within it a statement of fact that could be proved false (i.e., that Jones is in fact a liar). Therefore, that statement, though couched in the form of an opinion, can be defamatory.

3. **Hyperbole:** How, then, is the Court to determine whether the defendant's statement is a "pure" expression of opinion, or, rather, implies assertions of provable fact? Clearly one factor is whether the statement appears to be dry and literal or, on the other hand, filled with ***hyperbole,*** figurative speech or other ***non-literal language.*** The more it tends toward the latter, the less likely that the court will find it to contain assertions of provably false fact.

   Example: In a review of a play, the reviewer's use of the words "rip-off," "fraud" and "a snake-oil job" are not actionable, because a reasonable reader would inevitably view them as pure expressions of opinion. *Phantom Touring, Inc. v. Affiliated Publications,* 953 F.2d 724 (1st Cir. 1992).

4. **Context:** Similarly, the ***context*** of the statement will be considered in determining whether it implies an assertion of provably false fact. Thus if the statement is part of a column called "My View" or "Opinions," it is less likely to be found to contain factual assertions (though it may still be found to do so) than if it is contained, say, in a

front page pure news story. Similarly, a letter printed on a "Letters to the Editor" page is more likely to be found to be pure opinion than, say, a story by the newspaper's own staff.

5. **Reviews:** One especially controversial area is whether ***reviews*** of products, restaurants, movies, etc. are entitled to greater constitutional protection from defamation actions than are other types of stories. The Supreme Court has never spoken on this issue.

   a. **Subjective:** Most reviews are understood to contain large subjective elements that should probably be read as pure opinion. Thus a statement like, "Service was slow," or "This is the worst action drama of the year," would almost certainly not be found to contain a provably false assertion of fact, and would thus be free of liability for defamation.

      i. **Assertion of fact:** But even a review may be found to contain an express or implied assertion of fact, in which case there can be defamation liability. See, e.g., *Mr. Chow of New York v. Ste. Jour Azur S.A.*, 759 F.2d 219 (2d Cir. 1985), holding that a restaurant reviewer's statement that the Peking Duck dish "was made up of only one dish (instead of the three traditional ones)," was sufficiently "laden with factual content" as to be potentially defamatory.

      ii. **Context matters:** However, keep in mind that a statement which, if it were to appear in a news column, might be found to contain an "assertion of provably false fact," is more likely to be found to be pure opinion when contained in a review — this is so because the reader understands that a review is essentially the reviewer's opinions. Thus in *Mr. Chow*, *supra*, somewhat factual-sounding statements (e.g., "The sweet and sour pork contained more dough . . . than meat" and "The green peppers . . . remained still frozen on the plate") were found not to contain assertions of fact, and thus not to be even potentially defamatory.

   b. **Public figure:** Also, in the case of reviews, keep in mind that the corporate or individual plaintiff is likely to be found to be a ***"public figure."*** If so, under *New York Times v. Sullivan* there can only be

liability for defamation if the plaintiff proves "actual malice." Thus in *Mr. Chow, supra,* even the "factually laden" statement about a Peking Duck dish was found not to have been made with "actual malice," and thus not to be defamatory.

G. Who may be defamed: Any living person may be defamed.

1. **Deceased persons:** There can be no defamation of a ***dead person,*** and therefore neither his estate nor his survivors may sue.

2. **Corporation:** ***A corporation*** may be defamed, but only if the statement "tends to prejudice it in the course of its business or to deter others from dealing with it." Rest. 2d, §561. Thus a statement that one of the officers of a corporation was an adulterer would not be held to be defamatory of the corporation, unless this were shown to hurt its business directly. This same rule applies to ***partnerships*** and ***associations.*** Rest. 2d, §562.

III. LIBEL VS. SLANDER

A. Significance of distinction: The common law developed the distinct torts of libel and slander. While the problem of determining which category a particular statement fits into is a complicated one, discussed below, the significance of the distinction is fairly clear: To establish slander, the plaintiff must show that he suffered an actual "special harm" of a pecuniary nature (unless the statement falls into one of four special categories, discussed below). To prove libel, on the other hand, the plaintiff does not have to show such special harm (although some courts require him to do so if the defamatory nature of the statement is not evident on its face). Thus for a plaintiff who cannot point to any specific financial harm, and whose only complaint is that his friends have turned against him, the distinction between libel and slander remains of major importance.

B. Libel: Libel consists, first of all, of all ***written or printed matter.***

1. **Embodied in physical form:** Additionally, many modern courts, and the Second Restatement, §568, hold that it includes any communication embodied in ***"physical form".*** Thus a phonograph record or a computer tape would be libelous rather than slanderous. The Restatement in fact extends its definition of libel to include "any

other form of communication that has the potentially harmful qualities characteristic of written or printed words." *Ibid.*

a. Illustrations: For instance, the Restatement takes the position that if the defendant hires men to "shadow" the plaintiff, and they do so until the shadowing becomes well-known throughout the community, this is libel. Rest. 2d, §568, Illustr. 1. Similarly, if the defendant places a wax figure of the plaintiff among a collection featuring various murderers, this is libel. *Ibid*, Illustr. 3.

2. Dictation to stenographer: A spoken statement that is intended to be written down, and is so, is libellous. Thus if a person dictates to a ***stenographer,*** and the stenographer writes the statement down in shorthand, this is libel even if no one ever sees the writing. (This also probably constitutes a "publication" of the libel; see *infra,* p. 471. However, the dictation may be qualifiedly privileged; see *infra,* p. 477.)

3. Radio and television: If a program is broadcast on ***radio or television,*** all courts agree that it is a libel if the program originated with a ***written script.***

a. No script: But if the program is "ad-libbed", courts are in dispute. Thus in *Shor v. Billingsley,* 158 N.Y.S.2d 476 (Sup. Ct. N.Y. Co. 1956), this was held to be libel, on the grounds that "the broadcast of scandalous utterances is in general as potentially harmful to the defamed person's reputation as a publication by writing."

b. Restatement view: The Restatement, in §568A, provides that all such broadcasting is libel, whether or not it is read from a manuscript. But statutes in most states now provide exactly the contrary, that all broadcasts are slander. See P,W&S, p. 857, n. 2.

C. Slander: All other statements are ***slander.*** An ordinary oral statement is the most common form of slander.

D.Special harm: As noted, plaintiff may generally establish slander only if he can show that he has sustained some ***"special harm."*** This harm is usually required to be of a ***"pecuniary nature."*** Thus where the plaintiff proved merely that the defendant's statements about him upset him so much that he became ill, this was held insufficient to constitute "special

harm," since there was no evidence that other people's opinion of plaintiff was lowered. (Mere apprehension by plaintiff that this would occur was insufficient.) *Terwilliger v. Wands*, 17 N.Y. 54 (N.Y. 1858). Similarly, it is not enough that the plaintiff shows that his friends have rejected him, since friendship is not ordinarily something having economic or pecuniary value. See Rest. 2d, §575, Illustr. 4.

1. **Tacking on of damages:** But if the plaintiff can show the requisite pecuniary loss, he may then "tack on" his damages for emotional distress, loss of friendship, etc. This rule is similar to that which does not allow recovery for pure emotional distress in negligence actions, but permits recovery for such distress once physical injury is proved; see *supra*, p. 216.

2. **Harm caused by repetition:** In proving his special harm, the plaintiff may, in addition to showing the harm caused directly by the defendant's own statement, point to harm caused by certain ***repetitions*** of the statement by third persons. However, this will generally only be true if the defendant authorized the repetition, or it was either reasonably to be expected or "privileged". See Rest. 2d, §576. Thus if the defendant makes a defamatory statement to one person, and makes her agree that the material will not be repeated to anyone else, harm caused when this person breaches his agreement and goes around spreading the tale probably would not count as special harm (or be recoverable as damages).

3. **Cases where no special harm necessary ("slander per se"):** There are ***four kinds of utterances*** which, even though they are slander rather than libel, ***require no showing of special harm.*** These categories derive from a variety of historical factors, but their common element is that they are by their very nature especially likely to cause pecuniary harm. Such slander is generally called ***"slander per se."*** See P&K, p. 788-93. The categories are as follows:

   a. **Crime:** Statements imputing ***criminal behavior*** to the plaintiff. However, an accusation of a minor crime (e.g., a parking ticket) is not generally enough. The Restatement requires that the conduct imputed to the plaintiff either be "punishable by imprisonment" or "regarded by public opinion as involving ***moral turpitude."*** Rest.

2d, §571.

b. Loathsome disease: An allegation that the plaintiff currently suffers from a ***venereal*** or other loathsome and communicable disease. The theory behind this exception is that others will be afraid of catching the disease from the plaintiff; therefore, an allegation that the plaintiff once had the disease, and is cured, will not be sufficient. Rest. 2d, §572.

c. Business, profession, trade or office: An allegation that adversely reflects on the plaintiff's ***fitness*** to conduct her ***business,*** trade, profession or office.

Example: P is a storekeeper. D tells a friend F, "P cheats his customers." Since this statement reflects on P's fitness to conduct her business, P can recover without showing any pecuniary loss from the statement. So as long as P can show emotional distress (e.g., from when F repeats the remark to P), P can recover even though there's no evidence that F believed the statement, or that anyone stopped patronizing P's store.

i. Must be relevant to office: But the allegation must relate directly to the plaintiff's fitness to conduct these activities. Thus an allegation that a stenographer does not pay her bills, is not sufficient, since her creditworthiness has nothing to do with whether she is a good stenographer. See Rest. 2d, §573, Illustr. 7.

ii. Disparagement of goods not included: Also, if the plaintiff is a manufacturer or seller of goods, it is not sufficient that the quality of the goods themselves (as distinguished from the plaintiff's own personal reputation) is criticized. Rest. 2d, §574, Comment g.

d. Sexual misconduct: Statements imputing serious ***sexual misconduct*** to the plaintiff. In general, this has been applied only to women, and has included not only adultery but also fornication. The Fourteenth Amendment may, however, be interpreted so as to require that a state give equal tort protection to men. It also may be that allegations of ***homosexual activity*** will be included within this category; see P,W&S, p. 860, n. 4.

4. Libel: In the case of ***libel,*** by contrast, the traditional common-law

rule was that if the defamatory nature of the communication was apparent from the statement itself, ***actual harm did not need to be proved — "presumed"*** damages could be awarded. Thus the plaintiff could recover a sizeable sum in approximation of the damage that would "normally" flow from a defamatory statement like the one at issue, even though he produced no evidence of pecuniary harm, and in fact no evidence of *any* actual harm (e.g., humiliation or loss of friendship). However, Supreme Court decisions have substantially cut back on the right of courts to award such presumed damages.

a. Matters of public concern: If recovery is allowed without proof of "actual malice" (i.e., proof that the defendant knew the falsity of his statements or recklessly disregarded the truth), presumed damages ***may not constitutionally be awarded,*** according to *Gertz v. Robert Welch, Inc.*, discussed *infra*, p. 474. (Recovery without a showing of "actual malice" may not in any event be allowed to a plaintiff who is a "public figure," under *New York Times v. Sullivan, infra*, p. 473.)

b. Matter of purely private concern: A Supreme Court plurality opinion, *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985), *supra*, p. 465, further complicates the presumed damages issue. Under *Dun & Bradstreet*, if the defamatory statement does not involve a matter of ***"public concern,"*** presumed damages ***may*** be allowed, even without a showing of "actual malice." Apparently this result will rarely if ever benefit a traditional "media" defendant (i.e., a newspaper or broadcaster), since matters covered by the media will almost always be found *ipso facto* to involve the "public interest."

Example: The facts of *Dun & Bradstreet* indicate the type of situation in which an award of presumed damages may occur even without a showing of "actual malice." In that case, D was a credit reporting agency, which sent to several subscribers a written report falsely stating that P, a corporation, was insolvent. Since the statement was not of "public interest," it was not unconstitutional for P to be awarded $50,000 in presumed damages (plus $300,000 in punitive damages), even though P did not show that D either knew of the falsity of its statements or recklessly disregarded the truth (and although P did not show that its reputation was in fact harmed or its economic interests adversely affected).

c. Actual malice: When the plaintiff does show "actual malice" (i.e.,

either the defendant's knowledge of falsity or his reckless disregard for the truth), presumed damages may apparently constitutionally be awarded, even if the plaintiff is a public figure, and even if the matter is one of public interest. (But Rest. 2d, §621, in a Caveat, declines to take a position on whether presumed damages may be awarded in this situation.)

d. Libel per quod: There are some statements which are not defamatory on their face, but which become defamatory if the recipient is aware of certain ***extrinsic facts.*** In cases involving such "libel ***per quod,"*** the common law has required proof of "special harm" (i.e., pecuniary loss). However, this requirement seems to have fallen into disfavor, and Rest. 2d, §569, Comment b abandons it. Under the Restatement approach, even in cases of libel per quod, the plaintiff may recover for actual harm of a non-pecuniary nature (e.g., distress, loss of friendship, etc.)

IV. PUBLICATION

A. Requirement of publication generally: The plaintiff must show that the defamation was ***"published".*** "Publication" is a term of art, not meaning "disseminated by writing", but rather, ***"seen or heard by someone other than the plaintiff".***

1. Must be intentional or negligent: The defendant's publication must have been either ***intentional or negligent.*** That is, there is ***not*** (and never has been) any ***"strict liability"*** as to the publication requirement. For instance, if the defendant makes a defamatory statement to the plaintiff himself, and purely by some hard-to-foresee accident someone else overhears it, no publication as to that third person has occurred.

> **Example:** While D and P are dining together alone in a restaurant, D calls P a thief for stealing a sum that D invested with P. A waiter overhears and understands the remark. Unless D knew or should have known that the waiter (or at least someone other than P) would likely hear the remark, D can't be liable to P for defamation even if the statement was false.

2. Must be understood: The plaintiff must show that the third person not only heard or saw, but also ***understood,*** the communication, and perceived its defamatory aspects.

Example: One of D's clerks says, in English, to P, a Greek, that P has stolen a handkerchief. Another clerk states the same accusation in Greek.

Held, the first clerk's statement was not a publication, because it was addressed to (and heard by) only P. The second was not a publication because there was no evidence that any of those who heard it, other than P, understood Greek. *Economopoulos v. A.G. Pollard Co.*, 105 N.E. 896 (Mass. 1914).

3. **Dictation to stenographer:** If the defendant dictates defamatory matter to a ***stenographer*** who takes down shorthand notes of it, this is generally held to be publication, and of a libel rather than slander (even if the words are never transcribed). This is the view of Rest. 2d, §577, Comment h. See *supra*, p. 468.

4. **Defamation by will:** If a decedent has inserted defamatory matter into his ***will,*** some courts have held that the reading of the will by the executor constitutes a publication by him, and have therefore held the estate liable. See P&K, p. 801.

B. Publication by plaintiff: As noted, the making of a communication ***to the plaintiff*** is not publication. If the plaintiff then passes the statement on to someone else, this will also generally not constitute publication. But there are a few situations in which it will.

1. **Blindness:** For instance, if the plaintiff is blind, and receives a defamatory letter, there will be publication if he gives this to a friend or relative to be read to him.

2. **Job application:** Similarly, if the plaintiff is fired by the defendant, who in the course of doing so defames him, the plaintiff's repetition of this material to a new prospective employer will be a publication, at least where the employer asks "Why did you leave your last job?"

C. Repeater's liability: One who ***repeats*** a defamatory statement made by another is held to have published it, and is liable as if she were the first person to make the statement. And this is true even if she indicates that she herself ***does not believe*** the statement. See Rest. 2d, §578, Comment e.

Example: Citizen is arrested by the police. Sometime later, he calls a press conference, and says to the reporters assembled there, "When I was arrested, Officer Jones beat me." D, a newspaper, publishes an article stating, "Citizen said he was beaten by Officer Jones." If Citizen's statement was not true, then D has committed libel in repeating it. This is true even if the reporting by D states, "This newspaper has

been unable to determine the truth of Citizen's charges," or even, "This newspaper's investigation has turned up evidence that Citizen's charges may well have been false." (A court might recognize a privilege for "neutral reportage" in this situation; see *infra*, p. 479.)

1. **Newsdealers, libraries, etc.:** However, one who merely ***distributes*** or sells defamatory matter will not be liable if he can show he had no reason to believe the materials were defamatory; see *infra*, p. 475.

2. **Reading of written defamation:** A person who reads out loud a previously written defamation has published a ***libel,*** rather than a slander. P&K, p. 786.

D. Single or multiple publication: If many copies of a book are sold, is each one a separate defamation, or are they all to be treated as one defamation? The question is important for purposes of such issues as venue and statute of limitations.

1. **Single publication rule:** Most American courts now hold that an entire edition of a book or periodical is to be treated as one publication. This is called the ***"single publication rule."*** See, e.g., Rest. 2d, §577A, which says that "[a]ny one edition of a book or newspaper, or any one radio or television broadcast, exhibition of a motion picture or similar aggregation communication is a single publication," for which only one suit may be brought.

   a. **Internet postings:** In cases involving statements ***posted on the Internet,*** most courts have applied the single-publication rule. That is, the posting of a web page containing an unchanging defamatory statement is deemed to be a ***single publication,*** no matter how long the web page stays up or how many people independently view it over time.

Example: P is an employee of D (New York State). The state inspector general releases a report that is highly critical of P's job performance, and the state Education Department puts the report (which P alleges to be defamatory) on the Department's website. The statute of limitations for bringing a defamation action is one year. More than one year after the Department first posted the report, P sues the state. P claims that each "hit" by a person viewing the report about him is a new publication, giving him another year to sue. P also claims that the Department's one-time modification of its website by adding another report not related to P constituted a new publication.

Held, for D: P's claim is time-barred. Under the single-publication rule which New York applies, all viewings of a website that contains an unchanging statement

constitute a single publication, just as all sales of a particular print edition constitute a single publication. And the fact that D added some new report having nothing to do with P to its site did not cause a republication of the original statement about P, "for it is not reasonably inferable that the addition was made either with the intent or the result of communicating the earlier and separate defamatory information to a new audience." *Firth v. State of New York*, 775 N.E.2d 463 (N.Y. 2002).

V. INTENT

A. Common law strict liability: Libel and slander were, at common law, essentially ***strict liability*** torts. While the plaintiff had to show that the ***publication*** occurred due to the defendant's intent or negligence, neither intent nor negligence was required as to any of the other aspects of the tort.

1. Falsity: Thus it was irrelevant that the defendant had every reason to believe that the statement was ***true.*** Similarly, it was irrelevant that the statement was intended to refer to A, and through no negligence on the defendant's part, was interpreted to refer to B. As the idea was expressed by one court, "The question is not so much who was aimed at as who was hit." *Corrigan v. Bobbs-Merrill Co.*, 126 N.E. 260 (N.Y. 1920).

B. Constitutional decisions: However, over the last few decades, the U.S. Supreme Court has virtually eliminated the freedom of state and federal courts to impose strict liability for defamation. The Court's decisions have held that the plaintiff's right to recover for defamation gives way, to a certain extent, to the defendant's First Amendment free speech and free press rights.

1. *New York Times v. Sullivan:* The Court's first major decision in this area was ***New York Times Co. v. Sullivan,*** 376 U.S. 254 (1964), *supra*, pp. 470, 497. In that case, the plaintiff was a public official part of whose duties was the supervision of the Montgomery, Alabama police department. He alleged that the Times had libelled him by printing an advertisement that stated that the Montgomery police had attempted to terrorize Martin Luther King and his followers.

a. Holding: The Court held, *inter alia*, that the plaintiff was a ***"public official".*** As such, the First Amendment required that he recover only if he showed that the Times printed the advertisement either

with ***knowledge that it was false*** or in ***"reckless disregard"*** of whether it was true or not. The Times had not been shown to have either of these states of mind, the court said.

i. **"Actual malice":** The Court unfortunately tried to encapsulate these two states of mind, knowledge of falsity and recklessness as to the truth, in the phrase ***"actual malice".*** But it is clear from this case and its successors that the plaintiff is not required to show malice in the sense of "ill-will" on the part of the defendant.

b. Reference to plaintiff: The Court in *New York Times* also noted that the advertisement in question never mentioned the plaintiff by name or by position, and that his case was based solely on the theory that the advertisement contained an "implicit" criticism of him as the person who was in control of the police. The Court implied that it might be constitutionally impermissible to allow recovery for such oblique references, even apart from the question of the defendant's state of mind.

2. **Meaning of "reckless disregard":** The Court interpreted the phrase "reckless disregard of the truth" in *St. Amant v. Thompson*, 390 U.S. 727 (1968). The Court stated that in order to make such a showing (which, under *New York Times,* any plaintiff who is a public official would have to do), it is not enough to show that a "reasonably prudent man" would not have published, or would not have published without further investigation. Rather, there must be evidence to permit the conclusion that "The defendant ***in fact entertained serious doubts*** as to the truth of his publication."

3. **Public figures:** The *New York Times* "actual knowledge or reckless disregard of the truth" test was extended to include ***"public figures"*** in *Curtis Pub. Co. v. Butts*, 388 U.S. 130 (1967). In this and a related case, both the University of Georgia football coach and a prominent retired Army General were held to be public figures.

4. **Private figures:** But if the plaintiff is neither a public official nor a public figure, there is ***no constitutional requirement*** that he prove knowledge of truth or reckless disregard of the truth. See ***Gertz v. Robert Welch, Inc.,*** 418 U.S. 323 (1974).

a. Facts: In *Gertz*, the plaintiff was a locally well-known lawyer who represented the family of a youth who was killed by a police officer. Plaintiff was falsely attacked as a criminal and Communist by defendant, publisher of a John Birch Society magazine.

b. Main holdings: The Court, after concluding that plaintiff was a private figure, made two holdings concerning the defendant's state of mind required in actions brought by private figures: (1) The First Amendment requires that ***strict liability*** not be sufficient; in other words, the plaintiff must prove either that the defendant knew his statement was false, or that he was at least negligent in not ascertaining its falsity. (2) The states are ***free to decide*** whether they wish to establish ***negligence, recklessness,*** or ***intent*** as the standard.

c. Who is a private figure: *Gertz* also indicates that a person does ***not*** become a "public figure" merely because he has ***become involved in a controversy of public interest.*** The plaintiff in *Gertz* was a lawyer who brought a civil suit against a police officer accused of homicide; the Court held that he did not become a public figure merely because newspapers took a great interest in the lawsuit and surrounding events.

d. Rejection of "public interest" rule: Prior Supreme Court decisions had given the media the same freedom to comment upon any matter of "general public interest" as *New York Times* gave for comment about public officials. But *Gertz* ***repudiated*** these decisions.

i. Rationale: The *Gertz* Court distinguished between public officials and public figures on the one hand, and private individuals on the other. The Court reasoned that public officials "usually enjoy ***significantly greater access*** to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy." Therefore, private figures should not be subject to the same constitutional limitations on defamation recovery, whether they are involved in a matter of general public interest or not.

ii. **States can require at least reckless disregard:** But the states are still free to impose, as a matter of *state* (non-constitutional) law, the requirement that such private individuals prove at least reckless disregard by the defendant.

e. Presumed and punitive damages not allowed: The court in *Gertz* also held that at least where the state elects to allow private figures to recover based on less than a showing of reckless disregard for truth, ***presumed and punitive damages may not be awarded.*** (However, where no matter of "public concern" is involved, this aspect of *Gertz* is apparently no longer valid, in light of the later case of *Dun & Bradstreet v. Greenmoss*, discussed *infra*, p. 483.) Presumed and punitive damages are discussed further *infra*, p. 483.

5. Application to non-media: Both *New York Times* and *Gertz* involved ***media*** defendants, and the Court relied heavily on freedom of the press considerations. It is not clear whether the same constitutional rules apply where the defendant is a private person or other ***nonmedia defendant.*** Thus it is possible that such non-media defendants might as a constitutional matter: (i) be held liable without a showing of reckless disregard or knowledge of falsity when they defame a public official or public figure, and (ii) even be held ***strictly liable*** where they defame a ***private figure.*** The Supreme Court has simply never spoken on either of these constitutional questions.

a. State common-law rules However, virtually all states — as a matter of ***common law,*** not federal constitutional law — refuse to allow private-figure plaintiffs to recover against even non-media defendants unless the plaintiff ***shows at least negligence.*** In other words, as a common-law matter, all defamation suits require ***at least a showing that the defendant negligently failed to make reasonable efforts to ascertain the statement's truth or falsity.*** Rest. 2d, §580B(c).

Example: D fires P. P seeks a new job from X. X asks D for a reference. D writes back, "We fired P because P sexually harassed a co-worker." If D's belief that P harassed a co-worker was reasonable, under state common-law principles P cannot recover from D for libel, even if P can prove that the accusation was completely false.

6. Private aspects of public figures: Even if the plaintiff is a public official or public figure, it is quite likely that some aspects of her life

are so peculiarly ***private*** that the defendant's statement as to these aspects will not be protected by the *New York Times* "reckless disregard" requirement. See Rest. 2d, §580B. This would probably be true, for instance, of a politician's sex life, as long as it did not amount to "misconduct" reflecting on his fitness for office.

VI. PRIVILEGES

A. Privileges generally: Even if the plaintiff succeeds in surmounting all of the hurdles discussed thus far, she may still lose because the defendant establishes that he had a ***privilege*** to make the defamatory statement. Privileges are divided into "absolute" ones and "conditional" ones.

1. Distinction: The distinction between these two classes is that an "absolute" privilege applies regardless of whether the defendant was activated solely by malice or other bad motives, whereas a "conditional" privilege applies only where the defendant acts for certain well-defined purposes.

B. Absolute privileges: The following classes of absolute privileges are usually recognized:

1. Judicial proceedings: Judges, lawyers, parties, and witnesses are all absolutely privileged in what they say during the course of ***judicial proceedings,*** regardless of the motives for their statements. For instance, even if a judge tells the jury, for purely personal and malicious reasons, that the defendant should be convicted because he is a born crook and liar, the defendant cannot win a slander suit.

a. Must be relevant to proceeding: The one limitation on this privilege, however, is that the defendant's statement must have ***"some relation"*** to the matter at issue. See Rest. 2d, §§585-589.

b. Quasi-judicial proceedings: Absolute privilege may extend to quasi-judicial proceedings, such as private arbitration or grievance hearings. P&K 1988 Pocket Part, p. 115.

2. Legislative proceedings: A similar privilege exists for ***legislators*** acting in furtherance of their legislative functions (e.g., making a speech on the floor), and witnesses before legislative proceedings. Rest. 2d, §§590-590A.

a. Hearings: The privilege extends to ***legislative hearings.*** But it does not extend to a "newsletter" published by a legislator, and probably not to press conferences held by him, although these may be protected by the "Speech or Debate" clause of the Constitution. See Rest. 2d, §590, Comments a and b.

3. Government officials: Certain government officials may also have an absolute immunity from defamation, as to statements issued in the course their jobs.

a. Federal officials: The Supreme Court has held ***all federal officials,*** no matter how low their rank, have this absolute privilege. *Barr v. Matteo,* 360 U.S. 564 (1959).

b. State officials: All states agree that the governor, and other high state officials, have a similar immunity. But states disagree about whether this absolute immunity extends down to the lower ranks (e.g., police officers).

c. Must be within course of duty: Even where the absolute immunity exists, it applies only if the defamatory statement occurs in the course of, and in furtherance of, the defendant's job.

4. Husband and wife: Any communication between a ***husband and wife*** is absolutely privileged. Rest. 2d, §592.

a. May count as publication: But if a defamation originates with a third person, and is relayed by a husband to his wife, this repetition will still be a publication, and the third person will be liable for the harm caused by it. This is so under the rule that one who publishes a defamation is liable for any damage caused by the privileged repetition of it; see Rest. 2d, §576(a).

5. Consent: Any publication that occurs with the ***consent*** of the plaintiff is absolutely privileged. This is true even if the plaintiff has attempted, for the purposes of establishing a defamation suit, to maneuver the defendant into repeating a previously privileged statement. For instance, if the defendant has defamed the plaintiff during the course of a trial, and the plaintiff says to him, "Step outside the courtroom and repeat that, so I can sue you," the repetition will be privileged. See P&K, p. 823.

a. Attempt to find out what is said: But if the plaintiff has merely attempted to find out what the defendant is saying about her, and asks him to repeat it for this purpose, this is not held to be consent to the previous defamation. P&K, *ibid.*

C. Qualified privilege: In addition to these absolute privileges, there are a number of ***"conditional",*** or ***"qualified"*** privileges. The distinction between them and the absolute privileges is that the conditional ones will be lost if the defendant is acting primarily from ***malice,*** or for some other purpose not protected by the privilege.

1. Protection of publisher's interest: The defendant is conditionally privileged to ***protect his own interests,*** if these interests are determined to be sufficiently important, and the defamation is directly enough related to those interests. Rest. 2d, §594. Some of the interests which are generally held to be of sufficient importance include the following:

a. Protection of property: Protection of the defendant's ***property.*** Thus if the defendant's property has been stolen (or he reasonably believes that it has been) he may tell his suspicions of the plaintiff to the police. (But he may be held to have ***abused*** this privilege, by acting recklessly, or by spreading the defamation more widely than necessary; see *infra*, p. 481.)

b. Protection against defamation of defendant: The defendant may be conditionally privileged to protect ***himself*** against defamation by the plaintiff. For instance, he may have a qualified privilege to call the plaintiff a liar, even if she isn't.

c. Competition not sufficient interest: But a businessperson's attempt to obtain a ***competitive advantage*** is not a sufficient interest to qualify for the conditional privilege. Thus a businessperson has no right to say that one of his competitors does shoddy work, merely in order to gain a customer for himself (although, of course, he will not be liable if he can show the truth of this statement).

2. Interest of others: Similarly, the defendant may be qualifiedly privileged to act for the protection of the ***recipient*** of his statement, or

some other third person. But the Restatement limits this privilege to situations where the recipient is "a person to whom [the statement's] publication is ... within the generally accepted standards of ***decent conduct."*** Rest. 2d, §595(1)(b).

a. Definition of "decent conduct": In determining what is within these standards of "decent conduct," the Restatement attaches considerable importance to the fact that the statement is made "in response to a ***request*** rather than volunteered by" the defendant. *Ibid*, §595(2)(a).

b. Family or other relationship: Another factor tending to make the statement "decent conduct" is that there is a family or other ***relationship*** between the defendant and the person to whom he makes the statement.

i. Old boss to new boss: Thus an ex-employer generally has the right to give information about his ***ex-employee*** P to a new, prospective, employer if asked by the latter. That's true even if the ex-employer repeats his own or another's suspicion of wrongdoing by P that the ex-employer is negligent in believing. (But there is no privilege if the ex-employer passes on suspicions that he does not in fact believe or whose truth he recklessly disregards.) See Rest. 2d, §595, Comment i.

c. Credit-reporting agencies: A number of states have held that ***credit-reporting agencies*** have a conditional privilege to give their subscribers credit-worthiness reports on potential customers. See Rest. 2d, §595, Comment h. But again, this privilege may be abused, as it almost certainly would be by recklessness, and perhaps even by negligence. See *Dun & Bradstreet, infra*, p. 483, where punitive damages were awarded upon a showing that was apparently no more than negligence.

3. **Common interest:** The defendant may have a conditional privilege because of the fact that he and the recipient have a ***common interest.*** Rest. 2d, §596. For instance, one member of a club might be conditionally privileged to tell his co-members that a proposed applicant should not be admitted because he is a thief.

4. **Where recipient can act in public interest:** There may be a conditional privilege where a communication is made to one who has the power to ***act in the public interest*** (usually a public official). Rest. 2d, §598. For instance, a private citizen's accusation about ***crime*** made to a police officer or district attorney would have this privilege.

5. **Report of public proceedings:** At common law, there was a qualified privilege to report on ***public proceedings,*** such as ***court cases, legislative hearings,*** etc.

   a. Public figures: To the extent that such reports concern *"public officials"* or *"public figures,"* the privilege is *less frequently needed* than it was before *New York Times v. Sullivan.*

      i. No "actual malice": If the defendant making the report (typically a publisher or broadcaster) did not have "actual malice" as that term is used in *New York Times* (i.e., it did not know the statement in the public proceeding to be false and did not recklessly disregard whether it was true or false), the privilege is no longer needed in this "public official or public figure" situation. This result follows directly from *New York Times.*

      ii. Actual malice: But if the defendant does have "actual malice," then the privilege can still be useful even where the plaintiff is a public figure. In particular, the privilege allows the newspaper or publisher to print statements made in a public proceeding even though the publisher has ***serious doubts*** about the truth of the statement.

Example: X, on trial for the crime of resisting arrest, testifies, "I did not resist arrest, and the arresting officer, Officer Jones, beat me savagely." A reporter for D newspaper, having heard all the evidence at the trial, subjectively believes that X is lying and that the beating never occurred. D publishes a story stating that "At X's trial, X testified that Officer Jones had beaten him."

In a libel suit by Officer Jones against D, the privilege to report on public proceedings will turn out to be both applicable and useful. Because D (or its reporter) had actual serious doubts about the truth of X's statement, D has "actual malice" (as that phrase is used in *New York Times v. Sullivan),* and under ordinary libel principles could be held liable. But because the statement being reported upon was made at a "public proceeding," i.e., the court case, D is protected by the privilege.

b. Private figures: If the public proceeding being reported concerns a ***private figure,*** the "actual malice" requirement of *New York Times* will ***not*** be applicable. The Supreme Court rejected an argument that the "actual malice" requirement should be extended to all reports of judicial proceedings, in ***Time, Inc. v. Firestone,*** 424 U.S. 448 (1976). In this situation, the *Gertz* standard (requiring only that strict liability not be permitted, and that punitive damages not be allowed on a mere showing of negligence) is the sole applicable constitutional principle. Consequently, the qualified common-law privilege for reports of judicial proceedings may be of value not only where the defendant publisher has actual doubts about the truth of the statements being republished, but also where the defendant has been ***negligent*** (as opposed to "reckless") in publishing the statement. (See the discussion of abuse of qualified privileges *infra*, p. 481.)

c. Report of pleadings: The traditional privilege for reporting proceedings has generally been held not to apply to reports of ***pleadings*** filed in court which have not yet been acted upon. See P,W&S, p. 891, n. 9.

6. The "neutral reportage" privilege: Suppose a publisher or broadcaster repeats a statement made by someone ***outside*** of a "public proceeding." Obviously, the privilege for "reports of public proceedings," discussed just above, does not apply. Remember that one who repeats another's defamatory statement is himself liable for defamation, even if the repeater states that he does not believe the truth of the re-published assertion. (See *supra*, p. 472). Even with the protection given by *New York Times v. Sullivan*, a media defendant can be placed in a situation where it becomes liable for reporting statements concerning controversies of interest to the public; paradoxically, the defendant's greatest danger of liability comes when it investigates the charges and develops substantial doubts about their truth. To deal with this gap in the coverage of *New York Times v. Sullivan*, some lower courts have recognized a relatively new ***"neutral reportage"*** privilege.

a. Situation: There are two main situations where a defendant who republishes another person's statement made outside of formal

proceedings may find itself liable for defamation unless a "neutral reportage" provision is recognized:

i. **Charge against public official:** First, consider the situation where a person makes charges about a ***public official or public figure,*** and the charges are newsworthy.

Example: Suppose that Antrim and Bellows are colleagues on the City Zoning Board. Antrim tells a reporter that he thinks Bellows accepted an illegal kickback from a property owner. The reporter investigates, concludes that the charges are probably false, but also believes that the mere fact that a public official (Antrim) is accusing another public official of wrongdoing is itself a matter that the public should know about. Therefore, the reporter writes a story stating that Antrim has accused Bellows of an illegal kickback, and indicating that the newspaper has been unable to substantiate the charge. Without a "neutral reportage" privilege, Bellows can sue the reporter and the newspaper for libel — the reporter and the newspaper have repeated Antrim's defamatory statement, and their indication that they don't believe it is not a defense, as discussed *supra,* p. 472. Also, even though Bellows is a "public figure," the Ds had "actual malice" (since they had serious doubts about the statement's truth but published it anyway), so they are not protected by *N.Y. Times v. Sullivan.* See 86 Nw. U.L. Rev. 417.

ii. **Charge against private figure:** Second, the problem may arise where a person makes charges about the conduct of a ***private figure,*** but the charges are nonetheless of public concern. Again, the publisher or broadcaster may be blocked from reporting a matter of public interest, for fear of defamation liability.

Example: Recall the example on p. 472: Citizen tells a press conference, "Officer Jones beat me when he arrested me." At least if there had been widespread reports of police brutality, Citizen's statement is relevant to a matter of public controversy. Yet because Officer Jones is presumably a "private figure," Newspaper will be liable for defamation when it accurately reports Citizen's accusation, if Newspaper is shown to have been even negligent (let alone reckless) in not having determined that Citizen's charges are false. (Even more dramatically, Newspaper gets no protection for investigating, concluding that Citizen's charges are probably false, and saying so.) Again, a "neutral reportage" privilege could protect Newspaper.

b. Privilege recognized by a few courts: The Supreme Court has never squarely determined whether there should be a "neutral reportage" exception as a matter of constitutional law. However, a few lower-court cases have ***recognized*** such a privilege on constitutional grounds.

c. Requirements: Those courts that have recognized the "neutral reportage" privilege — whether on constitutional or non-constitutional grounds — have not always agreed on what the requirements for that privilege should be. Here are some of the requirements that have been imposed:

i. Correct reporting: All courts recognizing the privilege seem to agree that it applies only where the media defendant ***correctly reports*** the charges, so that the only truth/falsity issue is whether the charges themselves are true.

ii. Neutrality: All courts also seem to agree that the privilege should apply only where the defendant behaved ***"neutrally"*** with respect to the underlying controversy. Thus if the reporter states that he ***agrees*** with the charges, or ***distorts*** those charges to make the plaintiff look even worse, the privilege will be lost.

iii. Relates to public controversy: Most courts have required that the report relate to a ***public controversy.*** Thus if Newspaper reports, "X has written us a letter stating that his neighbor P is an adulterer," probably the privilege would not apply to this news item, since it does not relate to an area of significant public concern.

d. Rejected: Some courts have ***rejected*** the "neutral reportage" privilege, in least in those situations where the defendant had serious doubts about the truth of the charges that it was repeating.

D. Abuse: Even where a qualified privilege exists, it may be ***abused*** (and therefore forfeited) in a number of different ways.

1. Knowledge of falsity or reckless disregard: The privilege will be lost if the defendant ***knew that his statement was false,*** or acted in ***reckless disregard*** of whether it was true or not.

a. Rejection of negligence standard: Prior to *Gertz v. Robert Welch, supra*, p. 474, many courts held that a privilege was abused if the defendant was merely ***negligent*** in not ascertaining the falsity of his statement. But since, under *Gertz,* negligence is required in most cases, as part of the plaintiff's prima facie case, it would not

be sensible to hold that a qualified privilege is lost through negligence; this would mean, in any case in which less than reckless disregard was shown, that the privilege was abused as soon as the necessity for it (i.e., the establishment by the plaintiff of his prima facie case) was shown. See Rest. 2d, Ch. 25, "Special Note on Conditional Privileges and the Constitutional Requirement of Fault." Probably, therefore, most courts will allow the privilege even where the defendant was ***negligent*** (but not reckless) in not ascertaining that the statement was false.

b. Publication of rumor: Even if the defendant knows or believes that the defamatory matter is not true, he will not abuse a qualified privilege if he states that the matter is ***rumor or suspicion,*** and publication of the statement is otherwise reasonable. For instance, if D tells his friend X that he has heard a rumor that P, X's employee, is dishonest, this would not constitute an abuse of the qualified privilege to protect X's interest. See Rest. 2d, §602, Illustr. 1.

2. Purpose of the privilege: A qualified privilege will also be lost if the ***primary purpose*** behind the defendant's statement is something other than protecting the interest for which the privilege is given. For instance, where a person connected with the plaintiff's ex-employer made allegations to the plaintiff's new boss concerning his honesty, it was held that a jury could find that this communication was simply an attempt to coerce the plaintiff into returning certain materials to the defendant, or to find out whether the plaintiff had started work for the new boss before quitting the old job; in either event, this would be an abuse of the privilege of protecting the new boss's interests. *Sindorf v. Jacron Sales Co., Inc.*, 341 A.2d 856 (Md. App. 1975).

3. Excessive publication: The privilege is abused if the statement is made to persons to whom publication is ***not reasonably necessary*** to protect the interest in question. Rest. 2d, §604. Similarly, if more damaging information is stated than is reasonably necessary for the purpose, the privilege is abused. For instance, if the defendant reported to a police officer his suspicions that the plaintiff had committed a theft, and added his belief that the plaintiff was a homosexual, this would probably constitute an abuse. See Rest. 2d,

§§605 and 605A.

E. Statutory privileges: Many states, and the federal government, have enacted a number of ***statutory privileges.***

1. Internet Service Providers: One of the most important of these is the federal immunity given to ***Internet Service Providers*** (ISPs) under the Communications Decency Act of 1996 (CDA). Part of the CDA, 47 U.S.C. § 230(c)(1), says that **"no *provider or user*** of an interactive ***computer service*** shall be treated as the ***publisher or speaker of any information*** provided by ***another information content provider."*** This provision amounts to a grant of ***immunity*** from state defamation liability for "publishing false or defamatory material so long as the ***information was provided by another party."*** *Carafano v. Metros-plash.com, Inc.*, 339 F.3d 1119 (9th Cir. 2003).

Example: D is the corporate owner of the matchmaker.com Internet dating service. Some unknown person, using a computer in Berlin, Germany, posts a dating profile of P (the actress whose stage name is Chase Masterson) on the matchmaker.com site, without P's consent. The posting is done in the form of answers to a questionnaire that D requires posters to fill out; many of the questions are in multiple-choice format. The posting includes P's picture, her home address, her e-mail address and various sexually-oriented statements (e.g., that she is "looking for a one-night stand" and that she likes to be "controlled by a man, in and out of bed.") People who send e-mail to the email address are then given P's home phone number. As a result, P receives numerous phone calls, voice mail messages and e-mails, some of which are sexually explicit or threatening. She sues D in state court, alleging defamation and various privacy-related torts (e.g., misappropriation of identity, as to which see *infra*, p. 494). D defends on the grounds that the CDA gives it immunity against all such claims by P. P responds that the CDA immunity does not apply where D supplies part of the defamatory content, and that that is what happened here, since most of the content was formulated in response to matchmaker.com's detailed questionnaire.

Held, for D. The immunity given by the CDA was intended by Congress to be ***"quite robust."*** It is true that the immunity does not apply where the defendant functioned as an "information content ***provider"*** for the portion of the statement or publication at issue. But here, the fact that some of the content was formulated in response to D's questionnaire does not mean that D was the provider of the content in question. In this case, ***"the selection of the content was left exclusively to the user."*** And the fact that D's site structured and standardized the poster's answers (e.g., by supplying multiple-choice answers for dozens of questions) did not turn D into a supplier of the content in the profile, especially since the objectionable information, such as P's phone number, was "transmitted unaltered to profile viewers." *Carafano v. Metros-plash.com, Inc. , supra.*

VII. REMEDIES

A. Damages: A successful defamation plaintiff may, of course, recover ***compensatory*** damages. These can include not only items of ***pecuniary*** loss (e.g., lost business), but also compensation for humiliation, lost friendship, illness, etc., even though these items would not count as ***"special harm"*** for purposes of slander (see *supra*, p. 468).

1. Punitive damages: In *Gertz v. Robert Welch, supra*, p. 474, the Supreme Court that ***punitive damages*** may not be awarded upon less than a showing that the defendant knew his statements were false or recklessly disregarded the truth. Thus in those states that allow recovery by a private figure upon a mere showing of negligence, *Gertz* appeared to mean that punitive damages are not allowable. However, the post-Gertz case of ***Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.,*** 472 U.S. 749 (1985), cuts back this aspect of *Gertz* to cover only those suits by private figures that involve a matter of "public interest"; as to these, it remains the case that punitive damages may only be awarded upon a showing that the defendant knew his statements were false or recklessly disregarded the truth. As to matters that are of merely ***private concern, mere negligence will suffice,*** as a constitutional matter.

a. Facts of *Dun & Bradstreet:* Thus in *Dun & Bradstreet* itself, D, a credit reporting agency, falsely reported to a few subscribers that P, a corporation, was insolvent. Because the credit report did not involve any matter of public concern, a punitive damage award in favor of P was affirmed by the Supreme Court, despite the absence of any showing that D was more than ordinarily negligent.

b. No majority opinion: The precise significance of *Dun & Bradstreet* is especially hard to ascertain, since there was no majority opinion in that case. A three-justice plurality opinion argued that *Gertz* simply never addressed the issue of punitive damages in cases where the false statement did not concern a matter of public interest. Two additional members of the Court (Burger and White) joined the result reached by the plurality, but on the broader ground that *Gertz* should be overruled in its entirety. One aspect of *Dun & Bradstreet* that is especially unclear is what constitutes a matter of "public interest" — all we know from *Dun & Bradstreet* is that a credit reporting service's report about a

relatively small corporation, distributed to four or five subscribers, does not involve a matter of public interest.

2. **Presumed damages:** The common law allowed, in cases of libel (except libel per quod) and slander per se, the award of ***"presumed"*** damages. That is, even if the plaintiff could not show that she suffered any actual harm (whether of a pecuniary or non-pecuniary nature), she could recover a sometimes substantial sum representing the harm that would "ordinarily" stem from a defamatory statement like the one at issue. Presumed damages could be awarded even where the only witnesses put on by the plaintiff testified that they never believed the defamatory statement (so that there was no proof that the plaintiff's reputation was in fact damaged). However, *Gertz, supra*, p. 474, held that the plaintiff may only recover "actual damages (i.e., compensatory ones) if she does not establish at least reckless disregard of the truth. Thus in states that allow a private figure to recover upon a showing of mere negligence, *Gertz* bars such a plaintiff from recovering presumed damages.

   a. **Cases of private interest:** However, on this issue, too, the *Dun & Bradstreet* case cuts back the scope of what had appeared to be the holding in *Gertz.* Under *Dun & Bradstreet*, presumed damages may be awarded even on a showing of mere negligence, if the matter is not one of "public interest." (Where the matter *is* one of public interest, *Gertz* still bars the award of presumed damages unless the plaintiff establishes at least reckless disregard of the truth.)

3. **Nominal damages:** Even a plaintiff who has suffered no direct loss will, in order to "clear her name," often have a powerful incentive to try to establish defamation, and to recover ***nominal*** damages. *Gertz,* insofar as it allows a plaintiff to recover only "actual" damages if she does not establish reckless disregard of the truth, may mean that nominal damages are no longer awardable upon a showing of mere negligence. Such a result would be undesirable, since it would prevent a plaintiff who has not suffered actual damage from "clearing her name." (In any event, if the statement does not involve a matter of public interest, *Dun & Bradstreet* clearly allows nominal damages to be recovered.)

B. Retraction: Almost two-thirds of the states, in order to discourage defamation suits, have enacted so-called ***"retraction"*** statutes. Some of these statutes hold that if the defendant publishes a retraction of a defamatory statement within a certain period of time, this bars recovery. Others merely require a news medium to grant a right of response to the plaintiff, without providing that this eliminates the defamation action. See P,W&S, pp. 935-36.

Quiz Yourself on
DEFAMATION (Entire Chapter)

84. Ratso is a small-time criminal who likes to hang around with shady types. John Dillinger circulates the lie that Ratso is a "stoolie" who's ratted on various local criminals to the police. Ratso sues John for defamation. Was John's statement "defamatory?" _____

85. Clara Bow is an up-and-coming Hollywood starlet. Brunhilda, jealous of Clara's success, spreads the lie that Clara has been intimate with an entire college football squad. When Clara sues Brunhilda for defamation, must she prove that she suffered pecuniary harm?

_____

86. Socrates is up for parole. Defamitus testifies to the parole board that the parole should be denied because Socrates is a menace to society — he has been known to solicit sexual favors from young boys. This is not true, although Defamitus has good reason to believe it's true. Can Socrates successfully sue Defamitus for defamation?

_____

87. Pierre Exposee, a reporter for the Paris *Clarion du Jour*, publishes a story that the Emperor Napoleon falsified his war record. Pierre has heard the story from a friend, and actually believes it. Nonetheless, the story is wrong — Napoleon's record is bona fide (as Pierre could have determined with only a little further investigation). However, Pierre has despised Napoleon ever since he stole Pierre's girlfriend, Josephine, and Pierre is glad the story hurt Napoleon's reputation. Napoleon sues Pierre for defamation. Can he recover? _____

88. Gil Ibble, reporter for the Washington Rag during the Lincoln

administration, hears a guy in a bar say: “The only way Abe Lincoln got elected was by stuffing ballot boxes!” Ibble figures this would make a great story, and he writes it, fully believing it’s true, and not unearthing any evidence to the contrary. In fact, “Honest Abe” didn’t stuff any ballot boxes, and he sues Ibble for defamation. Can Abe recover?

_____

89. Dumbo, a home-loving elephant who teaches piano for a living, likes to keep to himself. While reading the local paper one day, he’s horrified to see an item in the gossip column, saying that he had just been in the hospital for ear implants. In fact, had the gossip columnist checked her sources, she would have found that Dumbo was in the hospital for an operation on his deviated septum; he’s never had an ear implant, his ears are just *naturally* that large. Dumbo sues the paper for defamation. Can Dumbo recover? (Assume that defamation suits by animals follow the same rules as for humans.)

90. Mrs. Tolstoy is jealous of the beautiful and popular Anna Karenina. In an effort to destroy her reputation, Mrs. Tolstoy circulates the story that Anna is an adulteress — she’s having an affair with Vronsky. Will the fact that this is true absolve Mrs. Tolstoy from liability, even though she was trying to wreck Anna’s reputation? _____

91. In Smalltown USA, Martha Washington tells her neighbor, Betsy Ross, “Dolly Madison told me Benedict Arnold is a Communist.” Arnold is not a Communist, and he sues Washington for defamation. She asserts truth as a defense, proving that Madison, in fact, told her Arnold is a Communist. Will the defense prevail? _____

92. Newspaper, in a story on the general subject of how organized crime figures have infiltrated legitimate business, states, “And Joe’s Casino, the big Atlantic City casino, is probably mob-controlled, because Joe Picolo, owner of record, has been linked by law enforcement authorities to the mob.” Joe brings a libel suit against Newspaper. At the trial, Newspaper does not come up with any evidence to show that Joe has links to the mob, but Joe does not come up with evidence to show that he does not. Assuming that the truth of Newspaper’s allegations is the only issue in the case, who will win the suit? _____

93. Newspaper, a local paper in the town of Chippewa, publishes an article

called “Police Blotter” in every day’s paper. The Blotter purports to be a reprinting of crimes handled by the local police (and listed on the police department’s blotter) the prior day. In one edition, the Blotter article says, “John Smith was charged by the police with a burglary at 123 Main Street, at the home of John Brown.” In fact, this item has not been taken from the blotter, but is the result of a conversation between the cub reporter on the police beat and Officer Flatfoot of the Chippewa Police Dept. Because the reporter was inexperienced and tired, the article as printed reversed the names — it was really John Brown who was charged with a burglary at the home of John Smith at 123 Main. A reporter of average professional standards would have read his notes back to Flatfoot before leaving the police department, but the cub reporter did not know to do this. Neither the reporter nor Newspaper or any of its other employees knew that the item printed was false. John Smith, a local resident of no special prominence, brings a libel action against Newspaper. May he recover? _____

Answers

84. **No.** A defamatory statement is one tending to harm one’s reputation so as to lower him in the eyes of a respectable segment of the community. The statement here is not defamatory because it didn’t tend to harm Ratso’s reputation in a respectable segment of the community. The fact that small-time cons give him the cold shoulder doesn’t satisfy the “respectable segment” requirement.

85. No. While in the normal case of slander pecuniary damages (known as “special” damages) must be proven, imputing serious sexual misconduct is one of the four exceptions to the rule, known as “slander per se.” Thus, Clara will not have to prove special damages in order for her claim to succeed.

Traditionally, only women plaintiffs could get the benefit of having allegations that they committed serious sexual misconduct treated as slander per se. But the 14th Amendment’s Equal Protection clause probably means that a state today must protect plaintiffs of either gender the same way, so an allegation that a man has committed, say,

fornication or adultery would probably also constitute slander per se.

86. No. The statement is subject to a "qualified privilege" because Defamitus is speaking in the public interest. A qualified privilege means the speaker will not be liable for otherwise defamatory statements unless he (1) exceeds the scope of the privilege, or (2) either lacks reasonable grounds for believing the statement, or acts recklessly in determining its truth or falsity (states are split on the reasonable/reckless issue). Neither applies here.

RELATED ISSUE: Were Defamitus speaking without a qualified privilege, the statement would be slander per se, since it imputes both serious sexual misconduct and a crime of moral turpitude — molesting little boys. Thus, Socrates would not have to prove special (pecuniary) damages in a defamation suit against Defamitus.

RELATED ISSUE: Say Defamitus made the statement not because he cares at all about society, but because he wanted to seduce Mrs. Socrates, and figured his chances would be better with Socrates in the slammer. He'd be liable for defamation, because he wouldn't have a qualified privilege — the privilege only applies when the defamer speaks *in furtherance* of the interest protected, not in an attempt to *injure* the plaintiff.

87. No. For plaintiffs who are "public figures," the fault level required for defamation is "actual malice." Actual malice is knowledge of the defamatory statement's falsity, or a reckless disregard for whether it's true — not spite or ill will, which is what's present in these facts. Since Pierre believed (even if unreasonably) that the story was true, there is no malice and the defamation claim will not lie.

NOTE: Here, Pierre was *negligent* (but not reckless) in not investigating the story. As a public figure whose public stature has been attacked, Napoleon cannot recover. If he were a *private figure* he could, since mere negligence is enough to support a defamation claim against a media defendant.

COMMON LAW RULE: Defamation was a strict liability offense, so no fault had to be proven.

RELATED ISSUE: Had the story libeled Napoleon's private life, on an

issue not bearing on his fitness for public life, he could probably have recovered on the same basis as a private individual (i.e., a mere showing of negligence).

88. No. In order to recover damages from a media defendant for defamation involving an issue of public interest or concern, a plaintiff who is a public figure or public official must prove "actual malice." Actual malice is knowledge of a defamatory statement's falsity, or reckless disregard for its truth. Recklessness is measured subjectively here, and requires proof that defendant *actually had serious doubts* about the truth of his story. Here, Ibble believes the story is true, so there's no "malice."

NOTE: At common law, defamation was a strict liability offense, so no fault had to be proven.

RELATED ISSUE: Had Ibble asked Lincoln himself, and Lincoln had denied the charge, Ibble might have been reckless in printing the story anyway. (However, not checking sources in and of itself is generally only negligence, not recklessness.)

89. No. The "*New York Times* privilege" protects the media when it publishes matters of public interest or concern about a *public figure* or public official, as long as the publisher doesn't act with *"actual malice"* (knowledge of falsity or a reckless disregard for the truth). Since Dumbo is a private figure, the paper doesn't get the benefit of the *Times* privilege. However, that doesn't mean that Dumbo won't have to prove *any* fault; he'll still have to prove at least *negligence.*

NOTE: Negligence can be shown by, for instance, a failure to check sources. Recklessness, however, requires a subjective evaluation: whether the reporter entertained serious doubts about the truth of what he was printing.

90. Yes. In defamation, truth is always an absolute defense. (Of course, Mrs. Tolstoy could be guilty of other torts, like invasion of privacy through publication of private facts about Anna.)

NOTE: If the defendant is a media defendant and the defamation involves a matter of public concern, the *plaintiff* has to prove the statement is false; otherwise, plaintiff only has to *allege* that it's false — defendant has the burden of proving truth as an affirmative defense.

91. No. While the entire statement need not be literally true in a truth defense, the defamatory "sting" must be proven true. Here, it doesn't matter who said it, it matters that Arnold was called a Communist. For a truth defense to fly, Washington would have to prove Arnold is a Communist.

NOTE: For media defendants and public matters, the *plaintiff* has to prove the statement is false; otherwise, the plaintiff only has to *allege* falsity, and the defendant has to prove truth as an affirmative defense.

92. Newspaper. If the statement involves a matter of public interest and the defendant is a media organization, the First Amendment requires that the plaintiff bear the burden of proving that the statement was false. This is true even if the plaintiff is a private figure. See *Philadelphia Newspapers v. Hepps.* Therefore, even though it may seem unfair to Joe to make him prove a negative fact (very difficult to do), this is what Joe must do, and he loses since he did not do it.

93. Yes. John Smith is clearly a "private figure." As such, the *New York Times* "actual malice" requirement does not apply to his libel suit. Therefore, to recover he only has to prove that Newspaper and its reporter were negligent, not intentionally false or reckless. Also, because the item originated with the unofficial words of Officer Flatfoot, the conditional privilege to report on public proceedings does not apply.

***Exam Tips** on*
DEFAMATION

Defamation issues are pretty easy to spot — you're looking, of course, for situations where someone is saying something that damages somebody else's ***reputation.*** But spotting and analyzing the sub-issues can be difficult, especially because of the Supreme Court's constitutional rulings.

☛ Don't get too hung up on the ***libel/slander*** distinction. It only matters when you're worrying about whether P has to prove "special harm," i.e., pecuniary loss. Use the term "defamation" if you're not sure whether the

suit is for libel or slander.

- Memorize this list of requirements for defamation (both libel and slander):
  - □ A ***false*** and ***defamatory*** statement by D about P;
  - □ A ***"publication,"*** i.e., a communicating of that statement by D to one other than P;
  - □ The appropriate level of ***fault,*** which is always at least negligence (except possibly in the case of a private figure suing a non-media defendant), and is "actual malice" if P is a public official or public figure;
  - □ If the action is for slander that is not "slander per se," ***"special harm,"*** i.e., damages of a pecuniary nature.
- Check that the statement was ***"defamatory."*** The term means "having a tendency to harm the ***reputation"*** of P.
  - Commonly-tested: the fact that the listener/reader ***doesn't believe*** the statement is ***irrelevant*** on the issue of whether the statement is defamatory. (But this may be relevant to whether "special harm" has been shown, where the suit is for slander.)
  - Some statements would, if believed, hold P up to disgrace or ridicule in the minds of ***some*** but ***not other*** listeners. Here, so long as a ***"significant and respectable minority"*** would have this negative opinion of P, the statement is defamatory even though other people would not have a negative opinion. *(Example:* "P is gay" is probably defamatory, because a sizeable minority of law-abiding — though perhaps not politically correct — Americans thinks poorly of gay people.)
  - Check the meaning of the statement. Where the statement is ***ambiguous,*** it's defamatory if a ***"reasonable person"*** might interpret the statement in a defamatory way, and at least one person in fact took this interpretation.
- Check that the statement referred (and was understood to refer) to **P*, not someone else.***
  - If the statement ***doesn't name*** P, but refers to P in a way that some

listeners ***understand*** to be a reference to P, that's enough. Often, the ***context*** will make it clear that P is the one referred to. *(Example:* "A leading member of this college faculty stole a computer" qualifies, if there are people who previously knew that P was the one under suspicion.)

- ☞ If the statement refers to an ***entire group,*** it's defamatory as to the whole group if the group is a small one (probably less than 20 members). If the statement pertains to only one or a few unnamed members of a larger group, the statement is probably not defamatory if there's no way for listeners to know which members are meant.

☛ Check that the statement was ***false.*** If it's true, the Constitution ***forbids recovery.***

- ☞ "Falsity" can occasionally be tricky to determine. Watch out especially for statements that are a charge of ***criminality,*** whose truth or falsity depends on technical details about the crime. *(Example:* D says, "P stole my tools when he quit working for me." If P took the tools by mistake but then failed to return them, this isn't common-law theft, so the statement would probably be ruled to be "false.")
  - ☞ But remember that ***"substantial"*** truth will bar recovery, not just literal truth. (However, if D accuses P of one crime, D can't defend by showing that P really committed a different crime, even a closely-related crime.)
- ☞ Statements of ***"pure opinion"*** can't be defamatory. *(Example:* "Our City Manager can't govern his way out of a paper bag" is an opinion, and thus can't be defamatory even if spoken with hatred and a desire to harm.)
  - ☞ But a statement of opinion that contains an ***implicit*** assertion of related ***facts*** can be defamatory as to those facts. *(Example:* "In my opinion, P is an alcoholic" contains the implicit statement that D knows facts that would support this opinion; if P never drinks, D loses.)
  - ☞ If the statement relates to a subject of controversy and public

interest, D gets some leeway for ***hyperbole*** and non-literalness. *(Example:* "P's position on this issue shows that he must have been high on something" probably isn't intended to be taken literally, so it's an opinion, not a statement of fact.)

- Check that D had the requisite degree of ***fault.*** Most-often tested: D's degree of fault relative to the ***truth or falsity*** of the statement.
  - If P is a ***"public figure"*** or ***"public official,"*** P must prove that D acted with ***"actual malice."*** Remember that this is a term of art, meaning not malice but either: (1) D had ***knowledge*** of the statement's falsity; or (2) D ***recklessly disregarded*** the truth. (Cite to *New York Times v. Sullivan* on this issue.)
    - Also, remember that D is "reckless" only where D ***"in fact entertained serious doubts"*** about the statement's truth. If D was extremely careless in not checking the story, but had no doubts, that's not "reckless disregard" of the truth for *New York Times v. Sullivan* purposes.
  - If P is a ***private*** figure, and D is a ***media*** defendant, P must prove ***at least negligence*** by D in failing to discover the statement's falsity. In other words, states can't impose strict liability here. (Cite to *Gertz v. Robert Welch* on this point.)
  - If P is a ***private*** figure and D is ***not*** a media defendant, the Supreme Court has never imposed a constitutional requirement of negligence or greater. (The Supreme Court simply hasn't spoken on this issue.) So the states are theoretically free to find D ***strictly liable.*** However, as a matter of common law, virtually no states impose strict liability as to fault — they all require at least negligence.
  - This issue is frequently tested despite the fact (or perhaps because of the fact) that it's relatively obscure.

    Example: D, P's former boss, says to X, "P is the most dishonest employee I've ever had." D has a reasonable, non-negligent belief that P stole from D. In fact, however, P never committed any crime. Although there's no constitutional rule preventing a state from imposing strict libility on D, no state would do so — P would always be required as a matter of state common law to prove at least that D was negligent in not ascertaining the statement's truth or falsity.

- At some point in your answer, you should try to determine whether the

defamatory statement was ***libel*** or ***slander.***

- ☞ Essentially, libel is ***written,*** and slander is ***spoken.*** Broadcast statements are clearly libel if they're done from written scripts; if the broadcast is ad-libbed, courts are split as to whether it's libel or slander.
- ☞ There is only one reason you have to worry about the distinction. For libel, P doesn't have to prove "special harm," i.e., that P's financial interests were harmed. For slander, P ***does*** have to prove ***"special harm,"*** i.e., that his financial interests were harmed — unless the slanderous statement falls into one of four special cases (collectively, "slander per se").
  - ☞ The four classes making up ***slander per se:*** (1) most important (and most often-tested), a statement accusing P of ***criminal behavior;*** (2) a statement that P has a ***loathsome disease;*** (3) a statement adversely reflecting on P's fitness for ***conducting her business*** or profession; or (4) an allegation of ***sexual misconduct*** by P. [

    Example 1: P works for D. D orally tells his friend X that P has stolen D's property. P in his slander suit need not show that he has suffered "special harm," i.e., financial harm from D's statement — D accused P of criminality, and the case is thus for slander per se.

    Example 2: Same basic facts, but now D tells X that P was a completely incompetent employee. Unless P can show that he suffered some financial loss from this statement, P can't recover even nominal damages.
- ☞ Where the hearer/reader ***doesn't believe*** the statement, the requirement of special harm (assuming it applies) will virtually never be met.

☛ Check that ***"publication"*** occurred.

- ☞ Most often tested: "Publication" is communication to ***one other than P.*** *(Example:* D says to P, "You're a crook." If no one else overhears this, there's been no publication. This is true even if P then repeats the defamatory statement to another.)
- ☞ [Courts do ***not*** impose ***strict liability*** on the publication issue. Thus if D neither knows nor has reason to know that anyone other than P

will hear/read the statement, D is not liable. *(Example:* D writes a letter to P, saying, "You're a crook." X, P's wife, opens the letter and reads it. If D didn't know and didn't have reason to believe that anyone other than P would read the letter, D is not liable.)

- A ***repeater*** is a "publisher," and thus is liable for defamation, on the same rules as the person who originally made the statement.
  - Most-often tested: It doesn't matter that the repeater says, "I'm just repeating what so-and-so says," or even, "I'm quoting so-and-so." It doesn't even matter that the repeater says, "But I ***don't believe*** the statement that I've just repeated." If the underlying statement is false, the repeater faces liability (subject to the rules on fault, e.g., the repeater must have "actual malice" if P is a public figure).

- Look for ***privileges*** that might apply as defenses. Here are the most commonly-tested:
  - The privilege of "protection of the ***publisher's interest."*** Most common illustration: D tries to protect/regain his ***property.*** *(Example:* D thinks P has stolen his property, and he yells, "Stop thief," or accuses P to the police. Even if D's belief is wrong, he is protected by the privilege, so long as he doesn't spread the defamation wider than needed or otherwise abuse the privilege.)
  - The privilege of "protection of ***another's interest."*** Most common illustration: X asks D for a ***job reference*** concerning D's former employee, P. Even if D's statement about P is wrong, D is protected by the privilege.
  - The privilege of "protection of ***common interest,"*** i.e., an interest shared by D and the person to whom D speaks. *(Example:* D, an officer of one bank, says to X, an officer of another, "I hear that P's been passing bad checks. Have you heard the same?" Since D and X are both interested in stopping bad-check passing, D is protected even if wrong.)
  - The privilege of ***"neutral reportage."***This is used especially by media reporting on allegations that the reporter has serious doubts about but thinks need public airing. *(Example:* D, a reporter, writes,

"Well-informed sources inside the D.A.'s Office say P [a public official] is believed to have taken bribes." Even if the reporter thinks that P probably didn't take the bribes, the reporter is protected if she reasonably thinks the accusation is important for the public to know about.) (Only a few courts have recognized this privilege so far.)

- ☞ But remember that all of the above privileges are just ***"qualified"*** ones, so they're ***lost*** if ***abused.*** Generally, a privilege is abused if used out of malice, if used for a different purpose than that furthered by the interest (e.g., idle gossip), or if the statement is spread more widely than needed. The privilege is also lost if D's belief as to the statement's truth is ***reckless.*** Courts are ***split*** about whether the privilege is lost if D is merely ***negligent*** in his belief that the statement is true.

☛ Remember that courts are limited in when they can award ***"presumed"*** damages. Presumed damages are compensatory (as opposed to nominal) damages awarded without actual proof of loss, on the theory that such an amount "would normally" be inflicted by the statement in question. At least where D is a ***media defendant*** and the issue relates to a matter of ***public concern,*** even a private-figure plaintiff can't be awarded presumed damages unless he shows that D acted with "actual malice" (not just negligence).

CHAPTER 18
MISCELLANEOUS TORTS

ChapterScope

This chapter covers several torts that have little to do with each other:

- **Invasion of privacy:** The tort of "invasion of privacy" is actually a cluster of four different, but related, torts.
  - **Misappropriation of identity: *"Misappropriation of identity"*** occurs where P's ***name*** or ***likeness*** has been used by D for D's financial benefit, without P's consent.
  - **Intrusion on solitude: *"Intrusion on solitude"*** occurs where D ***invades*** P's ***private space*** in a manner which would be highly offensive to a reasonable person in P's position.
  - **Publicity of private life: *"Publicity of private life"*** or "public disclosure" occurs where D publicly discloses a non-public detail of P's private life, where the effect would be highly offensive to a reasonable person in P's position.
  - **False light: *"False light"*** occurs where D publishes ***false statements*** about P which, although not defamatory, would be highly offensive to a reasonable person in P's position.
- **Misuse of legal procedure:** Three related tort actions protect P's interest in not being subjected to unwarranted judicial proceedings:
  - **Malicious prosecution:** The tort of "malicious prosecution" protects P's interest in not having wrongfully instigated a criminal proceeding against him.
  - **Wrongful institution of civil proceedings:** The tort of "wrongful institution of civil proceedings" is similar to "malicious prosecution," except that the original proceedings are civil rather than criminal.
  - **Abuse of process:** "Abuse of process" occurs where a person involved in criminal or civil proceedings uses various litigation devices (e.g., subpoenas) for improper purposes.
- **"Business torts":** There are three related torts that protect ***business interests:***

□ **Injurious falsehood:** The action for ***"injurious falsehood"*** protects P against certain false statements made against his business, product or property (e.g., D makes false statements disparaging P's goods or business).

□ **Interference with contract:** The tort of ***"interference with contract"*** protects P's interest in having others perform ***existing contracts*** which they have with her. The claim is against one who ***induces*** another to breach a contract with P.

□ **Interference with prospective advantage:** If due to D's interference, P loses the benefits of ***prospective, potential*** contracts (as opposed to existing contracts), P can sue for ***"interference with prospective advantage."***

I. INVASION OF PRIVACY

A. Right generally: The so-called "invasion of privacy" cause of action is essentially four distinct mini-torts. They have in common not much more than the fact that they involve various aspects of the plaintiff's "right to be let alone." The four are:

[1] ***misappropriation*** of P's name or picture;

[2] ***intrusion*** on P's solitude;

[3] undue ***publicity*** given to P's ***private life;*** and

[4] the placing of P in a ***false light.***

We consider each one in turn below.

B. Misappropriation of identity: The plaintiff can sue if her ***name or picture*** has been ***appropriated*** by the defendant for his own financial benefit. The action is said to be for ***"misappropriation of identity"*** or ***"right of publicity."***

> **Example:** D1, a baker, runs an advertisement for his bread in D2's newspaper. The ad states, "Keep that Sylph-Like Figure by eating more of Melts' rye and whole wheat bread, says Mlle. Sally Payne, exotic red-haired Venus." By mistake, the ad contains a picture of P in a bathing suit rather than a picture of Sally Payne.
>
> *Held*, "The unauthorized use of one's photograph in connection with an advertisement or other commercial enterprise gives rise to a cause of action. ... " Furthermore, P is entitled to nominal damages if she cannot prove actual damages. *Flake v. Greensboro News Co.*, 195 S.E. 55 (N.C. 1938).

1. **Statutory regulation:** A number of states have enacted statutes preventing such appropriation. See, e.g., New York Civil Rights Law §§50-51, which prohibits the use of any person's name or likeness without his consent for "advertising purposes" or for "purposes of trade."

2. **Evoking a celebrity:** There is dispute about whether the defendant should be liable for common-law misappropriation of identity if all he has done is to ***"evoke"*** the identity of a ***celebrity.*** Several courts have answered "yes" — even though the celebrity's name or "likeness" is not used, if advertising causes the reader to think that the celebrity is being ***referred to*** for the advertiser's financial benefit, that's enough to constitute common-law appropriation.

   Example: D, a manufacturer of VCRs, runs an ad depicting a robot, dressed in a wig, gown and jewelry which D has consciously selected to resemble the hair and clothing of P (TV personality Vanna White). The robot is posed next to a game board which is recognizable as the *Wheel of Fortune* game show set. D refers to this ad internally as the "Vanna White ad." P does not consent to the ad, nor is she paid. She sues for, among other things, violation of her common law right of publicity.

   Held, for P. D has violated P's common law right of publicity, by appropriating P's "identity." It does not matter that D has not appropriated P's name or "likeness." The right of publicity will be deemed to have been violated whenever a person's ***"celebrity value"*** is ***exploited*** by the defendant, regardless of the means by which this is done.

   (But a dissent argues that the majority's opinion is a "classic case of overprotection," and that courts should not make it tortious to simply "remind the public of a celebrity" or to simply "evoke the celebrity's image in the public's mind.") *White v. Samsung Electronics America, Inc.*, 971 F.2d 1395 (9th Cir. 1992).

C. Intrusion: The plaintiff may sue if his ***solitude*** is ***intruded upon,*** and this intrusion would be "highly offensive to a reasonable person." Rest. 2d, §652B.

1. **Must be private place:** This "intrusion upon seclusion" branch of invasion of privacy is triggered only where a ***private place*** is invaded. Thus if the defendant takes the plaintiff's picture in a public place, this will normally not be enough.

   a. Wiretaps and electronic surveillance: The use of ***wiretaps*** and other kinds of secret electronic surveillance equipment will generally constitute an intrusion into a "private place."

Example 1: P, consumer advocate Ralph Nader, plans to publish a book attacking the safety of automobiles manufactured by D (General Motors). In order to stop P from doing so, D harasses P by making threatening phone calls, conducting surveillance of P in public places, interviewing P's acquaintances, having women accost P with illicit proposals, tapping P's phone, and eavesdropping on P with electronic equipment. P sues D for invasion of privacy.

Held, P has a cause of action for invasion of privacy, but only for the wiretapping and electronic eavesdropping. "[T]he mere gathering of information about a particular individual does not give rise to a cause of action for [invasion of privacy]. Privacy is invaded only if the information sought is of a confidential nature and the defendant's conduct is unreasonably intrusive." *Nader v. General Motors Corp.*, 255 N.E.2d 765 (N.Y. 1970).

Example 2: Suppose that P and D are roommates at college; they share a suite, but each has his own small bedroom. D hides a web-cam in P's room, and uses it to stream video on the Internet of P having sex with X. P (as well as X) will have a claim against D for the intrusion-on-solitude branch of invasion of privacy: the use of hidden electronic equipment to monitor P's private space is an intrusion that would be "highly offensive to a reasonable person."

D. Publicity of private life: The publicizing of details of the plaintiff's ***private life*** may be an invasion of his privacy. As in the case of "invasion of seclusion," the effect must be "highly offensive to a reasonable person." Rest. 2d, §652D.

Example: D, a frustrated creditor of P, puts up a notice in the window of his store stating that P owes him money and has not paid him. This is an invasion of P's privacy. Rest. 2d, §652D, Illustr. 2.

1. **Must be truly "private":** The details divulged must be truly "private" ones, which are ***not*** contained anywhere on the ***public record.*** This requirement was spelled out, as a constitutional principle, in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975). In that case, the defendant broadcasting company broadcast the name of a deceased rape victim, in violation of a state law. The Supreme Court held that the girl's parents could not constitutionally be given recovery for invasion of privacy. The Court relied on the fact that the name of the victim was given in indictments made available for public inspection at the rapists' trial, and held that the First Amendment required that dissemination of such ***publicly-available information*** not be prohibited.

2. **Truthful matter not on any public record:** *Cox* leaves open the question of whether it is constitutional to allow a tort recovery for the

publicizing of truthful matter that is *not* contained on any public record. In a post-*Cox* case, the Supreme Court has held that only if the state is protecting ***"a state interest of the highest order"*** may the state punish (or allow a private plaintiff to sue for) publication of "truthful information about a matter of public significance," even where that information is not on the public record. *Florida Star v. B.J.F.*, 491 U.S. 524 (1989).

a. Hard burden to meet: The facts of *Florida Star* show that this will be a hard burden for the state, or the private plaintiff, to meet. In *Florida Star,* P, like the plaintiff in *Cox Broadcasting*, was a rape victim. Florida law made it a crime to publish the name of a rape victim. Unlike the *Cox* situation, in *Florida Star* the information was not truly public — the newspaper obtained it from the local sheriff's department, which had put it in the press room. The Supreme Court overturned the jury award for P, because the "state interest of the highest order" requirement was not satisfied here — the state here was adopting no-fault (strict) liability, plus it was punishing only media, not private individuals who might disseminate the same information.

i. Consequence: So it remains possible, but by no means clear, that a tightly-written state statute preventing the intentional publication of the name of a rape victim by anyone (not just by a media defendant) may give rise to an invasion-of-privacy action if the information was not part of the public record.

3. Must not be of legitimate public concern: In addition to the requirement that the details be "private" ones, it is probably also required for an "invasion of private life" action that the material ***not be of legitimate public concern.*** See Rest. 2d §652D(b).

> **Example:** P is tried for murder and is then acquitted. After the trial is over, D, a newspaper, publishes extensive reports on P's pre-trial history and his daily life. A court would almost certainly conclude that these details are of legitimate public concern, given P's status as a public figure on account of the murder trial. If so, P cannot recover under the publicity-given-to-private-life branch of invasion of privacy, no matter how offensive or embarrassing the details may be. Cf. Rest. 2d, §652D, Illustr. 13.

4. Must be publicized: The private details must be widely ***publicized,***

as opposed to being released to a few people. For instance, if a creditor notifies his debtor's employer about the debt and the debtor's refusal to pay it, this is not an invasion of privacy. Rest. 2d, §652D, Illustr. 1.

5. **Already-public information:** Conversely, the requirement that the details be widely publicized by the defendant means that recovery is not allowed where the information is ***already known or available to the public,*** and defendant merely gives extra publicity to this publicly-available information. Rest. 2d, §652D, Comm. b.

> **Example:** At a public meeting of the Muni Zoning Board, Fred complains that his next-door neighbor Nan has been sunbathing nude, and getting drunk, in her outdoor hot tub, which Fred (and only Fred) can see from a particular window in his house. Newspaper, whose reporter is present, accurately reports Fred's remarks, identifying Nan. Nan cannot recover for publicity-of-private-life against Newspaper, because the information had already been made public at the zoning meeting.

E. False light: The plaintiff can sue if he is placed before the public eye in a ***false light,*** and this false light would be highly offensive to a reasonable person. Rest. 2d, §652E.

> **Example:** P is a war hero. D makes a movie about P's life, which contains much material concerning a fictitious private life of P, including a non-existent romance with a girl. D is liable for invasion of privacy. Rest. 2d, §652E, Illustr. 5.

1. **Constitutional limits:** At least where the plaintiff is a public figure, he may bring such a "false light" action may only if he can show that the defendant either ***knew*** it was portraying its subject in a false light, or acted in ***reckless disregard*** of the risk of a false-light portrayal. *Time, Inc. v. Hill*, 385 U.S. 374 (1967). (In *Time, Inc.*, the Court consciously applied the defamation standard defined in *New York Times v. Sullivan, supra*, p. 473.)

2. **Distinguished from defamation:** In many "false light" cases, the material will also be defamatory of the plaintiff. But this is ***not necessarily*** the case. For instance, in the example of the war hero given above, P can sue for invasion of privacy even though the movie does not hold him up to ridicule (and even portrays his private life in a manner which some people would find dashing and romantic). However, the presentation must be "highly offensive to a reasonable person," and trivial deviations from the literal truth will not be

enough. Rest. 2d, §652E, Comment c.

F. Privileges: Most courts, and the Second Restatement, hold that the absolute and conditional ***privileges*** allowable in defamation actions are also available in invasion of privacy actions. Rest. 2d §§652F and 652G.

1. Consent: For instance, if the plaintiff consents to an appropriation of her name, publication of private information about her, etc., this consent will be a defense (assuming that its scope is not exceeded). Rest. 2d, §652F, Comment b.

II. MISUSE OF LEGAL PROCEDURE

A. Three torts: Three related tort actions protect the plaintiff's interest in not being subjected to unwarranted judicial proceedings. These are:

1. ***malicious prosecution;***

2. ***wrongful institution of civil proceedings;*** and

3. *abuse of process.*

B. Malicious prosecution: To make out a prima facie case of malicious prosecution, the plaintiff must prove the following elements: (1) that the defendant instituted ***criminal proceedings*** against him; (2) that these proceedings terminated ***in favor of the plaintiff*** (the accused); (3) that the defendant had ***no probable cause*** to institute the proceedings; and (4) that the defendant was motivated primarily by some purpose other than bringing an offender to justice. See Rest. 2d, §653; P&K, p. 871.

1. Initiating proceeding: The plaintiff must show that the defendant took an ***active part*** in instigating and encouraging the prosecution. For instance, if the defendant merely states what she believes to be the facts to the prosecutor, and leaves to the latter the decision whether to prosecute, this will probably not be "institution" of proceedings. But if the defendant has attempted to influence a district attorney to prosecute, or has lied so as to make prosecution more probable, this will be sufficient. See P&K, p. 872-73.

a. Prosecutorial immunity: The prosecutor himself is almost always immune from malicious prosecution suits. P&K, p. 873. (For exceptions to this rule, see generally P&K, pp. 1059-1062.) This immunity is also generally given to police officers, as long as they

act within the general scope of their duties. P&K, p. 873.

2. **Favorable outcome:** The criminal proceedings must ***terminate in favor of the accused*** (the plaintiff). This requirement is met not only where there is an acquittal, but also where the prosecutor ultimately decides not to prosecute because he does not think he has a good case, or a grand jury refuses to indict, or any other disposition that indicates the weakness of the case.

   a. **Plea bargain:** But a ***plea bargain,*** in which the plaintiff pleads guilty to some other offense, will not meet the "favorable disposition" requirement. Rest. 2d, §660(a).

3. **Absence of probable cause:** The plaintiff's biggest hurdle is likely to be the requirement that he show that the defendant ***lacked probable cause*** to institute the proceedings. In general, the defendant will be held to have had probable cause if she correctly or reasonably believed that the plaintiff had committed certain acts, and that these acts constitute the crime charged. Rest. 2d, §662.

   a. **Mistake:** The defendant may have been mistaken either as to the facts (i.e., whether the plaintiff committed the acts in question) or as to the law (i.e., whether those acts constitute the crime charged). But as long as her mistake is ***reasonable,*** she does not lack probable cause.

      i. **Mistake of law:** But a lay person's erroneous belief that certain conduct constitutes a crime is quite likely to be held to be unreasonable, if it is not arrived at after consultation with a lawyer or prosecutor. Once the defendant ***does*** receive assurances of her lawyer or the prosecutor that these facts constitute a crime, however, she has probable cause (assuming that she has made full disclosure of the facts known to her). See Rest. 2d, §662, Comment i and §666.

   b. **Effect of outcome:** The outcome of the criminal proceeding may, but does not necessarily, affect the existence of probable cause. If the plaintiff was convicted, this will always mean that the defendant had probable cause. If the complaint is dismissed by a magistrate, or a grand jury refuses to indict, most courts hold that

this is *prima facie* evidence that no probable cause existed. P&K, p. 880.

i. **Acquittal:** But an ***acquittal*** of the plaintiff does not establish lack of probable cause, and is not even admissible as evidence to that effect. The obvious reason for this is that the plaintiff can obtain an acquittal merely by showing a reasonable doubt, yet the existence of such a doubt is not incompatible with the existence of probable cause. See Rest. 2d, §667(2).

ii. **Retrial in tort action:** The consequence of this is that even if the plaintiff has been acquitted, the defendant has a right to ***retry the plaintiff's guilt*** in the course of the tort action. If she can show, by a ***preponderance of the evidence,*** that the plaintiff was guilty of the crime charged, she has established probable cause.

4. **Improper purpose:** Lastly, the plaintiff must show that the defendant acted out of ***malice,*** or for some other purpose than bringing an offender to justice. For instance, if the crime charged is the obtaining of money by false pretenses, the plaintiff might meet the "improper purpose" requirement by showing that the defendant was his creditor, and was trying to coerce him into paying the debt. See Rest. 2d, §668, Comment g.

5. **Damages:** It is usually held that the plaintiff does not have to prove actual pecuniary loss. But the common law principle of allowing "presumed damages" for harm to reputation, in the absence of an actual showing of such harm, is probably unconstitutional in light of *Gertz v. Robert Welch*, *supra*, p. 474 (except where no matter of "public interest" is involved — see *Dun & Bradstreet*, *supra*, p. 483). To the extent that plaintiff can prove such actual harm to his reputation, emotional distress, lost income, etc., stemming from the proceedings, he may recover for these losses.

C. Wrongful civil proceedings: The tort of "malicious prosecution," as noted, formally relates only to unwarranted ***criminal*** proceedings. Most states, however, have granted a similar tort action for wrongful institution of ***civil*** proceedings. While this tort is also often called "malicious prosecution," the better term is "wrongful use of civil

proceedings" (the Restatement's term) or something like it.

1. **Elements:** In general, the plaintiff must prove the same elements as for the criminal proceedings case.
2. **Institution of proceedings:** The "civil proceedings" which the defendant has initiated can include not only the ordinary civil lawsuit, but also insanity or bankruptcy proceedings, administrative proceedings, ancillary attachment proceedings, etc.
3. **Probable cause:** The defendant must be shown to have acted without probable cause.
    a. **Easier standard:** However, one has probable cause to institute civil proceedings on a significantly less certain knowledge of the facts than would suffice for a criminal proceeding (because of the difference in the burden of proof ultimately imposed, as well as the usually less severe hardship imposed on the person defending the action).
    b. **Mistake of law:** Similarly, the institutor of civil proceedings is less harshly penalized for a mistake of law than one who starts criminal proceedings; it is enough if she reasonably (though mistakenly) believes that there is a ***respectable chance*** (even if less than 50%) that she will be able to convince a court or jury of the legal merits of her claim. Rest. 2d, §675, Comment e.
4. **Improper purpose:** The civil proceedings must have been instituted for an ***improper purpose.*** The only proper purpose for such proceedings is "securing the proper adjudication of the claim on which they are based". Rest. 2d, §676. Thus if the suit is a "nuisance" suit or "strike suit", which the plaintiff knows has no real chance of succeeding, and which is brought solely for the purpose of extorting a settlement, this is an improper purpose. The same would be true of a ***counterclaim*** asserted solely for the purpose of delaying proceedings. Rest. 2d, §676, Comment c.
5. **Favorable termination:** The civil proceedings must have terminated in favor of the person against whom they were brought.
    a. **No re-litigation:** This first adjudication cannot be relitigated on the merits, as it could in the case of a criminal acquittal. That is, it is

not open to the person defending the "wrongful civil proceedings" claim to show that she should have won on the merits at the first trial, and is therefore not liable. (But she may, of course, show that she had probable cause to start the suit.)

D. Abuse of process: Even if a criminal or civil proceeding is brought with probable cause, and for allowable motives, a person involved in it may use various litigation devices available to him during the course of it for improper purposes. If so, he will be liable for ***"abuse of process."***

1. Writ of arrest: Thus in one case a judgment creditor, in order to avoid the trouble of having the sheriff seize the debtor's property and sell it off to satisfy the judgment, improperly obtained an arrest warrant. (At the time, a debtor could be imprisoned until he paid the debt.) As the creditor hoped, this arrest coerced the debtor into paying the judgment directly. The court allowed a cause of action for abuse of process, even though the underlying suit (which gave rise to the judgment) had not been terminated in the debtor's favor. *Ash v. Cohn,* 194 A. 174 (N.J. 1937).

2. Subpoena: Similarly, the use of a ***subpoena*** against a person to harass him or make him settle a suit, rather than for the proper purpose of obtaining his testimony, would be an abuse of process. See Rest. 2d, §682, Illustr. 3.

III. INTERFERENCE WITH ADVANTAGEOUS RELATIONS

A. Three business torts: A cluster of three tort actions protects certain business interests that are not protected by any of the actions previously discussed. These three are commonly referred to as:

1. ***injurious falsehood;***

2. ***interference with contract;*** and

3. interference with prospective advantage.

B. Injurious falsehood: The tort action for ***"injurious falsehood"*** protects the plaintiff against certain false statements made against his business, product, or property. The action is most often helpful to a businessperson whose competitor has made false statements disparaging the plaintiff's ***goods or business.*** In such a case, the tort is often called

"trade libel". The plaintiff must generally prove the following elements:

1. **False disparagement:** First, he must show that the defendant made a false statement disparaging the plaintiff's goods, business, etc.

   a. **Falsity:** The plaintiff bears the burden of proving the statement's falsity.

   b. **Clear reference to plaintiff:** The statement must ***clearly refer*** to the plaintiff or his product. P&K 1988 Pocket Part, p. 138.

   c. **Not co-extensive with defamation:** A statement can disparage the plaintiff's business or product even though it is not defamatory as against the plaintiff. For instance, if the defendant tries to get people to buy from her rather than from the plaintiff by saying that the plaintiff is dead or out of business, this is disparagement, even though it's not defamatory of the plaintiff (since it does not hold the plaintiff up to ridicule or disgrace).

2. **Publication:** Plaintiff must show that the statement was "published", as that word is used in defamation cases.

3. **Intent:** The plaintiff must also show ***scienter*** on the part of the defendant. Unlike common law defamation, for which the defendant could be liable if she either innocently or negligently failed to ascertain the falsity of her statement, the trade libel defendant must have either: (1) known her statement was false; (2) acted in reckless disregard of whether it was false; or (3) (according to some courts) acted out of ill-will or spite for the plaintiff, or to interfere with the plaintiff's business in some impermissible way. See Rest. 2d, §623A and Caveat thereto.

4. **Special damages:** The plaintiff must prove ***"special damages".*** This "special harm" is defined the same way as in defamation; i.e., the harm must be "pecuniary."

   a. **General lost business:** Courts used to hold that it was not enough for the plaintiff to show that his business suffered generally, and required him to point out specific lost sales. However, the modern view seems to be that this requirement will not be imposed where it is unreasonable to do so. For instance, if the disparagement is widely circulated, the plaintiff may be permitted to recover for the

general reduction in the volume of his business if he can show that there is no other reasonable explanation for this drop apart from the defendant's statement; see P&K, pp. 972-73.

5. **Defenses:** The defendant can raise a number of defenses, some of which are as follows:

   a. Truth: The defendant can, of course, attempt to show that the statement was true. As noted, it is generally up to the plaintiff to show that the statement is false.

   b. Privileges: Any of the absolute and qualified privileges that could be raised in a defamation case *(supra*, p. 475) may be raised by a trade libel defendant.

   c. Competition: Furthermore, courts recognize a privilege that does not exist in the defamation context, that of ***pursuing competition by fair means.***

      i. General comparisons: In particular, the defendant is privileged to make ***general comparisons*** between her product and the plaintiff's, stating or implying that her product is the better one. But this privilege only extends to statements that are in the language of misrepresentation, "puffing"; see *supra,* p. 444. If the defendant makes ***specific*** false allegations against the plaintiff's product, she will not be protected.

      Example: P and D both make devices for testing industrial material. D sends to P's present and prospective customers a false report that the U.S. government has found P's product to be only about 40% as effective as D's.

      Held, this statement goes beyond the bounds of privileged "unfavorable comparison". A statement that another's product is only "40% as effective" as one's own is already too specific to qualify for this privilege; the matter is even worse when a false allegation is made that this conclusion has been reached by the U.S. Government. *Testing Systems, Inc. v. Magnaflux Corp.,* 251 F. Supp. 286 (E.D. Pa. 1966).

6. **Slander of title:** A similar tort action is given where the defendant falsely disparages ***property rights*** in land, goods, or intangibles. This action is commonly known as one for ***"slander of title".*** See Rest. 2d, §624.

   a. Liens, mortgages and executions: One common way of

slandering title is to file a false mortgage, attachment, lis pendens, levy of execution, etc., which interferes with the plaintiff's right to hold or dispose of his property.

b. Patents, trademarks and copyrights: Another way of committing the tort is for the defendant to state that the plaintiff's goods infringe the defendant's patent, trademark, or copyright.

c. Intent: The plaintiff is required to meet the same scienter requirement as for trade libel. That is, he must prove knowing falsehood, reckless disregard of the truth, or malice.

d. Privileges: The defendant has defenses and privileges similar to those of trade libel.

i. Rival claimant's privilege: In particular, she has a conditional privilege to assert an ***inconsistent legal interest*** of her own. For instance, if she reasonably believes that she may have a right to land which is ostensibly owned by the plaintiff, she may file a lis pendens to prevent the plaintiff from selling the land until its ownership can be adjudicated. Similarly, if she believes that she may have a valid trademark or patent infringement claim against the plaintiff, she may assert this. See Rest. 2d, §647.

ii. Abuse: But since the privilege is conditional, it is lost where it is ***abused.*** It is abused if it is asserted in bad faith, or out of malice toward the plaintiff.

C. Interference with existing contract: The tort of ***"interference with contract"*** protects the plaintiff's interest in having others perform existing contracts which they have with him. The tort claim exists against one who ***induces*** another to breach a contract with the plaintiff.

> **Example:** P runs a theater, and has a contract with an opera singer under which she will perform for P, and will not perform for anyone else during a certain period. D induces the singer not to perform her contract with P. *Held*, P has a cause of action against D for inducing this breach. *Lumley v. Gye*, 118 Eng. Rep. 749 (Q.B. 1853).

1. Contracts as to which inapplicable: Certain kinds of contracts ***cannot serve*** as the basis for this "inducing of breach" cause of action.

a. Illegal contracts: For instance, if a contract is ***illegal*** or "contrary to public policy", the defendant may induce a breach of it with impunity. Rest. 2d, §774. This would be true, for instance, if the contract violates the antitrust laws.

b. Contract terminable at will: If a contract is ***terminable at will,*** most courts hold that the defendant is not liable for inducing one party to terminate it.

i. Restatement view: But the Second Restatement, and a growing minority of modern courts, hold that inducing the breach of a terminable-at-will contract ***does*** constitute interference with contract. See Rest. 2d, §766, Comment g. The theory behind this view is that until the contract has been in fact terminated, it is a valid and existing one, and the plaintiff has a right to expect that it will not be tampered with.

ii. Damages: However, even under this emerging minority view, the fact that the contract could be terminated at any time will be a factor tending to ***reduce the damages*** that the plaintiff has suffered; for instance, if the defendant can show that the other contracting party was unhappy with the service or price he was getting, and would have terminated the contract anyway, this will reduce or eliminate the plaintiff's damages.

iii. Privilege: Also, if the defendant acts for ***reasonable competitive purposes*** (i.e., getting the business for herself), her conduct is very likely to be held to be ***privileged*** if the contract is terminable at will, as it would be if only the "prospective advantage" of the plaintiff had been interfered with. See Rest. 2d, §768, Comment i. But if the defendant acts for other, improper, motives (e.g., desire to drive plaintiff out of business for pure spite) her conduct will not be privileged.

2. "Interference" by defendant: The defendant is liable only if she has ***actively interfered*** with the contract.

a. Mere offer of better price: Thus the defendant does not become liable merely by ***offering a better price*** to the third person, or routinely soliciting his business, even if she knows that an

acceptance would cause the third person to breach his contract with the plaintiff. Rest. 2d, §766, Comment m. But if the defendant says, "I'm offering you a better price than you have with P; if you take me up on it, you'll save enough that you can settle your contract with P and still come out ahead," the defendant has stepped over the line and actively induced the breach. Rest. 2d, §766, Illustr. 3.

3. **Intent:** The defendant's interference must be ***intentional.*** If she has merely negligently prevented another from performing his contract with the plaintiff, the tort of interference with contract has not occurred.

   a. **Knowledge of contract required:** For the defendant to have the required intent, it must be shown that she ***knew about the contract.*** Rest. 2d, §766, Comment i.

4. **Damages:** The plaintiff may recover the pecuniary loss he has sustained as a result of the interference (including the profits he would have made from the contract). Many courts also allow him to recover for ***emotional harm*** suffered.

5. **Privileges:** The defendant's interference may have been ***privileged.***

   a. **Business competition:** The defendant's desire to ***obtain business*** for herself, however, is ***not*** by itself enough to make her privileged to induce a breach of contract. Rest. 2d, §768(2).

      i. **Contract terminable at will:** One exception to this general rule, however, is that if the contract is merely ***terminable at will,*** the defendant is privileged to induce a termination of it solely for the purpose of obtaining the business for herself (assuming that the court is one which even recognizes the possibility that such an at-will contract can give rise to the tort.) Rest. 2d, §768(1).

      ii. **Improper means:** Even this limited privilege will be lost, if the defendant uses ***improper means*** (e.g., threats, violence, illegal boycotts, etc.) to induce the termination of the at-will contract. Rest. 2d, §768(1)(b), and Comment e thereto.

   b. **Defendant protecting her own contract rights:** If the defendant is not trying to gain business for herself, but trying to protect her

existing contract rights, she will generally be privileged to induce a breach. For instance, if D has a contract to buy widgets from X, and she knows that X can't deliver unless he breaks his contract to sell the same widgets to P, D can request that X favor her (and probably even threaten to sue if he doesn't). See P&K, p. 986.

c. Social interests: The defendant may be privileged if she is acting not primarily in furtherance of her own interests, but for ***valuable social*** interests. Thus in the classic case of *Brimelow v. Casson*, 1 Ch. 302 (Eng. 1923), the defendant labor leader was held privileged to induce various theater owners to cancel their contracts with the plaintiff troupe manager, where the wages paid by the latter to his female troupe members were so low as to force them into prostitution (including cohabitation with an "abnormal and deformed dwarf").

6. Interference with plaintiff's own performance: A closely related tort action exists where the defendant has interfered with the ***plaintiff's own performance*** of a contract. This can occur not only by forcing the plaintiff to breach, but also by making performance more burdensome or more expensive. Rest. 2d, §766A.

a. Illustration: For instance, if the defendant intentionally prevented the plaintiff's truck from delivering merchandise to a customer, or forced the truck to take an extensive detour, this would be actionable.

b. Same rules: In general, the same rules as to intent, damages, and privileges, apply as where a third person is induced to breach the contract with the plaintiff.

D. Interference with prospective advantage: Suppose that through the defendant's interference, the plaintiff loses not the benefits of an existing contract, but simply the benefits of ***prospective, potential,*** contracts or other relationships. In this situation, the plaintiff may be able to recover for the tort that is usually called ***"interference with prospective advantage."***

1. Same rules except for privilege: Essentially the same rules apply to this tort as to "interference with contract," discussed *supra*, p. 502.

But there is one major difference: since the plaintiff's interests have not ripened into a present, existing contract, they are somewhat less worthy of protection, and the defendant has a correspondingly greater scope of ***privilege*** to interfere.

a. Competition: The most important practical consequence is that the defendant's desire to ***obtain business for herself*** will be enough to give her a privilege, where she would not be privileged to interfere with an existing contract for this purpose.

b. Interference must be wrongful: Most courts hold that the defendant's interference must be ***"wrongful,"*** and that plaintiff bears the burden of showing wrongfulness. Since the defendant's attempt to protect its own legitimate business interests will not be "wrongful," this is usually a hard showing for plaintiffs to make.

Example: D (Toyota motors) wishes to prevent Lexus cars made by it that have been imported into the U.S. from being re-exported to Japan, since these re-exported cars compete with D's own Japanese sales efforts. P is an American in the business of buying Lexuses from U.S.-based Lexus dealers and exporting them to Japan at a profit. To stop these re-exports, D warns its U.S. Lexus dealers that anyone who does business with people like P may be punished. As a result, the dealers refuse to sell to P, and P's business dries up. P sues D for interfering with the purchases that P could have made from other dealers. The trial judge requires P to prove that D's conduct was "wrongful," and the jury then finds for D. P appeals on the grounds that the burden of proof on wrongfulness should have been placed on D.

Held, for D. It is important to distinguish sharply between claims for the tortious disruption of an *existing* contract and claims that a *prospective* contractual relationship has been interfered with. Courts should give less protection to the latter, and should recognize that "relationships short of [a contract] subsist in a zone where the rewards and risks of competition are dominant." Therefore, the trial judge was correct to require P to prove that D's interference was wrongful. *Della Penna v. Toyota Motor Sales, U.S.A., Inc.*, 902 F.2d 740 (Cal. Sup. Ct. 1995).

i. Intent to bankrupt plaintiff: In fact, as long as the means used are not unlawful or wrongful in themselves (e.g., price fixing, attempted monopolization, etc.), the defendant may even use methods that are intended to ***drive the plaintiff out of business.***

c. Pure malice: IHowever, if the plaintiff is lucky enough to be able to prove that the defendant acted not primarily to obtain economic advantage for herself, but rather, solely or primarily out of ***sheer***

malice, the defendant's conduct will not be privileged.

i. **Mixed motives:** But as long as furtherance of business interests is a significant motive on the defendant's part, the fact that she also bears the plaintiff ill-will will not cause her to lose the privilege.

2. **Honest advice:** One who gives ***honest advice*** to another against doing business with the plaintiff will not be liable for interference with prospective advantage. This is likely to be true, for instance, of advice given by a lawyer, friend, or relative. See Rest. 2d, §772.

3. **Unconstitutional zoning ordinance:** A city may be liable for interference with prospective advantage if it enacts an ***improper zoning ordinance*** (e.g., one that prevents the owner from signing a lease with a particular tenant). P&K 1988 Pocket Part, p. 140.

4. **Interference with non-business expectation:** It may also be tortious to interfere with the plaintiff's ***non-business*** expectations of financial gain. For instance, the defendant might be liable if he induced the plaintiff's grandfather to leave the plaintiff out of his will.

   a. **Interference with prospective legal claim:** Similarly, several courts have held that it can be tortious to interfere with a plaintiff's potential ***legal claim.*** Examples of such interference include: (1) D tampers with medical records or tape recordings; (2) D disposes of potentially revealing evidence she had agreed to preserve; and (3) D conceals facts that, if P knew them, would reveal to P that he has a cause of action. Even mere ***negligence*** by D may make him liable in this way (especially if a special relationship exists between D and P, such as where P is injured when the bus he is riding is hit by a car, and the bus company negligently fails to get the car's license plate number). P&K 1988 Pocket Part, pp. 140-41.

E. Common-law trademark, copyright and unfair competition claims: Related to these general business torts are common-law claims based upon ***trademark, copyright*** and ***unfair competition.*** Although major portions of these areas are governed by explicit federal statutes (e.g. the federal Copyright Act), certain cases involving these subjects are decided on general common-law tort principles.

1. Pre-emption: However, the plaintiff's common-law rights may in some cases be ***preempted by federal laws*** governing the subject area.

> **Example:** P holds a patent on a "pole lamp," an almost exact copy of which is being sold by D. The patent itself has been held to be invalid under federal law for "lack of invention" (a technical patent term). However, P now seeks a state-law ruling that D has nonetheless unfairly competed with P by selling an item which the public will confuse with P's own product.
>
> *Held* (by the U.S. Supreme Court), federal patent law has preempted the domain in question. Since the patent is invalid, a state may not award P damages for unfair competition arising out of D's copying of P's non-patentable item. (But the state *may* require that two otherwise indistinguishable items each be labeled, so that there will be no confusion as to source.) *Sears Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225 (1964).

IV. INTERFERENCE WITH FAMILY AND POLITICAL RELATIONS

A. Interference with family relations: A family member's interest in having the continued affections of the other members of his family is sometimes protected against outside interference by tort claims for "alienation of affections" and the like.

1. Husband and wife: A jilted ***spouse*** may, in a number of states, bring either of two tort claims against an outsider who has interfered with the marital relation:

a. Alienation of affections: Recovery for ***"alienation of affections"*** is available in some states against anyone who has caused the plaintiff's spouse to lose his or her affection for the plaintiff.

i. Not necessarily romantic rival: The defendant can, but does not necessarily have to, be a romantic rival who has lured the spouse away. The tort can also lie against a friend or relative who has convinced the spouse to leave the plaintiff. See Rest. 2d, §683.

ii. Privilege: But the defendant, particularly if he or she is a friend or relative (rather than romantic rival) may be ***privileged*** to interfere; this is the case, for instance, if the defendant acts "primarily to advance what is reasonably believed to be the welfare of the alienated spouse." Rest. 2d, §686.

b. Criminal conversation: A person who has ***sexual intercourse*** with one spouse may be liable to the other for ***"criminal conversation."*** Rest. 2d, §685.

i. Initiator irrelevant: At least in the Restatement's view, it is not a defense that the spouse, rather than the defendant, made the overtures that led to the act. It is also irrelevant that the spouse falsely represented that he or she was unmarried. See Rest. 2d, §685, Comment f. (But this would be a defense to the tort of "alienation of affections," since knowledge or belief that the person is married is necessary for that tort. Rest. 2d, §683, Comment i.)

c. Statutory abolition: Many states have eliminated both of these causes of action by statutes, commonly known as "Anti-Heart Balm" statutes. See, e.g., §80-c, N.Y. Civil Rights Law.

2. Parent's claim: A ***parent*** will not usually have a tort claim against one who alienates his ***child's affections.*** Rest. 2d, §699. But there are at least a couple of special situations in which a parent may sue for interference with filial relations:

a. Causing minor to leave home: He will have a claim against a person who causes his minor child to ***leave home,*** or not to return home. Rest. 2d, §700.

i. Moonies: This has been the basis for a number of tort suits against Rev. Sun Yung Moon and his followers; such suits are aided by the fact that it is no defense that the defendant may have acted out of motives of kindness or affection to the child, or believed that his not returning home was in the child's best interests. Rest. 2d, §700, Comment b.

ii. One parent against other: If a child's parents are divorced, and one has been awarded sole custody, that parent may maintain an action against the other for abducting the child or otherwise inducing him to leave the former's home. Rest. 2d, §700, Comment c. But if there has been no judicial determination on custody, or an adjudication of joint custody, there can be no such suit. *(Ibid.)*

iii. **Marriage:** One who induces a minor child to leave home in order to ***marry*** him or her is privileged, and therefore not liable. Rest. 2d, §700, Comment f.

b. Sexual intercourse with minor female: The parent has a tort claim against anyone who has ***sexual intercourse*** with the parent's minor ***daughter*** (but not son). Rest. 2d, §701. (But if the defendant is the daughter's husband, there will be no liability). (Ibid.)

c. Adoptive parent's claim: If D induces the P's to ***adopt*** a child by misrepresenting the facts (e.g., by concealing the child's violent tendencies), D may be liable. P&K 1988 Pocket Part, p. 129.

3. Alienation of parent's affection: A child will not usually be allowed to sue for the alienation of a ***parent's*** affections. Thus in *Nash v. Baker*, 522 P.2d 1335 (Okla. 1974), five children were denied recovery against a wealthy widow who had lured away their father from their mother "with a finer home, sexual charms, and other inducements." See also, Rest. 2d, §702A.

4. Indirect interferences: The right of family members to recover for indirect losses through physical injury to a spouse, child, or parent, is discussed *supra*, p. 269. See also the discussion of wrongful death recovery *supra*, p. 270.

B. Interference with political and civil rights: There may be liability for interfering with the plaintiff's ***political rights*** (e.g., his right to vote), his ***civil rights*** (e.g., his right to make a public protest) or his ***public duties*** (e.g., his duty to serve on a jury). Such areas are frequently governed by statutes, which often contain explicit civil damage provisions.

1. §1983 suits for state violation of federal rights: The most important statute allowing recovery for civil rights violations is the famous federal ***"section 1983,"*** 42 U.S.C. §1983. Section 1983 allows a person to bring a tort action against any person who, ***"under color of" state law,*** deprives the plaintiff of "any rights, privileges, or immunities" secured by the ***federal Constitution or a federal statute.*** So the basic effect of §1983 is to permit a tort suit by anyone who is injured when a ***state or local official*** violates the plaintiff's federal rights, typically her ***constitutionally-guaranteed civil rights.*** Dobbs,

§44, p. 82.

a. Constitutional provisions: Most §1983 actions allege that state or local officials have violated one of these three federal constitutional provisions:

[1] the 14th Amendment's guarantee of ***substantive and procedural due process*** of law, and its guarantee of ***equal protection*** of the laws;

[2] the 4th Amendment's prohibition of ***unreasonable searches and seizures;*** and

[3] the 8th Amendment's ban on ***cruel and unusual punishment.*** *Id.*

Example (Fourth Amendment): Suppose that Officer, an officer in the City police force, arrests P without probable cause, and then brutally beats P in an unsuccessful attempt to extract a confession. P can recover tort damages from both Officer and City under §1983. Officer has acted "under color of" state law — that is, he has used his official position as justification for his acts. And Officer's conduct amounts to an "unreasonable seizure" under the 4th Amendment. City is vicariously liable under the doctrine of *respondeat superior (supra*, p. 314).

b. Inaction: Probably the most controversial issue in connection with §1983 suits is the extent to which government officials and government itself can be liable for a ***failure*** to act, when that failure is a failure to protect the plaintiff from harm by non-governmental persons. § 1983 case law has essentially followed the common-law approach to this problem: government has ***no affirmative duty to protect citizens,*** except where government has somehow "undertaken" to act.

Example: City learns that P, a young boy who lives there, is being repeatedly beaten by his father. City fails to intervene. The father eventually beats P so badly that he becomes permanently brain-injured.

P cannot recover against City under §1983. That's because a person has no constitutional due process right to affirmative governmental aid, even if such aid is needed to protect a liberty or property interest of which the government could not itself deprive the person. Cf. *DeShaney v. Winnebago County Dept. of Soc. Serv.*, 489 U.S. 189 (1989).

i. Undertaking: But where the state ***affirmatively steps in*** to render protection, then this ***"undertaking"*** may impose a duty to act non-negligently, just as under the common law (see

supra, p. 200). For example, suppose the state takes ***physical custody*** of P, as where P is a prisoner or has been involuntarily committed to a mental institution. Here, it's clear that the government must take reasonable measures to protect P against physical harm by third persons.

c. Limitations: Supreme Court decisions over the last few decades have placed two important ***limits*** on the extent to which suits brought under §1983 can supplement state tort law recoveries.

i. Must show actual damage: First, compensatory damages may not be awarded based on the abstract ***value*** or ***importance*** of the constitutional rights that were violated.

Example: P, a teacher, is dismissed from his public school teaching post in violation of his First Amendment right to academic freedom. *Held,* P may not recover "presumed" damages under §1983, only "actual" damages such as emotional distress, loss of wages, etc. *Memphis Community School Dist. v. Stachura,* 477 U.S. 299 (1986).

ii. Negligence: Second, where the deprivation of a constitutionally-guaranteed right results from a public official's ***negligence*** rather than intent, §1983 ***may not be used at all.***

Example: P, a prisoner, is attacked by X, a fellow prisoner. Prior to the attack, a prison guard working for D (the state) negligently fails to heed P's warning that X plans to attack him. *Held,* for D: §1983 protects only against intentional, rather than negligent, deprivations of Due Process. So P has only his state-law tort remedies (which, apparently, don't exist here because of sovereign immunity). *Davidson v. Cannon,* 474 U.S. 344 (1986).

d. Implied right of action from constitutional provision: Section 1983 allows only actions against state and local government officials, not federal ones. However, when a federal official violates a citizen's constitutional rights, the citizen is often permitted to bring a federal tort-like suit against the official. This occurs because the court finds an ***"implied private right of action"*** for violation of the constitutional provision.

i. 4th Amendment violation: For example, suppose that a federal law-enforcement official violates P's 4th Amendment right to be free from unreasonable searches and seizures. The

Supreme Court has held that P has an implied right to bring a federal civil-damages suit against the official for this violation. See *Bivens v. Six Unknown Named Agents of FBI*, 403 U.S. 388 (1971) (civil suit for money damages allowed against FBI agents for search and arrest made without probable cause).

Quiz Yourself on
MISCELLANEOUS TORTS (Entire Chapter)

94. To cash in on the allure of the famous spy Mata Hari, the Madame X Lingerie Company introduces a line of Mata Hari jewelled bras without Mata Hari's permission. Has the Company committed an invasion of privacy? If so, of what sort? _____

95. Mr. Magoo is driving his car when he hits a pedestrian, Elastic Man. Elastic files a personal injury claim against Magoo, claiming he's wheelchair bound. Magoo's insurance investigator doesn't believe Elastic's as injured as he says he is. The investigator gets a tip that Elastic's going to be at the park for a picnic, and sure enough, at the appointed time, Elastic shows up at the park. The investigator sits 50 yards away, taking photographs of Elastic as he runs around and contorts himself into a pretzel. Someone mentions to Elastic that he's being photographed. He sues the investigator for invasion of privacy. Will Elastic recover? If so, for what variety of invasion? _____

96. Vivien Lee is at a Chinese restaurant, and she gets a fortune cookie for dessert. The fortune inside reads: "A phone call tomorrow will make you a millionaire." Thrilled, Vivien stays home all day for the phone call. In the process, she misses her audition for a Civil War movie. The phone call never comes. Furious, she visits her lawyer, Sid Sharky, and he tells her: "You have a valid criminal fraud case against the fortune cookie company." She presses criminal charges against the Phu Yuc Fortune Cookie Company, which produced the fortune. The case is dismissed, and Phu Yuc sues Vivien for malicious prosecution. Will Yuc prevail? _____

97. Hansel and Gretel are law students at the Gingerbread Law School. There is a bar review expo at school, where all the competing bar review courses display their wares on tables in an auditorium, in an attempt to

sign up students. Hansel and Gretel are standing at the Barcrusher Bar Review table, avidly listening to a sales pitch. They're just about to sign up, pen in hand, when Wicked Witch walks over to them and says, "Don't sign up for this before you talk to me about my course. My materials are better than these; they work like magic. Anyway, I have free chocolate chip cookies and beer at my table." (Assume that these statement are arguably true — they're not clear misstatements of the facts.) Witch leads them away by the elbow, and they wind up signing up for Witch's course instead of Barcrusher's. What's Barcrusher's best claim against Witch, and will it succeed? _____

98. Dogged, a notorious papparazzo, makes his living photographing celebrities (usually against their will) and selling the photographs to magazines. Peggy Pulchritudinous, a famous movie star, hates publicity, and especially hates to be photographed. Rumors have spread that Peggy, while still married, has been carrying on an affair with one of her co-stars, Siegfried Sensitive. Each night for a week, Peggy and Siegfried go for an evening stroll, sit on their favorite park bench, and have a cup of coffee at a sidewalk cafe. Each of those nights, Dogged snaps at least one picture of the couple doing this, although they ask him to stop. Dogged then causes two of the pictures showing the couple holding hands (one while they are walking down the street, the other while they are sitting at the cafe) to be published in a national magazine. Peggy wishes to bring a tort action against Dogged. Is there any claim she can make successfully, and if so, what? _____

Answers

94. Yes, of the "misappropriation of identity" variety. Appropriation is the defendant's unauthorized use (appropriation) of plaintiff's name or likeness for defendant's own commercial or business purposes. That's what Madame X did, so it's liable. Note that with a celebrity like Mata Hari, the damages will focus on the *reasonable value* of Madame X's use, such that Madame X won't profit from the appropriation.

NOTE: Consent is a valid defense to invasion of privacy; so, if Mata Hari had consented to the use of her identity, her claim would be defeated.

95. No — Elastic will lose. The only plausible invasion-of-privacy claim is for "intrusion on solitude." Intrusion requires intrusion on plaintiff's affairs in a way that would be objectionable to a reasonable person. The intrusion must be into something private; that is, where plaintiff has a reasonable expectation of privacy. That's not the case here; there's no reasonable expectation of privacy in a public park, so there can't be an intrusion.

RELATED ISSUE: Say that the investigator set up a high-powered camera at the top of a ladder at the edge of Elastic's yard, so he could photograph him in his bedroom at night through Elastic's upstairs window. This *would* be an intrusion, since there's a reasonable expectation of privacy in a room not visible from the street.

96. **No, probably.** Malicious prosecution requires wrongful institution of criminal proceedings against the plaintiff, lack of probable cause, favorable termination for plaintiff, and damages. Here, the "lack of probable cause" element is missing. Probable cause requires a reasonable ground for belief of the accused's guilt. Vivien initiated the proceedings based on Sharky's legal advice that plaintiff was guilty. This was probably enough to give Vivien probable cause to believe in Phu's guilt. Thus, the prima facie case is defeated.

97. Barcrusher's best claim is for interference with prospective advantage, but it'll probably lose. Interference with prospective advantage requires proof of defendant's act, with knowledge and purpose of interference, adversely affecting plaintiff's prospective advantage (a contract is not required). However, anyone can use fair, commercially-acceptable competitive tactics to lure customers away from competitors *before* they sign a contract. That's all Witch did here. As a result, she's not liable.

98. Probably not. Obviously, Peggy would like to allege invasion of privacy. "Invasion of privacy" is not a single tort, but is rather four different torts, three of which might conceivably (but probably would not) apply here. Peggy might claim that her solitude was intruded upon. However, this tort is generally committed only when the defendant has intruded into a private place — here, everything Dogged captured in his photographs was visible to a member of the public, so Peggy will

probably not win on this claim. Alternatively, Peggy could claim that her likeness and name had been appropriated. But the problem with this theory is that the tort is usually found to exist only when the defendant makes use of the plaintiff's name or likeness to publicize a product. A newspaper's publication of a photograph of a public figure, even where the item's news value is weak, is unlikely to be held to be the sort of "appropriation" that is protected against.

Finally, Peggy could claim that the details of her private life have been unreasonably publicized. However, the tort does not exist when the material that is publicized is of "legitimate concern to the public." Here, since Peggy is a "voluntary public figure" (she has sought her stardom), probably even the somewhat personal details of her romantic life would be held to be of legitimate public concern. Also, the First Amendment might prevent states from making Dogged liable on these facts. So in summary, Peggy probably loses on all three of her invasion of privacy claims. See Rest. 2d, §§652B, 652C & 652D.

***Exam Tips** on*
MISCELLANEOUS TORTS

Most of the torts in this chapter will appear on exams only as "minor" torts thrown into fact patterns that also involve the "major" torts from other chapters. For instance, the various "invasion of privacy" torts are most likely to be encountered in the same fact pattern as defamation and intentional infliction of emotional distress.

- The various ***"invasion of privacy"*** torts are overwhelmingly the torts from this chapter that you're most likely to be tested on.
  - You'll get very little credit for just noting that P may be able to sue for "invasion of privacy." The four types are so different that to get credit for spotting the issue, you've got to identify the right one.
  - Memorize this simplified list of definitions:
    - ***"Appropriation of identity"*** occurs where P's name or likeness

has been appropriated by D for D's financial benefit, without P's consent.

- □ ***"Intrusion on solitude"*** occurs where D invades P's private space in a manner which would be highly offensive to a reasonable person in P's position.
- □ ***"Publicity of private life"*** or ***"public disclosure"*** occurs where D publicly discloses a non-public detail of P's private life, if the effect would be highly offensive to a reasonable person in P's position.
- □ ***"False light"*** occurs where D publishes false statements about P which, although not defamatory, would be highly offensive to a reasonable person in P's position.

☞ For ***"appropriation of identity,"*** you're typically looking for an ***advertisement*** that claims that P uses or endorses the product.

- ☞ P doesn't have to be a public figure or celebrity to win.
- ☞ It's no defense that the statement is true. *(Example:* P, a famous comedian, says on TV, "I always smoke X-Brand cigars." X Co. takes out ads saying, "P smokes only our brand." X is liable.)
- ☞ If the disclosure is ***"newsworthy,"*** that's a defense. However, this defense is usually available only to "news stories," not "advertisements," so anything that looks like an endorsement probably won't qualify for this exception. *(Example:* If the *National Enquirer* runs a photo of a famous comedian on the cover as part of a news story about the comedian's problems, the fact that the newspaper is "using" the comedian's likeness to sell newspapers is irrelevant — the "newsworthy" defense applies.)
  - ☞ The "newsworthy" exception applies even if the item is of interest only to a small portion of the viewers/readers.
- ☞ P doesn't have to show that D had "malice" of any sort, even if P is a public figure or public official.

☞ For ***"intrusion on solitude,"*** look for a ***physical entry*** into P's ***private place*** (typically a ***home, office*** or ***vehicle).*** *(Example:* D

breaks into P's office, rifles through P's desk or safe, and copies down information found there.)

- Make sure the intrusion would be ***"highly offensive*** to a reasonable person." *(Example:* If D is a reporter who interviews P at her home, then without permission goes into P's bathroom to snoop, this probably doesn't meet the "highly offensive" test.)
- So long as there has been the requisite physical entry, the information does ***not*** have to be ***publicized*** in order for the tort to occur — the intrusion itself constitutes the tort.
- Surveillance of P done from and in a ***public place*** doesn't qualify. *(Example:* "Paparazzi" who dog P and shoot her photo constantly while she is in public aren't committing the tort.) If binoculars or telescopes are used from a public place to peer into P's house through a window, this probably qualifies (since it's certainly "highly offensive to a reasonable person").

- For ***"publicity of private life,"*** look for the disclosure of ***details*** that are highly private (and that a reasonable person would find highly offensive to have disclosed). *(Example:* The precise details of a minor celebrity's sexual preferences and sexual habits would probably qualify.)
  - The fact that the details are true (and thus the publication is not defamatory) is irrelevant, and in fact this tort is almost always committed by accurate disclosures.
  - Most commonly-tested aspect: The detail must not be anywhere in the ***public record.*** If it's in the public record (even buried away where no one except a reporter has ever noticed it), this is a defense. *(Example:* If the county real estate records disclose how much P paid for his house and how much he pays in property taxes, this information can be disclosed, even though a reasonable person would find it very offensive and even though no member of the public has ever known the information before.)

- Also, if the item is of ***"legitimate public concern,"*** that's a defense. *(Example:* If P is now on trial for theft, or is now running for public office, the fact that many years ago P was accused of theft by a former boss is probably of "legitimate public concern.")

- For ***"false light,"*** look for a fact pattern in which P is not defamed, but some ***untrue statement*** about P is published. Often, this statement will make P "look ***better"*** than the truth would have. *(Example:* P is falsely said to have been a hero, or to have won a prize.)

  - The statement need not be defamatory.

  - The main issue is whether the reasonable person would be ***"highly offended."*** "Embarrassed" isn't enough. *(Example:* A false statement that P has won a door prize or raffle probably isn't sufficient.)

  - If P is a ***public figure,*** P must show ***"actual malice"*** (that D either knew the statement was false or recklessly disregarded its truth). (Cite to *Time v. Hill* on this point.)

    - Undecided issue: The Supreme Court has never said whether P has to show "actual malice" where P is a ***private figure.*** Point out this uncertainty if your fact pattern involves a private figure.

- The ***"misuse of legal procedure"*** torts (malicious prosecution, wrongful use of civil proceedings and abuse of process) are rarely tested. Just try to memorize the basic definitions and scenarios for these torts.

- The three "business torts" are also not often tested.

  - If D makes false statements disparaging P's goods or services, that's ***"injurious false-hood. "***

  - If D ***induces X to breach an existing contract*** which X has with P, that's ***"interference with contract."***

    - If the contract is ***"at will"*** (terminable at any time on little or no notice), courts are split about whether and when D can be

liable for interfering with it. If D is acting out of spite, or to drive P out of business, D is probably liable; but if D is just offering a better price or better deal to get the business for himself, he is probably not liable.

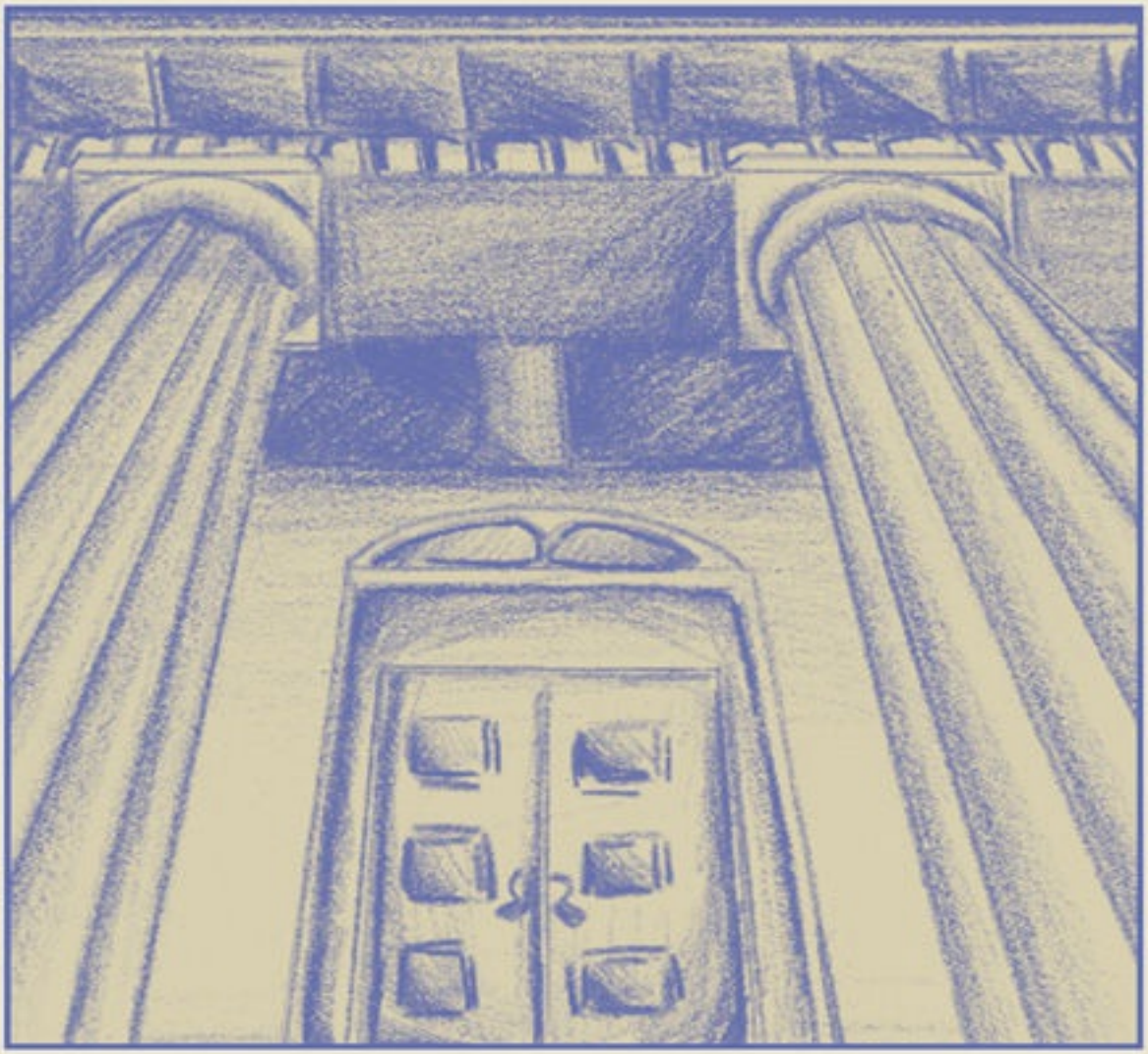
☞ If D interferes with P's chance to make a contract (or otherwise do business) with X in the ***future,*** that's ***"interference with prospective advantage."*** Basically the same rules apply as for interference with existing contract, except that D has a broader set of privileges to use as defenses. *(Example:* If D is ***competing,*** that's clearly protected by the privilege, whereas D's desire to compete is not protected by the privilege where an existing non-at-will contract is involved.)

EXAMPLES & EXPLANATIONS

The Law of Torts

Sixth Edition

Joseph W. Glannon



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EXAMPLES & EXPLANATIONS

The Law of Torts

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Fundamental Protections: The Tort of Battery

INTRODUCTION

The primitive world must have been a fairly scary place. Our ancestors had to cope not only with the awesome forces of nature, impossible to predict or control, but also with another unpredictable danger — other human beings. Doubtless, one of the primary reasons they decided to become "civilized" was to ensure physical security from each other.

Medieval England, from which our tort law evolved, sought to deter physical aggression through a criminal remedy, the "appeal of felony," for physical assaults and other invasions of personal interests. Harper, James & Gray, The Law of Torts §3.1 (3d ed. 1996). If the defendant was found guilty, she would be fined; that is, she would have to pay a sum of money or forfeit her goods to the crown. The appeal of felony helped to enforce the King's peace, but it did nothing to compensate the injured victim for her injury.

Over time, the English courts also developed civil tort remedies to compensate victims of physical aggression. This tort remedy differed according to the nature of the defendant's invasion. For example, the tort of battery authorized damages for deliberate, unwanted contacts with the plaintiff's person. Assault allowed recovery for placing the plaintiff in fear of an unwanted contact. False imprisonment was the remedy for unwarranted

restraints on the plaintiff's freedom of movement. This chapter examines the action of battery, that most basic of tort remedies for invasion of the most basic of personal rights, the right to freedom from unwanted bodily contact.

It seems as though this ought to be a very short chapter. Even the law, with its tendency to overanalyze, can only complicate a seemingly simple matter so much. And battery seems like a simple matter. Jones hits Smith: She has invaded Smith's right to freedom from physical aggression and should be liable for any resulting injuries. All that is left to decide is how much Jones should pay.

Sometimes it is that simple, but often it is not. Jones may have bumped into Smith because Lopez pushed her, or she may have collided with Smith while jumping out of the way of an oncoming car. Perhaps she pushed Smith in order to prevent the car from hitting *her*, or while thrashing around in an epileptic seizure. Each of these cases involves an unauthorized contact with Smith, but Jones should not be required to compensate Smith for such blameless — or even helpful — invasions of Smith's physical autonomy.

Since the courts have refused to condemn all unwanted contacts, they have struggled to craft a definition of battery that limits recovery to those types of contacts the law seeks to prevent. Most courts define battery as the intentional infliction of a harmful or offensive contact with the person of the plaintiff. See Restatement (Second) of Torts §13. Under this definition the defendant must act, her act must be intentional (in the restricted sense peculiar to tort law), the act must cause a contact with the victim, and the intended contact must be either harmful or offensive to the victim. These requirements are discussed in detail below.

THE INTENT REQUIREMENT

As this definition indicates, battery protects against *intentional* invasions of the plaintiff's physical integrity. No contact is intentional if it is not the result of a voluntary act. If Lopez faints and falls on Jones, Lopez is not liable for battery, because she has not caused the touching by a voluntary act. It hardly seems fair to require her to pay damages to Jones for something she didn't "do" in any meaningful sense, that is, something that was not the result of her voluntary conduct. Similarly, if Smith pushes Lopez into Jones, Lopez has

not acted, and would not be liable for battering Jones. See Restatement (Second) of Torts §2 (defining an act as an "external manifestation of the actor's will").

Even if the defendant has acted, however, in the sense of making a voluntary movement, that act may not be intentional as that term is used in the context of intentional torts. Suppose, for example, that Chu fails to look carefully in stepping off a bus, does not see Munoz coming along the street, and bumps into her. Chu's act of stepping off the bus is intentional in the sense that it was deliberate: She certainly intended to put her foot down and move off the bus, but she did not intend to cause the resulting contact with Munoz. To commit a battery, the defendant must not only intend to act; she must act *for the purpose of* inflicting a harmful or offensive contact on the plaintiff, or realize that such a contact is *substantially certain* to result.

> The word "intent" is used . . . to denote that the actor desires to cause consequences of his act, or that he believes that the consequences are substantially certain to result from it.

Restatement (Second) of Torts §8A. This definition lets Chu off the hook in the bus case, since her act was not intentional in the intentional tort sense. She did not act for the purpose of hitting Munoz, nor was she substantially certain that she would. The contact resulted instead from her failure to take proper precautions (such as looking where she was going) to avoid hitting Munoz. Chu may be liable for negligence, but she has not committed a battery.

Indeed, the purpose of the intent requirement is to confine intentional tort liability to cases in which the defendant acts with a higher level of culpability than mere carelessness: where she acts with a purpose, or with knowledge that the act will cause harmful or offensive contact to the victim. If Chu pushed Munoz to get her out of the way, she would meet this intent requirement, since she would be substantially certain that Munoz would find such a contact offensive. She would also meet the intent requirement if she pushed her to embarrass her in front of a friend — an offensive contact — or to cause her to fall in front of a car, an obviously harmful one.

The intent requirement in the Restatement is disjunctive; that is, it is met *either* by a purpose to cause the tortious contact *or* substantial certainty that such a contact will result. Suppose, for example, that Smith heaves a stone at her enemy Jones, though she thinks Jones is probably beyond her range. She is not substantially certain that she will hit Jones, but she acts with the desire

to do so. This satisfies the intent requirement; if the stone hits Jones, Smith has committed battery.

Under this definition, an actor can possess tortious intent even though she bears the victim no ill will whatsoever. If Chu sees Jones walking along the street below and deliberately throws a bucket of water on her from a second-story window, it is no defense that she was simply emptying the scrub bucket and did not mean to offend Jones. In intentional tort terms, she intends those contacts that she is substantially certain will occur, as well as those she desires to see happen. Indeed, a battery can be committed with the best of motives. In *Clayton v. New Dreamland Roller Skating Rink, Inc.*, 82 A.2d 458 (1951), for example, the defendant's employee attempted to set the plaintiff's broken arm, against her protests. While the employee was only trying to help, he knew (because the victim told him so) that she found the contact unwelcome, and consequently met the intent requirement for battery.

TRANSFERRED INTENT

Although intentional tort law requires a very specific type of intent, that standard may be met if the actor intends to commit a battery on one person and actually inflicts one on somebody else. Suppose, for example, that Chu throws a rock at Smith, hoping to hit her, but her aim is bad and she hits Lopez instead. Chu would argue that she cannot be held liable to Lopez, since she had no intent to hit her — she was aiming at Smith.

Although Chu had no tortious intent toward Lopez in this example, she *did* have tortious intent toward Smith. In such cases, courts hold that the tortious intent to hit Smith *transfers to* Lopez. Restatement (Second) of Torts §16(2). Thus, where the actor tries to batter one person and actually causes a harmful or offensive contact to another, she will be liable to the actual victim.

Obviously, transferred intent is a legal fiction created to achieve a sensible result despite lack of intent toward the person actually contacted. The rationale for the doctrine is that the tortfeasor's act is just as *culpable* when her aim is bad as when it is good; it would be unconscionable if she were exonerated just because she hit the wrong person. Under transferred intent, she will be liable whether she hits her intended victim or someone else.

The transferred intent fiction also allows recovery where the actor attempts one intentional tort but causes another. If, for example, Chu tries to hit Smith with a hammer but misses, placing Smith in fear of a harmful contact but not actually causing one, her intent to commit a battery suffices to hold her liable for assault. Conversely, if she tries to frighten Lopez by shooting near her, but the bullet hits her instead, she will be liable for battery even though she intended to commit an assault instead.

HARMFUL OR OFFENSIVE CONTACT

Not all intentional contacts will support a claim for battery. It would make little sense to allow Jones to bring a battery suit against every subway passenger who jostled her during rush hour. This kind of contact is an accepted fact of city life. Similarly, if Smith taps Jones on the shoulder to tell her that she dropped a glove, it is reasonable for Smith to expect that this touching is acceptable to Jones, as it would be to most of us.

To distinguish between such common, socially accepted contacts and actionable batteries, courts require that the defendant intend to cause either a harmful or an offensive contact. *Harmful* suggests broken arms, black eyes, and the like, but a great deal less will do. Section 15 of the Restatement (Second) of Torts defines *bodily harm* as "any physical impairment of the condition of another's body, or physical pain or illness." Of course, if the harm is minor, the plaintiff will recover very little, or be limited to nominal damages, but the courts will still have vindicated her right to physical autonomy.

Even if the contact is not harmful, it is tortious if it is offensive. If Smith chucks Jones under the chin in a demeaning manner, or spits on her, she has caused an offensive contact. Allowing a battery suit for such offensive contacts not only deters such personal invasions, it also provides Jones with a civilized alternative to retaliation. Since offensive acts are particularly likely to provoke retaliation, it is appropriate to provide a battery remedy for such contacts instead.

Of course, people don't all react the same way to every contact. If Smith goes around slapping folks on the back at the office party, Jones may find it obnoxious, but Cimino may be flattered by the attention. If the definition of

offensive contact depended on the subjective reaction of each plaintiff, Smith would not know whether her conduct was tortious until she saw the reaction to it. Smith should have some way of determining whether a contact is permissible *before* she acts. To allow such advance judgments, courts use an objective definition of offensive contact. The Second Restatement, for example, defines a contact as offensive if it "offends a reasonable sense of personal dignity." Id. at §19.

Under this test, a contact is offensive if a reasonable person in the circumstances of the victim would find the particular contact offensive. An actor is not liable under this definition for a contact that is considered socially acceptable (i.e., that would not offend a "reasonable sense of personal dignity"), even though the victim turns out to be hypersensitive and is truly offended. On the other hand, if she makes a contact that the reasonable person *would* find offensive, it is not a defense that she did not mean to give offense, or that she did not realize that the victim would be offended.

What the reasonable person would find offensive varies greatly with the circumstances. Often a prior course of conduct between the parties indicates that they accept contacts that would ordinarily be considered offensive. Suppose that Burgess and Munoz routinely engage in horseplay at work, including backslapping, arm locks, bear hugs, and the like. A stranger would undoubtedly find such contacts offensive, but Burgess and Munoz expect these contacts from each other. Burgess would be justified, given their previous interactions, in inferring that Munoz will not find such contacts offensive, though they would offend the "reasonable sense of personal dignity" of a new employee.

THE DIFFERENCE BETWEEN CONTACTS AND CONSEQUENCES

It is crucial to distinguish the intent to cause a harmful or offensive contact from the intent to cause a particular consequence which results from that contact. Suppose, for example, that Brutus decides to humiliate Cassius by tripping him as he leaves the Senate building. Unfortunately, Cassius suffers a freak fall sideways over a railing and down a flight of stairs, causing a severe concussion. While Brutus intended to trip Cassius, he certainly did not

intend the resulting freak injury. He did not act with a purpose to cause this unusual train of circumstances, nor was he substantially certain that tripping Cassius would result in serious injury.

However, Brutus did commit a battery on Cassius, and is therefore liable for all of Cassius's injuries. Brutus acted with the purpose to trip Cassius, which is surely an offensive contact. He succeeded in causing that contact when Cassius tripped. At that point, the battery was complete, and the law holds Brutus liable for all the consequences of the battery. Cassius may suffer no injury at all, or more injury than Brutus expects, or less, but if the contact itself is a battery, Brutus is liable for the resulting harm, whatever its extent may be.

The language of §8A of the Restatement is a bit confusing on this point: It states that the actor must intend "the consequences" of the act. However, the consequence to which §8A refers is the harmful or offensive contact itself, not the injuries that result from it. In our example, Brutus intended to trip Cassius; because he intended that "consequence," he is liable for the unintended fall down the stairs as well.

Perhaps another example will help to make this important distinction clear. In *Lambertson v. United States*, 528 F.2d 441 (2d Cir. 1976), an inspector ran up behind a worker in a meatpacking plant, jumped on his back, and pulled the worker's hat over his eyes. The worker stumbled forward, struck his face on some meat hooks, and sustained serious injuries. Evidently, the inspector in *Lambertson* acted in the spirit of horseplay; there was no suggestion that he intended the worker to hit the meat hooks or suffer serious injuries. Yet the court concluded that the inspector had battered the worker when he intentionally jumped on his back, since the reasonable person in the victim's circumstances would find that contact offensive. Since he battered the worker when he jumped on him, the inspector could be held liable for the consequences of that battery — the facial injuries — though he did not intend to cause them.

It is not hard to see the reason for this seemingly draconian rule: Batteries are intentional invasions of others' right of personal security. One purpose of intentional tort law is to deter such unauthorized contacts from the outset. Imposing the cost of all resulting injuries on the actor should serve this deterrent purpose. After all, intentional torts are eminently avoidable: Because they require a *deliberate choice* to invade another's rights, the actor need only restrain herself to avoid the invasion. Where she fails to do so, it

seems appropriate to impose all resulting damages — even unintended damages — on her rather than the innocent victim.[1]

THE CONTACT REQUIREMENT

Even the seemingly self-evident requirement of a contact requires some explanation. Suppose Smith doesn't touch Jones at all, but pokes her with a ten-foot pole or stretches a wire across the sidewalk as Jones approaches, causing her to fall. Surely the underlying policy of protecting physical autonomy supports liability in these cases. In each, Smith invades Jones's physical integrity in one way or another and intends to do so under the definition discussed above.

Although no part of her body has touched Jones in these examples, Smith has imposed an unauthorized *contact* on Jones. The defendant need not actually touch the plaintiff at all, or even be present at the time of the contact, to commit a battery. For example, setting the wire out for Jones, knowing that she will trip over it later, will satisfy the contact requirement. An actor is liable, regardless of whether she uses her fist, a nightstick, or a city bus to cause the contact, if it is intended to cause a harmful or offensive contact to the victim.

The contact requirement has also been extended to include objects intimately associated with the victim's body. Chu's sense of personal space can be breached as effectively if Lopez pulls her coat lapels or knocks off her hat as by a direct touching to the skin. Extending the sphere of personal autonomy to include such items protects against intrusive contacts that are very likely to be offensive, thus raising the ante in physical confrontations. Obviously, however, there are limits; if Lopez kicks the fender of Chu's vintage Ford Mustang, the contact requirement is probably not met, even if Chu is sitting in the back seat.

The following examples illustrate the elements of battery. In analyzing them, assume that the Restatement definitions apply.

Examples

The Bard, Updated

1. Romeo likes to drive his souped-up Trans Am around the high school parking lot, racing the motor, accelerating rapidly, and stopping on a dime. He arrives at school one winter morning, speeds across the parking lot, and screeches to a halt in a parking space, hoping to impress the ladies with his hotshot driving. Unfortunately, the parking lot is icy; the rear end of the car skids out of control, jumps the curb sideways, and knocks Thibault to the ground. Has Romeo battered him?

2. When Romeo gets out of the car to apologize, Thibault yells, "What's the idea?" and gives him a push. Romeo slips on a patch of ice, hits his head on one of the mag wheels of his Trans Am, and suffers a serious concussion. Is Thibault liable for Romeo's injuries?

3. Romeo and Juliet are an item, "going steady" as they said when I was in high school. Romeo comes up to Juliet in the school parking lot on Monday morning and gives her a hug, as he is accustomed to doing each morning. Unfortunately, Juliet is standing on a patch of ice and Romeo's embrace causes her to fall and fracture her arm. Is Romeo liable for battery?

4. In an effort to make amends, Romeo starts to help Juliet up. Thoroughly annoyed, Juliet growls, "Don't touch me." Romeo, determined to be gallant, helps her up anyway, despite her efforts to pull away. Is this a battery?

Introducing Judge Fudd

5. Romeo and Thibault are bitter rivals for Juliet's favor. After gym class, Romeo leaves a bar of soap on the floor of the shower Thibault usually uses, hoping that Thibault will slip and fall. He does, suffers injury, and sues Romeo for battery. At trial, Judge Fudd, a well-meaning but sometimes inartful jurist, instructs the jury as follows:

   > If you find that, when the defendant acted, he did not know that his act was substantially certain to cause a harmful or offensive contact to the plaintiff, you must find for the defendant.

   a. Which party will object to Judge Fudd's instruction, and what is wrong with it?

b. Can you write a more accurate instruction on the issue of intent?

6. Romeo is sitting on a wall in front of the school. He sees Thibault wandering across the lawn, with his nose in a book, toward a trench recently excavated for some utility work. Cheering silently, he watches as Thibault ambles absentmindedly toward disaster. To his delight, Thibault walks right into the trench, suffering minor injuries and considerable humiliation. Thibault sues Romeo for battery. What result?

No Offense Intended?

7. Romeo considers himself irresistible. He is accustomed to flirting with the girls at will. He comes up to Ophelia, a new student, on her first day in the school and, by way of introduction, gives her a hug. She sues him for battery. Is he liable?

8. Romeo is a sprinter on the track team. At the first meet of the season, he is nosed out by Mercutio, the star of the visiting team. In a burst of good sportsmanship, he goes over to Mercutio, slaps him heartily on the back, and says “great run, Mercutio!” Mercutio, who, it turns out, is very sensitive about being touched by strangers, reacts with rage at the contact. Is Romeo liable for battery?

9. Romeo and Mercutio meet again at the regional finals. This time Romeo ends up the victor. After the race, he turns to Mercutio on the track, punches his shoulder playfully and says, “Well, Mercutio, turnabout is fair play!” The humorless Mercutio sues him for battery. Is he liable this time?

10. Romeo races Mercutio again in the state finals, and loses. Infuriated, he takes his track shoes and hurls them into the crowded stands. They hit Polonius, causing facial lacerations. Can Polonius sue Romeo for battery?

Star-Crossed Lovers

11. Alas, poor Romeo. He still holds a candle for Juliet, and she won’t even talk to him anymore. He finds her asleep at one of the carrels in the

school library. A confirmed romantic, he slips up to her and kisses her on the cheek. Malvolio, the school sneak, later tells Juliet.

a. Upset, she heads for court. Battery?

b. You have recently passed the bar and hung out your own shingle. Juliet brings her sneaky-kiss case to you and asks you to sue Romeo for her. Would you take the case?

c. Assume Romeo had kissed the sleeping Juliet while they were still going together. However, Juliet does not find out about it until after they have broken up. Can she sue him for battery?

Some Touching Cases

12. Romeo gets the idea that Juliet is seeing Thibault. He decides to get even. Which of the following vengeful acts makes Romeo liable for battery?

a. He confronts Thibault in the cafeteria and makes some very offensive allusions to his moral character.

b. At the prom, he laces Thibault's lemonade with 100 proof vodka. Thibault drinks it.

c. He laces Thibault's lemonade with vodka, but the gallant Thibault gives his drink to Juliet, who drinks it.

d. He throws his own drink at Thibault. Unfortunately, Mr. Merola, the Vice Principal for Discipline, steps through the door at that moment and is hit instead.

e. Just before the science fair, Romeo deliberately sits on Thibault's latest science project, an elaborate geodesic representation of an international space station, built from 5,000 toothpicks and Elmer's glue. Thibault is watching at the time.

f. He blows cigarette smoke in Thibault's face.

g. He shocks Juliet by offering to show her a photo of her favorite rock group but shows her some pornographic pictures instead.

h. A motel manager rents a room to Thibault, even though he knows that the bed is infested with bedbugs.

13. Regan and Goneril, two teenagers, decide to wile away the afternoon standing on a bridge over the interstate, watching the traffic. Regan takes a mirror from her pocket and starts to shine it in the eyes of oncoming drivers. Cordelia, driving under the bridge, is temporarily blinded, swerves out of control, and hits the bridge. Is Regan liable for battery?

Explanations

The Bard, Updated

1. Romeo has done a dumb thing, a clearly negligent thing, but he has not committed a battery. A battery requires an intent to cause a harmful or offensive touching. While Romeo certainly *did* cause a harmful contact, he didn't intend to under the Restatement definition. He did act intentionally in the sense that he deliberately drove his car across the lot. However, while this act was voluntary, he did not act with the purpose of hitting Thibault or with knowledge that he was substantially certain to do so; he was headed in another direction entirely. Nor, the facts suggest, was he trying to frighten Thibault or another student, which might support an argument for transferred intent. He was just showing off. Thus, his act was not intentional in the limited sense in which courts use that term for defining intentional torts.

   In analyzing battery cases, always distinguish the intent to act from the intent to cause a harmful or offensive contact. Battery requires more than a deliberate act. It requires a deliberate act done for the purpose of causing a harmful or offensive contact, or which the actor knows to a substantial certainty will cause such a contact. If only a deliberate act were required, battery would encompass many cases where the actor intended no harmful or offensive contact. For example, a driver would commit a battery if she looked away from the road and got in an accident, even though she did not intend to hit the plaintiff. Or, a joker would be liable for battery for throwing a snowball at a tree, if a pedestrian unexpectedly stepped into the snowball's path. In both of these cases, the actor did a voluntary act. But these acts — like Romeo's in the example — were *not* done with the state of mind necessary to

commit an intentional tort: either purpose or substantial certainty that a harmful or offensive contact would result. They may be negligent acts, if the actor failed to exercise due care, but they are not intentional torts.

2. Although Thibault is justly angry with Romeo, that does not give him a license to retaliate against him. He has intentionally inflicted a contact that Romeo will find offensive, and perhaps harmful as well, and he is liable to him for battery.

   But is he liable for the unanticipated and unintended concussion? As in the Brutus example in the introduction, Thibault is fully liable for all harm resulting from the battery. Although he had no intent — as that term is used in either the Restatement or everyday life — to cause Romeo's concussion, he did intend to push him. Since he committed a battery by doing so, he is liable for all the resulting injuries, even unexpected ones.

   This rule, that a defendant who commits an intentional tort is liable for all the resulting harm, does not apply in negligence cases. Under negligence law, liability is limited to the foreseeable consequences of the defendant's act. See Chapter 12. However, because intentional torts are deemed more culpable, the courts generally hold the defendant liable for all the ensuing consequences, foreseeable or otherwise. This rule imposes very severe damages on Thibault for what seems like a relatively innocuous act — but it didn't turn out to be innocuous, did it? The Solomons of tort law have concluded that the loss in such cases should fall on the actor rather than the victim.[2]

   For an extreme example of this, see *Baker v. Shymkiv,* 451 N.E.2d 811 (Ohio 1983), in which a defendant's trespass to land (an intentional tort) led to an argument with the owner. During the argument, the owner had a fatal heart attack. The trespasser was held liable for it as a consequence of the intentional tort.

3. Given their relationship and Juliet's past acceptance of Romeo's embraces, Romeo is justified in inferring that Juliet will not find his customary hug offensive. The reasonable person in Juliet's circumstances would not be offended by a hug from her boyfriend. But surely she finds falling down and breaking her arm harmful or offensive. Even if Romeo's hug isn't a battery, isn't causing her to fall on the ice

one? (Remember that the contact need not be with the defendant; it can be with the ground or anything else.)

In this case, Romeo did not act with the intent of causing a harmful or offensive contact to Juliet. He had no reason to believe she would find the contact he intended — the hug — offensive, due to their relationship. And the contact she found harmful — the fall — he had no intent to cause: He did not act with a purpose to cause Juliet to fall or with substantial certainty that she would. While Romeo may be liable for negligence, for hugging her where the footing is slippery, he is not liable for battery.

Distinguish this case from Example 2. In that case, Thibault intended a harmful contact — the push. Thus, he committed a battery and was held liable for all the resulting harm, even though it was greater than he reasonably would have anticipated. Here, since Romeo did not intend a harmful or offensive contact, he did not commit a battery and consequently is not liable for battery even though the contact itself turned out to have harmful consequences.

4. Poor Romeo; he was only trying to help. Maybe he even *was* helpful. But he still committed a battery.

In analyzing battery cases, it is important to distinguish between intent and motive. The motive for Romeo's act was honorable, but he still intended to cause a contact to Juliet that he knew she would find offensive, because she told him so. The elements of battery do not include acting from a malicious motive, nor will a virtuous motive prevent liability if those elements are present. The plaintiff has the right to decide for herself which contacts are beneficial; she need not submit to the prodding of any Romeo who wishes to be gallant. Juliet may prefer the higher risk of slipping to the touch of the klutzy and out-of-favor Romeo. That decision is hers, not his. Where Romeo substitutes his judgment for hers, he is liable for battery.

Because of the fundamental value placed on physical self-determination, courts have held defendants liable for battery, even though their motives were pure and their contacts beneficial. The classic example is *Mohr v. Williams*, 104 N.W. 12 (Minn. 1905), in which a doctor was held liable for battery when he operated on the plaintiff's left ear after the plaintiff had consented to surgery only on the right.

Although the left ear was diseased, and the surgery was successful, the court concluded that the doctor had violated the patient's "right to complete immunity of his person from physical interference of others. . . ." Id. at 16.

Introducing Judge Fudd

5. a. Thibault will object to the instruction, and rightly so. If Judge Fudd's instruction were correct, Romeo would not be liable. Although he hoped that Thibault would slip and fall, and put the soap there for that purpose, he could hardly be substantially certain that he would cause Thibault to fall, since he did not know that Thibault would use that shower or that if he did, he would slip on the soap. However, the intent requirement is satisfied either by an act done with substantial certainty that the contact will result *or* by an act done with the purpose to cause the contact. Restatement (Second) of Torts §8A, (See p. 5 supra).

In the practice of law, a word can make a world of difference. Here, the word *or* indicates that either substantial certainty or a desire to cause the result will suffice to establish intent. Since Romeo acted with the purpose to cause the contact, he cannot defend by arguing that it was a long shot that his plot would succeed. Judge Fudd's instruction is wrong. Thibault's lawyer should object to it and have it corrected before it leads the jury to return an erroneous verdict.

b. How about this:

> If you find that, when he left the soap in the shower, Romeo acted either for the purpose of causing Thibault to fall or with substantial certainty that he would cause him to fall, then you should find that Romeo had the intent necessary to commit a battery.

This instruction tells the jury to find the intent requirement met if Romeo acted with either of the states of mind required for an intentional tort.

6. If desire can make a battery, Romeo has surely committed one, since he fervently hoped Thibault would fall in, and was delighted when he did. And we know that Romeo need not directly touch Thibault to batter

him: Contact with the trench suffices to meet the contact requirement. And certainly Thibault found the contact both harmful and offensive.

But Romeo is still not liable to Thibault. He has not done anything to cause the contact. To incur liability, he must *act;* he must inflict the contact, not simply hope for it. This contact results from the acts of others, not Romeo.

No Offense Intended?

7. Obviously, Romeo is of the opinion that no woman in her right mind would object to his attentions. However, the question is not whether Romeo finds his conduct offensive. It is not even whether Romeo thinks that Ophelia will. As the introduction points out, the question Romeo must ponder before his dalliance with Ophelia is whether the reasonable person in Ophelia's circumstances would find it offensive. The answer to that question is almost certainly "yes." Most teenagers don't like being hugged by strangers, even attractive strangers.

So, offensiveness is determined by an objective test — whether the contact would be offensive to the reasonable person in the victim's circumstances. But isn't it true, even if Romeo's hug is "offensive" under this definition, that Romeo must *intend* an offensive contact, not just cause one? And, if Romeo genuinely believed that the new girl in school would welcome his attention, how can he be said to have intended an offensive contact?

Very likely Romeo will be held liable, even if he is too conceited to realize that this contact is offensive under the Restatement definition; the law will attribute to him an understanding of what the reasonable person finds offensive. Otherwise, he could avoid liability based on his testimony that he didn't think it would be offensive. Such a test would allow social boors to escape liability simply because they have poor judgment — or lie about what they understood — even though they inflict unwanted contacts on others.

There is some authority suggesting that an actor commits battery by intentionally causing a contact that turns out to be harmful or offensive, even if the actor did not intend it to be either. This "single intent" theory (that is, that the only intent needed is the intent to make the contact) is approved in *White v. University of Idaho*, 797 P.2d 108 (Idaho 1990);

but see *White v. Munoz*, 999 P.2d 814 (CO. 2014) (en banc) (rejecting the single intent theory). See generally K. Simons, *A Restatement (Third) of Intentional Torts?* 48 Ariz. L. Rev. 1061, 1070 (2006). The draft Third Restatement of Torts explores this "single intent" approach in great detail, and comes down in support of it. Restatement of the Law Third: Intentional Torts to Persons (Tentative Draft No. 1) §102 cmt. b and Reporter's Note.[3] Your Humble Author is troubled by the "single intent" approach, because it would impose liability on an actor who made a contact that was not intended to cause either harm or offense. The Third Restatement draft acknowledges that this imposes "a modest degree of strict liability." Id. at §102, Reporters' Note §b. Romeo would be liable in this example under either a "single intent" or "dual intent" approach.[4]

8. Romeo has again acted with good intentions, but we saw in Example 4 that good intentions will not negate a battery if the elements of the tort are established. However, those elements are not met here, since Romeo has no reason to believe that his slap will be offensive to a reasonable person under these circumstances: Congratulatory hugs and slaps are common among athletes on such occasions.

   The requirement that the contact "offen[d] a reasonable sense of personal dignity" (Restatement (Second) of Torts §19) allows actors to make contacts with others that the ordinary person will not find offensive, without fear of a suit for battery. This requirement places the burden on the party with unusual sensibilities, such as Mercutio, to inform people of his susceptibility. Until he does, those who interact with Mercutio are protected if they conform to generally accepted standards of behavior.

   If actors were liable to hypersensitive plaintiffs for generally accepted contacts like this, many everyday interactions would entail the risk of liability. Under that rule, Romeo could be sued for tapping a stranger on the shoulder to tell her she had dropped her umbrella, or brushing past a fellow passenger on the subway. To avoid liability, he would have to avoid all contact. The world might be a marginally safer place for the hypersensitive, but a great deal of spontaneity would be sacrificed.

9. This example is like the last, except that here Romeo is aware before he acts that Mercutio is sensitive to physical contacts, even those generally accepted by others. The issue is whether the actor is liable for contacts that are not offensive under the Restatement's "reasonable-sense-of-personal-dignity" standard, but which the actor knows *will be* offensive to a particular hypersensitive individual.

The Second Restatement declined to take a position on whether there should be liability in a case like this, but the draft Third Restatement guardedly approves it if the actor knows that the contact is "highly offensive to the other's unusually sensitive sense of personal dignity." Restatement (Third) of Torts: Intentional Torts to Persons (Tentative Draft No. 1) § 103(b). Surely the values underlying battery support liability in this case: The purpose of battery is to protect individuals from unwanted intrusions on physical security. Where an actor knows that another *accepts* contacts that others would find offensive (for example, friends who routinely engage in rough horseplay), his actual knowledge protects him, despite the objective standard usually applied. Conversely, where he knows that another rejects contacts others would tolerate, that knowledge, not the objective standard, should govern his liability. Here Romeo knows this intrusion will be offensive to Mercutio, and he ought to avoid it, even if others would accept the contact.

10. Romeo will doubtless argue that he had no intent, in the battery sense of the term, to hit Polonius. He did not desire to hit him, nor did he know to a substantial certainty that he would hit him — the shoes could have hit anyone.

Clearly, this is an anemic defense. As long as Romeo knew to a substantial certainty that the shoes would hit *someone,* he knew his act would cause a harmful or offensive contact to the person of another. It should not negate the tort that his act had a large number of potential victims. If that were the case, a terrorist who threw a bomb onto the mezzanine at O'Hare Airport would not be liable to the strangers he injured, since he couldn't be sure which ones would be hurt, and wished no ill will to any one of them in particular.

This is not really a case of transferred intent. It is not a situation in which he threw at a specific victim and hit another instead. Rather, it is a

case in which the actor knows at the outset that he will cause a harmful or offensive touching to someone, but does not know who the victim will be. However, as in transferred intent cases, the intent requirement should be considered met, since Romeo's culpability is just as great here as if he had thrown at a particular victim.

Star-Crossed Lovers

11. a. Romeo's romantic gesture would be tortious if Juliet were awake, because it is an intentional contact that he knows she would find offensive. But can it be a battery if she doesn't even know about it?

One need only contemplate examples like the lecherous dentist and the anesthetized patient to confirm that battery must lie in this case. The underlying purpose of battery, to prevent invasions of physical security, will not be fully served if such conduct escapes liability. Juliet's right to be free of unpermitted touchings is infringed just as clearly when she is asleep as it would be if she were awake.

Romeo will probably argue that she did not find it offensive, since she was not even aware of the contact at the time. The argument will not fly. The requirement of offensive contact is met if it is a contact that the reasonable person in Juliet's circumstances would reject if given the choice. If immediate awareness of the contact were essential, a surgical patient could not be battered, even if the doctor gave her a nose job instead of the contemplated appendectomy. *Mohr v. Williams*, the case in which the doctor operated on the wrong ear, clearly indicates that the unconscious patient can be battered.

b. There is no requirement to prove damages in order to establish liability for battery. Proving that Romeo intentionally caused an offensive contact establishes Juliet's right to a judgment in her favor. Getting a jury to say that Romeo battered her may even meet Juliet's purpose for bringing the action, to assuage her sense of the invasion of her person.

However, while a plaintiff has a theoretical right to sue for even a trivial invasion of her person, the majesty of the law is tarnished somewhat by practical realities. While damages are theoretically

unnecessary in an intentional tort case, they are crucial as a practical matter. Most lawyers take tort cases on a contingent fee basis, under which they receive a percentage of the damages recovered as their fee. When there is little prospect of recovering substantial damages, the plaintiff will have a hard time finding a lawyer to take her case. Consequently, victims seldom recover for minor batteries, even if they are clearly actionable.

c. Although Juliet may now be offended at the thought that Romeo had kissed her, she presumably would not have been at the time of the contact. The offensiveness of the contact must be judged at that time, not in retrospect. Romeo must act on his understanding of what Juliet considers offensive *when he acts;* he cannot be expected to assess his conduct against the possibility that they may have a falling out in the future. This is not a battery.

Some Touching Cases

12. a. This is not a battery. It is offensive contact, not offensive conduct, that is required.

b. This is a case of indirect contact. Romeo did not touch Thibault but has intentionally caused him to come into contact with the alcohol because he acted with the purpose that Thibault would pick it up and drink it after he laced it. This is no different from lacing his drink with poison, although the effect is less drastic. So long as the reasonable teenager at the prom would find this offensive (a debatable issue, perhaps) this is a battery.

c. Romeo's intent was for Thibault, not Juliet, to drink the vodka. He did not desire nor was he substantially certain that he would cause a contact with Juliet. However, under the doctrine of transferred intent, a party who attempts a battery on one person but actually contacts another is liable for battery. Since Romeo intended to batter Thibault, he is liable if he causes a harmful or offensive contact to Juliet instead.

This fiction furthers the underlying purpose of battery law, to protect victims of acts intended to cause unwelcome or harmful

touchings. Romeo is just as culpable when his plot goes awry as if it hits his intended target. Under the transferred intent doctrine, liability follows in either case.

d. In this example, Romeo does not even know that Mr. Merola is around when he acts — presumably he would have restrained himself if he had. However, he acted with tortious intent toward Thibault. That intent will transfer to the unintended victim, even if the actor did not know that the unintended victim was there. Romeo tried to cause an offensive touching, and he did; he is liable for it under transferred intent.

e. This is doubtless pretty upsetting to Thibault, but it is not a battery. Battery requires an intentional harmful or offensive contact to the person, not to one's property. No matter how proud Thibault is of his construction, this doesn't fit the elements. It would, however, constitute trespass to chattels, a distinct intentional tort involving interference with another's personal property.

f. There is no doubt that Romeo's act here was intentional and meant to offend. The issue is whether Romeo has caused a contact with Thibault. Clearly, if he spat on Thibault, or took pebbles in his mouth and shot them at him, this would be a battery. But smoke? Why not? Smoke is a substance, the particulate products of burning. Why should it matter if the contact is with small particles propelled through the air, instead of a large rock propelled through the air? Although smoke is (arguably) less harmful, it is equally likely to offend, and was clearly meant to in this case. And isn't it equally likely to provoke a breach of the peace?

Advocates for the rights of nonsmokers have long argued that there should be a battery remedy for smoking. See A. Brody & B. Brody, The Legal Rights of Non-Smokers 75-80 (1977); O. Reynolds Jr., Extinguishing Brushfires: Legal Limits on the Smoking of Tobacco, 53 U. Cin. L. Rev. 435, 456-458 (1984). However, the case law on the point is contradictory, and fails to apply battery analysis consistently. For example, *McCracken v. Sloan,* 252 S.E.2d 250 (N.C. App. 1979), found no battery where the defendant smoked in his office during a meeting with the plaintiff:

> Consent is assumed to all those ordinary contacts which are customary and reasonably

> necessary to the common intercourse of life. Smelling smoke from a cigar being smoked by a person in his own office would ordinarily be considered such an innocuous and generally permitted contact.

252 N.E.2d at 252. The reasoning in *McCracken* is probably outdated, but a more recent case finds no battery from second-hand smoke on even more dubious reasoning. In *Pechan v. Dynapro, Inc.*, 622 N.E.2d 108 (Ill. App. 1993), the plaintiff was continuously exposed to the defendant's smoke, had protested repeatedly, and allegedly was made ill by it. However, the court dismissed her battery claim with the following anemic reasoning:

> [T]he act of smoking generally is not done with the intent of touching others with emitted smoke. [The plaintiff] has not alleged that any of the office's smokers intended that she be exposed to their smoke, or that reasonable persons should have known that their smoke would have contacted [her] in sufficient quantity to reasonably cause the damages claimed.

622 N.E.2d at 119. This analysis blatently ignores the substantial certainty prong of intent, as well as the maxim that damages are not an essential element of the battery tort.

In *Leichtman v. WLW Jacor Communications, Inc.*, 634 N.E.2d 697 (Ohio App. 1994), the court held that smoke can constitute contact for purposes of battery, where the defendant purposely blew smoke in the face of an antismoking advocate. "Furthermore, tobacco smoke, as 'particulate matter,' has the physical properties capable of making contact." 634 N.E.2d at 699. However, the court inconsistently distinguished the second-hand-smoke situation:

> We do not, however, adopt or lend credence to the theory of 'smoker's battery,' which imposes liability if there is substantial certainty that exhaled smoke will predictably contact a nonsmoker.

Id. Compare *Golesorkhi v. Lufthansa German Airlines,* 1997 WL 560013 (4th Cir. 1997) (dismissing claim under Virginia law for lack of a "physical touching").

The dubious reasoning in these cases reflects the discomfort courts encounter in extending a traditional tort like battery to new situations. If smoke is held a contact, how about obnoxious horn honkers, the odor of greasy french fries, or loud football spectators? Or, as one student nicely pointed out in my class, how about air pollution from Midwestern power plants? Taking matters further, if

courts accept that smoke is contact, and that substantial certainty of that contact constitutes intent, will it recognize a right of second-hand-smoke victims to use self-defense? These problems make courts reluctant to follow the seemingly inevitable logic of smoke as battery. As Justice Holmes famously declared, "The life of the law has not been logic: it has been experience." The Common Law 1 (Little, Brown 1881).

g. The battery action is not a general remedy for obnoxious behavior, but a limit on physical invasions of the person. Here again there is no contact, unless the court were to stretch the contact requirement to include light waves. If it did, battery would lie in every case in which an unpleasant scene was foisted on the unwilling eye. The courts will leave the plaintiff to other remedies on these facts, such as infliction of emotional distress.

h. Here, the motel manager presumably had nothing against Thibault; he simply wanted the benefit of his patronage. But he rented Thibault a room with substantial certainty that Thibault would suffer an offensive contact — with the bedbugs. Judge Posner (a former Torts professor) suggested in *Mathias v. Accor Economy Lodging Inc.*, 347 F.3d 672 (7th Cir. 2003), that such contact would constitute battery. Judge Posner cited "the famous case of *Garratt v. Dailey* . . . which held that the defendant would be guilty of battery if he knew with substantial certainty that when he moved a chair the plaintiff would try to sit down where the chair had been and would land on the floor instead." 347 F.3d at 675.

For another interesting case involving the "substantial certainty" prong of intent and an unusual contacts argument, see *Swope v. Columbian Chemicals Co.*, 281 F.3d 185 (5th Cir. 2002). In *Swope*, the plaintiff was an employee of a chemical company. He alleged that he was exposed at work on a daily basis to excessive levels of ozone, and that the company knew of the exposure and that it caused various health problems. The court held that these allegations stated a battery claim against the company. It noted that the victim need not be aware of the contact at the time it happens. Id. at 196.

In many states, employees cannot bring negligence suits for injuries suffered during their employment — they are limited instead to workers' compensation benefits. However, many workers'

compensation statutes do allow suits against employers for *intentional* torts in the course of employment. Students often wonder why we should fuss over the distinction between intentional tort and negligence. *Swope*, in which the plaintiff's lawyer asserted an intentional tort claim to recover a significantly larger award, illustrates one reason that the distinction matters.

13. On first glance, this seems to be a battery because the plaintiff crashed into the bridge abutment. That's a contact if there ever was one.

However, Regan did not have the necessary intent to cause that contact. She did not either desire or know to a substantial certainty that Cordelia would crash into the wall. Presumably, she merely meant to annoy drivers, not to cause a crash, and it is far from substantially certain — though clearly possible — that this brief distraction would cause Cordelia to crash.

Regan did, on the other hand, intend to flash the mirror in Cordelia's eyes: She desired to cause that result, even if she was not substantially certain that her aim would be good enough to hit such a small moving target. But, of course, for battery, there has to be a *contact*, and that means the court would have to conclude that the light rays constitute "contact."

One reader sent me the following e-mail, arguing that the light here satisfies the contact requirement.

> The physics of light is divided into particle theory and wave theory. Although it is certain that light behaves as a wave, physicists more often describe it using particle theory. A particle of light is a photon imparting energy to a surface that it strikes. Under this theory, light is analogous to the smoke of example [12f]. Lasers are highly focused beams of photons having extremely high energy. The difference in a laser and reflected sunlight is a matter of degree, not nature.

This may be good science, but I'm not sure that it would persuade a court that calling light a contact would be good law. Accepting the argument opens the door to slippery-slope arguments in the horn honking and other cases. If Regan had used a high-powered laser that

burns through steel, the court would doubtless find a contact. On these facts, however, the court might conclude that there was no contact, and therefore no intentional tort. But see *Adams v. Commonwealth*, 534 S.E.2d 347, 351 (Va. Ct. App. 2000) (contact through laser held a battery where it "result[ed] in some manifestation of a physical consequence or corporeal hurt"). If Regan's act was not a battery here, it surely was recklessness or gross negligence, which, of course, gives rise to tort liability as well.

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1. This is a wee bit of an overstatement. See Chapter 2, Example 12, which suggests that there is a limit — albeit a limited limit — to liability for unexpected consequences of an intentional tort.

2. But see Chapter 2, Example 12, which suggests that there is *some* limit to this extended liability.

3. A Restatement is a summary of accepted principles in an area of law, published by the American Law Institute. It is not "the law" of any state unless expressly adopted by that state's courts or legislature. The ALI is currently in the process of "restating" the law of Torts . . . and has been for more than twenty-five years! The sections dealing with intentional torts are in draft form but have not been finally approved by the ALI.

4. It appears that Juliet would have a claim for battery against Romeo in Example 3 under a "single intent" theory. If all he needs to intend is the contact, and it causes a harmful contact then liability follows? Y.H.A. is not comfortable with that result. Perhaps the authors of the Third Restatement would dodge that outcome by arguing that there was consent to Romeo's touching.

CHAPTER 2

The Action for Assault: A Tort Ahead of Its Time

INTRODUCTION

Historically, tort law has been reluctant to protect mental tranquility alone. For example, courts have not allowed recovery for insult, or for disturbing the plaintiff's peace of mind through distasteful behavior or voicing unpopular opinions. True, some courts have recently begun to redress limited forms of psychic injury, such as infliction of emotional distress and invasion of privacy. But these have gained currency only in the last few decades. If the duration of the common law were an hour, this would represent only the past few minutes.

Assault, however, is an exception to this general principle. The action for assault, which has been with us virtually since the inception of the common law, does allow recovery for interference with peace of mind, even where there is no physical invasion of the victim's person or property. Unlike battery, which requires a tangible, physical invasion, assault protects one form of mental tranquility, the right to be free from fear or apprehension of unwanted contact. In this sense, assault has truly been a tort ahead of its time.

> One of the most important objects to be attained by the enactment of laws and the institutions of civilized society is, each of us shall feel secure against unlawful assaults. Without such security society loses most of its value. Peace and order and domestic happiness, inexpressibly more

precious than mere forms of government, cannot be enjoyed without the sense of perfect security. We have a right to live in society without being put in fear of personal harm.

Beach v. Hancock, 27 N.H. 223, 229 (1853). Assault, like battery, protects this right of personal security by authorizing damages for threatened invasion of the person. However, assault is definitely not a general remedy for interference with mental tranquility: It only protects against one narrow type of mental distress, the apprehension of immediate physical aggression.

THE RESTATEMENT DEFINITION

Because assault is an ancient remedy applied in many jurisdictions, the cases vary somewhat in describing its elements. In *Cucinotti v. Ortmann,* 159 A.2d 216, 217 (Pa. 1960), for example, the court held that "an assault may be described as *an act* intended to put another person in reasonable apprehension of an immediate battery, and which succeeds in causing an apprehension of such battery." Compare *Western Union Tel. Co. v. Hill*, 150 So. 709, 710 (Ala. App. 1933): "To constitute an assault there must be an intentional, unlawful, offer to touch the person of another in a rude or angry manner under such circumstances as to create in the mind of the party alleging the assault a well-founded fear of an imminent battery, coupled with the apparent present ability to effectuate the attempt. . . ." Despite such differences, the essence of these definitions is quite similar. The elements of the tort are distilled in the Second Restatement definition of assault:

> (1) An actor is subject to liability to another for assault if
> (a) he acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact, and
> (b) the other is thereby put in such imminent apprehension.

Restatement (Second) of Torts §21. Under this definition, the defendant must (1) act with intent (2) to place the victim in apprehension of a harmful or offensive contact or to make such a contact, and (3) the victim must reasonably be placed in apprehension of such a contact. These requirements are discussed in detail below.

THE INTENT REQUIREMENT

Assault, like battery, requires intentional conduct, and in the same restrictive sense. The defendant must act with the *purpose* to cause apprehension of a contact or *substantial certainty* that the apprehension will result. Restatement (Second) of Torts §8A. Thus, as in a battery case, the defendant may not avoid liability by claiming that he did not mean to place the plaintiff in fear of an unwanted touching, if he knew to a substantial certainty that fear of a touching would result. Suppose that Owens throws a shot put across the infield while Jackson is standing in the landing area. Owens cannot avoid liability for assault by arguing that he was just warming up for the decathlon. If Jackson was looking at him, Owens must have known that Jackson would reasonably fear being hit. Thus his act is intentional under the Restatement definition, even though he did not do it for the purpose of placing Jackson in fear.

On the other hand, many cases in which plaintiffs are placed in fear of a touching are not intentional as that term is used in intentional tort law. If Jackson loses control of her car on Main Street, and careens over the curb in Owens's direction, Owens will doubtless be placed in fear of being run down. However, Jackson has not acted with a purpose to frighten Owens, or with substantial certainty that the act will frighten him. Jackson may be liable to Owens for negligence, but she has not assaulted him.

Even if Jackson acts intentionally in the sense that she *deliberately* swerves toward the curb, she lacks intent in the intentional tort sense if she does not desire or know to a substantial certainty that she will hit Owens (or place him in apprehension that she will hit him). For example, if Jackson suddenly realizes that her brakes have failed, and steers for the curb to stop the car, her act is intentional in the sense that it was a voluntary, deliberate act, but it would not be an assault if she did not know that Owens was there and would be placed in fear of being hit.

The Restatement definition also provides that one who attempts to batter the plaintiff but misses is liable for assault if the plaintiff is placed in apprehension of a blow. Restatement (Second) of Torts §21(1). Suppose, for example, that Rose, infuriated by Owens's bragging that he won more Olympic medals than she did, throws a shot put at him but misses. Even though Rose tried to commit a battery rather than an assault, she is liable to Owens for assault if he sees the shot put coming and is placed in fear of being hit. (On the other hand, if Owens is looking the other way and doesn't know of her act, he is not placed in fear of a harmful touching and has no tort claim

for assault.)

This principle, that the intent to batter can also suffice for assault, is obviously akin to the transferred intent doctrine illustrated in Chapter 1. See Example 12c from that chapter, in which Romeo tried to batter Thibault by lacing his drink, but Juliet drank it instead. In that example, Romeo was liable for battery, even though he had no intent to cause a harmful or offensive contact to Juliet. He intended to batter someone, and did, though by mischance he ended up battering someone other than the intended victim. Somewhat analogously, Rose is liable to Owens for assault, even though she tried to batter him instead. She had the intent necessary to commit an intentional tort, and she did commit one, though by mischance she accomplished assault rather than battery.

Because assault only protects against fear of a harmful or offensive contact, the plaintiff must prove that she feared the type of contact that would support a battery claim if it actually occurred. Thus, the analysis in Chapter 1 of the meaning of *harmful or offensive* is also necessary in assault cases. If a contact would not have been harmful or offensive had it been made, the threat of that contact is not an assault either. If Leonard and Spinks often slap each other on the shoulder in jest before sparring, their contacts are not offensive and do not constitute battery. Thus, if Spinks moves to slap Leonard, he does not commit an assault, since Leonard anticipates a touching, but not a harmful or offensive one.

NOTHING TO FEAR BUT APPREHENSION ITSELF

Actually, the word *fear*, though it is often loosely used in the cases, is not quite accurate. The Restatement definition requires that the defendant cause "apprehension" of a harmful or offensive contact. *Apprehension* as used here means the perception or anticipation of a blow, rather than fright. Assault protects not only against the fear of an unwelcome contact, but also against the mere expectation or anticipation of one. If Dillard threatens to spit on Baxter's shoes, Baxter will anticipate, or apprehend, an unwelcome and demeaning contact, which would be a battery if it actually took place. This

anticipation is sufficient for an assault claim, even though Baxter is not frightened in the usual sense of that term.

The Restatement definition also requires that the apprehended contact be *imminent*; that is, the defendant's act must cause the victim to expect that he is about to be touched. This imminence requirement obviously raises slippery-slope problems. Since the dawn of the socratic method, Torts professors have tortured (no pun intended) students with barely distinguishable assault hypotheticals: Dillard swings an axe at Oda from a foot away, from four feet away, through a window, from across the room, from the end of the street but he's a faster runner than Oda, and so on. The Restatement suggests that "imminent"

> does not mean immediate, in the sense of instantaneous contact, as where the other sees the actor's fist about to strike his nose. It means rather that there will be no significant delay. It is not necessary that one shall be within striking distance of the other, or that a weapon pointed at the other shall be in a condition for instant discharge. It is enough that one is so close to striking distance that he can reach the other almost at once, or that he can make the weapon ready for discharge in a very short interval of time.

Restatement (Second) of Torts §29 cmt. b.

This explanation still leaves line-drawing problems in applying the imminence requirement. However, the fact that there will be close cases (again, no pun intended!) is hardly a fatal criticism of the requirement. Close factual issues of this sort will be decided by the jury, under careful instructions as to the meaning of assault. The jurors' practical intuition about what actions are likely to cause reasonable apprehension will lead to a just decision in most cases. On the other hand, it is clear that fear of a *future* contact will not support liability for assault. "If you try out for the Olympic team next month, I'm going to bust your nose" is not an assault, since the threat is not of an imminent contact.

Perhaps such threats for the future *should* be assaults. They are reprehensible, and may be very unsettling to aspiring athletes. Realistically, however, the law can't protect everyone from everything; it has to pick its targets. Such general, future threats suggest possible, vaguely formed (and hence, changeable) intention, perhaps even mere braggadocio. Consequently, they are likely to be less intimidating than the raised fist of an incensed assailant. In addition, future threats leave the victim time to take other steps to prevent the harm, such as going to the police or avoiding the assailant. Thus, they are less likely to provoke immediate retaliation by the victim.

Sometimes a defendant may place the reasonable person in apprehension of an unwanted contact even though he could not actually batter her. Suppose, for example, that Landy brandishes a realistic-looking toy pistol at Oda. It may reasonably appear to Oda that the pistol is real, and that Landy intends to shoot her. Even though Landy could not actually accomplish a battery with the toy pistol, this is assault, since she had the "apparent present ability" to cause an unwanted contact. Put another way, assault turns on whether the defendant's act would place a reasonable person in apprehension of an unwanted contact, not whether the aggressor is in fact able to make the threatened contact. Assault protects the victim's right to be free of meaningful threats of unwanted touchings. Landy's threat obviously could be mighty disturbing even if she could not actually shoot Oda. (On the other hand, if Oda knows the pistol is a toy, she will not apprehend such a touching, and Landy will not be liable for assault.)

THE "MERE WORDS" PROBLEM

The requirement that the victim anticipate an imminent battery has led many courts to hold that *mere words* alone cannot constitute an assault, because they do not sufficiently show the defendant's purpose to immediately batter the victim. For example, a defendant who growls at the victim, "I'm going to wring your neck!" might be held not to commit an assault, but if he extracts a rope from his pocket and proceeds to wind it around his hands, his act provides the necessary evidence of an imminent intent to batter the plaintiff.

This problem of assault by words alone is intractable. The requirement that the defendant go beyond mere words to commit a threatening act is meant to distinguish between bluster and real aggression. Some cases have been quite strict in requiring such an act. In *Cucinotti v. Ortmann,* 159 A.2d 216 (Pa. 1960), for example, the plaintiffs alleged that the defendants confronted them and threatened that they would commit "immediate bodily harm upon the plaintiffs, and would strike the plaintiffs with blackjacks and would otherwise hit them with great force and violence." Id. at 218. The court held that the complaint did not state a claim for assault since no threatening act was alleged. The *Cucinotti* court even held that an allegation that the defendants produced the blackjacks and showed them to the plaintiffs

would not state a claim for assault. Id. at 218-219.

The Second Restatement of Torts, however, suggests a more flexible approach to this problem:

> Words do not make the actor liable for assault *unless together with other acts or circumstances* they put the other in reasonable apprehension of an imminent harmful or offensive contact with his person.

Restatement (Second) of Torts §31 (emphasis added). Accord: Restatement of the Law (Third): Intentional Torts to Persons (Tentative Draft No. 1) §105 cmt. g. The italicized clause suggests that circumstances may suffice to make words actionable as an assault, if they reasonably cause the victim to fear an imminent contact. Courts are likely to be realistic in assessing the defendant's intent; where the circumstances clearly indicate that he is about to strike, very little more than words — such as a step, a rolling up of sleeves, or a drawing back of fists — will suffice to take the case to the jury. Even without that, courts may allow recovery based on the words and surrounding circumstances alone, if those circumstances are compelling enough. For example, some courts, relying on §31 of the Second Restatement, would probably allow recovery on the facts of *Cucinotti.* For cases finding assault despite the absence of an obvious aggressive act, see *Gouin v. Gouin*, 249 F. Supp. 2d 62 (D. Mass. 2003) ("you can either do it my way or I can beat you half to death") and *Vetter v. Morgan*, 913 P.2d 1200, 1204 (Kan. App. 1995) (threat to pull plaintiff from van sufficed under the circumstances).

CONDITIONAL THREATS

Other factors may also undermine the imminence element of assault. Suppose that Oda snarls at Rudolph, "If you hadn't fouled out of the hundred-meter competition, I'd beat you to a pulp." Here, Oda's own threat defeats the assault, since her words indicate that she does not plan to carry it out. Her comment is still unpleasant and unwelcome, but it is not likely to make Rudolph anticipate immediate invasion of her physical security. Similarly, the defendant who states, "If you were not an old man, I would knock you senseless," does not assault the plaintiff, since his own words negate the

intent to cause a harmful contact.

Some threats, however, will constitute assault even though they are conditional. Suppose that Oda snarls at Rudolph, "If you don't get off this track, I'll kick your tail into next week." This folksy threat is conditional, in the sense that Rudolph can avoid the threatened battery by leaving. At least in theory, she need not fear a blow, because she holds the means of avoiding it. Obviously, however, this should still be an assault. Otherwise, Rudolph could be forced to abandon her right to walk the streets (or run the track) in order to avoid battery. Bullies would be able to impose their will on others by the threat of force, yet incur no liability. One need only pose a slightly more extreme hypothetical ("If you don't go to bed with me, I'll throw you out this window") to make clear that the imposition of a condition that the assailant has no right to impose will not defeat an assault, even though the plaintiff can avoid being struck by complying with the unlawful demand.[1] See, e.g., *Holcombe v. Whitaker*, 318 So. 2d 289, 294 (Ala. 1975) (liability for conditional threat where no right to impose the condition).

CRIMINAL ASSAULT DISTINGUISHED

Since the early days of the common law, assault has been recognized not only as a tort, but as a crime as well. However, the crime of assault has not always been equated with the tort of assault. Historically, criminal assault was usually defined as an attempt to commit a battery. *Pope v. State, 79* N.Y.S.2d 466, 471 (1948), *aff'd, 99* N.Y.S.2d 1019 (1950) (defining assault as "an unlawful offer or attempt with force or violence to do corporal hurt to another"); W. LaFave, Criminal Law §16.3. This definition does not specify that the victim must anticipate the blow; the mere attempt to batter suffices. Under this criminal law definition, if Haines throws a javelin at Mathias, intending to injure him, he commits a criminal assault, whether or not Mathias sees it coming. However, this would not constitute the civil tort of assault if Mathias were unaware of the oncoming javelin, since he would not be placed in apprehension of a blow.

By contrast, if Owens pretended to throw the javelin at Mathias simply to frighten him, without intending to release it, this would be an assault in the tort sense of the term (if Mathias saw him do so), since it would doubtless

place Mathias in fear of being skewered. But it would not be criminal assault under the traditional approach if Owens had no intent to throw, since he had not in fact attempted a battery. Similarly, if an assailant has no ability to cause the battery, as where Mathias threatens Owens from a distance with an empty gun, he does not commit a criminal assault under the traditional definition, but would commit the tort of assault.

In recent years, many states have amended their criminal statutes to make conduct that constitutes assault in the tort sense punishable as a criminal assault as well. A majority of states now make either act — attempted battery or placing in anticipation of a battery — a criminal offense. W. LaFave, Criminal Law § 16.3(b). But the historical distinction lingers in the form of confusing statements in the cases, such as the oft-repeated statement that "every battery includes an assault." *Western Union Tel. Co. v. Hill*, 150 So. 709, 710 (Ala. App. 1933). That is clearly untrue in the tort context: If the defendant kicks a sleeping plaintiff, he commits the tort of battery, but not the tort of assault, since he has not placed the defendant in fear of the contact.

The following examples probe the various elements of assault. In considering them, assume that the Restatement definition applies. After the examples, there is a brief discussion of how to plead the elements of assault and battery, together with an illustrative complaint.

Examples

Fear and Trembling

1. Hennie, an Olympic figure skater, is about to perform her final routine in the women's individual skating event. She brings her music CD, meticulously edited and carefully guarded over four years of preparation, into the arena and puts it on the table by the CD player. Wilson, a sports cartoonist with a sick sense of humor, puts the CD on the floor and pretends to jump up and down on it while Hennie looks on from across the ice. Hennie is terrified that it will be broken. Can she sue Wilson for assault?

2. The malicious Wilson crawls into the grid above the rink and loosens a heavy Olympic banner. He drops the banner as Hennie skates under him, but it sails a bit and lands ten feet behind her. She then turns and sees the

banner lying on the ice and is shocked to think how close she came to being injured.

a. Does she have an assault claim against Wilson?

b. Is Wilson guilty of the *crime* of assault?

3. Wilson lets the banner go, aiming for the unsuspecting Hennie, who is concentrating on her routine. As the banner falls, she looks up, sees it coming, and skates to safety. Is this an assault?

4. Assume that Hennie sees the banner coming, but she can't get out of the way in time. Hennie is hit, though not injured. Can she sue for assault?

5. Wilson crawls up into the grid, sees a skater below, thinks it's Hennie, and drops the banner. However, the skater is actually Thomas, who looks up, sees the banner falling, and barely escapes being hit. Can Thomas sue Wilson for assault?

Some Variations

6. Button, Hennie's partner in the doubles competition, is sitting in the stands and sees the banner fall toward her. He is terrified that she will be hit. He sues Wilson for assault. What result?

7. Suppose that Button was warming up at the same time as Hennie. Wilson, while climbing across the grid to loosen the banner, knocks an iron clamp off a beam. Button, alerted by a spectator, looks up in alarm and sees it coming at him, but manages to duck out of the way. Is Wilson liable to him for assault?

8. Wilson, a fan of the Russian sprinters, approaches the U.S. track coach. He shakes his fist and snarls, "If you run Ashford on the anchor leg of the women's four-hundred-meter relay tomorrow, I'll see that you never walk again." Is this an assault?

Judge Fudd at the Olympics

9. Hennie is practicing for her routine while the Zamboni (that big machine

that grooms the ice) circles the rink. As she gracefully executes a backward glide, Wilson yells to her, "Watch it! You're going to hit the Zamboni!" Although Hennie is startled, the Zamboni is actually on the other end of the rink. Hennie sues Wilson for assault.

a. Whether Wilson is liable for this conduct will depend on how the jury is instructed on the definition of assault. Consider the Restatement definition and the definition in the *Cucinotti* case, both quoted at p. 24. If you represented Hennie, which would you ask Judge Fudd to use in instructing the jury, and why?

b. If you represented Wilson, what other argument would you raise that Hennie could not meet the prima facie elements of an assault claim?

c. Gibson, the driver of the Zamboni, realizes that Hennie is still somewhere on the ice, but starts grooming the ice anyway. Coming around the end of the rink, Gibson suddenly reverses direction, turning quickly back the way she had come, and nearly hits Hennie, skating behind the Zamboni. Is this an assault?

The Impossible Dream

10. Corbett, a four-foot-nine-inch gymnast, approaches Press, a 250-pound shot-putter who has just beaten out the American favorite in the shot put competition. Shaking her fist at her, she growls, "Press, wipe that smile off your face or I'll wipe it off for you!" Press sues Corbett for assault. Is she liable?

11. Press, as it turns out, is a sensitive type. She is so upset by Corbett's threat that she develops a phobia about competition and goes into therapy to overcome it. She sues Corbett for a substantial sum for these consequences. Is Corbett liable for them?

Outrageous Fortune

12. Mathias, a rival of Weismuller, decides to upset him before the finals. While Weismuller is warming up, Mathias runs at him suddenly, startling Weismuller, who turns to run and sprains an ankle. Weismuller is taken to the hospital. While he is being treated, there is a fire in the

hospital and Weismuller is burned. Is Mathias liable for his burns?

Explanations

Fear and Trembling

1. In this example, Hennie clearly would be traumatized by Wilson's conduct, but would not succeed in an action for assault. Assault addresses only one narrow form of emotional distress, apprehension of a contact with the person of the plaintiff. That is not what Wilson has threatened in this case. Wilson did not intend to touch Hennie, nor did she fear that he would. Since assault only protects against threatened contacts with the plaintiff herself, this is not an assault.

   It surely is obnoxious behavior, though. Hennie ought to have a remedy for such conduct, even if it can't be shoe-horned into the elements of assault. If it isn't assault, it must be *something*, or else the law ought to make it something and give it a name so Hennie can recover. Traditionally, the common law did not provide a remedy for such antisocial acts — the courts did not attempt to redress all grievances, but confined themselves to the most venal. Only recently have the cases begun to develop the tort of infliction of emotional distress, which allows recovery for acts that cause severe distress, regardless of whether a physical threat was made. See also Restatement (Second) of Torts §870 (supporting liability for intentional infliction of harm that does not fit the elements of traditional intentional torts). But the assault tort, too hoary with age to learn new tricks, only applies to threats to the plaintiff herself.

2. a. When Hennie turns and sees the banner, she realizes that she might have been hit and is justifiably upset, but this is still not an assault. There is a difference between apprehending an imminent injury and realizing, after the fact, that you have narrowly escaped one. The elements of assault require that the plaintiff be placed in apprehension of an imminent contact. Hennie's post hoc awareness that the banner almost hit her may be equally disturbing, but it isn't an assault.

   As in the last case, our instincts tell us there should be a remedy

for this kind of behavior. If there is, however, it will have to be under the rubric of intentional infliction of emotional distress or some other cause of action such as "prima facie tort" (see Restatement (Second) of Torts §870), not assault. The assault cause of action is too arthritic to be stretched this far.

b. Under the traditional criminal law approach, an attempted battery is an assault. Wilson's act would constitute criminal assault if, as the example suggests, he acted with a purpose to hit Hennie when he dropped the banner. But the *tort* of assault is not synonymous with attempted battery; it requires that the actor place the plaintiff in apprehension of an impending, not a past, touching.

3. In this case, Wilson tried to hit Hennie, not frighten her. Indeed, the success of his scheme probably turned on her ignorance of the peril, since she could skate away if she knew it was on the way. Thus, Wilson may try to argue that he did not intend to cause Hennie to apprehend an imminent contact, only to make the contact itself.

   The argument fails under the Restatement definition of assault. Although Wilson only tried to commit the battery itself, he is liable for assault since he acted with tortious intent and placed Hennie in apprehension of a harmful touching. Under Restatement (Second) of Torts §21, the intent requirement is met if Wilson was trying *either* to cause the contact (as he was in this case) or to cause Hennie to apprehend it, and she actually suffers such apprehension.

4. Since the banner actually hit Hennie, this is a battery, even though she suffered no injury. Only an unwelcome touching, not resulting harm, is necessary to complete the battery. But Hennie suffered an assault as well, since she saw the banner coming and was placed in apprehension that she would be hit by it. The torts of battery and assault often occur together, though of course the elements of each must be separately satisfied.

   If Hennie had not seen it coming, she would have suffered a battery but not an assault, since she would not have experienced apprehension of the impending contact, but only the contact itself.

5. The twist in this example is that Wilson made a mistake about who the

skater was. Clearly, his act should be an assault. Wilson had the necessary intent to cause an assault (or a battery, which would also suffice) and he actually did place the skater in apprehension of a harmful touching. Yet, he had no intent to assault *Thomas.*

While this example looks a little like a transferred intent case, transferred intent does not apply. Wilson did not aim at one person and hit another: He aimed at Thomas and she is the one who suffered the apprehension. The problem is that he made a mistake about her identity.

In the law of intentional torts, this is analyzed under the aptly named doctrine of mistake. Generally, a tortfeasor will be liable to a victim even if mistaken about her identity. After all, Wilson saw Thomas, aimed at her, and meant to hit her. He's a bad actor; he *ought* to be liable! Imagine that he had shot Thomas, thinking she was Hennie. It would be outrageous if he could defend on the ground that he thought she was someone else. He can't. As the aggressor, Wilson is liable for his tortious act whether the victim is the person he thought she was or not.

There's a lovely old case on mistake, *Ranson v. Kitner,* 31 Ill. App. 241 (1888), in which the defendant shot and killed the plaintiff's dog, thinking it was a wolf. In *Ranson,* the court held the defendant liable, throwing the risk of the mistake on the defendant. It seems appropriate, where the actor acts for the antisocial purpose of causing a harmful or offensive touching, to place the risk of mistake on him. Another example is the intentional tort of trespass to land: Tort law holds an actor liable for trespass if she enters land of another, even if she mistakenly believes it to be her own. See Dobbs, Hayden & Bublick, Dobbs' Law of Torts §50 (cited hereafter as "Dobbs' Law of Torts"). The intent requirement is met, since the actor intended to enter the land; the law places the risk of mistake as to ownership on the actor.

Some Variations

6. In this example, Button has been placed in fear that Hennie will suffer a harmful or offensive contact. This is not assault, however, because assault protects only the intended victim from threats of bodily contact, not bystanders who fear for the victim's welfare. Restatement (Second) of Torts §26 cmt. a.

Since threats to physical security are considered so antisocial, and are so easily avoided by a little self-restraint, why not allow Button to recover on facts like these? Broadening the right to recover would further deter assaultive conduct, and remedy real infringements of Button's mental tranquility.

Perhaps so, but if we allow Button to recover, why not Hennie's manager — or her boyfriend, or anyone in the audience, or anyone who sees it on TV? Naturally, Button has more at stake than some of these bystanders, but each may suffer real distress from the fear that Hennie will be injured. Opening up the tort to third persons may not be worth the candle, since in most cases the truly distressed person will be the intended victim.

7. Wilson has placed Button in fear of a harmful or offensive contact with the clamp, but he has not acted intentionally in the restricted intentional tort sense. He may have carelessly knocked the clamp down, but he did not do it for the purpose of hitting or frightening Button, nor was be substantially certain at the time that it would do so.

   At the time of the act, however, Wilson was on his way to commit an intentional tort on Hennie by dropping the banner on her. Can Button's counsel make a transferred intent argument based on this? It seems not; transferred intent applies where a specific act is done with tortious intent and misfires. Here, the act of knocking down the clamp was not done with intent to hit or frighten anyone. Button cannot prove intent by showing that Wilson was planning to commit a tort later on someone else. He must focus on the act that placed him in apprehension of a harmful touching. That act may have been negligent, but was not done for the purpose or with substantial certainty that it would cause such apprehension.

8. In this example Wilson has threatened the coach with physical violence if he does not comply with Wilson's demands. Naturally, Wilson has no right to tell the U.S. track coach who to run in the relays, so the fact that the coach can avoid the threat by doing as he is told does not prevent this from being an assault. However, it isn't an assault anyway, since Wilson has not threatened the coach with an imminent contact. A threat to do something tomorrow almost certainly is not imminent; a future

threat, while reprehensible, does not satisfy the imminence requirement.

Judge Fudd at the Olympics

9. a. It would be crucial for Hennie to convince the judge to instruct the jury in terms of the Restatement definition instead of that given in the *Cucinotti* case. *Cucinotti*, if you read the definition carefully, requires that the defendant place the plaintiff in apprehension of a *battery*. Here, presumably Hennie anticipated an accidental collision with the Zamboni, not a deliberate battery by the driver. If apprehension of a battery is necessary, Wilson would not be liable.

Under the Restatement definition, however, the defendant need only cause the victim to apprehend a harmful or offensive contact, not necessarily a contact by the defendant, or one which meets the elements of battery. See Restatement (Second) of Torts §25 (victim need not be placed in fear of a touching from the actor in order to constitute assault). Under the Restatement definition, Wilson could be liable, since he caused Hennie to fear a harmful contact, though not a contact with Wilson or one which would constitute a battery at all.

There are many ways an actor can place a victim in fear of harmful or offensive touchings without threatening a battery. Consider the following:

- When passing a construction site: “Watch out, a plank is falling on your head!”
- While camping in the desert: “Don’t move; there’s a rattler next to your foot!”
- While riding up in a ski lift: “Jump! the cable’s about to snap!”

Such obnoxious tricks can be mighty disturbing to one’s mental tranquility. The drafters of the Restatement evidently concluded that inflicting such apprehension should be actionable. See Restatement (Second) of Torts §25 illus. 1 (actor liable for sounding a buzzer behind the victim in the desert, placing him in fear of a snake bite). However, your author has found no cases either imposing or denying liability in such circumstances.

b. Wilson's counsel will doubtless argue that this is a case of mere words, without any act. Yet, as the introduction suggests, words together with circumstances can create reasonable apprehension of unwanted contact. The Second Restatement (§31 cmt. d) gives the example of a thief who stands in the dark road, holding a gun but without moving, and says "stand and deliver!" These mere words, in context, certainly incite a fear of an imminent harmful touching; the discussion in the Restatement comment clearly suggests that the thief could be sued for assault. Accord: Restatement of the Law (Third): Intentional Torts to Persons (Tentative Draft No. 1) §105 cmt. g.

   Similarly, here, it seems likely that Wilson's words and excited tone of voice, together with the circumstance that Hennie is skating backward while the Zamboni is grooming the ice, would reasonably cause her to fear hitting the machine, even if Wilson does not move a muscle. Under the Restatement's approach, a court would likely uphold a finding of assault on these facts.

c. Although Gibson has acted "intentionally" in the sense that she meant to turn the Zamboni, the example suggests that she did not know that Hennie was behind her. Thus, she did not act for the purpose of placing Hennie in apprehension, nor did she know to a substantial certainty that she would do so. Her act may have been negligent, but was not an assault.

The Impossible Dream

10. Perhaps your first response here is that Press would have to be dreaming to be at all intimidated by Corbett's threat. Given the disparity in their size, the reasonable shot-putter would not have feared a threat from Corbett, so arguably no assault occurred.

   However, while Press doubtless was *not frightened* by Corbett's threat, her conduct does cause Press to *apprehend* an unwelcome contact from her — surely Corbett has the present ability to attack Press, even if she was unlikely to cause her any substantial harm. The action for assault protects victims from the anticipation of unwelcome contacts, even where they are confident that they can adequately defend themselves. Put another way, assault turns on the acts and intent of the

defendant, not on how good the victim is at self-defense. The strong have a right to physical autonomy as well as the weak, and should not be placed in the position of having to defend themselves from such invasions. Corbett is liable for assault.

11. In this example, the plaintiff reacts to the assault in an unexpected manner. Corbett's threat would be a minor annoyance to the average shot-putter, but Press is a hypersensitive soul who is really upset and permanently affected by it. The example is reminiscent of Example 8 in Chapter 1, in which Mercutio is upset by a good-natured slap on the back that other athletes would casually accept.

    Although it may be reminiscent of the Mercutio example, this case is different. In that example, Romeo did not commit a battery, since the reasonable person under the circumstances would not be offended by the contact Romeo made. Consequently, he was not a tortfeasor at all, and was not liable even though Mercutio was actually distressed. Here, however, Corbett did commit an assault, since she threatened a contact that would be offensive to the reasonable person. Consequently, she *is* a tortfeasor, and is liable for the damages Press suffers as a result of the tort — *all* the damages she suffers, even though they exceed the damage one would anticipate from the conduct.

    The difference between these two examples is important to understand. In the Mercutio example, the fact that the reasonable person would not be offended by the contact goes to the existence of liability in the first place. In the Press example, because a reasonable person would find the impending contact offensive, the threat is tortious. Since Corbett has committed a tort, she "takes the plaintiff as she finds her"; she is liable for the actual damages Press suffers, even if they are greater than the average shot-putter would experience from the tortious conduct.

Outrageous Fortune

12. In this example, Mathias clearly assaulted Weismuller. He will certainly be liable to him for the ankle sprain. But would a court go so far as to hold Mathias liable for the freak burn injury Weismuller suffered while at the hospital?

    It is often broadly stated that intentional tortfeasors are liable for all

the consequences of their torts, even unintended consequences. For example, where Brutus tripped Cassius in Chapter 1, and Cassius unexpectedly fell down the stairs, I suggested that Brutus would be liable for all of Cassius's injuries, even though they are greater than Brutus intended. See p. 8.

However, the result may be different where the subsequent injury is unforeseeable, as the burn injury is here. If Mathias had caused Weismuller's ankle sprain through negligence, the concept of proximate cause would probably bar Weismuller from recovering for the unforeseeable burn injury. See Chapter 12. While courts often impose liability for unexpected consequences on intentional tortfeasors, there is probably some foreseeability limit in intentional tort cases as well. The Third Restatement recognizes that there is a limit to the scope of liability even for intentional torts. See Third Restatement of Torts: Liability for Physical and Emotional Harm §33(b) (in considering whether to impose liability for unexpected harm from an intentional tort, the court should consider the moral culpability of the actor, the seriousness of the harm intended, and the degree to which the actor's conduct deviated from appropriate care). Here, Mathias's spur-of-the-moment act seems relatively mild compared to the severe consequences that ensued and the unexpected manner in which they occurred. Despite the occasional language in the cases suggesting that there is no proximate cause limit on intentional tort liability, the court might well refuse to make Mathias pay for Weismuller's burn injury, even though he committed an intentional tort.

PLEADING CLAIMS FOR ASSAULT AND BATTERY

These two chapters have analyzed the substantive elements of assault and battery, that is, the basic facts the plaintiff must show to establish that the defendant is liable. It may be useful to see how these elements are presented to a court in a complaint for assault and battery.

The first step in seeking recovery for a tort claim is to file a complaint

alleging that the defendant has committed a tort and demanding damages. A well-crafted complaint should allege a *prima facie* case, that is, the basic facts establishing that defendant's conduct fits the elements of the tort for which the plaintiff seeks damages. In an assault complaint, the plaintiff must allege facts that show that the defendant intentionally placed her in apprehension of a harmful or offensive touching. A battery complaint must allege facts that show that the defendant intentionally caused such a harmful or offensive touching. In addition, the plaintiff should allege the harm that resulted from the assault and the relief (usually money damages) that she seeks as compensation.

Often, a single incident will support claims for both assault and battery. Figure 2-1 is an example of such a complaint. Like most court papers, it is basically straightforward. It begins by identifying the parties (paragraphs 1 and 2) and then briefly setting forth the events that gave rise to the claim. See paragraphs 3-5. The complaint then recasts the facts in terms of legal causes of action, in individual *counts* or *claims for relief.* Paragraph 7 of Juliet's First Claim for Relief specifically alleges that Romeo's conduct satisfies the elements of an assault: an act ("threatened to strike her and shook his fist"), intent ("intentionally"), and resulting fear of a touching ("placing her in fear that he was about to strike her"). Paragraph 8 does the same for the second assault alleged. Paragraph 11 similarly alleges the elements of battery. Thus, the complaint demonstrates that the plaintiff claims she can establish the facts necessary to recover for each tort. In addition, it alleges the injuries suffered as a result of the defendant's tortious acts (paragraphs 9 and 12).

Finally, Juliet's counsel includes a demand for damages (the "wherefore" clause following paragraph 13). The damage demand here far exceeds the actual out-of-pocket costs Juliet incurred; a large part of the injury in intentional tort cases is intangible emotional harm, such as distress, pain and suffering, and humiliation resulting from the invasion. Such damages are genuine but hard to quantify; hence, plaintiffs often demand a good deal more than their out-of-pocket damages in cases involving such intangible elements as pain and suffering, emotional distress, interference with reputation, or other psychic injuries. Similarly, punitive damages, which may be awarded for intentional torts in some states to punish and deter tortious conduct, also may lead to an award of damages which far exceeds the plaintiff's economic damages from the tort.

STATE OF WEST DAKOTA

CONKLIN COUNTY, SS.

CIVIL ACTION NO. 19-7192

JANE JULIET,

Plaintiff,

v.

COMPLAINT FOR ASSAULT AND BATTERY

RONALD ROMEO,

Defendant

1. The plaintiff is an individual residing at 332 Ruiz Circle, Arlington, West Dakota.

2. The defendant is an individual residing at 11 Rolvag Way, Arlington, West Dakota.

3. On February 6, 2019, the defendant approached the plaintiff in the main hall of Arlington High School, in Arlington, West Dakota, raised his right arm with the fist clenched, and threatened to punch her if she did not stop seeing a classmate, Michael Mercutio.

4. When the plaintiff refused to agree, the defendant deliberately grabbed her by the arm, squeezed it hard, and knocked her to the ground.

5. As a result of the defendant's acts, the plaintiff suffered a bruised arm, and abrasions on both knees requiring medical treatment. She also suffered severe pain, fear, and emotional distress.

FIRST CLAIM FOR RELIEF—ASSAULT

6. The plaintiff repeats and realleges the allegations in paragraphs one to five of the complaint.

7. The defendant committed an assault on the plaintiff when he intentionally and without her consent threatened to strike her and shook his fist, placing her in fear that he was about to strike her.

8. The defendant committed a further assault when he intentionally and without her consent reached out to grab the plaintiff's arm, placing her in fear that he was about to strike her.

9. As a result of these assaults, the plaintiff suffered fear, humiliation, and emotional distress, and was unable to attend school or engage in other usual activities for two weeks.

SECOND CLAIM FOR RELIEF—BATTERY

10. The plaintiff repeats and realleges the allegations in paragraphs one to five of the complaint.

11. The defendant committed a battery upon the plaintiff when he intentionally and without her consent grabbed her arm and threw her to the ground.

12. As a result of the defendant's acts, the plaintiff suffered bruises and abrasions on both knees, extensive pain and suffering, fear, humiliation, and emotional distress.

13. As a further result of the defendant's acts, the plaintiff incurred $400 in medical expenses for treatment, and was unable to return to school or engage in other usual activities for a period of two weeks.

WHEREFORE, the plaintiff seeks the following relief:

1. Compensatory damages in the amount of $8,000.

2. Punitive damages in the amount of $10,000.

3. Interest from the date of judgment as allowed by W.D. Rev. Code §14:103.

4. Her costs of suit.

The plaintiff claims trial by jury in this action.

By her attorney

_____

Luis Mendez
84 Main Street, Suite 4
Arlington, WD 58102
(901) 225-1093

Figure 2-1

1. On the other hand, if the defendant *does* have a right to make a conditional threat, he is not liable for doing so. "If you don't get off my land, I will put you off," threatens physical force, but the owner has a right to use reasonable force to eject a trespasser. Restatement (Second) of Torts §77. Even if this

frightens the trespasser, it is not an assault, since the statement is privileged.

CHAPTER 3

Protecting the Right of Possession: Trespass to Land

INTRODUCTION

The tort of battery protects against unwelcome intrusions to the person, basically, touchings to the body. Assault protects against the anticipation of such intrusions. Trespass to land provides a legal remedy for intrusions upon one's real property, that is, on land owned or occupied by the plaintiff. We all know what a trespasser is — someone who comes on another's land without permission. As one of the casebooks suggests, "Trespassers tend to be thought of as fence-breaking, chicken-stealing no-accounts."[1] But to sue for trespass, a plaintiff still must prove a set of carefully defined elements of the tort.

THE ELEMENTS OF TRESPASS

Even stating those elements turns out to be a bit complex. The Second Restatement of Torts defines trespass as follows:

> §158. One is subject to liability to another for trespass, irrespective of whether he thereby causes harm to any legally protected interest of the other, if he intentionally

(a) enters land in the possession of the other, or causes a thing or a third person to do so, or
(b) remains on the land, or
(c) fails to remove from the land a thing which he is under a duty to remove.

Note some points about this definition. First, trespass is an intentional tort. In order to be a trespasser, the actor must act with a purpose to cause the intrusion on land, or with substantial certainty that she will cause it. Negligently causing entry on Astor's land will not support a claim for trespass . . . though it may support a claim for negligence. So the analysis of intent in Chapter 1 applies to trespass as well as to assault and to battery.

Various corollaries of intent analysis will also apply, such as the doctrine of transferred intent. If Connors gets mad at Lugo and hurls a rock at him, intending to batter him, but misses, and the rock rolls onto Parvi's land, Connor has committed trespass to land. He intended to cause a battery, but accomplished an unauthorized entry on the land of another, a trespass. He is liable for trespass under transferred intent.

Similarly, a mistake by the actor is treated the same way in analyzing intent for trespass as it is for battery or assault. An actor is liable for entry on property of another, even if she believes that she is on her own property, or some other property where she is entitled to be. Suppose that Ramone wanders back into the woods behind her house, believing she is still on her own land, but has actually drifted across the line into Wang's woods. She is a trespasser, even though she doesn't know it and didn't "intend" to be. She did intend to walk where she walked, and her intentional walking caused an intrusion on the inviolable grounds of her neighbor. She may be morally innocent, but from the tort point of view she takes the risk of her imperfect understanding of the boundaries of her lot. Restatement (Second) of Torts §164.

Note, too, that damage to the property is not an element of trespass to land: Under §158, the unauthorized entrant is liable "irrespective of whether he thereby causes harm to any legally protected interest of the other." This allows a court to award at least nominal damages for the intrusion, in order to vindicate an owner's right to sole possession of her property. Historically, this provided a legal vehicle for determining possessory rights in land. Lord Snobbin could sue Jack Sprat for trespass based on the mere fact that Jack walked on the property, even though he hadn't bent a blade of grass. The court would have to determine Snobbin's title to the property in order to determine whether Jack was a trespasser, and a judgment for Snobbin for

nominal damages would confirm his title. Historically the tort of trespass to land was probably used as much for this purpose — to prevent trespassers from acquiring easements or adverse possession rights[2] — as it was to remedy significant economic damages to the property.

THE ROLE OF CONSENT

Suppose that Paredes invites Marshall to his birthday party. At the appointed time Marshall shows up and knocks on the door, and Paredes declares her a trespasser. Under §158 of the Second Restatement, Marshall appears to be a trespasser: She has intentionally entered Paredes land, and nothing in the Second Restatement definition excuses an actor just because she had permission to enter. But of course consent to Marshall's entry will defeat a claim for trespass. For simplicity's sake, let's think of it as a defense or privilege which, if established, defeats the right to recover, even though the prima facie elements — (1) intentional (2) entry (3) on the land of another — have been proved.

The Second Restatement tucked this point away near the end of its four-volume compendium of black letter tort principles:

> **§892A. Effect of Consent**
>
> (1) One who effectively consents to conduct of another intended to invade his interests cannot recover in an action of tort for the conduct or for harm resulting from it.

Under this principle, Paredes cannot sue Marshall for trespass to land if he consented to her entry. Consent is probably the most common defense to actions for trespass to land. Like the prima facie elements, however, it has its subtleties. For example, Paredes can consent to one intrusion on his property but not others. Although he invites Marshall to the birthday party, that does not mean she may use his property at will. Consent to entry on one occasion, or for one purpose, does not constitute a general consent to entry. If Marshall returns to fish in Paredes's pond a week later, she will be a trespasser, if the reasonable understanding of the birthday invitation was that it limited entry to the party itself.

Similarly, consent may be limited in time. By inviting Marshall to the party, Paredes does not acquiesce to her staying for a week, even if she

claims she is still celebrating. And, it may be limited to entry on certain areas of the owner's property. A store owner who invites customers to visit his showroom does not consent to them coming upstairs to his apartment and watching TV.

It is clear, too, from the Restatement (Second) definition that a person may become a trespasser even though she entered the land with permission. If Marshall wanders off from the party and takes Paredes's horse for a ride, she will become a trespasser, though she entered the land with permission. Or, if Clements, a college student, leaves her trunk full of textbooks at Kobe's house for the summer, decides not to return to school, and never returns for the trunk, she becomes a trespasser by failing to remove the trunk at the end of the agreed time. The act of leaving the trunk — of not coming for it — is a trespassory act, although one might argue that it is no act at all.

Consent provides a defense not just to trespass to land, but to other intentional torts as well, such as battery or trespass to chattels. It is explored in more detail in Chapter 6.

Trespass Compared to Nuisance

I usually manage to get through my course in Torts without mentioning the word "nuisance." I do this because the concept is, well, a nuisance, a complex and slippery concept. But it is hard to discuss trespass to land without comparing it to the complementary protection that nuisance law provides to landowners. Trespass is generally viewed as a tort remedy for actual physical intrusions on land — throwing stones on the property, driving a truck across it, or mining gravel on it. The action for private nuisance, by contrast, provides a remedy for interference with the use or enjoyment of land that is less tangible, such as operating machinery on adjacent land that causes continuous vibrations, excessive noise, or foul odors.

One definition of nuisance is "a condition or activity that interferes with the possessor's use and enjoyment of her land, typically by incorporeal or non-trespassory invasions to such an extent that the landowner cannot reasonably be expected to bear them without compensation."[3] Such invasions do not usually amount to physical entry on the land, yet they may sufficiently interfere with the owner's use and enjoyment of the property to support a claim for an injunction or for damages.

Here are some distinctions between trespass and nuisance that will help

you decide which of these remedies for interference with land is likely to apply:

- Trespass requires an unauthorized direct or immediate intrusion on the owner's property, while nuisance typically involves interference with use and enjoyment over a period of time.
- Trespass usually involves the entry of a person or physical object, while nuisance usually involves more diffuse annoyances, such as smoke, noise, or vibrations. Typically, the nuisance defendant acts on nearby land, but the effects of her activity impact a nearby owner's quiet enjoyment of hers, through some sensory interference. Nuisance "typically involves the indirect consequences to plaintiff's land of something done entirely on defendant's own premises."[4]
- A trespasser is usually liable even for trivial physical intrusions, such as a single harmless amble across a neighbor's lawn. Nuisance, by contrast, involves a weighing of the interest of the party creating the nuisance and the party who suffers from it. Sometimes, a court may conclude that some level of interference with the quiet enjoyment of adjoining property is reasonable, in view of the value of the activity that creates it, and therefore will not support recovery for nuisance.
- On the dividing line between nuisance and trespass lie cases in which invisible particles intrude on property. While there is no traditional interference with use and possession, as typically required for an action of trespass, some courts have allowed actions for trespass if the intrusion results in actual damage. See *Rhodes v. E.I. Dupont de Nemours and Co.*, 657 F. Supp. 2d 751, 771-772 (S.D. W. Va. 2009). However, plaintiffs typically rely on nuisance actions in such claims for environmental injury. S. Ferrey, Environmental Law: Examples & Explanations 30 (8th ed. 2019).
- Trespass is an intentional tort. The actor must act with intent — either the purpose to cause the intrusion or with substantial certainty that it will cause the intrusion. An actor may create a nuisance, however, without intending to impact the property of another. The gravamen of the nuisance claim is the interference defendant's activity causes to the plaintiff's use of her property, not intent to cause that interference. Restatement (Second) of Torts §822(b). An actor might not know, for example, that the noise from his cement plant will reach owners'

property a half-mile away, but the noise can still constitute a nuisance to those owners.

- If a physical trespass is found that may recur, a court will grant an injunction against further trespasses. However, in nuisance cases courts balance the utility of the conduct against its interference with the adjacent owner's rights. If a court finds that the defendant has created a nuisance, it may choose not to enjoin the conduct, due to its importance to the community. In such cases, the court will permit the defendant to continue his conduct, while granting damage compensation to surrounding owners affected by the activity.

The following examples should help you understand the elements and the limits of the claim for trespass to land.

Examples

No Putt Intended

1. Albers, a sometime golfer, goes golfing on Saturday. On the fourth hole he hits a smashing drive. While his drive has lots of height, it hooks badly, veers off the course, and breaks the window in Genet's bungalow adjoining the golf course. Does Genet have an action against Albers for trespass to land?

2. Dean, a teenager high on life, decides to impress his friends with his neat sports car. He speeds down the road adjacent to Genet's land at 75 miles per hour. When he encounters a sharp turn he loses control, skidding off the road onto Genet's lawn. Is he a trespasser?

3. Albers gets so mad at his golf score that he picks up a small stone and heaves it off the golf course onto Genet's lawn. The stone rolls across the lawn and into the woods. Genet wasn't home at the time, so did not see it happen.
   a. Has Albers committed trespass?
   b. Why would Genet bother to sue for trespass if he has suffered no significant injury?

c. Albers's stone flies into Genet's driveway and smashes the windshield of his vintage Model T Ford, which had been handcrafted for Genet by an antique car specialist at a cost of $3,000. Is Albers liable for the loss?

Moving In

4. Albers buys a home with a large stand of maple trees toward the back of the lot. The real estate broker tells him that the trees are on the lot he is buying. After buying, Albers decides to thin the stand by cutting several trees. After doing so he is sued for trespass by Piaget, owner of the property behind his. It turns out that the maples are only partly on Albers's land, and the ones he cut were on Piaget's. Is Albers liable for trespass?

5. Same facts, except that Albers had a survey done before cutting the trees. The survey showed the whole stand of trees to be on Albers' land. But the surveyor made a mistake in calculating the location of the property line. In fact, the trees were on Piaget's lot, and he sues for trespass. Is Albers liable?

A Ridiculous Question

6. Albers is irked by Piaget's trespass suit. He decides to cut down two *more* of Piaget's trees, but do it in the middle of the night, when no one will see him. He sneaks out one moonless eve and cuts two trees. He goes out the next day and discovers that in the dark he had actually cut a couple of his own trees. Unfortunately, he had bragged to Mercutio, the town snitch, that he was going to cut Piaget's trees, so Piaget learns of the escapade and sues him for trespass on a transferred intent theory. Is Albers liable?

Not So Funny

7. Berle, a jokester, tells Menlove that Snobbin, as a charitable gesture to those who live near his estate, has announced that anyone from the town may go in and pick strawberries from his strawberry patch. Menlove

does so, but Snobbin's gardener catches him at it. Snobbin, less beneficent than Menlove gave him credit for, sues him for trespass.

a. Has Menlove committed trespass?

b. Has Berle?

8. Menlove was having breakfast at the local diner when he heard Janowski talking to a waitress. Janowski tells the waitress that she had heard that Snobbin was allowing people to pick his strawberries. After breakfast, Menlove heads for the strawberry patch and eats Snobbin's strawberries. Snobbin, learning that Menlove heard this rumor from Janowski, sues Janowski for trespass. Is she liable?

A Hard Case

9. On the snowy plains of West Dakota, local municipalities often erect snow fences next to roads, in order to prevent drifts from covering the roads. The town of Plainsville obtains permission from Frain, a local farmer, to place a snow fence along the edge of his field, to be removed by May 1 each year so he can farm the land. After the third winter, the town removes the fence, but leaves a metal anchor pipe in the field. Frain, mowing his field in July, is killed when the mower catches on the pipe and he is thrown under the machine. Is the town liable? Should Frain's survivors sue for negligence or trespass?

Nuisances and Trespasses

10. Arnez belongs to the Concord Minutemen, a group of ten would-be patriots who reenact Revolutionary War scenes. While practicing at Arnez's home, they set off their antique flintlock rifles twice. The reports of these ancient arms are noisy and produce a foul-smelling gunpowder odor that blows across Martell's next-door lot. Have Arnez and his Minutemen committed trespass or nuisance?

11. Chan is late for the train, which he sees pulling into the station. Since he needs to catch the train to make an important meeting, he cuts across Pasik's lawn to the station, saving enough time to make the train. No harm is done. Pasik is away, but learns about Chan's shortcut and sues.

a. Should Pasik sue for trespass or nuisance?

b. How will the court respond to Chan's argument, that he had an important reason to cross Pasik's property, and caused no harm?

c. Suppose that Chan was chased by a mugger with a knife, and ran across Pasik's land to reach the police station. Would he be liable to Pasik for trespass?

d. While fleeing through Pasik's yard to avoid the mugger, Chan tramples Pasik's flower garden. Is he liable for the damage?

12. Conglomerate Chemicals Corporation manufactures chemicals at a plant in East Dakota. The processing of raw materials into chemicals involves a complex smelting process that gives off emissions containing trace amounts of various chemicals, including quasimonomethane. Over a period of years, the particles in these smokestack emissions settle on surrounding property. Green is an organic farmer who lives a mile from Conglomerate's plant. In 2008, he learns that he cannot get the vegetables grown on his land certified as organic anymore, due to traces of quasimonomethane the plants have absorbed from the soil on his farm. He wishes to sue Conglomerate.

    a. Conglomerate argues that it is not liable for trespass, because it had no intent to deposit chemicals on Green's property. If it moves to dismiss Green's case on this ground, how is the court likely to rule?

    b. Is Green's proper remedy in trespass or in nuisance?

Trespass Down Under

13. Zarvas owns an undeveloped lot in a growing neighborhood. Two years ago his neighbor Fox developed his property. To do so, he had to lower the water table, so he dug a drainage ditch near the border between his property and Zarvas's. A perforated pipe was set in the ditch, which was covered back over. Water under the property would run out through the pipe and off into a stream, keeping the ground water below the level of the pipe.

    Zarvas decides to sell his lot and has it surveyed. The surveyor informs Zarvas that Fox's pipe actually runs under a corner of his property. It isn't doing any harm down there (it may even be keeping

Zarvas's lot dry), but it is on his property. Removing the pipe would be quite expensive, especially since Fox has put in expensive plantings above it. May Zarvas obtain an injunction ordering the pipe removed from his property?

Owners and Occupiers

14. Shepherdson keeps sheep on his land in rural Nebraska. A fence — entirely on Shepherdson's property — keeps them off farmland next door. The farmland is owned by Grangerford, and this year he had leased the acreage to Farmer, who was growing grain on it.

    It was a dry year, and Shepherdson's sheep were struggling, while Farmer's field of grain, thanks to constant irrigation, was thriving. One night, Shepherdson slipped out and pulled back a section of his wire fence, and then went to visit his brother for the weekend. While he was away, his sheep took the hint; they wandered into Grangerford's field, where they ate a lot of Farmer's grain as well as destroying a bunch of ornamental shrubs along the edge of the field.

    a. Is Shepherdson liable for trespass?

    b. If so, to whom?

Explanations

No Putt Intended

1. Albers is not liable for trespass, because he did not act with intent to cause an entry on Genet's land. He did not have a purpose to do so, nor did he know to a substantial certainty that his ball would veer off into Genet's yard. Certainly, if he is a mediocre golfer, he will recognize that this is a possibility. But possibilities do not make an intentional tort; intended intrusions do. Here, when Albers acted, he did not have either of the states of mind that would support intentional tort liability — purpose to cause the intrusion or substantial certainty that he would. He may be liable for negligence, but that's another tort, requiring a different type of fault.

2. Here, Dean acted "intentionally," in the sense that he meant to speed down the street. And, as with Albers, he could foresee the danger of losing control and veering onto adjacent property. But he still has not acted with the intent — either purpose or substantial certainty — to enter Genet's property. Genet will have to sue him for negligence, not trespass (so long as Dean does not linger on the property after his car stops).

3. a. Certainly he has, as long as he meant to throw it on Genet's lawn. Although he has not entered the property himself, he has caused the stone to do so. In the language of §158 of the Second Restatement, he has "caused an object" to enter the land without permission, interfering with Genet's right of exclusive possession.

It didn't interfere very much, though, did it? The stone rolled off into the woods, joining a thousand others just like it. But damage is not an element of trespass: The intruder is liable for nominal damages for making the intrusion even if it causes no harm. The unpermitted interference with exclusive use is itself tortious, with or without resulting harm to the property.

Nor is there any requirement that the landowner be aware of the intrusion at the time it happens. The common law has always placed a high premium on the right to exclusive use of property, including the right to use it for nothing or leave it entirely alone. If Genet spends 11 months a year in another state, he still enjoys the right to keep his local property free of intrusions by others while he is away.

b. Most of the time, owners don't sue for trivial trespasses to land. But if they happen continually, they may, seeking injunctive relief — that is, a court order to the defendant to cease the intrusions. If Trujillo crosses Genet's land every day to get to the bus stop, he may not damage Genet's land. But he does interfere with the right to exclusive enjoyment that we associate with land ownership. Genet may sue, not because he has suffered economic damage, but to keep Trujillo and others from entering his land.

If Genet ignores these trespasses, they could at some point ripen into an easement — the right to cross his land to reach the bus stop. So it is important, in terms of confirming title, for Genet to have a right to sue even though he has not suffered damages from the

trespass.

c. Albers threw the stone out of pique, not because he had a purpose to injure Genet's property. But he did have the purpose to throw the stone at his lot, and this deliberate intrusion led to the windshield damage. By deliberating throwing the rock onto Genet's property, he became a trespasser, and as a trespasser, he will be liable for resulting damage, even damage he had no desire or expectation that he would cause.

Moving In

4. Yeah, Albers is liable. He intentionally entered on Piaget's land and cut the trees. "But he didn't know they were on Piaget's land," you say. True, but they were. Albers acted in good faith, but he still intentionally went on his neighbor's land and cut the trees. Will Piaget miss the trees any less knowing that Albers "didn't mean to" cut *his* trees?

   This is a classic "mistake" case: Albers believes he is on his own property but in fact is not. Someone has to take responsibility for the mistake. . . . Should it be Piaget, who lost his trees, or Albers, who cut them down? Trespass law places the loss in these cases on the person who caused it. One rationale is that this rule gives actors like Albers an incentive to investigate fully before venturing forth with a chain saw.[5]

5. In this case, Albers responded to the incentive that trespass law provides: He used all care to make sure he did not intrude on his neighbor's lot. But he still entered Piaget's property and cut his trees, and he is a trespasser. Very likely, he would not be liable for criminal trespass; criminal prosecution generally requires a *mens rea* element lacking in examples like this. See, e.g., 18 Pa. Cons. Stat. Ann. §3503 (requiring knowledge that the actor lacks license or privilege for criminal trespass). But the *tort* of trespass to land protects against unauthorized entries, even if not morally reprehensible.

   In *Serota v. M. & M. Utilities, Inc.*, 285 N.Y.S.2d 121 (N.Y. Dist. Ct. 1967), an oil company had a delivery contract with a homeowner. The homeowner sold the property but didn't tell the oil company, so they duly appeared to refill the heating oil tank, but spilled some oil because the tank had been filled. The company was held liable to the

new owner as a trespasser. “Obviously, the defendant intended to come upon plaintiff’s land and make an oil delivery and did not intend to commit a trespass or intentionally to cast oil upon plaintiff’s land. His innocence and his mistaken belief that his visit was authorized is of no moment since his intent is clearly shown to have been to deliver oil. This unauthorized act, resulting in whatever damages which may have occurred, rendered him liable.” 285 N.Y.S.2d at 124.

A Ridiculous Question

1. Albers had tortious intent — he planned to and tried to cut Piaget’s trees. But he didn’t. The intent to commit a trespass will not support liability, without causing an actual intrusion on the land of another. Ridiculous question, indeed.

   Put another way, there isn’t a tort of attempted trespass. Just as an actor would not be liable for battery if he threw a rock at someone and missed,[6] Albers is not liable if he does not actually cause an intrusion on Piaget’s property.

Not So Funny

7. a. Even if we assume that Menlove’s mistake was a reasonable one, it is unlikely to protect him from a trespass action. If Albers’s reasonable mistake about whether he was on Piaget’s land was no defense in Example 5, Menlove’s mistake about consent to entry will presumably be equally ineffective. This is the position taken by the Second Restatement: Section 164 declares that an entrant is a trespasser even though he acts under a mistaken belief that the owner has consented.

   This approach places the risk of mistake on the party who acts, and is in a position to take additional steps to confirm his right to do so. Suppose Menlove thought he had consent to cut a stand of trees, and did cut them. Snobbin should not go without recompense for this unconsented harvest, even if Menlove acted in good faith. Very likely, a court would take a very hard line here. For example, comment a to §164 of the Second Restatement states that an entrant would be liable for trespass even if, “due to the advice of the most

eminent of counsel," he believed that he was on his own land. See also §164 illus. 5 (entrant a trespasser though assured by another that he has permission to enter).

b. Berle is a trespasser under the Second Restatement definition of trespass. Even though he never entered Snobbin's land, he caused Menlove to do so. Section 158(1)(a) expressly provides that one who causes another to trespass is liable for the entry. Of course, Berle must still act with intent to cause the entry. Assuming that, as a jokester, he acted for the purpose of causing Menlove to pick Snobbin's strawberries, he would have the necessary intent.

8. Here, Janowski's loose talk led Menlove to trespass, so one can argue that she caused the trespass. However, trespass is an intentional tort. Janowski did not act for the purpose of causing Menlove's entry, nor with substantial certainty that she would. She is not liable to Snobbin for trespass.

A Hard Case

9. This example is based on a Michigan case, *Rogers v. Board of Road Commissioners*, 30 N.W.2d 358 (MI 1948). The farmer's survivors sued for wrongful death, based on negligence and trespass theories. The court held that the complaint stated a claim for trespass. The commissioners had permission to put the fence in for the winter, but by not removing the anchor pipe in the spring, committed trespass. The court relied on Restatement (Second) of Torts §160, which provides that

> A trespass, actionable under the rule stated in §158, may be committed by the continued presence on the land of a structure, chattel or other thing which the actor or his predecessor in legal interest therein has placed thereon
> (a) with the consent of the person then in possession of the land, if the actor fails to remove it after the consent has been effectively terminated . . .

In this case, no one entered Frain's land with tortious intent — they had permission to erect the fence. All the Plainsville employees did was

forget to remove the pipe. But the fact that the pipe remained on the land after permission had terminated still constituted a trespass, supporting recovery.

Although the resulting harm in this case was personal injury, not harm to the property, the defendant could still be liable for it. Section 158 of the Second Restatement suggests that a trespasser is liable for "harm to any legally protected interest of the other," not just for property damage caused by the intrusion.

This case illustrates why it is important for tort lawyers to think carefully about their potential remedies. Frain's survivors might sue for negligence in this case, based on the employee's negligent failure to pull up the pipe. However, cities and towns often have limited liability or immunity for acts of negligence by their employees. The *Rogers* court held that, whether or not a negligence claim could be brought, public immunity did not bar the claim for intentional tort.

Nuisances and Trespasses

10. Probably neither. Trespass requires a physical intrusion on property, and the few puffs of smoke from these colonial flintlocks will probably not be considered a sufficient physical invasion to constitute a trespassory entry. Nor is this event likely to constitute an actionable nuisance. It was a single event, not an ongoing interference with Martell's quiet enjoyment of his property. If they did this every day, and fired 56 times at each practice, Martell would likely have a case for nuisance. But this single event is probably not substantial or continuous enough an interference to support liability.

    If single-shot annoyances sufficed, too many of life's vicissitudes might lead to neighborly litigation, such as an occasional noisy car repair, a dance party, or burning the fall leaves. The requirement that the interference be substantial eliminates many such annoying cases about annoyances.

11. a. Pasik's claim is for trespass, Chan's intentional physical entry onto his property. It's a one-shot thing, and it involves actual entry by Chan, so trespass is his proper remedy.

    b. Reasonable people might view Chan's decision as a reasonable one,

but his need to make the train will not provide a defense to trespass. He still intentionally entered Pasik's property, and will be liable for trespass. Owners, in our ownership-oriented society, have a right to exclude others, even if those others might have good reasons to enter.

c. Although the common law generally worships the sanctity of private property, it thankfully recognizes some limits to the right to exclude. This example illustrates one. The law recognizes a privilege to enter the property of another if necessary to avoid serious harm to the person.

Restatement (Second) of Torts §197 Private Necessity

(1) One is privileged to enter or remain on land in the possession of another if it is or reasonably appears to be necessary to prevent serious harm to (a) the actor, or his land or chattels. . . .

The Restatement offers several examples of such privileged entries. In one, a canoist encounters a violent storm and ties up to B's dock to save his life and his canoe. In the other, a pilot with sudden mechanical trouble makes a forced landing in B's field. Restatement (Second) of Torts §197 illus. 1, 3. In each of these cases, the actor was privileged to enter, though he intentionally entered on private property.

d. The previous example indicates that Chan was privileged to enter to save himself from his pursuer. However, the few cases on the point suggest that, while there is a privilege to enter under these circumstances, it does not excuse the entrant from the obligation to pay for any resulting harm to the land. See, e.g., *Vincent v. Lake Erie Transp. Co.* 124 N.W. 221 (1910). So Chan will have to pay for the trampled flowers. While he may grumble about that now, it's a deal he gladly would have made at the point of deciding to run through the garden.

And it makes sense, really. He has made use of Pasik's property for his own benefit, and it is reasonable that he, rather than Pasik, absorb the resulting loss. As Professor Dobbs nicely puts it, "the skier who is lost in a snow storm may enter your cabin for shelter without liability. But if he burns the furniture to stay warm he must pay for its destruction."[7] In the (unlikely) event that Chan recognizes

this possible liability as he flees his pursuer, it will give him an appropriate incentive to choose the least costly route of escape across Pasik's land. Thus, the privilege recognized here is sometimes referred to as an "incomplete privilege," because, while the actor is privileged to enter, she must pay for resulting harm to the property.

12. a. The court will likely reject the no-intent argument. Conglomerate's argument is like Romeo heaving his sneakers into the crowded stands at the track meet, and then arguing that he isn't liable when they hit a spectator, since he didn't know who would be hit. See Example 10 in Chapter 1. An actor has the intent necessary to commit an intentional tort if he acts for the purpose of causing the invasion of the other's interest, or with substantial certainty that he will invade it. Romeo knew that he would cause a harmful touching to *someone*. Here, Conglomerate knows that its smelting operation emits polluting chemicals. It may not know who Green is, or where his farm lies, but it does know that the pollutants will come to earth on someone's property. It has intent to cause the intrusion, in the "substantial certainty" sense of the term.

b. Green may be able to sue for both trespass and nuisance. Traditionally, trespass would lie for direct physical intrusions on property. If Consolidated lofted an errant steam boiler onto Green's land, that would be trespass. For interferences with use of property due to noise, vibration, or light, however, nuisance was the proper remedy. See Dobbs' Law of Torts §51.

The facts in this example fall along the divide between the two remedies. The entry is by invisible particles, not a rock or a car. And the intrusion takes place over time; it is the accumulated amount of quasimonomethane that causes the damage, not one day's or week's emissions. But the intrusion is physical and causes actual deposits on the land. Traditionally, it would probably have been viewed as nuisance, since the particles were so small as to be invisible as they arrived on Green's farm. Today, however, many courts would conclude that Conglomerate is liable both in nuisance and in trespass. See, e.g., *J.H. Borland v. Sanders Lead Co.*, 369 So. 2d 523 (Ala. 1979). It is trespass, because there is a detectable physical entry that damages the property. The entry also constitutes a

nuisance, since it is based on continuous behavior and interferes with Green's use of his property.

While modern courts may treat such invisible intrusions as trespass, they are likely to require proof of actual damage in order to allow recovery. Admittedly, more traditional trespasses are actionable without proof of resulting damages. However, as one court noted, "no useful purpose would be served by sanctioning actions in trespass by every landowner within a hundred miles of a manufacturing plant." *Bradley v. American Smelting and Refining Co.*, 709 P.2d 782, 791 (Or. 1985). Requiring substantial damage to the property is different from traditional trespass law, which holds trespass actionable at least for nominal damages without proof of any resulting damage.

Not all courts agree with this trend to treat such pollution cases as trespass. In *Adams v. Cleveland-Cliffs Iron Co.*, 602 N.W.2d 215 (Mich. App. 1999), for example, the court rejected the trend to find trespass in cases like this, choosing instead to retain the distinction between trespass, which requires "an unauthorized direct or immediate intrusion of a physical, tangible object on land" (602 N.W.2d at 222), and nuisance, which lies if the plaintiff proves "*significant harm* resulting from the defendant's *unreasonable interference* with the use or enjoyment of property." Id. (emphasis in the original). See also *Johnson v. Paynesville Farmers Union Co-op Oil Co.*, 817 N.W.2d 693, 702-705 (Minn. 2012) (rejecting trespass claim based on pesticide drift particles).

The distinction may matter for several reasons. The limitations periods may differ for nuisance and trespass (usually trespass is longer). And, if the intrusion is short lived, nuisance may not provide a remedy at all. If only nuisance applies, a court may find some level of interference reasonable, and therefore not actionable.

Trespass Down Under

13. Zarvas is likely to obtain an injunction ordering removal of the pipe, even though it will be inconvenient and expensive for Fox to do so.

    Note that this is a subterranean trespass, which will only be actionable if Zarvas's exclusive right to use of his property includes the

right to use of the property below the surface. Most courts hold that an owner's right to exclusive possession extends both above and below the surface of the property. See Restatement (Second) of Torts §159, which provides in part that "a trespass may be committed on, beneath or above the surface of the earth." Thus, ownership of property protects the right to subsurface mining as well as use of the property's surface and the immediate airspace above the property.[8] So Fox's laying of the pipe is a trespass, an invasion of Zarvas's right to exclusive use of his property.

However, the pipe isn't bothering Zarvas, and it will be expensive to remove it. Still, the right to exclusive use of property is sufficiently prized that a court will likely order the pipe removed. It is not a defense to trespass that the trespass isn't causing damage, or that terminating the entry will be costly. And, while the pipe isn't causing any problems now, it might interfere with Zarvas's use of the land in the future. For example, he might want to put a septic system along that property line at some point.

If Zarvas decides to be a good neighbor and let the pipe remain, since it's not a present problem, he risks problems later. If he is aware of the trespass and does not seek to remedy it, Fox may acquire an easement for his pipe over time, and Zarvas may be stuck with it.

Probably the "right" outcome for a case like this is a settlement. The value to Zarvas of enforcing his right to exclusive possession is probably a great deal less than the cost to Fox of digging up the pipe. Hopefully Fox can convince him to sell him an easement to leave the pipe in place for an amount reflecting the diminution in value of his land, rather than the exorbitant cost of terminating the trespass.

Owners and Occupiers

14. a. Shepherdson may argue that he did not intend to trespass, his sheep did. How is he to know that they will wander next door to eat all that juicy grass? Well, one might argue that Shepherdson was substantially certain that his sheep would head for Farmer's field, but the easier argument is that Shepherdson opened the fence for the purpose of having his sheep enter the field, so he has the intent necessary to commit a trespass. We know that Shepherdson need not enter himself, he may do so by causing a stone, a car, or a sheep to

do so. Shepherdson is — and should be — liable for trespass.

b. In this case two parties have an interest in the field — Farmer's right, as lessee for the year, has been infringed by the loss of his grass, and Grangerford's, as the owner of the land, by the damage to the bushes. Both of these interests seem worthy of protection against trespass. However, §157 of the Second Restatement provides that a person is "in possession of land" (and therefore able to maintain an action for trespass) if he is "in occupancy of land with intent to control it." This allows Farmer, who has full control over the land while he has leased it, to sue for trespass, to recover for the damage to his interest — the value of the grain consumed by Shepherdson's sheep.

Traditionally, however, a party like Grangerford, with a reversionary interest in the land — that is, the right to possession at some later date, but not presently — could not sue in trespass, because the defendant had not interfered with his right to possession. However, in cases like this, in which the trespasser causes injury to an owner's interest in the property as well as the current possessor's, courts have allowed recovery for the damage to the owner's interest under one name or another.

> An action for trespass may technically be maintained only by one whose right to possession has been violated . . . however, an out-of-possession property owner may recover for an injury to the land by a trespasser which damages the ownership interest. . . .In our view, the inquiry in a case involving unlawful intrusion on property rights should focus upon the nature of the injury and the damages sought: If the right to possession has been abridged and possessory rights damaged, the possessor may complain by way of an action for trespass; if, on the other hand, an intruder harms real property in a manner which damages the ownership interest, the property owner may seek recovery whether the cause of action be technically labeled trespass or some other form of action, such as waste.

Smith v. Cap Concrete, Inc., 184 Cal. Rptr. 308, 310 (Cal. App. 1982). Under some such rubric, Grangerford would doubtless

recover for the value of his bushes as well. See also *Motchan v. STL Cablevision, Inc.*, 796 S.W.2d 896, 898 (Mo. App. 1990) (owner has right to sue for damage to its reversionary interest as a result of trespass to land).

For an even clearer example in which both interests are infringed, imagine that Rollo backs a truck onto a neighboring lot and hits the corner of a house on the property. The lessee has to vacate the house until repairs can be made, and the owner suffers damage to the value of the house. Although their interests differ, both should have a remedy against Rollo.

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1. J. Henderson, R. Pearson, & D. Kysar, The Torts Process 439 (9th ed. 2017).

2. Adverse possession, covered in the Property course, is a means of acquiring an interest in property by openly occupying it for a period of time.

3. Dobbs' Law of Torts §51 (footnotes omitted).

4. F. Harper & F. James, The Law of Torts 83 (2d ed. vol. 1).

5. Albers might have a claim for indemnification from the real estate broker, since her negligent (or intentional) misrepresentation led to the trespass.

6. If the victim saw it coming at him it would be assault, however.

7. Dobbs' Law of Torts §117.

8. Section 159(2) provides an exception for aircraft flights above the "immediate reaches of the air space next to the land."

CHAPTER 4

Dueling Remedies: Trespass to Chattels and Conversion

INTRODUCTION

The traditional intentional torts protect not only the inviolability of the body (through the action for battery) and possession of real property (through the action for trespass to land) but also a possessor's interest in personal property, such as a car, a couch, a book, or a cow. Such personal possessions are referred to as "chattels" under property law, pieces of tangible, movable personal property, as opposed to "real property" such as land.

Over time, several intentional torts evolved to protect against invasions to personal property. If an actor intentionally damaged an owner's personal property, or temporarily deprived the owner of possession, she was liable for trespass to chattels. If she intentionally deprived the possessor of an item of personal property, as by stealing it, she was liable for conversion. This chapter will discuss and compare these related causes of action for interference with personal property.

TRESPASS TO CHATTELS

The most basic distinction between trespass to chattels and conversion is that trespass to chattels provides a remedy for damage to personal property, or temporary interference with its use, even though the possessor is not permanently deprived of it. Suppose that Carter takes Puso's horse, Flora (conceived in law as a chattel, whatever Flora may think about it) for a three-hour ride, and then returns her to Puso's barn. Carter has probably committed trespass to chattels, but he is not liable for conversion. Carter has not permanently deprived Puso of Flora's use, nor is she damaged by the interference. Or, if Carter throws a rock at Puso's car, and puts a dent in its door, he has committed trespass to chattels, by damaging the car, but not conversion, since Puso still has the car.

The Second Restatement addresses the elements of a claim for trespass to chattels in two sections. Section 217 defines the ways in which an actor can commit trespass to chattels:

Section 217. Ways of Committing Trespass to Chattel

A trespass to a chattel may be committed by intentionally

(a) dispossessing another of the chattel, or

(b) using or intermeddling with a chattel in the possession of another.

Oddly, §218 then addresses when an actor who commits a trespass to chattels *is liable to the possessor*, suggesting that sometimes one may commit the tort (under §217), but not incur liability for it, because none of the consequences described in §218 results from the trespass.

Section 218. Liability to Person in Possession

One who commits a trespass to a chattel is subject to liability to the possessor of the chattel, if, but only if,

(a) he dispossesses the other of the chattel, or

(b) the chattel is impaired as to its condition, quality or value, or

(c) the possessor is deprived of the use of the chattel for a substantial time, or

(d) bodily harm is caused to the possessor, or harm is caused to some person or thing in which the possessor has a legally protected interest.

When Puso took Flora for a ride, he used the horse, so he committed trespass to chattel under §217(b). Carter can sue him for the tort if he suffers one of the four consequences listed in §218. If Puso rode Flora for three hours, he is likely liable under §218(c), because he deprived Carter of her use for a substantial period of time. Or, if he rode Flora so hard that she developed shin splints,[1] he may be liable under §218(b). Unlike trespass to land, which is actionable without any resulting harm, §218 limits liability for trespass to

chattels to those which cause resulting harm. If Puso sits down on the bumper of Carter's car, he has intermeddled with Carter's personal property under §217, but under §218 he is not liable if he causes no damage to the car. For example, suppose that D releases the brake on P's car, and pushes it forward a few feet to make space to park behind it. If no harm is done, D is not liable, since he did not dispossess P of the car or cause any damage to it. Restatement (Second) of Torts, §218 Ill. 3.

Note several things about this definition. First, §217 requires intent, as that concept is analyzed in Chapter 1. As with battery, assault, and other intentional torts, the actor must act for the purpose of causing the trespass, or with substantial certainty that the trespass will result. Negligent interference with personal property will not support recovery for trespass to chattels.

Second, note that, under §§217 and 218(a), one who totally deprives a possessor of a chattel is liable for trespass to chattels. This is puzzling, because total deprivations of a chattel are usually treated as a conversion. To some extent, the two remedies overlap, so that conduct constituting conversion may also support recovery for trespass to chattels.

Note also that the definition speaks of a "possessor" of the chattel, not an owner. Usually, the owner will be the possessor of the property, but not always. If Burstein borrows his neighbor Konegin's lawnmower, and Goliath comes over and smashes it with a sledge hammer, Burstein will have an action against Goliath for trespass to chattel. His interest as a borrower suffices to constitute "possession" for purposes of recovering for Goliath's interference with the mower. Section 219 of the Second Restatement provides that one who damages or takes a chattel is liable to an "immediate possessor," such as a bailee. Section 220 provides that the tortfeasor is also liable to a "person entitled to future possession" — the owner Konegin, in the mower case — for any damage to his residuary interest in the chattel.

CONVERSION COMPARED

Historically, conversion evolved from the early form of action for "trover," and provided a remedy for dispossession of a chattel. The major distinction between trespass to chattels and conversion is that conversion provides a remedy for a deprivation sufficiently serious that the tortfeasor is liable for

the full value of the property. It "requires very substantial exercise of control or dominion inconsistent with the plaintiff's rights." Dobbs' Law of Torts §61. If the property is merely damaged, or possession is temporarily interfered with, the claim is usually for trespass to chattels, not for conversion. If the property is stolen, or even used for a substantial period of time, however, the actor will likely be liable for conversion. "The significance of conversion lies in the measure of damages, the recovery of the full value of the goods, and that the tort is properly limited to those wrongs which justify imposing it." W. Prosser, The Nature of Conversion, 42 Cornell L.Q. 168, 173 (1957).

Here is the Second Restatement's attempt to define conversion:

> **Section 222A. What Constitutes Conversion**
>
> (1) Conversion is an intentional exercise of dominion or control over a chattel which so seriously interferes with the right of another to control it that the actor may justly be required to pay the other the full value of the chattel.

Of course, trespass to chattels also involves interference with possessory rights in the chattel. Here are a few examples that may help you to distinguish these two related tort claims.

- Horton, leaving a restaurant, picks up Cobble's hat from a coat hook, thinking it is his own. When he reaches the street he realizes that he has the wrong hat and returns it.
  - — This is not conversion, because the dispossession is brief and does not cause damage to the property. See Restatement (Second) of Torts §222A illus. 1. It probably isn't trespass to chattels either, since the deprivation is so brief, and there is no indication that Cobble tried to find the hat while it was away.
- Horton takes Cobble's hat, again thinking it his own. As he is leaving, he is frustrated that it won't fit right, and pushes it down on his head, tearing the hat band inside it. Then he realizes it isn't his and returns it to the coat hook.
  - — This is likely trespass to chattels, since the hat is damaged. See Restatement (Second) of Torts §218(b). If the hat were damaged to the point of being useless, Horton would be liable for conversion.
- Horton takes Cobble's hat by mistake and wears it home. He doesn't look at it again until the following winter, when he realizes that the hat is not his. He returns it to the restaurant.

— Cobble will have a claim for conversion, since he has been deprived of his hat for such a long period of time.

Suppose on the facts of the last example that Cobble did return to the restaurant to ask about his hat, and they gave it to him. What would Horton be liable for? The Restatement takes the position that he is liable for conversion, due to the length of time for which Cobble has missed his hat. Restatement (Second) of Torts §222A illus. 2. But this fits the definition of trespass to chattels as well, since Cobble has been deprived of the use of the hat for "a substantial time." Restatement (Second) of Torts §219(b). In these cases, it appears that trespass to chattels and conversion overlap. If I were Cobble, and wanted to recover from Horton, I would assert claims for both conversion and trespass to chattels, and let the court sort it out.

In the last two examples, Horton is a tortfeasor, though he had no malicious intent. But he did have *intent* in the sense needed for an intentional tort: He meant to assert dominion over the hat, and did, by the act of taking it. Although he was mistaken about the character of his act, tort law places the consequence of his mistake on him.

Admittedly, the line between trespass to chattels and conversion is hazy. The Second Restatement recognizes that there is no single bright line distinction that classifies the cases. Instead, it suggests several factors courts should consider in determining whether conversion is the proper remedy.

Section 222A

(2) In determining the seriousness of the interference and the justice of requiring the actor to pay the full value, the following factors are important:

(a) the extent and duration of the actor's exercise of dominion or control;
(b) the actor's intent to assert a right in fact inconsistent with the other's right of control;
(c) the actor's good faith;
(d) the extent and duration of the resulting interference with the other's right of control;
(e) the harm done to the chattel;
(f) the inconvenience and expense caused to the other.

This section attempts to make sense of centuries of somewhat contradictory case law, by basing liability for conversion on a number of factors. In some cases conversion may lie because the property has been completely destroyed or sold, perhaps even if the actor acted in good faith. In others, it may lie because the tortfeasor acted with conscious intent to interfere with possessory rights, or knew that his interference would cause severe consequences to the possessor. Sometimes, brief exercise of control over the chattel may support a

conversion claim; in other cases, based on the other factors in §222A, it will not.

If conversion is found, the defendant is liable for the full value of the chattel at the time of conversion. Restatement (Second) of Torts §222A cmt. c. If the defendant commits trespass to chattels, the damages are the diminished value of the chattel or damages for the deprivation of use.

Perhaps the examples below will help you to get a handle on these two intentional torts.

Examples

Insults and Injuries

1. Romeo is joking around with Benvolio, exchanging slaps before class. Benvolio steps backward to avoid a slap, and falls on Thibeault's science project, a model of an international space station made from 5,000 toothpicks and Elmer's glue. It is demolished. Is Romeo liable for trespass to chattels? For conversion? How about Benvolio?

2. Cody sees Woof, his neighbor Fred's dog, walking down the sidewalk next to his property. He throws a rock at Woof, but misses. Fred sees this from his window. What tort may he sue Cody for?

Hat Tricks

3. Cobble is wearing a hat with a peace sign on it. Horton grabs it off his head and throws it to the ground. The hat is not damaged. What tort, if any, has Horton committed?

4. Horton grabs Cobble's hat, which is sitting on the fender of Cobble's car, and heaves it up in the air. Cobble retrieves it immediately, but Horton's greasy fingers have left a stain on the brim. The cleaning bill is 15 dollars. Is Horton liable for it? What tort should Cobble sue for?

5. Horton grabs Cobble's hat, which is sitting on the fender of Cobble's car, and heaves it behind him. It lands in the street, where it is run over by a steam roller, reducing it from three dimensions to two. What tort?

6. Horton sees Cobble's hat on a shelf near the door of a restaurant. Mistaking it for his own hat, he puts it on and walks out. It doesn't feel right, so he looks more closely at it, realizes it isn't his, and returns it to the shelf, none the worse for wear (so to speak). What tort has he committed?

7. Horton sees Cobble's hat on the shelf. He decides to steal it, grabs it, and starts out the door. However, he sees a police officer nearby, so he slips back in and places the hat back on the shelf. What tort has he committed, if any?

Horse Play

8. Wongsun lives next door to Brooks, who has a stable where she keeps horses. Wongsun learns that Brooks is going away for the weekend. While she is gone Wongsun takes Flora, one of her horses, for a two-hour ride through the woods. He returns Flora before Brooks comes home, but Malvolio, a sneak, tells Brooks about it. Has Wongsun committed conversion? Has he committed trespass to chattels?

9. Wongsun takes Flora for that ride, and Flora steps in a rabbit hole, breaking a leg. The horse must be shot. What tort has Wongsun committed?

10. Wongsun borrows Flora while Brooks is away, with Brooks's permission. While Flora is grazing in his backyard, Interloper, a passing motorist, stops and offers to buy Flora for an excellent price. Wongsun sells Flora to her and spends the proceeds gambling on the lottery. Is Wongsun liable for conversion? Is Interloper?

At Sea

11. a. Sailor keeps a mooring for his sailboat in a local harbor. (A mooring is a large floating buoy anchored to the harbor floor that you tie a boat to so it won't float away.) Sneaky Pete sails into the harbor for the night and finds Sailor's mooring empty, since his boat is in dry-dock having the barnacles scraped off the hull. Pete ties up to

Sailor's mooring for the night. He leaves the next morning. Has he committed trespass to chattels?

b. Same facts, but Sailor shows up to use the mooring late in the evening and finds Pete there, so he can't tie up.

c. Section 217 provides that an actor commits trespass to chattels by certain conduct. But §218 provides liability for damages for such conduct only if the trespass leads to damage or deprivation of use. If B sits on the fender of A's car for half an hour, he commits trespass to chattels under §217. But if he does no damage, and does not interfere with A's use of the car, he is not liable for trespass to chattels under §218. What is the point of declaring certain conduct tortious if it will not support an action for damages?

A Clever Ploy

12. Cain and Abel, two brothers, both have a fondness for a painting of an apple orchard done by their mother Eve. It is only worth 50 bucks on the open market, but has great sentimental value to both brothers. Mom leaves it to Cain. Abel, a first-year law student and usually the goody-two-shoes of the family, studies conversion in Torts and hatches a scheme. He will borrow the painting and just keep it. If Cain sues for conversion, Abel will pay him 50 bucks. So he will end up with the painting through an "involuntary sale." What do you think?

Quick Takes

13. Consider, in each of the cases below, whether the actor would be liable for trespass to chattels, conversion, both, or neither.

a. Mephisto, having a grudge against Plaintiff, shoots her horse Flora.

b. Mephisto slashes the front tires on plaintiff's car.

c. Mephisto rents a car, misses a turn, and hits a tree, causing damage to the fender.

d. Mephisto, a medical researcher jealous of a colleague, contaminates her cell cultures, ruining her experiment.

e. Mephisto borrows Plaintiff's horse Flora for a ride, with Plaintiff's

permission. Flora steps in a rabbit hole and is permanently lamed.

f. Mephisto sneaks over and takes Flora, while Plaintiff is away, to ride into town. On the way Flora nibbles a poisonous bush and is sick for three hours.

g. Mephisto performs a risky surgery on Secretarius, Plaintiff's race horse. The surgery is not successful, leaving the horse unable to race.

h. Mephisto, a rival of plaintiff in an auto-racing event, dumps a truckload of dirt at the end of his driveway. Plaintiff cannot get his car out in time to compete in the race.

i. Muir, an environmental activist, chains himself to a giant logging machine owned by Monumental Paper Company, to prevent the company from logging old-growth forest in a national park. Work is stopped for a day while the police dispose of Muir.

j. Zenger, a reporter, is waiting to interview Carnegie, a corporate executive accused of wrongdoing. He notices that Carnegie has left his papers out on a desk in his office, while conferring with his lawyers in a nearby conference room. Zenger slips into the office and takes photos of Carnegie's papers with his cell phone. He later publishes a story based on the documents.

Cyber Chattel

14. Compu-Drive is an Internet service provider. Its computers provide access to the Internet, both for e-mail and the World Wide Web, for subscribers who establish accounts with Compu-Drive. Spam Spreader Incorporated is in the business of sending "spam," thousands of unsolicited e-mail advertisements to people with e-mail accounts. Many of these unwanted e-mails are sent through Compu-Drive's servers, placing a burden on the servers and slowing down access to the Internet and e-mail for customers. Compu-Drive sues Spam Spreader for trespass to chattels. Does its complaint state a claim upon which relief can be granted?

Explanations

Insults and Injuries

1. Romeo is probably not liable for either trespass to chattels or conversion. Both are intentional torts, and Romeo probably has not acted with the intent necessary to commit an intentional tort. If he and Benvolio are used to this kind of horseplay, as the example suggests, they consent to it, so Romeo was not assaulting Benvolio by aiming the slap at him: He had the intent to make a touching, but not a harmful or offensive one. While Thibeault's creation is smashed as a result, he will have to sue for negligence, not intentional tort. Similarly, Benvolio has not acted with the intent to damage the science project. He may be negligent for fooling around next to it, but he is not an intentional tortfeasor.

2. However mean-spirited Cody may be, he has not committed a tort. Woof may be a chattel, but Cody hasn't converted Woof, nor has he trespassed upon him. He may have acted with the intent (in the "purpose" sense here) to injure Woof but he didn't injure him.

   Since Fred saw this, he may have been upset to think that Woof would be injured. But that isn't an assault, which requires apprehension of a harmful or offensive touching to one's person, not one's dog. I know of no tort for being subjected to the apprehension (but not the fact) of injury to property. I don't think Cody is liable.[2]

Hat Tricks

3. Cobble should probably sue for battery. As noted in Chapter 1 (see p. 9), contact with an object intimately associated with a person's body will satisfy the "contact" requirement for battery. Grabbing Cobble's hat should suffice. Which is good, because Cobble should have a remedy, and conversion and trespass to chattels will probably not provide one. Horton has not converted Cobble's hat, since he has only taken it for a moment. And he hasn't damaged the hat, though he has "intermeddled" with it. So he is probably not liable for trespass to chattels. The essence of his invasion here is his intrusion on Cobble's person, so battery is the most appropriate claim and likely to apply. Recall that for battery (unlike trespass to chattels), Cobble need not suffer any resulting harm

to have a claim; the intrusion itself is actionable.

4. Horton's intentional meddling with Cobble's hat constitutes trespass to chattels. See §217 of the Second Restatement (trespass to chattels is committed by intentionally intermeddling with another's personal property). And, since he has caused damage to the hat, §218(b) provides that he is liable for the resulting impairment of its condition. Horton should pay Cobble's cleaning bill.

5. Horton is liable for conversion. He acted with intent to exercise control over Cobble's chapeau, if only temporarily. That satisfies the intent standard for conversion. And, as a result of his intentional act, the hat has been destroyed, making it reasonable that Horton should be treated as an involuntary purchaser liable for the full value of the hat.

   True, Horton did not intend to demolish the hat, only to pull a prank. But Horton intended to take the hat, which makes him an intentional tortfeasor. Since he acted with intent to interfere with Horton's property, he is liable, even though the damage caused is more extensive than he intended.

6. This example is used as an illustration in the Second Restatement. See Restatement (Second) of Torts §222A illus. 1. The illustration says it is not a conversion, presumably because there was only a brief interference with Cobble's possession of his hat. However, Cobble may have an action for nominal damages for trespass to chattels, since Horton did "dispossess" Cobble of the hat for a brief period, even though he did not damage it in any way. See Restatement (Second) of Torts §218 cmt. d (even minimal loss of possession supports recovery for nominal damages).

   Horton might also argue that he did not have the intent to commit a tort, since he made an innocent mistake. That would not be a good defense. Horton did intentionally take control of the hat. Just as a trespasser who thinks he is on his own land is liable for trespass to land, Horton would be liable for trespass to chattels if he damaged the hat or lost it after taking it by mistake.

7. In Example 6 Horton did much the same thing as he did here. Where he did it by mistake, the Restatement concludes that he has not converted

the hat. On these facts, however, the Second Restatement takes the position that Horton has converted the hat. Restatement (Second) of Torts §222A illus. 4.

What's the difference? While the interference with Cobble's dominion over his hat in this case is again brief, factors (b) and (c) of §222A(2) support liability for conversion: Horton clearly had the intent to "assert a right in fact inconsistent with [Cobble's] right of control" (factor b) and did not act in good faith (factor c).[3]

If Horton is liable, what are the damages? Presumably Cobble still wants his hat, and doesn't want to involuntarily sell it to Horton. So the ordinary measure of damages for conversion — the fair market value of the converted property — doesn't apply. Perhaps Horton will be liable for punitive damages. If not, there seems little point to bringing suit. This will be the case in many minor trespass to chattels and conversion cases.

Horse Play

8. Wongsun is probably not liable for conversion, based on the factors listed in Restatement (Second) of Torts §222A. He only used Flora briefly, during a time when Brooks was away, so he hasn't substantially interfered with Brooks's horsey rights. He hasn't damaged Flora, as far as the facts tell us. He hasn't caused Brooks any inconvenience or expense. He did deliberately take Flora, just as Cobble took Horton's hat in Example 7, but his intent was to use her briefly, probably a crucial distinction from Example 7.

   He might be liable for trespass to chattels, however. He has used Flora, which constitutes trespass to chattels under Restatement (Second) of Torts §217. Section 218 provides that he is only liable to Brooks if he has dispossessed her of Flora, interfered with Flora's use for a substantial period of time, damaged the horse, or caused personal injury by his use. He hasn't dispossessed Brooks of Flora, since he only used her briefly. Has he deprived her of Flora's use (§218(c)) if Brooks doesn't even know Flora is missing and had no intent to use the horse during the period that it is missing? I don't know, and haven't found any definitive authority on the point. Liability would have to be premised on his interference for a period of time with Brook's use of Flora. If Brooks

were home, and Wongsun took Flora for a 12-hour ride, this damage would be shown. But where Brooks was away, and the ride is fairly short, it is not clear that Wongsun would be liable.

However, Wongsun may have committed trespass to land when he entered to take Flora. That intentional tort is actionable without a showing of resulting harm, at least for nominal damages.

9. Wongsun has committed both trespass to chattels and conversion. Under Restatement (Second) of Torts §217, he has taken Brooks's horse, and as a consequence caused damage to it. Restatement (Second) of Torts §218(b). One might also argue that he has "dispossessed" Brooks of Flora, since the horse had to be shot.

Wongsun has also committed conversion — in this case both remedies apply. He has exercised control over Flora inconsistent with Brooks's ownership, which has led to Flora's loss. And the factors in Restatement (Second) of Torts §222A strongly point to liability for conversion. Taking Flora was inconsistent with Brooks's right of control (§218(b)), and led to her complete loss (§218(e)), causing serious expense and inconvenience to Brooks (§218(f)). Wongsun's deliberate commandeering of Flora also shows bad faith (§218(e)). This would support liability for conversion as well as trespass to chattels.

10. Wongsun is liable for conversion, since he has completely deprived Brooks of her horse, and acted in bad faith. It would be hard to find a clearer case for conversion. Most jurisdictions would also hold Interloper liable as a converter. She has taken Flora, and obtains no right to possession by buying her from Wongsun. Although Interloper acted in good faith, she still deprived Brooks of her property. Here's the Restatement's position on such cases:

> **Section 229. Conversion by Receiving Possession in Consummation of Transaction**
>
> One who receives possession of a chattel from another with the intent to acquire for himself or for a third person a proprietary interest in the chattel which the other has not the power to transfer is subject to liability for conversion to a third person then entitled to the immediate possession of the chattel.

Put another way, buyer beware. This position is consistent with the treatment of mistake in other intentional tort cases: Here, as there, Interloper is "innocent" in some sense, but the law places the burden of her mistake on her rather than on the party who loses her property. The Restatement suggests that one who becomes a converter in such cases may reduce the resulting damages by returning the chattel unimpaired. Restatement (Second) §229 cmt. f.[4]

At Sea

11. a. Pete has committed trespass to chattels, but probably isn't liable to Sailor. As in Example 9, Pete has intermeddled with property, but caused no damage to it. He has used it for 12 hours or so, but it is hard to say that he has deprived Sailor of its use, since Sailor's boat was not even in the water, and Sailor was not planning to use the mooring. Again, it is unclear whether a claim exists for such deprivation of use when, as here, the owner has no intent to use the property during the period when it is interfered with.

The Restatement offers an example in which A leaves his car on the street, and B, for a joke, pushes it around the corner. A spends an hour finding it. Restatement (Second) of Torts §218 illus. 4. Under the Restatement, B has committed trespass to chattels. However, this example is distinguishable, since A tried to use his car and was deprived of its use. It's hard to make that argument here.

b. On these facts, Pete is liable for damages under §218, since he has deprived Sailor of the use of the mooring for a substantial time. Restatement (Second) §218(c). Sailor could sue . . . but realistically, would he? What lawyer would take this case for a contingent fee (a percentage of the recovery)?

c. Even if some trespasses to chattels do not support an action for damages, defining such intrusions as tortious may give the possessor other rights. For example, tort law creates a limited privilege for a possessor of chattels to use force to recapture them. See Restatement (Second) §§100-110. This privilege would presumably apply if the taker had committed trespass to chattels under §217, even if he had not caused damages compensable under §218.

In addition, commission of the tort might support an action for an injunction, even if the trespasser had not caused damages. If Sneaky Pete regularly uses Sailor's mooring, Sailor might seek an injunction, even though he could not establish that he had planned to use the mooring at any time when Sneaky Pete tied up. See, e.g., *Buchanan Marine Inc. v. McCormack Sand Co.*, 743 F. Supp. 139, 142 (E.D.N.Y. 1990) (approving injunctive relief in a similar case).

A Clever Ploy

12. You can see Abel's reasoning here, can't you? If the tortfeasor interferes substantially with the right of possession, conversion law treats him as having "bought" the chattel. "Suits me," says Abel, "I'll pay the 50 bucks and keep the painting." Surely this is not going to work. Apart from potential criminal liability, a court would order return of the painting. (Traditionally the plaintiff could bring an action for *replevin* to recover the painting. See generally D. Dobbs, Law of Remedies §5.16) Some courts might also grant punitive damages. Conversion is not meant to give tortfeasors an option to commandeer property as long as they are willing to pay for it. It is meant to make them pay its value as damages for major interference with the owner's possessory rights.

Quick Takes

13. a. Here, Mephisto has never taken possession of Plaintiff's property; instead, he destroyed it. He might argue that he is not liable for conversion because he did not "exercise . . . dominion or control" over Flora. The argument won't fly. Surely, killing an animal is a way of exercising control over it. Mephisto is liable for conversion, since he has destroyed, not damaged Flora. Restatement (Second) of Torts §222A illus. 17.

    b. Mephisto has converted the tires, since he has rendered them useless by his intentional interference. He is also liable for trespass to chattels with regard to the car, since he has intermeddled with it (Restatement (Second) of Torts §217), resulting in an impairment of its condition. Restatement (Second) of Torts §218(b).

    c. Mephisto is not liable for trespass to chattels or conversion, since he

did not act with intent to cause harm to the car. He may be liable for negligence.

d. This is conversion. Mephisto intended to interfere with Plaintiff's property (Restatement (Second) of Torts §222A(2)(b)), caused extensive interference to it (§222A(2)(d), (e)), and certainly did not act in good faith. In *United States v. Arora*, 860 F. Supp. 1091 (D. Md. 1994), on which this example is based, the court held that the defendant had converted the cell line, which was destroyed by his interference.

e. This is neither conversion nor trespass to chattels. Mephisto had permission to use Flora, so his taking is not a dispossession. And he had no intent to cause the harm Flora suffered.

f. Trespass to chattels. Mephisto has intermeddled with Flora, but only caused temporary damage, not serious enough to treat him as a converter.

g. Neither conversion nor trespass to chattels. Presumably Plaintiff agreed to the surgery, understanding the risk that Secretarius would never run again. Thus, Mephisto would have consent to perform it, defeating a claim for intentional interference. Any claim would have to be based on negligence instead.

h. This is trespass to land, not to chattels. Mephisto has come upon plaintiff's property and deposited dirt on it, a clear trespass. He is liable. The more complicated question is what the damages are. Plaintiff's damage is consequential loss of economic opportunity, which is not your typical damage from trespass. Frankly, I don't know if Mephisto is liable for that. He is liable for trespass, regardless of whether he caused *any* damage (Restatement (Second) of Torts §163)), but naturally plaintiff wants damages for losing the chance to compete. Perhaps he will recover punitive damages based on Mephisto's reprehensible conduct.

i. Though Muir's motives may be lofty, he has committed trespass to chattels by intermeddling with Monumental's logging machine. As a result Monumental has been deprived of its use for a substantial period of time . . . loss of a day's logging with these huge machines is likely a significant economic hit. See *Huffman and Wright Logging Co. v. Wade*, 857 P.2d 101 (Or. 1993) (affirming verdict for

compensatory and punitive damages for trespass to chattels on similar facts).

j. Zenger is probably not liable for either trespass to chattels or conversion. He has not deprived Carnegie of the use of his papers for any length of time, much less permanently, so he isn't liable for conversion. Nor is he likely to be liable for trespass to chattels. He has "intermeddled" with Carnegie's papers, so arguably he has committed trespass to chattels. But he hasn't damaged Carnegie's papers, or dispossessed Carnegie of them in any way, so it appears that he would not be liable to Carnegie under §218. A much more likely remedy is a claim for invasion of privacy, which is the real gist of Carnegie's complaint. See *Pearson v. Dodd*, 410 F.2d 701 (D.C. Cir. 1969) (denying recovery for trespass to chattels or conversion on similar facts).

Cyber Chattel

14. In *Compuserve Inc. v. Cyber Promotions, Inc.*, 962 F. Supp. 1015 (S.D. Ohio 1997), the court held a spammer liable for trespass to chattels on similar facts. Cyber Promotions argued that it did not cause any injury to Compuserve's servers by its e-mail transmissions, but the court, citing Restatement (Second) of Torts §218 cmt. h, noted that a defendant who interferes with a chattel can be liable for trespass even though it does not harm the chattel. The spamming in this case caused multiple problems for Compuserve, including the burden of excessive traffic and the costs of trying to circumvent the defendant's misuse of its electronic facilities. The court entered a preliminary injunction barring Cyber Promotions from sending spam messages through Compuserve's network. See also *eBay Inc. v. Bidder's Edge, Inc.*, 100 F. Supp. 2d 1058 (N.D. Cal. 2000) (granting preliminary injunction against use of "web crawler" technology challenged on a trespass to chattels theory); *America Online Inc. v. IMS*, 24 F. Supp. 2d 548, 550-551 (E.D. Va. 1998) (defendant who sent 60 million unauthorized e-mail advertisements through Internet service provider's network liable for trespass to chattels).

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1. What are shin splints, anyway? Do horses get them?

2. In extreme cases, acts like this might give rise to a claim for intentional infliction of emotional

distress, if they were committed with the intent to cause distress to the plaintiff. See Restatement (Second) of Torts §46. But Cody's act very likely does not rise to the level of extreme and outrageous conduct.

3. "There seems to be no doubt that any taking with knowledge of the plaintiff's rights and an intent to deprive him of them permanently is a conversion." W. Prosser, The Nature of Conversion, 42 Cornell L.Q. 169, 175 n.29 (1957).

4. Interloper might recoup any damages she pays to Brooks from Wongsun, in an action for fraud or misrepresentation.

CHAPTER 5

False Imprisonment: Protecting Freedom of Movement

INTRODUCTION

Battery and assault protect the right to be free of physical intrusions on the person. Trespass allows redress for intrusions on private property. False imprisonment safeguards an equally fundamental value, the right to be free of restraint on one's freedom of movement, the right to "go freely through the world,"[1] the right not to be confined against one's will. Physical confinement is a drastic intrusion on personal liberty, as well as a humiliating blow to a person's sense of dignity and independence. It isn't surprising that the tort of false imprisonment dates to the very early days of the common law.

The Elements of False Imprisonment

The law of false imprisonment in most states fairly closely reflects the formulation in the Restatement of Torts.

Section 35. False Imprisonment

(1) An actor is subject to liability to another for false imprisonment if

(a) the actor intends to confine the other within a limited area, or the actor's intent is sufficient under §11 (transferred intent);

(b) the actor's affirmative conduct causes a confinement of the other, as provided in §§8 and 9, or the actor fails to release the other from a confinement despite owing a duty to do so;

(c) the other is aware that he or she is confined or the other suffers bodily harm as a result of the confinement; and

(d) the other does not consent to the confinement, as provided in §12.

Restatement of the Law (Third) Torts: Intentional Torts to Persons (Tentative Draft No. 3) §7.

Note that false imprisonment again requires intent, in the same sense as required for other intentional torts. Carelessness is not enough; the defendant must have acted with a purpose to cause the confinement, or with substantial certainty that his acts will cause it. Here, as with battery and assault, one may act *deliberately* but not intentionally. If Peterson, a zookeeper, closes up the tiger cage and goes to bed, not realizing that Stanley is still in there feeding the tigers, he has not committed the tort of false imprisonment. Although he acted deliberately, in the sense that he meant to close the door, he did not close the door with the purpose to confine Stanley, or with substantial certainty that he would. Any remedy against Peterson will be for negligence, not intentional tort.

Second, the defendant's intentional act must cause confinement of the plaintiff. The essence of the tort is restraint of the plaintiff's freedom of movement, so she must establish confinement to recover. Not all restraints on a plaintiff's freedom of movement constitute confinement. If Munoz blocks the door of her store, refusing to let Maxwell in, she has not committed false imprisonment. Preventing the plaintiff from going to one particular place does not "confine" her, even though it restricts her freedom of movement in some degree. Similarly, blocking the plaintiff's way in the street will not support recovery for false imprisonment, as long as plaintiff can go some other way. Even if Munoz blocks an exit from her store while Maxwell is inside, she has not confined Maxwell, if some reasonable means of getting out remains. If the side door is open, and Maxwell knows it, he is not confined, just frustrated. If, on the other hand, he can only escape by slipping out through a hatch into the sewer system, he has no reasonable means of escape.

Confinement must be within a limited area. Threatening to kill Bertucci if he goes into outer space would not be actionable: No court would view a restriction to wandering the earth as confinement to a bounded area. One court wisely found Taiwan too spacious to constitute a "bounded area" (see *Shen v. Leo A. Daly Co.*, 222 F.3d 472, 478 (8th Cir. 2000)), but another suggests that "if Denmark was a dungeon to Hamlet . . . we suppose Illinois could be a prison to [the plaintiff]." *Albright v. Oliver*, 975 F.2d 343, 346 (7th

Cir. 1992). See also *Helstrom v. North Slope Borough*, 797 P.2d 1192, 1199 (Alaska 1990) (preventing plaintiff from leaving Barrow, Alaska, could constitute false imprisonment). Obviously, most of the cases involve confinement within a much more limited space, such as the four walls of a house, an office or a prison, or in a car or other vehicle.

Consent by Coercion

Confinement does not always entail physically locking the plaintiff up. If store personnel confront a customer in the aisle, accuse her of theft, and threaten her with physical harm if she leaves, she suffers confinement, even if the door is open. "The restraint may be by means of physical barriers, or by threats of force which intimidate the plaintiff into compliance with orders. It is sufficient that he submits to an apprehension of force reasonably to be understood from the conduct of the defendant, although no force is used or even expressly threatened." *Dupler v. Seabert*, 230 N.W.2d 626, 631-632 (Wis. 1975). Similarly, an actor can confine the plaintiff by confiscating significant items of personal property, or by other threats that would cause a reasonable person to submit to confinement.

Cases often involve the question of whether the plaintiff was really forced to remain, or simply responded to psychological or economic pressure that we all experience at times. Consider the common false imprisonment scenario involving a customer in a store who is brought to the office and accused of theft. The customer may choose to stay in the office for a variety of reasons. She may believe that she is not free to leave, and will be subjected to physical restraint if she does. As the *Dupler* case suggests, this suffices to constitute confinement. Or, the customer may believe that, if she leaves, store personnel will keep her purse, or her purchases. The cases hold that staying to avoid loss of personal property also constitutes confinement. Or, the customer may believe that, if she refuses to cooperate and leaves, store personnel will call the police, or tell others that she had stolen from the store. Choosing to remain in scenarios like these, which involve forms of pressure that the defendant has a right to use, generally will not constitute confinement.

Such cases pose close factual issues concerning what threats were made or why the plaintiff submitted to physical restraint. These cases, of course, raise questions of fact for the jury, as to whether the plaintiff stayed because

she reasonably apprehended physical force or loss of valuable property, or stayed for other reasons, such as to clear matters up, or to avoid arrest or dismissal from employment.

As with other intentional torts, the plaintiff generally need not show any physical injury or other damage in order to recover for false imprisonment. The Restatement draft quoted above (pp. 79–80) provides that damages need not be proved unless the plaintiff was unaware of the confinement. The plaintiff may recover at least nominal damages by proving the fact of the false imprisonment itself. However, few plaintiffs bring lawsuits solely to have the court declare that they have been wronged. Almost always, they hope for an award of substantial damages. A jury might find substantial damages if the plaintiff has suffered psychological injuries as a result of the confinement. In one case, for example, a store clerk accused of theft testified that the incident caused her throat to swell so that she couldn't breathe, and that she could no longer work in a store, for fear of making mistakes and being subjected to similar treatment. Such consequences could support a substantial award. In some states punitive damages may be available, providing an additional incentive to sue even if physical or economic damages are small.

COMMON PRIVILEGE DEFENSES TO FALSE IMPRISONMENT

Many false imprisonment cases turn on whether the defendant had a privilege to commit acts that otherwise would constitute false imprisonment. The three most common privileges asserted in false imprisonment cases are consent, the privilege to detain a customer to investigate apparent shoplifting, and the privilege to arrest.

It isn't entirely clear whether these privileges constitute defenses, or whether the plaintiff must prove the absence of such privileges as part of her prima facie case. Logically, these privileges probably should be viewed as defenses to false imprisonment, which a defendant must plead and prove to avoid recovery. The definition of false imprisonment in Restatement (Second) of Torts §35 did not include lack of consent as an element.

However, authorities often speak of the tort as applying to confinement "without a lawful privilege." Harper, James, & Grey, The Law of Torts §3.7. The proposed Third Restatement will apparently include lack of consent as an element of false imprisonment (§7(d)), which likely reflects the trend in the cases. See id. at cmt. k.

The privilege of consent, addressed in Chapter 6, is frequently asserted in false imprisonment cases. If a party consents to enter a three-week drug treatment program, he cannot sue for false imprisonment if he is kept for three weeks.[2] Similarly, a store clerk who consents to remain in the security office to discuss a claimed theft cannot sue for false imprisonment. But consent can be limited. The clerk might have consented to a brief detention, but not five hours. The drug user might have consented to three weeks' treatment, but not five months. The issues here tend to be — as in other consent cases — whether there was true consent, as opposed to coercion, and whether the defendant exceeded the scope of the consent freely given.

A common false imprisonment scenario involves detention of a person suspected of stealing from a store. Under the traditional common law approach, a merchant who detained a person suspected of stealing goods risked liability for false imprisonment, particularly if it turned out that the person had not stolen the merchandise. Some courts, recognizing the dilemma this poses for merchants, have recognized a privilege to detain a person to investigate theft. This privilege is often referred to as the "shopkeeper's privilege." The Second Restatement recognizes this privilege, though it has not been universally adopted by courts:

> One who reasonably believes that another has tortiously taken a chattel upon his premises, or has failed to make due cash payment for a chattel purchased or service rendered there, is privileged, without arresting the other, to detain him on the premises for the time necessary for a reasonable investigation of the facts.

Restatement (Second) of Torts §120A. Under the Restatement, the privilege is not limited to the police or similar security officers. It may be exercised by a store manager or a clerk. But note several limits on the privilege: The actor must have a reasonable belief that the theft has taken place, and the detention must be limited to the time necessary for a reasonable investigation. Many states now have statutes that codify this privilege. See, e. g., Calif. Penal Code §490.5(f)(1), which provides in part that

> A merchant may detain a person for a reasonable time for the purpose of conducting an

> investigation in a reasonable manner whenever the merchant has probable cause to believe the person to be detained is attempting to unlawfully take or has unlawfully taken merchandise from the merchant's premises.

Another common affirmative defense to false imprisonment claims is the privilege of arrest. This is too complex an area to get into in detail here . . . the Second Restatement offers some 34 sections on the privilege of arrest.[3] It involves a good many complex distinctions, such as arrest by private persons vs. police officers, arrest with or without warrants, and arrests for felony vs. arrests for lesser offenses. The issue is furthered complicated by constitutional guarantees and statutory variations. Suffice it to say here that in many circumstances there is a privilege to arrest a person based upon a warrant or reasonable suspicion that the person has committed a crime, but that where the privilege does not apply, an arrest constitutes actionable false imprisonment (though often referred to as false arrest).

Examples

Probing the Elements

1. Lewis, a school bus driver, completes her route, returns the bus to the lot, locks the door, and heads for home. Unbeknownst to her, Gretel, a small first grader, had fallen asleep curled up in a back seat, and wasn't visible from the front of the bus. Lewis had looked to the back before getting off the bus, but did not see her. Gretel awoke and was terrified. She was not discovered until the following morning. Her parents bring suit on her behalf for false imprisonment. What result?

2. Tough and Thug meet Milquetoast, a hiker and nature lover, on a grassy hill, with a view for 60 miles in each direction. Furious that Milquetoast won the school spelling bee, they order him to sit down in the grass and stay put, threatening to beat him to a pulp if he moves. Milquetoast sits. After Milquetoast sits in the grass for seven minutes, enjoying the view, they let him go. Can Milquetoast sue for false imprisonment?

3. Tough and Thug accost Milquetoast on a city street late at night. Thug pulls a knife and demands that Milquetoast take them to an ATM to

withdraw money. They walk seven blocks to the ATM, but Tough and Thug run away when they see a police officer nearby. Are they liable to Milquetoast for false imprisonment?

4. Clevinger refused to pay the bill for repairs on his car, claiming they were inadequate. Parrish, the owner of the garage, had him bring the car in from his farm, 40 miles out of town. When Clevinger arrived, Parrish put the car on the lift and raised it in the air. He then refused to bring it back down until Clevinger paid his bill. Clevinger sues for false imprisonment, claiming he could not return home without his car. What result?

5. Alston gets on the bus to go downtown and starts talking politics with Felix, the bus driver. Unfortunately they don't see eye-to-eye on such matters, and end up in a violent argument. When they get to Alston's stop, Felix refuses to let Alston off the bus until he apologizes for insulting his favorite politician. Alston sues for false imprisonment. Can he make out a good claim?

Confinement and Compulsion

Many close false imprisonment cases involve the issue of whether the plaintiff was really forced to remain, or chose to for reasons of her own. Here are a few examples that explore the problem.

6. Xavier meets Quentin on the street. He steps in front of Quentin and orders him to stop. Quentin had just broken up with Xavier's sister, and she was devastated. Xavier demanded an explanation, and showed every sign of making a scene if Xavier didn't discuss the matter with him. Quentin, anxious to avoid a scene, stops. The confrontation lasts 20 minutes. Quentin later sues Xavier for false imprisonment. Does he have a false imprisonment claim?

7. Here's a nice example from the Second Restatement. "A is naked in a Turkish bath. B locks the door into the dressing room but leaves open the door to the general waiting room where persons of both sexes are congregated." Restatement (Second) of Torts §36 illus. 5. Has B confined A?

8. Mulvey, as a joke, locks Maroney in his (Mulvey's) apartment while he is sleeping off a hangover. Maroney gets up and tries the doors but can't get them open. When sued for false imprisonment, Mulvey argues that Maroney was not confined, because all the windows were unlocked and the apartment was on the first floor. What result?

9. Montez has just broken up with Hurley. She agrees to go for a drive with Hurley to discuss their relationship, if he will bring her back to the house. He brings her back, but then begins to coast slowly down the street. Montez could escape by jumping from the car, but doesn't. Instead, she sues for false imprisonment. Has she been confined?

10. Griffin pays a visit to a former boyfriend, Clark. Clark offers to drive her home, but she refuses, saying she will take the train to her home 30 miles away. Clark grabs her suitcase and puts it in his car. Meanwhile, the train leaves the station. Rather than spend the night in a strange town, Griffin reluctantly gets into Clark's car. En route, there is an accident due to the negligence of another car, and Griffin suffers personal injuries. What arguments would you expect Clark to make to avoid liability for Griffin's injuries?

11. Consider this example from the Second Restatement:

> A, a small and weak man, takes hold of B's coat for the purpose of detaining him against his will. B is a much larger man and could, with little exertion, free himself at once. B submits. A has confined B.

Restatement (Second) of Torts §39 illus. 2.

a. Would B have a privilege to use force to free himself?
b. Why, if B has a privilege to escape, and easily could, do the drafters of the Restatement treat this as confinement?

False False Imprisonment

12. Ruggiero, a store security officer, sees Li walking out of the store with four pairs of Levis, which still have the security tags attached. (These are typically removed when items are rung up on the cash register.) He asks Li if he can examine the Levis. Li gives them to Ruggierio, who

then announces that Li will have to come to the office to discuss the matter. Li, unwilling to part with the Levis, goes along. In the office he is interrogated by the manager for 20 minutes before he is allowed to leave.

a. Assume that Li had paid for the Levis, but the clerk had failed to remove the tags. Since he was not a shoplifter, could he sue for false imprisonment?

b. Rudansky, a customer, follows Li out of the store and grabs him, ordering him to return to the store and pay for the goods. Is he covered by the shopkeeper's privilege articulated in §120A of the Second Restatement (see p. 83)?

c. Suppose that Ruggiero, the security officer, was told that a tall male customer had run out of the store with unpaid merchandise, and ran out and grabbed Li, a tall male. However, it turns out that it was another tall male who had taken the goods. Is Ruggiero liable for false imprisonment?

Cabin Fever

13. In *Abourezk v. New York Airline, Inc.*, 705 F. Supp. 656 (D.D.C. 1989), the plaintiff was a passenger on a plane set to fly from Virginia to New York. Due to flight delays, the plane sat on the tarmac for several hours. Since he could no longer make his appointment in New York, Abourezk demanded to be let off the plane, but the pilot refused. His subsequent lawsuit for false imprisonment was dismissed by the federal district court. Why isn't this a good claim for false imprisonment?

A Tough Case

14. Hernandez is watching his son Jose sail a small boat on a lake. A sudden gust makes the boat heel over, and Jose is thrown into the water. Hernandez, knowing that Jose is a weak swimmer and prone to panic attacks, jumps into a motorboat that has just pulled into the dock, driven by Peroski. Hernandez tells Peroski to go out to rescue Jose, but Peroski refuses. Hernandez, who doesn't know how to drive a boat, pulls out his fishing knife and orders Peroski to start the motor and putter out to the

rescue. Is Hernandez liable for false imprisonment?

Explanations

Probing the Elements

1. Gretel will lose this case, since Lewis did not act with tortious intent. She did act "intentionally," in the sense that she deliberately locked the bus before leaving. But she did not act with a purpose to confine Gretel, or with substantial certainty that she would.

   Lewis may have been negligent, for failure to walk to the back of the bus and check for sleeping kids; this doesn't seem like a totally unlikely scenario. If so, Gretel may have a claim for negligence against her. But false imprisonment is an intentional tort, which means that Gretel can only recover for it if she proves that Lewis acted with intent to confine or with knowledge to a substantial certainty that her act would confine her. That isn't true here.

2. Even though Milquetoast is confined in the open, with a 60-mile view, he is confined. He is forced to remain where he is, whether he wants to or not. He is confined within a bounded area, the spot where he sits. The area may not have walls, but it doesn't have to. One can be confined in the open as well as in a room, and experience the same indignity and humiliation from deprivation of the freedom of movement. Milquetoast has a good cause of action for false imprisonment.

   Seven minutes is not a very long confinement, but even a very brief confinement suffices for false imprisonment. The fact that the confinement was short may affect the extent of the damages, but does not avoid liability for the tort itself.

3. This is false imprisonment. Tough and Thug didn't make Milquetoast stay in one place, but they did confine his freedom of movement, forcing him to go where they order him to. (Similarly, one can be confined by being carjacked, for example.) They have committed assault as well, since they have placed Milquetoast in apprehension of being knifed if he does not comply with the illegal condition of going where they order him to.

4. This example, loosely based on *Warrem v. Parrish*, 436 S.W.2d 670 (Mo. 1969), does not constitute false imprisonment. While Clevinger was prevented from driving home, he was not prevented from going home in some other way, or from going any other place. He was not "confined." His remedy will have to be for conversion of the car, or infliction of emotional distress, but not for false imprisonment.

   Admittedly, this case looks a lot like the case in which a store manager grabs a customer's purse and tells her to stay in the store while they investigate whether she stole merchandise. But in that case, the defendant confiscates the purse to coerce the plaintiff to *stay*, that is, restricts her right to leave by taking property. In *Warrem*, the station owners did not bar the car owner from leaving; they just told him they would keep his car.

5. Even though Alston got on the bus voluntarily, he did so with the understanding that he could get off at any stop. The driver has a duty to let Alston off at his stop. By refusing to do so, the driver has intentionally confined Alston in the bus. His indignation at Alston's political views does not give him any privilege to confine him. Alston has a right to get off, and is detained against his will. This is a good claim.

   As the case illustrates, a defendant can commit false imprisonment by refusing to release another as well as by initiating confinement. In a well-known case, the defendant induced the plaintiff to travel on his yacht, agreeing to let her off when they got to Maine, but refused to provide a boat to take her to shore when they arrived. Because he had a duty to assist her in disembarking, the defendant was liable for false imprisonment. See *Whittaker v. Sandford*, 85 A. 399 (1912).

Confinement and Compulsion

6. A plaintiff can reasonably respond to various threats by submitting to confinement, including threats of physical force, threats to her property, or threats to a member of her family. But staying to avoid the prospect of "a scene" does not suffice to constitute confinement. Life is full of awkward situations that put us to difficult choices. Not all can be redressed by tort law. Quentin may choose to avoid embarrassment by

staying to talk to Xavier, but the law does not protect him from "scenes." Similarly, the choice to stay in a place to clear one's name, to resolve a dispute, to avoid being reported to the police, or for similar reasons will not make out a case of false imprisonment.

7. This example, like the last, probes the types of threats that may reasonably lead the plaintiff to consider himself confined. The Restatement states that a person is not required to take a means of escape "if the circumstances are such as to make it offensive to a reasonable sense of decency or personal dignity." The Turkish bath example is a clear example of such a situation. A may sit tight and sue for false imprisonment.

8. This might be a good defense. One is not confined if there is a reasonable means of escape. Surely Maroney should consider the windows, shouldn't he? I would think so. If he had to jump ten feet to get out, this would not be a reasonable means of escape. But if they are fairly close to ground level there is a strong argument that he was not confined.

9. First, the fact that Montez agreed to get into the car initially does not prevent her from suing for false imprisonment. One can consent to one thing without consenting to another. Here, Montez consented to go for a ride with Hurley, not to remain in the car afterwards. So Hurley's consent defense will not fly.

   As stated in the Introduction, a plaintiff is not confined if there is a reasonable means of escape from the confinement. But jumping from a moving car, even a slowly moving car, is not a reasonable means of escape. So Montez is confined in the car, and may sue for false imprisonment for the period after they returned from the drive. Hurley's driving away forces her to remain, constituting false imprisonment.

10. In this example, loosely based on one of the classic cases, *Griffin v. Clark*, 42 P.2d 297 (Idaho 1935), there is no suggestion that Clark drove negligently. Thus, Griffin could not sue him for negligence; she would have to recover based on his false imprisonment of her instead. Clark might argue that she was not forced to skip the train; she did so to retrieve her bag. But coercion through seizure of personal property can

constitute false imprisonment, so that argument will not fly.

Clark might also argue that she consented to ride with him, since she got into Clark's car. But here too, if she did so under compulsion, she could still claim that she was imprisoned in the car. This is like the customer who willingly goes to the office in a store after her purse is confiscated by security guards. There is no true consent to the detention, because it is done under duress. See Restatement (Second) of Torts §40A (submission under duress makes consent ineffective to bar action for false imprisonment). Whether she has been coerced is a factual question: Certainly if Clark said he would leave with her things if she did not come along, this would constitute coercion, vitiating her consent.

Perhaps Clark's most interesting argument would be that his false imprisonment was not the proximate cause of Griffin's injuries in the accident. Even though he acted intentionally in falsely imprisoning her, he did not do so for the purpose or with substantial certainty that she would suffer resulting personal injuries in the accident. Very probably, however, a court would hold Clark liable for this extended consequence of his tort. Intentional tortfeasors are generally liable for the consequences of their deliberately tortious behavior, even unexpected consequences. While there is probably some limit to this (see Chapter 2, Example 12), an accident is a reasonably predictable consequence of forcing Griffin to ride in the car. Thus, she is likely to recover for it on a false imprisonment theory.

11. a. Yes, B would have the privilege of self-defense, since A, by grabbing him, is committing a battery. Also, if A's grabbing constitutes false imprisonment, the common law recognizes a privilege to use self-defense to prevent it. Restatement (Second) of Torts §68. So, B *could* use force here, but the Restatement *gives him the choice not to.* He may submit and sue for false imprisonment, and A will not be able to argue that he did not commit false imprisonment because B could have broken loose.

    b. As a policy matter, the Restatement position makes sense. Otherwise, B would be required to use self-defense, by breaking loose from Milquetoast-like assailants, since he would not have the alternative of submitting and suing for false imprisonment. (Either way, he could sue for battery, but the two torts protect different

invasions.) Requiring B to use self-defense would encourage escalation of the conflict.

If the tort rule only allowed B to submit and sue for false imprisonment when the assailant is stronger, B would have to make difficult judgments when accosted with physical force. In many cases, it won't be clear who is the weaker party. Suppose that A and B are more evenly matched, or B doesn't know that A is a karate instructor (or mistakenly thinks that he is)? The position taken by the Restatement should (if anyone in such circumstances considers tort law) discourage violence by allowing B to acquiesce and later sue for false imprisonment.

False False Imprisonment

12. a. The facts suggest that Li was coerced into going to the office and remaining there during the interrogation. As the Introduction states, one can be confined by coercion, and confiscation of personal property can constitute coercion. This makes out a prima facie case of false imprisonment.

However, while Li makes out the elements of a false imprisonment claim, the facts suggest that Ruggierio and the manager can establish the "shopkeeper's privilege" as a defense to it. They had reasonable cause, based on the fact that the tags remained on the jeans, to believe that Li had taken them without paying. Thus, they probably had a sufficient basis to detain Li for a reasonable period to investigate the possible theft. Although the reasonableness of the length of the detention depends on the facts of each case, 20 minutes is probably a reasonable time to detain a customer to resolve most shoplifting disputes.

In this case, of course, Li turns out *not* to be a shoplifter. The Second Restatement suggests that the privilege arises where the person exercising it "reasonably believes" that the other has stolen the goods. In these situations, as with the privilege of self-defense, the actor must act based on reasonable appearances. "If there were no such privilege, he must either permit the suspected person to walk out of the premises and disappear, or must arrest him, at the risk of liability for false arrest if the theft could not be proved." Restatement

(Second) of Torts §120A cmt. a. It seems that the privilege should apply, even if further investigation establishes that no theft has taken place.

b. Probably not. Section 120A refers to taking of chattels "upon his premises," pretty clearly creating a privilege for merchants, but not a roving privilege for anyone who may think someone else has stolen goods. Customers or bystanders are not likely to be as aware of the details of a transaction, so would likely make more mistakes. In addition, they are not used to dealing with such cases, so might more frequently provoke violence. Evidently, the section does not support a privilege for such vigilante intervention.

c. This is a tough question. Suppose that Tough and Thug decide to hold Milquetoast for ransom, and lock up Jessup, who looks like Milquetoast. Their mistake of fact will surely not prevent them from being liable to Jessup, just as a mistake about ownership of property will not bar an action for trespass. But if a mistake about *whether* there was a theft does not negate the shopkeeper's privilege (as suggested immediately above), why should a reasonable mistake about *who* committed a theft?

Tort law is often more tolerant of mistakes in assessing privileges than it is in applying the basic elements of intentional torts, (see *Prosser & Keeton on Torts*, (5^{th} ed. 1984) at 111), so the privilege may well apply to this mistake in asserting a privilege. In many states this will depend on the wording and intent of the statute codifying the shopkeeper's privilege. For example, there is a strong argument that the California statute quoted at p. 83 protects the detention of a person to investigate, even if it turns out that she has been mistaken for someone else.[4]

Cabin Fever

13. Abourezk makes out a good prima facie case of confinement. He was confined within the airplane by the deliberate refusal of the pilot to let him out, after he had repeatedly expressed his desire to leave. Naturally, the pilot had good reasons; he couldn't very well let him walk out onto the runways, and it was dangerous for a vehicle to come out to the plane.

But he clearly was confined.

The defense, it seems, should be consent. Passengers, by contracting for transportation with the airline, consent to the airline's reasonable procedures incident to providing transportation, including restrictions on movement in situations like this. Surely, if passengers were ordered to stay in their seats with their seatbelts fastened during turbulence, that would not constitute false imprisonment, even of the most vociferously objecting passenger.

A Tough Case

14. This is another tough case. The prima facie elements of false imprisonment are met, since Hernandez has forced Peroski to go with him in the boat. Although they are moving, he is confined, just as Milquetoast was in Example 3. Hernandez's defense will be a privilege to rescue his son — necessity, I suppose it would be called. Hernandez would almost certainly be privileged to use Peroski's boat to rescue Jose, as long as he pays for the gas. But it is questionable whether he can commandeer Peroski as well.

    Creating such a privilege could give rise to all sorts of slippery-slope problems. Would the privilege apply if the rescue were dangerous? if multiple parties needed rescue? if Peroski had compelling reasons not to help? The court is unlikely to put the choice in Hernandez's hands by giving him a privilege to force Peroski to assist. Compare Restatement (Third) of Torts §37 (actor has no duty to assist a person in need even though aware that such assistance is necessary).

    Several sections of the Second Restatement approve the infliction of minor bodily harm or false imprisonment to avoid greater harm. See §§73, 74. An argument could be made that an analogous right exists here, to impose a minor false imprisonment on Peroski to prevent a much greater harm to Jose. I don't know the answer to this one. I tend to think there would be no privilege, because courts would be uncomfortable licensing actors to commandeer others, but a respected colleague disagrees.

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1. M. Shapo, Principles of Tort Law §10.07.
2. Unless, of course, he validly revokes consent during the period.
3. See Restatement (Second) of Torts §§112-145.

4. There may be another problem with asserting the privilege here, since Li was detained after leaving the store. It is not clear that the Second Restatement version of the shopkeeper's privilege extends beyond the premises. See §120A (authorizing detention "on the premises"). The California statutory privilege contains no suggestion, however, that it is limited to detention on the premises.

CHAPTER 6

The Far Side of the Coin: Classic Defenses to Intentional Torts

INTRODUCTION

The preceding chapters describe the elements a plaintiff must prove in order to recover for various intentional torts. These elements, it is said, are necessary to establish a "prima facie case," that is, a showing sufficient to allow a jury to conclude that the tort has been committed. However, the case is not over once the plaintiff has presented evidence to establish these prima facie elements. The defendant must be heard from, and very likely, she will offer another side to the story.

The defendant may defend by simply negating one or more of the prima facie elements of the tort. For example, she may present evidence in a battery case that she never touched the plaintiff, that she did so unintentionally, or that the touching was not one that the reasonable person would find offensive under the circumstances. In other cases, however, the defendant takes the position that, *even if* the prima facie elements of the tort are shown, she is not liable anyway, because of additional facts that allow her to avoid liability. Such additional facts are often referred to as *affirmative defenses.*

Some affirmative defenses have nothing to do with the underlying incident itself. For example, if Jones sues Smith for battery, Smith might defend on the ground that the claim is barred by the statute of limitations, the statutory period within which suit must be brought on a claim. This defense

asserts that, even if Jones can prove that Smith intentionally inflicted a harmful or offensive touching on her, she is not liable, because the suit was brought too late. Or, Smith might plead that Jones had signed a release from liability (a contractual agreement not to sue on the claim, usually given for a sum of money paid in settlement). Again, this defense does not rely on a showing that no battery occurred, but rather on additional facts that demonstrate that there is no longer a right to sue for the claim.

Other affirmative defenses, however, relate more directly to the events that give rise to the claim. The classic example is self-defense. In Jones's action for battery, for example, Smith might plead that she hit Jones because she was warding off a blow from Jones. If she acted in self-defense, she was privileged to inflict the harmful or offensive touching on Jones, and will not be held liable for doing so.

Another common affirmative defense to intentional tort is consent. Courts generally hold that the victim's consent bars recovery for touch-ings that would otherwise constitute batteries. If Jones proves that Smith slapped her in the face, Smith might plead that she and Jones were rehearsing for a play, and that Jones consented to the slap as part of the script. If this is true, Smith's act was privileged; she will not be liable even if the slap was offensive and intentional.

A number of other privileges may also constitute defenses to battery and assault claims. Police officers enjoy a privilege to use reasonable force in the course of arrest. An actor who causes an intentional invasion of another's property interests may sometimes assert the defense of *necessity,* that an otherwise tortious act was privileged because it was done to prevent a greater harm. Teachers and parents enjoy a limited privilege to use force in disciplining children. And there are other privilege defenses. This chapter, however, focuses on self-defense and consent as examples of the effect of privileges on tort liability.

THE PRIVILEGE TO USE FORCE IN SELF-DEFENSE

Self-preservation, they say, is the first law of nature. It is not surprising, then,

that the law of torts has long recognized the privilege to use force to protect oneself from an aggressor. An actor who is privileged to use force in self-defense incurs no liability for doing so, in some cases even if she inflicts serious bodily injury or death upon her assailant.

However, self-defense is a limited privilege. It is not a general license to attack an aggressor, or to respond to unwarranted provocation, or to give blow for blow; it only authorizes the use of force to prevent an impending battery or to stop one which is in progress. Suppose, for example, that Jones slaps Smith on the face and announces, "There, now we are even." Smith has no privilege of self-defense on these facts. She does not need to use force in her own defense, because she is no longer threatened with a battery. True, she has been the *victim* of one, and may sue for it, but self-defense does not authorize a tort victim to respond to force with force. It is a privilege to forestall an impending battery, not to retaliate for prior ones.

Similarly, there is no right to attack another simply because the other may deserve it. Smith may not strike Jones because she makes derogatory statements about Smith's lineage or her politics. Nor may she invoke self-defense against threats of future harm, such as a threat to attack her at a later time. In such cases, Smith has peaceful legal remedies, and is required to resort to them rather than "taking the law into her own hands" by immediate physical force.

Even where the privilege arises, it is limited: the victim of an aggressor may only use reasonable force in self-defense. The victim is not licensed to extract an "eye for an eye," but only to use the force that she reasonably believes is necessary to avert the threatened harm. Smith may not knife Jones in the ribs to avoid a slap in the face, though she would certainly be privileged to block the blow or push Jones away. Smith may not even be privileged to use the same level of force used by the initial aggressor, if less will do to prevent the contact. Remember that the purpose of self-defense is not to remedy the wrong already inflicted; such redress should be sought through criminal prosecution or intentional tort damages. Self-defense is authorized solely to prevent a further intrusion that cannot be avoided by waiting for legal redress.

On the other hand, the victim will sometimes be privileged to use *more* force than was necessary to avert a threatened battery. The privilege to use force in self-defense turns on the victim's *reasonable belief* that force is necessary, even if, in fact, it is not. If Enemy Jones raises a knife before her,

Smith has no time to conduct an investigation of Jones's motives before forestalling the blow. Smith would be privileged to strike Jones if she reasonably concluded that Jones was about to stab her, even if Jones actually intended to scratch his back with the knife. Restatement (Second) of Torts §63 cmt. i.

The limits on the privilege of self-defense reflect a policy of minimizing the use of force as a means of self-protection. Arguably, this goal would be furthered by always requiring victims to retreat — that is, to run away — before using self-defense. However, courts have refused to create a duty to retreat (even if it can be done with perfect safety) before using *nondeadly* force in self-defense. Such a duty would require the victim of threatened violence to relinquish her right to walk the streets. Our culture places a high premium on personal choice and independence; consequently, a "duty to run" has not met with public or judicial acceptance. Thus, at least where nondeadly force is threatened, the victim is privileged to stand her ground and use nondeadly force in self-defense, even if retreat is feasible. Restatement (Second) of Torts §63 cmt. m.

DEADLY FORCE IN SELF-DEFENSE

While all courts recognize a limited right to self-defense, most impose additional restrictions on the right to use deadly force, that is, force that is "intended or likely to cause death or serious bodily harm." Restatement (Second) of Torts §65(1). The Second Restatement, for example, takes the position that an actor may use deadly force in self-defense only if she reasonably believes that she is threatened with deadly force "which can be prevented only by the immediate use of such [deadly] force." Id. Under this widely accepted approach, there is no right to use deadly force in response to the lesser threat of nondeadly force. If Smith raises her hand to slap Jones, Jones may not shoot her dead, or swing at her head with a hammer. Jones may use nondeadly force, or retreat, or suffer the slap and sue for battery, but she is not privileged to escalate the conflict by using deadly force.

Jones may not even be privileged to use deadly force if she is attacked with deadly force. Some jurisdictions, and the Second Restatement, require a victim of deadly force to retreat if it is safe to do so before using deadly force

against the assailant. See Restatement (Second) of Torts §65(3). The Restatement offers this rationale for imposing a duty to retreat:

> the interest of society in the life and efficiency of its members and in the prevention of the serious breaches of the peace involved in bloody affrays requires one attacked with a deadly weapon, except within his own dwelling place, to retreat before using force intended or likely to inflict death or serious bodily harm upon his assailant, unless he reasonably believes that there is any chance that retreat cannot be safely made.

Restatement (Second) of Torts §65 cmt. g. The Restatement recognizes, however, that the victim need not retreat unless it is clearly safe to do so. If the victim has any doubt of that (as most will), she may use deadly force in self-defense against deadly force.

A majority of jurisdictions reject the Restatement approach. Instead, they hold that the victim of an assault with deadly force is privileged to stand her ground and use deadly force in self-defense, even if retreat is feasible. V. Schwartz, K. Kelly & D. Partlett, Prosser, Wade and Schwartz's Torts: Cases and Materials 112 (13th ed. 2015). Even the Restatement recognizes that one threatened with deadly force in her home need not retreat. This obviously reflects the widely shared view that one's home, if not quite a castle, ought at least to be an inviolable place of refuge.

DEFENSE OF OTHERS

Interesting problems arise when an actor defends others rather than himself. Suppose, for example, that Sir Galahad comes around the corner and sees Goliath taking a swing at David. Inferring that Goliath is about to batter David, he punches Goliath. Is he protected from liability by a privilege of "defense of another"?

The basic premise in the cases has been that an intervenor such as Galahad has the right to use the same force to defend David that David could use to defend himself. Thus, if Goliath is about to batter David with nondeadly force, Galahad (like David) could use reasonable nondeadly force to prevent that battery. If Goliath was using deadly force, Galahad could use deadly force in defense of David, if necessary to forestall the battery.

But suppose that Galahad, when he comes around that corner, misconstrues the situation. Suppose that David had just reached into his

pocket for a knife, and Goliath's impending blow was a privileged act of self-defense against an assault by David? Galahad may reasonably interpret the scene as an assault by Goliath, but suppose he is wrong?

The cases have taken two approaches to this "mistaken defense of other" problem. Some take the position that Galahad has a privilege to act upon his reasonable perception. Thus, if it reasonably appears to Galahad that Goliath is the aggressor, he may defend David from Goliath's blow, even if he is wrong. After all, we give *David* that privilege — to act upon his reasonable perception that he is being attacked, even if he is not. So why not give the same privilege to Galahad, the virtuous intervenor? Under this approach, Galahad may use reasonable force to protect David so long as he reasonably believes that David is about to be the victim of a battery by Goliath. Restatement (Second) of Torts §76.

Other courts have taken what is sometimes called the "shoe-stepping" approach to defense of others. Under this view (evidently a minority position), Galahad only has a privilege to defend David if David *actually* was privileged to defend himself. So, when Goliath swings at David in self-defense against the knife threat, but Galahad, arriving on the instant, mistakenly perceives Goliath as the aggressor, Galahad would not be privileged to defend David, because David, as the initial aggressor, would not be privileged to defend himself. In a jurisdiction that takes this approach, Galahad acts at his own risk. If he is wrong about who the aggressor is, and defends the actual aggressor, he "steps into the shoes" of the aggressor (David, in our example). He would not have a privilege to defend David, because David would not be privileged to defend himself from a blow by Goliath in self-defense. This approach suggests that intervenors should "look before they leap," while the reasonable mistake approach places a higher priority on Galahadism. See generally, Dobbs' Law of Torts §84.

THE "DEFENSE" OF CONSENT

A second common affirmative defense to intentional torts is *consent.* Tort law generally accepts the maxim, *volenti non fit injuria* ("to one who is willing, no wrong is done"). Prosser & Keeton, The Law of Torts §18 at 112 (5th ed. 1984). If the victim of a harmful or offensive touching manifests

consent to the contact, the defendant is usually not liable for causing it. This is an example of the premium our society places on the individual's right to craft her own fate, to choose for herself, even to make choices most of us would consider stupid or self-destructive.[1]

Although consent avoids liability, it may not be entirely accurate to call it a defense. If an element of battery is the unwelcome nature of the contact, arguably the plaintiff's consent negates a basic element of her prima facie case. On this reasoning, *lack of consent* should be an element of the plaintiff's prima facie case of battery, and the plaintiff should include an allegation of lack of consent in her complaint.[2] There is considerable authority that this is so. See Dobbs' Law of Torts, §105. The draft Third Restatement treats lack of consent as a required element of battery and assault. See Restatement of the Law (Third): Intentional Torts to Persons (Tentative Draft No. 1) §102(d); §104(b). But some cases treat consent, like most privileges, as an affirmative defense that must be raised and proved by the defendant if she claims that the plaintiff consented to the contact. See, e.g., *Sims v. Alford,* 118 So. 395 (Ala. 1928).

This somewhat scholastic pleading question is less important than understanding what constitutes consent, and when it is effective to protect the actor from liability. Largely, common sense dictates the scope of consent. Common sense tells us that a person may consent to one touching but not another. Smith's acceptance of a "kiss in the moonlight" does not authorize Torres to have intercourse with her, nor does Vega's agreement to a fist fight with Jones authorize Jones to use a shotgun if he fares poorly in the battle. Common sense also tells us that one can manifest consent to a touching without signing a contract, or even uttering a word. Smith may agree to Torres's kiss with a look or a blush — and may similarly refuse without speaking.

Naturally, difficult factual issues will often arise as to whether the victim consented to the contact. However, paradoxically, the privilege does not turn on *actual* consent. Most courts hold that the defendant is privileged to make a contact where the plaintiff's words, gestures, or conduct reasonably manifest consent to it, even if she was not actually willing to be touched. Restatement (Second) of Torts §892(2). The classic case for this proposition is *O'Brien v. Cunard S.S. Co.,* 28 N.E. 266 (Mass. 1891), in which the plaintiff received a shipboard vaccination prior to entering the United States. Although she later testified that she was unwilling to be vaccinated, she had stood in a line of

200 women waiting to be vaccinated, had watched those in front of her receive their vaccinations, and had held up her arm to receive the shot. On these facts, the court held that the doctor was "justified in his act, whatever her unexpressed feelings may have been. In determining whether she consented, he could be guided only by her overt acts and the manifestations of her feelings." Id. at 266.

Common sense also suggests that consent that is based on a fundamental misunderstanding of the facts does not evidence true acceptance of a contact. This is illustrated by two recurring scenarios. In one, a doctor obtains a patient's consent to an examination by representing that it is for treatment purposes, but actually is seeking sexual gratification. In another, the defendant obtains the plaintiff's consent to sexual intercourse without revealing that she has a communicable venereal disease. In both cases, the plaintiff's consent is invalid, because, due to the defendant's misrepresentation (or, in the second case, failure to reveal crucial facts relevant to the plaintiff's choice), she did not appreciate the true nature of the intended contact and thus did not meaningfully consent to it.

Where the legislature has barred conduct to protect a disadvantaged class, even the plaintiff's *actual* consent may not create a privilege. For example, it has been held that consent to intercourse by a minor under the legal age of consent does not bar the minor from suing for battery. Statutory age-of-consent laws are intended "to protect a definite class of persons from their own immaturity." Harper, James & Gray §3.10 at 3:49-3:50. They prohibit the defendant's conduct *regardless of the minor's consent*, since the minor is deemed incapable of making a proper judgment about whether to engage in the conduct. Consequently, the defendant (the party who induces the minor to engage in the conduct) is subject to criminal prosecution even if the minor consented. To reinforce this legislative policy, courts hold that the defendant should also be barred from raising the minor's consent as an affirmative defense in a tort action based on the same conduct. See Restatement (Second) of Torts §892C(2).

CONSENT TO MEDICAL TREATMENT

Consent issues often arise in the context of medical treatment, since even

therapeutic touchings have been viewed as batteries if the patient has not consented to them. Thus, the medical cases illustrate in one frequently recurring context the consent issues discussed more generally above.

For example, the treatment cases mirror the common sense principle that consent may include one touching but not another. In *Mohr v. Williams*, 104 N.W. 12 (Minn. 1905), *overruled on other grounds by Genzel v. Halvorson*, 80 N.W.2d 854 (Minn. 1957), a physician obtained a patient's consent to operate on her right ear, but, finding the left more seriously diseased, operated on it instead. Although the surgery was carefully done, it was held a battery, since the doctor's touching went beyond the scope of contact to which the patient had consented.

Mohr was a pretty clear case of exceeding consent, but many medical consent situations are more ambiguous. A recurring scenario is the surgeon who, after commencing surgery with the consent of the patient, encounters unexpected conditions which require extension of the procedure beyond that approved by the patient. For example, the surgeon might find it necessary, in an operation on the intestine, to remove part of it, or, in an operation for ovarian cysts, to remove the ovary. In a heart bypass operation, the surgeon might find it necessary to make an unanticipated incision in the patient's arm to locate a suitable artery for the bypass procedure.

It would be nice if surgeons could satisfy the law's sense of propriety by waking the patient in such cases to obtain consent to the extension of surgery, but that would usually be impracticable or even dangerous to the patient. Ideally, such complications should be anticipated and addressed in advance, by obtaining the patient's consent (or refusal) to various predictable scenarios the surgeon may encounter. However, this is often not possible, because there is no reason to anticipate the extension. It is common practice for physicians to seek consent from a relative of the patient in such situations. Such "substituted consent" or "proxy decision-making" may also be authorized by state statutes. See, e.g., WA St. 7.70.065. Substituted consent is generally honored by the courts. In addition, patients are much less likely to challenge a decision in which their family members have concurred. Thus, this practice greatly reduces the likelihood that suit will be brought based on lack of consent.

If no relative is available, the cases support a limited privilege to extend the surgery within the area of the initial incision, unless the extension involves the destruction of a bodily function, such as the amputation of a

limb or loss of reproductive function.[3] See Prosser & Keeton at 118. While it is sometimes said that there is implied consent to such extensions (see Dobbs' Law of Torts §115), this privilege is not really based upon consent — which, by definition, has not been given. It arises from the exigencies of the situation, which allow the surgeon to choose for the patient based upon what the reasonable patient would consent to if she could be consulted.

A related issue is the emergency privilege to treat an unconscious patient, for example, the victim of an auto accident who requires immediate treatment, but is unconscious due to her injuries. If no relative is able to consent, the cases recognize a privilege to render such treatment if the reasonable person would consent to it, there is no reason to believe that the particular patient would not, and delay would involve a risk of death or serious bodily harm to the patient. See, e.g., *Shine v. Vega*, 429 Mass. 456, 464-465 (1999); see generally Dobbs' Law of Torts §115.[4]

The examples that follow explore the application of self-defense and consent to some fairly straightforward cases — and a few be-Fuddling ones as well.

Examples

Self-Defense Basics

1. In which of the following cases was the assailant's blow a privileged act of self-defense?
   a. Rollins makes a disparaging comment about Okina's husband. She slaps him in the face.
   b. Rollins goes to knock off Okina's hat. She pushes him back hard.
   c. Rollins punches Okina in the stomach and turns to go. Okina hits him with the umbrella she is carrying.
   d. Rollins, on the facts of the last example, sees Okina coming at him with the umbrella and pushes her away as she swings it.
   e. Rollins pushes Okina. She stabs the sharp point of her umbrella at his face.
   f. Zilla sees Enemy Kong running toward her excitedly. Fearful of an attack, she punches him in the chest. As it turns out, Kong had had a

religious conversion and was rushing up to Zilla to apologize for past transgressions.

g. Zilla sees Enemy Kong rushing at her with a bat. She throws a brick at him and hits Cusack, a bystander.

2. Zilla is standing on a street corner when Kong, an old enemy, spies her. Kong advances toward her, shaking his fists and threatening to knock her down. Zilla, who is bigger, pushes at Kong with both hands as she is about to be hit, knocking Kong down. Unexpectedly, Kong falls on the stub of a metal post that had been cut off several inches above the sidewalk, and is gouged in the back. The wound requires 18 stitches and lands Kong in the hospital for three weeks. Is Zilla liable to him?

Never Sound Retreat

3. Zilla is sitting in the front seat of her car with the door open. Kong, an old enemy, sees her from 100 yards down the street and charges at her with a knife. Zilla steps out of the car with a baseball bat, swings hard at Kong with the bat, and hits him.

   a. Assume that the principles of the Second Restatement §65, requiring retreat in certain deadly force cases, apply. Who is liable, and for what?

   b. Assume that the incident takes place in a state that does not require retreat before the use of deadly force. Is Zilla liable to Kong?

4. Goliath meets David, who is considerably smaller than he is, on the street. Goliath objects to David's coat, which has a picture of the American flag covered over with a peace sign. He threatens to tear the flag right off the coat while it is on David's back, and moves toward him in obvious anger. David, convinced that it is his only means of self-defense, stabs Goliath with a pitchfork he is carrying.

   a. Is either party liable to the other, and if so, for what?

   b. On the same facts, assume that Goliath sees the pitchfork coming. To prevent being impaled, he picks up a two-by-four and hits David on the head with it. David suffers a concussion. Is Goliath liable for the injury to David?

c. Assume that David defended himself against Goliath's assault by pushing at Goliath with his arms outstretched, in an effort to knock Goliath down. Goliath, surprised by David's aggressive response, swings at him, knocking him down. Who is liable to whom?

Into the Fray

5. Assume, on the basic facts of the last example, that Lancelot comes on the scene and sees David rushing at Goliath with the pitchfork after Goliath rushes him to grab the flag. To protect Goliath, he swings at David with a crowbar, hitting him on the head and injuring him. Is Lancelot liable to David?

6. Suppose that Lancelot happens on the scene, and sees David about to push Goliath to prevent him from grabbing the flag on his jacket. Lancelot hits David in the stomach. Is Lancelot liable to David for battery?

Judge Fudd on the Cutting Edge of the Law

7. Zilla is sitting on the bench at a softball game when she sees Kong bearing down on her with a knife. Unable to retreat, Zilla wards off the blow by hitting Kong with a baseball bat. On later examination, it turns out that the knife Kong was carrying was a child's toy, made of soft rubber.

   Kong sues Zilla for battery. The case arises in a jurisdiction that does not require retreat before the use of deadly force in defense against deadly force. At trial, Judge Fudd instructs the jury as follows:

> You are instructed that the defendant was privileged to use that level of force reasonably necessary to defend herself from a threat of bodily harm.
>
> If you find that the defendant was attacked with nondeadly force, then the defendant was only privileged to use nondeadly force in self-defense. If you find that the defendant was attacked with nondeadly force, and that the defendant used deadly force in self-defense, then you must find for the plaintiff.
>
> If you find that the defendant was attacked with deadly force, then the defendant was only privileged to use that level of force reasonably necessary for her self-defense, which may include deadly force. If you find that the defendant used more force than was reasonably necessary, you must find for the plaintiff.

Who will object to the instruction, and why?

Macho Consent

8. Franken approaches Stein in the street and threatens him: “If you don’t hightail it out of here I will give you two black eyes.” Stein refuses to budge, and Franken socks him in the eye. Has Stein consented to the touching?

9. Hulk, a wrestler, brags to his friends at a bar about how strong he is. He braces himself and invites them to “just try to push me over.” Brower, with a mighty shove, pushes at Hulk with both hands. Hulk loses his balance, stumbles backward, and falls against the footrest in front of the bar. He suffers a separated shoulder, which ends his wrestling career. He sues Brower for battery. Is Brower liable?

What You Don’t Know . . .

10. Rodriguez meets Alvord in a bar. They chat. One thing leads to another. They end up back at Rodriguez’s apartment, and go to bed together. A month later, Rodriguez discovers that she has contracted a sexually transmitted disease from Alvord, and sues him for battery. If the evidence shows that Alvord did not know at the time of their tryst that he had the disease, will he be liable to her?

11. Alvord meets Rodriguez and they have several dates. In their conversations Alvord articulates his desire to “settle down.” Rodriguez, who is anxious to get married, pursues the relationship, including going to bed with Alvord. It turns out Alvord is not interested in settling down. When she discovers this, Rodriguez sues him for battery, claiming that her consent was ineffective because it was based on a unilateral mistake.

Taking Aim

12. Manny and his brother Paul go out with their buddies to play paintball, a game in which two teams with paintball guns stalk each other and “kill” opponents by hitting them with a paintball. When a player is hit, the

paintball explodes, leaving a colorful splat that shows that the opponent has been hit. Players agree to aim for the enemy's body rather than his head.

a. Manny and Paul are on opposite teams. He shoots at Paul, who was on the opposite team, but his shot goes a little high, hitting Paul in the neck and leaving a bruise. Is Manny liable for battery?

b. As they are suiting up at the outset, Manny sees Paul across the field, leaning over to tie his shoe. His large derriere is a tempting target, and Manny can't resist planting a paintball on it. Is he liable for battery?

13. Dr. Langone is scheduled to do surgery on Carella. On his way into the operating room he grabs the chart for a different patient, which had been put in the wrong spot. Langone starts to do an incision for a gallbladder surgery rather than the planned appendectomy. The mistake is caught; they sew up the incision and reschedule the surgery for the next day. Carella sues for battery. Assuming the mistake was reasonable on Langone's part, is she liable?

You're the Doc

14. Seaman is about to have hip surgery by Dr. Langone. She stops in to obtain consent, and to discuss the risks and possible side effects with Seaman. Seaman stops her. "Doc," he says, "I'm a businessman; I know stocks and bonds. You're my doctor; you know surgery. I trust you. Just do what has to be done for me and that'll be fine with me."

During the surgery, Langone extends the surgery by doing a full hip replacement. Seaman, upset with the result, sues for battery. Will the defense of consent apply?

Consent-less Consent?

15. Wenner is sunning himself on the beach when he sees Fiori, a swimmer, flailing wildly and about to go under the waves. He dives in, pulls Fiori to shore, and begins to do CPR. Wenner had been trained in CPR 15 years before, but he had never actually performed it and did not remember much from the training. In the process of trying to stimulate

Fiori's heartbeat, he breaks three ribs. Is he liable for battery?

16. Carella is brought to the emergency room unconscious after an accident, in need of immediate surgery. Dr. Langone recognizes that immediate surgery is necessary, and is much less dangerous if blood transfusions are given. Giving blood during the surgery would be good medical practice, and would be accepted by "the reasonable patient." Carella, however, is wearing a medical alert bracelet stating that he does not wish to be given blood transfusions.

    Since Carella cannot be awakened to seek his consent, Dr. Langone performs the surgery and gives Carella six pints of blood. Is she liable for battery?

There Must Be Some Privilege Here!

17. Wedge is walking past a hotel and sees a large chair falling from the fifth-floor balcony toward Janus, a pedestrian. He lunges forward and pushes the unsuspecting Janus out of the way. She falls and breaks her arm. If she sues Wedge for battery, what defense would Wedge raise and would it be accepted?

Explanations

Self-Defense Basics

1. a. Okina's blow is not in response to a threat of an unwanted physical contact; rather, it is in retribution for an insult. The privilege of self-defense authorizes physical force to forestall an invasion of the victim's person, not to respond to insults or to "get even." Okina's blow is a battery.

    b. Here, Rollins has threatened an offensive contact to Okina's hat, not a physically harmful contact. However, his act, if completed, would be a battery — the unconsented contact with objects intimately associated with the body satisfies the contact requirement. So Okina is privileged to use reasonable nondeadly force to prevent the intrusion. Since her push probably constitutes reasonable force, the

privilege of self-defense applies.

c. This is clearly retaliation rather than self-defense. Rollins's battery is over, he's leaving, and Okina therefore has no need to protect herself from an impending battery. Since she is not privileged, her blow is a battery. (Of course, Rollins's blow was as well.)

d. Even though Rollins committed a battery himself when he punched Okina, her later effort to strike him with the umbrella is an independent battery, as explained in the prior example. Because Okina's threatened blow with the umbrella is not privileged, it is an assault, and Rollins has a right to use reasonable force to defend himself against it. His push is therefore privileged.

e. Rollins commits battery when he pushes Okina, which gives rise to a right on her part to use self-defense if she expects Rollins to continue to do so. However, she only has the right to use reasonable, nondeadly force in response to a nondeadly assault. Stabbing a sharp point into Rollins's face may well be excessive force, because it is "likely to cause death or serious bodily harm," such as putting out Rollins's eye. Her stab is likely an assault, and if it lands, battery.

f. Here, Zilla thought that Kong was going to attack her, and therefore punched him in self-defense. However, she was wrong about the need to use self-defense, since Kong actually had no intent to attack her.

Zilla's act was privileged, even though she was mistaken about the need to use self-defense. Where she must act immediately, and reasonably believes that she is about to be battered, the privilege will apply. After all, what would *you* do? Right, you'd defend yourself, just as she did. Zilla is not "at fault" for acting on her reasonable understanding of the facts, rather than waiting meekly for Kong's blow to fall. Thus, most courts allow the privilege of self-defense, so long as the victim reasonably believed that she was about to be battered. Dobbs' Law of Torts §82.

g. Here, Zilla is threatened with deadly force, and responds with deadly force. Her act would be privileged in most jurisdictions, which allow a victim to use deadly force in self-defense against deadly force without any duty to retreat. (In a jurisdiction that followed the Restatement (Second) of Torts §65(3), Zilla would not be privileged

to use deadly force against Kong if she could safely retreat from Kong's attack.) Assuming her throw would have been privileged if the brick hit Kong, is it privileged when it hits Cusack, an innocent bystander? Who should this unfortunate loss fall upon — the innocent Zilla or the innocent Cusack?

Analytically, Zilla has not committed battery on Cusack; she did not intend to cause a harmful or offensive touching to him. But, she *did* intend to cause one to Kong, so shouldn't the intent transfer to Cusack? No; to hold someone liable under the doctrine of transferred intent, you must first show that the actor's original intent in striking the blow was tortious. Here, if Zilla had a right to hit Kong in self-defense, her blow was not tortious toward Kong and therefore cannot be if it hits Cusack.

On a policy level, there may be stronger arguments for holding Zilla liable for Cusack's injury. If she invited Kong's attack, for example, it seems fairer to place the loss on her than Cusack. On appropriate facts, a court could reach that result by finding Zilla negligent for inviting a dangerous brawl in a crowded place. See Restatement (Second) of Torts §75.[5]

2. This example is reminiscent of several from the first two chapters, in which the actor intends a blow, but it causes more injury than she expected it would. Here, Zilla intended the push, but she did not intend to impale Kong on the metal post. As in the earlier examples, Zilla's liability turns on whether she committed a tort in the first place. If she did, she is liable for the resulting harm, though greater than anticipated. If her act was not tortious, she is not liable, although serious injury resulted.

   Here, whether Zilla's act is tortious turns on whether she was privileged to push Kong down in self-defense. It certainly appears that she was. She was threatened with nondeadly force, a push, and responded with appropriate nondeadly force to ward off the blow. Since she was privileged to push Kong, the touching is not a battery, and Zilla is not liable, even though serious injury resulted.

Never Sound Retreat

3. a. Section 65 of the Second Restatement requires a person attacked with deadly force to retreat, if she may safely do so, before responding with deadly force in self-defense. The facts here suggest that Zilla could have retreated by closing the car door and driving away. If this is true, she would not have a privilege to defend herself with a baseball bat. If her blow is not privileged, it is a battery, so Zilla would be liable to Kong for the injury she inflicts.

Kong would also be liable to Zilla. His charge down the street with the knife is clearly an assault — Zilla's overreaction doesn't change that fact, though it makes Zilla liable as well.

b. As the introduction indicates, many states do not require retreat before the use of deadly force. Yet Zilla might be liable even in a jurisdiction that takes this view. A threat of deadly force does not automatically authorize the use of similar force in self-defense. Rather, it gives the victim a privilege to use force she reasonably believes necessary to prevent the threatened battery. That may include deadly force if such force appears necessary, but here Zilla could presumably have prevented the battery by simply closing and locking the car door. If so, she is not authorized to do more simply because Kong's attack threatens more serious harm.[6]

4. a. Goliath is liable to David for assault. He has no right to redesign David's jacket, and his move toward David reasonably puts David in fear that he is about to do so by force. But Goliath's assault does not justify David's use of deadly force in self-defense. The threat to David was of nondeadly force. Such a threat does not authorize him to use deadly force in self-defense. Thus, David is also liable to Goliath since he exceeded the scope of his privilege of self-defense.

The facts suggest that David, a smaller man than Goliath, used the only means at his disposal — his pitchfork — that would avoid the invasion of his person. However, this does not change the result. David is not authorized to use deadly force to prevent the threat of nondeadly force, even if his only alternatives are to run or submit to the battery. See Restatement (Second) of Torts §63 cmt. j. While this may be humiliating to David, the policy reason for this conclusion appears sound: It is better that David suffer temporary humiliation and be vindicated later in court, than cause a serious injury or death

to Goliath to prevent a fairly minor intrusion on David's rights.

This presupposes, of course, that David does not fear anything beyond having his coat ripped. If Goliath's conduct leads David to reasonably fear serious bodily injury himself, he would be entitled to use similar force in self-defense.[7] In order to determine the scope of David's privilege, it is necessary to characterize the type of force *Goliath* has threatened — or, more accurately, the type of force David reasonably anticipates. It is often difficult to say after the fact that the victim was unreasonable in perceiving a threat of deadly force, even if the assailant really intended something less — which is a forceful argument for aggressors to think twice before striking.

b. Here, Goliath is the initial, nondeadly aggressor, and David overreacts by using deadly force to protect himself from nondeadly force. By overreacting, he becomes a batterer himself, and would be liable to Goliath for any injuries resulting from his excessive force.

If Goliath is now the victim of a battery, it follows, doesn't it, that Goliath has a privilege to use self-defense against David's battery? Frankly, I'm not sure that it *should* follow: Goliath is the original aggressor here. Had he not provoked the fight, he would have had no need for self-defense. If Goliath is privileged to respond to the pitchfork with deadly force, he might provoke a quarrel fully expecting David to overreact, and then use his privilege to injure or kill him. It seems like poor policy to authorize Goliath to do that. On the other hand, it hardly seems sensible to require Goliath to meekly accept his fate at the tines of a pitchfork, either.

A middle ground would require Goliath, as the original aggressor, to retreat if possible before using deadly force against the victim-turned-aggressor. Apparently, some criminal cases have taken this approach. See Dressler, Understanding Criminal Law § 18.02[B][2][b] (6th ed. 2012); see also Model Penal Code §3.04(2)(b)(i). The Second Restatement of Torts takes the position that Goliath is privileged to use deadly force in self-defense once David converts the nondeadly quarrel into a deadly one. "One who intentionally invades or attempts to invade any of another's interests of personality, does not by his wrongdoing forfeit his privilege to defend himself by any means which would be privileged were he innocent of wrongdoing against any excess of force which the other

uses in self-defense." Restatement (Second) of Torts §71(c) cmt. d.[8]

c. This example is like the last, in that Goliath, the original aggressor, responds to David's self-defensive efforts by defensive efforts of his own. Here, however, David has not exceeded his privilege. He is using a reasonable method to ward off Goliath's initial attack. Thus, David is not a batterer; consequently, Goliath is not privileged to act in self-defense; he must either retreat or suffer David's blow. If he does more, he is liable, while David is not.

Into the Fray

5. Here Lancelot, an interloper, comes on the scene, concludes that David is the aggressor, and intervenes to protect Goliath. If his interpretation were correct, there would be no doubt of his right to come to Goliath's aid. Tort law provides a privilege to defend others threatened with battery as well as to defend oneself. Restatement (Second) of Torts §76.

   However, here Lancelot is wrong; David is not the initial aggressor, he is acting in self-defense (but exceeding his privilege by using deadly force). Courts have taken two approaches to the situation in which an intervenor acts to protect an apparent victim of a tort (here Goliath) who was actually the initial aggressor. Some courts say that the intervenor may act on her reasonable belief that a battery is about to be committed. Under that rule, Lancelot's act would be privileged, since it reasonably appeared to Lancelot that David's attack was a battery. Other courts say that the intervenor steps into the shoes of the apparent victim, in this case, Goliath. Under this approach, Lancelot would only be privileged to use deadly force to defend Goliath if Goliath were privileged to do so himself. If Goliath had no privilege of self-defense, Lancelot's intervention would be battery.

   Even under this second, shoe-stepping rule, Lancelot's act may have been privileged. If Goliath had no chance to retreat, he was privileged to respond to David's pitchfork with deadly force, even though he was the initial aggressor. See Example 4b. If so, then Lancelot shares Goliath's privilege.

6. The outcome of this case will depend on the approach the jurisdiction takes to defense of a third person. If, under the relevant law, the

intervenor is authorized to act on his reasonable perception, Lancelot would be privileged, since David appeared to be the aggressor. If the law of the jurisdiction only gives Lancelot a privilege to defend Goliath if Goliath himself would have a privilege of self-defense (the "shoe-stepping" approach), Lancelot would not be privileged and would be liable for battery.

Judge Fudd on the Cutting Edge of the Law

7. Judge Fudd's instruction is incorrect for several related reasons that would seriously prejudice Zilla's case. First, the instruction suggests she must have *actually* been attacked with deadly force in order to have a privilege to use deadly force in self-defense. This is not always true: Zilla would have the right to use deadly force if she *reasonably believed* that she was threatened with deadly force. See Restatement (Second) of Torts §65 (premising right to use deadly force on reasonable belief that assailant threatens deadly force).

   Second, Judge Fudd's instruction makes her privilege turn on whether the force she used was *actually* necessary to repel Kong's attack. Because Kong's knife was harmless, Zilla did not actually have to use deadly force to avoid it. However, she may have *reasonably believed* that such force was necessary for her self-defense, if she thought the knife was real. Because an assault victim has no time to verify her perceptions of the force with which she is threatened, the law allows her to act on her reasonable belief that deadly force is necessary. Because Judge Fudd's instruction does not allow the jury to consider Zilla's state of mind in determining whether she was privileged, it is improper.

   Such distinctions may appear hypertechnical, but many verdicts in tort cases are reversed for such subtle mistakes in instructing the jury. The be-Fuddled instructions throughout this book should give you useful practice in reading jury instructions critically. If you acquire this skill, sometime down the road you will be glad that you did.

Macho Consent

8. This example is reminiscent of the conditional threat example (Example

8) in Chapter 2. As in that example, the aggressor here threatens to hit the victim if she does not comply with a condition. The condition ("hightail it out of here") is one that the aggressor has no right to impose. In Chapter 2 we concluded that such threats are assaults. By the same logic, the aggressor commits a battery if she follows through on the threat.

Obviously, this analysis of conditional threats compels the conclusion that Stein does not consent to Franken's punch by standing his ground. Franken has no right to force Stein to choose between his freedom of movement and a punch in the eye. His refusal to comply with this impermissible condition does not constitute consent to the ensuing blow, which is an obvious battery. Nor would the reasonable person construe his act of standing his ground as a manifestation of consent. The more logical inference is that Stein simply refuses to be bullied.

9. Forgive me for belaboring once again the distinction between *contacts* and *consequences.* Here, Hulk, for his own macho reasons, has invited his friends to try to knock him over. He is willing that they should try, though he does not expect any of them to succeed. He has consented to the exact contact that Brower has imposed, though he did not anticipate the harmful consequence (the separated shoulder) of the contact. Since he consented to the contact, it is not tortious, and Brower is not liable despite the ensuing injury.

What You Don't Know . . .

10. The Introduction explains that sometimes the mistaken understanding of a consenting party will render her consent ineffective, because she acts without understanding the true nature of the contact she is accepting. For example, if Alvord knew that he had a sexually transmittable disease, and had sexual relations without telling Rodriguez, her acceptance of the contact would be based on a misunderstanding facilitated by his failure to reveal a fact central to her decision. His act would smack of misrepresentation by omission, and vitiate the "meeting of the minds" upon which true consent is based.

Where Alvord does *not* know about his condition, however, there is

no disparity in the understanding of the parties at the time of consent, and no misrepresentation by Alvord. True, Rodriguez didn't know all the facts when she consented to the contact, but neither did Alvord. They both consented to a contact that entailed some risks, as most do. The court would very likely find Rodriguez's consent effective and deny recovery on the battery claim.

11. Rodriguez's claim of mistaken consent will probably fail. She did consent to the sexual contact that took place. Her complaint is really that she was deceived, not about the nature of the contact, but about other facts that influenced her decision to engage in it. If a court accepted this argument, it is easy to imagine myriad cases in which a party is mistaken — or deceived — about collateral matters that influenced the decision. Suppose Alvord had claimed he made $100,000 a year, or graduated Phi Beta Kappa from Stanford, or has a great idea for the next generation of software? (Suppose he just thought his software idea was great, but it really wasn't? or claims that he only told her that he *hoped* it was great idea??) For fear of a plethora of such slippery-slope cases, courts are likely to confine the concept of mistaken consent fairly closely to mistakes central to the transaction itself, such as that in the previous example.

Taking Aim

12. a. This is a clear case of consent. The participants understand that the object of the game is to hit the other side's players with paintballs, and thus consent by their participation to that contact.[9] Although players are required to aim for the body, having a shot go astray is clearly within the expectations of the players, so Paul has consented to the contact even though he is hit in the neck and suffers pain and a bruise.

    b. Although Paul has consented to being hit by some paintball shots, this one is likely beyond the scope of his consent. A player's reasonable expectation would be that he might be hit during the game, not by random shots some joker can't resist before it starts.

    I suppose Manny might assert the "brother privilege," that it's OK to do anything to your brother if it's funny and doesn't cause

permanent disability. This privilege is not recognized by any of the prominent authorities. Manny's best argument would be that he and Paul have a history of physical-contact practical jokes, so Paul consents to this type of brotherly assault. But nothing in the question suggests such a history.

13. This example is reminiscent of some in earlier chapters, in which an actor caused interference with person or property due to a mistake. Even if his mistake was reasonable, Langone will be liable for battery, for intentionally making an unwanted touching to Carella. See Restatement (Second) of Torts §51 illus 1. As in the trespass cases (see Chapter 3), intentional tort law places the risk of making an unconsented intentional intrusion on the actor, who can take steps to avoid the mistaken intrusion. The same would be true if Langone started the right operation on the wrong patient.

You're the Doc

14. Here Seaman has effectively delegated the decision making to his doctor. There is no bar to a patient doing that; presumably the autonomy to make decisions about one's body includes the right to designate another to do it for you. This is commonly done in substituted consent situations, in which a patient designates another to make health care decisions for him if he is incapacitated.

    But there is still an issue as to *what* decisions Seaman has delegated to Dr. Langone. Surely, she couldn't give him a new nose or insert a pacemaker while he is under the knife. A court would have to consider the *scope of the consent* that he had given. Surely, common extensions of the expected surgery were within the contemplation of the parties, and perhaps even the new hip. The case poses a question of fact for the jury as to whether this extension was within the reasonable expectations of the parties, given their discussions, his presenting condition, and the purpose of the surgery.

Consent-less Consent?

15. Wenner did cause a harmful touching to Fiori by breaking his ribs. But

did he intend to cause one? He had a virtuous motive for acting, but one can commit battery with a pure heart. See *Mohr v. Williams*, 80 N.W.2d 854 (Minn. 1957), in which the doctor placed the patient under anesthesia to operate on the right ear, but found the left one worse and operated on it instead. While the operation was successful, the doctor was held liable for battery, for invading the patient's body without consent.

Here, absent the exigent circumstances, anyone would find a stranger pounding on his chest to be an offensive contact, even without the broken ribs. Wenner will rely on "implied consent" as a defense, arguing that he had a privilege to render emergency assistance to save Fiori's life. This privilege is not based on consent at all, but a privilege to render emergency assistance to an unconscious or endangered person. The Second Restatement expressly notes that the privilege is not based on consent. See Restatement (Second) of Torts §892D, entitled "Emergency Action without Consent":

> §892D. Conduct that injures another does not make the actor liable to the other, even though the other has not consented to it if
>
> (a) an emergency makes it necessary or apparently necessary, in order to prevent harm to the other, to act before there is opportunity to obtain consent from the other or one empowered to consent for him, and
>
> (b) the actor has no reason to believe that the other, if he had the opportunity to consent, would decline.

How about the fact that Wenner's CPR skills are rudimentary and out of date? If Wenner reasonably believes it necessary to act immediately, the privilege should still apply. If there are three lifeguards standing around, his clumsy intervention might not be reasonable, but if he is the only other person on the beach it would be. If we could ask Fiori, he would very likely accept CPR from Wenner over probable death without an attempt at resuscitation. Who knows, maybe he did save Fiori's life while breaking those ribs.

Note that nothing in §892D restricts such emergency treatment to doctors, nurses, and EMTs. There may not be one of these types around when a waitress is confronted with a choking diner; if there isn't, the tort rules should protect the waitress's choice to perform the Heimlich

maneuver to save the diner's life.

16. As the previous example indicates, tort law recognizes a limited privilege to provide generally acceptable emergency treatment to an unconscious person. The logic for the privilege is that most people would accept such treatment, so going ahead probably implements *this patient's* choice. However, in this case Carella's bracelet informs Dr. Langone that he does not accept a treatment that others would. The bracelet rejects this touching just as clearly as if Carella sat up on the table and said, "Hey, no transfusions!" Dr. Langone must honor this choice, despite her disagreement with it, even if she expects it may prove fatal to Carella. If she does not, she will be liable for battery.[10]

There Must Be Some Privilege Here!

17. Wedge has caused a harmful touching to Janus. Absent any privilege, the push itself would be a battery, let alone the broken arm. One might label the privilege "necessity." But if so, it would be private necessity, and in those cases the courts hold that the actor, while privileged to interfere with property or person, must pay for resulting harm. That doesn't seem like the right result here.

    How about "defense of other?" A person may defend another under the same circumstances that the other could defend herself. But it again seems awkward to think of Janus here as "defending" herself from the falling chair. Typically, "defense of other" involves defense against another person, not a chair.

    Isn't this example covered, though, by the privilege in §892D of the Second Restatement, quoted just above in the analysis of Example 15? While the obvious applications of that section concern emergency medical treatment, it is written much more generally and certainly appears to cover this example.

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1. Another example is the negligence doctrine known as "assumption of the risk," discussed in Chapter 24.

2. Note that Juliet did include this allegation in her complaint for assault and battery. See Figure 2-1, pp. 42–43, paragraph 11.

3. Even here, the surgeon may be privileged if delay would itself lead to death or loss of a bodily function.

4. Here again, there may be a stricter standard if the treatment involves destruction of a major bodily function, as, for example, an amputation. In such cases, the privilege may only attach if delaying treatment would risk death or very serious consequences to the health of the patient. Prosser & Keeton §18 at 117-118.

5. *Kong* very likely would be liable to Cusack on a negligence theory, since it is foreseeable that his attack on Zilla would cause injury to bystanders. Harper, James & Gray §§3.11, 3.62 (3d ed.).

6. Might a court hold that Zilla need not close the door because that would constitute "retreat"? Probably not; by closing the door, Zilla is not running away (a loss of face that many jurisdictions refuse to compel), but simply blocking the battery without directly exerting force against the aggressor.

7. Unless he has a duty to retreat, as he might in jurisdictions following the Restatement (Second) of Torts §65.

8. Since no privilege arises under the Second Restatement to use deadly force if retreat is feasible, the Restatement position appears to echo the criminal cases. If this is true, Goliath would only be liable if he could have retreated safely before invoking the two-by-four.

9. Doubtless they sign a pregame contractual release of liability as well, but that would protect the operator, perhaps not other participants.

10. Might Dr. Langone give the transfusions anyway? Perhaps she would choose to save Carella's life even at the risk of being sued. How much would a jury award Carella under these circumstances, especially if the evidence suggests that Carella would have died without the transfusions? Probably not much. But ignoring Carella's directive disregards a solemn value choice by the patient about contacts with his person. As a practical matter, hospital policy will almost certainly mandate compliance with such directives.

PART II

The Concept of Negligence

That Odious Character: The Reasonable Person

INTRODUCTION

Surely the most common basis for tort liability is negligent conduct. This chapter is about the meaning of negligence.

Let's begin by clarifying our terminology. Courts often speak of a "claim for negligence." In this sense, negligence is a tort with four elements: (1) a duty of reasonable care, (2) breach of that duty, (3) causation, and (4) resulting damages. A plaintiff must prove all four of these elements to "recover on a claim for negligence." But courts also use the term "negligence" in a related but more limited sense, to refer to the failure to live up to the standard of due care. In this sense, "negligence" refers to the *second element* of a claim for negligence, breach of the standard of due care. To say that the defendant "was negligent" is to say that he failed to exercise reasonable care under the circumstances.

Since courts do not always distinguish these two meanings of "negligence," students often get confused between the tort of negligence and the concept of negligence as a breach of the standard of due care. A defendant may be negligent without necessarily being "liable for negligence" (if, for example, the plaintiff does not suffer damages from the defendant's failure to exercise due care). It is important to distinguish the *tort* of

negligence from the second *element* of that tort. This chapter is about the latter meaning, the failure to live up to the standard of reasonable care.

THE STANDARD OF REASONABLE CARE

The basic premise of negligence law is that we generally owe our fellow citizens a duty to exercise reasonable care in the conduct of our own affairs. This duty does not require that we avoid all injury to others, but only that we avoid injuring others by carelessness. That duty is breached (element #2 of a negligence claim) by failing to exercise reasonable care.

> Negligence is the omission to do something which a reasonable man, [sic] guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man [sic] would not do.

Blyth v. Proprietors of the Birmingham Waterworks, 156 Eng. Rep. 1047, 1049 (1856). See also Restatement (Third) of Torts: Liability for Physical and Emotional Harm §3 (to avoid being negligent, actor must "exercise reasonable care under all the circumstances"). While the *Birmingham Waterworks* case goes back a century and a half, you could go into courtrooms across the United States and hear juries in negligence cases instructed in very similar terms today — though the reference would be to the gender-neutral "reasonable person."

Who is this "excellent but odious character,"[1] the Reasonable Person? He is a model of propriety and common sense, a person of sound judgment who acts at all times with "ordinary prudence, . . . reasonable prudence, or some other blend of reason and caution." Prosser & Keeton §32 at 174.

> He is an ideal, a standard, the embodiment of all those qualities which we demand of the good citizen . . . He is one who invariably looks where he is going, and is careful to examine the immediate foreground before he executes a leap or bound; who neither stargazes nor is lost in meditation when approaching trapdoors or the margin of a dock; . . . who never mounts a moving omnibus and does not alight from any car while the train is in motion, . . . and will inform himself of the history and habits of a dog before administering a caress; . . . who never drives his ball till those in front of him have definitely vacated the putting-green; . . . who uses nothing except in moderation, and even while he flogs his child is meditating only on the golden mean.[2]

Odious indeed, the Reasonable Person is a fiction, an impossible creature

who always exercises proper self-restraint and weighs appropriately not only his own interests, but those of others as well in regulating his affairs.

HOW THE REASONABLE PERSON THINKS

The reasonable person standard seems self-evident, even tautological: Of course we should all act reasonably to avoid injury to others. But the standard is also desperately vague. It hardly projects the majesty of The Law to admit that every year hundreds of millions of dollars in damages turn on such a homespun, common sense idea of fault. Yet, courts obviously cannot prescribe more specific rules in advance as to what is reasonable in every situation: The variety of human experience is much too great to allow such a catalogue of proper behavior. It is possible, however, to describe in a general way the factors that the reasonable person considers before acting, and how he weighs those factors.

First, in deciding whether a course of conduct is appropriate, the reasonable person considers the *foreseeable risks of injury* that that conduct will impose on the community. This does not suggest that the reasonable person avoids all conduct that creates risks to others: We all accept the fact that people must act, and that most activities impose some risk on the community. But the reasonable person considers those risks in light of the *utility* of the conduct. For example, lighting a fire in dry woods near a town imposes a risk that the fire will spread. It may be reasonable to impose that risk to prevent a brush fire from spreading, but not to toast marshmallows. Similarly, rapid release of a large volume of water from behind a dam imposes a risk of downstream property damage or personal injury. That risk might be reasonable to prevent a collapse of the dam, but not to lower the water level to facilitate dredging.

The reasonable person also considers the *extent* of the risks posed by her conduct. Restatement (Third) of Torts §3. Conduct may be reasonable if it threatens minor property damage, but unreasonable if it creates a risk of serious personal injury. The dam release, for example, might be appropriate if it risks minor flooding of grazing land but not if it threatens to drown campers down river. Placing a gas tank in a particular place on a truck might be reasonable if it poses a risk of stalling the engine, but unreasonable if it

could cause the tank to explode in a collision. And, since a risk is greater if it exposes many to a risk of injury than if it endangers a few, our odious paragon considers that too.

The reasonable person also considers the *likelihood* of a risk actually causing harm. It often makes sense to do a useful thing that imposes low-probability risks, but may not if the risk is greater. Placing the gas tank in a particular place may be reasonable if it risks a one-in-a-million explosion, but not if one in a thousand will blow up. Distributing a vaccine may be a reasonable choice if an adverse reaction will happen to one patient in 10,000, but not if one in ten will suffer it. Restatement (Third) of Torts §3 ("likelihood that the person's conduct will result in harm" a primary factor in determining negligence).

Our Model of Propriety also considers whether *alternatives* to her proposed conduct would achieve the same purpose with lesser (or greater) risk. Restatement (Third) of Torts §3 cmt. 3. If a live vaccine poses a risk of serious injury to one patient in 10,000, but a dead vaccine achieves the same protection with injury to only one in a million, it may be unreasonable to use the live vaccine. On the other hand, if there is no alternative to the live vaccine, the one-in-10,000 risk may be reasonable, given the benefit to the other 9,999 users.

It must also be admitted that this obnoxious paragon of ours is a little bit cold-blooded: He also considers the *costs* of various courses of action in determining what is reasonable. He does not take every precaution which might reduce the risk of injury, but only those which are "worth it" in the sense that the injuries avoided outweigh the cost of the extra precaution. If it would cost $15 to add a kill switch to a $50 circular saw, and the switch would prevent a hand injury to one in 20,000 users but would also substantially impede the operation of the saw, it would likely be reasonable to leave off the switch. Adding the switch would increase the costs of the machine by $300,000 for each injury avoided ($15/saw×20,000 saws) and reduce its efficiency for all users. The "trade-off" to avoid one hand injury doesn't seem worth it.

Similarly, if a live vaccine that risks side effects to one in 10,000 costs $1 per dose, while a dead vaccine that will only injure one patient in 100,000 costs $25, the drug manufacturer may be "reasonable" to market the live form, even though it will mean, statistically speaking, nine more injured kids per 100,000 users. This economic dimension to reasonableness analysis is

hard to swallow — one of those kids might be yours — but there is little question that it exists. Otherwise we would all drive tanks instead of vulnerable automobiles.

THE "HAND FORMULA"

While it is useful to identify the factors the reasonable person considers in contemplating action, it is more difficult to specify exactly how he weighs those factors, or what conclusion is reasonable on a given set of facts. One estimable jurist, Judge Learned Hand, endeavored to do so in the famous case of *United States v. Carroll Towing* Co., 159 F.2d 169 (2d Cir. 1947). Judge Hand postulated that the defendant's duty in controlling its barge in that case was

> a function of three variables: (1) The probability that [the barge] will break away; (2) the gravity of the resulting injury, if she does; (3) the burden of adequate precautions. Possibly it serves to bring this notion into relief to state it in algebraic terms: if the probability be called P; the injury L; and the burden B; liability depends upon whether B is less than L multiplied by P; i.e., whether B is less than PL.

Id. at 173. This celebrated "Hand formula," B < PL, is meant to suggest not only the factors the Reasonable Person considers, but how he balances those factors in reaching a judgment. The reasonable person, Hand postulates, takes a precaution against injury if the burden of doing so is less than the loss if the injury occurs multiplied by the probability that the injury will occur. To illustrate, suppose that a safety catch costs $20 per machine, that one in 100 of the machines will cause an injury without the catch, and that the likely damages from the injury if it happens are $1,000. The Hand formula suggests that the reasonable person will not attach the safety catch. It will cost $2,000 to put the guard on 100 machines, but will only prevent $1,000 in injury costs. On the other hand, if the guard cost $5 per machine, the formula would compel the conclusion that the reasonable person would add it.

The Hand formula has been applauded particularly by economic theorists, who see negligence law as a means of regulating social conduct to promote efficiency. See, e.g., R. Posner, A Theory of Negligence, 1 J. Legal Stud. 29, 32-34 (1972). But it is also very easy to criticize. What, for example, does "L" really mean in the formula? A single risk, such as a bald tire on the

defendant's car, could cause a wide variety of losses, from a broken axle to a nine-car collision with multiple fatalities. How is the reasonable person to apply the formula where such a range of "L"s is possible? And, of course, *valuing* even a known loss is a very speculative business. How is the defendant, in deciding whether to drive on the bald tire, to assign a value to a serious personal injury if he does not know the age, employment, susceptibility to pain, family circumstances or other characteristics of his future victim? Similarly, assigning probabilities to particular types of risks is a highly speculative business. The defendant may have a vague sense that bald tires are a bad idea, but that is a far cry from assigning a meaningful quantitative value to "P" in the Hand formula.

The formula, standing alone, also fails to consider other possibilities, such as adopting an entirely different method of achieving a given result. It may be prohibitively expensive to design an alarm system which would eliminate a small risk of a release of a poisonous gas used in a certain manufacturing process. If so, the Hand formula suggests that it is reasonable to conduct the operation without such a system. But the reasonable person would also consider other alternatives: It may be possible to change the process to eliminate the gas entirely, and ordinary prudence may dictate that course if the danger cannot otherwise be adequately reduced. In other cases where precautions to eliminate a risk are too expensive, the only reasonable choice may be to *forgo the conduct entirety*, a possibility not accounted for in Hand's calculation.[3]

Such criticisms of the Hand formula are valid, but they may miss the point. Judge Hand never viewed his formula as a mechanical solution to the complex human problem of reasonableness. He made no attempt to quantify the elements of the formula in *Carroll Towing*, and suggested elsewhere that it is in fact impossible to do so. *Moisan v. Loftus*, 178 F.2d 148, 149 (2d Cir. 1949). But Judge Hand's formula does highlight basic factors that the reasonable person considers in making choices about risk-creating conduct. In an intuitive, impressionistic way, reasonable people do consider, in deciding upon a course of conduct, the extent of the risks posed by that conduct, the type of injury likely to result from those risks, the utility of the conduct, and the cost of avoiding the risk. Juries in negligence cases will not be instructed in strict Hand formula terms ("the reasonable person takes precautions against risk if the burden of doing so is less than the probability of an injury multiplied times the loss that will be suffered if the risk

materializes"). But a jury might well be instructed that, in considering whether the defendant acted reasonably, they should consider the likelihood of an accident happening, the burden of taking precautions to prevent an accident, the utility of the conduct, and the nature and extent of the injuries likely to result if an accident occurs.[4]

APPLYING THE REASONABLE PERSON STANDARD: THE RELEVANCE OF PERSONAL "CIRCUMSTANCES"

While the reasonable person is a fictitious construct, people are not. Each individual possesses unique physical and mental characteristics. How can this artificial, uniform standard of good judgment account for our individuality — or should it?

To some extent, the negligence standard does account for the personal characteristics of the actor. One's duty is to act as a "reasonable person under the circumstances." Some individual characteristics of the actor are considered part of "the circumstances" in determining reasonableness. For example, it is generally held that a person with a physical disability is required to act as a reasonable person *with that disability* would act. Thus, it is not negligent for Lear, a blind person, to walk the streets, though he will occasionally bump into others. The blind have to live in the same world as the rest of us, and it is reasonable for them to impose the risk of occasional sidewalk collisions (and more serious motor vehicle accidents as well) in order to do so. It might be a closer case if Lear ventured forth without a cane, but the important point is that his conduct will be judged against that of other actors in the same "circumstances," not against the population at large.

While allowance is made for physical disabilities, no allowance is made for the "circumstance" that a person lacks good judgment, is hasty, awkward, or perennially oafish. This was well settled in the torts classic, *Vaughan v. Menlove*, 132 Eng. Rep. 490 (1837), in which poor Menlove argued that he had exercised his judgment to the best of his ability, and should not be held liable just because his "best" wasn't very good. If Lear is not held to the standard of a sighted person, why should Menlove be held to the standard of

a person with good judgment? Isn't his obtuseness a "circumstance" that the law should take into account as well?

In the courts of heaven, Menlove's argument will doubtless weigh heavily, but as a legal standard his suggested test (whether he "had acted honestly and bona fide to the best of his own judgment" (Id. at 493)) would obviously be a disaster. Had Menlove's test been adopted, we would not have one standard of care for negligence, but a million. We would not try the defendant's *conduct* in negligence actions, but his character and intelligence. The perennially careless would enjoy the right to endanger their neighbors with impunity. By sticking with the "reasonable person under the circumstances" test, the courts have provided instead an objective test that allows impartial application, avoids subjective judgments about individual character, and allows some measure of prediction about the consequences of conduct.

This same refusal to consider individual personality is illustrated in the treatment of the mentally ill. The traditional rule, still generally accepted, is that the mentally ill are held to the same standard as everyone else, despite the "circumstance" of their illness:

> An actor's mental or emotional disability is not considered in determining whether conduct is negligent, unless the actor is a child.

Restatement (Third) of Torts: Liability for Physical and Emotional Harm §11(c). This is a harsh, perhaps indefensible rule. It holds a mentally ill adult to a standard that any psychology student will tell you he cannot meet. But it is at least consistent with *Menlove*, in the sense that it is based on a refusal to make the standard a subjective one, to account for individual personality in administering the negligence system. These rules send the same message to those who, due to mental illness or weak intelligence, may have trouble meeting the objective standard: "Since the law will not hold you to a lesser standard, you will have to curtail your activity or exercise particular self-restraint (or be restrained by others) in order to avoid liability."

This treatment of the mentally ill and those of weak judgment confirms that the reasonable person standard is a legal judgment, not a moral condemnation. Morally, we could hardly fault a Menlove for a judgment which was the best he could do, or a mentally ill defendant for conduct that was compelled by delusion or neurosis. But for legal purposes, we need a standard that defines "fault" in some predictable, universal way. The

"reasonable-person-under-like-circumstances" test provides a neutral instrument for deciding disputes, not a value judgment about a person's character.

Given the refusal of negligence law to account for mental deficiencies, the application of the "reasonable person" standard to children may seem inconsistent. Children are *not* held to the adult standard of care, but rather the standard of a reasonable person of like age, intelligence, and experience under like circumstances. Restatement (Third) of Torts §10. Unlike the unitary adult standard of care, this child standard clearly *does* make allowance for their mental ability and development. The rationale is that children have to *learn* to be careful, and ought not be exposed to tort liability for conduct that is reasonable in light of their stage of development during the learning process. Adults, however, have had 18 years to become "reasonable"; if they don't make it by that age, they probably never will. They must then suffer the liability consequences or adopt a low-risk lifestyle to avoid causing injury to others.

The child standard does not mean that children cannot be found negligent. There is little doubt that most children of ten have developed the judgment to understand that setting a fire can burn a building, or shooting an arrow at a playmate can put out an eye. In many respects a child of 16 is as capable of due care as an adult (in crossing streets, stacking lumber, or playing football, perhaps) and will effectively be required to meet the adult standard of care. In addition, a good many cases hold children who engage in certain high-risk activities primarily engaged in by adults, such as driving, to the adult standard of care. See Dobbs, Hayden & Bublick §137.

APPLYING THE REASONABLE PERSON STANDARD: THE RELEVANCE OF EXTERNAL "CIRCUMSTANCES"

While the personal characteristics of the actor are sometimes relevant to determining whether she acted reasonably, the external circumstances in which she acted are always relevant. Decisions about conduct are not made in a classroom or an armchair, they are made in the hurly burly of everyday

events, in the factory, on the road, in the operating room. The reasonableness of the defendant's decision is always judged in relation to the unique context or "circumstances" in which she made it.

For example, a defendant may make a decision in the second before an impending accident that he would not have made if he had time to weigh the choices more carefully. In judging that decision, the jury should consider whether the decision was reasonable in light of the "circumstance" that the defendant had to act in a split second. The so-called "emergency doctrine" means no more than this, that in judging the reasonableness of conduct in an emergency, the "circumstance" that the defendant must act quickly is relevant.

Other circumstances are also relevant. It is relevant that the defendant acted as others customarily do in like circumstances. The fact that conduct is generally engaged in by those in a particular trade or profession at least suggests that such conduct is acceptable. For example, *if* a roofer is injured in a fall from the roof of a two-story building, it is relevant on the issue of his negligence that roofers ordinarily do not wear safety harnesses in reshingling two-story buildings (or that they do). If most roofers consider that an acceptable risk for the extra freedom of movement or time savings involved, it may well be that they are right.

However, while relevant, evidence of custom is not dispositive. In some circumstances, custom and reasonableness may diverge dramatically. To save costs, out of inertia, tradition, or for other reasons, a practice may continue long after thoughtful analysis would compel its rejection, or a new precaution may be ignored despite its obvious benefits. Seat belts offer a good example. Aware of the proven safety advantages of seat belts, our odious paragon doubtless buckles up every time he motors forth, although a substantial segment of the population refuses to follow his pious example.[5] Similarly, if some enterprising roofer develops a new easy-snap, no-hassle safety harness, it may be that the reasonable roofer would use it. Even if it is hard to teach old roofers new tricks, they may be unreasonable to follow the older custom under changed circumstances.

Another "circumstance" that commonly colors the reasonableness of conduct is whether a statute requires a particular course of action under the circumstances. Generally speaking, the reasonable person obeys the law; thus, evidence that the defendant ignored a statutory standard will frequently suffice to establish that he was negligent. This problem, proving negligence

based on violation of statute, is explored in the next chapter.

A further relevant circumstance is whether the actor has acted as an expert in a particular field. If you have a tax accountant prepare your taxes for you, you justifiably expect a higher level of knowledge and judgment than if your bookkeeper or your neighbor does. If you entrust your yacht to a licensed merchant marine captain, she should have a higher level of skill than a beach bum. This does not mean that persons with specialized knowledge are held to a higher *standard* of care than others: Their standard, like that of others, is reasonable care under the circumstances. But the fact that an actor is a professional or assumes the role of an expert in an activity is a "circumstance" that colors the meaning of reasonableness. A professional will be expected to possess and employ the skill and knowledge of her profession, not of the "ordinary reasonable person."

The facilities or resources available to the actor are also relevant to the reasonableness analysis. It may be reasonable to perform exploratory surgery in a community where less invasive methods of diagnosis are unavailable, but not in an area were they are. It may be reasonable for a general practitioner to litigate an antitrust case in northern Maine, where antitrust lawyers are hard to come by, but not in Washington, D.C., where several are lurking on every block.

Beyond these recurring types of relevant circumstances, there are the utterly miscellaneous facts of every individual case to be considered. Facts about weather, about what the parties knew, about how they observed events, about the condition and behavior of animals, vehicles, computers, or machines, about the purposes the actors hoped to achieve by their conduct and alternative ways they might have done so. Reality is infinitely diverse, and each case is unique. It is up to the parties to bring out the circumstances that conditioned the actors' choices, and argue the reasonableness of those choices in light of the flesh and blood context in which they were made. It is exactly this multifariousness of *facts* that requires the *legal standard* of negligence to be so frustratingly general, and makes the practice of negligence law interesting.

The examples below explore the factors involved in the negligence calculus, and the process by which they are weighed.

Examples

Burdens and Benefits

1. Costard, owner of a large estate, throws an all-day party for a few hundred of his close friends. During the day, some of his guests wander through the woods and come to an abandoned quarry on the property, which has filled up with water. They opt for a dip. Trinculo is injured when he dives into the quarry and hits his head on a submerged promontory only three feet under the surface. He sues Costard for negligence.

   Costard argues that he was not negligent, since, though the injury was foreseeable, filling in the quarry was prohibitively expensive. In Hand formula terms, the burden was too great given the relatively low risk of injury to a wandering entrant on the property, which is normally not open to outsiders. What is the problem with this argument?

2. Suppose that, instead of a quarry, an abandoned well existed on the property, covered with some boards placed there a few years ago and now beginning to rot. Trinculo, wandering the grounds, does not see the well, which is covered with autumn leaves. He falls through, is injured and sues Costard for negligence. Is he likely to prove negligence?

3. The town of Stratford is given a piece of vacant land adjacent to a quiet residential street. Since there is considerable demand for recreational space, and little open space in town, they build a baseball field on the parcel. The edge of the field is 30 feet from the road. In the course of a game, Feste hits a high foul ball, which is caught by the wind and angles into the street. Glendower, driving by, suddenly sees the ball coming, instinctively swerves away from it, and is injured when his car turns into a ditch. He sues the town for negligence in locating the field where it did. Do you think the jury will find the town negligent?

Risks and Reasonableness

4. The Leadville Railroad Company is putting in a new rail line. The line will cross Elm Street, a moderately busy street. The railroad's planners have to decide between a grade crossing (where the street simply crosses the tracks) and an overpass. Based on long experience they can predict

that, even with gates and flashing lights, there will be (statistically speaking, anyway) two accidents at a grade crossing on a street like this every ten years. If they build an overpass for the street, the presence of the rail line will not cause any accidents. However, it will cost $12 million for the overpass, compared with $20,000 to install a grade crossing.

The planners opt for the grade crossing. Feste is seriously injured when he fails to see the gate coming down and drives across the track in the path of an approaching train. Is the railroad negligent?

5. One of the early classics of negligence law is *Blyth v. Proprietors of the Birmingham Waterworks*, 156 Eng. Rep. 1047 (1856). In *Blyth*, the plaintiff's basement was flooded by a Birmingham Waterworks water line, which burst during a cold spell. Due to the cold, the frost had "penetrated to a greater depth than any which ordinarily occurs south of the polar regions." Id. at 1049. The court held that the waterworks was not liable for failing to place their pipes deep enough in the ground to avoid bursting in such a frost.

   a. Suppose that there had been a frost this bad 75 years ago. Would the waterworks be negligent for failing to set the pipes deep enough to withstand such a frost?

   b. Suppose that there had been a frost this bad the year before, but it was the only one in recorded history and was considerably worse than any other recorded year. Would the waterworks be negligent if it continued to place its pipes at the shallower depth?

   c. Let's think about *Blyth* in Hand formula terms. Suppose that placing the pipes one foot down would avoid most, but not all, flooding damages to abutters. It would cost the waterworks an extra $20 million to place the pipes two feet down, but the waterworks engineers can predict with confidence that going the extra foot would avoid $5 million in flooded basement damages to homeowners over the life of the system. What would the reasonable waterworks company do?

   d. Assume that, after doing the calculation just described, the waterworks lays its pipes at the one-foot level. Two years later, a highly unusual, deep frost bursts a pipe and Blyth's basement is

flooded. Is the waterworks liable to Blyth?

e. Assume that tort law holds waterworks companies strictly liable for all damages caused by their operations (that is, they must pay if the system causes damages, whether they conducted their operations with due care or not). Assume further that the waterworks had placed their pipes one foot down, knowing that in highly unusual years some pipes could burst and flood basements. In an unusual frost, a pipe bursts and floods Blyth's basement. Who pays?

f. Assume that strict liability applies, and that the waterworks knows that it will be strictly liable for all flooding damages from its system. If the numbers given in Example 5c apply, would the waterworks place its pipes at the two-foot level?

A True Story: Judge Hand at the Roller Rink

6. Once upon a time, a Torts professor took his daughter roller blading. Kids of all ages were speeding around the rink, some more in control than others. To his dismay, the prof noticed that there was a wall around the rink, about three feet high, made of concrete blocks. Having always sought to emulate that odious paragon, the Reasonable Person, the prof approached the rink manager. "Why don't you hang some mats on the inside of that wall? One of these kids could lose control, go into the wall head first, and suffer serious injury." The manager coolly replied, "It hasn't happened in 17 years."

   The next day, Jane, a nine-year-old daredevil, stumbles and goes into the wall, suffering a serious head injury.

   a. Identify the Hand factors — probability, loss, and burden — in Jane's case.

   b. If you were arguing those factors in front of a jury, which party would you think had the stronger argument?

Fudd and Foreseeability

7. Falstaff, anxious to get to a pub, passes a driver on a curve, and collides with Bottom coming the other way. Sued for negligence, Falstaff argues that he was not negligent, because the road was little traveled, and it was

very unlikely that a car would come around the curve at the time he was in the wrong lane. Judge Fudd instructs the jury as follows:

> If you find that it was more probable than not that a car would be traveling in the opposite lane and collide with the defendant's car, then you should find that the defendant violated the standard of reasonable care in passing as he did.

What is wrong with Fudd's instruction? Can you write a more accurate one?

8. Barnardine, a roofer, is working on the roof of a townhouse on a narrow city street. Like most roofers, he is not wearing a safety harness, though effective safety harnesses are available. He is startled by a flying pigeon, steps back, and falls from the roof, hitting Elbow, a passing pedestrian.

   In Elbow's negligence action against Barnardine, Judge Fudd instructs the jury as follows:

   > If you find that it was customary in the trade for roofers to work on roofs such as the one in question without safety harnesses, then you must find that the defendant was not negligent for failing to wear a safety harness at the time of the accident.

   a. Which party will object, and why?
   b. Assuming that the evidence that most roofers don't use safety harnesses is admitted, how should Judge Fudd instruct the jury with regard to that evidence?

A Duty of Much Care

9. Gobbo, a gas station attendant, has just started a cigarette break when Mariana drives up for gas. He goes out to fill her gas tank with the cigarette in his mouth. Annoyed by a persistent bee, he takes a swipe at it and knocks the cigarette out of his mouth. It falls near the nozzle of the hose, causing an explosion that injures Mariana. She sues him for negligence.

   At trial, her counsel asks the judge to instruct the jury that Gobbo, in dispensing the gas, owed her a duty of extreme care, due to the explosive nature of gasoline. Should the judge give the instruction?

An Almost Perfect Record

10. Dr. Quince operates on Peasblossom to remove a bony growth from her lower spine. During surgery, he accidentally contacts her spinal cord, causing partial paralysis of her left leg. Peasblossom sues him for negligence.

    At trial Quince seeks to establish that he exercised due care in surgery by offering evidence that he has an almost perfect record as a back surgeon. He has performed over 370 similar surgeries, and only twice come into contact with the spinal cord. His counsel argues that this proves that he is a careful surgeon.

    a. Does this evidence establish that Quince complied with the standard of reasonable care?

    b. How should Judge Fudd instruct the jury as to the standard of care Dr. Quince was required to meet in operating on Peasblossom?

    c. How is the jury to know what due care requires in this case?

Menlove in Reverse

11. Dogberry has been skiing since he was four, has participated in several skiing competitions, and is generally acknowledged to be a first-class skier. One morning, he is executing a turn on a moderate ski run, loses control, and slides backward into Portia, breaking Portia's ankle. She sues him for negligence. At trial, Portia argues that the jury should be instructed that Dogberry must exercise the level of care that would be exercised by "the reasonable expert skier under the same circumstances." Should the instruction be given?

An Elementary Example

12. Falstaff heads home after drinking nine beers at the local pub. Much the worse for wear, he is proceeding along at 28 miles per hour, just below the speed limit, within his lane of traffic, when a pickup truck, going the other way, makes a sharp stop in the opposite lane. Moth, a boy of five, is leaning over the side of the bed of the pickup and is thrown out immediately in front of Falstaff's left front wheel. Falstaff runs him down and is sued for negligence. Leaving aside possible contributory negligence of Moth, would Falstaff be liable?

Explanations

Burdens and Benefits

1. Costard has tried to take charge of the negligence analysis here by looking at one possible means of addressing the risk and applying the Hand formula with only that in mind. The argument might hold water (so to speak) if filling in the quarry were the only possible means of dealing with the risk. But other, less burdensome "B"s exist here. Costard could have fenced the quarry, or posted signs warning of the danger of rocks beneath the surface. The burden of taking these alternative precautions is much lower, and the balance of risk against cost of prevention is a great deal closer on these facts. This is not to say that Trinculo will necessarily win, but that it is important for his counsel not to let Costard frame the negligence issue only in terms of a prohibitively expensive precaution, since other means of prevention are possible.

2. In this case, Costard's negligence is clear because the burden of prevention is so low. Even filling in the well would likely be an appropriate precaution to eliminate the risk of serious injury from falling in. But much less would prevent most accidents. Building a fence around the well or capping it with a solid concrete cover would eliminate the risk at a clearly acceptable cost. Surely our Paragon of Propriety, the reasonable person, would have done so.

3. Stray foul balls like Feste's are certainly foreseeable; indeed, even an accident like Glendower's is foreseeable. But foreseeable risk is not the end of the analysis. The reasonable man eschews unreasonable risks, but not all risks. If the risk here was low enough, in relation to the utility of the activity, it is not negligent for the town to impose it.

   Here, that may well be the case. The facts suggest that there was little open land and a need for recreational facilities in the town. The town sited the field with a substantial margin beside the road. Certainly, a few fouls will still reach the road, but, since it is a quiet street, most will not hit a car. Those that do will not usually cause much damage. In view of the value of the field to the citizenry, the lack of alternative

sites, the relatively low risk of accidents, and the minimal damage likely if an accident does take place, the town's choice is probably reasonable.

One lesson of this example is that plaintiffs do not always win negligence suits just because an accident actually happens. The test is not whether injury was caused, or even whether injury was foreseeable, but whether the defendant's conduct was reasonable in view of *all* the circumstances, including the possibility of injury, the utility of the conduct, the alternatives available, and others.

The example also illustrates that the peculiar circumstances of every individual case really do matter. This case might come out differently if there were more alternatives to the site, if the space outside the foul line were only ten feet, or if the road was a busy high-speed freeway. *Facts* are ever so important to negligence cases, because each fact colors the "circumstances" against which the defendant's conduct must be judged.

Risks and Reasonableness

4. My students often conclude that a defendant who foresaw a risk of injury but failed to prevent it will be found negligent. However, negligence law does not hold actors to that stringent standard, which would amount to strict liability. In this case, the railroad could foresee injuries if it chose a grade crossing, but went ahead anyway, based on the great expense of eliminating the risk and the small number of injuries likely to be caused by the grade-crossing option. This may well be a reasonable decision, even though the railroad knows, on an actuarial basis, that its decision will cause injuries to others. The railroad is not required to eliminate all risk of injury from its operations, only to conduct it with reasonable care. If the planners drew a reasonable balance here between risk and the expense of eliminating it, the decision to use a grade crossing will not be deemed negligent.

   Analyzing the railroad's decision in Hand formula terms suggests that the decision may well be reasonable. If we assume that two injuries will be caused in a decade, that the average injury cost will be $500,000,[6] and that the overpass will last 30 years, the injury cost will be $3 million, compared to the $12 million cost of averting the six likely accidents. In social terms, the investment to prevent these accidents may be more than society — through the mechanism of tort law — is willing

to require.

It is true that the analysis here involves valuing human suffering against economic cost, but negligence law routinely involves such heartless but practical balancing. For example, the automobile causes immense human suffering, yet we accept — indeed, seem at times to worship — the automobile for the convenience it brings. It is not negligent to drive, even though resulting accidents are a statistical certainty. "There is essential truth . . . in the saying that the law of negligence privileges actors to kill and maim people carefully." Harper, James & Gray §16.9 at 478.

5. a. The waterworks is not necessarily negligent for failing to take precautions against this risk. Once in 75 years is a very small risk. A frost like that may not happen for another 75, or another 150. Even if it does happen again, the flooding damages are likely to be small compared to the cost of placing the pipes deeper. So the reasonable operator might well choose to ignore this very small risk in planning the water system.

   b. Logically, it shouldn't make any difference if the freak frost was 75 years ago or last week. In either case, the waterworks is on notice of this unusual risk, but the question remains whether they must act to avert it. As long as it is a very unusual risk, and as long as it will be very expensive to eliminate it, the decision not to eliminate it is probably reasonable.

   Of course, if the waterworks engineers had reason to believe that last year's frost shows that such frosts were becoming *more* common (if, for example, woolly mammoths have recently appeared in the streets of Birmingham), then the risk would be a more important factor in the equation. But if their best judgment is that the recent deep freeze was indeed off the charts, they may reasonably view it as too remote a risk to warrant expensive precautions.

   c. The Hand formula indicates that the reasonable waterworks company should not place the pipes lower. In economic terms, it is not reasonable to invest $20 million to avoid $5 million in economic losses. So, if we use Hand's formula as the measure of reasonableness, the waterworks company is not negligent for laying the pipes at the one-foot level.

d. Assuming that the decision not to guard against this frost was a reasonable judgment on the part of the waterworks, it is not liable to Blyth. The whole point of a negligence liability rule is that you pay if your conduct was unreasonable, but not if it was reasonable, *even though others suffer harm from your reasonable conduct.*

   The irony of this example, of course, is that the waterworks saves $20 million by imposing $5 million in losses on the homeowners! Because negligence law tells the waterworks that it doesn't have to take precautions against this unusual risk, it doesn't. If the risk comes to pass, and floods Blyth's basement, the waterworks isn't liable to compensate Blyth, because it wasn't negligent.

e. The difference between strict liability and negligence is that under strict liability the actor who causes harm pays the resulting damages, even if he acted with due care. Under this rule, the waterworks would have to pay for Blyth's flooded basement, even if it made a reasonable judgment not to avoid the risk of extreme frosts. Under negligence law, the cost of accidents often falls on an innocent victim — like Blyth in the last example — as long as the person causing the harm acted with due care.

f. This example asks how the waterworks' conduct would be different if we change the governing tort principle to strict liability. A large organization like a waterworks, which expects to be around for a long time, may very well consider liability rules in planning its operations. Indeed, according to economic theorists, one of the goals of tort law is to design rules that will encourage socially desirable planning *in advance*, not just redistribute a loss after it happens.

   In this case, however, the waterworks' conduct wouldn't be different at all. Using the figures in Example 5c, the rational waterworks would still put the pipes at the one-foot level. This would save $20 million. If a freak frost occurs, they will have to pay $5 million to homeowners, but that makes more sense than spending $20 million to save $5 million.

   So here, the choice of the strict liability rule over a negligence rule does not affect the rational economic actor's level of precautions. However, it *does* make a difference: It requires the actor to internalize the accident costs it causes, even though it reasonably

chose not to prevent them. There's something to be said for that result, both in economic terms and in person-in-the-street fairness terms. But strict liability is not the law in most accident cases. Negligence is.

A True Story: Judge Hand at the Roller Rink

6. a. This really is a classic Hand formula situation, isn't it? There is evidence of P — that the probability of an accident was quite low. "It hasn't happened in 17 years." Intuitively, I would have estimated that P was much higher: The combination of youthful exuberance, frequently coupled with inexperience and speed, suggests that accidents would be more common. Frankly, I think the rink was beating the odds.

   There is also evidence about L, the likely loss if an accident happens. Of course, L could be low, a skinned knee or bruised shoulder, perhaps. But really serious accidents, possibly leading to profound brain injuries, are also quite predictable — and of course, those are the ones likely to end up in court.

   On the other side of the formula, B, the burden of prevention, is also very low: For a few hundred dollars the rink could pad that wall and drastically reduce the risk of a serious injury.

   b. While the jury can't quantify the Hand formula terms, they could, in an impressionistic way, analyze this case intelligently in Hand formula terms. Can't you just hear Jane's lawyer's closing argument to the jury:

> An accident like Jane's was an obvious, very serious risk. They should have seen it coming and known that when it came it was likely to be a head injury, the most serious kind. All they had to do to prevent this from happening to Jane was to put some padding on the walls. The cost would be negligible — a few hundred bucks to avoid a catastrophic injury. The reasonable operator would have done it. They should have done it. If they had, Jane would be OK and we wouldn't be here today. You should send them a clear message to give safety a higher priority in running their business.

I would sure rather argue this case for the plaintiff than the defendant, wouldn't you? It would have taken so little to avoid the harm. Even if the accident was unlikely, the formula clearly suggests that that odious Reasonable Person would have taken precautions.

Fudd and Foreseeability

7. Fudd has grievously confused the burden of proof with the standard of care. His instruction suggests that Falstaff was negligent only if the accident was "more probable than not." In fact, Falstaff's act may have been negligent even if an accident was very unlikely.

In a civil case, the plaintiff must convince the jury that it is more probable than not that each of the elements of the claim is true. Here, most juries would conclude that it was more probable than not that Falstaff *was negligent*, even though the probability that his conduct would cause an accident was quite low. As the Hand formula suggests, a risk does not have to be *likely* to happen before the reasonable person avoids it. The reasonable person avoids even small risks if the resulting injuries, if they occur, are likely to be great. Since the damages from a head-on collision with an oncoming car are likely to be grievous, the reasonable driver in Falstaff's circumstances would not take that risk, even if it was a very small risk. In Hand formula terms, while P is low, L is very great, and B, the burden of avoiding the risk, is very low: Falstaff need only wait for a clear stretch of road before passing.

Opinions in negligence cases often state that conduct was negligent because injury was the "natural and probable consequence" of the defendant's act. This is promiscuous language; "probable" here really means *foreseeable.* A risk may be foreseeable, and worth avoiding, even though the chances are a great deal less than 50 percent that it will actually come to pass.

The Honorable Fudd would be better advised to instruct the jury along these lines:

> If you find that the defendant passed on the curve without being able to tell whether a car was coming the other way, and that the risk of a collision was sufficiently foreseeable that a reasonable person in the defendant's circumstances would not have acted as he did, then you should find that the defendant breached the standard of due care.

This instruction requires the jury to engage in the same balancing process that the Reasonable Person does, to weigh risks and advantages to determine what Falstaff *should have done* and then to compare that to what he actually did. In effect, the jury first decides what the standard means in the context of the facts (what is "reasonable" under *these* circumstances) and then decides whether the defendant acted that way or

not.

8. a. Elbow's counsel will object to Fudd's instruction because it requires the jury to find that Barnardine was not negligent if he did what is customarily done in the trade. This instruction would elevate custom to a rule of law: Whatever is done in a trade or profession would automatically constitute due care, thus delegating to roofers the decision about what due care means on a roof. For various reasons, real roofers may not behave the way the reasonable roofer should. As Judge Learned Hand so eloquently explained:

> [A] whole calling may have unduly lagged in the adoption of new and available devices. It never may set its own tests, however persuasive be its usages. Courts must in the end say what is required. . . .

The T. J. Hooper v. Northern Barge Corp., 60 F.2d 737, 740 (2d Cir. 1932). Consequently, evidence of custom, what is usually done in a trade or profession, is admissible at trial — the jury is allowed to hear such evidence. However, they still must determine whether what was done, customary or not, comports with the negligence standard itself — ordinary care under the circumstances.

b. Judge Fudd should tell the jury that they can consider the evidence of what is customary in the roofing trade, but that they are not bound to find Barnardine reasonable if he did what most roofers do:

> There has been evidence introduced at trial about the extent to which roofers wear safety harnesses in working on jobs like the one that gave rise to this claim. If you find that it was customary in the trade to use a safety harness, or not to wear one, you may consider this evidence along with all the other evidence in determining whether the defendant acted reasonably under the circumstances that gave rise to this claim.

This instruction allows the jury to consider custom evidence, but indicates that the question for the jury is whether the defendant's conduct was reasonable under the general due care test.

If I represented Elbow, I would ask Judge Fudd to give the following further instruction:

> If you find that it was customary for roofers not to wear a safety harness, you may still find that the defendant was negligent for failing to do so. The standard you must apply is reasonable care under the circumstances, not what is generally done in the trade.

This instruction makes the point a little more emphatically from the plaintiff's point of view. However, the judge might refuse to give it. It basically repeats the general instruction above, and is perhaps a bit argumentative as well.

A Duty of Much Care

9. The judge should refuse the instruction. Negligence law holds defendants to a duty of reasonable care under the circumstances, not different duties depending on the degree of risk of each activity. The jury should be instructed that Gobbo owed Mariana a duty of reasonable care under the circumstances.

However, the circumstances here involve a high risk of injury. Reasonable care in the dispensing of gasoline undoubtedly requires a greater *amount* of care than dispensing ice cream sodas. But this is not a different *standard* of care, it is just what the reasonable person would do under *these* circumstances. It would be perfectly appropriate for the judge to instruct the jury as follows:

> If you find that dispensing of gasoline involves a high risk of explosion, and that the reasonable person in the defendant's circumstances would have known or should have known of that risk, then the defendant was required to exercise a high level of care commensurate with the high risk involved in that activity.

This instruction may be only subtly different from the one Gobbo's counsel requested, but it is different in an important respect: It states that the reasonable person, acting under the usual due care standard, exercises a higher *amount* of care if the circumstances involve high risk. The requested instruction wrongly suggests that a different *standard* of care applies.

The jury very likely won't catch the subtle distinction between these two instructions: They will just pick up on the fact that the defendant was required to be very careful. But getting the instruction right is still important, especially to Mariana. If the inaccurate one is given, her verdict may be reversed on appeal. The correct instruction will communicate much the same message to the jury, but without the risk of reversal for legal error.

An Almost Perfect Record

10. a. In baseball, .300 is a good batting average, and Quince is batting nearly a thousand. This tends to show that Quince is a careful doctor. If I were choosing a doctor, such information would make me more likely to choose Quince.

But this case is not about whether Quince is a careful doctor: It is about whether he exercised due care *on this occasion.* We are not testing his general virtue or his career accomplishments, we are testing his conduct in one particular operation. It is no answer to Peasblossom that Quince was careful in all those *other* cases; she claims — and is entitled to — the exercise of reasonable care in the performance of *her* operation.

On the other hand, how can we hold Quince to a standard of perfection? We all make mistakes, and Quince makes fewer than most. How can we condemn him if the knife slips once?

Well, we aren't condemning him. A finding of negligence is not a moral judgment passed upon a person, or a finding of incompetence, but a post hoc evaluation of a single event against an abstract standard set up by the law. Since that is all that we are doing, evidence of Quince's batting average, that he usually meets the standard of care in his operations, is beside the point, just as evidence that he had made mistakes on other patients would not establish that he was careless in Peasblossom's operation. See Fed. R. Evid. 404(a) (evidence of character generally inadmissible "to prove that on a particular occasion the person acted in accordance with the character or trait"); see also Restatement (Third) of Torts: Liability for Physical and Emotional Harm §3 cmt. k ("tort law's case-by-case focus makes it appropriate to say that the reasonably careful person is infallible in a way that ordinary people are not").

b. Judge Fudd should not give the usual reasonable-care-under-the-circumstances instruction on the element of negligence. Here, the defendant was acting as a professional, a lumbar surgeon. By doing so, he has undertaken to apply the skill of a specialist, and will be required to meet that standard in Peasblossom's case. Fudd should instruct the jury along the following lines:

> In performing the operation that gave rise to this claim, the defendant was acting as a specialist in the area of surgery. In determining whether the defendant was negligent, you must decide whether, in performing the operation, he committed some act that the reasonably competent physician engaged in the practice of surgery would not have done, or failed to do some act that the reasonably competent physician engaged in that specialty would have done.[7]

c. The average jury is made up of a cross section of individuals with varying educational backgrounds, professions, experiences, and values. Few, if any, will know anything about lower lumbar surgery. They are in no position, based on their general knowledge, to say what reasonable care requires in such operations.

   Thus, the parties will have to educate the jury not only about what the defendant did, but also about what the standard of reasonable care required under the circumstances in which he did it. Each side will offer expert evidence (doubtless from lumbar surgeons in Peasblossom's case) as to the proper way to perform surgery of this type. The jury will have to determine, after assessing the conflicting testimony of these experts, what the reasonable surgeon does in such cases. Having determined that, they will then have to decide whether Quince failed to meet that standard.

   In many cases, the jury's life experience will allow them to determine what reasonable care means without the testimony of experts. Jurors can pass judgment on the reasonableness of driving a car, operating simple machinery, controlling children in a classroom, crossing the street, or climbing a ladder, based on their general knowledge. But a great many cases require expert evidence in order for the jury to determine the standard of reasonable care. The proper way to reinforce a bridge, to pilot an ocean vessel, to analyze a financial statement, to ride a racehorse, to land a 747, or to treat a drug overdose, to name a few examples, are beyond the common experience of jurors. In such cases, trial must include an expensive "battle of the experts" on what reasonable care demands in those circumstances.

Menlove in Reverse

11. Portia can make a pretty good argument for holding Dogberry to the standard of care of an expert: He is a highly experienced skier who is

probably capable of better control than your basic weekender on the slopes. Why should he be held to a lesser standard of care than he is able to meet?

There is some force to the argument, but there are also problems with it. First, it tends (like Menlove's argument) to destroy the uniformity of the standard of care. If the argument were accepted, the jury would have to ascertain in each case just how good the defendant was at what he did before deciding what standard to apply to him. Should the jury "grade" the defendant as "expert," "very good," "good," or "average" before determining what standard he must meet? Suppose he is a sub-par skier? Ratcheting the standard of performance *up* for the able seems to imply lowering it for the less able as well, yet *Menlove* certainly indicates that the court will not do that. If the goal is a single objective standard, it appears to make sense to stick to the reasonable-person-under-the-circumstances test for Dogberry, at least when he is engaging in ordinary maneuvers engaged in by skiers with a wide range of abilities.

It would be different if Dogberry were *acting as an expert* at the time of the injury. For example, if Dogberry were a member of the ski patrol in the course of a rescue, he would be acting as an expert and should be held to that standard. But in this example Dogberry is just skiing, like everyone else on the slopes, and should be held to the same standard of care as the reasonable skier under the circumstances. Similarly, a trucker driving his car to the movies may be an "expert" driver, but will be held to the general reasonable person standard for ordinary driving. See *Fredericks v. Castora*, 360 A.2d 696, 698 (Pa. Super. 1976) ("to vary the standard according to the driver's experience would render the application of any reasonably uniform standard impossible").

The result here is not entirely clear, however. Some authorities suggest that Dogberry should be held to the standard of an expert in this example. See Restatement (Third) of Torts: Liability for Physical and Emotional Harm §12; see also Harper, James & Gray §16.6 at 415-421. As a practical matter, of course, if the evidence shows that Dogberry is highly experienced, the jury is likely to demand more of him anyway, whether or not they are instructed to do so.

An Elementary Example

12. This chapter began by drawing the distinction between negligent conduct and liability on a negligence claim. We end with the same distinction. Falstaff was clearly negligent here in the sense that he breached the standard of due care by driving drunk. He failed to act as a reasonable person under the circumstances would. That satisfies Element #2 of the cause of action for negligence.

    But the *tort* of negligence has three other elements, and one of those is causation. Here, the facts suggest that Falstaff was not negligent in the way he handled the car, even though he was drunk. He was in his lane, driving below the speed limit. Because Moth fell right in front of the car, there was nothing Falstaff could have done to avoid hitting Moth; even if he had been sober, the accident would have happened the same way. Liability for negligence turns not just on *being* negligent, but upon negligent conduct *causing* injury.

    But Falstaff's negligence did cause the harm, didn't it? He was negligent to be on the road *at all* while drunk, and his driving caused the accident. This argument proves too much. On this theory, Falstaff would be liable to Moth if he had bald tires, worn windshield wipers, or a loud muffler, and had the same accident, even though none of these conditions contributed in any way to the injury.

    In order for a negligent act to be considered a cause of the plaintiff's injury, the risk that makes the conduct negligent must lead to the harm. Driving while drunk is negligent because it impairs the ability to control the car: It is only when this impairment contributes to the occurrence of the accident that the negligence becomes a "cause" of resulting harm. Falstaff would be liable if Moth fell far enough in front of the car that an unimpaired driver could have braked in time, and Falstaff failed to brake because of his inebriation. On those facts his negligence would have affected the outcome, and the causation requirement — Element #3 — would be established. See generally Chapter 10 on cause in fact.

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1. A. P. Herbert, Misleading Cases in the Common Law 12 (7th ed. 1932).

2. Herbert, supra n.l at 9-11.

3. Other more global criticisms have been leveled at the formula as well. For example, the formula appears devoid of any moral content, suggesting that tort law is a purely economic calculation rather than a system to compensate victims, to punish unacceptable conduct, or to deter injurers. Beyond that,

of course, lies the plain fact that people simply don't think in formulas, and won't be made to by judges.

4. The Third Restatement of Torts expressly endorses Hand formula analysis in determining negligence: "Primary factors to consider in ascertaining whether the person's conduct lacks reasonable care are the foreseeable likelihood that the person's conduct will result in harm, the foreseeable severity of the harm that may ensue, and the burden of precautions to eliminate or reduce the risk of harm." Restatement (Third) of Torts: Liability for Physical and Emotional Harm §3.

5. Ironically, courts and legislatures have gone to considerable lengths to avoid the ineluctable conclusion that it is unreasonable to drive without buckling up. See, e.g., D. Westenberg, Buckle Up or Pay: The Emerging Safety Belt Defense, 20 Suffolk U. L. Rev. 867, 885, 923-943 (1986) (detailing statutes limiting use of evidence of failure to wear seat belt to prove negligence). These attitudes may be changing, however. See Restatement (Third) of Torts: Apportionment of Liability §3 cmt. b and illus. 3 (failure to wear seat belt treated as negligence).

6. Yes, I know, this figure is bound to be a wild approximation. The actual accidents could be anything from a minor fender bender with no personal injuries to a school bus full of seriously injured children.

7. A good many states still apply a "customary practice" standard of care to doctors. See, e.g., *Purtill v. Hess*, 489 N.E.2d 867, 872 (Ill. 1986) (same reasonable care as "reasonably well-qualified physician" in same or similar medical community). This standard essentially equates what doctors generally do with acceptable medical practice, contrary to the more limited role that custom usually plays in proving reasonable care (see Example 8). However, the general reasonable physician standard reflected in this instruction appears to be gaining ground. See P. Philip, The Role of the Jury in Modern Malpractice Law, 87 Iowa L. Rev. 909, 913-917 (2002).

CHAPTER 8

Borrowing Standards of Care: Violation of Statute as Negligence

INTRODUCTION

As the previous chapter indicates, the plaintiff in a negligence case must prove four elements — duty, breach, causation, and damages — in order to recover in a negligence case. To establish the second element, breach of the duty of care, or negligence, the plaintiff must show that the defendant failed to act with reasonable care, to behave as the ordinary prudent person would under like circumstances.

This reasonable person standard has been criticized as too vague to provide any meaningful guidance to the jury in evaluating the defendant's conduct. Juries are supposed to find facts, not to establish the rules of law that determine whether the defendant is liable. Arguably, the negligence standard is so broad that it licenses the jury to find as they please, without constraining them by meaningful legal rules.

On the other hand, how can the rule be any more specific? The variety of human experience, the range of circumstances that may cause injury, is so great that it would be impossible for courts to formulate specific rules in advance to govern liability for all careless conduct. Since it is impossible to "particularize" the negligence standard, the jury is usually instructed under the reasonable person formula. The jurors are left to use their common sense,

experience, and, where appropriate, expert testimony, to pass judgment on the defendant's conduct under this very general standard.

While courts cannot elaborate specific negligence rules to define how parties should behave in all circumstances, *legislatures* routinely enact statutes establishing standards of care for common situations. This chapter considers the role that such statutes play in proving the second element of a claim for negligence, that a party breached the standard of care or "was negligent."

LEGISLATIVE STANDARDS OF CONDUCT

Legislatures very commonly enact statutes that establish standards of care for private conduct. Many such statutes govern that ubiquitous, highly practical, but potentially lethal instrumentality, the automobile. Here are some hypothetical, but typical, examples:

> No person shall make a turn onto or off of a public way without signaling his or her intention to turn, either by hand or by an electrical signal device. West Dakota Ann. Laws Title V §12.
>
> No person shall drive a motor vehicle without a muffler or other suitable device to control excessive noise. West Dakota Ann. Laws Title V §212.
>
> No person shall drive an unlighted vehicle upon any public highway during the period from one-half hour after sunset until one-half hour before sunrise. West Dakota Ann. Laws Title V §94A.
>
> The driver of a vehicle on any public highway, traveling in any direction, shall stop before reaching any bus marked "school bus" and exhibiting flashing red lights. Said driver shall not proceed until the bus resumes motion or the lights are no longer flashing. West Dakota Ann. Laws Title V §74.

Many statutes establish standards of care in other areas as well:

> No person shall enter upon or be employed upon the premises of an active construction site without wearing a construction helmet. West Dakota Ann. Laws Title IX §111.
>
> No person shall leave a refrigerator, freezer, or similar appliance in any unsecured area accessible to children, whether for disposal or otherwise, without detaching the door from said appliance. West Dakota Ann. Laws Title XXIV §51.
>
> Every owner or lessor of property used for rental purposes shall maintain every outside stair and porch in sound condition and good repair. West Dakota Ann. Laws Title XVII §19.
>
> No person shall operate any mobile piece of heavy construction equipment unless said equipment is equipped with a beeper which sounds at all times while such equipment is operating in reverse.

West Dakota Ann. Laws Title XXIII §123.

Statutes like these are intended to promote safety by establishing standards of conduct for particular situations. They are legislative commands which, if applicable, every citizen is bound to obey. Usually, such safety statutes impose a small criminal penalty for violations of the standard, but do not say anything about whether violation of the statutory standard establishes negligence in a civil action for damages. Not surprisingly, however, persons injured due to a violation of such a statute usually claim that the defendant was negligent for failing to comply with the statutory standard of care.

Suppose, for example, that Bourjailly drives past a stopped school bus with flashing lights and hits Hellman, a child alighting from the bus. If the school bus statute quoted above applies, Hellman will argue that Bourjailly should be found negligent because he violated the statute. Or suppose that Updike is injured by a falling object on a construction site, and sues the contractor. If the helmet statute quoted above applies, and if Updike was not wearing one, the defendant would argue that Updike's violation of the statute proves, in and of itself, that he failed to live up to the standard of due care.

ARGUMENTS FOR AND AGAINST THE NEGLIGENCE PER SE RULE

There are some good arguments that a violation of a statute should be treated as "negligence per se," that is, negligence in itself. Where the legislature has decreed that certain precautions must be taken, or that certain acts should not be done, a person who violates the statute has ignored the standard of care established by the legislature. Arguably, reasonable people don't do that.

In addition, if the jury is permitted to find that the defendant acted with due care, despite his violation of a statutory standard of care, the jury is being licensed to disregard the command of the legislature. Suppose, for example, that the jury finds that Updike was not negligent in failing to wear a helmet. Doesn't this ignore the legislature, the voice of the people, which has barred such conduct? Shouldn't the standard of conduct enforced by the courts be the same as that established by the legislature, so that court decisions in negligence suits will reinforce rather than contradict the policy of the

legislature?

There is much logic to these arguments, but the negligence per se cases vividly illustrate Justice Holmes's famous maxim, "The life of the law has not been logic; it has been experience." O. W. Holmes, Jr., The Common Law I (Little, Brown 1881). Automatic adoption of general legislative standards has proved too rigid. While it may be generally true that the reasonable person obeys the law, it is not always true. In unusual circumstances, it may be reasonable to disregard the statute, as where a driver swerves across the center line to avoid a child in the street, or stops in a no-stopping zone to attend to a seriously ill passenger. In other cases, it may be impossible to obey the law, despite the best will in the world, as where blizzard conditions overwhelm efforts to keep a street clear. Imposing liability in cases like these, simply on the ground that the defendant violated the statute, would look more like strict liability than liability based on fault.

Another argument against automatic adoption of the legislative standard is that most statutes that establish standards of care say nothing about what role the legislative standard should play in a tort action for damages. Since the legislature has not provided that violation of the statutory standard of care automatically establishes negligence, it is fair to infer that courts have some discretion to "borrow" that standard selectively.

Last, it is doubtful that the legislature intended blind adherence to statutory standards regardless of the circumstances. Legislators tend to be practical people, and practical people recognize that there are circumstances in which the ordinary rules do not pertain. If asked, no legislator who voted for a statute requiring drivers to keep to the right would testify that she intended them to run down small children in order to fulfill the statutory command, or to smash into a stalled oil delivery truck.

COMMON APPROACHES TO BORROWING STATUTORY STANDARDS

Some early cases appear to hold that violation of a statutory standard of care always constitutes negligence per se. Under this approach, if the defendant violated the statute, the jury would be required to find her negligent, without

regard to any excuse she might offer. One of the classic cases, *Martin v. Herzog*, 126 N.E. 814 (N.Y. 1920), might be read to stand for this position,[1] and early cases from other jurisdictions appear to agree. See, e.g., *Decker v. Roberts*, 3 A.2d 855 (Conn. 1939); *O'Bannon v. Schultz*, 169 A. 601 (Conn. 1933); cf. *Zeni v. Anderson*, 243 N.W.2d 270, 281 (Mich. 1976) (noting that the negligence per se rule bars evidence of excuse). Under this approach, the only way the defendant could avoid liability would be to show that the statute did not apply under the circumstances (see, e.g., *Tedla v. Ellman*, 19 N.E.2d 987 (N.Y. 1939)), or that the violation, while admittedly negligence, did not cause the plaintiff's injury.

However, as Holmes's maxim portends, experience with the negligence per se doctrine has led virtually all courts to soften this Draconian stance. Most courts have adopted one of the following approaches, which allow the jury to *consider* the violation of a statutory standard of care in determining negligence, but avoid making it automatically determinative.

A. Negligence Per Se with "Excuse"

The most common approach to violation of statute as negligence is reflected in §14 of the Third Restatement of Torts: Liability for Physical and Emotional Harm. That section provides as follows:

> An actor is negligent if, without excuse, the actor violates a statute that is designed to protect against the type of accident the actor's conduct causes, and if the accident victim is within the class of persons the statute is designed to protect.

Under this provision, if an actor violates a relevant statutory standard of care, that violation will establish her negligence if no excuse is offered. Suppose, for example, that Bourjailly violates the school bus statute quoted above by passing a stopped school bus and hits Hellman, a student getting off the bus. Suppose also that Bourjailly offers no excuse for his violation (quite likely because he doesn't have one). On these assumptions, the jury would be instructed that, if they find that Bourjailly violated the statute, they must find that he was negligent.

However, the Restatement recognizes that there may be legitimate reasons for violating a relevant statute. Thus, the violator will be entitled to offer evidence of an excuse for the violation. Section 15 of the Third Restatement recognizes the following categories of "excused violations":

(a) the violation is reasonable in light of the actor's childhood, physical disability, or physical incapacitation;
(b) the actor exercises reasonable care in attempting to comply with the statute;
(c) the actor neither knows nor should know of the factual circumstances that render the statute applicable;
(d) the actor's violation of the statute is due to the confusing way in which the requirements are presented to the public; or
(e) the actor's compliance with the statute would involve a greater risk of physical harm to the actor or to others than noncompliance.

Under the Restatement, these listed excuses are not exclusive; Bourjailly would be free to offer some other reason for the violation as well. Restatement (Third) of Torts: Liability for Physical and Emotional Harm §15 cmt. g.

Under the Restatement approach, Bourjailly would be deemed negligent if he violated the school bus statute and offered no evidence of an acceptable excuse. However, if he did present evidence of an excuse, the plaintiff's effort to prove negligence simply by proving a violation of the statute would fail. The jury would be instructed to determine whether Bourjailly acted reasonably under all the circumstances, including his violation of the statute, the reasons offered for noncompliance, and others. That sounds a good deal like a general reasonableness inquiry.

B. "Presumption" of Negligence

Some jurisdictions hold that proof of a statutory violation creates a "presumption" that the violator was negligent. The violator is still free, however, to rebut the presumption by showing that the reasonable person would have acted as he did. It is not clear that there is much difference between this approach and the Restatement approach. Under each, the plaintiff may use evidence of a statutory violation to establish negligence. Under each, the defendant may offer evidence of a good reason for her conduct. If she does not offer such evidence, the violation of the statute establishes her negligence. If she does offer evidence of an excuse, the jury is left to assess her conduct under a reasonable person standard, considering both the requirements of the statute and the violator's reasons for violating it.

Under both the Restatement and the presumption approaches, most courts hold that the burden of proof remains on the plaintiff.[2] The plaintiff can prove negligence by proving violation of a relevant safety statute, if the defendant

does not offer evidence of an adequate reason for the violation. If evidence of an excuse *is* offered, the burden remains on the plaintiff to convince the jury that, in light of the violation and the reasons offered, the defendant did not behave as a reasonable person would under the circumstances. See, e.g., *Moughon v. Wolf,* 576 S.W.2d 603, 604-605 (Tex. 1978) (where plaintiff proves statutory violation and defendant offers evidence of excuse, plaintiff bears the burden to convince the jury that defendant's conduct was negligent under the reasonable person standard).[3]

C. Evidence of Negligence

The third common approach is to treat violation of a statutory standard of care as evidence of negligence. Under this approach, evidence that the defendant violated a statute is admissible at trial. The jury may consider it along with all the other evidence that the defendant did or did not exercise ordinary care. They may be persuaded (on that evidence alone, or along with other evidence) that the defendant was negligent. But they are not compelled to find him negligent, *even in the absence of rebutting evidence from the defendant*.

This is meaningfully different from the per se and presumption approaches. Under those approaches, if no excuse is offered, the judge should instruct the jury that they must find the defendant negligent if they find that she violated the statute. Under the evidence-of-negligence approach, proof of an unexcused violation would support a finding of negligence by the jury, but they would still be free to find that the defendant was not negligent, *even if no excuse were offered*. It is certainly conceivable that a jury would refuse to find negligence despite the violation: For example, a jury might well find that driving 57 m.p.h. on a clear dry day on a rural interstate highway is not negligence, even if the speed limit were 55 and the defendant had no excuse. Under the evidence-of-negligence approach, the jury would be free to reach that conclusion. Under the presumption or per se approaches, however, this violation would establish negligence unless an excuse were offered.[4]

THE REQUIREMENT OF RELEVANCE

As the foregoing section indicates, evidence of the violation of a statutory standard of care is usually admissible, and can be conclusive, on the negligence question. However, such evidence may not be used to establish breach of the duty of care unless the statute establishes a *relevant* standard of care. If Bourjailly causes an accident by turning into the path of Perelman's oncoming car, common sense tells us that it is irrelevant that he violated a statute requiring him to curb his dog, or even one requiring working windshield wipers (assuming the weather was dry at the time of the accident). Allowing evidence of these violations might prove that Bourjailly was a generally negligent person, but would not show that his negligence caused this particular accident.

Courts frequently state that a statute is only relevant in establishing negligence if it is meant to protect persons like the plaintiff from the type of harm which actually occurred. The dog curbing statute was not aimed at preventing intersection collisions, but the turn signal statute quoted at p. 146 clearly was enacted to protect other drivers from collisions with turning vehicles, exactly the type of accident which resulted from Bourjailly's failure to comply with the statute. This statute establishes a relevant standard of care, because it was meant to protect drivers like Perelman from the type of harm — turning accidents — that resulted in this case. See generally Dobbs' Law of Torts §152.

This requirement is nicely illustrated by one of the classic cases on the point. In *Gorris v. Scott, 9* L.R.-Ex. 125 (1874), the plaintiff's sheep were washed overboard while being transported by sea. The plaintiff tried to establish the carrier's negligence by proving that it had violated a regulation requiring that animals on shipboard must be kept in pens of a certain size. Had the defendant complied with the statute, the plaintiff argued, the sheep would not have been washed overboard.

The court refused to find negligence on the basis of the violation. The regulation, the court concluded, was not meant to protect animals from being washed overboard, but rather to prevent the spread of disease by preventing overcrowding. Since it was not aimed at preventing the type of harm that occurred, it did not establish a standard of care relevant to the circumstances, and could not be used to establish the shipper's negligence.

Another case which nicely illustrates the point is *Kansas, Okla. & Gulf Ry. Co. v. Keirsey,* 266 P.2d 617 (Okla. 1954), in which the plaintiff's cow entered a railroad right of way and ate itself to death. The plaintiff claimed

that the railroad was negligent per se, because it had violated a statute which required it to maintain fences to prevent animals from straying onto the right of way. The court refused to find negligence based on the violation, since the statute was aimed at protecting farm animals from being hit by trains, not from eating too much grass.

Courts will also refuse to treat violation of a statute as negligence if the statute was not intended to protect the class of persons to which the plaintiff belongs. See Restatement (Third) of Torts: Liability for Physical and Emotional Harm §14, which provides

> An actor is negligent if, without excuse, the actor violates a statute that is designed to protect against the type of accident the actor's conduct causes, and if the accident victim is within the class of persons the statute is designed to protect.

For example, a building code might be intended to protect building occupants, not workers involved in the construction of the building. If so, the court would likely refuse to apply the building code standards to determine negligence in an action by a worker injured during construction, since the legislature was thinking about a different group with a different set of expectations and different opportunities to protect themselves. Thus, the statute is not relevant on the question of proper precautions during construction. Another nice example is a firefighter injured fighting a fire in a building that lacks sprinklers required by statute. The court might refuse to allow the firefighter to establish negligence based on the lack of sprinklers, since the statute was meant to protect occupants, not emergency personnel.

If the defendant successfully argues that the statute was not aimed at the type of harm the plaintiff suffered, or at protecting persons in the plaintiff's situation, violation of the statute will not be given per se effect. That does not mean that the plaintiff must lose the case. All it means is that she cannot prove the second element of her claim — breach of the standard of care — by proving a violation of the statute. Instead, she must shoulder the usual burden to show negligence under the reasonable person standard discussed in the previous chapter.

THE PERSUASIVE FORCE OF THE NEGLIGENCE PER SE ARGUMENT

It is easy to see why the negligence per se argument is attractive to lawyers. If Hellman can prove that Bourjailly was negligent just by showing that he violated the school bus statute, it substantially eases her burden of proof. It is a lot easier to prove that he didn't stop for the bus than to prove that his conduct was careless under the vague ordinary-prudence-under-the-circumstances standard. In addition, proving that Bourjailly violated the statute brands him as a "lawbreaker" in the eyes of the jury, which can't do his case a lot of good. Thus, using the violation to establish negligence has great tactical value for Hellman. Similarly, if the contractor in the second example can prove that Updike was negligent simply by showing that he wasn't wearing a helmet, its defense looks a good deal stronger than it would under a general negligence standard.

The use of statutory standards to prove negligence also reduces the likelihood that the jury will decide the case on grounds unrelated to the merits. A jury sympathetic to the injured Updike in the helmet case might be tempted to ignore his negligence and find for him anyway. It will be harder for them to do that if they are instructed that they *must* find him negligent if they find that he did not wear a helmet. Indeed, if it were undisputed that Updike had no helmet on, the court might take the negligence issue from the jury entirely, on the ground that the undisputed and unexcused violation of the statute establishes his negligence as a matter of law.[5]

All this appears complex, but is pretty much a matter of common sense in actual operation. Perhaps the following examples will help.

Examples

Some Relevant Questions

1. A good place to start in any negligence per se situation is to ask whether the statute was intended to protect the plaintiff from the type of harm which she actually suffered. In which of the following cases do you think the court would find the statutory standard relevant to the plaintiff's claim?
    a. Porter, the town dog officer, quarantines a dog who had bitten a child. The officer allows the owner to take the dog after a week, in violation of a quarantine statute that requires him to hold the dog for

14 days. The next day, the dog runs in front of Jones's car. Jones swerves to avoid the dog and is injured.

b. Oliver, a seven-year-old child, finds an abandoned refrigerator in a vacant lot, crawls in to hide, and suffocates. In an action for his death, the estate tries to prove the owner's negligence by showing violation of the statute quoted on p. 146, requiring removal of doors from appliances left in places accessible to children.

c. Welty hits Capote broadside when she is driving down Main Street and fails to see Capote pulling out into the street at an intersection. Capote alleges that Welty was negligent because she violated the statute quoted on p. 146, requiring a working muffler on all motor vehicles.

d. O'Neill leaves his dirt bike on the front porch of a general store while he goes in to buy some candy. When he comes out, he mounts the bike, rides off the end of the porch, and is seriously injured. He sues the store owner, claiming that she was negligent for violating a building code provision that requires "a wall or protective railing at least 36 inches high enclosing every porch more than 30 inches above the ground."

e. Welty is driving east on Main Street when a school bus coming in the other direction stops. Since she can see that the only child around is already stepping into the bus, Welty drives on. As she passes the bus, she hits Capote's car coming out of a side street. Capote claims that Welty's negligence is established by her violation of the statute quoted on p. 146, requiring traffic to stop when school buses do. How should the court rule?

f. Austin, riding her bicycle down the street, approaches a truck parked in a loading zone. To clear the truck, she steers further into the street, and is hit by a passing motorist. She alleges that Porter, the owner of the truck, was negligent for violating a statute that limits parking in the loading zone to one-half hour during morning hours. Porter's truck had been there for nearly two hours.

2. After reading about the various ways in which the defendant may excuse a statutory violation, it may seem that the negligence per se doctrine is a toothless tiger. The plaintiff can use it to suggest negligence, but the

defendant can rebut it, so it all comes down to general reasonableness anyway. Here are a few cases that illustrate that the doctrine can make a big difference in a negligence case. In each case, ask yourself why the per se negligence doctrine will make an important difference in the outcome.

a. Salinger is driving east on a rural West Dakota highway when Ginsberg comes toward him from around a curve, driving astride the center line of the road. Their cars collide and Ginsberg is killed. Salinger sues Ginsberg's estate for negligence. To prove that Ginsberg failed to exercise due care, he testifies that Ginsberg violated a statute that requires vehicles to keep to the right of the center line.

b. Salinger is injured when Ginsberg's car turns in front of him while he is driving down Maple Street. He seeks to establish Ginsberg's negligence by proving that Ginsberg failed to signal his turn, as required by the statute quoted on p. 146. Ginsberg claims that he did signal before turning.

c. Perelman hits Woolf, a construction worker, while backing up a large bulldozer. Perelman was watching carefully, but (as he knew) the beeper on the bulldozer was broken, and had been for five days. The statute on p. 146, requiring a beeper on heavy construction equipment, applies.

3. Williams, a painter, is painting the exterior wall on a new five-story building. Although a statute requires that hardhats be worn on all active construction sites, Williams was not wearing one. He is injured when a two-by-four falls on him from a higher floor. Williams claims that he lacked knowledge of the need to comply with the statute, since he was unaware of the statute. Will this excuse the violation?

Statutory Enlightenment

4. Cheever owns a three-unit apartment building in Oakley, West Dakota. He fails to replace a burnt-out lightbulb in the upstairs hall. O'Connor, a tenant, is unable to see the steps, trips, and falls down the stairs. She sues him for negligence, and offers to prove his negligence by showing

that he violated West Dakota Stat. Ann. Title XVI §31, which requires landlords to maintain adequate lighting in all common areas of their buildings.

a. Does the statute establish a standard of care relevant to the case?

b. Assume that Cheever defends by offering evidence that the light was not out; thus, he does not offer any reason for failing to replace the bulb. Assuming that West Dakota applies the negligence per se doctrine, should the judge direct a verdict for O'Connor on the negligence issue?

c. Assume again that Cheever claims the light was on, and that West Dakota applies the negligence per se doctrine. How should the judge instruct the jury on the negligence issue?

d. If there were no statute establishing a relevant standard of care in this case, how would the judge instruct the jury on the negligence issue?

e. Assume now that West Dakota takes the position that violation of a relevant statute is admissible evidence of negligence rather than negligence per se. If O'Connor claims that Cheever violated the statute, how should the judge instruct the jury on the issue?

5. Assume again that O'Connor relies on the violation of the lighting statute to prove Cheever's negligence. Cheever testifies that he was aware of the burnt-out bulb, but had asked Porter, another tenant, to replace it, and Porter had told him that he would do it right away.

   a. Assume that West Dakota applies the negligence per se with excuse approach, but that it only recognizes the five excuses listed in the Restatement (Third) of Torts §15 (see p. 147). How will the negligence issue be resolved?

   b. Assume that West Dakota applied the "presumption of negligence" approach. How would the negligence issue be resolved?

6. Assume that Cheever's building is in a high crime area. Calisher, accosted on the street by a robber, runs into his building to escape. Because the light is out, she stumbles over a child's tricycle and is injured. In a negligence action, can she rely on his violation of the lighting statute to establish negligence?

Judge Fudd Rules Again

7. Calisher runs a small, low-budget theater in the round. Wharton, a patron, is injured when her seat collapses during a performance, evidently because a bolt sheared off underneath it. In her negligence action against Calisher, Wharton introduces evidence that Calisher had violated West Dakota Ann. Laws Title LXI §21A, which requires that theater owners have their premises inspected and certified annually by the city building inspector.

   a. Assume that West Dakota follows the evidence of negligence approach. Judge Fudd instructs the jury, in part, as follows:

      > If you find that West Dakota Ann. Laws Title LXI §21A is intended to protect a class of persons including the plaintiff from the danger of injuries such as that suffered by her, and that the defendant violated that statute, then you are instructed that the violation is evidence, along with all the other evidence in the case, that you may consider in determining whether the defendant was negligent.

   Can you spot a fundamental flaw in Judge Fudd's instruction?

   b. Assuming that the statute establishes a relevant standard of care, what other basic problem do you see in Wharton's case?

Negligence Per Se, or Negligence Per Cent?

8. One more variation on Cheever's lightbulb woes. Let's assume that the case takes place in a comparative negligence jurisdiction. Under comparative negligence, the jury not only decides whether the parties were negligent, they also assign percentages of negligence to all parties who caused the accident. The plaintiff's damages are then reduced to account for her negligence. For example, if the jury found the defendant 60 percent negligent and the plaintiff 40 percent negligent, the plaintiff would recover 60 percent of her damages. (For a detailed treatment of comparative negligence, see Chapter 25.)

   Assume that O'Connor sues Cheever in a state that applies comparative negligence, and that Cheever has no excuse for violating the lighting statute. What would be the effect of the negligence per se doctrine in the case?

The Goose and the Gander

9. A West Dakota statute requires a fence at least four feet high around private pools. Beverly has such a pool, with a four-foot fence. Alice, a child of seven, climbs over the fence, jumps into the pool, and drowns. Alice's parents sue Beverly for negligence in failing to prevent children from entering the pool area.
   a. What will Beverly argue in her defense?
   b. How should the court rule on the defense?

Explanations

Some Relevant Questions

1. a. Clearly, this statute is aimed at protecting people from being bitten by diseased dogs, not at preventing dogs from running into the street, which could happen no matter when the dog is released. Since the statute is not meant to protect against the *type of harm* suffered by Jones, the court will not allow her to prove Porter's negligence by showing this violation.

   b. This statute was clearly aimed at exactly the risk that caused the harm here: A child getting caught in the appliance when the door closes on her. In the absence of an excuse, the violation of this statute would establish negligence in a per se or a presumption jurisdiction.

   c. In order to invoke the muffler statute to prove Welty's negligence, Capote will have to demonstrate that it was aimed, at least in part, at preventing the type of accident that took place here. At first glance, the statute appears aimed at preventing excessive noise that disturbs the public peace. But it is entirely plausible that it was also aimed at ensuring that drivers could *listen* for traffic hazards as well as see them. A statute may be aimed at preventing a variety of evils. So long as one purpose of the statute is to avert the type of injury suffered by the plaintiff, the violation should be considered relevant to the negligence issue.

      Often there is little legislative history to assist in determining what risks the legislature was trying to prevent by the passage of a

statute. The court must infer the statute's purposes primarily from the provisions of the statute itself. Thus, courts exercise a good deal of judgment in determining whom the statute was meant to protect, and from what hazards.

Of course, Welty's violation of the muffler statute would only establish liability if it *caused* the accident. Her noisy muffler would be irrelevant unless her inability to hear contributed to the accident. The evidence might show, however, that Capote had blown his horn to warn Welty, but that she was unable to hear due to the muffler noise. If so, Welty's violation of the muffler statute would be a cause of the accident.

d. This example is based on *Matteo v. Livingstone,* 40 Mass. App. Ct. 658 (1996). In *Matteo,* the court held that when building code provisions "prescribe protective walls or rails, the consequence they are designed to prevent is that a person will fall off accidentally. Such regulations do not have as their object preventing bicycle acrobatics." 40 Mass. App. Ct. at 661. The court upheld the trial judge's refusal to allow the statute to be admitted in evidence to establish the store owner's negligence.

The regulation at issue in *Matteo* was not a statute, but a regulation promulgated by a state agency. The Third Restatement takes the position that negligence per se applies to "regulations adopted by state administrative bodies, ordinances adopted by local councils, and federal statutes as well as regulations promulgated by federal agencies." Third Restatement of Torts: Liability for Physical and Emotional Harm §14 cmt. a. However, this regulation was clearly not aimed at the type of harm the plaintiff suffered anyway.

e. This statute was obviously aimed at protecting school children from injury, not other drivers. On that rationale, the Supreme Court of Rhode Island held on similar facts that violation of the statute could not be used to establish negligence. *Paquin v. Tillinghast,* 517 A.2d 246 (R.I. 1986).

However, the fact that the violation of the statute would not establish Welty's negligence does not mean that it is irrelevant in this case. It may be, for example, that Capote pulled out because he expected Welty to stop for the bus, as the statute required her to do. If so, Capote could prove those facts in order to show that Welty was

negligent for failing to do what the reasonable person would do under the circumstances. But this is quite different from equating negligence with violation of the statute, as the per se approach does. Rather, the statute would be introduced here to prove that, in light of the normal expectations of drivers, Welty was negligent under the usual reasonable person standard.

f. This statute is aimed at ensuring access to adequate parking for deliveries, not at preventing the type of accident Austin has suffered here. Austin does not claim the truck was too far out into the street, but only that it was *there*. She could just as well have suffered the same accident if the truck had only been there for ten minutes. Indeed, if Porter had left on time, another truck would likely have been there anyway. This statute is irrelevant to the case; Porter's violation of it should not be considered by the jury on the negligence question. See *Capolungo v. Bondi,* 224 Cal. Rptr. 326 (Cal. App. 1986) (rejecting negligence per se on similar facts).

2. a. Under either the per se or presumption approaches, Salinger's evidence of the violation will, if the jury believes it, establish Ginsberg's negligence, unless evidence of an adequate excuse is offered. Here, Ginsberg is not around to offer exculpatory evidence. He may have had a good reason for the violation, but if the proof is not offered, the presumption governs. The doctrine is very powerful in cases like this, where the violator is unable to offer the countervailing evidence that would rebut the presumption.

b. Here, instead of trying to prove a good reason for violating the statute, the defendant claims that he did not violate it. It is a little hard for the defendant to play both sides of the street (no pun intended) in these cases. Usually, she will have to either try to explain a violation or deny that it took place. If she stakes her case on the factual contention that she did not violate the statute, and the jury finds that she did, that finding will determine the negligence issue: Under either the negligence per se or presumption approach, the violation establishes negligence, in the absence of any evidence of an acceptable excuse.

c. Here, the defendant violated the statute, which was clearly intended

to prevent the type of accident which took place, and just has no acceptable excuse. In a per se or presumption jurisdiction, the evidence that the beeper was not working will establish Perelman's negligence. The fact that he looked carefully will not avert a required finding of negligence, because the jury is not free to make a general finding on the negligence issue: If it finds that the statute was violated, and Perelman has no excuse, it must find that he breached the duty of due care.

This will doubtless be the situation in many negligence per se cases: The defendant simply has no excuse for the violation of the statute. In such cases, the statutory negligence doctrine provides a powerful weapon for the plaintiff, since it establishes the most ambiguous element which she must prove to recover: breach of the duty of due care.

3. No way. We are all held to know the law. It is one thing to be unaware of *facts* that give rise to a violation; it is quite another to be unaware of relevant statutes themselves. If a driver's taillight suddenly goes out while she is driving, she would have an excuse for violating a statute requiring working taillights. However, if she knew her light was out but was unaware that a statute required working taillights, she would have no excuse. The Third Restatement recognizes an excuse if the actor "neither knows nor should know of the factual circumstances that render the statute applicable" (Third Restatement of Torts: Liability for Physical and Emotional Harm §15(c)) but not if an actor simply isn't aware of applicable statutory requirements. The judge would not even allow Williams to offer this evidence, since the excuse is insufficient as a matter of law.

Statutory Enlightenment

4. a. The lighting requirement in the statute is clearly aimed at protecting tenants like O'Connor from the type of harm that she has suffered — injury while trying to negotiate the stairs in the dark. Thus, it establishes a standard of care relevant to the case, and it is appropriate to consider that standard in resolving the negligence issue.

b. The judge should not direct the verdict, even if the negligence per se doctrine applies. The violation of the lighting statute only establishes Cheever's negligence if the light *was* out. Whether it was out is a factual issue the jury must decide. Thus, the jury still has an important role to play, even in a negligence per se jurisdiction. But their task will be much more circumscribed than it would be under a general reasonable care standard, since they need only decide whether Cheever violated the statute. If he did, and offers no excuse, his negligence is established under the negligence per se doctrine.

c. The judge should instruct the jury along the following lines:

> Under West Dakota law, the violation of a statute intended to protect against the type of harm suffered by the plaintiff establishes negligence. If you find in this case that the defendant violated West Dakota Ann. Laws Title XVI §31, by failing to provide adequate lighting in the hallway of the building, then you must find that the defendant was negligent.

Note that the judge would not instruct the jury on the effect of an excuse for the violation, since Cheever has not offered such evidence. He has staked his case on the position that he did not violate the statute.

d. If there were no statute relevant to the case, the judge would instruct the jury to consider whether Cheever was negligent under the usual reasonable person standard:

> Negligence is the failure to use that degree of care that an ordinary prudent person would use under the circumstances. If you find that the defendant exercised the degree of care that an ordinary prudent landlord would exercise in maintaining the common areas of the building, then you should find that he was not negligent. If you find that the defendant failed to exercise the degree of care that an ordinary prudent landlord would exercise in maintaining the common areas of the building, you should find that he was negligent.

It is not hard to see why O'Connor would prefer to see the jury given the instruction in Example 4c. That instruction narrows the issue from the general "throw-it-to-the-jury" due care standard to a very specific fact question, and requires the jury, if it finds the light was out, to find for O'Connor on the critical issue of negligence (assuming no evidence of excuse is offered). Thus, the adoption of the statutory standard of care substantially eases her burden of proof. It also brands Cheever as a "wrongdoer," which may color the way

the jury looks at other issues in the case.

e. The judge should give the jury a general negligence instruction, such as the instruction in Example 4d. She should then add a further instruction along these lines:

> If you find that the defendant violated West Dakota Ann. Laws Tit. XVI §31, requiring adequate lighting in the common areas of apartment buildings, you may consider that violation together with all the other evidence in the case in determining whether the defendant failed to exercise reasonable care under the circumstances.

This instruction would leave it to the jury to consider the statutory duty along with all the evidence in deciding whether Cheever was negligent. The jury could conclude, under the ordinary reasonable person standard, that he was negligent. On the other hand, the jury would also be free to conclude that he wasn't, even if it finds that the light was out. This more flexible rule gives a good deal more latitude to Cheever to persuade the jury that he acted reasonably under all the circumstances, even if he violated the statute.

5. a. Most of the excuses listed in §15 of the Third Restatement would not apply. Cheever is not a minor or incapacitated, he was aware of the facts that violated the statute, there is no evidence that the statute was confusing or ambiguous, and there is no reason why complying — by replacing the lightbulb — would pose a greater risk of harm than noncompliance. Cheever would presumably rely on §15(c), arguing that he had "exercise[d] reasonable care in attempting to comply with the statute" by asking Porter to replace the bulb. Alternatively, he might argue that the list of excuses in §15 is not exclusive, so that his "thetenant-agreed-to-do-it" excuse should still be considered by the jury. Based on one argument or the other, presumably the jury would be allowed to consider whether Cheever's reliance on his tenant was an adequate excuse for the violation. Thus, the jury would have to decide, in light of the violation and Cheever's excuse, whether he exercised reasonable care.

b. In a presumption state, proof of the violation establishes negligence, unless the violator offers evidence of an excuse. Here, Cheever has offered evidence of an excuse. Unless the offered excuse were

patently insufficient, it would be for the jury to evaluate the adequacy of that excuse. Thus, as under the Restatement, the case would go to the jury.

6. To be relevant, a statute must not only protect against the harm suffered by the plaintiff, but must also be intended to protect a class of persons to which the plaintiff belongs. Certainly, the lighting statute was meant to prevent stumbling over obstacles in the dark, but it is questionable whether it was meant to protect *Calisher* from such risks. It was doubtless aimed at protecting tenants, and probably guests as well . . . maybe even meter readers. But it hardly seems that it was meant to protect passersby who enter unexpectedly to avoid a robbery. Thus, Calisher probably cannot use the statute to show a standard of care relevant *to her*.

Judge Fudd Rules Again

7. a. The problem here is that the jury is not the proper body to decide whether the standard of care established in the statute is relevant — Judge Fudd is. The jury is there to try the case, not the statute. Whether the statute was enacted to prevent a certain type of harm poses a question of law for the judge, not an issue of fact to be decided by the jury. When Wharton offers evidence of the violation at trial, the judge will have to decide whether the statute was meant to protect parties in the plaintiff's position from the type of harm suffered. If the judge concludes that the statute establishes a standard that is relevant to the case, evidence that it was violated will be admitted; otherwise, the jury will hear nothing about it.

   b. Wharton may be able to convince the jury that the inspection statute was meant to prevent injuries by identifying safety problems on the premises. But she will still have a hard time establishing that the violation of the inspection statute *caused* her injury. It is extremely unlikely that an inspection would have revealed that a bolt underneath the chair was about to shear off. Presumably, most of the bolt is not even visible, and it may be impossible to spot this type of metal fatigue from a visual inspection anyway. It is doubtful that the inspector would get down and look underneath the chairs; probably

she would check for major risks such as blocked aisles, inadequate emergency lighting, or broken sprinklers. Thus, Calisher will argue that, even if the required inspection had been done, the bolt problem would not have been detected. If this is so, the violation is not an actual cause of Wharton's injury.

That does not mean that Wharton must lose: It simply means that she must fall back on the general negligence standard to establish Calisher's negligence. Perhaps Calisher continued to use the seats beyond their useful life or after other similar accidents. Perhaps she was notified of this type of risk by the manufacturer, but failed to repair the seats. Maybe she replaced the bolt herself with one too small for the task. Any of these might show that Calisher was negligent under the usual reasonable person standard.

Negligence Per Se, or Negligence Per Cent?

8. At common law, negligence was an all-or nothing decision. If the plaintiff was negligent, for example, she lost, under the doctrine of contributory negligence. If the defendant was negligent, she was fully liable for the damages, unless the plaintiff was negligent as well. Thus, the negligence per se doctrine had particular force, because in many cases it required the jury to find a party negligent.

Under comparative negligence, however, a finding that one or both of the parties was negligent has a less profound impact on the outcome. For example, even if the jury is instructed, under the negligence per se doctrine, that they must find Cheever negligent for failing to replace the lightbulb, *the percentage of negligence* they attribute to him based on the violation is still up to them. If they don't think he was particularly faulty, they might ascribe 3 percent to him and 97 percent to O'Connor, which is pretty close to letting Cheever off the hook entirely.

However, the negligence per se doctrine still has a powerful impact in cases where the jury ascribes *no negligence* to the plaintiff. If Cheever violated the lighting statute, the jury would have to find him negligent under the per se doctrine. If O'Connor was not negligent at all, the jury must then ascribe 100 percent of the fault to Cheever, even if they don't think he was "very negligent" for violating the statute. Thus, the doctrine still forces the jury in these cases to find the defendant fully

liable for the plaintiff's injury.

In addition, the doctrine still has important persuasive force in comparative negligence cases, since it may lead the jury to ascribe a large percentage of fault to a party who has failed to follow an established statutory standard.

The Goose and the Gander

9. a. Beverly will argue that "what is sauce for the goose is sauce for the gander": If failure to comply with a statute constitutes negligence, *compliance* with a statute ought to constitute due care. Here, the statute required a four-foot fence. That, Beverly will argue, is the measure of due care, and she should be found "careful per se" for providing the security required by the statute.

   b. The argument has an immediate appeal but has generally been rejected. Standards of care imposed by the legislature are often minimum standards, intended to avoid the most dangerous practices but not to immunize persons who do the minimum from liability where more precaution is appropriate. It may be that it is unreasonable to ignore the minimum standards set by the legislature, but it does not follow that the reasonable person takes *only* those minimum precautions. See Restatement (Third) of Torts: Liability for Physical and Emotional Harm §16 (compliance with statute "does not preclude a finding that the actor is negligent . . . for failing to adopt precautions in addition to those mandated by the statute"). For example, a four-foot fence around a pool may suffice in some areas, but in others where many children live a reasonable person might conclude that a four-foot fence is insufficient to prevent them from entering.

   Speed limits provide another good example of this point. In setting a limit, the legislature may have concluded that it is dangerous to exceed a particular speed, but that does not imply that it is always reasonable to travel at that speed. In fog, snow, or heavy traffic, a slower speed may be called for and a rule that compliance with the posted limit absolves the defendant would be inappropriate.

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1. However, even *Martin,* despite its strong language, intimated that the violation in that case

established negligence per se because it was "wholly unexcused." 126 N.E. at 815.

2. A few cases appear to shift the burden of proof to the defendant to prove due care, once a violation of statute has been shown. See, e.g., *Resser v. Boise-Cascnde Corp.*, 587 P.2d 80, 84 (Or. 1978) (once violation is shown, burden shifts to violator to prove that he nevertheless acted reasonably). It is not always clear, however, whether these courts mean that the burden to produce evidence of excuse shifts to the defendant, or the actual burden of proof.

3. This chapter consistently speaks of the plaintiff invoking negligence per se. Clearly, however, defendants may invoke the doctrine as well to prove that the plaintiff was negligent.

4. It is sometimes said in the cases that violation of a relevant statute establishes "*prima facie* evidence of negligence." This sounds very much like the "evidence of negligence" approach, but most courts that use this phrase actually appear to apply the presumption of negligence approach. See, e.g., *Zeni*, 243 N.W.2d at 276, 283, in which the court appears to use the presumption and prima facie evidence language interchangeably.

5. Even if instructed that the violation constitutes negligence, the jury in a comparative negligence jurisdiction would still have to determine Updike's percentage of negligence.

CHAPTER 9

A Phrase in Latin: Res Ipsa Loquitur

INTRODUCTION

The last chapter considered the use of statutory standards of care to prove that the defendant breached the duty of due care or "was negligent." This chapter considers another means of proving negligence, through the mystic doctrine of res ipsa loquitur.

Sometimes proving negligence is straightforward. Suppose that Cisneros goes to the neighborhood garage to have the wheels of his Maserati balanced. After driving away, the right front wheel falls off. Cisneros gets out and looks around, but is only able to find three of the lug nuts that hold the wheel on. He returns to the station, where another customer tells him that he saw the mechanic leave the other lug nuts off. Negligence? No problem: What happened is clear from direct evidence, the testimony of the other customer, and a jury would almost certainly conclude that the mechanic was negligent in failing to replace all the lug nuts.

Would that all negligence cases were so easy. If they were, few negligence cases would be tried, because cases in which liability is clear almost always settle before trial. The cases that reach the trial stage are likely to present substantial disputes of fact, in which proof of essential elements — particularly negligence — is more problematic.

THE DIFFERENCE BETWEEN DIRECT AND CIRCUMSTANTIAL EVIDENCE

In the Maserati example, Cisneros produces compelling evidence of the mechanic's negligence, direct testimony from a witness who observed the negligent act. However, negligence need not always be proved by direct evidence. In many cases, plaintiffs will have to rely on "circumstantial" evidence, that is, evidence of facts from which a jury could *infer* that the defendant was negligent. Cisneros might, for example, return to the garage and find two Maserati lug nuts sitting next to the wheel balancing apparatus. This might suffice to allow a jury to infer negligence on the part of the mechanic. The argument runs like this: If the wheel fell off shortly after Cisneros drove away, and if two Maserati lug nuts were sitting at the garage, and if Cisneros could only find three at the scene, it is likely that the mechanic only refastened three. Common experience tells us that leaving some of the lug nuts off creates an unreasonable risk that the wheel will come loose. Therefore, it appears probable that the mechanic was negligent in failing to secure the wheel.

Cisneros might have to rely on even less compelling circumstantial evidence to establish negligence. He might only be able to prove that the wheel fell off shortly after he left the garage, and that he was unable to locate all the lug nuts at the scene of the accident. This does not directly show that the mechanic failed to refasten them, but it again suggests (though less forcefully than the last scenario) that the likely explanation of the accident is the failure to refasten all the lug nuts. A jury could still reasonably infer from the facts Cisneros *has* proved that the accident more probably than not happened because the lug nuts were not refastened or were improperly fastened. Thus, proof of the circumstances allows an inference of further facts which would establish the mechanic's negligence.

Circumstantial evidence is commonly used in proving all sorts of tort cases. The plaintiff offers evidence of a pile of freshly cut maple logs in the defendant's backyard to establish that the defendant cut down his maple trees. Scratches or paint scrapings on the defendant's fender are offered to establish that it was his car that hit the plaintiff's. Evidence of large, unexplained deposits in defendant's bank account is offered to establish that he converted the plaintiff's funds. In each case, evidence of one fact is

offered because it tends to establish another.

The “banana peel cases” offer a classic example of the use of circumstantial evidence to establish negligence. The plaintiff slips on a banana peel on the supermarket floor, and sues for his injuries. To establish negligence, he must show that the banana peel was there long enough that store employees should have seen and removed it. It would be ideal to introduce direct evidence, say, three customers who saw it on the floor over the course of several hours before the accident. Such direct evidence isn’t likely to be available, however. If three customers had seen it, one would likely have told someone about it, or picked it up. (Similarly, in the Maserati case, if another customer had seen the lug nuts left off, he would likely have said something to the mechanic and averted the accident.)

Absent such direct evidence, banana peel plaintiffs usually offer circumstantial evidence to prove that the banana peel was on the floor long enough that store employees should have seen and removed it. The plaintiff will testify that the banana peel was black, or gritty, or trampled flat. From such facts, a jury could reason as follows: Most people don’t hold onto old banana peels; they throw them away immediately after eating the banana. Therefore, if a black and gritty banana peel was on the floor, it was probably on the floor long enough to *turn* black and gritty. Common experience suggests that this takes an hour or so, and that’s long enough that an employee should have found it and picked it up. Similarly, if the banana peel had been trampled, the jury could infer that it had been stepped on repeatedly over a period of time. Such evidence does not exactly provide an airtight case, but it will often be the best that the plaintiff can do, and may well convince a jury that it is “more probable than not” that the defendant was negligent.

FROM CIRCUMSTANTIAL EVIDENCE TO RES IPSA LOQUITUR

If circumstantial evidence is one step away from direct testimony, the classic doctrine of res ipsa loquitur is a further step beyond the traditional use of circumstantial evidence. The doctrine originated in the famous case of *Byrne*

v. Boadle, 159 Eng. Rep. 299 (1863), in which the unfortunate plaintiff was hit on the head by a flour barrel which fell from the defendant's second-story window. While there was no evidence of what caused the flour barrel to fall on Byrne's boodle, the court allowed him to recover. "Res ipsa loquitur," the court opined, "the thing speaks for itself."

Dean Prosser offers the following whimsical response to this tautological logic: *"res ipsa loquitur, sed quid in infernos dicet?"* ("The thing speaks for itself, but what the hell did it say?") Schwartz, Kelly & Partlett, *Torts: Cases and Meterials*, at 252 (13th ed. 2015). Well, the *Byrne* judges took it to say that flour barrels don't just fall out of windows on their own; that when they do fall, the most likely reason is the negligence of the person in control of the premises. Thus, even though the plaintiff cannot offer direct or circumstantial evidence of exactly what caused the barrel to fall, he should be allowed to reach the jury on the issue of negligence by proving the circumstances of the accident itself, because they "bespeak negligence" even without a more specific showing of the chain of events.

There is nothing particularly mystical or sophisticated about this idea. As Lord Shaw quipped: "If that phrase had not been in Latin, no one would have called it a principle." *Ballard v. North British Ry. Co.*, 1923 Sess. Cas. 43 (1923). Res ipsa is not really a separate principle, but rather a special form of circumstantial evidence. The underlying rationale of res ipsa loquitur, as of circumstantial evidence in general, is that facts can sometimes be inferred from other facts. In a case like Cisneros's tire problem, the circumstantial evidence allows the jury to infer *a particular negligent act*, failure to replace the lug nuts. In res ipsa loquitur cases, the circumstantial evidence allows the jury, based on evidence about the accident itself, to infer that it must have resulted from *some negligent act* by the defendant. In *Byrne v. Boadle*, for example, the circumstantial evidence that the barrel had fallen from the defendant's second-story window sufficed to allow a jury to conclude that some negligent act by the defendant had probably caused it to fall.

Here are some other examples of cases in which the plaintiff might use res ipsa loquitur to establish negligence.

- A railway company hires a contractor to install a temporary boarding platform for trains, and it collapses under Feinstein shortly after it is put into use. Even if the collapse makes it impossible to produce evidence of the exact cause, a jury might well infer that negligent

construction caused the collapse.

- A brick falls from a roof where a chimney is being repaired and hits the plaintiff. Here again, the plaintiff may not be able to demonstrate what caused the brick to fall; indeed, the workers may not be able to either. Again, however, a jury might fairly infer that the brick probably fell due to some negligent act by the workers.
- An elevator stops abruptly between floors, throwing the plaintiff to the floor.

In each of these cases, there is no showing of exactly how the accident happened, but the fact that it happened at all suggests that someone was probably negligent.

A CRITIQUE AND A DEFENSE

We saw in Chapter 7 that the plaintiff must prove all the elements of a negligence claim in order to hold the defendant liable. Arguably, courts that apply res ipsa loquitur play fast and loose with the negligence element of the claim, since they allow the jury to find for the plaintiff without proving any specific negligent act. In the platform case, for example, if the plaintiff merely offers evidence that the platform fell shortly after it was constructed, he has not "proved" any particular negligent act by the contractor. Similarly, in the brick case, evidence that the brick fell while the defendant's employees were working on the roof does not prove what negligent act (if any) caused it to fall. The jury cannot determine exactly what caused the brick to fall on the basis of such general evidence. How then, are they to know that there was negligence involved at all?

Well, they don't *know* that negligence was involved, of course. On the other hand, they don't *know* what caused the accident in the Maserati example, either; they simply make a reasonable estimate of the probabilities based on what they do know. Similarly, in res ipsa loquitur cases, the jury may not be able to reconstruct the sequence of events, but they may be able to make an educated inference that, whatever it was, it probably involved the defendant's failure to exercise due care in some respect. The inference may not be infallible, it may not be satisfying to the ruthlessly syllogistic mind,

but it is accepted by the legal system as sufficient to satisfy the "more probable than not" standard of proof in negligence cases. Courts, as practical institutions, must face the fact that irrefutable proof is seldom available in practical affairs, that the system is imperfect by its nature and must settle for a reasonable balance of the probabilities. "Res ipsa by its nature deals with mysteries and the efforts of imperfect legal processes to unravel them." M. Shapo, Principles of Tort Law 255.

Consider the alternative. The judicial system could send Byrne away empty handed, explaining the result to him thus:

> Sorry, Byrne, about your busted boodle. But we aren't willing to make Boadle pay you unless you show that he did something wrong. You haven't met your burden of proof, because you haven't shown us what specific act Boadle did that was negligent. Unless you produce such evidence, you are not entitled to recover.

This reasoning sounds pretty good, but it doesn't comport with most people's sense of elementary fairness. Most people *would* make the inference that Boadle or his employees must have done something negligent for that barrel to get loose, even if we don't know exactly what it was. Similarly, most people would infer that the platform collapse was caused by faulty construction, or that the brick fell because of negligence. The res ipsa loquitur doctrine allows juries to make the same inference of negligence that most of us would make from our common experience.

THE "FOUNDATION FACTS" IN A RES IPSA CASE

Not every plaintiff can get to the jury by intoning the magic Latin, however. For the res ipsa doctrine to apply, the circumstances must support an inference of negligence:

> There must be reasonable evidence of negligence. But where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care.

Scott v. London & St. Katherine Docks Co., 159 Eng. Rep. 665, 667 (1865). This early statement of the doctrine remains essentially intact. Most courts

hold that the plaintiff can make a case for the jury under res ipsa loquitur by showing *first* that he was injured by an accident that would not ordinarily happen without negligence and *second* that the negligence is more likely than not attributable to the defendant, rather than to the plaintiff or a third party.

A. The Requirement That the Accident Ordinarily Would Not Happen Without Negligence

The first "foundation fact" is that the accident is of a type that ordinarily does not happen without negligence. Many accidents would not support an inference that negligence was involved. It is doubtful that a court would allow the jury to infer negligence from the fact that the plaintiff trips going down the defendant's stairs, or that the defendant's car skids into plaintiff on a rainy day. There are common explanations for such occurrences which do not involve negligence. But many other accidents, by their very nature, do support an inference of negligence. For example, most courts would conclude that the following accidents probably would not have occurred without negligence:

- a newborn baby is matched to the wrong mother in the maternity ward
- an airplane disappears without a trace in good weather
- a chunk of glass or a tack is found in a can of spinach
- oil spills from a tank truck on the highway

In each of these cases, common knowledge suggests that this is probably not an "accident" in the pure sense of the word; that someone's careless conduct is the likely explanation. That is not to say that negligence is the *only conceivable* explanation for the accident. It is always possible to hypothesize other causes — for example, terrorism in the airplane case, or an undiscoverable defect in the tank truck case. But the plaintiff's burden of proof in a negligence case is not to eliminate all possible alternative causes of his injury. His burden is to show that the *more probable* cause was negligence. In the example cases just given, a jury might reasonably conclude that it was.

B. The Requirement That the Negligence, If Any, Is

Attributable to the Defendant

The second “foundation fact” in a res ipsa case is that the negligence is attributable to the defendant. It is not enough to show that someone’s negligence probably caused the harm. The evidence must point to the defendant as the negligent party. Often this is obvious, as where a load of cement drops from the defendant’s crane, or a scaffold just erected by the defendant falls. In these examples, the defendant is in control of the source of the accident and responsible for its safe operation. If an accident bespeaks negligence in these cases, it very likely bespeaks the defendant’s negligence.

This attribution requirement is more difficult, however, where a product causes injury after leaving the defendant’s hands. A frequent example is the explosion of a bottle of soda or beer in the hands of a consumer. Many courts have concluded that beverages bottled under pressure should not explode unless someone was negligent in filling or handling the bottle. Thus, the probably-would-not-happen-without-negligence element is met. But in these cases the bottle may have been handled by the distributor, the retailer, and the consumer after it left the bottler’s hands. Thus, it is harder to show that the negligence, if there was any, was the bottler’s.

The cases often state that this attribution requirement is not met in a res ipsa loquitur case unless the instrumentality that caused the harm was “under the defendant’s control” at the time of the accident. This formula is clearly too narrow. For example, in the glass-in-the-spinach case, the canner was clearly not in “control” of the can when the plaintiff ate the spinach and was cut by the glass. Yet it is highly likely that the glass got in the can when the spinach was canned. Thus, a jury could reasonably infer that the negligence, if any, is attributable to the canner. Similarly, the collapsing railroad platform may not be in the “control” of the contractor who built it at the time of the collapse, but it is very likely that the negligence took place at the time of construction and is therefore attributable to the contractor. Although this “control” language is often found in the cases, most courts have not taken it so literally as to preclude use of res ipsa in such obviously appropriate cases.[1]

The formulation of the res ipsa loquitur doctrine in the Second Restatement of Torts nicely avoids the misleading “control” language:

> (1) It may be inferred that harm suffered by the plaintiff is caused by negligence of the defendant when
>
> (a) the event is of a kind which ordinarily does not occur in the absence of negligence;

> (b) other responsible causes, including the conduct of the plaintiff and third persons, are sufficiently eliminated by the evidence. . . .

Restatement (Second) of Torts §328D. Under this statement of the doctrine, the plaintiff may invoke res ipsa loquitur even if the defendant did not have exclusive control of the source of the harm, so long as the plaintiff can demonstrate that the negligence was likely that of the defendant rather than himself or other parties.[2]

THE EFFECT OF THE PLAINTIFF'S CONDUCT

Courts often state that there is a third requirement for the application of res ipsa loquitur: that "the event must not have been due to any voluntary action or contribution on the part of the plaintiff." *Reber v. United States*, 941 F.2d 975, 978 n.l (9th Cir. 1991). This is confusing, because it suggests that a plaintiff who was partially at fault in causing an accident can never prove the defendant's negligence through a res ipsa loquitur inference.

That isn't so. Often, the circumstances will support an inference that a defendant was negligent, even if the plaintiff was too. Suppose, for example, that a contractor sets up a scaffold on the outside of a building, and it starts to topple. Merlini, rushing to a meeting inside the building, sees it sway, but dashes underneath, figuring that she can get inside before the scaffold falls. She doesn't make it, and is injured. Clearly, Merlini's negligence contributed to her injury. But shouldn't res ipsa still be available to prove negligence of the contractor in causing the initial collapse? A scaffold should not collapse unless there is negligence in erecting it. And, if there was negligence, it was almost certainly the negligence of the contractor. Merlini should be able to use res ipsa to establish the contractor's negligence, whether she was negligent in rushing underneath or not. Her subsequent negligence should be accounted for under comparative negligence analysis, not by barring her from proving the other party's negligence through res ipsa loquitur.

This supposed third requirement is really only a corollary of the second: It is meant to reemphasize that the plaintiff must show that the negligence that created the initial danger (whatever it was) is attributable to the defendant rather than to her. If it is equally probable that the plaintiff's

negligence created the danger, she has not "brought the negligence home to the defendant." But when the circumstances show that the negligence that created the initial danger was probably the defendant's, res ipsa should be available, even if the plaintiff was negligent in reacting to the danger. In the scaffold case, for example, there is a strong res ipsa loquitur case that the *collapse* was caused by the defendant's negligence. Merlini should be able to invoke res ipsa on that issue, even though she was negligent in running under the scaffold.

THE EFFECT OF THE DOCTRINE AT TRIAL

Even if a case is tried, a judge has the power to refuse to submit it to the jury if there is no credible evidence in support of one or more of the elements of the plaintiff's claim. Frequently, the defendant will argue that the judge should take the case from the jury (by "directing a verdict" for the defendant[3]) since the plaintiff has not produced proof of a specific negligent act by the defendant. The crucial impact of res ipsa loquitur is that it allows the plaintiff's case to go to the jury even though he has not proved a specific act of negligence. Naturally, plaintiffs are very keen to avoid directed verdicts and reach the jury; thus, the res ipsa doctrine is very popular with the plaintiff's bar.

If the plaintiff establishes the "foundation facts" discussed in the preceding section, the judge will allow the case to go to the jury. It will then be up to them to decide whether the accident was more probably than not the result of the defendant's negligence. They are free to infer that his negligence caused the accident, but they are also free to conclude, based on the evidence presented, that the defendant's negligence is *not* the more likely explanation. The doctrine, in other words, permits the jury to infer negligence, but it does not require them to. Some cases suggest that res ipsa loquitur shifts the burden of proof to the defendant, or creates a presumption of negligence which requires a finding of negligence if not rebutted. Most courts hold, however, that the doctrine merely provides evidence sufficient to support an inference that the defendant was negligent, but does not compel a finding for the plaintiff even where there is no rebuttal evidence. See Restatement (Third) of Torts §17 cmt. j.

INSTRUCTING THE JURY ON RES IPSA LOQUITUR

Logically, it would seem unnecessary to confuse the jury by giving them specific instructions about res ipsa loquitur. It should suffice to tell them that the plaintiff must prove the defendant's negligence by the preponderance of the evidence, and that they are free to infer negligence or not, as they choose, from the evidence presented. The risk of resting on such general instructions, however, is that the jury will take a more technical view of the plaintiff's burden than the courts do, and find for the defendant simply because the plaintiff has not shown the exact cause of the accident. Thus, courts usually give specific instructions detailing the "foundation facts" for res ipsa loquitur and the effect of finding those foundation facts. Here is an example adapted (not quite *verbatim)* from a Minnesota case:

> When an accident is such that it would not ordinarily have happened unless someone was negligent, and if the thing which caused the accident is shown to have been under the exclusive control of the defendant at the time that the negligent act, if any, must have happened, then you are permitted to infer from the mere fact that the accident happened and the circumstances surrounding it that the defendant was negligent.

See *Bossons v. Hertz Corp., 176* N.W.2d 882, 886 (Minn. 1970). Note how this instruction tracks the elements of the doctrine. It tells the jury that they *may* conclude that the defendant was negligent, if they find that it was the type of accident that does not ordinarily happen without negligence, and that the thing which caused it was under the defendant's control at the time of the negligence. (This instruction, like many currently in use, does include the dubious "exclusive control" language, which has raised problems when taken too literally. However, it focuses on control at the time of the likely negligence rather than at the time of the accident.)

THE DEFENDANT'S CASE

The res ipsa doctrine may warm the hearts of plaintiff's counsel, but it places the defendant in a very difficult position. How is he to refute the plaintiff's proof of negligence, where plaintiff hasn't proved any specific negligent act?

Certainly, the most effective way to rebut a res ipsa loquitur case is to prove the actual cause of the accident. For example, proof that the station platform collapsed because the transit authority was tunneling underneath it will completely undermine (excuse the pun) the res ipsa inference.

Short of that, the defendant can attack each of the foundation facts necessary to support res ipsa loquitur. He may question the second foundation fact by showing that other persons mishandled the product that caused the injury after it left his hands (e.g., the retailer in the exploding beverage case). He may undermine the required showing that the type of accident does not ordinarily happen without negligence, by showing other common, nonnegligent causes of this type of accident. A chain is only as strong as its weakest link; if the jury is not convinced that each of the foundation facts is established, it should refuse to infer the ultimate fact of negligence. If the defendant's proof on either of these points is strong enough, the judge may even direct a verdict for him, on the ground that the jury could not reasonably conclude that the proper foundation for the res ipsa doctrine has been established.

When the defendant does *not* have evidence of the exact cause of the accident, he may try to refute the res ipsa inference by proving that he generally exercised due care. In the case of the glass in the spinach, for example, the canner might produce evidence of the careful quality control measures it takes to avoid objects getting into the cans. The airline in the lost plane example might produce evidence of its careful training, maintenance, and inspection procedures. This does not conclusively eliminate negligence as the cause, but it could influence the jury's thinking about the probabilities. On the other hand, this can backfire: The more careful the defendant's procedures, the less likely that an accident would happen if they had in fact been followed. Thus, such proof could lead the jury to conclude that, had the procedures been followed, there would not have been an accident at all. For a fine example of this, see G. Fricke, The Use of Expert Evidence in Res Ipsa Loquitur Cases, 5 Vill. L. Rev. 59, 70-72 (1959), quoting cross-examination of a defendant's expert that very effectively showed that the accident could not have happened unless the usual precautions were omitted.

The cases often suggest that the plaintiff should be able to rely on res ipsa loquitur because the defendant has better access to evidence of the cause of the accident than the plaintiff does. It is certainly true that the doctrine creates a strong incentive for the defendant to produce any evidence it has that will

rebut the inference that its negligence caused the accident. However, most courts do not restrict the doctrine to cases in which the defendant has better access to proof. See Restatement (Third) of Torts §17 cmt. i; D. Dobbs, The Law of Torts §160. Often, the defendant has no better chance of explaining the accident than the plaintiff does. In the disappearing plane case, or the glass-in-the-spinach case, for example, the airline or the canner may have no idea what caused the accident, or any way of finding out. Yet the likely explanation of the accident may still be negligence. In such cases, the defendant should not be able to avoid res ipsa simply by showing that it knows no more about the cause of the accident than the plaintiff does.

The following examples should help you to understand the types of cases in which the res ipsa doctrine applies, and how this mystic doctrine assists the plaintiff in getting to the jury in those cases.

Examples

Victims of Circumstance

1. In which of the following cases do you think the plaintiff could reach the jury by invoking res ipsa loquitur?
   a. Lindsey's front tire blows out while he is driving down Sunset Boulevard. He sues Firewall Tire, the manufacturer of the tire.
   b. LaGuardia is injured while making a delivery to Acme Manufacturing Company's warehouse. He was raising a rolling garage door upward when the door stuck in the metal track and bounced back on his head. He offers evidence of multiple hammer marks on the track and a distortion in the shape of the track to show that Acme had negligently maintained the door.
   c. Young, a three-year-old toddler, comes home from day care. Throughout the evening, he complains of a sore arm. His parents finally take him to the emergency room, where an x-ray reveals that his arm is broken. The parents sue the day care center for negligence.
   d. Younger, a five-month-old baby, comes home from day care. Throughout the evening she shows obvious discomfort on her left

side. Her parents take her to the emergency room, where x-rays reveal that her left arm is broken. The parents sue the day care center for negligence.

e. Flynn is walking past a high-rise hotel when a beer mug falls on his head from one of the balconies above. He sues the hotel for negligence.

f. While entering an interstate highway, Daley is injured when a stray Volkswagen engine suddenly appears in the roadway in front of him, causing him to crash. There is no sign of an ailing Volkswagen to be found in the area. Daley sues his insurance carrier, under a policy provision allowing recovery from the insurer for injuries negligently caused by an unidentified motorist.

g. White is injured when a large truck backs into a propane tank, causing an explosion. Lindsey, the trucker, claims that he hit the tank because Wagner, another trucker, waved him back too far. Wagner claims that the truck jumped suddenly at the last moment, presumably because Lindsey hit the accelerator instead of the brake. White sues them both, and invokes res ipsa loquitur.

Possibly Probable Negligence

2. Consider again Example 1c above, in which Young, a three-year-old toddler, came home from day care with a broken arm. Suppose that the only evidence before the court is the evidence of Young's injury. Suppose further that the judge recognizes that there is a good deal of uncertainty about the more likely cause of the accident. He believes that negligence of the day care center may have been involved, but doubts that it was the *more likely* cause. Perhaps he views negligence as a 40 percent likelihood, and an accident resulting from the toddler's general exuberance a 60 percent likelihood. Should the judge direct a verdict for the day care center, or allow the case to go to the jury?

Firming Up the Foundation

3. Alioto makes up a yummy salad for lunch. He throws in some lettuce, a tomato, a can of artichokes, some mushrooms, and some sliced turkey.

Then he pours Newton's Own Natural Russian Salad Dressing over the top. While enjoying the salad, Alioto bites into a piece of glass and breaks a tooth. He sues Newton's.

a. Which of the foundation facts poses a problem here?

b. How might Alioto strengthen the argument for applying res ipsa loquitur to the case?

4. Ulner undergoes leg surgery by Dr. Eastwood to correct an arterial problem in his thigh. After the operation, he notices that he has decreased sensation along the left side of the leg, which gets worse over the ensuing weeks. He sues Eastwood for negligence.

a. What foundation fact raises problems in applying res ipsa loquitur to this case?

b. In addition to the basic facts described above, Ulner presents a medical expert, who testifies that reduced sensation "does not ordinarily occur" as a result of the type of surgery Ulner had, if ordinary care was exercised. Should Ulner's case go to the jury on a res ipsa loquitur theory?

c. Assume that Ulner's expert testifies that nerve damage of the type he suffered would not ordinarily happen unless the surgeon was negligent. Dr. Eastwood then offers an expert who testifies that such loss of sensation may result from a number of causes, including the underlying medical problem, poor post-surgical nursing care, unavoidable surgical abrasion of the nerve, or negligence. Given the contradictory expert testimony as to the likelihood of negligence, should the judge allow the case to go to the jury on a res ipsa theory?

d. Suppose that after Ulner's expert testifies that the damage would not ordinarily occur without negligence, Dr. Eastwood takes the stand. He testifies that the surgery was unremarkable, that he followed standard procedure, and that he definitely did not touch, cut, or pinch any of the surrounding nerves. At the close of his evidence he moves for a directed verdict. How should the judge rule?

e. Assume instead that Dr. Eastwood takes the stand and testifies that during the surgery an artery in Ulner's leg began to hemorrhage, due to an unanticipated weakness in the artery wall. To prevent a life-

threatening loss of blood, Eastwood was forced to clamp off the artery, which was directly in contact with the major nerve in the left side of the leg. This procedure risks damage to the nerve, but is unavoidable when such surgical complications arise. This evidence is confirmed by the surgical notes and by the assisting physician. After offering this evidence (which is not contradicted by the plaintiff), Dr. Eastwood moves for a directed verdict. Should it be granted?

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5. Should the court apply res ipsa loquitur in the following cases?
   a. Feinstein rents a dry cleaning shop from Bradley. The shop is destroyed by fire in the middle of the night. Investigation indicates that the fire began near or along the wall between the office and the cleaning area, but there is no explanation as to the cause. Bradley sues Feinstein for negligently burning the shop.
   b. Bradley, a guest at the Fontainbleau hotel, leaves his suite for dinner. A half-hour later there is a fire in the room. The evidence indicates that the fire started in a sofa in the sitting room of the suite. The hotel sues Bradley for negligence.

6. Atkins's house is destroyed in a fire following an explosion in a closet in the cellar. He offers evidence that two weeks before the fire the gas company had installed a new gas line to his water heater, located in the closet. He argues that this evidence suffices to allow the jury to find negligence based on res ipsa loquitur.
   a. Would this evidence suffice to get to the jury on a res ipsa theory?
   b. After Atkins produces this evidence, the gas company puts on its case. Its evidence indicates that Atkins had taken the door off the closet and stored various combustible materials in the closet before the explosion, that no one had smelled gas during the two weeks before the fire, that Atkins had been working around the heater an hour before the fire, and that the wind was blowing at 80 miles an hour outside at the time of the explosion. Should the case go to the jury on a res ipsa loquitur theory?

7. Young is hit by a piece of wood that falls from the open third floor of a construction site. At the time, Koch and Alioto, two employees of the Wagner Construction Company, the framing subcontractor, were the only workers on that floor.

   a. Unable to discover exactly what caused the board to fall, Young sues Koch and Alioto. Can he invoke res ipsa?

   b. Young has an easy alternative here; what is it?

Fudd Ipsa Loquitur

8. Assume that Judge Fudd tries the case described in Example 5b, in which the hotel fire started in a couch in the defendant's room. Judge Fudd, after brushing up on his res ipsa learning, gives the following instruction to the jury:

   > If you find that the fire in this case was not likely to have happened in the absence of negligence, and that the negligence, if there was negligence, was likely that of the defendant, then these facts give rise to an inference of negligence on the part of the defendant.

   What is the problem with the Honorable Fudd's instruction?

9. Farmer Jones decides to take a break from the spring plowing. He turns off the ignition and gets off his new tractor. Suddenly, the tractor unaccountably starts up with Jones standing next to it. Jones, perhaps ill-advisedly, jumps for the driver's seat to stop it, is thrown off and injured. He sues International Tractor Company, the manufacturer, alleging negligence in causing his injuries. At trial, he proves the above facts, and argues that he should get to the jury based on res ipsa loquitur.

   The defendant asks Judge Fudd to give the following jury instruction:

   > No inference of negligence by the defendant is permitted, unless the plaintiff has shown that the injury-causing occurrence was not due to any contribution or voluntary activity on the plaintiff's part.

   Should Judge Fudd give the instruction?

Explanations

Victims of Circumstance

1. a. As the introduction states, res ipsa loquitur only applies where the nature of the accident indicates that it would not ordinarily happen without negligence. Most courts would probably hold that a tire blowout does not satisfy this requirement. Tires can blow out from a number of causes, including over- or underinflation, glass or other sharp objects in the road, excessive wear, a Chicago-sized pothole, and probably others as well. Of course, it could result from a defect in the tire, but given all the other potential causes, this accident is probably not the type that "ordinarily does not happen without negligence."

   b. This isn't really a res ipsa case. LaGuardia has simply used circumstantial evidence to show a *particular negligent act.* The hammer blows and twist in the track indicate that the track had been damaged and someone had tried to fix it. From this a jury could infer that the repair had been poorly done, and that the distortion in the track had caused the door to stick and bounce back at LaGuardia.

   In a res ipsa case, the plaintiff usually doesn't have evidence of the particular cause of the accident. Rather, he tries to show that the general circumstances of the accident suggest that it wouldn't have happened if the responsible party had been careful. The plaintiff argues, "Hey, I can't explain just what happened here, but it's reasonable to infer that the defendant must have done *something* careless, or this accident wouldn't have happened." LaGuardia doesn't have to fall back on such general proof, since he has evidence — albeit, circumstantial evidence — of the specific act of negligence that caused his injury.

   c. Surely any parent can testify to the fact that many toddlers are more enthusiastic than careful. They try new things, fall down a lot, bump into things. It seems quite credible that an active three-year-old would fall off a swing, trip, or get hit hard enough to break an arm, even if the day care personnel were exercising due care in supervising him. Thus, it is at least doubtful that a jury could infer negligence of the day care center from the mere fact of this accident. See, e. g., *Ward v. Mount Calvary Lutheran Church,* 873 P.2d 688 (Ariz. App. 1994), which refused to apply res ipsa on similar facts.

d. Although three-year-olds get around very well and consequently take some pretty hard knocks, a five-month-old can hardly navigate at all. It seems improbable that Younger could manage to break her arm all by herself; it is much more likely that someone dropped her, or left her unattended on a changing table. This case seems a much stronger candidate for application of res ipsa loquitur.

e. This accident is not likely to happen without someone's negligence. The problem is in attributing the negligence to the hotel owner. It is quite likely that a guest, rather than an employee, knocked the mug off a balcony railing. While hotels have a duty to exercise due care in controlling the conduct of guests, the hotel cannot have guards in every room to interdict every careless act of its guests. Thus, res ipsa will probably fail here because it is impossible to show that the negligence, if there was any, was attributable to the defendant.

f. This is a good res ipsa case. When an engine is found in the middle of an expressway, it probably didn't walk there. The facts strongly suggest that the engine must have fallen from a truck. Clearly, that shouldn't happen if the hauler has exercised reasonable care in securing the load.

   But what of the second foundation fact — ascribing the negligence to a particular person? Here, Daley is relieved of the problem posed by the second res ipsa requirement. Under the policy provision, the insurer is liable as long as his accident was caused by the negligence of some unidentified motorist. Here the facts provide reasonable proof of that.

g. When I gave this fact pattern on an exam, a number of students said that White should invoke res ipsa, since he is unable to tell which defendant's negligence caused the collision. However, this is not a res ipsa case. First, to invoke res ipsa the plaintiff must show that the negligence, if any, was likely that of a particular defendant. Here, there are two, and White simply isn't sure which one was at fault. Res ipsa does not allow White to simply point the finger at multiple defendants and argue, "Hey, someone did it, so I can sue them all, prove that somebody was negligent, and recover." White still bears the burden of attributing the probable negligence to a particular person.

In addition, this is not really an unexplained accident. It is clear what happened: The truck backed into the tank. The only problem is the conflict in the evidence as to which of two negligent acts caused it. That's simply a question of who is telling the truth. Suppose, in *Byrne v. Boadle*, that Boadle had testified that a delivery person for another company had been in the shop and dropped the barrel, but the delivery person testified that Boadle had dropped it. On these facts, their Lordships would not have thrown any legal Latin at the problem. They would simply have left it to the jury to decide who was telling the truth.

Possibly Probable Negligence

2. This example raises a tough but important question. Here, it is a debatable proposition whether the accident was more probably the result of negligence or pure accident. The judge puts the probabilities at 40 percent negligence/ 60 percent pure accident, but recognizes that others (in particular, the jury) might disagree. Should he let the jury decide, or direct a verdict for the defendant on the ground that one of the foundation facts (that the accident "ordinarily would not have happened without negligence") has not been established?

   Presumably, if the jury could reasonably conclude that the accident "ordinarily would not happen without negligence," they should be allowed to decide. They are the factfinders, so presumably they decide the *foundation facts* as well as the ultimate issue of negligence. If they agree with the judge that negligence is not the more probable explanation, they should find for the defendant. But if they conclude that the accident does bespeak negligence (and that the negligence is likely attributable to the defendant) they would be entitled, under res ipsa, to make an inference that the defendant was negligent.

   Put another way, the judge's role is not to make findings himself that the foundation facts are established, but rather to determine whether the jury reasonably could conclude that those facts are proved. If there is evidence from which the jury could find that the foundation facts are probably true, they must be given the opportunity to do so, and (if they do) to decide whether to make the further inference that the defendant was negligent.

Firming Up the Foundation

3. a. It seems very likely that glass would not have ended up in Alioto's salad unless someone was negligent. The problem in the case, of course, is to decide whose negligence it was. The glass could have come from the mushrooms, the lettuce, the artichokes, perhaps even the sliced turkey, as well as from the salad dressing. It may also have fallen into the salad from a shelf or the kitchen counter. Thus, the circumstances do not of themselves demonstrate that the negligence is attributable to Newton's.

   b. Alioto may be able to shore up his res ipsa foundation against Newton's by eliminating the other possible sources of the glass. He may be able to testify that he washed the lettuce, drained, washed, and cut up the artichokes, rubbed each mushroom before cutting it into the salad, and sliced the turkey on a clean cutting board. He may also be able to testify that he washed the counter before making the salad. Depending on the particulars, such testimony could lead the jury to eliminate the other items in Alioto's lunch as the source of the glass, leaving Newton's the likely culprit.

   It is quite common for plaintiffs to offer testimony to eliminate the negligence of others, including themselves, so as to satisfy the requirement that the negligence be attributable to the defendant. In an exploding bottle case, for example, the plaintiff will try to show careful handling by the retailer and himself, in order to prove that the negligence was likely that of the bottler. In a disappearing airplane case, the plaintiff will offer testimony that the weather was clear to bolster the inference that negligence, not weather, caused the plane to crash.

4. a. If there was negligence at all in this case, it was very likely attributable to Dr. Eastwood. However, it is not at all clear that this side effect results from negligence. It is very doubtful that a jury could conclude, from their general knowledge, that decreased sensation after thigh surgery bespeaks negligence of the surgeon. Thus, the jury is not in a position, based on the mere fact of the injury, to determine that the foundation for the res ipsa inference is established.

b. Ulner's expert testifies that nerve damage does not usually result when the type of surgery Ulner had is carefully performed. However, it does not follow, just because this side effect doesn't usually occur, that when it occurs it probably results from negligence. There are many side effects of surgery that occasionally happen despite the exercise of due care. Surely, negligence should not be inferred just because such side effects are rare. For example, surgical patients rarely get infections from careful surgery, but this does not mean that, if a patient does get infected, the surgeon was probably negligent. In a small percentage of cases, it just happens anyway, despite all reasonable precautions.

Many courts state that res ipsa applies to "the type of injury that ordinarily would not occur if reasonable care had been used." *Wick v. Henderson*, 485 N.W.2d 645, 649 (Iowa 1992). However, this language is misleading. It is one thing to say that the type of accident does not ordinarily happen when the actor is careful. It is another to say that, *when the accident does occur*, it is more likely than not that negligence was the cause. Tire blowouts do not ordinarily happen if car owners are careful, but it does not follow that when tires *do* blow out, it is probably the result of negligence. People do not ordinarily fall down on the sidewalk, but when they do, it does not follow that negligence is the likely cause.

A better statement of this requirement is that the accident "would not ordinarily happen without negligence." (Note that Ulner's expert did not testify to that.) Res ipsa requires that the accident not only be unusual, but that it be unlikely to happen unless someone failed to exercise due care. If Ulner's expert testified that nerve damage does not occur in this type of surgery *unless the surgeon was careless*, his testimony would provide an evidentiary basis for the jury to conclude that his injury probably resulted from negligence. On that testimony, Ulner would be allowed to reach the jury on a res ipsa theory.

c. Here, Ulner's expert has provided testimony that would support the first "foundation fact." However, Dr. Eastwood has offered expert testimony that contradicts that testimony. Presumably, it is for the jury, as the factfinders, to resolve this conflict in the evidence. If they believe Ulner's expert, they may conclude that injuries of this

type most likely result from negligence. They could then make the further inference that this one in fact *did* result from Dr. Eastwood's negligence. Compare Example 2. If they are convinced by Eastwood's expert, they will conclude that negligence is not the most likely explanation, and find for the defendant.

d. Eastwood's motion should be denied. Ulner's evidence suggests that this type of outcome likely results from negligence of the surgeon. Eastwood then testifies that he did not make the type of mistake which would likely explain Ulner's complications. If the jury believes Eastwood's testimony, they will presumably refuse to make the inference permitted by the res ipsa loquitur doctrine. They are free to do that, but they are also free to disbelieve Eastwood's testimony and make the res ipsa inference based on the evidence that such results usually do result from negligence of the surgeon, and the further fact that the injury did in fact occur. On this state of the evidence, the case is for the jury.

e. The res ipsa loquitur doctrine allows a jury to conclude that an unexplained accident more than likely happened due to negligence. But here, the defendant has offered an uncontradicted, fully corroborated explanation that the injury occurred without negligence. Unless there is some basis to conclude that the witnesses are lying, this accident is no longer unexplained, and there is no need for the jury to estimate the probabilities concerning an unexplained occurrence. Thus, res ipsa would no longer have a role, and the judge would likely direct a verdict for the defendant.

If there were some basis in the evidence for the jury to disbelieve Eastwood's testimony concerning the ruptured artery, they would be entitled to do so. If they did disbelieve it, and the proper res ipsa foundation had been laid, they would be free to infer that negligence caused the problem.

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5. a. Most courts would probably refuse to allow this case to go to the jury on the basis of res ipsa. Ordinary experience suggests that there are a number of possible causes for this fire which do not involve negligence of the tenant, including electrical problems, a customer's

smoldering cigarette, vandalism, or mechanical problems. The fire may be attributable to the operator's negligence: She could have spilled cleaning fluids, left oily rags near the wall, or left a pressing machine on. But it seems doubtful, where the fire occurs overnight and cannot be directly tied to the cleaning machines, that it can reasonably be inferred that one of these is the more likely cause.

b. Although this is another fire case, it is a much better candidate for application of res ipsa loquitur. Here, the evidence indicates that the fire started in a sofa, not a usual place for fires absent someone's negligence. In addition, it started shortly after Bradley left the room, which supports the inference that, if negligence led to the fire, it was his. See *Olswanger v. Funk,* 470 S.W.2d 13 (Tenn. App. 1970) (approving use of res ipsa loquitur in a similar case).

In this case, further evidence may strengthen the inference of Bradley's negligence. If he locked the room, for example, this tends to eliminate vandalism as an alternative explanation. If Bradley is a smoker, that would greatly strengthen the inference that he had caused the fire.

6. a. Atkins has probably produced enough evidence to go to the jury on res ipsa. His evidence shows that the accident happened shortly after the gas company worked on the heater, that the fire resulted from an explosion, and that the explosion took place in the area where the gas company had done the work. A reasonable jury could infer from these facts that the accident probably resulted from a gas leak, and that the leak was probably caused by faulty work in installing the gas line. Atkins's case is hardly ironclad, but it supports a reasonable inference of negligence.

Of course, the gas company was not "in control" of the heater or the gas lines at the time of the explosion. But under the Restatement formulation of res ipsa this is not necessary. Atkins must simply show that the negligence is probably attributable to the gas company.

b. Sometimes res ipsa seems to leave defendants at the mercy of the jury as long as some inference of negligence can be made. But this example, based on an actual case, *Nutting v. Northern Energy, Inc.*, 874 P.2d 482 (Colo. App. 1994), illustrates that defendants, through aggressive discovery, are often able to muster substantial evidence to

undermine the foundation facts. In *Nutting*, the plaintiffs had to admit that they had been working around the heater, weakening the inference that the negligence, if any, was the gas company's. In addition, the weather records suggested yet another explanation for the fire — that the force of 80-mile-per-hour winds had caused a downdraft, blowing the burner flame outward, and igniting the combustible materials stored in the closet. On this state of the evidence, the court held that the plaintiffs had not made a case for one of the res ipsa foundation facts: that the negligence, if any, was likely attributable to the defendant. Consequently, the court refused to give the jury a res ipsa instruction.

7. a. This case resembles *Byrne v. Boadle*, the flour barrel case that gave rise to the res ipsa doctrine. As in *Byrne*, it seems fairly clear that a jury could find, based on their own experience, that this accident would not ordinarily happen without negligence. Someone must have left the board too near the edge of the building, or dropped it in the course of the work, or *something*.

The problem is the other foundation requirement, attributing the negligence to a particular defendant. Granted, it is probably attributable to *one of the defendants*, but it is not clear which one. Even where the plaintiff relies on the general inference of negligence permitted by res ipsa, it must be an inference of a particular person's negligence, not just someone's. Otherwise, Young could simply sue all possibly negligent parties and argue that one of them must have been negligent.[4]

On these facts, most courts would refuse to send the case to the jury on a res ipsa theory.

b. Young can rely on res ipsa loquitur in this case if he sues Wagner Construction Company. The accident is of a type that ordinarily would not happen without negligence. Wagner, as an employer, is liable for the negligence of any of its employees in the course of the work. See Chapter 23. Thus, it is liable regardless of which employee caused the board to fall. Even though Young could not invoke res ipsa against Koch or Alioto, he could show that the negligence must be attributable to someone for whom Wagner is responsible.

Fudd Ipsa Loquitur

8. Fudd's instruction tells the jury that, if they find the foundation facts established, "these facts give rise to an inference of negligence on the part of the defendant." This suggests to the jury that they *should* make the inference that Bradley was negligent if they find the foundation established. Most courts hold that res ipsa permits, but does not require a jury to infer negligence where the foundation facts are shown. The instruction would be much improved if the Honorable Fudd told the jury that, if they find the foundation facts are established, they *may* but are not required to infer that the defendant was negligent.

   One may well wonder if such subtle distinctions in a complex verbal instruction have any real meaning for a jury. If the jury understands the res ipsa instruction at all, they may well understand it as Judge Fudd mistakenly phrased it, to mean that they should find for the plaintiff if they find the foundation facts established. Jury instructions play an ironic role in the trial of cases. When they are correct, it is not clear that the jury understands them or pays them undue attention. But when they are wrong, the losing party is very likely to appeal on the ground that the jury was given the wrong rules for decision. Thus, it may be more important not to get the instructions wrong than it is to get them right.

9. As the Introduction notes, you will very frequently see language of this sort in the statement of the res ipsa loquitur requirements. See, e.g., *Stillman v. Norfolk & W. Ry.* Co., 811 F.2d 834, 837 (4th Cir. 1987). The rationale is apparently that, *if* the plaintiff contributed to the accident, the inference that the negligence leading to it was the defendant's is undermined. In addition, res ipsa dates from the era of contributory negligence, when any negligence by the plaintiff barred recovery even if the defendant was negligent.

   In this case, however, Jones should be able to invoke res ipsa loquitur even if he was a partial cause of his injury. Although Jones may have been negligent *after* the tractor started, for jumping on board, there is nothing to suggest that he contributed in any way to causing it to start. Thus, his conduct does not undermine the inference that any negligence that led to the tractor starting up was International's. Brand-new tractors should not roar into life on their own. When they do, a jury could

reasonably infer that the manufacturer was negligent. The fact that Jones *reacted negligently to* the risk should not bar him from using res ipsa to establish the initial negligence of International. If Jones reacted negligently to the situation, and thus contributed to his own injury, this can be accounted for under comparative negligence by reducing his recovery.

Thus, in instructing the jury, Judge Fudd should separate the issue of International's negligence in causing the initial problem from Jones's negligence in reacting to it. He should instruct the jury that they could infer negligence of International based on res ipsa loquitur, and further instruct them that, if Jones's subsequent conduct was also negligent, they should account for that under comparative negligence principles. See, e.g., *Giles v. City of New Haven*, 636 A.2d 1335, 1341-1342 (Conn. 1994) (allowing plaintiff to invoke res ipsa in a similar situation under comparative negligence).

This point is a bit confusing, but important, since comparative negligence has become the law in most states. So let me describe another example. In *Cramer v. Mengerhausen,* 550 P.2d 740 (Or. 1976), the plaintiff was having a tire changed at a repair shop when the truck started to slip off the jack. He grabbed the back of the truck, to try to keep it from sliding forward, and was injured when the truck fell. The court held that plaintiff could invoke res ipsa, even if he had been negligent as well, to establish the initial negligence of the repair person, since trucks shouldn't fall if properly jacked. If plaintiff was negligent in reacting to the situation, this could be accounted for under comparative negligence by assigning him a percentage of negligence and reducing his damages accordingly.

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1. *Kilgore v. Shepard Co.*, 158 A. 720 (R.I. 1932), is an oft-cited case in which the court took an overly rigid approach to the "control" issue. In *Kilgore,* the plaintiff was injured when she sat down in a chair at the defendant's store and it collapsed under her. Although the cause of the collapse was very likely negligent maintenance of the chair, the court refused to apply res ipsa loquitur. Taking the control element too literally, the court concluded that the foundation elements of res ipsa were not established, since the plaintiff, not the defendant, was in control of the chair at the time of the accident.

2. The Third Restatement of Torts: Liability for Physical and Emotional Harm §17 recasts the definition of res ipsa loquitur as follows:

> The factfinder may infer that the defendant has been negligent when the accident causing the plaintiff's harm is a type of accident that ordinarily happens as a result of the negligence of a class of actors of which the defendant is the relevant member.

Although this description may be accurate, it is hard to understand and is not likely to be used in instructing juries. In this chapter I will stick with the Second Restatement formulation.

3. For a discussion of directed verdict practice, see J. Glannon, Civil Procedure: Examples and Explanations 493-501 (8th ed. 2018).

4. *Ybarra v. Spangard*, 154 P.2d 687 (Cal. 1944), appears to hold that the plaintiff can do just that. However, *Ybarra* has not been generally accepted outside of the unique context (surgery on the unconscious patient) in which it arose. Even in that context, it may be a dubious proposition that the defendants should bear a burden of explanation which they probably cannot meet. See D. Seidelson, Res Ipsa Loquitur — The Big Umbrella, 25 Duq. L. Rev. 387, 446-450 (1987).

A few cases have watered down the second foundation fact requirement, dubiously in your author's opinion. See, e.g., *Collins v. Superior Air-Ground Ambulance Service, Inc.*, 789 N.E.2d 394 (Ill. App. 2003). A better reasoned case is *Novak Heating & Air Conditioning v. Carrier Corp.*, 622 N.W.2d 495 (Iowa 2001), upholding the requirement that the plaintiff ascribe the negligence to a particular defendant, not just one of two.

PART III

The Causation Enigma

CHAPTER 10

Reconstructing History: Determining "Cause in Fact"

INTRODUCTION

As previous chapters have indicated, the common law has developed a consistent set of elements — duty, breach, causation, and damages — that plaintiffs must prove in order to recover in a negligence action. This chapter addresses basic aspects of the very difficult — and fascinating — third element, causation. The next chapter addresses several complex causation issues frequently encountered in the Torts course.

Causation is a profound problem. We could think about it for years and perhaps at the end be little closer to understanding it. Yet one of the majesties of the law is that it must answer the unanswerable: It must decide, *today*, between plaintiff and defendant, and lacks the luxury of indefinite speculation. Consequently, judges must settle for some working approaches to thorny problems like causation, approaches that are no doubt imperfect, perhaps not even fully intellectually consistent, and always subject to refinement and eventual change.

Although causation is a complex problem, fundamental fairness obviously requires that a defendant be held liable only for injuries he actually caused. If Jones, an electrician, wires Smith's house, and leaves exposed wires in the wall, which cause a spark and burn down the house, Smith's loss

is a direct result of Jones's negligence. It would not have happened if Jones had been careful, and it did happen because Jones wasn't careful. It seems fair to shift the loss from the blameless Smith to the careless Jones. However, if the house burns down because Smith's toddler starts the fire, Jones did not cause the harm and should not pay, even if he was negligent in wiring the house.

To assure that liability will only be imposed where the plaintiff's loss is fairly attributable to the defendant's conduct, courts have developed two causation requirements, causation *in fact* and *proximate* or legal causation. Cause in fact, the subject of this chapter, requires that, as a factual matter, the defendant's act contributed to producing the plaintiff's injury. Proximate causation, considered in Chapter 12, deals with limits on liability for remote or unexpected consequences of tortious conduct.

It is often quite clear from the events themselves that the defendant's negligence was the cause in fact of an injury. Suppose, for example, that Wright drops a sheet of plywood from a building onto Sullivan's car, obscuring her ability to see the road, and she crashes into a parked car. There is little doubt that Wright's negligence "caused" the accident. Sullivan will doubtless testify that she swerved off the road *because* the plywood obscured her view. The accident would not have occurred otherwise. Similarly, if Darrow, a lawyer, draws a will for a client and fails to include one of the intended beneficiaries, it is clear that this omission is the cause in fact of the beneficiary's inability to take under the will. Common sense tells us that the problem happened because the beneficiary was left out, and would not have happened if she had been included. We would all accept that Darrow's mistake "caused" the beneficiary's damages, and so would any court.

In other cases, we could all agree, philosophers included, that the defendant's negligence did *not* cause the plaintiff's injury. Suppose that Pei's truck hits Gaudi on Maple Street. Investigation shows that the truck was carefully driven and in good working order, except that the windshield wipers were broken. However, the weather was dry at the time. No court will hold Pei liable for the accident because of the broken wipers. The wipers weren't needed; the accident would have happened the same way if they had been working. Even though Pei was negligent, his negligence was, in the language of the torts trade, "negligence in the air," negligence irrelevant to the injury that Gaudi suffered, and therefore not actionable.

THE TRADITIONAL TEST: "BUT FOR" CAUSATION

Traditionally, courts have used the "but for" test to determine whether the defendant's act was a cause in fact of the plaintiff's harm. Under the "but for" test,

> [t]he defendant's conduct is a cause of the event if the event would not have occurred but for that conduct; conversely, the defendant's conduct is not a cause of the event if the event would have occurred without it.

Prosser & Keeton at 266. Under this approach, the court asks whether the plaintiff would not have suffered the harm "but for" the defendant's negligence. In other words, if we go back and replay the accident, but take away the defendant's negligent act, would plaintiff have escaped injury? For example, in Pei's windshield wipers case, if the wipers had been working at the time of the accident, Gaudi would still have been injured in exactly the same way. So, Pei's negligence in failing to fix the wipers is not a "but for" cause of the harm. We cannot say that, but for the broken wipers, the accident would not have happened.

The plywood case, on the other hand, satisfies the "but for" test. But for the falling plywood, which obscured Sullivan's view of the road, she would not have swerved and hit the car. If we take Wright's negligence in dropping the plywood out of the scenario, the accident doesn't happen. Because the accident would not have happened without Wright's act, that act is a "but for" cause of the harm. Consequently, cause in fact is satisfied.

Another way of saying this is that the defendant's act must be a "sine qua non" of the plaintiff's injury. Sine qua non means "without which it is not; an indispensable requisite" (Ballentine's Law Dictionary 1182 (1969)), that is, that the injury would not have happened without the defendant's act. Again, the test invites us to look at what *did* happen and compare it to what *would have* happened if defendant had not been negligent. If the injury would not have resulted without the defendant's negligence, then the negligence is a sine qua non of the injury, and the cause-in-fact element is met.

Let's apply the "but for" test to two more straightforward examples. (We'll see more complicated ones soon enough.) Suppose that Rios, a pharmacist, mistakenly fills Paul's prescription for an antidepressant with

pills that can lead to seizures. Paul takes the pills and has a seizure resulting in injuries. “But for” causation is clear: Paul had the seizure because Rios gave him the wrong pills. But for Rios’s mistake, Paul would not have had the seizure. Rios’s negligence is a cause in fact of Paul’s injury.

Now the other example. Suppose that Mancuso works in a factory using a high-speed band saw. Phillips had removed the saw blade guard, which is meant to prevent workers’ hands from contacting the blade. Mancuso is cutting a piece of plastic on the saw and has a severe allergic reaction to the plastic fumes. Here, although Phillips may have been negligent in removing the guard, his negligence is not a “but for” cause of Mancuso’s injury. Presumably, the fumes would still have wafted up to Mancuso’s nose if the saw had a guard, so the accident would have happened the same way if Phillips had not been negligent. His act is not, therefore, a cause in fact of Mancuso’s injury.

THE PROBLEM OF MULTIPLE “BUT FOR” CAUSES

Accidents very frequently result from more than one negligent act. Suppose, for example, that the Edison Company negligently attaches a transformer to a light pole, and Gaudi negligently backs into the pole, knocking the loose transformer down on a child waiting for the school bus. Assume that the transformer would not have fallen, even though Gaudi hit the pole, if it had been tightly secured. Similarly, assume that the transformer would not have fallen, even though it was loose, if Gaudi had not negligently hit the pole.

If this is so, Edison might argue as follows: “Yes, it is true that I was negligent, but even though I was, the accident would not have happened unless Gaudi was, too. Even if the transformer was loose, it wouldn’t have fallen unless he hit the pole. So Gaudi is the cause of the accident, not me.” Of course, Gaudi can make a similar argument: “Well, I may have negligently hit the pole, but if the transformer were adequately secured it would not have fallen. So Edison’s negligence is the cause of the harm, not mine.”

Neither argument is sound. While it is true that either defendant’s

negligent act was not enough to cause the accident alone, each act was a necessary antecedent to the harm. Each cause contributed to the accident; if we take away the negligence of either defendant, the accident would not have happened, even assuming the negligence of the other. In cases like this, *both* negligent acts are causes of the injury under the "but for" test.

Put another way, it is no defense for one negligent actor that someone else's negligence also contributed to the accident. There is no requirement that the defendant's act be the *sole* "but for" cause of the injury, only that it be *a* "but for" cause.

> [A] tortfeasor is liable for all damage of which his tortious act was a proximate cause. "[He] may not escape this responsibility simply because another act — either an 'innocent' occurrence such as an 'act of God' or other [tortious] conduct — may also have been a [concurrent] cause of the injury."

Richards v. Owens-Illinois, Inc., 928 P.2d 1181, 1185 (Cal. 1997), quoting from *American Motorcycle Assn. v. Superior Court*, 578 P.2d 899, 903 (Cal. 1978). Thus, Edison cannot avoid liability because the transformer would not have fallen if Gaudi hadn't hit it. Although the loose transformer was not the sole cause of the accident, it was a "but for" cause because if Edison had not been negligent there would not have been an accident. The same is true for Gaudi. Both are "but for" causes of the accident.

This point is important enough to merit another illustration. Suppose Olmstead, a mason, is building a chimney on top of a city townhouse while pedestrians are using the sidewalk below. Richardson, the general contractor, was required to place a scaffold with a roof over the sidewalk to protect pedestrians from falling objects during construction, but failed to do so. Olmstead drops a brick and it injures Wren who is walking on the sidewalk. On these facts, the negligent acts of both Richardson and Olmstead are "but for" causes of the harm. The accident would not have happened if Olmstead had not dropped the brick. It also would not have happened (even if Olmstead dropped the brick) if Richardson had put up the scaffold.

This logic applies both to negligent acts that take place at different times, as in the Edison example, and to negligent acts that take place simultaneously. Suppose that Sullivan is driving down the street without looking carefully, and that Pei runs a stop sign coming out of a side street. Sullivan hits Pei, and his car careens into a pedestrian. The jury finds that the accident would not have happened if Pei had not run the stop sign. They also find that (even assuming Pei's negligence) the accident wouldn't have

happened if Sullivan had been keeping a proper lookout. On this reasoning, both drivers' negligent acts are "but for" causes of the accident. Take away either one, and the accident would not have happened. Each is a sine qua non of the harm, since that harm would not have happened without the negligence of each.

PROBLEMS IN APPLYING THE "BUT FOR" TEST: RECONSTRUCTING HISTORY

In the cases described above, applying the "but for" test is easy. In many cases, however, it involves a complex and speculative exercise, because we can never know for sure what would have happened if history had been different. Suppose, for example, that a motorcyclist is killed when he pulls out in front of a bus that is going seven miles per hour over the speed limit. Or suppose that the plaintiff suffers chest pains, his doctor fails to diagnose it as a heart attack and provide suitable emergency treatment, and the patient dies of the heart attack.

In each of these cases, we know that the defendant was negligent, but we don't know whether things would have come out differently if the defendant had not been negligent. If the bus had been driving at the speed limit, could it have stopped before hitting the cyclist? If the doctor had provided timely treatment, would the patient have survived or died anyway? The defendant should not be held liable in such cases if the harm would have taken place regardless of the negligence. However, to determine whether the defendant's negligence affected the outcome, the jury must not only decide what actually happened, but must also speculate about a hypothetical alternative version of events: What would have happened if the defendant had not been negligent. In such cases, the "but for" test

> challenges the imagination of the trier to probe into a purely fanciful and unknowable state of affairs. He is invited to make an estimate concerning facts that concededly never existed. The very uncertainty as to what might have happened opens the door wide for conjecture.

W. Malone, Ruminations on Cause in Fact, 9 Stan. L. Rev. 60, 67 (1956).

However, while the "but for" inquiry involves a speculative comparison between actual events and hypothetical alternatives, that comparison still

must be made, in order to distinguish consequences that would have happened anyway from those that were brought about, in whole or in part, by the defendant's negligent conduct. After all, the defendant's argument in these cases has much force: "I should not be held liable, even if I was negligent, unless my negligence made a difference, actually led to the plaintiff's injury."

Although this type of counterfactual inquiry is inherently speculative to some degree, the parties may be able to produce evidence that makes it less so. In the motorcycle example, the distance between the bus and the cycle when the cyclist pulled into the street will be critical in determining whether the excessive speed of the bus made a difference. Expert evidence about stopping distances at various speeds will also make the jury's task less speculative. In the heart attack example, the medical evidence may establish fairly clearly that the plaintiff would have recovered with prompt treatment, or, conversely, that death was inevitable even with immediate care. Although we can never achieve certainty about cause in fact, the jury can usually make a reasoned judgment as to whether the negligence contributed to the outcome.[1]

SOME COMPLICATIONS: THE "SUBSTANTIAL FACTOR" TEST

"But for" analysis has been the traditional basis for analyzing cause in fact in negligence cases.[2] Cause in fact will almost always be established if the "but for" test is met. See Restatement (Third) of Torts §26 ("Conduct is a factual cause of harm when the harm would not have occurred absent the conduct"). However, there are a few quirky situations in which the "but for" test leads to unsatisfactory results, yet courts still think the defendant should be treated as a cause of the harm. In these situations, courts have created exceptions to the "but for" approach. Remember, however, that these *are* exceptions; in most circumstances, the defendant whose conduct was not a "but for" cause of the harm will not be liable.

One situation in which courts have created an exception to the "but for" rule is where two defendants act negligently, and either's act alone would

suffice to cause the plaintiff's injury. Suppose, for example, that two motorcyclists roar past the plaintiff's horse and wagon, scaring the horse and injuring the plaintiff. See *Corey v. Havener,* 182 Mass. 250 (1902). In this situation, the plaintiff cannot establish cause in fact under the "but for" approach. Defendant One will argue that his act was not *necessary* to cause the harm, since the noise of the other cycle was *sufficient* to scare the horse even if Defendant One had not been there. Defendant Two will make the same argument. Since, conceptually, neither act is a sine qua non ("without which it is not") of the harm, both would get off under the "but for" test.

The court wrestled with this sufficient-but-not-necessary dilemma in *Anderson v. Minneapolis, St. P. & S. S. M. Ry. Co.,* 179 N.W. 45 (1920), in which two fires merged into one and burned the plaintiff's property. Only one of the fires was due to the defendant's negligence. It was impossible to say that but for the defendant's fire, the plaintiff's barn would still stand, because the other fire would likely have caused the damage anyway. Yet the defendant's culpable act clearly contributed, and it seemed fair to hold him liable for it.

In *Anderson,* the court resolved the dilemma by applying a different, less stringent, test of causation. The court held that the defendant would be a cause in fact of the damage if the jury found that its act was "a material or substantial element" in producing it. 179 N.W. at 46, 49. Under that test, the defendant was held liable even though the property would probably have been burned by the other fire anyway. This "substantial factor" test clearly leaves more leeway to the jury in assigning causal responsibility for the harm. Unlike the "but for" test, the substantial factor test is a matter of degree. The jury must make an intuitive judgment both as to what degree of causation is "substantial" and whether the defendant's negligence reaches that level. See Robertson, Powers, Anderson & Wellborn, Torts 141 (2d ed. 1998) ("substantial factor" test "incorporates no particular mental operation but appeals forthrightly to instinct"); see also, for a more jaundiced view, B. Black & D. Hollander, Unravelling Causation: Back to the Basics, 3 J. Env. Law 1, 10 (1993) ("substantial factor" test allows jury "to do essentially what it pleases").

In the unusual situation illustrated by *Anderson,* the "substantial factor" test has gained wide acceptance. See Restatement (Second) of Torts §431(a); see also Restatement (Third) of Torts: Liability for Physical and Emotional Harm §27. That section recognizes the concept explained here, using the

phrase “multiple sufficient causes.” However, it is important to understand that the “substantial factor” test is an *alternative* approach to cause in fact for those unusual situations in which the “but for” test does not yield satisfactory results. On exams, students often run the facts through both tests, as though both must be satisfied in any case. This reflects understandable confusion. Remember that, generally speaking, plaintiff must show that the defendant’s act was a “but for” cause of the harm. Only in unusual situations like *Anderson*, where the traditional analysis breaks down, will the court allow the more amorphous showing that the defendant’s negligence was a substantial factor (or “multiple sufficient cause”) in causing the harm.

The Third Restatement rejects the view that actual cause analysis should include an assessment of how “substantial” a cause is. Instead, it provides that any sufficient cause is a factual cause, even if others are as well.

> If multiple acts exist, each of which alone would have been a factual cause under s. 26 of the physical harm at the same time, each act is regarded as a factual cause of the harm.

Under this approach, the railroad would be liable because its fire was sufficient on its own to cause the harm that occurred. The drafters of the Third Restatement avoided the “substantial factor” language because it seems to introduce *proximate cause* concepts into actual cause analysis. It invites the jury to assess the extent to which the defendant’s conduct contributed to the harm, which suggests a policy analysis rather than a judgment about actual causation.[3] See Restatement (Third) of Torts §27 and cmt. b.

However, a good many courts continue to use a “substantial factor” causation instruction in cases like *Anderson*. Some courts now hold that the substantial factor test should be used to determine cause in fact in all cases, not just anomalies like *Anderson.* See, e.g., *Mitchell v. Gonzales,* 819 P.2d 872, 878-879 (Cal. 1991). However, even under a substantial factor instruction, the defendant should not be held liable (except in *Anderson*-type multiple-sufficient-cause cases) if the harm would have occurred even if she had not been negligent. See Restatement (Second) of Torts §432(1) (an actor’s negligence is not a substantial factor in causing harm if the harm would have been sustained even if the actor had not been negligent);[4] see also Prosser & Keeton at 267-268 (in almost all situations, defendant’s conduct will not be a substantial factor if the harm would have occurred without it). So, the “but for” test is alive and well for most situations. If the defendant is not a “but for” cause of the harm, he will generally not be liable, unless the

situation involves a twist like *Anderson* or *Summers* (discussed immediately below).

MORE COMPLICATIONS: SHIFTING THE BURDEN OF PROOF

Summers v. Tice, 199 P.2d 1 (Cal. 1948), illustrates another situation in which the "but for" test yields unsatisfactory results. In *Summers*, the two defendants fired their shotguns, and a pellet from one or the other injured the plaintiff's eye. Both defendants were negligent, but it was impossible for the plaintiff to show that it was "more probable than not" that either defendant's pellet had hit him: It was a 50/50 proposition that either defendant's shot had hit the eye. Under "but for" analysis, the plaintiff would lose.

The California Supreme Court was unwilling to see the plaintiff lose in *Summers.* It was clear that both defendants had committed the same act, that both were negligent, and that one or the other had injured the plaintiff. Given those facts, the court concluded that it would be unfair to let both of them off the hook simply because plaintiff was unable to pinpoint which hunter's shot had caused the harm. Instead, the court shifted the burden of proof to each defendant to show that he had *not* caused the harm. The defendants, of course, were no more able to prove whose shot hit the plaintiff than he was. So, the result was that both were liable for the injury.

Summers v. Tice stands for the proposition that, where two (or perhaps more) defendants commit substantially similar negligent acts, one of which caused that plaintiff's injury, the burden of proof shifts to each defendant to show that he did not cause the harm. If they cannot make that showing, both will be held liable for the plaintiff's loss. This fairly narrow proposition has been followed by a number of courts. Others, however, have rejected *Summers* entirely, leaving the plaintiff to establish causation under the traditional "but for" test. See, e.g., *Leuer v. Johnson,* 450 N.W.2d 363 (Minn. App. 1990).

However, be careful not to take this case to stand for more than it does. *Summers* does *not* hold that every time the plaintiff sues more than one defendant, the burden of proof shifts to the defendants on the issue of

causation. That is much too broad a reading of the case. *Summers* addresses a narrow anomaly in which "but for" analysis fails; it is not a general abdication of plaintiff's burden on the causation element of a negligence claim.

Suppose, for example, that Corbusier is injured when a light pole collapses on him as he walks down the sidewalk. There is evidence that Van der Rohe may have backed into the pole earlier in the day, and also evidence that Wren did some excavating next to the pole the day before. The plaintiff cannot march into court, citing *Summers v. Tice,* and shift the burden of proof to each of these defendants to show that his negligence did not cause the pole to fall. This case is very different from *Summers.* First, in *Summers,* the two defendants were both found to be negligent. Naturally, the principle of the case could not apply until Corbusier proves that both Van der Rohe and Wren were negligent. Second, Corbusier alleges quite different acts of negligence against Van der Rohe and Wren. In *Summers,* the defendants did exactly the same thing, so the chances were equal that either caused the harm, and there was no logical way to decide who had caused it. In more typical multi-defendant cases like Corbusier's, the jury has some basis for making a more-probable-than-not finding of who caused the harm (or finding that they both did under traditional "but for" analysis). Consequently, the court is unlikely to invoke the burden-shifting approach of *Summers.*

RECONSTRUCTING HISTORY: PRACTICAL PROOF PROBLEMS IN ESTABLISHING CAUSE IN FACT

In many cases the act that caused the injury is clear, but the plaintiff faces a difficult causation problem in identifying the actor who did that act. Suppose in the plywood example that three subcontractors were working on the floor from which the plywood fell. Although the falling plywood clearly caused Sullivan's injury, Sullivan will have the very practical causation problem of proving who dropped it. Or, suppose that Fleming is injured when a crowbar she is using snaps in half, sending a splinter of steel into her eye. Here again, the mechanism that caused the harm is clear, but Fleming faces a formidable

problem in proving who made the crowbar, since crowbars look pretty much alike and may not carry any identifying marks. Or, suppose a fan throws a beer bottle from the stands at a football game, injuring a player. Negligence and causation are clear, but it may simply be impossible to identify who threw the bottle.

The causation issue in these who-done-it cases is not *conceptually* difficult, but poses the difficult practical problem of identifying the proper defendant. If we had an omniscient observer (we'll call him Solomon) and a time machine, we could send him back to review the relevant events and solve these identification problems. Without Solomon, however, plaintiffs must do the best they can to prove that the defendant was the negligent actor. In the real world of law practice, plaintiffs often lose cases because they cannot prove that the defendant committed the negligent act. In many other cases, the plaintiff never brings suit in the first place because she simply can't identify the negligent party. Students generally come to the Torts course with the preconception that a person who is hurt always recovers damages, but any torts practitioner will attest that practical realities often prevent worthy plaintiffs from recovering at all.

The examples below illustrate basic problems in determining cause in fact. In approaching them, assume that the "but for" test applies, except in situations such as *Anderson* and *Summers,* in which it yields unsatisfactory results.

Examples

Applying "But For" Causation

1. Perrone, a landlord, rents rooms in an apartment building to tenants. Despite repeated citations from city authorities for failure to install a required fire escape at the back of the building, he doesn't install one. Late one night a first floor tenant, Dwyer, falls asleep in bed while smoking, causing a fire that destroys the building. Swensson, a tenant with a room on the front of the third floor of the building, is found dead in his bed of smoke inhalation. Swensson's family sues Perrone for wrongful death.

   a. What causation problem do you anticipate in proving Perrone's

liability for Swensson's death?

b. Suppose Swensson's body was found half way down the hall? How would that affect the causation issue?

2. Gray is driving his delivery truck on the interstate when it suffers a freak blowout and jackknifes to a halt across the three lanes of traffic. Harper, another driver who is tuning the radio dial instead of looking where his car is going, doesn't see the truck until too late and applies his brakes hard, swerving into the next lane. James, a third driver who is combing his hair in the little mirror on the visor fails to brake and hits Harper, sending Harper's car careening into Gray's truck, causing injuries to Gray. Who is liable to Gray?

3. Gray is taken to the hospital, where Dr. Green negligently sets his arm. Consequently, it must be rebroken a week later and set again, causing Gray considerable pain and medical expense. Which actors are "but for" causes of the injuries to Gray?

Nature and Negligence

4. Corbusier, driving down a country road, comes around a curve and encounters a deep puddle due to recent heavy rains. He tries to stop, but his brakes have been so poorly maintained that he cannot control the car. The car swerves to the left and hits Saarinen driving in the opposite direction, causing serious injuries. Is Corbusier liable under the "but for" test?

5. Dobbs is driving carefully to the store for a quart of milk when Fletcher pulls out of a side street without looking and crashes into Dobbs, who swerves into Schwartz on the sidewalk. Which driver's conduct is a "but for" cause of Schwartz's injuries?

6. Dobbs is driving to the store without his glasses, which he really ought to be wearing to drive safely. Fletcher pulls out of the side street without looking. Dobbs sees him too late, they collide, and Dobbs suffers a concussion in the resulting collision. What are the "but for" causes of the accident?

Revisionist History

7. Haines, a student, is beaten and robbed in a college dormitory. Investigation determines that the assailant, Gibbs, had been admitted to the dorm to visit another student. Haines sues the college, alleging that it was negligent in failing to hire enough security officers to assure adequate security.
   a. What is the nature of Haines's problem in proving causation in this case?
   b. What will the college argue on the causation issue?
   c. What will the plaintiff's counterargument be?
   d. If you represented the plaintiff, would you prefer that the jury be instructed under the "but for" or substantial factor test for causation?

8. Smith applies to Jones, the Chief of Police, for a permit to carry a handgun. A statute requires Chief Jones to check with the state Department of Public Safety to determine whether an applicant has a criminal record before issuing the permit, and to refuse the permit if the applicant has a record. Jones fails to do so and issues the permit. Three days later, Smith shoots Doe on the street with the gun. Doe sues Chief Jones for negligence.
   a. Assume that Smith had no criminal record. Is cause in fact established?
   b. Assume that Chief Jones fails to check, and issues the permit to Smith even though he has a criminal record. Can the plaintiff prove cause in fact?

Pestiferous Problems

9. Smith and Jones, two farmers, both sell tomatoes to a local market that have been sprayed with Icthar, a banned pesticide. The market puts the tomatoes out, together, in a bin. Wren buys one and gets sick from the pesticide.
   a. If Wren sues the farmers, what type of causation problem will he face?

b. How does the problem compare to the problem in *Anderson v. Minneapolis, St. Paul & St. Marie R.R. Co.*, the two fires case?

c. Can this problem be solved by use of the "substantial factor" test?

d. How will this case come out under *Summers v. Tice*?

e. What is the best argument *against* the *Summers*'s court's solution to this type of problem?

But for Judge Fudd

10. Ortega is injured when he slips on a pencil on the office floor. The floor had been swept early that morning. The only other employees in the office that day are Chu, Abbrezio, and Tate. Ortega sues all three for his injury. Prior to trial, Ortega requests the following jury instruction on cause in fact at trial:

> If you find that the defendants Chu, Abbrezio, and Tate were at the office on the day in question, but that the plaintiff is unable to establish which of them dropped the pencil that caused her injury, you should find each of the defendants jointly liable for the injury. However, if any of the defendants establishes by a preponderance of the evidence that he did not drop the pencil, you should not find that defendant liable.

Should the Honorable Fudd so instruct the jury?

11. Markosky negligently fails to stop at a traffic light, and plows into Osteen's car. Osteen is shaken up but, after exchanging papers, heads home. On the way, the luckless fellow is rear-ended again, by Lugo.

Later in the evening, Osteen's back begins to ache. X-rays reveal that he has a serious injury to a disk in his back. The causation problem, of course, is to determine which accident caused his injury.

a. How is this case like *Summers v. Tice*?

b. How does it differ from *Summers*?

c. What are the court's options for choosing a causation rule for this case?

A Conundrum for Fun

12. Two farmers negligently start fires on a windy day, to burn brush off of

their fields. Both fires escape, Farmer Jones's fire a bit ahead of Farmer Smith's. Jones's fire burns toward Menlove's barn, which burns to the ground. Just after it burns, Smith's fire arrives.

a. Who is liable under the "but for" test?

b. Who is liable under the substantial factor test?

c. Applying a little common sense, who should be liable to Menlove?

d. Can you think of a clever argument to limit Jones's liability?

An Elemental Example

13. Wright negligently runs down Morales in the street. Morales dies of his injuries. However, Morales had a terminal disease from which he was expected to die within a matter of weeks. Did Wright cause Morales's death? Should he be held liable, and if so, for what?

Explanations

Causation and Consequences

1. a. There seems to be little question that Perrone was negligent in failing to provide adequate fire escapes for the building. Evidently a fire escape was required by law, so Perrone was likely negligent per se. However, proving Perrone negligent is not enough to establish his liability; Swensson's family will have to establish that Perrone's negligence caused Swensson's death. Yet it appears that Swensson died in his bed from smoke inhalation, without ever trying to escape from the building. If that is true, a dozen fire escapes would have made no difference in the outcome. We cannot say that, but for Perrone's failure to install a fire escape, Swensson would be alive today. It appears that Swensson would have died just the same if Perrone had not been negligent. If that is true, it will be impossible to establish that Perrone's negligence in failing to install a fire escape was a factual cause of his death.

It should be easy, of course, to establish that Dwyer's negligence in falling asleep while smoking caused Swensson's death. But for

that act, there would have been no fire. But the other tenant will not likely have as deep a pocket as the landlord.

b. If Swensson is found in the middle of the hall, his family can argue that the lack of a fire escape did lead to the result, that it did "change history." If he was found in the hall, perhaps he made it to the back window, was unable to get out because there was no fire escape, and ran back toward the front. That would show that he died *because of* the lack of a fire escape, that "but for" the negligence of the landlord, Swensson would be alive today. That is the plaintiff's burden in establishing causation.

Of course, this would still be a tough case on actual causation. The landlord will argue that Swensson never made it to the back window, so the lack of a fire escape did not cause the death, was mere "negligence in the air." It will be very difficult for the family to establish causation here without more evidence that the lack of a fire escape made a difference but it is not necessarily impossible. For example, evidence that the back window was open, or that someone saw Swensson at the window (wouldn't the family's lawyer love to have that evidence!) could help to establish causation.

2. In this example Harper's negligence and James's are both "but for" causes of the accident, because each contributed to causing Gray's injuries. But for Harper's sharp stop, which sent him into James's lane, James would not have hit him. But for James's failure to watch the road, he would have avoided hitting Harper and knocking his car into Gray's truck. Each contributed to causing a single, indivisible injury to Gray, and each is liable for the entire injury.

3. Under "but for" analysis, Harper and James are both "but for" causes of Gray's initial injury, and of his additional injuries due to Green's malpractice. But for each of their negligent acts, Gray would not have been in the hospital to begin with, and would not have suffered the additional injury due to Dr. Green's mistake. Consequently, they have caused the initial injury and the malpractice damages as well.

Dr. Green, however, is not a cause of the turnpike accident. It would have happened the same way if we remove his negligence from the scenario. He is, of course, a "but for" cause of the injuries from resetting

the arm. But for his failure to set it properly the first time, this enhanced injury would not have happened. So, he may be liable for the enhanced injuries but not those resulting from the initial collision.

As we will see in later chapters, the traditional response of the common law to situations where more than one tortfeasor causes an injury is to hold them all liable for the plaintiff's damages. Under traditional tort law, Harper and James would be jointly liable for Gray's initial injury. Harper, James and Green would be liable for the extra damages due to Green's missetting of the arm.

Nature and Negligence

4. This accident is caused by both Corbusier's negligent maintenance of his car and the puddle that created the dangerous condition in the road. Although only one of these causes is due to Corbusier's negligence, that negligence is still a "but for" cause of the harm. The accident would not have happened if Corbusier had not been negligent. True, it would not have happened, *even if Corbusier was negligent*, if the puddle had not been there, but that does not exonerate him. It is not a defense for him that other circumstances, whether natural or negligent, also contributed to the accident, if his negligence was one of those causes.[5]

5. This example makes a very basic point. Clearly, both Dobbs's and Fletcher's driving are "but for" causes of the accident. If Dobbs hadn't gone for milk, the accident wouldn't have happened; if Fletcher hadn't pulled out of the side street, the accident wouldn't have happened. However, the fact that they both *caused* the accident doesn't mean that they will both be liable to Schwartz. Dobbs caused the accident by non-negligent conduct, while Fletcher was a negligent cause. In a tort case, the plaintiff must show that the defendant's *tortious conduct* caused the harm, not just that his act caused it. In analyzing cause in fact, then, be careful to ask the right question — whether the defendant's negligence caused the harm, not just whether his conduct caused it.

6. In this example, the plaintiff's negligence is one of the "but for" causes of the accident, along with the negligence of the defendant. There's nothing unusual about that; it's just another multiple-cause case.

Sometimes two parties are negligent and cause injuries to a third party, as in the typical joint tortfeasor situation like the Edison example in the introduction. At other times, two actors are negligent and their negligence causes injury to *one of them*, as in this case.

If the plaintiff's negligence is one of the "but for" causes of an accident, tort law has to decide what to do about that. As a matter of policy, we might decide to bar a plaintiff who was causally negligent from recovery entirely — the rule of contributory negligence. Or, we might reduce the plaintiff's damages to account for his negligence — the rule of comparative negligence. Last, we might hold the defendant fully liable anyway — the rule of strict liability. But these choices have nothing to do with the basic *factual* question of whose negligence caused the accident: It is perfectly clear under "but for" causation that the negligence of both Dobbs and Fletcher did.

Revisionist History

7. a. The causation problem here is to determine whether the defendant's negligence affected the result, that is, whether the plaintiff would have been assaulted if the college had provided adequate security. It requires the factfinder to compare what did happen to what *would have happened* absent the defendant's negligence.

   b. The college will argue that it should not be held liable, even if security was inadequate, because any inadequacy in security did not cause the assault. It will argue that having more security officers would not have affected the outcome, because the student did not slip into the dorm illegally; he was admitted through the ordinary procedures.

   There is certainly force to this argument. Gibbs did not break into the dorm, he entered openly for a legitimate reason. Consequently, inadequate security did not affect Gibbs's ability to get into the dorm. Even if there had been additional officers available, they would not have barred his entry and prevented Gibbs's actions.

   c. Haines will argue that, even if the inadequate security did not cause Gibbs's entry, it still caused the harm because, had Gibbs known that the campus was well patrolled, he would have feared being caught

and therefore would not have attempted the crime. This illustrates the speculative role of the jury in this type of case, in which they must try to get into Gibbs's mind and decide what he would have done under different circumstances.

d. Under the "but for" test, the jury could only find causation if it concluded that Gibbs would not have committed the assault if security had been better. The substantial factor test, however, would allow the jury to find for the plaintiff on the causation issue if they concluded that inadequate security was a substantial factor in causing Gibbs's assault. This is clearly less demanding than the "but for" standard. The substantial factor instruction is less clear-cut, and thus leaves the jury more leeway to conclude that inadequate security contributed in a meaningful way to Gibbs's decision, without resolving the harder question of whether Gibbs would have acted the same way if security had been stronger.

8. a. This is another case that requires the jury to compare what actually happened to what would have happened if the defendant had not been negligent. Here, Jones's negligence in failing to check Smith's criminal record was not a "but for" cause of Doe's injury. Had he checked, he would have discovered that Smith had no record; consequently, he would have issued the permit anyway. Thus, Doe cannot show that, but for Jones's failure to check the record, Smith would not have obtained the gun permit and shot Doe. Although that failure was negligent, it was not causal negligence.

b. The argument for causation is a great deal stronger in this case. If Jones had checked, he would have discovered that Smith had a record and refused the permit. But for his failure to check, the permit would not have been issued.

However, Smith might have carried the gun without the permit and shot Doe anyway. Perhaps the evidence would even show that he would have. But the evidence might also lead the jury to conclude that Smith would not have carried a gun without a permit, and that Doe would therefore not have been shot. The plaintiff need not show that Smith could not possibly have shot Doe without the permit; she need only convince the jury that it is more probable than not that she would not have been injured but for the defendant's negligence.

Though there is certainly a measure of speculation involved, one can imagine facts on which the jury could reasonably reach that conclusion here.

Pestiferous Problems

9. a. These facts are closely analogous to the facts of *Summers v. Tice*, in which two hunters fired at a bird and shot from one of the guns injured the plaintiff. Here, as in *Summers*, we know what caused the harm — eating the tomato laced with pesticide — but we need to know whose tomato it was. It is a proof problem that Solomon could easily solve if he went back and watched the events carefully enough. But we don't have a Solomon and we don't have any way of determining which farmer's tomato Wren ate.

   b. In *Anderson*, there were two causes of the harm, either of which was sufficient to produce it. Each defendant could argue that its negligence was not a "but for" cause of the harm, because the negligence of the other would have caused it anyway. However, each was clearly a sufficient cause of the fire. Here, by contrast, there was only one cause of the harm: Wren only ate one tomato, supplied by one of the farmers but not by the other. The problem — probably an insuperable one, as a practical matter — is identifying which defendant's tomato was the "but for" cause of his illness.

   c. Using a substantial factor test for causation does not resolve this problem. Even under this test, there was only one "substantial factor" that caused the injury. The basic problem of tracing the tomato remains.

   d. In *Summers*, the court resolved the dilemma posed by cases like this by shifting the burden of proof to the defendants, since they were both negligent. This does not solve the identification problem; it simply places the risk of nonidentification on the defendants. Since the farmers here are no more able to show whose tomato caused the harm than the plaintiff, they will both be held liable, and will end up splitting the loss under contribution principles if both are solvent. This resolution of the dilemma may lack intellectual elegance, but it does provide a kind of rough and ready justice that courts must often

settle for in real disputes.

e. The best argument against the *Summers* solution is that it guarantees that a defendant who did not cause any harm to the plaintiff will be held liable for her damages. Since neither farmer will be able to prove that Wren did not eat his tomato, each will be held jointly and severally liable. Presumably, one will pay Wren, and then seek contribution from the other, so they will end up splitting the damages. But Wren only ate one tomato, so only one farmer caused her any harm. Admittedly, the other was negligent, but traditional tort doctrine says that's not enough to support liability: The defendant's negligence must *cause injury* to support liability. Not so under *Summers v. Tice.*

   While this is a departure from the traditional rules, it is one that a number of courts find more acceptable than the alternative: sending the plaintiff away empty-handed.

But for Judge Fudd

10. If I put this on my exam many students would say that Judge Fudd should give the requested instruction, since the case is vaguely like *Summers v. Tice.* They would justify that conclusion with reasoning like this: "If the plaintiff is unable to determine which defendant caused the harm, the court will shift the burden of proof to the defendants to show that they didn't cause it."

    This is Fudd-led analysis, because this case differs from *Summers* in important respects. First, in *Summers,* the plaintiff had proved that both defendants were negligent. Here, she hasn't proved that any of them were; she could have dropped the pencil herself. If it was one of the defendants, well, it was *one* of the defendants, and the others didn't do anything negligent. There is no justification for shifting the burden of proof to the defendants every time plaintiff sues more than one. This would be a major change in American tort law, one even the California court didn't make! The burden remains on Ortega to prove who dropped that pencil. Restatement (Third) of Torts: Liability for Physical and Emotional Harm §28 cmt. i.

    But, how can she ever meet that burden of proof? Maybe she can't. But there is no rule of tort law that says injured plaintiffs must always

win. The basic rules say she wins only if she proves all elements of her negligence claim, and — *Summers* or no *Summers* — the uncertainty of making that proof *generally falls on her.*

11. a. The case is like *Summers* in that plaintiff can prove that both defendants were negligent. It is also like *Summers* in that plaintiff may be unable to establish by a preponderance of the evidence which defendant caused the resulting injury.

b. The case differs from *Summers* in that here, unlike in *Summers,* causation is not necessarily an either/ or proposition. In *Summers,* plaintiff's eye was hit by one pellet, either Tice's or Simonson's. One defendant had caused no harm at all; the other had caused the entire injury. In Osteen's case, one collision may have caused the entire injury, but it is also possible — indeed, likely — that the first collision caused some and the second collision caused some more.

This type of case (in which two negligent defendants have probably contributed to an injury, but it is difficult or impossible to determine how much of the injury was caused by each) is much more common than the pure *Summers v. Tice* scenario. Osteen's case, unlike *Summers,* poses a proof problem that commonly arises in the practice of tort law.

c. The court could take a number of approaches to this apportionment problem. One would be to stick to the traditional rules: make Osteen prove how much injury each defendant caused. If he couldn't, he loses. He may not be able to muster the necessary proof, but if not, that's life in the big Torts city. As indicated in the introduction, lots of plaintiffs go without compensation because they simply can't find the proof.

A second approach is to shift the burden to the defendants, once Osteen establishes that they were both negligent, to show that they did not cause the injury, or to show what part of it they did cause. Most courts have taken this approach to this apportionment dilemma. If the plaintiff proves that both defendants were negligent, and that he suffered an injury difficult to apportion, the burden shifts to the defendants to show which part they caused. If they can't separate the damages, they are held jointly liable for them all or severally liable in proportion to their fault. Restatement (Third) of

Torts: Liability for Physical and Emotional Harm §28 cmt. k and illus. 10; see generally Dobbs' Law of Torts 192.

A Conundrum for Fun

12. a. Farmer Jones will argue that the "but for" test does not apply, because if his fire had not burned the barn down Farmer Smith's would have done so immediately thereafter. Clearly, Jones argues, the barn would have burned down even if he had not started a fire; Smith's fire was adequate to do the job and would have.

    It seems doubtful that a practical court would accept that reasoning. Jones's fire did burn the barn. If his fire had not been there, perhaps Smith's fire would have. . . . or maybe not. If Chan runs over Miss Marple on the street, she is the "but for" cause of her injuries, even if fifty other negligent drivers were careening in her direction.

    b. Any sensible jury should conclude that Jones's fire was a substantial factor in burning Menlove's barn. It *did* burn the barn, without any help from Smith's fire.

    Presumably, Smith's fire was *not* a substantial factor in causing the loss — it made no contribution at all to the demise of Menlove's beloved barn. It certainly could have if it had had the chance, but the barn was gone when it got there.

    c. This conundrum involves what might be called a "preempted cause," one that is sufficient to cause the harm, but never actually comes into operation. Smith's fire would have done the job, but didn't, because the other fire caused the loss first. Having the capacity to cause the loss ought not to substitute for actually causing it. Jones, whose negligence caused the damage, should be liable for it, even though the "but for" test fails. Smith, who didn't cause it, shouldn't be liable, even though his negligence would have caused the harm if Jones had not preempted him.

    This is like the case of Villain, who poisons his enemy's drink. Just as Enemy puts it to his lips, he is shot by Desperado. Villain tried to cause Enemy's death, and his means were sufficient to the purpose. But the poison never came into operation, since Enemy died without drinking. We might punish Villain for attempted

murder at criminal law, but he is not the cause of Enemy's death.

d. Jones could argue that, while he burned down the barn, he only deprived Menlove of a few minutes of use of the barn. If he (Jones) had not been negligent, Smith's fire would have burned the barn several minutes after his did. So what damage has he actually caused to Menlove . . . just the use of the barn for the few minutes before Smith's fire arrived.

Surely, this argument must fail . . . I think. If it is accepted, Menlove recovers almost nothing from Jones, and nothing at all from Smith, though he is deprived of all use of his barn. Jones burned down *the barn*, and should pay for it, even if some other cause would have destroyed it later. Compare a case in which Ace and Deuce each go looking for Menlove, to shoot him. Ace finds him and shoots him, and Deuce arrives on the scene minutes later with evil intent. Who killed Menlove?

An Elemental Example

13. Of course Wright caused Morales's death; the example basically says so. Morales died of his injuries, not of the terminal disease. But for the accident, Morales would have been alive; because of the accident, he died. Wright is a tortfeasor and liable for Morales's death.

The fact that Morales was terminally ill is relevant, however, to the fourth element of the negligence claim, *damages.* The measure of damages in Morales's case will be the loss caused by Wright's tort. But for Wright's negligence, Morales would have lived, but only for a few weeks. Wright will be liable, but the damages for wrongful death will be limited by Morales's short life expectancy.

So, you ask, how do you square this example with the last? Well, I think if Menlove's barn was on its last legs, Jones would only pay its value at the time, analogous to this situation. But if Menlove's barn was in the full flower of its useful life, Jones would pay full value. I am not entirely clear on this, so I welcome your input.

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1. For an example of just how difficult such counterfactual analysis can be, consider the case of a plaintiff attacked by an emotionally unstable mental patient taking Prozac. Plaintiff claims that the drug caused the assailant's assaultive conduct, yet the very reason the patient was on the drug was for emotional problems. Even if the plaintiff shows that Prozac can cause aggressive behavior, it is a

speculative enterprise indeed to show that it, rather than the patient's underlying condition, caused her assault.

2. For a sophisticated discussion of "but for" causation, and a suggested alternative (but basically consistent) test, see R. Wright, Causation, Responsibility, Risk, Probability, Naked Statistics, and Proof: Pruning the Bramble Bush by Clarifying the Concepts, 73 Iowa L. Rev. 1001, 1018-1023 (1988).

3. Because the "substantial factor" test requires the factfinder to make a judgment about how much causal contribution is "enough," it arguably melds the actual causation inquiry with proximate cause analysis. See R. Wright, Causation in Tort Law, 73 Cal. L. Rev. 1735, 1782-1783 (1985). ("[T]he question of limiting liability due to the *extent* of contribution rather than to the absence of any contribution, is clearly a proximate-cause issue of policy or principle, rather than an issue of actual causation (contribution to the injury).")

4. For a review of the debate about the relation between the two tests, see Wright, 73 Cal. L. Rev. at 1781-1784.

5. In addition to the puddle, there are many other nonnegligent causes of this accident. Saarinen's decision to drive caused it; the construction of the two drivers' cars caused it; the invention of the wheel caused it. Clearly, Corbusier should not be able to exonerate himself by showing that there were such other contributing factors.

CHAPTER 11

Risks Reconsidered: Complex Issues in Establishing Factual Cause

INTRODUCTION

Most law students think of proximate cause as the Heartbreak Hill of the Torts marathon, the toughest problem in a course replete with tough intellectual issues. However, the real action today is in the cause-in-fact arena, where tort law is constantly butting heads against an intractable problem: the limits of human knowledge about cause and effect. There is a world of difference between a defendant causing injury to a plaintiff, on the one hand, and the plaintiff *proving* that she did, on the other. This chapter, for those of you courageous enough to press on, addresses a number of cutting-edge factual causation issues often encountered in the Torts course — and increasingly, in the practice of tort law.

CAUSATION IN DES CASES: WHO DONE IT?

The first complex causation problem is illustrated by the DES cases. DES is a drug that was widely prescribed for several decades to prevent miscarriage, but which has subsequently been shown to cause various medical problems in

the daughters of women who took it during pregnancy. Because DES was marketed in chemically identical form by over 200 companies, a plaintiff injured by DES exposure faces a very difficult cause-in-fact problem: Even if all companies were negligent for marketing the drug, only one of them — the manufacturer that manufactured the DES pills her mother took — caused her injuries.

This is an enormously difficult proof problem, but there is nothing *conceptually* hard about it. Evidently, the health problems DES daughters experience are clearly traceable to DES exposure, so there is no difficulty in determining *what* caused their injuries. The problem is determining *who* caused it, since so many drug manufacturers sold DES for use during pregnancy. If we could summon Solomon, our omniscient time traveler, he could solve this problem easily enough, by going back to watch the relevant events and jotting down the name of the manufacturer on the bottle.

Sometimes the plaintiff can solve it, too. She may be able to identify the manufacturer if her mother recalls the shape, color, or brand of DES she took.[1] In many cases, however, the evidence will show that the mother took DES, but not which manufacturer's pill it was. In such cases, the plaintiff will be unable to establish that a particular manufacturer caused her injury. If she is held to the usual burden to prove causation, she must lose.

While this result appears inexorable under traditional tort theory, the California Supreme Court in *Sindell v. Abbott Laboratories*, 607 P.2d 924 (1980), found it unacceptable. To avoid this outcome, the court fashioned the "market share" theory, which allows the plaintiff to sue a number of manufacturers and — assuming they are found at fault — hold each liable for part of the plaintiff's damages. Under the *Sindell* approach, each manufacturer's share of the liability is determined by the proportional share of DES it sold in the relevant market area.

Sindell does not solve the cause-in-fact problem . . . it redesigns it. Instead of asking who caused the particular plaintiff's damages, it asks who contributed to the creation of a general risk of injury, and distributes the damages among those risk creators in proportion to the amount of risk each created. It is entirely clear under *Sindell* that defendants will be held liable to a plaintiff *even though they did not cause her any harm.* If Sindell sues six manufacturers who sold DES in the relevant market, but her mother only took one brand of DES, five of them will be held partially liable without having caused the injuries for which she sues.

On the other hand, if all DES daughters sued all manufacturers under the market share approach, the manufacturers would, theoretically, pay in proper proportion to the injuries they caused. A manufacturer who made 10 percent of the DES sold would be held liable for 10 percent of each plaintiff's injuries. Since it actually caused *all* the injuries suffered by 10 percent of DES daughters, this should work out about right in the aggregate. Of course, all plaintiffs will not sue all defendants for their DES injuries, nor have all states (or even a majority) adopted the market share theory. Consequently, while in theory there is logic to the market share approach, its effect is rather haphazard in practice.

Market share liability looks more like a legislative solution to the causation problem than a judicial one: The court fashions a remedy that encompasses not only the party that actually caused the plaintiff's harm but also other parties who contributed to the general risk that harmed her. While it serves several of tort law's basic goals — compensation for the plaintiff and deterrence of negligent conduct — it arguably goes beyond the traditional role of courts in tort cases, by holding parties liable who caused no harm to the plaintiff before the court. But complex problems of modern life have forced courts to fashion such nontraditional remedies in a variety of contexts. While it is easy to criticize the California court's approach, the alternative — leaving plaintiffs without a remedy for negligent conduct, and defendants without an incentive to avoid it — isn't very satisfying either. In lawsuits, unlike philosophy classes, courts have to decide. Refusal to refashion traditional doctrine in cases like *Sindell* usually means that the plaintiff loses.

Since *Sindell*, courts have created some interesting variations on the market share approach. Here are three.

- In *Martin v. Abbott Labs.*, 689 P.2d 368 (Wash. 1984), the Washington Supreme Court held that a plaintiff may sue one DES manufacturer only. (Of course, she is free to sue more if she wishes.) If she proves that that manufacturer sold the drug in the relevant market area (that is, where her mother purchased the drug), and that DES caused her injuries, that defendant will be liable for the plaintiff's injuries.

  However, the defendant may implead (that is, bring into the action) other DES makers. If it does, all makers before the court are *presumed* to have equal market shares. Thus, the plaintiff need not shoulder the

difficult burden of establishing market shares. If the defendants offer no proof as to market share, they will each be held liable for a pro rata share of the plaintiff's damages. (If, for example, five are joined, each would be severally liable for one-fifth of the plaintiff's damages.) Any defendant that establishes that it had a smaller market share will pay according to that share. If this happens, the shares of the other defendants go up, so that plaintiff still recovers 100 percent of her damages.

- In *Abel v. Eli Lilly & Co.*, 343 N.W.2d 164 (Mich. 1984), the Michigan Supreme Court adopted an approach to DES liability modeled on *Summers v. Tice.* The court held that a plaintiff may recover by joining all defendants who might have sold the drug ingested by her mother. Any defendant may avoid liability by proving that it did not manufacture the DES that injured the plaintiff. Any maker who does not make such proof would be *jointly and severally liable* to the plaintiff for her entire damages.[2]
- The New York Court of Appeals has taken the most radical approach to market share liability. In *Hymowitz v. Eli Lilly & Co.*, 541 N.Y.S.2d 941 (1989), the court held that a plaintiff who proves that she was injured by her mother's ingestion of DES recovers from any defendant who participated in the *United States* market for DES. Recovery is in proportion to national market share. If less than all makers are before the court — which will virtually always be so — the plaintiff will recover less than full damages, since each maker pays only in proportion to its market share.

What makes New York's approach radical is that it uses national market share, *and bars any maker from proving that it did not make the DES that injured the plaintiff.* Suppose, for example, that Acme Drug Company proves that it never sold DES in New York, where the plaintiff's mother bought the drug. Or suppose it proves that its DES pills were blue, and the plaintiff's mother testifies that the pills she took were red. Under *Hymowitz,* Acme pays in proportion to its national market share, even though it conclusively establishes that it did not cause the plaintiff's injury:

> It is merely a windfall for a producer to escape liability solely because it manufactured a more identifiable pill, or sold only to certain drugstores. These fortuities in no way diminish the culpability of a defendant for marketing the product, which is the basis of liability here.

541 N.Y.S.2d at 950. This quotation from *Hymowitz* is enormously ironic. Common law courts for centuries have premised liability on causing the plaintiff's harm. Yet the *Hymowitz* court fairly casually concludes that it is "merely a windfall" to allow the defendant to avoid liability by showing it did no harm to the plaintiff!

Market share liability is a controversial doctrine. Many courts have refused to adopt any variant on *Sindell.* Rhode Island, for example, rejected it in a one-page rescript opinion. "We are not willing to adopt the market-share doctrine which has been accepted in the State of California in *Sindell v. Abbott Laboratories, Inc.* . . . We are of the opinion that the establishment of liability requires the identification of the specific defendant responsible for the injury." *Gorman v. Abbott Laboratories,* 599 A.2d 1364, 1364 (R.I. 1991). See also *Mulcalhy v. Eli Lilly & Co.*, 386 N.W.2d 67, 75 (Iowa 1986) ("awarding damages to an admittedly innocent party by means of a court-constructed device that places liability on manufacturers who were not proved to have caused the injury involves social engineering more appropriately within the legislative domain").[3]

The examples that follow illustrate the application — and some of the problems — of the market share approach to actual causation. The explanations begin on p. 226.

Examples

Share, or Share Alike?

1. Sindell sues nine DES makers in California. At trial, she introduces some proof that the drug was that of Acme Drug Company. In the alternative, she relies on the market share theory. If the jury concludes that Acme made the drug her mother took, what should it do?

2. Sindell sues four DES makers in California. At trial, she establishes that all defendants were negligent for marketing DES, and that their individual market shares were as follows: Dl 10 percent, D2 20 percent, D3 30 percent. D4 proves that it sold no DES in the relevant market at the time. The jury finds Sindell's damages to be $100,000. Under the *Sindell* approach, how much should each defendant pay?

3. On the facts of Example 2, what happens if D2 is unable to pay its share of the total liability?

4. You represent Sindell, and have decided to proceed on a market share theory in California. What problems would you foresee in proving the market shares of the various defendants?

Absent Tortfeasors

5. Assume that Sindell's mother bought DES in New York, and Sindell sues there after *Hymowitz.* One defendant, the Acme Drug Company, establishes that it never sold DES in New York, but that it did have a 10 percent share of the national market for DES at the relevant time. Is it liable?

6. Assume that Sindell sues in New York after *Hymowitz.* Assume that the Acme Drug Company proves that it did not sell DES at all at the time that Sindell's mother took the drug, but the plaintiff establishes that it did have a 20 percent share of the DES market two years later. How should its liability be determined under *Hymowitz*?

7. Assume that Sindell sues one DES maker, the Acme Drug Company, in Washington State (Washington's approach to market share liability is described on p. 215). Acme brings three others, Beta, Gamma, and Phi Corporations, into the suit. Phi establishes that it never sold DES in the relevant market. Beta establishes that its share of the market was 6 percent. The other defendants offer no evidence on their market shares. Under the approach adopted by the Washington Supreme Court in *Martin,* what would each defendant owe?

8. Suppose on the facts of Example 7, that Acme proved its share was 15 percent, Beta proved its was 6 percent, Gamma proved its share was 10 percent, and Phi proved it had no market share. How much would each defendant pay under the Washington market share approach?

9. On the facts of Example 7, what would the plaintiff recover under the Michigan approach in *Abel v. Eli Lilly* (p. 215), assuming again that she cannot prove which manufacturer sold the DES taken by her mother?

Assume that the plaintiff's damages are $100,000.

CAUSATION IN MULTIPLE EXPOSURE CASES

A somewhat different problem is posed by cases of multiple exposure to a dangerous substance such as asbestos. Suppose, for example, that Corbusier worked as a pipe insulator in a shipyard for 30 years and was exposed over those years to various asbestos products sold by six companies. These products might include insulating materials, fireproofing, floor and ceiling tiles, and others. Eventually, he contracts asbestosis, a disease of the lungs which has been definitively linked to breathing asbestos fibers.

As in the DES cases, there is no problem here in ascertaining the mechanism that caused the harm. As the name indicates, abestosis is a "signature disease"; medical experts can determine from a physical examination that Corbusier got his disease from asbestos exposure.[4] The problem here is another who-done-it problem, but of a different sort. Here *all* the defendants exposed the plaintiff to the injury-causing agent.

If it were clear that *cumulative* exposure to all the asbestos was necessary to cause Corbusier's disease, the "but for" test would dispose of this problem. The plaintiff could argue that, but for the negligence of each defendant, he would not have gotten asbestosis. Each would be liable under traditional causation principles.

In most cases, however, the evidence will *not* show that each defendant's product was essential to causing the disease. The plaintiff's expert will testify that breathing asbestos causes asbestosis and that the more you breathe, the greater the chances of contracting the disease, but that a fairly brief exposure can suffice. She will be unable to state in Corbusier's case how much was necessary, though she will state with certainty that asbestos exposure caused the harm. On these facts, each defendant can argue that "but for" causation is not established because, even if its product had not been at the site, Corbusier would have contracted asbestosis from the other defendants' products anyway.

In this type of multiple exposure case, most courts have invoked the "substantial factor" test for cause in fact. The jury is left to consider, based on the evidence of each defendant's contribution to the risk, whether its product

was a substantial factor in causing Corbusier's disease. If the exposure to Company #6's product was minimal, the jury may conclude it did not meaningfully contribute to the harm. But if Company #6's product was there on a consistent basis and its asbestos particles were more than a minimal percentage of the exposure, they would be free to conclude that it had "caused" Corbusier's disease, even though he probably would have contracted it from the other manufacturers' products anyway. The test allows the jury to find the defendant liable if it contributed significantly to the *risk* of plaintiff's injury:

> We therefore hold that . . . in a trial of an asbestos-related cancer case, the jury should be told that the plaintiff's or decedent's exposure to a particular product was a substantial factor in causing or bringing about the disease if in reasonable medical probability *it contributed to the plaintiff or decedent's risk of developing cancer.*

Rutherford v. Owens-Illinois, Inc., 941 P.2d 1203, 1206 (Cal. 1997) (emphasis added).

Using the "substantial factor" test in such cases is hardly an intellectually rigorous solution to the problem. "The [substantial factor] test has become a default, resorted to when nothing else works, and juries are afforded virtually no guidance as to how much of a causal connection is necessary to satisfy the test." G. Boston, Toxic Apportionment: A Causation and Risk Contribution Model, 25 Envtl. L. 549, 630 (1995). The jury cannot determine which asbestos particles actually injured the plaintiff. Even Solomon with his time machine would have tough sledding trying to reconstruct the etiology of the disease. So the question is, what should tort law do in the absence of better knowledge about causation? On balance, holding the defendants liable under the substantial factor approach, based on meaningful contribution to a general risk, is probably more satisfactory than denying liability simply because the other manufacturers' asbestos might have caused the disease anyway. See Restatement (Third) of Torts: Liability for Physical and Emotional Harm §27 cmt. g (in multiple exposure cases, each exposure is a factual cause of the harm, though minimal exposures may be held not liable on policy grounds).

Examples

Substances and Substantial Factors

10. Are the asbestos cases more like *Summers v. Tice* (discussed in the previous chapter at p. ***) or *Anderson v. Minneapolis, St. Paul and St. Marie R.R. Co.* (discussed in the previous chapter at p. ***)?

11. Why not use a market share approach to liability in the asbestos cases?

12. Suppose the plaintiff proves exposure to the asbestos products of five defendants, and the jury concludes that each was a "substantial factor" in causing his asbestosis. What would the plaintiff recover from each defendant?

13. Suppose that the evidence shows that Asbestos Products, Inc. contributed about 4 percent to the asbestos particles in the work area where the plaintiff worked during his years of exposure to asbestos. Should it be held liable to the plaintiff? Suppose it contributed one-tenth of 1 percent?

Comparing Causation

14. Five mining companies release saltwater into various streams that flow into Farmer Jones's pond. Over a period of time, the salt level rises to the point where his fish die.
    a. How is this like the asbestos cases?
    b. How would you argue that this is different from the asbestos cases?

CAUSATION IN TOXIC EXPOSURE CASES

A third thorny cause-in-fact problem arises in cases like the Agent Orange case, which involve exposure to toxic chemicals. The Agent Orange plaintiffs were veterans who were exposed to dioxin in Vietnam and subsequently developed a number of skin diseases they claimed were caused by the exposure. Medical science can sometimes establish that persons who have been exposed to toxic substances are more likely to contract certain diseases, but such evidence will not always establish causation in tort cases. Suppose, for example, that epidemiological studies demonstrate that individuals

exposed to quasimegamethane are more likely to contract liver cancer. The studies might show, perhaps, that there are 10 cases of liver cancer per 100,000 among the general population, but 14 cases per 100,000 among those exposed to quasimegamethane. Suppose further that Wren was exposed to quasimegamethane and that he subsequently contracts liver cancer.

There are two problems with using this evidence to prove that quasimegamethane caused Wren's cancer. First, although liver cancer is *correlated with* exposure to quasimegamethane, this does not necessarily prove that quasimegamethane has the capacity to *cause* liver cancer. Here is a nice example to prove the point: Although production of pig iron in the United States and the birth rate in Great Britain followed the same linear increase, it is relatively clear that the one did not cause the other![5] Similarly, exposure to quasimegamethane could be correlated to liver cancer for many reasons, even though it did not cause the cancer. Perhaps the lives of factory workers are more stressful for economic reasons, so that they smoke more. Or perhaps they had poorer nutrition as children, and this increases their rate of liver cancer.

If studies are carefully done to correct for such extraneous factors, they may establish that quasimegamethane *can* cause liver cancer.[6] Doubtless, epidemiologists would accept strong correlations based on careful studies as proof of causal capacity. However, even assuming that the plaintiff establishes causal capacity, there remains the further question whether quasimegamethane caused *Wren's* cancer. The statistics given show that people also get liver cancer *without* being exposed to quasimegamethane. Indeed, of the 14 cancer victims in the group exposed to the toxin, presumably 10 contracted cancer from other causes: There is no reason to believe that the rate of cancer from background causes would be lower in the exposed group. Thus, even if quasimegamethane *can* cause liver cancer, this does not show that it *did* cause Wren's.

In the first two situations discussed in this chapter, the mechanism of harm was clear but the identity of the proper defendant was problematic. In these cases, by contrast, the mechanism of harm is itself uncertain both on the general level ("Can quasimegamethane cause liver cancer?") and on the particular level ("Did quasimegamethane, rather than one of the other possible causes, cause Wren's cancer?"). This is a what-done-it problem, and a very difficult one indeed.

Sometimes the plaintiff in these cases can provide evidence to link her

disease to a particular toxic agent. The medical evidence may establish that the agent can cause the disease, and that it runs a different course in patients who contract it from that agent, or that these patients have unique symptoms that support an inference that the agent induced it. She might show that the disease appears after an unusual latency period if it is caused by the defendant's chemical, and that hers did as well, or that the diseased cells actually look or act a little differently if they are caused by the chemical. Evidence of this sort allows the jury to infer that *this plaintiff* contracted the disease from the exposure instead of other known causes for which the defendant is not responsible.

In other cases, however, the plaintiff is only able to show that she was exposed to a toxic chemical and that persons exposed to it contract the disease at an increased rate. Some courts would refuse to allow a jury to find the defendant liable based solely on such proof. Even if statistical evidence establishes a general causal relationship between the chemical and the disease, this does not establish that *this* plaintiff contracted the disease from the exposure. See, e.g., S. Gold, Causation in Toxic Torts: Burdens of Proof, Standards of Persuasion, and Statistical Evidence, 96 Yale L.J. 376, 379-380 (1986). If courts require "particularistic evidence" that the individual plaintiff's disease was caused by the chemical rather than background causes, the plaintiff may lose even though the exposure caused by the defendant substantially increased their risk of getting the disease.

This is a very tough problem. Some commentators have suggested a risk creation approach to it, analogous to *Sindell*'s approach to DES liability. Under this approach, the manufacturer would be liable to each liver cancer victim who had been exposed to quasimegamethane for a proportion of her damages, reflecting the probability that the exposure caused the disease. See, e.g., D. Rosenberg, The Causal Connection in Mass Exposure Cases: A "Public Law" Vision of the Tort System, 97 Harv. L. Rev. 849, 859 (1984) (advocating proportional liability in toxic exposure cases).

Most courts have not adopted a proportional approach, however, or automatically imposed or rejected liability based on statistical probabilities derived from epidemiological evidence. Instead, courts have generally admitted careful studies in evidence as relevant to the question whether the toxic substance is capable of causing the plaintiff's disease (general causation) and whether it actually did cause it (specific causation). Courts then look to expert testimony about the individual plaintiff that may

undermine or strengthen the inference of causation based on the statistics. A plaintiff may bolster her case, for example, by showing (in addition to a statistical increase in disease due to exposure to the substance) that she lacks genetic factors suggesting alternative causes, that she has not engaged in other conduct (such as smoking) likely to lead to the disease, that she had extensive exposure to the toxic agent, or that the disease appeared within an expected "latency period" after exposure to the agent. Such testimony by the medical witnesses or experts may support an inference, beyond bare statistical likelihood, connecting the plaintiff's exposure to her injury. Courts are likely to find such "particularistic evidence" sufficient to allow the plaintiff's case on causation to go to the jury.

Examples

Science and Solomon

15. Quinn worked for 11 years at Acme Company's plant. During those years his hands often came into contact with the chemical pseudomonomethane. After he left Acme, he developed skin cancer on his hands. He believes that the cancer was caused by his exposure to pseudomonomethane. However, since pseudomonomethane is a rare chemical, no epidemiological studies have been done to determine whether it causes cancer. How will Quinn prove that Acme is liable?

16. Employees of Beta Corporation are exposed to quasimegamethane during their employment there, and later contract liver cancer. Suppose that a careful epidemiological study shows that exposure to quasimegamethane increases liver cancer rates by 40 percent. The disease strikes 10 people per 100,000 in the general population, but the study shows that 14 per 100,000 persons exposed to quasimegamethane contract liver cancer.
    a. If Nunez, one of the employees, sues for damages, should she be allowed to recover based on the study?
    b. Assume that the jurisdiction would not allow recovery to a plaintiff based on this evidence, unless she presented some proof that her individual disease was caused by quasimegamethane. If 14 Beta

employees with liver cancer sued Beta and the study is the only evidence they have, how many would recover?

c. Based on the scientific evidence, how many of these 14 plaintiffs can we deduce were harmed by exposure to quasimegamethane?

d. If we view deterrence and compensation as major goals of the tort system, what is the problem with denying recovery to these plaintiffs?

17. Suppose we allow each of the plaintiffs in Example 16 to prove her case based on the study, and send each case to the jury with a "substantial factor" instruction. What should the jury do? What would you do if you were on the jury?

18. What would happen in these 14 cases if we used a percentage-risk approach to the problem, under which each plaintiff recovers in proportion to the risk that her disease was caused by Beta's conduct?

Double Indemnity

19. Suppose that the epidemiology study shows that exposure to quasimegamethane increases the risk of liver cancer by more than two? Suppose, for example, that there are 10 cases per 100,000 in the general population, but 23 cases per 100,000 in the population of persons exposed to quasimegamethane. If 14 employees sued Beta for causing their cancer, how many would likely recover?

20. Suppose that Nunez produces a credible expert who testifies, with supporting evidence from the medical literature and her own experience, that liver cancer, when caused by quasimegamethane, attacks a particular part of the liver and follows an unusual disease pattern. Surgery shows that Nunez's disease follows this pattern. However, assume that the epidemiological studies indicate that quasimegamethane only increases the risk of liver cancer by 20 percent. Should Nunez be allowed to get to the jury on the issue of whether quasimegamethane caused her disease?

CAUSATION IN LOSS-OF-A-CHANCE CASES

Another difficult cause-in-fact problem is illustrated by medical malpractice cases in which the defendant's negligence has reduced a plaintiff's chances of survival or cure. In *Herskovits v. Group Health Cooperative of Puget Sound*, 664 P.2d 474 (Wash. 1983), for example, the decedent died of lung cancer. The evidence indicated that he had a 39 percent chance of surviving with prompt diagnosis of his cancer, but that the defendant's negligent delay in diagnosing it reduced his survival chance to 25 percent. The suit was for wrongful death.

Naturally, the defendant in cases like this will argue that he did not "cause" the harm. It is impossible to say that Herskovits would have lived but for the delay in diagnosis, since, even if his cancer had been promptly diagnosed, chances were better than even (61/39) that he would have died.

This loss-of-a-chance causation problem, like other "but for" dilemmas, requires the factfinder to compare what did happen to what would have happened if the defendant had not been negligent. This is a very speculative endeavor: The statistics suggest that the outcome *might* have been different absent the defendant's negligence, but probably would not have been.[7] Yet the plaintiff takes little solace from these cold statistics. She still feels she has lost something very valuable, a significant chance that her husband would still be with her. In *Herskovits* for example, the late diagnosis deprived the decedent of a 14 percent chance to survive.

The majority in *Herskovits* held that the causation issue should go to the jury under a "substantial factor" instruction. That is, the jury would be asked, based on this statistical evidence, to decide whether the late diagnosis contributed to the decedent's death or whether he would have died even if diagnosed immediately. This is not a very satisfactory solution to a vexing problem: How can the jury possibly place Herskovits in the 14 percent group that would have lived with earlier diagnosis, as opposed to the 61 percent who were doomed either way? The substantial factor approach simply licenses the jury to find for the plaintiff on intuitive grounds, despite the likelihood that the negligence did not change the outcome.

There is an obvious relationship between this loss-of-a-chance problem and the toxic chemicals problem just discussed. There, the epidemiological evidence established an increased risk of harm, but could not show whether

the chemical had injured the individual plaintiff. Here, the statistical survival evidence establishes that the defendant's negligence decreased the plaintiff's chance of survival, but cannot resolve the issue of whether she would have survived if promptly diagnosed.

Here, as there, some scholars have suggested a proportional approach to the problem: If a defendant reduced the decedent's chance of survival by 15 percent, she should be held liable for 15 percent of the wrongful death damages. See J. King, Causation, Valuation, and Chance in Personal Injury Torts Involving Preexisting Conditions and Future Consequences, 90 Yale L.J. 1353 (1981). In this group of cases, unlike the toxic exposure cases, this percentage solution has caught on with the courts. A good many have chosen to treat the injury as the *lost chance*, and allow the jury to value the damages in proportion to the chance lost due to the defendant's negligence.

This solution is subject to the same objection here as in the toxic exposure cases: It overcompensates in every case in which the decedent would have died anyway, and undercompensates in every case where the delayed diagnosis caused the death. The examples below explore the implications of the loss-of-a-chance approach.

Examples

Chance Occurrences

21. Sven goes to Dr. Kildare complaining of indigestion and tightness of the chest. Kildare negligently fails to diagnose a heart attack. Later that day, Sven goes to the emergency room and is diagnosed and treated for a heart attack. However, he dies three days later.

    The medical testimony establishes that Sven had a 40 percent chance of recovery had he been diagnosed when he first saw Kildare. However, by the time he went to the emergency room, the progress of the heart attack had reduced his chance of recovery to 15 percent. Sven's survivors sue Kildare for wrongful death.

    a. If the court retains the traditional "but for" approach to causation, how will the case come out?

    b. If the court sends the case to the jury under a "substantial factor" instruction, how will it come out?

c. If the court applies the “lost-chance” approach to the case, how will it come out?

22. Assume that Dr. Kildare made the same mistake on 100 patients, and the survivors of the patients who died sued in each case.
    a. How many would recover under the traditional causation standard?
    b. How many would recover under the loss-of-chance approach?

23. Assume that the medical testimony is that Sven would have had a 60 percent chance of recovery with prompt treatment, which was reduced to 40 percent due to the delay. Sven dies and his family sues Kildare.
    a. What will happen if the court applies the traditional causation standard?
    b. What will happen if the court applies the loss-of-chance approach?

Judge Fudd’s Dilemma

24. Yamato goes to Dr. Kildare, complaining of a lump in her breast. Kilclare fails to take a biopsy. Later, after the lump has grown, Yamato goes to Doctor Rivera, who finds an advanced malignant tumor. The tumor is removed, and no sign of cancer is found in the surrounding tissue. However, Rivera advises Yamato that, because of the advanced stage of the tumor, she has a 50 percent risk of a recurrence. Had the tumor been taken out earlier (when she went to Kildare) the risk would have been 20 percent. Yamato sues Kildare, in a jurisdiction that has adopted the lost-chance approach to damages. Should the Honorable Fudd dismiss the case?

Explanations

Share, or Share Alike?

1. Obviously, the jury should find Acme liable for her full damages (assuming, of course, that they find Acme was negligent) and dismiss the claims against the other manufacturers. The market share theory provides a back-up alternative where the plaintiff cannot prove which

maker caused the harm. If the jury finds that one defendant caused it, that defendant should pay, and the others should not.

2. Under *Sindell*, where the plaintiff sues defendants representing "a substantial share" of the market, they are liable in proportion to their market shares, unless a defendant proves that it did not sell DES in the relevant market. Since D4 has made that showing, it is not liable. The other three, however, are liable for their market shares.

   So what do they pay? There are two possibilities: They could each pay an appropriate proportion of $100,000, the total damages. Under this approach, Dl would pay 10/60ths of $100,000, D2 would pay 20/60ths, and D3 would pay 30/60ths. Sindell would recover fully, though she only sued four makers, and there are many more out there who could have supplied the drug.

   Alternatively, *Sindell* may be interpreted to require each defendant to pay its market share percentage times the total damages. Here are the numbers:

Dl pays 10 percent of $100,000	=	$10,000
D2 pays 20 percent of $100,000	=	$20,000
D3 pays 30 percent of $100,000	=	$30,000
Sindell recovers		$60,000

   It was unclear after *Sindell* which of these methods the California Supreme Court intended. In *Brown v. Superior Court of San Francisco,* 751 P.2d 470 (Cal. 1988), the court opted for the second. Under this approach, plaintiff does not recover her full damages, because the defendants found liable do not absorb the market shares of absent defendants.

3. The point of *Sindell* is that each maker would pay in proportion to the risk it created by marketing DES. Each is only *severally* liable for its share of the market; it is not liable for other defendants' shares. Thus, if D2 cannot pay, plaintiff loses this part of the judgment.

4. The first problem you would face is defining the market. Is the market the particular pharmacy plaintiff's mother bought from? The town where she lived? The metropolitan area? Or the state? The individual pharmacy seems like the best choice, but this information may not be available. If a local area is used, there will be serious proof problems: For example, many drug makers may have sold DES to wholesalers, who redistributed the drug to pharmacies. They may have filled orders with DES from various manufacturers, and may well have no remaining records of what was sold where. The same proof problems are likely if a state market area is used. To make matters worse, the plaintiff's mother may have bought the drug in a distant state. Thus, actually *proving* a market area under *Sindell* could be extremely complicated and expensive.[8] Doubtless, this entered into the thinking of the New York Court of Appeals in choosing a national market area. The total national sales of various makers will be easier to reconstruct. And, once it has been done in a few cases, the parties in later cases will likely stipulate the market shares, thus dramatically simplifying the trial of most market share cases.

Absent Tortfeasors

5. Yes, it is. Even though Acme conclusively establishes that it could not have caused the plaintiff's injury, it will pay 10 percent of her damages. New York has chosen to impose damages based on the amount of risk each maker created, *nationally*, even where it is clear that some of them created no risk to the plaintiff personally. That is why defendants cannot exonerate themselves under *Hymowitz* by showing that they did not make the drug taken by the plaintiff's mother.

6. This example introduces another problem posed by the market share approach: Manufacturers entered and left the market for DES at various times. Here, Acme created a risk of DES injuries, but not at the time the plaintiff's mother ingested the drug. If a court decides to base liability on risk creation, rather than specific causation of the plaintiff's injury, it seems that Acme ought to pay in this case. Under *Hymowitz*, it pays even if it was not in the market at the particular *place* where the drug was sold. Why shouldn't it pay here, even though it was not in the

market at a particular *time,* so long as it contributed to the overall risk posed by the sale of DES? As the *Hymowitz* court held, "[W]e choose to apportion liability so as to correspond to the overall culpability of each defendant, measured by the amount of risk of injury each defendant created to the public-at-large." 541 N.Y.S.2d at 950.

If we are looking to the "overall culpability" of each defendant, it seems we ought to look at the total DES sold by each defendant over the entire period DES was marketed, and convert that to a percentage of the total DES sold by all makers during that entire period. Acme would pay that percentage, even though it did not sell DES at the time plaintiff's mother took it. Under this logic, Acme could be held liable, though it never sold DES in New York and never sold it anywhere when plaintiff's mother took the drug.

7. Phi Corporation owes nothing. By proving it did not participate in the Washington market at the relevant time, it establishes that it did not cause the plaintiff's injury. In Washington (unlike in New York), this bars recovery.

Beta owes the plaintiff 6 percent of her damages. Under the Washington scheme, makers who prove their market shares pay in proportion to those shares.

The dicey part of the analysis concerns Acme and Gamma. Since they have not presented proof of their market shares, they are presumed to have equal market shares, and to have the entire market except for Beta's 6 percent. Thus, they are each presumed to have 47 percent of the market (one half of 94 percent). Each will pay 47 percent of the plaintiff's damages.

Note several points about this: First, under the Washington approach, the plaintiff doesn't bear the burden of proof on market share; the defendants do. If they don't shoulder that burden, they are presumed to have equal shares of the market. Second, unlike in California, the plaintiff recovers fully, since the market shares of defendants who don't prove their actual share expand to cover the shares of makers who were not sued. Third, in Washington a plaintiff can sue just one maker. Defendants then have a strong incentive to implead other makers, to reduce their presumptive market shares.

8. Here, the defendants have overcome the presumption of equal shares, so each would pay according to its market share. Acme would pay 15 percent of the plaintiff's damages, Beta 6 percent, Gamma 10 percent, and Phi would pay nothing. Plaintiff would recover only 31 percent of her damages. However, if she could locate one defendant unable to establish its market share, that defendant would be liable for the remaining 69 percent.

9. Under Michigan's approach, all makers who can't prove that they were not in the market are jointly and severally liable for the plaintiff's full damages. Thus, Acme, Beta, and Gamma would be jointly and severally liable to Sindell for $100,000. Under contribution principles, of course, they will ultimately share the loss.

   There is language in *Abel*, however, that suggests that the plaintiff must sue "all the possible defendants" to invoke this form of market share liability. 343 N.W.2d at 174. This is based on the rationale of *Summers v. Tice*, 199 P.2d 1 (Cal. 1948), which held that all negligent parties must be before the court before shifting the burden of proof. In the DES context, this requirement will be almost impossible to meet, since many DES makers are out of business, have been bought out, or have gone bankrupt.

Substances and Substantial Factors

10. These cases are closer to *Anderson* than to *Summers.* In *Summers* there was only one cause, but the plaintiff was unable to prove which hunter it was. In *Anderson*, there were two sufficient causes of the harm, and the defendant argued that he should get off because the plaintiff would have suffered the same harm if his fire had not been present. The harm was "overdetermined," in the sense that, if the one fire hadn't caused it, the other would have.

    Similarly, in the asbestos exposure cases, the plaintiff's injury is also overdetermined. If any one defendant's asbestos had not been at the worksite, the others would probably have sufficed to cause the plaintiff's disease anyway. The problem is, if we let any one defendant off the hook on this basis, they all get off. *Anderson's* substantial factor approach avoids that unpalatable result.

11. In the DES cases, all defendants marketed exactly the same product, and the plaintiff's mothers (presumably) only took one defendant's pill. The problem is simply identifying which defendant made the offending product. It can be said, with approximate fairness, that each created risk to the public in direct proportion to its market share.

    In the asbestos cases, however, the plaintiff's injury was usually caused by cumulative exposure to the asbestos in the products of several defendants. In addition, asbestos products are quite different, and impose quite different risks. For example, in some products the asbestos is permanently fixed in tiles or other adhesives, and is seldom released into the atmosphere. In others, however, the particles are "friable," that is, easily broken up and released, posing a much greater risk.

    Last, asbestos exposure takes place over time, often decades. Over such long periods asbestos products entered and left the market, or a particular workplace. Thus, it would be virtually impossible to reconstruct a single "market" for asbestos. For these reasons, courts have generally rejected market share analysis in asbestos cases.

12. If the jurisdiction retains joint and several liability, under which each defendant that caused the harm is fully liable, the plaintiff could recover his entire damages from any one of the five defendants.[9] This is in marked contrast to market share liability, which holds each defendant severally liable only in proportion to its percentage of the market.

13. Under the substantial factor standard, this defendant probably could be held liable. Most courts have not set a threshhold minimal percentage requirement for finding a defendant liable under the substantial factor test. Indeed, it would be hard to ascertain such a percentage, given the variety of asbestos products involved, the differences in their toxicity, and the great difficulty in reconstructing working conditions decades after the fact. Some courts have required the plaintiff to establish that they worked regularly in proximity to the defendant's product to get to the jury against that defendant. See, e.g., *Sholtis v. American Cyanamid Co.*, 568 A.2d 1196, 1206-1208 (N.J. Super. Ct. App. Div. 1989). Other courts have rejected even this requirement, in light of evidence that a minimal exposure can cause asbestosis.[10]

    At some point, however, a defendant's contribution to the risk may

become so small that it is inappropriate to hold it liable, even though it did contribute to the risk that caused the injury. The substantial factor test allows the jury to reach that result; they can simply conclude, if Asbestos Products contributed one-tenth of 1 percent of the asbestos, that its product was not a "substantial factor" in causing the plaintiff's disease, and render a verdict in its favor.

The Third Restatement of Torts would reach the same result by a different analysis. It would conclude that such a trivial contribution to the risk is not a legal cause of the resulting harm. Thus, it would reject liability on proximate cause grounds rather than actual cause grounds. The drafters reason that this defendant's product may in fact be an actual cause, though a minor one. The reason to exonerate Asbestos Products is that its conduct was a trivial contributing factor, which is a judgment about the appropriate contours of legal responsibility, not a judgment about factual causation. See Restatement (Third) of Torts: Liability for Physical and Emotional Harm §36 and illus. 1.

Comparing Causation

14. a. This case is like the asbestos exposure cases, in that all the defendants have contributed to the exposure that caused the plaintiff's harm. All released salt into Jones's pond, though perhaps in varying amounts.

    b. In the asbestos cases, any one of the defendants' asbestos could have caused the harm even if the others were not present. We don't know — and never will — which defendant's asbestos actually caused it, or if they all did together. In this case, by contrast, the facts suggest that the harm resulted from the *cumulative* exposure to salt, so we can say that they all contributed to cause an indivisible harm: When the combined discharges reached a certain level, the fish died. Thus, the defendants would probably all be liable even under a "but for" standard.

Science and Solomon

15. Quinn probably won't recover from Acme. He bears the burden of proof, yet the evidence to tie the chemical to his disease simply doesn't exist.

Scientists can't study everything, and they simply haven't gotten around to pseudomonomethane. In the absence of proof that it causes cancer, it is hard to see how Quinn can win, even if the chemical really did cause it.

As the introduction suggests, Quinn will probably offer medical testimony that his cancer was caused by exposure to pseudomonomethane. Although courts have noted that scientific studies are not always necessary to support a finding of causation *(Ferebee v. Chevron Chemical Co.*, 736 F. 2d 1529, 1535-1536 (D.C. Cir. 1984)), Quinn's expert will have to support her view on some accepted medical basis. If she could show that the symptoms are different if linked to pseudomonomethane, that would allow an inference of causation. But they probably aren't, or if they are, no one has shown that they are, since there are no studies on the drug. She might make the causal link by showing that the disease progresses differently, or appears sooner, or whatever, but how will she make such a showing without supporting scientific studies?

How about the fact that Quinn's disease appeared after his exposure to pseudomonomethane, and in the area where he sustained that exposure: Would that suffice to allow the jury to infer causation? Probably not, since this is a "post hoc, ergo proper hoc" argument: Because it occurred after the exposure, it must have been caused by the exposure. The argument has some force, but may not suffice to make a prima facie case. See, e.g., *Conde v. Velsicol Chemical Corp.*, 804 F. Supp. 972, 1020-1023 (S.D. Ohio 1992), in which the plaintiffs showed that their home was treated with Chlordane, that they became sick after the exposure, and that their symptoms abated when they moved out of the house. The court held that they had not established that Chlordane caused their injuries, in the absence of medical evidence that Chlordane could cause the symptoms they alleged. But see *Alder v. Bayer Corp.*, 61 P.3d 1068, 1089-1090 (Utah 2002) (temporal sequence, together with other evidence, supported proof of causation).

16. a. Here, there is no individual proof that any plaintiff's disease was caused by quasimegamethane, as opposed to the general background causes of liver cancer. Solomon might be able to go back and find the answer, but logically there is no way for the jury, based on the

study, to conclude that Nunez's disease was more likely caused by quasimegamethane than by the other, nontortious causes of the disease. Indeed, chances are 10 out of 14 that it was caused by something other than the defendant's conduct. If the only proof before the court was the statistical increase, it seems that a verdict should be directed for Beta.

b. If particularized proof is needed, none of these plaintiffs will recover. Each plaintiff will face the same problem, lack of individualized proof that *her disease* resulted from the defendant's conduct. The 40 percent increase in disease associated with exposure to quasimegamethane is not sufficient (even in a purely statistical sense) to establish that any plaintiff's disease was "more probably than not" caused by the exposure. (To establish that, as a matter of statistics, the increase would have to exceed 100 percent; exposure would have to more than double the risk of contracting the disease.)

c. The studies support an inference that 4 out of every 14 cases of liver cancer in persons exposed to quasimegamethane are caused by that exposure (the 14 cases minus the 10 expected from general causes). Thus, statistically speaking, we can say that 4 of these plaintiffs' injuries were caused by Beta's conduct.

d. If each of these plaintiffs loses her case for lack of particularized proof that her cancer was caused by the chemical, neither of these goals is served. Refusing recovery to each of these plaintiffs will lead to "under-deterrence" of tortious conduct, since Beta caused four cases of liver cancer, but is held liable for none. In addition, four deserving plaintiffs who suffered injury from Beta's conduct go without compensation.

17. This is not a viable solution to the causation enigma. There is simply no way for the jury to reach a reasoned verdict using a substantial factor test. They should probably, if acting rationally, find for the defendant in each case, since there is no logical way to conclude that its conduct probably caused any one of these cases of liver cancer.

More likely, they will find for the plaintiffs in all 14 cases, since Beta was negligent and caused harm to some. If so, then Beta's conduct will be overdeterred, since they probably only caused 4 cases of the

disease. In addition, the 10 plaintiffs who contracted the disease from background causes instead of quasimegamethane will be overcompensated.

18. Under this approach, the manufacturer should pay each plaintiff 4/14ths of her damages. If each plaintiff suffered $100,000 in damages, each would recover $28,571.

Arguably the manufacturer would pay the "right" amount in damages under this formula. The study shows that it caused 4 of these cases of liver cancer, for a total in damages of $400,000. It ended up paying 14 plaintiffs $28,571 each, which comes out to $400,000. Thus, this approach works well in terms of deterrence.

However, it does not work so well in serving tort law's compensatory purpose. Ten of these plaintiffs collect $28,571 too much, while four of them (those actually harmed by defendant's chemical) collect $71,429 too little.

Double Indemnity

19. In this example, the study shows that exposure to the chemical more than doubles the risk of contracting liver cancer. Thus, the jury can reasonably conclude — at least statistically speaking — that it is more probable than not that the exposure caused each plaintiff's disease. It seems likely that a court would allow the jury to find for each of the 14 plaintiffs on this evidence. See, e.g., *Merrell Dow Pharmaceuticals, Inc. v. Havner*, 953 S.W.2d 706, 715-719 (Tex. 1997); see generally Restatement (Third) of Torts: Liability for Physical and Emotional Harm §28 cmt. c(4).

This result is not inexorable, however. The plaintiff has still only presented purely statistical proof, not any evidence about her own disease. Some courts would probably still deny recovery, absent particularized proof about each individual plaintiff's disease, such as testimony about the extent, nature, and duration of the plaintiff's exposure to quasimegamethane, the exact nature of each plaintiff's symptoms, or the absence of other risk factors for the disease.

If the court allows each plaintiff to recover based on the study alone, the defendant will pay some plaintiffs who did not get the disease from

exposure to its chemical. Presumably some of these cases (roughly 10 out of 23) were caused by other causes, not by quasimegamethane.

20. In the last example, the statistical evidence demonstrated that exposure to quasimegamethane more than doubled the risk of contracting liver cancer. In this example, however, the studies alone would certainly not support a finding that Nunez "more probably than not" contracted the disease from exposure to quasimegamethane, since exposure only increases the risk of liver cancer by 20 percent.

    But here, while the statistics suggest that exposure to quasimegamethane only increases the risk of getting liver cancer by 20 percent, Nunez has evidence that strongly suggests that she is one of that 20 percent. The fact that the disease originated in an unusual spot, and followed an unusual pattern characteristic of quasimegamethane poisoning, provides "particularistic" evidence that Nunez contracted liver cancer from that chemical. Even if the studies suggest that people exposed to quasimegamethane are not very likely to contract liver cancer, they also support a conclusion that the agent is *capable of causing* liver cancer, and does so in about 20 percent of the cases. And Nunez has clinical evidence suggesting that it did lead to her disease. Thus, even though exposure to quasimegamethane does not "double the risk," her diagnostic evidence, together with the epidemiological evidence of "general causation," would likely suffice to make a submissible case that exposure to quasimegamethane caused her disease.

Chance Occurrences

21. a. Under the traditional approach, Sven's survivors would not recover. The chances are better than even (60 percent) that he would have died even if Kildare had diagnosed him immediately. Thus, a jury could not rationally conclude that it is "more probable than not" (the standard of proof in a civil case) that Sven would have survived with prompt treatment. If the medical evidence is to be believed, he probably wouldn't have.

    b. Who knows what the jury will do if the judge instructs them under the substantial factor test? They may take a sober look at the case, conclude that he probably would have died even if treated

immediately, and find for Kildare. But they may also decide that Kildare injured Sven by depriving him of a very significant chance of recovery, and find Kildare liable. If they do, it appears, based on the majority opinion in *Herskovits*, that Kildare would be liable for full wrongful death damages.

c. Under the lost-chance approach, the jury would determine the chance that Sven lost due to Kildare's negligence, and value that. To do this, they would determine full wrongful death damages and discount them by the percentage chance Sven lost due to Kildare's negligence. If damages for his death were $100,000, they would find Kildare liable for $25,000 (25 percent × $100,000).

22. a. Presumably, all plaintiffs would lose, since none can show that their decedent's death was more probably than not due to the negligence of Kildare, since in each case the chance of dying was 60 percent before the patient sought treatment. The irony, of course, is that with a hundred cases, we can say (with statistical confidence, anyway) that Kildare caused 25 deaths.

b. Under the lost-chance approach, the survivors in each suit would recover $25,000 (assuming, again, that damages in each case were $100,000). There will be 85 suits (remember, statistically speaking, 15 percent of Kildare's victims will survive even with delayed diagnosis). Kildare will pay $25,000×85, or $2,125,000 in damages.

If we could identify the 25 patients who died due to delayed diagnosis, each family would recover $100,000 from Kildare. So he would pay 25×$100,000, or $2.5 million. So he saves a little, but pays something like the full damages he has caused.

Once again, however, the approach looks dubious in light of tort law's compensatory goals. If all 100 families sue, 60 of them recover $25,000, even though Kildare caused no harm to their decedents — the 60 who would have died even with prompt diagnosis. The other 25 families, who have each suffered $100,000 in damages, recover only a quarter of that.

23. a. Under traditional causation analysis, Sven's family apparently would be able to recover full wrongful death damages in this case. If Sven had been diagnosed promptly, he had a better than even chance of

recovery (60 percent), but he died with late diagnosis. It appears that, prior to the development of the loss-of-chance doctrine, most courts would have sent this case to a jury under a traditional "but for" causation instruction. See, e. g., *Wilson v. Horton*, 2004 WL 2913562 (loss-of-chance theory inapplicable where initial chance of survival was 60 percent).

However, note that in this example Kildare deprived Sven of a smaller chance of recovery than in the prior examples. It is at least quizzical that Sven's family would only be entitled to a percentage recovery in Example 21c, yet here, because the numbers hover around the 50 percent mark, his family recovers full wrongful death damages.[11] At least one court has recognized that it is awkward to allow full recovery in a case like this, and opted for a lost-chance approach even though the initial chance of recovery exceeded 50 percent. See *DeBurkarte v. Louvar*, 393 N.W.2d 131, 137-138 (Iowa 1986).

b. A jurisdiction that applies the loss-of-chance approach in cases like Example 21, where the plaintiff's initial chance of recovery was less than even, to be consistent should also apply the loss-of-chance approach in a case like this. If the court so holds, recovery under the loss-of-chance approach may be less generous than under the traditional rule: Sven's family will recover 20 percent of wrongful death damages rather than full damages. In *Renzi v. Paredes*, 452 Mass. 38 (2008), the evidence suggested that the plaintiff had a better-than-even chance of recovery if she had been diagnosed properly, but that was reduced to a 30 percent chance of survival due to late diagnosis. The jury found the doctor not liable for wrongful death, but liable for loss of a chance.[12] The Massachusetts Supreme Judicial Court affirmed, finding the loss-of-chance analysis applicable to cases in which the initial likelihood of recovery exceeds 50 percent.

Judge Fudd's Dilemma

24. In this example, the plaintiff has incurred a 30 percent increased risk of *future* harm due to Kildare's negligence. However, she has not yet sustained the injury itself, just incurred the risk. How can the plaintiff

sue without having suffered an injury?

If a court adopts the loss-of-chance approach to cases like those just discussed, it is really compensating the plaintiff for incurring the risk, not for the disease itself. Thus, it ought not to matter that the risk is a future risk instead of a past risk. In both cases, the injury is the exposure to risk. To be consistent, shouldn't Judge Fudd allow Yamato to recover 30 percent of the damages she would incur from a recurrence of the cancer?

The cases in this chapter illustrate that some courts have recognized risk exposure as a harm in several contexts. Yamato's counsel should argue that she has been harmed by being exposed to the risk of future disease, and is entitled to recovery for the harm. See, e.g., *Cudone v. Gebret*, 821 F. Supp. 266 (D. Del. 1993) (approving submission of an increased risk claim to the jury under Delaware law).

Many courts would probably refuse to do this, even if they had adopted the lost-chance approach. After all, the plaintiff has not suffered the actual underlying harm — malignancy — just a risk of it. These courts might hold Yamato's suit premature, but allow her to sue later if her cancer recurs. Then, the case becomes a regular lost-chance case.

What would happen if the court allowed recovery, and then Yamato later did have a recurrence? Presumably, she would be barred from a second action, under traditional principles of res judicata. Even if she could bring one, presumably her recovery should be a loss-of-chance recovery (since the late diagnosis only increased the risk by 30 percent) and she would already have received that in her earlier action.

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1. The plaintiff hit a snag with this approach in *Krist v. Eli Lilly & Co.*, 897 F.2d 293 (7th Cir. 1990). Her mother testified repeatedly, under the defendant's examination, that the DES she had taken was a "little red pill." The defendant then introduced evidence that it had indeed sold DES in a little red pill, but that it had done so only *after* the mother's pregnancy.

2. The *Abel* approach may no longer apply, due to statutory abrogation of joint and several liability in Michigan. See *Napier v. Osmose, Inc.*, 399 F. Supp. 2d 811 (W.D. Mich. 2005).

3. Several states have also passed statutes barring adoption of market share liability. See Ga. St. §51-1-11(d) & (e); OH St. §2307.73(C).

4. Asbestos exposure also causes diseases, including cancer, that are not signature diseases (i.e., they have other causes as well, some known and some not known). In these cases, the plaintiff faces both a who-done-it problem and a what-done-it problem in establishing factual causation.

5. B. Black & D. Lilienteld, Epidemiologic Proof in Toxic Tort Litigation, 52 Fordham L. Rev. 732, 755 (1984) (citing G. Snedocor & W. Cochran, Statistical Methods 189 (6th ed. 1967)).

6. In the Agent Orange cases, the plaintiffs were ultimately unable to surmount even the first hurdle,

proving that Agent Orange had the capacity to cause their illnesses.

7. Even Solomon with his time machine couldn't help much with this one. Going back to watch the events wouldn't answer the real question: What *would have happened* if the doctor had diagnosed the cancer at an earlier stage?

8. "The administrative costs of determining each defendant's market share have been distressingly disproportionate to the compensation provided." Restatement (Third) of Torts: Liability for Physical and Emotional Harm §28 cmt. p.

9. In most states, if Defendant #1 paid the judgment, it would have a right to contribution from the other defendants, so that the judgment would be redistributed among them all.

10. See B. D. Masi, Comment, The Threshold Level of Proof of Asbestos Causation: The "Frequency, Regularity and Proximity Test" and a Modified *Summers v. Tice* Theory of Burden-Shifting, 24 Cap. U. L. Rev. 735, 748-751 (1995).

11. If we assume that Kildare reduced the chances of recovery of 100 patients from 60 to 40 percent, the families of all who died — there should be 60 of them — would recover under the traditional standard. Statistically speaking, however, he would only have injured 20 patients.

12. Apparently, the jury reasoned that they could not find the doctor liable for wrongful death where she reduced the likelihood of recovery by less than 50 percent, even though recovery went from "more probable than not" to less-than-an-even chance.

CHAPTER 12

Drawing a Line Somewhere: Proximate Cause

INTRODUCTION

One of the nice things about the inch is that virtually everyone who has anything to do with one agrees about what it is. While it is a purely human construct, an *idea*, we have achieved such wide consensus about its meaning that we can use the term effectively without wasting energy arguing about its definition. This is probably true for the vast majority of concepts we manipulate through language. If it weren't, language wouldn't communicate much and people would rebel and vote in a new one.

Unfortunately, proximate cause is the exception that proves the rule (please excuse the pun). A great deal of confusion persists about what the term "proximate cause" is meant to convey. Students find this very frustrating: Justifiably, you would like some answers, some solid ground on which to base an understanding of a difficult concept.

Yet, if exact definition eludes us (as it does, of course, for other useful concepts, like "negligence" or "justice") we can still achieve a working knowledge of the problem sufficient for most purposes. This chapter seeks such a working knowledge of "proximate cause."

THE CRUX OF THE PROBLEM

Despite differences in approach to proximate cause, all courts agree that the crux of the problem is that defendants cannot be held liable for every consequence of their conduct, even if that conduct is negligent. Here are a few examples in which courts would likely balk at imposing liability:[1]

- Defendant store owner leaves a box lid on the sidewalk. Plaintiff stumbles over it, skins her knee, and stops to get first aid. Consequently, she misses her train and gets a later one. She is injured when that train crashes into another at a crossing.
- Defendant, a restaurant owner, leaves a box of rat poison on a shelf near the stove that is used to store food. Although the owner had no reason to expect it, the poison explodes due to heat from the stove, injuring a customer.
- Defendant drives negligently, and collides with plaintiff, causing him injuries. Plaintiff is taken to the hospital, where he is further injured three days later when the hospital burns.
- Defendant leaves his car unlocked, with the keys in the ignition. A terrorist steals the car, loads it with explosives, and sets off an explosion at a foreign embassy, injuring a passerby.

In each of these cases, the defendant was negligent, and in each, that negligence was on actual cause of the resulting harm. Yet most courts, perhaps all, would deny recovery, on the ground that the plaintiff's injury is too unusual, too far removed from the type of harm to be anticipated from the defendant's negligence to warrant imposing liability.

It is important to emphasize at the outset that this is not based on a lack of *actual* causation. If the only issue were cause-in-fact, the defendant would likely pay in all of the examples, since her conduct was a necessary antecedent of the plaintiff's harm in each. If the store owner had not left out the box lid, the pedestrian would have gotten the earlier train and would not have been injured in the crash; if the restaurant owner had not placed the poison on the shelf, it would not have exploded, and so on. Indeed, unless actual causation is found, there is no need to consider issues of proximate cause at all. If the defendant was not a cause-in-fact of the harm, the court will dismiss the case without reaching the complex policy question of

whether liability should follow. For this reason, courts often describe the proximate cause problem as one of "legal cause," or "scope of liability" to emphasize that the issue is whether liability should be imposed, not whether the defendant's act was a cause-in-fact of the plaintiff's harm. "An actual cause question asks, 'What happened?'; a legal cause question asks, 'What shall be done about it?' " C. Morris, On the Teaching of Legal Cause, 39 Colum. L. Rev. 1087, 1089 (1939).

Certainly, courts must impose some further limit on liability, apart from the cause-in-fact requirement. Otherwise it is too easy to come up with absurd hypotheticals. Reynolds, not looking where he is going, bumps Carpenter on the sidewalk, knocking her down. Carpenter then walks to the corner and meets Dias, an old boyfriend, crossing the other way. They have dinner, end up at Dias's apartment, and Carpenter contracts a venereal disease. Reynolds's negligence is a necessary historical antecedent of the harm; had he not delayed Carpenter, she would not have spotted Dias, and so on. Yet no system could countenance holding Reynolds liable for Carpenter's disease. As a matter of policy, the relation between the negligence and the injury is too tenuous, the consequence too out of proportion to the fault, to make Reynolds pay.

Here's another example that makes the point.[2] A doctor negligently performs a vasectomy. As a result, the patient later fathers a child. At the age of six, the child sets fire to the plaintiff's garage. Here, as in the last case, the doctor's negligence is clearly a "but for" cause of the plaintiff's loss. If he had done the operation right, the patient could not have conceived a child, etc. If the defendant were held liable for all injuries caused by her negligence, the doctor would pay here. But no court would hold the doctor liable for this. All courts agree that a line must be drawn, *somewhere*, to limit liability for the consequences of a negligent act. The problem, of course, is how to define that limit.

EFFORTS TO DEFINE PROXIMATE CAUSE

Courts have labored for over a century to articulate such a definition, to draw a defensible line between consequences of negligence that are actionable and others too remote to support liability. Perhaps it is a mistake to try; proximate

cause decisions, even within a single jurisdiction, often appear inconsistent or hard to predict based on previous precedents. It may be like pornography, of which Justice Stewart said that perhaps he could not define it, but "I know it when I see it." *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964). Most courts, however, have felt obliged to try to define some proximate cause limits, in order to guide litigants and lower courts in future cases.

A. An Early Approach: The Direct Cause Test of *In Re Polemis*

An early proximate cause case, *In Re Polemis and Furness, Withy & Co.*, 3 K.B. 560 (1921), held that the defendant is liable if his conduct is the "direct cause" of the plaintiff's injury, as opposed to a "remote" cause. In *Polemis*, a workman dropped a board into the hold of the plaintiff's ship, which caused a spark and ignited petrol vapors in the hold, destroying the ship. Although the explosion was deemed unforeseeable, the court held that the defendant was liable, since the negligent act of its employee was the "direct cause" of the harm. Although the English court questioned *Polemis* in *Overseas Tankship (U.K.) Ltd. v. Morts Dock & Engineering Co., Ltd. (The Wagon Mound)*, A.C. 388 (1961), direct cause language still appears in some proximate cause cases.

The problem with the direct cause test is that it is "not responsive to the decisions either as a test of inclusion or exclusion." W. Seavey, Mr. Justice Cardozo and the Law of Torts, 52 Harv. L. Rev. 372, 389 (1939). In other words, it simply does not explain the results in real cases. It is often more restrictive than the cases: Since "directness" suggests the lack of a later cause after the defendant's negligence, it suggests that liability would be cut off where subsequent conduct contributes to the accident. Yet courts often conclude that the defendant should be liable despite intervening forces. For example, where one driver is negligent and another then negligently fails to avoid the accident, the first driver would typically be held liable, even though a later, independent act of the other driver also led to the accident. But if this is direct, just what does direct mean?

In other cases, we would all agree that the defendant's act led directly to the harm, yet we would not think she should be held liable. The act of the restaurant owner in leaving the rat poison near the stove appears to be a direct cause of the explosion in that case. The placement of the poison led it to become hot and blow up. Yet many courts would be uncomfortable imposing

liability for that unexpected consequence of the owner's negligence. Thus, it is hard to escape the conclusion that "direct" is just a word rather than a method of analysis. It does not in itself help judges or juries to draw the line between consequences the defendant should be held responsible for and others he should not.

B. Perhaps as Good as It Gets: Foreseeability/Scope of the Risk

Perhaps the most helpful approach to proximate cause considers whether the defendant, at the time that he acted, could foresee the risk that injured the plaintiff. Under this foreseeability/scope-of-the-risk approach, the court considers what the risks were that made the defendant's conduct negligent in the first place. If the defendant should have anticipated a particular risk at the time he acted, and he negligently failed to avert that risk, he would be liable if that risk caused the plaintiff's harm.

The Third Restatement of Torts rather nicely articulates this approach:

> **Section 29. Limitations on Liability for Tortious Conduct**
> An actor's liability is limited to those harms that result from the risks that made the actor's conduct tortious.[3]

In other words, an actor is negligent for ignoring foreseeable risks. When those risks cause injury, liability follows, because ignoring those risks was negligent. But if some bizarre result happens, a risk that a reasonable person would not have foreseen, the actor is not liable, because failing to avoid that risk was not negligent. The Third Restatement, by the way, generally avoids the phrase "proximate cause." Instead, it refers to the "scope of liability," which is certainly a more accurate expression for the concept covered in this chapter.

For example, in the terrorist bombing case, a reasonable driver should realize that leaving the keys in the car creates a risk that children would be injured tampering with the car, that a thief would take it and drive negligently, or that vandals would damage it. But it hardly seems that the reasonable person should foresee a terrorist using the car to dynamite an embassy. Under the scope-of-the-risk approach, the defendant would not be liable, since the risk that caused the harm was not a risk he should have anticipated when he committed the negligent act.

Similarly, where a driver drives too fast, she should foresee that a

collision could follow, injuring another motorist. But only the most bleakly neurotic pessimist who drove too fast would anticipate that her victim would be injured in a hospital fire three days later.

This foreseeability/scope-of-the-risk approach to proximate cause has the virtue that it provides an analytical basis for consistent decision making. It relates the scope of liability to the faulty aspect of the defendant's conduct, and gives us a question to ask about that conduct, rather than relying on a phrase like "direct cause" or an intuitive guess in limiting liability. The judge or jury can ask what unreasonable risks the defendant should have anticipated at the time she acted, and compare those risks to the injury that actually occurred.

Here's a little torts role-play you can use to apply this scope-of-the-risk analysis to proximate cause problems. Imagine that at the time the defendant acted, that obnoxious, self-righteous, odious character, the Reasonable Person, was standing next to him. Imagine that the defendant is about to do the unreasonable act that gives rise to the plaintiff's injury. As he presses his foot to the accelerator, or drops the box lid on the sidewalk, or exits his car without taking the keys, what would that odious paragon say to him? In the speeding case, he would doubtless warn him that he might cause an accident, with resulting personal injury to himself or others, or property damage from a collision. However, obsessive though he may be, the odious character would not warn him not to speed, because his victim might end up suffering burns in a hospital fire. In the box lid case, the Reasonable Person would warn the storeowner, as he dropped the lid to the sidewalk, that a pedestrian might stumble over it and fall, or drop a valuable package, or even fall down the adjacent stairs. But even the odious character would not say "Tsk! Tsk! Don't drop that box lid! A pedestrian might fall over it, suffer an injury, end up getting a later train, and be injured in a train wreck!"

VARIETIES OF FORESEEABILITY: *WAGON MOUND AND PALSGRAF*

The two most famous proximate cause cases, *Overseas Tankship (U.K.) Ltd. v. Morts Dock & Engineering Co., Ltd. (The Wagon Mound), 1* All E.R. 404

(1961), and *Palsgraf v. Long Island R.*R., 162 N.E. 99 (N.Y. 1928), both exemplify a scope-of-the-risk approach to the proximate cause problem.

In *Palsgraf*, the defendant's conductors were negligent in assisting the rushing passenger onto a moving train, causing him to drop a package. Although there was no reason for the conductors to suspect it, the package contained firecrackers, which exploded, overturning some scales a distance away. The scales fell and injured the reluctantly famous Mrs. Palsgraf.

Although the railroad's employees were found negligent in *Palsgraf*, the railroad argued that their negligence only posed a foreseeable risk of injury to the passenger or his package, not to Mrs. Palsgraf. Justice Cardozo, writing for the majority, held that the duty to avoid injuring others extends only to those risks the actor should anticipate from her negligent act. Here, the unreasonable risk created by the conductors' conduct was that the passenger or his package would be injured, not Mrs. Palsgraf. Since the conductors would not have anticipated injury to her from their conduct, they owed no duty to avoid the injury and were not negligent in relation to her. Since she was an "unforeseeable plaintiff" to whom no unreasonable risk was to be anticipated, Mrs. Palsgraf was denied recovery.[4]

In *Wagon Mound*, the defendant's oil fouled the waters around the plaintiff's dock, where welding was in progress. Because of its high ignition point, the oil was unlikely to burn, but it did, through a strange concatenation of circumstances found in the case to be unforeseeable. Other injury to the dock, however, *was* foreseeable, and in fact took place: the fouling of the docks by the oil. The dock owner argued that, since the defendant could foresee *some* injury to the dock, it was liable for *all* injury which actually resulted.

The Privy Council held that the plaintiff could only recover for the injuries that the defendant should have anticipated at the time it released the oil into the water. It would be liable for fouling the slips of the plaintiff's dock, a foreseeable consequence of releasing the oil, but not for the unforeseeable fire which destroyed the dock itself.

SOME GUIDEPOSTS IN THE WILDERNESS

Although proximate cause can never be reduced to a test that mechanically

resolves all the cases, there are some fairly well-established principles that at least help to narrow the issues.

- *First*, and most fundamentally, if the plaintiff's injury is truly beyond the type of harm to be expected from the defendant's conduct, the plaintiff will virtually always go uncompensated. A basic sense of justice demands that liability should not extend to consequences radically different from those to be anticipated from an act, and courts — whatever language they use — will find a way to reach that result. In the venereal disease hypothetical, for example, the court may dub Carpenter's disease too remote, unforeseeable, or beyond the risk that made the conduct negligent, but one way or another, it will reason to a judgment for the defendant.

  Conversely, it is worth noting that most tort cases pose no legal cause problem because the harm suffered is exactly the type to be expected. In the run-of-the-mill motor vehicle case, for example, there is no question that a collision is the type of harm to be anticipated, and that, if the other elements are proved, the defendant must pay. Like *Erie* problems in civil procedure, the close cases are excruciatingly hard, but the great majority of the cases are not hard at all.
- *Second*, where a particular type of injury to the plaintiff is foreseeable, the defendant is liable for the injury sustained, even though it is more serious than might have been anticipated. If, for example, Goodhart knocks Gregory down, causing small lacerations, he is liable if Gregory contracts an infection and becomes seriously ill, or if he is a hemophiliac and dies from loss of blood. If Goodhart injures Bohlen in an auto accident, disabling him for six months, he must pay the value of Bohlen's lost wages, whether he is a day laborer or the CEO of a Fortune 500 company. It is said that the defendant "takes the plaintiff as he finds her." The fact that she is more susceptible to injury than the average person, has a "thin skull," so to speak, is not a defense to liability. If Goodhart could foresee personal injury to Bohlen, he is liable for the personal injury actually caused, not some hypothetical average ordinarily to be expected from the act.
- *Third*, the cases distinguish unforeseeable consequences of a negligent act from consequences that are foreseeable but take place in an unusual manner. This foreseeable-injury-in-an-unforeseeable-manner principle

is nicely illustrated by *United Novelty Co. v. Daniels*, 42 So. 2d 395 (Miss. 1949). In *Daniels*, the defendant allowed its employee to clean some machines with gasoline in a small room heated by a heater with an open flame. A rat, drenched with gas, ran from under one of the machines over to the heater, caught fire, and ran back to the machine, causing an explosion which killed the employee. The court concluded that, while the manner in which the accident took place was unusual, an explosion was exactly the type of accident to be anticipated from using a volatile, flammable liquid in a small room with an open flame. The defendant was held liable.

There is something to this distinction. The exact sequence of events in every accident is unique, but in most the general nature of the damage threatened was foreseeable. Distinguish from the rat case, for example, the terrorist bombing hypo at the beginning of the chapter. In the rat case, the general nature of the accident threatened by the conduct actually took place. In terms of the risk rule, the risk of an explosion of the vapors, causing personal injury to the employee, was the very risk that made the defendant's conduct negligent. But in the terrorist case, the general nature of the risk to be expected from leaving the keys in the car was far afield from that which injured the passerby at the embassy.

The trick, of course, is in making the distinction: In many cases the line between unforeseeable consequences and unforeseeable manner is a fine one, if indeed a defensible line can be drawn at all. Consider, for example, *Doughty v. Turner Mfg. Co.*, *1* Q.B. 518 (1964). In *Doughty*, the plaintiff was standing next to a vat of molten liquid when the cover of the vat was negligently knocked into it. Nothing happened at first, but several minutes later there was an explosion within the vat, caused by a chemical reaction of the lid with the liquid. The plaintiff argued that the defendant's employees negligently created a risk that he would be splashed by the liquid, and that, indeed, he *was* injured by splashing (when the explosion threw the liquid out of the vat) though in an unusual manner. The court, however, held that he was injured by a different risk, the risk of an unforeseeable chemical reaction causing explosion, not physical splashing from the dropping of the cover. I think the case was rightly decided, but it turns on a nice distinction indeed.

- *Fourth*, an injury does not have to be *likely* or *probable* in order to be foreseeable in proximate cause analysis. Many acts are culpable even

though they pose a relatively small risk of injury. If Smith throws a flower pot out a third story window without looking, there may be only a 3 percent chance that someone will be hit. But this conduct is clearly negligent, because it poses an unreasonable risk of injury to passersby. No court in the country would deny liability in such a case on proximate cause grounds. "Foreseeability is not to be measured by what is more probable than not, but includes whatever is likely enough in the setting of modern life that a reasonably thoughtful person would take account of it in guiding practical conduct." Harper, James & Gray §18.2 at 657-659. Similarly, the Reasonable Person stops at a rural railroad crossing, even though it is rarely used: In Hand formula terms, the risk of a train appearing may be low, but the extent of injury if it does is great, and the burden of avoiding the harm is slight.

AN ECONOMICS PERSPECTIVE ON THE FORESEEABILITY/SCOPE-OF-THE-RISK APPROACH

Economic analysis provides an interesting defense of the scope-of-foreseeable-risks approach to proximate cause. Economists view tort law as a means to control activity *prospectively.* They advocate rules of liability that will encourage people to act in socially desirable ways. If tort law holds a person liable for certain risks of his conduct, presumably the actor will take care to avert those risks, since he will bear their costs if an injury occurs:

> These [liability] rules tell decision makers that, under certain conditions, they will be forced to bear the costs of their activities to others. The effect of such rules is to give rational decision makers an incentive to incorporate the costs to others into their decisions about whether to engage in the activity, and hence, to create a situation in which the activities chosen by the rational decision maker are efficient from an aggregate point of view.

B. Zipursky, Rights, Wrongs, and Recourse in the Law of Torts, 51 Vand. L. Rev. 1, 46 (1998). However, the rational actor can only consider the liability consequences of risks that he can foresee. Imposing liability for unforeseeable risks will not affect his choices:

Palsgraf stands for the proposition that the tort law does not require an individual to consider, in selecting her activity, costs to persons to whom harm is not reasonably foreseeable. Unforeseeable harm cannot be internalized because, by definition, the decision maker could not have foreseen it. Imposing liability where there is no foreseeability will "confer no economic benefit; it will merely require a costly transfer payment."

Id. at 46. In economic terms, a rule that an actor must pay for unforeseeable harms will not affect the actor's choices about activities that impose risk. If we make him pay for unforeseeable injuries caused by his conduct, it will not make the world any safer or more efficient: An actor cannot plan his conduct in light of risks he does not anticipate. Instead, "hanging over defendants' heads the specter of liability for harm from risks they cannot anticipate might conceivably produce socially unwarranted overdeterrence." J. Page, Torts: Proximate Cause 103 (2003). So, economic analysts argue, there is little point to a liability rule that makes him pay damages for such risks.

If you think economic analysis of tort law is a lot of hooey, the basic point can be rephrased in more general normative terms: We impose liability because we think the actor should have acted differently. But we can't really "blame" an actor for acting in a certain way unless he would anticipate that doing so would cause harm. If the injury that results could not be anticipated, it doesn't seem "fair" to hold him liable for it.

HARM INSIDE THE CIRCLE OF FORESEEABILITY

Although courts will find a way to avoid imposing liability for unforeseeable injuries, it does not follow that the converse is always true, that is, that a defendant must pay whenever he causes *foreseeable* harm. In some situations, for various reasons of policy, courts also refuse to hold defendants liable for injuries that could be foreseen.

Consider the case in which the shopkeeper dropped the box lid, delaying the plaintiff, who was later injured in a train wreck. Doubtless, her harm falls outside the circle of foreseeability, at point A on Figure 12-1, and the court will refuse to impose liability for it. The court will likely explain its decision on the ground that the shopkeeper's act was "not the proximate cause" of the injury because it could not be foreseen.

Well enough. But now let's consider some types of cases that pretty clearly fall *inside* the circle of foreseeability, but in which courts still refuse to hold the defendant liable. One example is the case of secondary economic losses as a result of a negligent act. Suppose that Goodhart negligently causes a factory fire that injures Green, an employee, but also shuts down the factory for three months. It is obviously foreseeable that a fire would cause injury to a worker in the factory, and Goodhart will be liable for this foreseeable injury. However, while it seems equally foreseeable that the fire could cause a shutdown, so that the employees would suffer lost wages, most courts would deny recovery for the workers' lost wages during the shutdown.

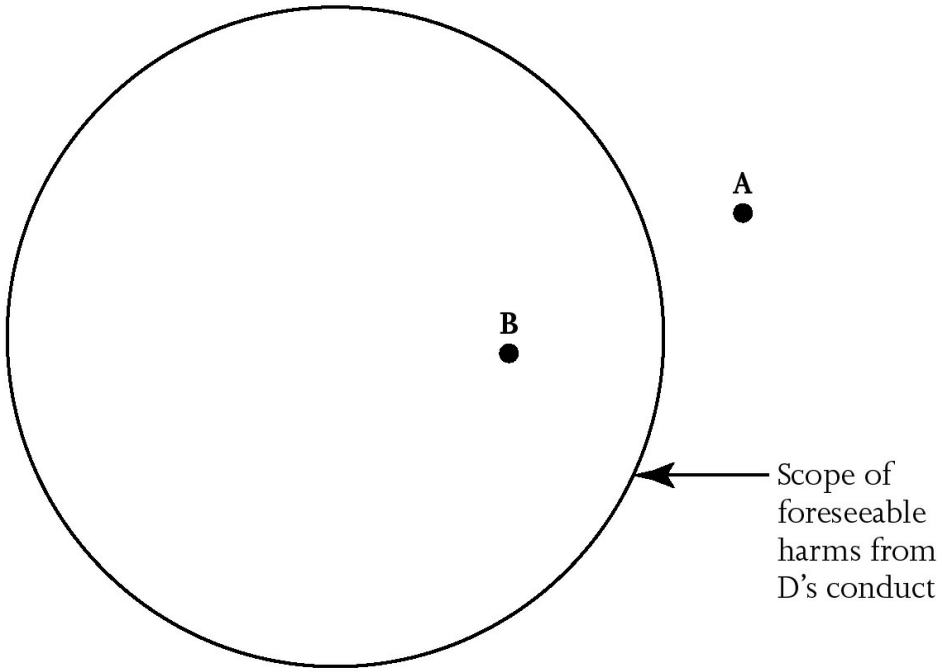

Figure 12-1. The Circle of Foreseeability

This economic loss to the workers pretty clearly falls at point B on Figure 12-1, within the circle of foreseeability, just as Green's personal injury does. Thus, courts that deny recovery for such secondary economic losses cannot credibly do so based on lack of proximate cause. Generally, courts reason that the burden of liability for such secondary economic losses is too great. (Imagine, for example, the potential liability if Goodhart had burned down a bridge, interrupting the business affairs of an entire town.) However, while the denial of recovery in such cases has nothing to do with proximate cause,

the cases frequently state that the defendant's conduct was "not the proximate cause" of the secondary losses. The use of proximate cause language in cases like these is unfortunate, but widespread.

New York's early rule limiting recovery for damages by fire provides another example of a court limiting liability, for policy reasons, for harm within the circle of foreseeability. In *Ryan v. New York Central Railroad Co*., 35 N.Y. 210 (1866), the New York court restricted liability for fire damage to the first adjacent property burned. The *Ryan* court dubbed the burning of further properties "not the immediate but the remote result of the negligence of the defendants." Id. at 212. This conclusory proximate cause analysis, to borrow Dean Prosser's language in a related context, is "moonshine and vapor."[5] Anyone could foresee that a fire would burn beyond the next lot. The true rationale for the rule was the crushing burden such liability would impose, and the general availability of fire insurance as an alternative source of protection:

> To sustain such a claim as the present, and to follow the same to its legitimate consequences, would subject to a liability against which no prudence could guard, and to meet which no private fortune would be adequate . . . To hold that the owner must not only meet his own loss by fire, but that he must guarantee the security of his neighbors on both sides, and to an unlimited extent, would be to create a liability which would be the destruction of all civilized society.

Id. at 216.[6]

Unfortunately, courts that restrict liability for harm *within* the circle of foreseeability, for reasons of policy, often mask their decisions in proximate cause language, as the *Ryan* court did in talking about "remote" and "immediate" causes. Cases involving liability for serving alcohol to intoxicated patrons provide another example of such obfuscatory rhetoric. Early liquor liability cases refused to hold barkeeps liable for serving intoxicated patrons who caused motor vehicle accidents, on the ground that the drunk driving, not the service of liquor, was the "proximate cause" of the injury. Yet few acts are more foreseeable than a drunk driving home from a roadside bar. The real thrust of these cases (since repudiated in many jurisdictions) was a policy decision to place liability for obviously foreseeable harm on the more blameworthy of two negligent parties.

The law of torts would be tidier if the courts would use *duty* analysis when they deny recovery for harm within the circle of foreseeability, for other policy reasons, and use *proximate cause* analysis in cases involving unforeseeable harm. Frequently, courts do use duty analysis to limit liability

for foreseeable harm. (See pp. 283–284 for several examples.) But many other cases that deny recovery for policy reasons — as in the economic loss and drunk driving cases — use proximate cause language instead. One of the great challenges in reading these cases is to cut through promiscuous foreseeability references to determine whether some other policy is actually driving the decisions.

The following examples illustrate the basic issues involved in proximate cause cases. In analyzing them, assume that the court adopts a scope-of-the-risk approach to the proximate cause issues, unless otherwise noted. After some examples, we will take up the related conumdrum known as "superseding cause."

Examples

Revisionist History

1. Bingham is running for a Long Island Railroad train that is about to pull out of the station. He is carrying a small package wrapped in brown paper. Two conductors, seeing the train start to leave, reach out to help Bingham onto the train, and one clumsily knocks the package onto the tracks. Alas, the package contains an antique music box which Bingham had just had valued at $5,000. The music box is demolished upon landing. Is the railroad liable under a foreseeability/scope-of-the-risk approach?

2. Bingham is running for a Long Island Railroad train that is about to pull out of the station. He is carrying a small package wrapped in brown paper. Two conductors, seeing the train start to leave, reach out to help Bingham onto the train, and one clumsily knocks the package onto the tracks. Alas, the package contains fireworks, which explode upon impact. A certain Mrs. Falsgraf, running to the same train immediately behind Bingham, is injured by the explosion.

   a. Is the railroad liable for her injuries?

   b. Assume, on the facts of Example 2a, that Mrs. Falsgraf sued Bingham, the passenger carrying the package. Would Bingham be liable for her injuries?

c. Assume that the conductors negligently jostle Bingham, causing him to drop the package to the platform. It explodes, the passengers on the crowded platform panic and run, knocking down Mrs. Falsgraf 30 feet away. Would the railroad be liable to Falsgraf?

d. Assume, on the facts of *Palsgraf*, that Mrs. Palsgraf had sued the passenger. Would the court have denied recovery on proximate cause grounds?

e. Suppose that Mrs. Palsgraf tried a different theory against the railroad: She argued that the railroad was negligent because they placed a tall, unstable scale on the platform, where a small force could cause it to fall. Could she then argue that the scale falling over was foreseeable, so that the railroad would be liable?

Judge Fudd Does the Foreseeable

3. The Bentham Construction Company excavates a deep foundation for an office building in downtown St. Louis, immediately adjacent to a main street. Beale, a Bentham crane operator, sets down a load of iron beams in the street, on the edge of the excavation, but his touch is off and the load lands heavily, causing the wall of the excavation to collapse. The landslide breaks a large water main under the street, flooding the foundation. Bentham's employees were not aware that the water main was there.

   The owner sues for the damage caused by the flooding. Judge Fudd instructs the jury, in part, as follows:

   > If you find that the defendant's employees were unaware that the water main was under the street, then you must find that any negligence of Bentham's employees in causing the collapse was not the proximate cause of the plaintiff's damages.

   What is wrong with Judge Fudd's instruction?

4. Consider the distinction discussed in the Introduction between foreseeable injuries that happen through an unusual sequence of events (for which a defendant will be held liable) compared to injuries that happen through an unforeseeable mechanism of harm (for which they often will not). In which category would you put the following cases?

   a. A train collides with a car at a railroad crossing, due to negligence of

the engineer. The car is thrown into a track switch, throwing the switch and turning the train onto a side track, where it collides with a boxcar. Fletcher, a passenger, is injured by the collision with the boxcar.

b. Hill was repairing a "fender," made of piles driven into a stream bed below a bridge. He pried two piles apart and inserted a brace to hold them apart while he was inserting another pile. At this point a tug came along and hit a pile further along the fender, jarring the successive piles, causing the brace to fall out and the piles to spring back together. Hill's leg was trapped between them. He sued for his injuries.

c. In *Lewis v. Kehoe Academy*, 346 So. 2d 289 (La. App. 1977), a day care center negligently allowed a child to ingest rat poison. As a result, a small bruise the child later suffered was greatly accentuated, leading welfare authorities to conclude that the child had been abused, and to remove the child from the custody of his guardians.

Fudd Tries Again

5. Corletti, a passenger on the way to an Italian festival, is assisted onto a Long Island Railroad train by a conductor. The conductor jostles him roughly, and he drops a package, which contains fireworks. The package explodes, causing burn injuries to Corletti.

Judge Fudd, who is handling the case, must determine whether the issue of proximate cause should be decided by the judge or the jury.

a. Which party do you think would prefer to have the jury decide the proximate cause question?

b. Suppose that Judge Fudd proposes to send the Corletti case to the jury, with the following instruction:

> If you find that, when the conductor assisted the plaintiff onto the train, he should have foreseen an unreasonable risk of injury to the plaintiff from that act, then you should find that the conductor's negligence was a proximate cause of his resulting injury.

What change would you recommend in the Honorable Fudd's instruction?

The Thin Shell Rule?

6. Keeton is driving along the road when his nose starts to run. He reaches over to the floor of the passenger's seat for a tissue and his car crosses the center line into the path of a gasoline truck. The truck swerves to avoid a collision, hits a wall and springs a leak. Gasoline pours out, percolates down into the public water supply, and triggers a $1 million environmental cleanup by county health officials. The county sues Keeton to recover its costs. Assuming that Keeton was negligent, is his conduct a proximate cause of the cleanup?

Risky Business

7. On March 16, 2014, the Gregory Railroad Company accepts electric motors from Pollack for shipment. Because Pollack needed the motors as components for a finished product, he requested delivery of the goods within ten days. Through the negligence of the railroad, shipment of the goods is delayed for five days. On March 30, while in transit on board a Gregory freight train, the goods are damaged in a flood. Is the railroad liable under the "risk rule"?

8. On October 15, 2014, the Gregory Railroad accepts a shipment of apples to deliver for Pollack. Because the weather is cool and frost could spoil the apples, Pollack requires that the apples be delivered within four days. Gregory delays, and the apples are spoiled by freezing on October 23. Is the railroad liable?

9. *In Johnson v. Kosmos Portland Cement Co.*, 64 F.2d 193 (6th Cir. 1933), workers were working inside the hold of a barge, evidently installing a boiler. The barge was used for the transport of oil, and was full of gases generated by the oil, which should have been cleared out before the workers began their work. As luck would have it, the barge was struck by lightning, which caused the gases to explode, killing the workers.
    a. Is this case like the rat case, a foreseeable kind of harm that happens in a quirky manner, or is it like the vat case, in which the injury results from an unforeseeable mechanism of harm?

b. Reconsider *In re Polemis*, in which the ship's hold was full of fumes, and they were ignited by a board that fell into the hold. The court applied a "direct cause" test in *Polemis*, but if it had applied a foreseeability/scope-of-the-risk test would apparently have held that this accident was unforeseeable. In light of the *Johnson* case, what argument might you make on behalf of the plaintiff in *Polemis*, if the foreseeability/scope-of-the-risk test were used?

SUPERSEDING CAUSE

In a good many proximate cause cases, the defendant argues that, even if she was negligent, a later act supersedes her negligence and "breaks the causal chain." An example from the casebooks is *Derdiarian v. Felix Contracting Corp.*, 434 N.Y.S.2d 166 (1980). In *Derdiarian*, the defendant contractor was working in an excavation in the traveled roadway, and failed to erect a barrier (such as a truck or concrete blocks) to protect workers from traffic. Dickens, an epileptic who had failed to take his medication, suffered a seizure, lost control of his car, and careened into the excavation, throwing Derdiarian into the air, where his body ignited from a kettle of hot enamel in use for the repairs.

Derdiarian involves a typical scenario in which the "superseding cause" argument is raised. *First*, the defendant is negligent (failure to erect the barrier); *second*, some other act happens after the defendant's negligence (Dickens's passing out due to failure to take meds), and *third*, the two acts together lead to an injury to the plaintiff (Derdiarian's accident). The contractor in *Derdiarian* argued that the bizarre subsequent events leading Dickens's car to enter the work area "superseded" its negligence. Consequently, "there was no causal link" (434 N.Y.S.2d at 159) between its failure to erect a barrier and the worker's burns.

In actual cause analysis, of course, this argument does not hold water. The company's negligence in failing to provide a barrier was clearly a "but for" cause of Derdiarian's injury. If the company had provided a proper barrier, Derdiarian would not have been injured, even if Dickens lost control of his car. The contractor's real argument is that Dickens's subsequent negligent act of driving without taking his meds, and the bizarre sequence of

events that it engendered, should "cut off its liability," should cause the court to place the loss on the later actor instead of on the contractor.

Such "superseding cause" cases don't require any different analysis than other proximate cause problems. If we apply scope-of-the-risk analysis to *Derdiarian*, the outcome is clear: Working in the middle of a busy street poses a risk that a vehicle will enter the worksite. This is the foreseeable risk that makes it reasonable to put up a barrier. "A prime hazard associated with [omitting the barrier] is the possibility that a driver will negligently enter the work site and cause injury to a worker." Id. at 170. This is the risk that injured Derdiarian. The contractor should be liable — and it was held liable — even though later negligence of Dickens caused the vehicle to enter the worksite. As to the quirky details of the accident — Dickens' epilepsy, the vat of molten enamel — the court correctly noted that "the precise manner of the event need not be anticipated." Id. at 170.

So what kind of later events would a court find a "superseding cause" that "cuts off" the liability of the previously negligent party? Generally speaking, courts will not hold the negligent party liable when bizarre, unforeseeable events give rise to a risk different from the one the defendant should have anticipated. "Highly improbable and extraordinary intervening forces are generally found superseding and preclude liability." J. Diamond, L. Levine & M. Madden, Understanding Torts 194 (5th ed. 2013). In other words, these cases are just a special instance of the more general principle, that actors are not liable for truly unforeseeable harm.

In rewriting this chapter, I searched some treatises for cases in which a defendant, though negligent, got off based on "superseding cause." While many cases are cited in which the argument was raised, the defendant's argument prevailed in few. In *Cleveland v. Rotman*, 297 F.3d 569 (7th Cir. 2002), the court refused to hold a lawyer who had allegedly provided negligent tax advice liable for the subsequent suicide of his client, dubbing the suicide "an independent intervening event that broke the chain of causation." Id. at 572. And here's a hypo in which the argument would fly: Ace Taxi Service is called by Costas, waiting at a park for a ride. It negligently fails to send a driver, and Costas is injured by a tornado that strikes the park. The dangers the taxi company should foresee from failing to send a car do not include the risk of tornados; a court would very likely dub this one a "superseding cause."

The superseding cause argument is frequently made in cases involving

subsequent intentional acts by third parties, including criminal acts. In one of the classic superseding cause cases, *Watson v. Kentucky and Indiana Bridge & R.R. Co.*, 126 S.W. 146 (1910), for example, the defendant railroad negligently spilled gas in a street, and it was subsequently ignited by a match thrown by Duerr. The court held that if Duerr had thrown the match negligently, the railroad would be liable for the fire, but if he had done it intentionally, his deliberate criminal act would cut off the railroad's liability, since it was "not bound to anticipate the criminal acts of others." 126 S.W. at 151. The argument for this result seems to be that the deliberate act of arson is unforeseeable as a matter of law, and that the greater culpability of a criminal act should lead the court to place the responsibility on the criminal actor rather than the actor whose prior negligence contributed to the harm.[7]

In many circumstances, however, criminal acts are foreseeable, and indeed, are the very risk that require the reasonable person to take precautions. In another of the classic cases, *Hines v. Garrett*, 108 S.E. 690 (Va. 1921), a train passed the plaintiff's stop and the conductors let her off a mile down the line, in an area known to be frequented by vagrants. While walking back to her stop she was assaulted. The court summarily dismissed the railroad's argument that the assault was a superseding cause: "The very danger to which this unfortunate girl fell a victim is the one which would at once suggest itself to the average and normal mind as a danger liable to overtake her under these circumstances." 108 S.E. at 694. When the risk of criminal conduct is foreseeable, it will not "cut off" the liability of a defendant who negligently exposes the plaintiff to that risk.

> If the likelihood that a third person may act in a particular manner is the hazard or one of the hazards which makes the actor negligent, such an act whether innocent, negligent, intentionally tortious, or criminal does not prevent the actor from being liable for harm caused thereby.

Restatement (Second) of Torts §449.[8] This principle is frequently applied in cases involving negligent security at hotels and apartment complexes.

Afterthoughts

10. Consider, in the following cases, whether the later event should be treated as a superseding cause, "cutting off" the original negligent party's liability.
    a. Hart negligently repairs Mendoza's brakes. As Mendoza is driving

along a main highway, Ellsworth negligently pulls out without looking, in front of Mendoza. Mendoza applies the brakes, but they fail, and the cars collide. Mendoza sues Hart for her injuries.

b. Mendoza is injured in the accident just described, and taken to the hospital with a broken arm. The arm is negligently set by Dr. Zipursky, causing additional injuries. Mendoza sues Hart and Ellsworth for her injuries, including the injuries from Zipursky's malpractice.

c. In *Merhi v. Becker*, 325 A.2d 270 (Ct. 1973), a union gave a party with unlimited beer, but negligently failed to provide adequate security. Becker drank a lot of beer and got into two fights. A half hour later he got his car and drove it at one of his adversaries, but injured the plaintiff instead.

d. Icarus Airlines negligently fails to fill all the fuel tanks on a passenger plane. Consequently, the plane is forced to land on a Pacific island. Morris, a passenger, is injured when a volcano on the island erupts while they are refueling.

    i. Was the airline's failure to fill the tanks an actual cause of Morris's injury?

    ii. Is the airline's negligence a proximate cause of Morris's injury?

e. Apex Alarm Company installs a security system in Smith's home. The alarm is designed to sound at the Apex office if the system is activated by an intruder. The Apex employee on duty then calls the police department, which ideally nabs the culprit at the scene of the crime.

    On a balmy June evening, a burglar breaks a window at Smith's home. This should activate the alarm system, but due to negligent rewiring at the Apex office, it fails to go off. The burglar makes off with Smith's valuables, and Smith sues Apex. Apex moves for summary judgment on the ground that the burglar's intentional criminal act supersedes its negligence in wiring the alarm improperly. How should the court rule?

You Be the Judge

11. Consider this case:

> A dredger, though warned of a gas main in the area, negligently breaks it while dredging. A factory a mile away, supplied with gas through the main, suffers damage to its equipment and loss of production due to the sudden loss of power.

Would you characterize this case as one involving unforeseeable harm, or foreseeable harm in an unusual manner, or one inside the "circle of foreseeability" for which liability would be denied anyway?

Explanations

Revisionist History

1. Whether the railroad is liable under the foreseeability/scope-of-the-risk rule depends on how broadly you define the risk the defendant must foresee. Arguably, the presence of an expensive antique was not a risk that the conductors should have foreseen, and therefore they were not negligent for failing to foresee it. But most courts would define the risk more generally. They would conclude that the risk that makes the conductor's act negligent is the risk that either the passenger or his belongings would fall and be injured. When one of those risks causes the injury, the defendant is liable, because it is a risk that she should have anticipated and averted.

   The fact that the package contained a valuable antique goes to the *extent* of the risk rather than its nature. The nature of the unreasonable risk that the conductors should have anticipated was damage to personal property from falling, and that was the risk that led to the harm. As in the "thin skull" cases, it should not be a defense for the railroad that the conductors did not know the contents of the package. They could foresee that Bingham would be carrying a package, that it might fall if they were not careful, and that the contents — whatever they were — might be damaged if it fell. Where damage of the general type sustained was foreseeable, courts usually hold defendants liable for the damage *actually* caused, even if that is greater than one might ordinarily expect.

2. a. There are some obvious differences here from the facts of *Palsgraf.* Here, because Mrs. Falsgraf is next to Bingham, personal injury to

her is foreseeable: The package could fall on her foot and injure her, or the conductor or the passenger could hit her, causing her to fall to the platform or even under the train. Palsgraf will argue that, on these facts, the conductors could foresee a risk of personal injury to her. Consequently, she is a foreseeable plaintiff and should recover for her injuries.

However, the court will probably not accept this argument. True, the conductors could foresee personal injury of one sort to Mrs. Falsgraf — from falling or being hit by the package — but they could not foresee injury of the sort that actually occurred — explosion. Most courts would conclude that the injury she suffered arose from a different risk than those the railroad could anticipate, and would therefore deny recovery. See, e.g., the *Doughty* case, described above at pp. 246–247.

Example 1 illustrates that the proximate cause analysis must avoid defining the foreseeable risk too *specifically*. This example shows that the court may also go awry if it defines the risk too *generally*. If the defendant need only foresee "personal injury" of some sort, the plaintiff who tripped over the box lid, missed her train and was injured when the later train crashed could recover: The box lid left on the sidewalk created a risk of personal injury, she suffered personal injury, ergo liability. Yet this analysis would be too broad in both cases. The court must focus on the particular types of harm to be anticipated from the defendant's act. At the same time, as Example 1 illustrates, it must avoid getting bogged down in the idiosyncratic "details" of the accident.

b. Mrs. Falsgraf's case against Bingham is distinguishable from her case against the railroad. Since Bingham *knows* that the package contains fireworks, he is aware of the risk of explosion. Most courts would conclude that he is negligent for bringing fireworks into a crowded place, precisely because they might be detonated by some kind of incident such as the scenario here. Since the risk of an explosion is one of the risks that makes his conduct negligent, most courts would hold him liable to those injured when an explosion actually takes place.

c. Under the scope-of-the risk approach, the railroad should probably not be held liable to Mrs. Falsgraf on these facts. When the

conductors acted, they could anticipate Bingham falling or dropping his package, but they had no reason to anticipate an explosion that would trigger a stampede among the passengers. Not even that odious character, the Reasonable Person, would warn them of such a consequence from jostling a passenger. Since they could not anticipate the general nature of the risk that injured Falsgraf, they should not be liable to her under the scope-of-the-risk approach.

d. In the *Palsgraf* case, Mrs. Palsgraf was not directly injured by the blast, but by a set of scales some distance from the explosion, which were knocked over on her foot. Yet it does not seem unusual that a bystander, even at some distance, should be injured by flying debris if an explosion takes place. The details are unique — as they always are — but the general nature of the accident is within the scope of the risk to be anticipated.

   Suppose you went up to the Reasonable Person and asked her whether she would anticipate that, if a package of explosives exploded in a public place, a bystander might be injured by an object dislodged by the blast. Doubtless, our odious character would view this as foreseeable, even if she could not tell you that the object would be a set of scales. Since this is a foreseeable risk of carrying explosives in a train station, the passenger would likely be held liable to Mrs. Palsgraf.

e. This is a nice argument. It may not be foreseeable that a passenger would be carrying fireworks, but isn't it foreseeable that something would knock over a heavy, unstable scale? The defendant, after all, doesn't have to anticipate the details of the accident, just the general nature of the risk that injured the plaintiff. The railroad could anticipate a number of things knocking over the scale, such as a passenger running for a train or a worker pushing a large trunk.

   Although the argument refocuses the negligence analysis on the scale rather than the fireworks, we should still ask whether the general mechanism that caused the harm was foreseeable. A court would probably hold that the mechanism of harm here was still a fireworks explosion, and that the reasonable person, in thinking about the risks of having the scale on the platform, would not be bound to anticipate that, even though she could anticipate other ways the scale might topple.

Judge Fudd Does the Foreseeable

3. Judge Fudd's instruction requires the jury to find for the defendant if they find that its employees did not know that the water main was there. Presumably, his reasoning is that, if its employees were unaware of the water main, they had no reason to foresee the risk of water damage.

   This is seriously Fuddled reasoning. If actual knowledge were required, a Menlove who threw a flower pot out the third story window without looking would not be liable if it hit a pedestrian. The important question is what Beale, the employee who dropped the beams, could *foresee* as a consequence of his negligence, not what he knew would happen. Surely, if that odious Reasonable Person had been there when Beale dropped the beams, he would have smugly explained to Beale that underground utilities *might* be under the street and that, if they were, they might rupture if the excavation collapsed. Since this was one of the risks that made Beale's act negligent, he should be liable, even if he was not sure what utilities actually ran under the street.

4. a. In the early case from which this example is drawn,[9] the court denied recovery, based on lack of foreseeability.

> That an automobile should suddenly appear upon a railroad track and be struck by an approaching train is not a matter of unusual occurrence, and is one that might reasonably be anticipated; but that such a collision should result in the automobile being thrown against a switch stand in such a manner as to open the switch is a possibility so remote as to be beyond the realm of events reasonably to be anticipated. This being true, the independent agency so intervening must be treated as the sole proximate cause of the injuries. . . .

   133 N.E. at 140. However, this court almost certainly was seduced by the quirky "details" of the accident. While the particular sequence of events was certainly bizarre, the general nature of the harm — injury to the passenger when a collision throws him from his seat — is a foreseeable risk of negligently driving the train at a crossing. Most modern courts would look to the general nature of the risk threatened by the engineer's negligence, and hold the railroad liable on these facts.

   b. This Rube Goldberg scenario seems pretty idiosyncratic. But one of the basic risks of negligent piloting of the tug was that it would hit

the fender and injure a worker working on it. That's just what happened. If the defendant had to foresee the particulars, such as the brace getting dislodged and trapping the plaintiff's leg, defendants would seldom be liable, even though they could foresee the general risks of their conduct. This one should go in the foreseeable injury/ quirky facts category.

c. This case is best characterized as unforeseeable harm through a different mechanism of harm. The risk the reasonable person would anticipate from exposing the child to poison is the risk of physical injury from poisoning, not the risk of deprivation of custody through misinterpretation of bruising. In addition, the reasonable actor would anticipate harm to the child from leaving the poison around, not to his guardians. As in *Palsgraf*, harm to them from this negligent act is unforeseeable. The complaint in *Lewis* was dismissed for lack of proximate cause.

Fudd Tries Again

5. a. It is frequently said that whether the defendant's negligence was a proximate cause of the plaintiff's injury is a question of fact for the jury. Surely the plaintiff will breathe a sigh of relief if the judge decides that the issue is one of fact, and sends it to the jury. In general, the jury won't have the foggiest idea of what proximate cause means. Imagine yourself, after a few classes on the concept in Torts class, trying to apply the concept effectively to a real case. The jury must do so based on a vague, general instruction such as this:

> A proximate cause of an injury is that which in a natural and continuous sequence, unbroken by an independent intervening cause, produces the injury, and without which the injury would not have occurred. It need not be the only cause, nor the last nor nearest cause. It is sufficient if it occurs with some other cause acting at the same time, which in combination with it, causes the injury.[10]

One study of jurors' understanding of proximate cause instructions concluded that all they take from an instruction like this is that "proximate cause [is] just a fancy way of saying causation." C. Mikell, Jury Instructions and Proximate Cause: An Uncertain Trumpet in Georgia, 27 Georgia St. Bar J. 60, 63 (1990). They have

no real concept of it as a separate limit on *legal responsibility* apart from actual causation.

The lesson of this for defense lawyers is that they must win the proximate cause battle in front of the judge, by convincing her that, as a matter of law, the defendant's act was not the proximate cause of the plaintiff's injury. This is a realistic prospect; in many cases the judge will grant summary judgment for the defendant, concluding as a matter of law that the plaintiff's injury was unforeseeable. If she lets the issue go to the jury, the plaintiff has probably won the proximate cause battle.

b. Judge Fudd's instruction misses the mark. He has instructed the jury that if the conductor should have anticipated injury to Corletti from his act, he is liable to him for the injury he sustains. This instruction is too broad, though you could find similar instructions in use in various states today. Surely the conductor could anticipate injury to Corletti from jostling him as he gets on the train: He might fall under the train, or fall down and get a bruise. But the conductor would not foresee explosion injuries, and it is very unlikely a court would hold him liable for them.

   Here is a less fuddled instruction:

> If you find that, when the conductor assisted the plaintiff onto the train, he should have foreseen an unreasonable risk of injury to plaintiff *of the general nature that actually took place*, then you should find that the conductor's negligence was a proximate cause of plaintiff's resulting injury.

If Judge Fudd had added the italicized language to the instruction, he would probably have concluded that, as a matter of law, the jury could not find it satisfied. The mechanism of harm that injured Corletti — explosion — was quite different from the risks the conductor might have expected from helping him onto the train.

The Thin Shell Rule?

6. When I used this example on my exam, many students argued that Keeton's negligence was not the proximate cause of the cleanup, on the ground that he would not have anticipated such an expensive consequence of his act. However, it is very doubtful that a no-

proximate-cause argument is going to get Keeton off the hook. Certainly, an accident with an oncoming vehicle is exactly the risk the odious Reasonable Person would announce, "like a town-crier in Pompei,"[11] as he saw Keeton dive for the tissue. And, if such an accident happens, it is entirely foreseeable that one of the vehicles could be damaged and leak. It is unfortunate for Keeton that that vehicle was a gasoline truck, and that the resulting damage is so extensive, but that fact is a detail of the accident. The general nature of the risk that caused the harm is one that Keeton should have anticipated. Let's hope he's well insured.

Consider a slightly less extreme case. Suppose that Keeton's negligence causes an accident with a dump truck carrying construction debris, which overturns onto the plaintiff's property, destroying plantings and a fence. Clearly Keeton would be liable for that. The gasoline truck seems to me equally foreseeable, though its spillage is more toxic.[12]

Risky Business

7. This is a recurring fact pattern that has spawned contradictory holdings in the cases. But the result under the risk rule seems clear. The risk that made the railroad's delay negligent was the risk that Pollack would suffer commercial losses, not the risk that, if the motors were shipped later rather than sooner, they would be damaged in transit by a flood. That risk is presumably the same whether they are in transit from March 16 to March 26, or March 21 to March 31, for all we know from the facts. Thus, the risk of flood was not a risk that made it negligent to delay the shipment. Under the risk rule, the railroad should not be held liable.

8. This example contrasts nicely with the last. Here, the railroad agreed that the apples would be shipped immediately, and was presumably aware, or should have been, that delay posed a risk that the apples would be spoiled by cold weather. Thus, one of the risks that made the delay negligent here was the risk of freezing as the weather got colder, and it was exactly this risk that caused the damage. (Couldn't you just see that self-righteous Reasonable Person wagging her finger at the railroad

superintendent and warning, “Those apples may freeze if you don’t ship them soon . . .”?) Consequently, the railroad would likely be held liable for the resulting damage. See *Fox v. Boston and Maine Railroad Co.*, 19 N.E. 222 (Mass. 1889).

9. a. I would analogize this case to the rat rather than the vat. Allowing the workers to work in the hold without clearing the gases posed a risk of explosion, and that is what caused their deaths. Yes, it is surprising that lightning set off the explosion, but the type of accident that occurred was precisely that to be anticipated, and the defendant need not anticipate “the details” of the accident. The *Johnson* court held as follows:

> Any one of a number of expectable circumstances might have brought about the precise injury which resulted; a lighted match, the flame of the acetylene torch, a heated rivet, a spark produced by friction of a tool or boot, and so on. The danger of the injurious result was over [sic] present, even though the manner in which, or the means by which, such result was brought about may have had in it some aspect of unusualness.

64 F.2d at 197. Based on this reasoning, the barge owner was held liable . . . but there was a dissent on the proximate cause analysis.

b. Isn’t there a nice argument to be made for the plaintiff in *Polemis*, based on the result in *Johnson*, that the explosion in *Polemis* was within the scope of the risk the charterer should have anticipated? The risk created by allowing the vapors to accumulate in the hold was that an explosion would take place. And one did, due to the unusual action of the board falling into the hold. This is just like *Johnson* and the rat case. This argument focuses on the general nature of the risk posed — explosion — rather than the peculiar means by which the risk came to pass. If “the friction of a tool or a boot” could cause the explosion, why not the friction of a board falling into the vaporous hold?[13] This focuses on the basic risk in the case — explosion — and characterizes the board as a “detail of the accident” rather than an unforeseeable cause. This is a pretty good argument that might well carry the day if *Polemis* were litigated today under modern proximate cause principles.

Afterthoughts

10. a. This is the typical "joint tortfeasor" case in which two actors are negligent at different times, and the two negligent acts combine to cause the plaintiff's injury. If Hart could argue that Ellsworth's negligence "superseded" his, there would be no law of "joint tortfeasors" in such cases; only the party who was negligent last would be liable, even though the negligence of each was a "but for" cause of the plaintiff's injury.

This is clearly not the law. One of the foreseeable risks of driving is that other drivers will be negligent. Thus, Hart cannot argue that Ellsworth's subsequent negligence "cuts off" his liability — one of the primary purposes for efficient brakes is to respond to the foreseeable risk of emergencies due to negligent driving.

b. Clearly, Hart's negligence and Ellsworth's negligence are "but for" causes of Mendoza's malpractice injury. If negligence of a driver on the road is foreseeable, why not negligence of a doctor practicing her profession? Virtually all courts hold that a tortfeasor who causes injury can anticipate that the victim might suffer further injury from medical treatment. Thus, the original tortfeasor is also liable for the subsequent malpractice.

Of course, Dr. Zipursky is *not* liable for the original injury, since he is not a "but for" cause of that injury. He is liable only for the additional injury caused by his negligent treatment.

c. Surely, one of the risks of supplying unlimited beer to guests at a party is that fights will arise. Most people won't get mad enough to run someone down, but the general risk of aggressive conduct is one of the risks that makes such conduct negligent, absent adequate security (or, probably, with it). In *Merli*, the court noted that

> neither foreseeability of the extent nor the manner of the injury constitutes the criteria for deciding questions of proximate cause. The test is whether the harm which occurred was of the same general nature as the foreseeable risk created by the defendant's negligence.

325 A.2d at 273. Here, the general nature of the risk — uncontrolled aggressive conduct — was clearly foreseeable to the union when it planned the bibulous barbecue. The union was held liable though it did not foresee that Becker would resort to using his car as a weapon.

d. i. Of course it was. If the tanks had been filled, the plane would have flown on to its intended destination and never would have been on the island when the volcano erupted. "But for" the failure to fill the tanks, the plane would not have been there and Morris would not have been injured. But we still have to ask the proximate cause question: Should the airline be held liable for this utterly unexpected injury?

ii. In this example, borrowed from Schwartz, Kelly & Partlett, Prosser, Wade and Schwartz's Torts: Cases and Materials 349 (13th ed. 2015), virtually any court would conclude that the airline's negligence was not the proximate cause of Beale's injury. Injury from an erupting volcano is not a foreseeable consequence of failing to fill all the fuel tanks. Under the risk approach, leaving the fuel out creates an unreasonable risk that the plane would have to ditch in the water or make an emergency landing, but not that the plane would land on an island at the time of a volcanic eruption. The court will deny recovery to Beale for this bizarre occurrence.

Many courts would hold that the eruption of a volcano near the airport where the plane was forced down was such an unexpected later event that it "supersedes" the negligence of the airline. But labeling the eruption a "superseding cause" is more a conclusion than a helpful method of analysis. The court must still separate superseding causes from others which do not cut off liability. Most courts do so on the basis of the extraordinary or unforeseeable nature of the subsequent events.

e. In this example, Apex was negligent in rewiring the system, but a later, deliberate criminal act of a third person leads to the plaintiff's injury. The issue is whether this act "supersedes" the negligence of Apex, so as to cut off its liability for the theft.

Subsequent intentional acts may cut off liability in some cases. A nice example is the owner who allowed a child trespasser into its building, only to have the boy maliciously usher a visitor into an unguarded elevator shaft. See *Cole v. German S. & L. Soc.*, 124 F. 113 (8th Cir. 1903). No one, not even a law professor, would anticipate such a twisted sense of humor. But other intentional acts are entirely foreseeable. Here, Apex was hired to avert the very type

of act which caused Smith's loss. It hardly seems appropriate for Apex to take his money to protect him from theft, and then when it fails to do so, to deny that such theft was foreseeable! Since illegal entry by a burglar is clearly one of the hazards that makes it negligent to wire the system improperly, Apex's motion for summary judgment should be denied. See Restatement (Second) of Torts §449 (quoted at p. 256).[14]

You Be the Judge

11. In the case from which this example is drawn, the court held that, while injury to persons or property from the escaping gas would be foreseeable, injury to the plaintiff's business was not.

> [T]he damage arising from the loss of natural gas supply, in turn causing the shutdown of electric turbines, in turn causing a loss of electric power vital to the aluminum reduction process, with the ultimate result being substantial damage to equipment and product-in-process, goes beyond the pale of general harm which reasonably might have been anticipated by negligent dredgers.

Consolidated Aluminum Corp. v. C.F. Bean Corp., 833 F.2d 65, 68 (5th Cir. 1987). With all due respect, this conclusion is dubious. It seems eminently foreseeable that the interruption of gas service will cause many commercial losses to nearby businesses. In fact, such secondary economic losses fall so clearly within the circle of foreseeability, and are claimed so frequently in tort cases, that courts have developed the "economic loss doctrine" to address them.

This case is an example of a court misusing foreseeability analysis to limit liability for other reasons. As stated in the introduction, courts often limit liability for clearly foreseeable harm for other policy reasons. Doubtless, the court denied liability because of the extreme burden that liability for secondary economic losses would impose in a case like this: If the dredger were liable to this plaintiff, it would be liable to all those who suffered from the interruption in service. It is certainly understandable that courts will refuse to impose overwhelming liability for secondary consequences of negligence. But it does little for clarity of analysis to mask this policy conclusion in the guise of foreseeability.

Couldn't the court, with stronger justification, have written as follows, relying on the economic loss doctrine:

> It is hardly unforeseeable that severing a major gas supply line (of which the defendant had been informed) will interrupt the flow of energy to a nearby manufacturer dependent upon that supply line, causing injury from the sudden disruption of complex manufacturing sequences and loss of products in process. However, given the magnitude of the losses that could flow from even a single interruption of such service, we think the burden of liability for such secondary losses too great to impose on the negligent tortfeasor.

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1. Many of the examples in this chapter are drawn from cases discussed in Judge Robert Keeton's helpful book, Legal Cause in the Law of Torts (1963).

2. This example is taken from Dobbs' Law of Torts, §198.

3. Restatement (Third) of Torts: Liability for Physical and Emotional Harm §29.

4. Another way to look at this is to say that there is no doctrine of "transferred negligence" analogous to that of transferred intent in intentional tort cases. See G. Williams, The Risk Principle, 77 Law Q. Rev. 179, 185-190 (1961).

5. Prosser, Proximate Causein California, 38 Cal. L. Rev. 369, 376 (1950).

6. Most states have rejected the rigid limits of the *Ryan* rule. New York has modified it as well. See Schwartz, Kelly & Partlett, Prosser, Wade and Schwartz's Torts: Cases and Materials 316-317 (13th ed. 2015).

7. "A view common in the 19th and early 20th century was that the deliberate infliction of harm by a 'moral being,' who was adequately informed, free to act, and able to choose, would 'supersede' the negligence of the first actor." D. Dobbs, P. Hayden & E. Bublick, Torts and Compensation 262 (7th ed. 2013).

8. The Third Restatement quite sensibly treats superseding cause as a simple variant of the basic test for scope of liability:

> Restatement (Third) of Torts §34:
>
> > Where a force of nature or an independent act is also a factual cause of harm, an actor's liability is limited to those harms that result from the risks that made the actor's conduct tortious.

9. *Engle v. Director General of Railroads*, 133 N.E. 138 (Ind. App. 1921).

10. Adapted from a prior version of New Mexico Model Jury Instruction UJI 13-305. The reporter's note to §29 of the Restatement (Third) of Torts: Liability for Physical and Emotional Harm offers an instruction that may be clearer to lay jurors:

> You must decide whether the plaintiff's harm was of the same general type of harm that the defendant should have acted to avoid. If you find that it is, you shall find for the plaintiff. If you find that it is not the same general type you must find for the defendant.

Reporter's note to §29 cmt. b, p. 518.

11. Dylan Thomas, A Child's Christmas in Wales 4 (New Directions 1954).

12. I get e-mails from students protesting my analysis of this example. I haven't been convinced by them yet, but remain open to further enlightenment.

13. "That friction of metal against metal or even wood against wood will produce fire is boy scout knowledge." L. Green, Foreseeability in Negligence Law, 61 Columbia L. Rev. 1401, 1411 (1961).

14. Compare *Stahlecker v. Ford Motor Co.*, 667 N.W.2d 244, 253-257 (Neb. 2003) (manufacturer of defective tire that blew out in remote area not liable for murder of stranded motorist).

PART IV

The Duty Element

CHAPTER 13

The Elusive Element of Duty: Two Principles in Search of an Exception

INTRODUCTION

It is hornbook law that the plaintiff in a negligence case must prove four elements in order to recover: duty, breach, causation, and damages. Even if the defendant was negligent, and that negligence caused injury to the plaintiff, the defendant will not be liable unless he also owed the plaintiff a duty of care. This chapter addresses the elusive element of duty.

It hardly seems that this should be a problem: Don't we all owe a duty to *everyone* not to injure them by our own negligence? Such a universal duty of care would simplify negligence law considerably: It would effectively eliminate the duty element from the plaintiff's burden of proof, since a duty of care would always exist. Although such a broad rule is tempting, courts have not been willing to impose a universal duty of due care. Courts have often refused to hold defendants liable, even though they have caused clearly foreseeable harm to the plaintiff. Here, for example, are some situations in which many courts would deny recovery even though harm was to be anticipated from the defendant's conduct.

a. Adler visits city hall to pay a traffic ticket. While walking up the stairs, he sees a pen lying on the edge of one of the stair treads. He

fails to pick it up, and Skinner later falls on it, breaking a leg.

b. Federal Safety Insurance Company provides fire insurance for industry. To reduce claims, Federal inspects the premises of the companies it insures for fire hazards before issuing a policy. Federal Safety inspects Rainbow Paint Company's factory, but neglects to enter a small room in which oily rags have been left in a pile. A week later, Skinner, an employee at the plant, is burned in a fire started by those rags. He sues Federal for failing to prevent the fire by seeing that the rags were removed.

c. Reik is driving down a rural highway and witnesses an accident in which White drives into a tree. Unwilling to get involved, she drives on. White is not found for an hour, and his injuries are aggravated by the delay in receiving treatment.

d. Dr. Rogers treats Jung for an infectious form of hepatitis. He is aware that Jung is a professional dancer. However, he makes no effort to warn other dancers who may have contact with Jung. Klein, a member of Jung's dance troupe, contracts hepatitis from Jung.

In each of these examples, the actor was (we will assume) negligent, and that negligence caused the plaintiff's damages. Yet many courts would refuse to allow recovery in these cases, on the ground that the actor did not owe a duty of care to the plaintiff.

WHY COURTS IMPOSE DUTIES, OR REFUSE TO IMPOSE THEM

Tort duties are not like chemistry's Periodic Table of Elements. Nature's elements (they tell me) have a physical existence quite apart from anything we might think about them. Chemists have identified them, but (with perhaps a few high-tech exceptions) they have not created them. Tort duties, on the other hand, do not exist in nature; they are *made up* by judges because they conclude that a duty *ought to* exist under the circumstances. "[L]egal duties are not discoverable facts of nature, but merely conclusory expressions that, in cases of a particular type, liability should be imposed for damage done."

Tarasoff v. Regents of the Univ. of California, 551 P.2d 334, 342 (Cal. 1976). "[I]t should be recognized that 'duty' is not sacrosanct in itself, but is only an expression of the sum total of those considerations of policy which lead the law to say that the plaintiff is entitled to protection." Prosser & Keeton at 358. If a court concludes that society will be better off if store owners exercise due care to assist injured customers, it will create such a duty; if a court concludes that bystanders should not be legally bound to render aid in an emergency, it will refuse to create a duty to intervene, and so on.

This fundamental fact of tort life is not something to be embarrassed about: Determining the legal rights and obligations of the parties is the most fundamental task of judging. On the other hand, it is not particularly satisfying to students simply to tell them that the duty issue is difficult and judges have to decide it. Understandably, you want more guidance about such an important issue.

Though the duty issue is complex, we can at least identify major factors that judges consider in deciding whether to impose a duty in a given case. These factors include the judge's sense of morality, the foreseeability and extent of the likely harm from the defendant's conduct, the burden that the new duty will impose on the defendant, alternative ways of protecting the plaintiff's interest, the increased safety likely to result from imposing the duty, the chilling effect the duty may have on defendants' conduct, administrative problems for the courts in enforcing the duty, problems of proof, and others.

Certainly, the foreseeability of harm weighs heavily in favor of imposing a duty on the actor, since it makes basic good sense that a defendant "should" avoid foreseeable injuries to others. For example, it is highly foreseeable that a mental patient who threatens to kill a relative will do so if released from custody, or that a parent will suffer traumatic shock if a negligent driver hits his child. Where resulting harm is so likely to follow, the argument is persuasive that the court should impose a duty of care to prevent it.[1]

The moral argument is also strong in many duty cases. Most people would believe that it is "right" for an employer to go to the aid of an injured worker, or a doctor to take steps to assure that an HIV-infected patient does not engage in unsafe sexual practices. This argument is particularly persuasive if the defendant is uniquely positioned to prevent harm. The psychiatrist who releases a patient who has threatened a relative, for example, may be the only one in a position to warn the relative. The police officer who

stops a drunk driver is uniquely placed to prevent that driver from causing an accident.

Other factors, however, weigh against imposing a duty of care, even if harm is foreseeable and avoidable. Courts hesitate to create duties that impose excessive burdens on actors. A court might, for example, refuse to impose a duty on school officials to supervise school children at bus stops. Such a duty would impose an expensive burden on school districts, which can be fulfilled as well, if not better, by parents. Similarly, many courts have refused to impose a duty of care on municipalities to properly inspect private property. Here too, the burden on municipalities would be exceedingly broad, and the risk can be averted by owners. Similarly, a court refused to hold that a hospital has a duty to warn all patients of the risks of medications, on the ground that the duty would be too broad, and that it can be better fulfilled by the patient's doctor. *Kirk v. Michael Reese Hosp. & Medical Ctr.,* 513 N.E.2d 387, 396-397 (Ill. 1987).

Administrative problems of enforcing the duty may also influence the court's judgment. For many years, courts denied liability for infliction of emotional distress on the ground that the risk of fraudulent claims and excessive litigation was too great. Similarly, they rejected claims for injury to fetuses partly on the ground that it would be extremely difficult to prove that the defendant's conduct was the cause of prenatal injury.

In other cases, the chilling effect of imposing the duty has counseled hesitation. In *Eiseman v. State*, 511 N.E.2d 1128 (N.Y. 1987), the court refused to hold that a college had a duty to control the acts of a parolee admitted to a college enrichment program. The court was unwilling to create a duty that would force colleges to place discriminatory restrictions on the very persons the program was meant to assist in reintegrating into society. Similarly, some courts hare refused to impose a duty on theater operators to prevent violence by viewers of violent movies, to avoid chilling activity protected by the First Amendment. See, e.g., *Yakubowicz v. Paramount Pictures Corp.*, 536 N.E.2d 1067, 1071-1072 (Mass. 1989).

Policies established by the legislature will also influence the court's duty analysis. Courts that have imposed a tort duty on the police to arrest drunk drivers have noted the firm legislative policy of controlling drunk driving. See *Irwin v. Town of Ware, 467* N.E.2d 1292, 1302 (Mass. 1984). Similarly, the *Tarasoff* court, in concluding that the psychiatrist had a duty to warn, rejected the argument that it would impair doctor/ patient confidentiality in

part because a statute rejected the privilege in situations involving danger to third persons. 551 P.2d at 346-347.

Other policy considerations may also be relevant to the duty analysis, depending on the facts of each case. In most, no single factor will be determinative; the judge will balance many to reach a conclusion. See generally Dobbs' Law of Torts §255. As an advocate, you may not always be able to predict that conclusion, but you can learn to identify factors relevant to the duty analysis, and to formulate arguments for or against imposing a duty based on those factors.

In many common situations, decades of precedent have defined fairly clearly the extent to which the courts will recognize a duty of care. The remainder of this introduction addresses common situations in which courts impose such a duty — or refuse to. However, it is important to remember that the duties described are not immutable truths; they are pragmatic policy judgments that may be reconsidered by future judges as society and public attitudes evolve.

FIRST PRINCIPLES: TORTS AND THE COUCH POTATO

I find it useful to analyze tort duties in terms of two basic principles, each liberally qualified with exceptions. The first principle is that courts generally refuse to impose liability for doing nothing. If Adler, a couch potato, spends all of his time on the sofa watching TV, he is in an excellent position to avoid tort liability. Indeed, as a Torts professor, I would advise you to do just that. People get into tort suits in the weirdest of ways, but they have little to fear from being inert.

This long-held view of the common law, that there is no liability for the failure to act, is illustrated by the hypothetical of the callous bystander who watches a blind man walk into a busy street and fails to call out a warning. Our moral sense is repulsed by the illustration, yet in most states the bystander still has no *legal* duty to act to protect another, and therefore is not liable for failing to do so. Similarly, a sunbather who watches a child going under the waves has no duty to dive in the water, throw her a life ring, or

even notify a nearby lifeguard:

> The fact that the actor realizes or should realize that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action.

Restatement (Second) of Torts §314.[2] According to the Second Restatement,

> The origin of the rule lay in the early common law distinction between action and inaction, or "misfeasance" and "non-feasance." In the early law one who injured another by a positive affirmative act was held liable without any great regard even for his fault. But the courts were far too much occupied with the more flagrant forms of misbehavior to be greatly concerned with one who merely did nothing, even though another might suffer serious harm because of his omission to act. Hence, liability for nonfeasance was slow to receive any recognition in the law.

Restatement (Second) of Torts §314 cmt. c.

Although torts scholars usually cite this no-duty-to-act principle with embarrassment, there are some substantial policy arguments to support it. The defendant whose act (misfeasance) endangers the plaintiff has "created a new risk of harm to the plaintiff, while by 'nonfeasance' he has at least made [the plaintiff's] situation no worse, and has merely failed to benefit him by interfering in his affairs." Prosser & Keeton at 373. Other defenders of the principle emphasize the infringement on individual liberty posed by coercing services from unwilling bystanders,[3] and the difficulty of defining the duty if it is to be imposed. For example, how great an effort would the defendant have to make? Would a bystander have to dive in after a drowning child if he could not swim? *Which* bystanders would have the duty — a whole beachful? Would bystanders be required to subordinate important interests of their own to effectuate rescue (for example, postpone visiting a seriously ill relative to assist at an accident scene)?

These objections are probably not insurmountable; most European countries impose a limited duty to aid, as does the state of Vermont. See Vt. Stat. Ann. tit. 12 §519. Yet most American courts have not rejected the no-duty-to-act rule outright. Instead they have nibbled away at it by carving out exceptions (discussed below at pp. 277–281). For on interesting defense of the no-duty-to-rescue rule, see M. Scordoto, Understanding the Absence of a Duty to Reasonably Rescue in American Tort Law, 82 Tulane L. Rev. 1447 (2008).

SECOND FIRST PRINCIPLES: RISK CREATION AS A SOURCE OF DUTY

The second broad duty principle complements the first: Those who do act, who choose to engage in activities that create a risk of injury to others, *do* have a duty to exercise care to avoid injuring others. If Bruner drives his car negligently and hits Gilligan, he has set loose a dangerous force that creates a risk to others. If Freud is reroofing his garage and drops his hammer on a pedestrian, that also creates a new risk of harm. If Chef Adler bakes a quiche with spoiled ingredients, causing food poisoning, he too has set in motion a new force capable of causing harm. These defendants, unlike the bystander in the nonfeasance cases, have "created new risks" by their activities which have caused injury.

Far and away the largest proportion of negligence cases — perhaps 90 percent — involve situations like these, in which defendants have let loose dangerous forces that have caused injury. In these cases, the defendant's choice to engage in risk-creating conduct for his own benefit imposes the reciprocal duty to exercise due care toward those who may foreseeably be injured by that conduct. The law tolerates, indeed, encourages, activity, including activities that impose risks of injury on others. But it has long recognized that those who unleash such forces owe a duty to others to keep that risk to a reasonable level.

In most cases, risk creation is the obvious basis of the duty to exercise due care. Duty is probably the least frequently contested element of a negligence claim, because most negligence cases arise from active conduct, and it is clear that the actor owed a duty to exercise due care toward those who might foreseeably be injured by it. For example, the duty issue is seldom raised in highway accident cases, since we all understand that we owe a duty of due care to others in driving a car. Similarly, it is clear that a utility company that erects a telephone pole owes a duty of care to anyone who might foreseeably be injured if it falls.

In analyzing duty issues, it is important to keep in mind these two divergent first principles — on the one hand, the bystander who has not created any risk and who declines to get involved, and, on the other, the actor whose conduct creates a risk of injury. However, these two paradigms do not, unfortunately, resolve all the cases. For various policy reasons, courts have

spawned exceptions to both principles. As discussed below, a person who has done nothing may sometimes be held liable for failing to act. And, at times, a person who has created a risk will *not* be held liable, even though her risk-creating activity leads to foreseeable injury.

EXCEPTIONS TO THE NO-DUTY RULE: DUTIES OF AFFIRMATIVE ACTION

Let's look first at some exceptions to the no-duty-to-act rule. Courts have not hesitated to create "affirmative duties" to act for the protection of another where some policy justifies departing from the no-duty rule. When such a duty of affirmative action is found, the actor may not defend on the basis that "I just didn't want to get involved": The law imposes a duty to get involved.

A. Duty Based on a Special Relationship to the Victim

Courts often impose a duty to aid based on a preexisting relationship between the defendant and the person who needs assistance. See Restatement (Third) of Torts §40. Here are some typical examples in which courts have imposed a duty to act for the protection of another due to a "special relationship" to the plaintiff:

- A train conductor sees a passenger being assaulted by another, but fails to come to the victim's aid.
- A factory owner fails to assist an employee who is trapped in an elevator in the course of his employment.
- School officials note that a child is feverish but fail to seek medical care for the child.
- A prison inmate complains repeatedly to a guard of stomach pains, but the guard fails to take any steps to get him medical help.

In each of these situations, the defendant is not the source of the injury-producing conduct. The school officials, for example, did not cause the

child's fever, nor did the train conductor assault the passenger. However, because of the defendant's relationship to the victim in these cases, the courts impose a duty on the defendant to take affirmative steps to minimize or avert the harm. In the factory example, the duty is based on the fact that the employer is uniquely situated to mitigate the harm and that the employee is on the premises for the benefit of the employer. The duty in the school case is based on the fact that school officials take charge of children with knowledge of their need for protection. The duty to prisoners is premised on taking charge of the prisoner and depriving him of the ability to act for his own protection.

B. Duty Based on a Special Relationship to the Perpetrator

A second category of special relationship exceptions to the no-duty rule involves situations in which courts impose a duty to control one person to prevent him from injuring others. Examples include the duty of a parent to control a child in certain circumstances (Restatement (Second) of Torts §316) and the duty of an employer to control an employee. Restatement (Second) of Torts §317. The Restatement imposes a similar duty on one who takes charge of another with "dangerous propensities":

> One who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm.

Restatement (Second) of Torts §319. Accord: Restatement (Third) of Torts: Liability for Physical and Emotional Harm §41. This exception, which applies primarily to those in charge of mental patients or prisoners, reflects the courts' conclusion that the defendant accepts a duty of care by taking charge of a person who poses a risk of injury. The employer's duty to control an employee is presumably based on the benefit the employer derives from the activities of the employee. In addition, as noted above, the defendant in those situations is often uniquely positioned to prevent the harm.

Perhaps the most famous affirmative duty case, *Tarasoff v. Regents of the Univ. of California,* 551 P.2d 334 (1976), was decided on the basis of this special relationship principle. The *Tarasoff* court concluded that the

psychiatrist's relationship to a dangerous patient gave rise to a duty to warn the patient's intended victim that the patient had threatened to kill her. This particular application of the special relationship approach has been controversial. Because of the burden this duty imposes on defendants, some courts have refused to extend it beyond situations involving a threat to a particular victim. See *Leonard v. State*, 491 N.W.2d 508, 512 (Iowa 1992) (holding psychiatrist owes no duty to members of general public in discharging patient).

C. Duty Based on Innocent Creation of the Risk

Another set of exceptions to the no-duty rule involves situations in which the defendant, without negligence, creates the risk that causes injury to the plaintiff. See Restatement (Second) of Torts §321, which provides:

> (1) If the actor does an act, and subsequently realizes or should realize that it has created an unreasonable risk of causing physical harm to another, he is under a duty to exercise reasonable care to prevent the risk from taking effect.

The Restatement gives the example of a driver whose truck suddenly becomes disabled on the road and fails to warn oncoming traffic. Restatement (Second) of Torts §321 illus. 3. Under §321, the driver, though not negligent, is the author of the risk, and owes an affirmative duty to warn other drivers of the danger. Similarly, under Restatement (Second) of Torts §322, an actor who has injured another, even without negligence, has an affirmative duty to render assistance to prevent further harm to the injured party. For example, if Freud hits Adler, a pedestrian, with his car and knocks him into the street, §322 requires Freud to take reasonable steps to protect Adler from further injury.[4]

These exceptions to the no-duty rule are presumably based on the risk creation rationale. Even though Freud was not negligent, he has, by his risk-creating conduct for his own purposes, placed Adler in a position of danger. To require him to go to Adler's aid "is simply requiring [a person] to minimize the consequences of risks which society gives him a privilege to create." F. James Jr., Note, Scope of Duty in Negligence Cases, 47 Nw. U. L. Rev. 778, 804 (1953).

This duty to help persons injured or placed in peril by the actor without negligence illustrates the way in which duties evolve. Both the Second

Restatement and the Third Restatement take the position that innocently placing another in peril gives rise to a duty of care. However, §322 of the First Restatement of Torts limited the duty to persons "made helpless by *tortious* conduct" (emphasis added). What changed in the intervening years to make judges willing to impose a duty to assist, even if the actor had not been negligent? Perhaps the New Deal and the Second World War tempered the rampant individualism of the nineteenth century. Perhaps the increased frequency of automobile accidents played a part. Perhaps the lessening of a moralistic focus on fault, and increased emphasis on risk creation and cost avoidance as bases for liability, have contributed. For whatever reasons, as society has changed, so has the scope of duty.

D. The Gratuitous Services Exception

Another widely recognized exception to the no-duty-to-act principle arises where the defendant, though under no initial duty to do so, goes to the aid of another:

> One who, being under no duty to do so, takes charge of another who is helpless adequately to aid or protect himself is subject to liability to the other for any bodily harm caused to him by
>
> (a) the failure of the actor to exercise reasonable care to secure the safety of the other while within the actor's charge, or
>
> (b) the actor's discontinuing his aid or protection, if by so doing he leaves the other in a worse position than when the actor took charge of him.

Restatement (Second) of Torts §324. This exception is illustrated by the bystander who sees a pedestrian hit by a car, and goes to the pedestrian's assistance, but negligently causes further injury to her by handling her roughly or using clearly inappropriate first aid techniques.

Ironically, this exception to the no-duty principle imposes the risk of tort liability on the bystander who makes the worthy choice to render assistance. Once Smith decides to "get involved," he assumes a duty of care, although, had he simply stood by or walked away, he would have incurred no liability. See Restatement (Second) of Torts §314.[5] Presumably, the rationale is that the actor, while virtuous, is still a risk creator in rendering assistance, and should not be licensed to mishandle the victim with impunity.

EXCEPTIONS TO THE RISK CREATION RULE: DUTY AS A LIMITING FACTOR IN NEGLIGENCE CASES

This introduction began by describing two "first principles": that there is no general duty to act for the benefit of another, and that those who choose to act owe a duty to others to use due care in such conduct. Then, we explored some exceptions to the no-duty principle, situations in which courts have imposed a duty on one person to act for the benefit of another. Now, let's consider some exceptions to the second "first principle," that persons who choose to engage in risk-creating activity owe a duty of care to others who might foreseeably be injured by that activity.

One school of thought argues that there should be *no* exception to this second "first principle," that actors who engage in risk-creating activities should be liable for all injuries foreseeably caused by their negligence. The argument traces its roots to the following statement in *Heaven v. Pender*, 1881-1885 All E.R. Rep. 35, 39 (1883).

> [W]henever one person is by circumstances placed in such a position with regard to another that any one of ordinary sense who did think would at once recognise that, if he did not use ordinary care and skill in his own conduct with regard to those circumstances, he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger.

Despite the intuitive appeal of this statement, no court accepts it without qualification.[6] Liability for all foreseeable injury from negligent conduct would impose too heavy a burden on defendants in some situations. Sometimes, the extent of this burden leads courts to restrict liability for foreseeable harm by holding that the defendant "owed no duty" to the plaintiff.

Many casebooks illustrate the point with two classic limited duty problems, duties to the unborn and duties to avoid inflicting emotional distress. In each of these areas, courts have drawn the circle of duty considerably more narrowly than the limits of foreseeable harm. For example, many early cases held that a defendant who injured a fetus (e.g., by negligently hitting the mother with a car), was not liable, because there was "no duty to the unborn." See, e.g., *Magnolia Coca Cola Bottling Co. v.*

Jordan, 78 S.W.2d 944, 945-950 (Tex. 1937), *overruled*, *Leal v. C. C. Pitts Sand & Gravel Inc.*, 419 S.W.2d 820, 822 (Tex. 1967). While such injuries are foreseeable, the early cases denied liability for policy reasons, including the difficulties of proving the cause of prenatal injury, reluctance to treat fetuses as "persons" in the absence of statutory authority, and the risk of fraudulent claims.

More recently, many courts have recognized a duty of care to the unborn in at least some circumstances. See generally Liability for Prenatal Injuries, 40 A.L.R. 3d 1222 (1971). This is not because the defendant's conduct is any different or the plaintiff's injury any more foreseeable. Modern courts, for various reasons of policy, are simply more willing to impose a duty in such cases. Doubtless two reasons for the shift are the improved ability to trace the source of fetal injury and the wide availability of insurance for such claims.

Similarly, early cases refused to allow recovery for infliction of emotional distress unless the plaintiff suffered a physical impact. For example, recovery was denied where the plaintiff, narrowly missed by a speeding car, suffered serious fright and a resulting heart attack. Here again, it was often clear that the defendant had created the risk and that the risk had caused foreseeable injury to the plaintiff. Yet the courts refused to recognize a duty here, out of fear of fraudulent claims and greatly increased litigation. Recent cases have broadened this duty as well, but liability for negligent infliction remains considerably narrower in most states than the all-foreseeable-risks principle argued for in *Heaven v. Pender*. See Chapter 14, which analyzes in detail claims for negligent infliction of emotional distress.

Courts have similarly limited the duty of care in many other types of cases, based on policy considerations unique to each situation. Some examples include liability for serving alcohol to intoxicated patrons, liability of lawyers to beneficiaries for negligent drafting of a will, liability of accountants to third parties (other than their clients) who rely on their opinions, liability for secondary economic losses and the liability of landowners for injury to entrants on their land. In these and other situations, courts often refuse, for policy reasons, to impose liability even though the defendant has caused foreseeable harm to others.

THE RELATION OF DUTY TO PROXIMATE

CAUSE

Much confusion exists as to the distinction between the duty element in negligence cases and proximate cause limitations on liability. It may help, however, to distinguish two types of limitations that courts place on liability: First, limiting liability to the foreseeable consequences of the defendant's negligent act, and second, denying liability for consequences that *are* foreseeable, for the types of policy reasons discussed in this chapter.

Courts very frequently use the concept of *proximate cause* to limit liability to the foreseeable consequences of a negligent act. Consider, for example, the hypothetical in which the defendant leaves the ignition key in his car, and it is stolen by a terrorist and used to bomb an embassy. The defendant may well owe a duty not to leave his car open to theft, particularly in an area where teenagers congregate. Yet the result here is so idiosyncratic, so beyond the scope of harm to be expected, that most courts would refuse to hold the defendant liable for the bombing damages. The rationale here is that liability should be limited to the circle of foreseeability, the consequences that the defendant could reasonably anticipate at the time he acted.

By contrast, courts often use the *duty* concept to deny liability for consequences that *are* foreseeable, as in the early emotional distress and fetal injury cases. These courts refused to impose liability for policy reasons, and found the duty concept a proper tool for limiting recovery much more narrowly than foreseeability analysis would.

Unfortunately, this distinction between duty and proximate cause analysis is not consistently honored in the cases. The issue in *Palsgraf*, for example, was foreseeability, yet Justice Cardozo used duty analysis to reject Mrs. Palsgraf's claim, while Justice Andrews's dissent concluded that she was owed a duty and analyzed the case in proximate cause terms. In other cases courts use proximate cause language in placing policy limits on liability for clearly foreseeable harm. For example, earlier cases held that a barkeep who served liquor to an intoxicated patron was not "the proximate cause" of her drunk driving, though nothing could be more foreseeable than a drunk driver causing an accident.

When they make me the King of Torts, my first decree shall be that courts must always use proximate cause analysis to bar liability for unforeseeable harm, and duty analysis to impose policy limits on liability for harm that *is* foreseeable. But in our motley kingdom as it stands today, we have to live

with the fact that the two concepts are sometimes used interchangeably. Even if the courts' duty and proximate cause analysis is not always consistent, however, it will still be helpful to keep in mind the above distinction between refusing to impose liability for unforeseeable consequences (the classic proximate cause situation), and refusing, for policy reasons, to impose liability for ones that are foreseeable (the classic duty limitation).

Examples

Matters of Principle

1. On a breezy morning after a storm, Ellis leaves his house to walk to the train station. As he passes the house of his neighbor, Klein, he notices a tree limb in the road in front of her driveway. Pressed for time, he continues on his way to catch his train. Klein is injured when her car hits the limb as she backs out of the driveway. She sues Ellis for failing to warn her of the danger. Ellis moves to dismiss Klein's complaint, on the ground that, as a matter of law, he had no duty to Klein under the circumstances.
   a. Should this case be analyzed under the no-duty principle (and its exceptions) or the risk creation principle (and its exceptions)?
   b. Will the motion be granted?

2. Muller, while tearing down an old shed with a friend, Ehrlich, negligently knocks out a post which supports the upper floor. The floor falls on Ehrlich, who suffers a concussion. She is taken to the hospital and kept for observation overnight. During the night, the hospital wing catches fire, and she is burned. She sues Muller for her injuries.
   a. Is this a risk creation case or a no-duty case?
   b. How should the court rule if Muller moves to dismiss the claim for the burns?

Limited Duties

3. Reik decides to go boating. She goes down to the local marina, rents a

rowboat from Lake Rentals, and takes her family out in the boat. An hour after they get out onto the lake, the wind comes up, the boat capsizes, and Reik is drowned.

Her estate sues Lake Rentals for wrongful death. The complaint alleges that Lake was negligent in failing to supply adequate life vests, in renting a boat that was not seaworthy for the lake, and in failing to warn her that strong winds were expected that afternoon.

a. Which theory is likely to be challenged on no-duty grounds?

b. How do you think it will be resolved?

4. Consider the example from the Introduction in which Dr. Rogers treats Jung, a professional dancer, for hepatitis, but fails to warn his dance troup that he has a disease that can be spread through physical contact. Klein, one of his dance partners, contracts hepatitis and sues Dr. Rogers. Naturally, Klein, in arguing that Rogers owed her a duty of care, relies on *Tarasoff v. Regents of the University of California*, 551 P.2d 334 (1976), which held that a therapist had a duty to warn a homicide victim that a mental patient had threatened to kill her.[7]

   a. You represent Rogers. How would you argue that the duty created in *Tarasoff* should not be extended to this case?

   b. You represent Klein. If the court refuses to recognize a duty to warn her, what more limited duty argument might still support recovery?

Her Spouse's Keeper?

5. Antell, an alcoholic, injures Freud while driving drunk. Freud learns that Antell had been drinking at home all day before the accident. Antell's wife had threatened to take away his car keys (usually left hanging on a hook in the kitchen when not in use) but had failed to do so. Freud sues Mrs. Antell for negligence, and she moves to dismiss.

   a. Should this case be analyzed under the no-duty principle (and its exceptions) or the risk creation principle (and its exceptions)?

   b. How should the court rule on the motion?

6. Suppose instead that Antell had a history as a child abuser. His wife notes that two neighborhood girls are spending a lot of time with Antell,

but does nothing about it. The girls are sexually abused and sue her for failing to intervene or warn their families of her husband's propensities.

a. Once again, should the duty argument for suing Mrs. Antell be based on risk creation or a special relationship?

b. What are the strongest arguments against imposing a duty here?

The Priest and the Levite

7. Dr. Rogers, a doctor in general practice, is driving to work one morning on a quiet country road. He witnesses a single-car accident in which the driver, Jung, hits a tree, opens the driver's side door and falls to the ground. Anticipating a busy morning at the office, he drives on. Jung suffers permanent injuries which would have been considerably less severe if he had received prompt treatment. He brings a negligence action against Rogers.

   a. Did Dr. Rogers cause any injury to Jung?

   b. Will the court dismiss the case for lack of duty if it applies §324 of the Second Restatement (see p. 280)?

   c. Suppose that Dr. Rogers witnesses the accident and calls 911 to report it. He then drives away. Would he then be liable for failing to provide emergency treatment to Jung?

   d. How do you think the court would rule if Rogers recognized Jung as a patient he had treated for ulcers, yet still failed to stop?

8. Assume, on the facts above, that Dr. Rogers *did* stop to help Jung. In an effort to make him more comfortable, he moves Jung over onto the grass. However, because Jung's leg was broken, the move caused serious additional damage to Jung's leg. Jung sues Rogers for negligence. Rogers moves to dismiss on the basis that he owed no duty of care to Jung. How will the court rule on the motion if it applies §324 of the Second Restatement (see p. 280)?

9. Suppose, on the facts of Example 7, that Klein happens by and sees Jung lying unconscious on the ground. She moves Jung off the road and then, realizing that Jung is severely injured, she becomes upset and drives away. Jung suffers serious injuries from loss of blood, which could have

been avoided had Klein remained with him and bound up his wound. Would Klein be liable to Jung under §324 of the Second Restatement?

10. While Skinner is driving down a West Dakota street a mudflap from a truck blows onto his windshield. Skinner instinctively ducks, and his car swerves onto the sidewalk, pinning Klein, a pedestrian, against a building. Skinner gets out and tries to extract Klein by pushing the car. Instead, the car rolls farther forward, aggravating Klein's injury. Klein sues Skinner for negligently causing the increased injury.

    Skinner moves to dismiss based on West Dakota's Good Samaritan statute, which provides in part that "A person who, without a duty to do so, renders emergency care at or near the scene of an emergency, gratuitously and in good faith, is not liable for any civil damages as a result of any act or omission by the person rendering the emergency care, unless the person is grossly negligent." How should the court rule on Skinner's motion?

Remy's Revenge

11. As the introduction notes, a common duty problem in tort law involves whether a duty of care is owed to unborn children. Early cases generally rejected such a duty, but more recent cases tend to recognize it. For example, most courts today would recognize that drivers owe a duty of care to unborn children, so that a driver who negligently injures a pregnant woman, leading to injuries to the fetus, would be liable for those injuries.

    Remy v. MacDonald, 440 Mass. 675 (2004), involves a fascinating twist on this problem. In *Remy*, an unborn child was injured in an auto accident, and sued for her injuries. The twist was that she sued her mother, who was driving one of the cars.[8] Fifty years ago, this suit would have been barred by parental immunity. But that doctrine has been abrogated in most states, including Massachusetts. If Remy's mother had delivered her, and caused injuries to her while driving home from the hospital, Remy could have recovered from her mother for those injuries. And, as just noted, if she were injured while in utero by the negligence of the other driver in the accident, she could have recovered from the other driver after being born. So why not, putting these two

principles together, recover from her mother for her prenatal injury due to the mother's negligence?

a. What principle is in play here, the special relationship principle or the risk creation principle?

b. What are the arguments *against* recognizing that the mother owed her fetus a duty of reasonable care?

12. Bettelheim, a bar owner, is working behind the bar when a distraught citizen runs in to call the police to stop a robbery out on the street. Bettelheim refuses to allow him to use the phone. Couch, the victim of the robbery, is then stabbed by his assailant and sues Bettelheim for his injuries.

a. Which of our two principles should we start from in analyzing this case?

b. Should Bettelheim be held liable?

Judge Fudd Does His Duty

13. Jack, a convicted murderer, escapes while being transported to court by Freud, a prison guard, and attacks White on the street while trying to steal his car. White sues Freud for his injuries. Judge Fudd instructs the jury in part as follows:

If you find that the defendant had charge of Jack at the time of the incident, and that Jack was likely to cause harm to others if not controlled, then you may find that the defendant owed a duty to the plaintiff to prevent the attack by Jack on the plaintiff.

Can you spot two fundamental problems with Judge Fudd's instruction?

Explanations

Matters of Principle

1. a. This case should be analyzed under the first principle, that there is no general duty to act for the protection or aid of another. Ellis has not

created a risk to Klein; Mother Nature is responsible for that. The question is whether, for one reason or another, the court will impose a duty on Ellis to take affirmative steps to protect Klein from a risk he did not create.

b. As the introduction suggests, the general rule is that Ellis is not his neighbor's keeper. He is under no legal duty to aid another simply because she may need it, because it would be easy or morally appropriate, or because the risk to the other person is great. Archaic though the rule may seem, it is alive and well. The court will grant Ellis's motion, on the ground that he owed no duty to Klein, unless she can establish some basis for an exception to the no-duty principle.

The facts here do not suggest a basis for such an exception. Ellis has not created the hazard, so the most likely basis for avoiding the effect of the general rule is to argue that a special relationship between him and Klein supports a duty to aid her. The only source of such a relationship in this case is the fact that Ellis and Klein are neighbors. But in a society that puts a premium on individualism, it is very doubtful that a court would transform neighborliness into a legally enforceable duty. Becoming a neighbor is not like taking charge of a pupil or running a train service. People hardly expect that they have assumed any degree of care for their neighbors, whom they may like, loath, or ignore as the case may be.[9]

While imposing such a duty might lead to a marginal decrease in injuries, it would also create potentially intrusive relationships between abutters who may have no interest in anything but being left alone. Can't you just imagine the busybody next door coming over weekly with a list of dangerous conditions you should abate immediately for your own good? Those dead limbs should come off your trees; that big flower pot on the railing could fall; you need a safer lid on your well; you ought to trim those bushes at the end of your driveway, and so on. It's enough to make the no-duty rule look halfway respectable!

2. a. This case is clearly based on Muller's risk-creating conduct. Muller's active conduct in demolishing the shed has created a risk of injury to Ehrlich, and she has suffered injury from that risk.

b. This example illustrates the distinction between existence of a duty and the *extent* of liability in a situation where a duty clearly exists. Any court would conclude that Muller owed Ehrlich a duty of care in working on the shed, and that he is liable for her concussion. He engaged in risk-creating conduct, and Ehrlich's injury results from it. It was foreseeable that, if the floor collapsed, the collapse would cause personal injury, and it did.

However, many courts would refuse to hold Muller liable for Ehrlich's burns, since the risk that she would be burned in a fire at the hospital was unforeseeable. To me, this is best explained in proximate cause terms, as a refusal to hold a defendant liable for bizarre consequences. Yet many courts would conclude, following Cardozo's approach in *Palsgraf*, that Muller "owed no duty" to Ehrlich to prevent this type of harm, since being burned in a hospital fire was not one of the foreseeable risks of knocking out the porch post.

Whichever formula the court uses, the crux of the matter here is that courts are unwilling to extend liability for risk-creating conduct beyond the circle of foreseeable risk. They sometimes draw the liability limit *short* of foreseeability, but very seldom impose liability *beyond* its bounds.

Limited Duties

3. a. The estate's third theory raises the most difficult duty question. Lake Rentals engaged in risk-creating conduct by renting the boat to Reik: It would clearly create unreasonable risks if it rented her a boat that wasn't seaworthy, or that lacked adequate life vests. However, it is more of a stretch to argue that they assumed a duty to warn her about the weather.

b. While Lake Rentals clearly engaged in risk-creating conduct by renting Reik a boat, there must be some limits to the duty it has assumed. Must it, having rented the boat, instruct Reik in safe methods of rowing? Must it warn her of submerged rocks on the other side of the lake? Must it explain to her that putting all passengers on one side of the boat will cause it to tip, or that in cold water one might die of hypothermia before reaching shore? If the

court imposes a duty to warn of the weather, these cases will follow hard upon. At the same time, boaters are in as good a position as Lake Rentals to check the weather before they take to the lake. In the case from which this example is drawn, the court held that the marina had no duty to monitor the weather and warn of expected winds. The court emphasized that the duty would be "unwieldy" and that boaters are equally able to ascertain these matters for themselves. *Leach v. Mountain Lake,* 120 F.3d 871, 873 (8th Cir. 1997). Accord: *In re Aramark Sports & Entertainment Services, LLC*, 831 F.3d 1264, 1279-1284 (10th Cir. 2016).

Note that here the plaintiff's injury is clearly foreseeable to the defendant. It should hardly be surprising to Lake Rentals that a small boat will founder in high winds, especially if it knew the winds were coming. Liability is denied, not for lack of proximate cause, but because the judicial system is unwilling to impose a duty to prevent the harm.

4. a. There is some force to the argument that *Tarasoff* supports recovery for Klein. Rogers has assumed a duty of care by accepting Jung as a patient, and he was uniquely placed to prevent the harm. Imposing a duty to warn on Rogers would perhaps reduce the risk that Jung would infect others, just as warning Tarasoff might have prevented her death.

However, there is a strong argument that imposing a duty to warn Klein is an unwarranted extension of *Tarasoff*. In *Tarasoff*, the psychiatrist was aware of a risk to a particular person. Here, the risk is to a large, ill-defined class of persons. Would Rogers be required to seek them out or to obtain a list of all possible dance partners? Who else would he be required to warn? In addition, there is a significant difference between Jung in this case and the mental patient in *Tarasoff.* Presumably, Jung has no desire to infect others, and can take steps to avoid doing so. By contrast, the patient in *Tarasoff* had every incentive to conceal the risk he posed from his intended victim.

In addition, imposing a duty to warn would seriously breach the confidentiality of the doctor/ patient relationship. Rogers would have to reveal Jung's disease to a large group of persons, not just to one

individual.

A few cases have imposed a duty to warn members of a patient's family of a communicable disease. See, e.g., *Safer v. Estate of Pack*, 677 A.2d 1188 (N.J. Super. 1996) (duty to inform member of patient's family of genetic risk). Compare *Lemon v. Stewart*, 682 A.2d 1177 (Md. Ct. Spec. App. 1996) (no duty to inform family members that patient was HIV positive); *Gammill v. United States*, 727 F.2d 950 (10th Cir. 1984) (doctor owed no duty to warn friends who contracted hepatitis while babysitting for children of infected patient); see generally Annot., 3 A.L.R. 5th 370 (1992). But this example entails a considerable expansion of the duty that most courts would hesitate to approve.

b. Since courts are naturally hesitant to create broad new duties, plaintiff's counsel should argue for the narrowest duty that will serve her purpose. Here, Klein can argue that Rogers had a duty to *warn the patient* of the risk of spreading the disease through contact. This duty is not subject to the same objections as the wider duty to warn third parties. It is easily performed while treating the patient, involves no breach of confidentiality, and places no burden on Rogers to identify persons at risk. Consequently, this duty has been much more widely accepted. See, e.g., *Reisner v. Regents of the University of California*, 37 Cal. Rptr. 2d 518 (Cal. App. 1995) (third party later infected by patient may sue hospital for failure to inform patient of HIV infection).

Of course, if Klein relies on this narrower duty, she will face a further problem: causation. She will have to establish that Jung, if warned, would have avoided the contacts through which he gave Klein the disease. Even if warned, Jung might not have acted on the advice, since his livelihood was as stake.

Her Spouse's Keeper?

5. a. This case should be analyzed under the no-duty principle and its exceptions. This is not a case in which Mrs. Antell has created the risk that injured Freud. The direct risk-creating conduct was her husband's — the supremely antisocial act of driving while intoxicated. If she is liable for it, it will have to be based on some

affirmative duty to avert that risk.

b. This motion should be granted unless some exception to the no-duty principle applies. Naturally, the special relationship exceptions spring to mind as a promising source of such a duty; what relation is "special" if not marriage?

Marriage is indeed sacred, but it is not an automatic source of vicarious liability for the torts of one's spouse, nor have courts concluded that tying the knot gives rise to a duty to control an errant spouse. Even though it would have been easy and socially beneficial for her to palm the keys, most courts would conclude that Mrs. Antell is not liable to Freud for failing to do so. Cf. *Andrade v. Baptiste*, 411 Mass. 560 (1992) (wife had no duty to prevent husband from storing weapons in home she owned, though she knew of his serious drinking problem). See also *Grover v. Stechel*, 45 P.3d 80 (N.M. App. 2002) (mother supporting adult son owed no duty to protect third party from his violent tendencies). But see *Volpe v. Gallagher*, 821 A.2d 699 (R.I. 2003) (mother liable for failing to act to control conduct of mentally ill son who kept multiple weapons in family home and used one to kill neighbor).

Plaintiffs in cases like this will have a better chance of recovering under the risk creation principle. Suppose, for example, that Mrs. Antell had provided her husband with keys to her car and he was driving that car at the time of the accident, or she had insisted that he drive to the store for a battery for her laptop. On these facts, she would have participated in the creation of a foreseeable risk, and could be held liable for doing so.

6. a. Here again, Mrs. Antell did not create the risk that the girls would be abused; her husband did. The tort claim against her is premised not on something she did, but on her failure to act, the failure to warn or prevent the abuse. The plaintiffs will have to argue that she had a special relationship to her husband, the perpetrator, that imposed a duty on her to act to prevent the abuse.

b. There are several strong arguments against imposing a duty in these circumstances. If the court imposes such a duty, it suggests that Mrs. Antell must, if she has reason to suspect abuse, watch and confront her husband, or denounce him to others based on a suspicion that he

might commit child abuse. Even child abuse reporting statutes usually are triggered by knowledge of actual abuse, not just knowledge of a risk. Imposing such a duty is hardly likely to promote marital harmony.

Another argument against imposing the duty is that recognizing the duty will lead to many slippery-slope problems, much as the *Tarasoff* decision has in an analogous context. If the court imposes a duty on these facts to warn the girls' families, it would be a short step to impose a duty in the example of the intoxicated spouse. In that case, as here, the wife was aware of a risk, but failed to take steps to prevent that risk of injuring a third party. Further, if this duty to act is recognized, *which* neighbors would the spouse have to warn? All of them, or only those with children? For what distance? And, if the duty is recognized, the court will have to confront cases in which defendants other than spouses, such as roommates or neighbors, are sued for failing to prevent abuse. And, suppose that the suspicion proves erroneous? It isn't hard to predict that many such difficult cases will follow if this duty is recognized. This prospect might lead a court to avoid these murky waters entirely by refusing to recognize a duty at all, despite the reprehensible nature of child abuse.

Despite these arguments, the New Jersey Supreme Court, in *J.S. v. R.T.H.*, 714 A.2d 924 (N.J. 1998), held that a spouse owes a duty to take reasonable steps to prevent child abuse, or to warn of the risk, if the spouse "has actual knowledge or special reason to know of the likelihood of his or her spouse engaging in sexually abusive behavior against a particular person or persons." Id. at 935. The court relied on the "strong public policy of protecting children from sexual abuse," and on the fact that a New Jersey statute requires reporting of child abuse, even by spouses. But see *Sacci v. Metaxas*, 810 A.2d 1119 (N.J. Super. App. Div. 2002), which refused to extend the duty recognized in *R.T.H.* to require a wife to warn a shooting victim of the risk that her husband, who had violent propensities, might kill him. See also *Eric J. v. Betty M.*, 90 Cal. Rptr. 2d 549 (Cal. App. 4th Dist. 1999), in which family members of a man previously convicted of child abuse failed to warn his new girlfriend, who had a young son, of his conviction. Although the

abuser proceeded to abuse her son, the court denied her claim against them for failure to warn.

The Priest and the Levite

7. a. Rogers certainly did not cause Jung's injury from running into the tree, but he may be a but-for cause of the aggravation of the injury. If Jung's injuries would have been less severe with prompt treatment, Rogers's failure to stop is a but-for cause of the aggravation. Certainly if Rogers had a duty to help Jung (for example, if Jung were a student in his charge), a court would have no problem concluding that he had caused the aggravated injuries by his failure to aid.

   b. This is also a nonfeasance case, in the sense that the defendant Rogers has not created the risk to Jung or done anything to cause his initial injury. The question is whether a court will impose a duty on Rogers, due to his awareness of Jung's need for assistance or his ability to render it.

   Most courts would conclude that this falls squarely under the no-duty principle, that a bystander owes no duty to aid another unless the bystander has placed the victim in peril or has a previous relationship with the victim that supports a finding of duty. Since Rogers, as a doctor, is obviously in a superior position to help Jung, there is a strong moral argument that he should stop. The cases, however, do not find a duty to aid based on the fact that the defendant would be good at it.

   If duties are based on public policy, why shouldn't the court jettison the special relationship theory and impose a duty on Rogers frankly based on common sense? Courts can create whatever duties they wish; the special relationship concept is simply a rationale for the court's decision to do so. Imposing a duty on doctors to assist accident victims should lead to an overall increase in societal welfare, since more victims would get timely professional assistance — so why not go for it?

   Maybe courts should. Maybe they will some day. But most courts remain unwilling to press strangers into service by creating such a duty. Instead, many states have sought to encourage

bystanders to assist by passing statutes that limit their liability for injuries they may cause while rendering aid. Typically, such "good Samaritan" laws immunize those who assist in an emergency from liability for negligence, though not for grossly negligent or reckless conduct. See, e.g., Kan. Stat. Ann. §65-2891 (1993) (health care providers only).[10]

c. In this example, Rogers takes one step to assist at the scene, but then takes off. Under Restatement (Second) §324, he would not be liable. Under §324(a), he is OK: While he assisted, he acted reasonably, by calling for aid.[11] And §324(b) provides that he may leave without rendering all care that he could, as long as he didn't leave Jung in a worse position. Here he left Jung in the same position, so he is not in violation of the duty created by §324(b). He did something for Jung, but not everything he could do . . . but the section allows Rogers to make that choice.

d. In this example Rogers is still guilty of nonfeasance, so the issue is whether the court would find that his prior treatment of Jung imposes a duty on Rogers to succor him on the roadside. If Rogers were Jung's banker, no court would conclude that he had assumed a duty to aid Jung under these circumstances. But Rogers is Jung's doctor. Shouldn't that support a duty to help him?

Probably not. It hardly seems that either Rogers or Jung would expect that Rogers had accepted such a duty by his unrelated prior treatment of Jung. Suppose Rogers had treated Jung six years ago? Or suppose Rogers were an allergist; would *that* impose a duty to treat Jung's leg at the accident scene? Or suppose Jung was not physically injured at all, but trapped in his car? On balance, it seems difficult to impose or define a legal duty based on this limited prior relationship.

8. This case is squarely addressed by §324 of the Second Restatement. Once Dr. Rogers decides to intervene, the Restatement takes the position that he must exercise due care in assisting Jung. Because he has assumed a duty of care, the motion to dismiss will be denied. Rogers is now a risk creator, an actor whose negligent conduct may foreseeably injure Jung. It hardly seems appropriate that he should be immune from liability no

matter how badly he bungles the rescue. On the other hand, as Prosser so eloquently puts it:

> The result of all this is that the Good Samaritan who tries to help may find himself mulcted in damages, while the priest and the Levite who pass by on the other side go on their cheerful way rejoicing.

Prosser & Keeton at 378. Good Samaritan statutes provide a middle ground in such cases, by limiting the rescuer's liability to grossly negligent or reckless conduct.

Section 324 does not say, however, that Dr. Rogers is liable for *any* injury he causes in rescuing Jung. Rather, it imposes on Rogers a duty of due care in the course of his rescue. If Rogers had no reason to know that Jung's leg was broken, moving him was probably a reasonable choice. If so, he would not be liable to Jung, even though his assistance caused further injury. Similarly, on my exam one year, I had Cleveland, a rescuer, roll an accident victim over to check his breathing. In doing so, he aggravated the victim's cracked rib. However, Cleveland probably made a reasonable choice to roll the victim over if he didn't know about the cracked rib, and maybe even if he did, since breathing is rather important. If Cleveland's conduct was reasonable, he is not liable, even if he caused further injury to the victim.

9. In this case Klein, a bystander with no duty to aid Jung, elects to come to his aid. The Restatement takes the view that Klein's laudable decision to act gives rise to at least a minimal duty of care to Jung, though she owed him none before. On the other hand, Klein's duty should presumably be limited: Her admirable conduct should not obligate her to pay Jung's hospital bills or take him home and tend to him until he recovers.

Section 324 of the Restatement tries to walk this line, by imposing only a limited duty on the rescuer. Section 324(a) requires her to use reasonable care while she assists Jung, but §324(b) provides that she may stop assisting, even if Jung could use more help, as long as she doesn't leave him "in a worse position that when [she] took charge of him." Here, Klein has not left Jung in a worse position than he was in before; he is in a safer position out of the road.

Jung might argue that Klein did not "secure his safety" (§324(a)) because she did not bind up his wound. Comment g to §324 states that

the bystander's choice to intervene "does not require him to continue his services until the recipient of them gets all of the benefit which the actor is capable of bestowing." But the same comment also states that the actor must "act with reasonable consideration for the other's safety."

The drafters probably intended to require Klein to use reasonable care for the victim's safety *while she chooses to continue her aid*, but to leave her free to discontinue her services at any time. This conclusion follows from the basic assumption that the victim's need for services does not create a duty to render them. The opposite reading, that §324 imposes a duty on the rescuer to continue aid until the victim is "safe," would create a positive duty to continue aiding the victim for an uncertain period. Section 324(b) only holds the rescuer who chooses to discontinue aid liable if she leaves the victim in a worse position. The drafters did not intend to impose on a rescuer the duty to continue giving assistance until the victim no longer needs any.

10. The court should deny the motion. The purpose of Good Samaritan laws is to encourage bystanders who are not obligated to render assistance to do so anyway, by giving them a measure of protection from liability. Such statutes are not intended to grant immunity to persons who *already have a duty* to render assistance. Skinner's risk-creating conduct (driving) caused the original injury to Klein. Under the Second Restatement, he has a duty to come to her aid, whether or not he was negligent in causing the accident. Restatement (Second) of Torts §322; Restatement (Third) of Torts: Liability for Physical and Emotional Harm §39. Thus, he was not "gratuitously" assisting Klein, but fulfilling a duty to assist her under the circumstances. The court would probably conclude that he is not protected by the Good Samaritan statute. See, e. g., *James v. Rowe*, 674 F. Supp. 332 (D. Kan. 1987).

Remy's Revenge

11. a. Although there could hardly be a more "special" relationship than that between a mother and her unborn child, this is actually a risk creation case. The child's argument is not that her mother failed to protect or rescue her from some danger from a third party, but rather that she (the child) was injured due to her mother's negligent

driving. Remy's mother engaged in risk-creating conduct, did so negligently, and injured the plaintiff. Our second "first principle" — that those who impose new risk on others owe a duty to act reasonably in creating that risk — applies, unless the court makes an exception to it.

b. On first blush, this case seems like a slam dunk. Relevant case law already established that parents owe a duty of care to their children and are not immune from suit by them. The cases also establish that those who injure children in utero are liable for those injuries. It seems an obvious next step to combine the two principles and hold the mother liable. Indeed, the *Remy* court stated that "[t]here is . . . no question that, had the plaintiff been born at the time of the accident, even if only one hour of age, she would have been able to recover" for injuries suffered due to her mother's negligence. 440 Mass. at 681.

There are some powerful arguments, however, for refusing to impose a duty in these circumstances. In the *Remy* court's words:

> [D]uring the period of gestation, almost all aspects of a woman's life have an impact, for better or for worse, on her developing fetus. A fetus can be injured not only by physical force, but by the mother's exposure, unwitting or intentional, to chemicals and other substances, both dangerous and nondangerous, at home or in the workplace, or by the mother's voluntary ingestion of drugs, alcohol, or tobacco. A pregnant woman may place her fetus in danger by engaging in activities involving a risk of physical harm or by engaging in activities, such as most sports, that are generally not considered to be perilous. A pregnant woman may jeopardize the health of her fetus by taking medication (prescription or over-the-counter) or, in other cases, by not taking medication. She also may endanger the well-being of her fetus by not following her physician's advice with respect to prenatal care or by exercising her constitutional right not to receive medical treatment.

440 Mass. at 678-679. In view of these considerations, the court feared that recognizing such a duty

> would present an almost unlimited number of circumstances that would likely give rise to litigation. Courts would be challenged to refine the scope of such a duty, including the degree of knowledge expected of a mother in order to pinpoint when such a duty would arise (e.g., at the point of pregnancy; at the point of awareness of pregnancy; or at the point of awareness that pregnancy is a possibility) or the particular standard of conduct to which a reasonably careful pregnant woman, in a single case, should be held.

440 Mass. at 678.[12]

In light of these concerns, the court refused to recognize a duty owed by the mother to her unborn child. The case presents a dramatic example of a court creating an exception, for reasons of social policy, to the second "first principle," that we all owe a duty of care to those injured by our risk-creating conduct. Typically, however, the *Remy* court notes five other cases on the point, two refusing to recognize the duty and three that allowed recovery. See also *Tesar v. Anderson*, 789 N.W.2d 351 (Wis. App. 2010) (allowing claim for injury to fetus based on mother's negligence under Wisconsin's broad approach to duty in negligence cases).

12. a. The analysis here must begin with the no-duty principle. Couch was not injured by any risk created by Bettelheim. The threat is from the assailant, and Bettelheim is asked to act to prevent the harm by helping to summon aid.

b. It is hard to fashion an argument for liability in this case based on the recognized exceptions to the no-duty principle. Bettelheim has no relation to either the perpetrator of the accident or to Couch. The owner of a bar, a place of public accommodation, might owe a duty to Couch if he were injured in the bar, or if he were a patron, but he was not. While the conduct appears gratuitously obnoxious, it does not appear actionable.

The California Court of Appeals, however, ruled otherwise in *Soldano v. O'Daniels*, 190 Cal. Rptr. 310 (Cal. Ct. App. 5th Dist. 1983). The *Soldano* court recognized the prevalence of the no-duty rule embodied in §314 of the Second Restatement, and admitted that it would be "stretching the concept beyond recognition" (190 Cal. Rptr. at 314) to find any special relationship between the barkeep and the injured plaintiff. It then openly rejected the no-duty rule based on an analysis of various policies California cases have considered in determining duty issues.[13]

The *Soldono* case may portend the abandonment of the no-duty principle, long tort law's ugly duckling. However, reaction to the case does not suggest any rush to bury the rule. See, e.g., *Clarke v. Hoek*, 219 Cal. Rptr. 845, 852 (Cal. Ct. App. 1st Dist. 1985) (suggesting more limited reading of *Soldono* and that California Supreme Court has reaffirmed the no-duty rule since). Indeed, the

ALR annotation on *Soldano* may win the prize for the shortest annotation ever: More than 30 years after *Soldano* was decided, it still included only *one* case — *Soldano* itself! See 37 A.L.R. 4th 1196. If this is the wave of the future, it is still a long way from shore.

Judge Fudd Does His Duty

13. The first problem with Fudd's instruction is that it tells the jury to decide whether Freud owed a duty to White or not ("[Y]ou may find that the defendant owed a duty. . . ."). Unlike the other elements of a negligence claim, duty is a question of law. It is up to courts to define enforceable legal duties, not juries. If Judge Fudd's language were proper, the jury would be left to create the substantive law of torts in each case, by determining the extent of the defendant's duty anew in every trial. Consequently, there would not be one standard for liability, but a different one for each case. *Au contraire,* the judge should instruct the jury as to the duty owed in each case. If none is owed under the circumstances, the case should never go to the jury at all.

    The second problem with the instruction is equally basic: Fudd's language implies that Freud had a duty to *prevent* the attack. This would be a duty indeed, a duty of absolute protection of White no matter what the circumstances. The law seldom imposes such a stringent burden, although it does at times impose greater or lesser duties than the duty of due care. In this situation, as in most, the Restatement describes the duty as a duty to *exercise reasonable care* to prevent injury from the dangerous person. Restatement (Second) of Torts §319; Restatement (Third) of Torts: Liability for Physical and Emotional Harm §41.

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1. The Third Restatement would deny foreseeability a role in determination of duty, arguing that this is a jury issue relevant to proximate cause, not a factor in legal analysis of duty. See Restatement (Third) of Torts (Liability for Physical and Emotional Harm) § 7, cmt. j (2010). See also Dobbs' Law of Torts §256. However, myriad cases hold that the foreseeability of harm is a relevant consideration in determining the existence of a duty. Your (very) humble author predicts that judges will continue to find foreseeability of harm an important factor in crafting duties in tort law.

2. The Third Restatement (§37) takes essentially the same position.

3. Consider the case posed by Professor Epstein in his defense of the rule:

> X as a representative of a private charity asks you for $10 in order to save the life of some starving child in a country ravaged by war. There are other donors available but the number of needy

children exceeds that number. The money means "nothing" to you. Are you under an obligation to give the $10?

R. Epstein, A Theory of Strict Liability, 2 J. Legal Stud. 151, 198-199 (1973).

4. This duty is also recognized in the Third Restatement of Torts. See Restatement (Third) of Torts: Liability for Physical and Emotional Harm §39.

5. The Third Restatement has a similar provision — §42 — but it is harder to understand, so I have used the Second Restatement provision for illustration purposes. Neither version, of course, is "the law" of any jurisdiction unless adopted by the courts of that jurisdiction.

6. See Restatement (Second) of Torts §302 cmt. a: "In general, anyone who does an affirmative act is under a duty to others to exercise due care of a reasonable man to protect them against an unreasonable risk of harm to them arising out of the act." See also Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 7(a) (actor whose conduct creates a risk of physical harm "ordinarily" owes a duty of reasonable care).

7. See, e.g., 551 P.2d at 340, where the court holds that "[w]hen a therapist determines, or pursuant to the standards of his profession should determine, that his patient presents a serious danger of violence to another, he incurs an obligation to use reasonable care to protect the intended victim against such danger. The discharge of this duty may require the therapist to . . . warn the intended victim or others likely to apprise the victim of the danger. . . ."

8. Why would she sue her mother, rather than the other driver? Most likely, the other driver had limited insurance, so the child (suing through her father) sought to reach the mother's insurance policy as well to obtain full compensation. (There is always the possibility, too, that the accident was caused solely by the mother's negligence.)

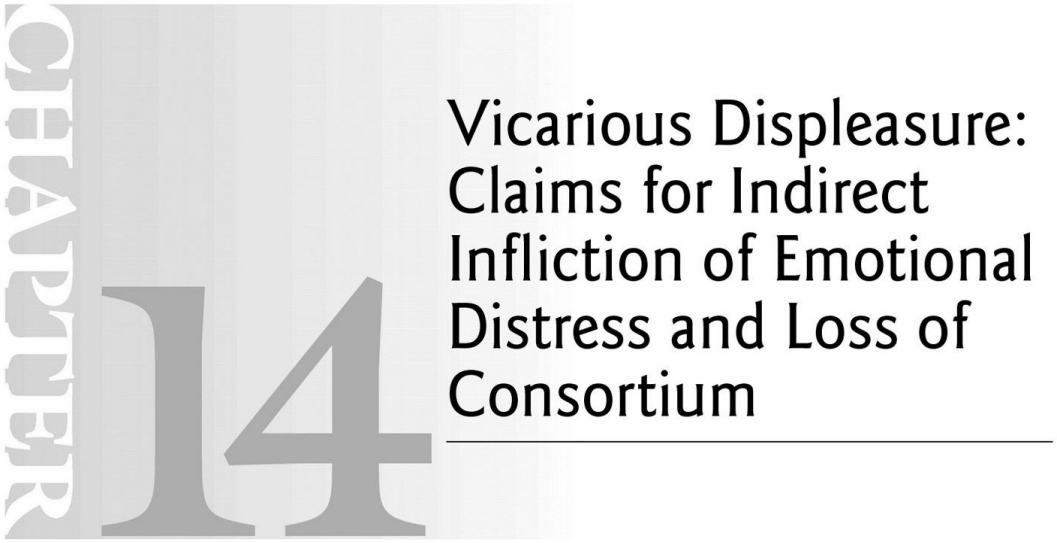
9. For a provocative feminist critique of the no-duty rule, clearly rejecting the result in examples like this, see L. Bender, A Lawyer's Primer on Feminist Theory and Tort, 38 J. of Legal Ed. 3, 33-36 (1988).

10. Good Samaritan statutes frequently protect health professionals only, not all gratuitous rescuers. Watch for that point on your Torts exam!

11. Jung might argue that Dr. Rogers was "unreasonable" not to help more, given his special skill and Jung's need for help. But accepting that argument would effectively read §324(b) out of the provision. That subsection tells Rogers that he may stop without doing all that he could for Jung, that he does not owe a duty of ongoing care by deciding to render some aid.

12. Interestingly, the court hardly mentioned another factor counseling hesitation, the constitutional right of a woman to terminate a pregnancy.

13. "These factors include: 'the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved.'" 190 Cal. Rptr. at 315 (quoting *Rowland v. Christian,* 443 P.2d 561, 564 (Cal. 1968)).



Vicarious Displeasure: Claims for Indirect Infliction of Emotional Distress and Loss of Consortium

INTRODUCTION

Hamlet hit the nail on the head when he complained of the "thousand natural shocks that flesh is heir to."[1] Even in a "civilized" society such as ours, life is fraught with stresses, anxieties, fears, and sorrows. Many are indeed natural shocks, the inevitable concomitants of unfolding human experience from birth to death (and let's not forget adolescence either). Much emotional distress, however, is inflicted upon us by other people as well, either deliberately or carelessly.

We live in a culture that attempts a legal response to most problems, probably too many problems, so it should not prove surprising that courts have been asked to fashion a remedy for emotional distress as well. This chapter considers the approaches courts have taken to one of tort law's most intractable problems, claims for indirect infliction of emotional distress. It then contrasts such claims with another type of claim for emotional injuries, loss of consortium.

Claims for indirect infliction of emotional distress (frequently referred to as "bystander" claims) are based on emotional trauma suffered by one person who witnesses or learns of an injury to another. Here are some examples:

- A worker at a construction site sees a coworker crushed under a dump truck.
- A father, watching from the living room window, sees his child hit by a car that careens over the curb and onto the front lawn.
- A wife suffers emotional distress from watching her husband's health decline due to medical malpractice.
- A parent learns by telephone that his son has just suffered a serious injury in a fire negligently caused by the defendant.
- The wife of a comatose patient visits him at the hospital and discovers that he has just been severely bitten by rats.

In each of these cases, the person who suffers direct physical injury from the defendant's negligence obviously has a claim for those injuries. However, those who witnessed or soon learned of the injury may also seek damages for emotional distress resulting from the traumatic experience of either witnessing that injury or learning of it. Such claims are referred to as claims for "indirect infliction" of emotional distress because they are asserted by bystanders who suffer emotional injury indirectly due to the direct physical injury to another.

The distress in such cases is often both foreseeable and severe. Thus, the plaintiff will frequently be able to establish that the defendant's negligence was an actual and proximate cause of his emotional damages. Consequently, courts which have sought to limit liability for indirect infliction of emotional distress have usually used duty analysis to do so. Many courts have held that defendants owe no *duty* to avoid inflicting emotional distress on bystanders, or only owe such a duty in very limited circumstances. That is why this chapter, which seems to deal primarily with a type of damages, appears in the duty section of the book.

It is not hard to see why courts are reluctant to impose a duty to avoid indirect infliction of emotional distress. Several important factors relevant to duty analysis suggest caution in creating such a duty. *First*, the very foreseeability of such distress argues for restraint. For every victim who suffers negligent physical injury, a number of bystanders may suffer emotional distress:

> It would be an entirely unreasonable burden on all human activity if the defendant who has endangered one person were to be compelled to pay for the lacerated feelings of every other person disturbed by reason of it, including every bystander shocked at an accident, and every distant relative of the person injured, as well as all his friends.

Prosser & Keeton §54 at 366.

Second, courts are reluctant to impose a duty to persons who have no relationship to the defendant. While the defendant usually has some immediate interaction with the direct victim of his negligence — the child hit by the car, the patient diagnosed, the worker actually hit by the dump truck — he usually has had no contact with bystanders who suffer indirect emotional distress. He may not know who they are, where they are, or how many of them there are.

Third, judges are justifiably concerned about the impact that creating a duty will have on the administration of justice. Recognition of indirect infliction claims could clog the courts with suits over trivial unpleasantries better dealt with by "a certain toughening of the mental hide." C. Magruder, Mental and Emotional Disturbance in the Law of Torts, 49 Harv. L. Rev. 1033, 1035 (1936). In addition, courts have feared the specter of fraudulent claims. It is easy enough for a plaintiff to carry on about how distressed he was by the defendant's conduct, and even to believe it after a while. It is difficult to verify such claims, or to attribute the plaintiff's distress to the defendant's conduct, as opposed to the thousand natural shocks that take their toll on us all.

Thus, for many years courts severely limited indirect infliction claims, lest such claims open a Pandora's box of woes for both courts and defendants. However, the compelling nature of the suffering inflicted on indirect victims has led to a gradual recognition of some claims for indirect infliction of emotional distress. How can a court refuse recovery to a father who watches a driver negligently run down his child and suffers a heart attack on the spot? Many courts, unable to turn such sympathetic plaintiffs away, have created a duty to avoid inflicting emotional distress, at least in limited circumstances.

Once a court opens this box a crack, however, it is very hard to close it on other equally sympathetic indirect victims. The history of the law in this area has been a constant struggle to define some limiting principle that will allow recovery for deserving victims without throwing the courts open to a flood of litigants upset over something that the defendant did to someone else. (Other useful metaphors for the jurisprudence in this area might be a series of defense lines by a retreating army, or successive walls of sandbags holding back a flooding Mississippi.) Indirect infliction claims are a useful study, because they vividly illustrate the difficulty of establishing satisfactory limits

to a duty once it has been recognized. The effort of courts to limit indirect infliction claims has led to tortured line-drawing, evasive distinctions, and some of the least intellectually defensible doctrine in the annals of tort law. Emotional distress seems to be one of those areas in which courts cannot solve a legal problem, only decide cases.

THE HISTORICAL APPROACH TO EMOTIONAL DISTRESS CLAIMS

Courts have long awarded emotional distress damages in negligence cases if the defendant causes direct physical injury to the plaintiff. For example, if Marat's car knocks DuBarry down, DuBarry may recover for any physical injury sustained and for any emotional distress from the accident as well. Restatement (Second) of Torts §456; Prosser & Keeton §54 at 362-363. This would include pain and suffering resulting from the physical injury, emotional distress resulting from disfigurement or physical impairment (such as a facial scar or a limp), and any other demonstrable emotional damages.

This principle, that recovery for emotional distress was proper if the plaintiff also suffered physical injury, became known as the "impact rule." Emotional distress damages were often described as "parasitic": They could be added on if the plaintiff suffered a traditional physical contact from the defendant's negligence, but could not sustain an action on their own. If Marat's car narrowly missed DuBarry, he could not recover, even if he was badly frightened by the near miss, since he suffered no "impact."

The impact rule was tort law's first effort to keep the flood of emotional distress claims at bay. While it defined a limit, many courts found it an intellectually indefensible one. The plaintiff was allowed full recovery for emotional distress if the defendant barely touched him, but denied recovery if the defendant inflicted the same degree of distress (or much more) but just missed hitting the plaintiff. Even if the emotional distress *led* to a physical illness (for example, if DuBarry suffered a heart attack from fear of being hit by Marat's car), recovery was barred if there was no physical impact upon which to piggyback the distress damages. The obvious artificiality of this rule invited courts to evade it by literal application. In *Porter v. Delaware, L. &*

W. R.R., 63 A. 860 (1906), for example, the court found the impact requirement satisfied where the plaintiff got dust in her eyes, and therefore allowed full recovery for emotional distress from the accident. A more recent example is *Condor v. Wood*, 716 N.E.2d 432 (Ind. 1999), in which the plaintiff pounded on the side of a truck to alert the driver that her companion had fallen under the wheels. The court concluded that the pounding constituted an impact, making her eligible to recover for emotional distress due to the injury to her companion.

Although the impact rule was no "hymn to intellectual beauty,"[2] it did address some of the policy concerns relevant to duty. It alleviated fears of fraudulent claims, perjured (or at least, exaggerated) testimony and excessive damages based on jury sympathy. It premised liability on an objective fact that could be proved or disproved, and, in a rough sort of way (all right, a *very* rough sort of way), filtered out frivolous claims while allowing the most serious ones to proceed. A few courts still apply the rule, at least in some types of cases. See, e.g., *Malibu Boats, LLC v. Batchelder*, 819 S.E.2d 315, 318 (Ga. App. 2018); *Dowty v. Riggs*, 385 S.W. 3d 117 (Ark. 2010).

THE "ZONE-OF-DANGER RULE"

The impact rule bars recovery in most indirect infliction cases, because these claims are generally asserted by bystanders who were not directly involved in the accident. Some courts, unwilling to turn all bystander plaintiffs away, have adopted alternative tests to define the duty in indirect infliction cases. Some allow a bystander to recover for emotional distress if he was in the "zone of danger," that is, if he was close enough to the defendant's negligent conduct to be placed at risk of physical injury, even though he was not actually touched. Under the zone-of-danger rule a mother walking next to a child hit by a negligent driver would recover for emotional distress due to witnessing injury to her child, since she might have been hit herself.

The rationale for the zone-of-danger approach is that the defendant owes these bystanders a duty of care because they are within the area of the risk created by his conduct, and hence injury to them is foreseeable. This rationale derives from Justice Cardozo's proximate cause analysis in *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99 (N.Y. 1928). Since injury to the bystander is

foreseeable, the argument goes, the defendant has a duty to avoid injury — either physical or emotional — to him.[3]

The zone-of-danger rule compensates a limited class of indirect victims, a class that is reasonably likely to be seriously affected by the accident. However, like other limiting principles in this area, it is easier to criticize than to justify. The father who watches from the house as his wife and child cross the street will suffer just as much distress if the child is hit as the mother will. In addition, his presence is foreseeable, though he is not within the zone of risk of physical injury. Yet, because he is out of range of the car, he is barred from recovery under the zone-of-danger rule, no matter how manifest his distress may be. The line drawn is basically arbitrary. In the words of a leading decision on emotional distress, it suffers from "hopeless artificiality." *Dillon v. Legg*, 441 P.2d 912, 915 (Cal. 1968).

LIMITED FORESEEABILITY: THE DILLON RULE

The arbitrariness of the zone-of-danger rule has led other courts to seek a more flexible approach to indirect infliction claims. Many states have found such an approach in the California Supreme Court's decision in *Dillon v. Legg*. In *Dillon*, a mother suffered emotional distress from seeing her daughter fatally injured by a car while crossing the street. The *Dillon* court held that defendants have a duty to avoid infliction of emotional distress that is reasonably foreseeable, including infliction of such distress on indirect victims. However, the court established three factors to be considered in determining whether such distress was foreseeable:

> 1) whether plaintiff was located near the scene of the accident as contrasted with one who was a distance away from it; 2) whether the shock resulted from a direct emotional impact upon the plaintiff from the sensory and contemporaneous observance of the accident, as contrasted with learning of the accident from others after its occurrence; 3) whether plaintiff and the victim were closely related, as contrasted with an absence of any relationship or the presence of only a distant relationship.

441 P.2d at 920.

Although *Dillon* purports to establish a foreseeability standard based on

the above factors, the *Dillon* rule, like the impact and zone-of-danger rules, also bars recovery to many bystanders whose distress is foreseeable. For example, the first factor implies that a close relative would be barred if she was not present at the scene of the accident, though it is virtually inevitable that close relatives will suffer severe distress when a family member is injured. The second factor suggests that a plaintiff who is summoned to the scene after the accident may be denied recovery, though the potential for severe distress is still great. And the third factor suggests that a stranger, friend, or coworker would not recover, though it is surely foreseeable that anyone could suffer traumatic distress from witnessing massive injury to another.

REQUIRING FURTHER CORROBORATION: RESULTING PHYSICAL INJURY

Some courts that apply the zone-of-danger or *Dillon* approaches to indirect infliction claims *also* require that the plaintiff suffer some physical symptoms *as a result of* the emotional distress caused by the defendant's conduct. This "resulting-physical-injury" requirement is intended to provide additional corroboration that the plaintiff's claim is genuine. See *Payton v. Abbott Labs.*, 437 N.E.2d 171, 180 (Mass. 1982) (resulting-physical-injury rule "will serve to limit frivolous suits and those in which only bad manners or mere hurt feelings are involved, and will provide a reasonable safeguard against false claims"). California initially suggested that resulting physical injury must be shown along with the *Dillon* factors, but later abandoned this additional requirement. See *Hedlund v. Superior Court of Orange County*, 669 P.2d 41, 47 n.8 (1983). Other courts have adopted the *Dillon* guidelines for indirect infliction cases without requiring resulting physical injury. See, e.g., *Paugh v. Hanks*, 451 N.E.2d 759 (Ohio 1983).

It is important to distinguish the resulting-physical-injury approach from the impact rule. The impact rule allows a plaintiff who sustains a direct physical impact (from the defendant's car, for example) to recover for emotional distress. The resulting-physical-injury rule, on the other hand, allows the plaintiff who is missed by the car, but frightened by the near miss,

to recover for emotional distress if the emotional distress itself leads to some form of physical injury, such as a heart attack.

Some courts have imposed other corroborative requirements along with one of the above approaches. Some require the plaintiff to prove "serious" or "severe" distress in order to recover. *Camper v. Minor,* 915 S.W.2d 437, 446 (Tenn. 1996). Others require expert testimony to establish the existence of the distress. *Kinard v. Augusta Sash & Door Co.*, 336 S.E.2d 465, 467 (S.C. 1985). Some cases have refused recovery, even if the distress is genuine, unless the *direct* victim of the accident suffers serious injury. *Clohessy v. Bachelor,* 675 A.2d 852, 864 (Conn. 1996).

On the other hand, a few courts have adopted very broad standards for indirect infliction claims. Several courts allow indirect plaintiffs to recover if they prove that they suffered objective symptoms of a physical injury or psychic disability as a result of the distress suffered from witnessing injury to the direct victim, without meeting the *Dillon* or zone-of-danger standards. See Dobbs, Hayden & Bublick §391. And at least one court has held that indirect infliction plaintiffs may recover simply on a showing that severe emotional distress was reasonably foreseeable from the defendant's negligent act. *Wages v. First Natl. Ins. Co. of America, 79* P.3d 1095 (Mont. 2003).

A DISTINCTION WITH A DIFFERENCE: DISTRESS DISTINGUISHED FROM DISTRESS

An injury to one person is likely to cause a variety of emotional reactions in others. A bystander who witnesses traumatic injury to a family member may suffer acute emotional shock from the unexpected, wrenching experience of witnessing serious physical injury to a loved one. She may also experience feelings of grief, loss, sympathy or sadness due to the fact that the immediate victim has been injured or killed.

Although the general term "emotional distress" (or "mental anguish") is often applied to both of these types of injuries, they are meaningfully different. The shock of witnessing the accident is sudden and traumatic, aggravated by the very fact that it is unanticipated, so that one can make no emotional preparation to sustain it. Consider, for example, the gruesome facts

of *LeJeune v. Rayne Branch Hosp.,* 556 So. 2d 559 (La. 1990), in which the wife of a comatose patient came into his room shortly after he had been bitten all over by rats. There is a fundamental difference between the impact that kind of horror scene engenders and the grief or sadness one experiences from knowing that a loved one has suffered an injury and must cope with its consequences.

It is the first type of emotional distress — the trauma of witnessing a horrific event or injury — which gives rise to a claim for indirect infliction of emotional distress. This cause of action does *not* compensate for general feelings of grief, loss, or empathy for an injured person. See, e.g., *Frame v. Kothari,* 560 A.2d 675, 678 (N.J. 1989) (claim applies to "the observation of shocking events that do not occur in the daily lives of most people," such as "bleeding, traumatic injury and cries of pain"); *Thing v. La Chusa*, 771 P.2d 814, 828 (Cal. 1989) ("the impact of personally observing the injury-producing event . . . distinguishes the plaintiff's resultant emotional distress from the emotion felt when one learns of the injury or death of a loved one from another, or observes pain and suffering but not the traumatic cause of the injury"). While watching a loved one suffer is surely one of life's most gut-wrenching experiences, it is one of the "natural shocks" that we all must bear when a loved one suffers. Most courts do not allow emotional distress claims for such general grief and suffering of third parties.

Because indirect infliction claims are based on the sudden shock of witnessing injury, factors like those cited in *Dillon,* which emphasize proximity to the traumatic events themselves, make sense as limiting factors. Proximity to the accident, actually witnessing it, and being closely related to the victim, all tend to increase the traumatic impact of witnessing serious injury. By contrast, liability has usually been denied where relatives learn of an injury at a distance, or even observe an injured family member after the fact. Similarly, where relatives of a direct victim suffer emotional distress, but the victim has not suffered a traumatic accident, recovery is usually denied. In *Frame,* for example, the direct victim was allegedly injured due to medical malpractice by the defendants. Although relatives witnessed his suffering, they did not witness a sudden traumatic injury to him. Their claims for indirect infliction of emotional distress were denied. See *Frame,* 560 A.2d at 680 (a misdiagnosis "normally does not create the kind of horrifying scene that is a prerequisite to recovery"). Accord: *Finnegan v. Wisconsin Patients Compensation Fund,* 666 N.W.2d 797, 808, 811-812 (Wis. 2003) (concurring

opinion).

ANOTHER DISTINCTION, AND ANOTHER DIFFERENCE: LOSS OF CONSORTIUM

When one person suffers physical injury due to a defendant's negligence, relatives of the victim will also suffer a third type of emotional damage, "loss of consortium." This term refers to the impairment of a relative's opportunity to relate to the party directly injured by the defendant. The classic loss of consortium claim is brought by the spouse of a person whose physical injury prevents him or her from enjoying the usual satisfactions of the marital relationship. If, for example, Josephine is seriously injured due to Robespierre's negligence, her injury may interfere drastically with her ability to relate to her spouse. The injury may interfere with recreational activities the couple shared, the division of labor within the household, the sexual society they shared, and the comfort, affection, advice, and moral support that ideally flow from marriage. These associational losses, the "constellation of companionship, dependence, reliance, affection, sharing and aid" *(Hopson v. St. Mary's Hosp.*, 408 A.2d 260, 261 (Conn. 1979) (quoting *Brawn v. Kistleman*, 98 N.E. 631 (1912)), which derive from the marital relationship, are generally referred to as "loss of consortium" or "loss of society."

Like indirect infliction, loss of consortium compensates an emotional loss to one party due to a direct injury to another. But the two claims compensate very different losses, and may frequently be brought in the same suit. Loss of consortium does not stem from a sudden traumatic experience, but from the impairment over a period of time — perhaps years or decades — of the opportunity to relate to the injured spouse. While a large component of the loss is emotional, it is not a claim for shock or trauma from witnessing the injury. Indeed, it is entirely immaterial to a consortium claim whether the consortium plaintiff witnessed the accident.

Loss of consortium also differs subtly from grief and sadness. Loss of consortium compensates for the inability to relate to the direct victim, not for general feelings of sadness or empathy for him. While grief and sadness tend to fade over time, the impairment of the relationship may persist as long as

the injury does. In theory, a jury should consider only the interference with the relationship in determining consortium damages, not the general grief a spouse feels due to injury to his partner. Obviously, however, it is easier for lawyers to draw conceptual distinctions between these types of emotional losses than it is for juries to separate them in reaching a damage award.

THE EVOLUTION OF LOSS OF CONSORTIUM CLAIMS

The history of consortium claims has not been the common law's finest hour. Under early doctrine the wife owed her husband services. Where injury to the wife impaired her ability to render them, the husband had a cause of action against the tortfeasor for that impairment. The wife, however, had no corresponding claim, since at common law the husband had no duty to render services to her. Prosser & Keeton §125 at 931.

Gradually, the concept of "services" was broadened to encompass not only loss of services, but also emotional losses, including affection, comfort, companionship, and sexual society. Despite the obvious reciprocity of these emotional blessings of marriage, the claim remained limited to the husband until 1950, when the court in *Hitaffer v. Argonne Co., Inc.,* 183 F.2d 811, 813-819 (D.C. Cir. 1950) rejected the common law analysis and granted consortium recovery to the wife as well. Most courts quickly followed suit in granting equal consortium rights, though a few ironically equalized them by eliminating the husband's right rather than extending it to wives. Prosser & Keeton §125 at 932. In most states today both spouses have a right to full recovery for loss of consortium due to injury to the other.

While spousal consortium claims are well established, there is no consensus on the right of parents or children to claim consortium losses. Historically, the common law accorded a father the right to his children's services, and authorized a claim for the loss of those services where the child was injured. Prosser & Keeton at 934. But no claim existed for interference with the emotional relationship with a child. Since the broadening of spousal consortium rights, some states have allowed claims by parents for loss of "filial consortium" when their child is injured. Many courts, however, have

rejected such claims. There is a similar split of authority on claims for loss of consortium brought *by* children whose parents have been injured by a tortfeasor. Some states have recognized such claims, but the majority of those that have addressed the issue have rejected those claims as well, choosing to restrict consortium recovery to spouses only. See *Mendillo v. Board of Education of East Haddam*, 717 A.2d 1177, 1193-1194 (Conn. 1998) (reviewing the decisions going both ways). *Mendillo* denied recovery for parental consortium, but 17 years later, the Connecticut Supreme Court overruled *Mendillo* and recognized a child's right to recover for loss of parental consortium. *Campus v. Coleman*, 123 A.3d 854, 858-869 (Ct. 2015).

If judges were writing on a blank slate, most would probably find a small child's relationship to a parent at least as worthy of protection as the spousal relationship. It is difficult to imagine a more serious loss than the support, advice, comfort, and education that a parent provides over a child's early years. However, unlike spousal consortium claims, which have been recognized in a limited way for many years, there was no historical precedent for consortium claims for loss of a parent. Approving such claims would represent a new burden on defendants (and insurers). That burden would often be substantial, since parents often have several children, while only the most adventurous have multiple spouses. Thus many courts have refused to create a duty to avoid loss of parental society, even though the logical case for doing so may be stronger than for spousal consortium. For the same reason, courts have not extended the consortium cause of action to other close relatives such as siblings.

The examples that follow are intended to help you distinguish the types of claims discussed in this introduction and to understand the varying standards courts have applied to them.

Examples

Unnatural Shocks

1. Marat is shaken up but not injured when the car she is riding in, driven by her husband De Sade, collides with a car negligently driven by Robespierre. De Sade suffers gruesome injuries and is in severe pain. Marat brings suit against Robespierre for the distress she suffers from

seeing her husband seriously injured in the accident.

a. Would Marat recover in a state that applies the impact rule?

b. Would she recover in a state that applies the zone-of-danger rule?

c. Would she recover in a state that applies the *Dillon* approach?

2. Assume that Marat was driving to work with a friend, Blanc, instead of her husband when the accident took place. She suffers severe emotional distress from witnessing serious injury to Blanc.

   a. Would she recover under zone-of-danger rule?

   b. Would she recover under the *Dillon* approach?

   c. Would she recover under the impact rule?

3. Cardet, an elementary school student, falls asleep on the school bus on Friday afternoon. The driver completes his route, returns the bus to the parking area, and locks it, without noticing the student. She is not found for almost two days, driving her parents to distraction. Under which rules for indirect infliction would her parents recover for their distress?

Hard Cases Make Sad Law

4. As indicated in the introduction, efforts by courts to establish defensible limits on a defendant's duty to avoid indirect infliction of emotional distress have led to arbitrary decisions and seemingly indefensible distinctions. The following examples illustrate some typical problem cases under the various rules. Consider how each should be resolved under the applicable standard.

   a. Roget is walking with his daughter on the sidewalk when a car careens off the road from behind them and hits the girl. Roget sues for his emotional distress from seeing her seriously injured. May he recover under the zone-of-danger rule?

   b. Carnot is visiting his wife in the hospital when she has cardiac arrest. Two nurses rush to the bedside to attempt to revive her. His wife is clearly in great pain, although she survives. Later, Carnot learns that the nurses negligently used a type of resuscitation technique that is dangerous for a patient with her illness, thereby greatly exacerbating

her pain. He sues for his distress at witnessing the episode. What result if the zone-of-danger rule applies? What result if the *Dillon* standards apply?

c. Cordet hears a crash and comes running out as a small child, evidently her son, is hit by a car, flies through the air and lands on a lawn across the street. She suffers a cerebral hemorrhage and dies. Her estate sues for indirect infliction. However, it turns out that the child is not her son. How should this case be decided under the *Dillon* approach to indirect infliction?

d. Cordet hears a screech of brakes while weeding the flower beds and turns to see a car careening off the street right at her son. Terrified, she faints. As it turns out, the car missed little Johnny, but she suffers severe traumatic neurosis from the incident and sues the driver. What result under *Dillon*?

e. Carnot hears shouts and sirens from his neighbor's yard, and races over in time to see his son lying beside his neighbor's pool, very close to death from drowning while paramedics struggle to revive him. He collapses in distress and later sues the neighbor (who had left the pool gate open) for negligent infliction. What result if the *Dillon* approach applies?

f. Danton witnesses an accident in which his wife is seriously injured when hit by Roget's car. As a result of the incident, he experiences anxiety, sleeplessness, and loose bowels for several months. He sues Roget for indirect infliction of emotional distress. What result in a jurisdiction that applies the *Dillon* factors, but also requires resulting physical injury?

g. Consider the example given at the beginning of the chapter, in which a parent learns by phone that her son has just been badly burned in a fire negligently started by the defendant. What result under *Dillon*?

Consortium Compared

5. DeFarge's adult daughter Belle is seriously injured in an auto accident while driving with DeFarge. Belle is hospitalized for three months, and is left with a permanently disfigured left leg. Which of the following claims will support recovery, and under what theories (i.e., indirect

infliction or loss of consortium)?

a. DeFarge claims damages for the loss of Belle's company during the time Belle is hospitalized.

b. DeFarge is knocked unconscious from the accident. She wakes up in the hospital and suffers severe distress when told of the extent of her daughter's injuries.

c. DeFarge claims damages due to the fact that Belle is withdrawn, quiet, and unwilling to go out in public due to humiliation at her disfigurement.

d. DeFarge claims damages for Belle's inability to play tennis with her due to her disability.

e. DeFarge claims damages for the depression she suffers as a result of watching Belle trying to cope with the disability caused by the accident.

f. As a result of her injuries, Belle is unable to work, and consequently unable to contribute to the rent of the apartment she shares with her mother. DeFarge claims damages for these lost payments.

g. Marlene, Belle's twin sister, was also in the car at the time of the accident. She is slightly injured, but is extremely upset from seeing Belle seriously injured at the scene. She claims damages for indirect infliction of emotional distress and for loss of consortium due to Belle's inability to participate in many activities they previously enjoyed together.

6. Assume that DeFarge was not in the car with Belle when Belle was injured. Could DeFarge still sue for loss of consortium with Belle?

7. What kinds of evidence will the consortium plaintiff submit at trial to allow the jury to assess damages for a claim for loss of consortium with a spouse?

Another Distinction that Makes Another Difference

8. In what important respect do *all* of the following emotional distress cases differ from the ones previously analyzed in this chapter?

- Plaintiff was negligently diagnosed with cancer. It turned out that she had an easily treated viral infection.
- Plaintiff was a passenger in a plane that dove suddenly, 35,000 feet, toward the ground. The pilot regained control at 5,000 feet and landed safely.
- Plaintiff, a health care worker, was negligently stuck with a used hypodermic needle, and suffered severe distress from fear of contracting AIDS.
- Plaintiff was informed by her physician that she was sterile. It turned out not to be true.

An Elementary Example

9. DuBarry is driving down Rue Street when she has a sudden heart attack. Her car careens off the street and hits Louis, who is seriously hurt. Antoinette, Louis's wife, witnesses the accident from the sidewalk and sues for indirect infliction. Will she recover if the jurisdiction applies the *Dillon* approach to indirect infliction claims?

Explanations

Unnatural Shocks

1. a. Although Marat was not injured, she did sustain an impact from the accident. Under the impact rule, a plaintiff who suffered a physical impact to her person was allowed to recover for emotional distress as well as physical injury. However, this example goes a step beyond the usual impact case, since the plaintiff who suffered an impact seeks recovery for distress caused by injury to another person.

The impact rule is based on the premise that physical contact corroborates the likelihood of actual emotional distress. That premise seems justified where the distress is "parasitic" to the impact itself, that is, where the distress is suffered due to the accident and the injury. But it is more attenuated to conclude that Marat has suffered genuine distress due to injury to her husband simply because she also sustained an impact in the accident. The rule

seems a poor fit for indirect infliction cases.

However, some courts have allowed recovery for indirect infliction of emotional distress under these circumstances. In *Binns v. Fredendall,* 513 N.E.2d 278 (Ohio 1987), for example, the court allowed recovery to a passenger who suffered emotional distress due to injuries to the driver. The court noted the difficult proof problem of separating her distress from the accident itself (which is compensable along with her own injuries under the impact rule) from the additional distress she suffered due to the injury to the driver. The court also suggested that, since impact is basically a corroborative factor, once it is satisfied the door is open to all emotional damages from the accident, not just those directly flowing from the impact to her. For another case with a full discussion of this twist on the impact rule see *Pieters v. B-Right Trucking, Inc.*, 669 F. Supp. 1463, 1467-1471 (N.D. Ind. 1987) (also allowing recovery).

b. Marat was in the zone of danger in this case; that is, she was herself at risk of physical injury from the defendant's conduct. Thus, she can recover for the emotional distress she suffers from witnessing injury to her husband under the zone-of-danger approach. Courts that apply the zone-of-danger rule reason that defendants can foresee injury to persons who are in danger of physical injury from their negligence. Thus, the defendant owes such persons a duty of care and is liable to them even if they only suffer emotional distress.

However, some states that follow the zone-of-danger approach require that the indirect infliction plaintiff *also* suffer physical injury as a result of the emotional distress. See, e.g., *Rickey v. Chicago Transit Auth.*, 457 N.E.2d 1, 4-5 (Ill. 1983). Marat would not recover in such a state since she did not suffer physical injury from her distress. The *impact* she suffered in the accident would not satisfy this requirement; the physical injury must be caused by the *distress*, not by the accident itself.

However, Marat would probably recover in this state anyway under the impact rule: Most courts view standards like the zone-of-danger rule or *Dillon* standards as an expansion of traditional grounds for recovery, rather than a new, exclusive standard. Since Marat satisfies the impact rule, she would likely recover on that ground even in a zone-of-danger state. It is worth remembering this

subtle point, that the plaintiff can probably still recover her emotional damages as "parasitic" if she suffers impact, even if she does not satisfy the state's "liberalized" standard for indirect infliction claims *in the absence of* impact.

c. The *Dillon* approach would probably also support recovery on these facts. Marat satisfies all three of the *Dillon* requirements for "foresee-ability." She was present at the time of the accident, witnessed it, and is a close relative of DeSade. Robespierre might argue that Marat did not witness the accident unless she was actually looking at her husband at the time of the collision, but it is doubtful that the court would be that rigid about the requirement that the plaintiff observe the accident. Presumably, realizing that the accident was taking place would suffice. See *Bliss v. Allentown Pub. Library*, 497 F. Supp. 487, 488-489 (E.D. Pa. 1980) (rejecting the argument that the plaintiff should be denied recovery because she was looking in the other direction at the moment the accident occurred).

Although the basic *Dillon* factors would support recovery on these facts, some courts have imposed the additional requirement that the plaintiff's emotional distress result in physical injury as well. See, e.g., *Champion v. Gray*, 478 So. 2d 17 (Fla. 1985). In a state that takes this view, Marat would have to demonstrate resulting physical injury from her emotional distress in order to recover.

2. a. The zone-of-danger analysis is no different here than in Example 1. However, the driver here is not a member of the plaintiff's family; does the zone-of-danger approach still apply?

Nothing in the zone-of-danger test itself suggests that it only allows recovery to members of the direct victim's family. Nor does the logic of the test, which is based on the fact that the defendant could foresee injury to those near the victim. However, it is very doubtful that recovery would be allowed to non-family members. Even though distress is clearly foreseeable in a case like this, allowing recovery would greatly expand the scope of liability. It is likely that the balance of burdens and benefits (the "practical politics" of tort law Justice Andrews notes in his *Palsgraf* dissent[4]) is likely to weigh against extending a duty to bystanders unrelated to the primary victim. See, e.g., *Hislop v. Salt River Project Agr. Imp.*

and Power Dist., 5 P.3d 267, 269-272 (Ariz. App. 2000) (denying recovery to "co-worker and friend"); see generally Minzer, Nates, et al., Damages in Tort Actions §5.03[2][g] (most courts have rejected bystander claims by non-family members under all theories). Similarly, the construction worker who witnesses a coworker's injury — or, *a fortiori*, a stranger — will likely be denied recovery, even if she was nearly hit herself. See *Pizarro v. 421 Port Assoc.*, 739 N.Y.S.2d 152 (App. Div. 2002) (no recovery for witnessing decapitation of stranger on elevator). Yet, even this levee against the flood may be giving way in some jurisdictions. See *Bray v. Marathon Corp.*, 588 S.E.2d 93 (S.C. 2003), which allowed the plaintiff to recover for distress from witnessing the death of a coworker in a products liability action.

b. Two of the factors established in *Dillon* are clearly met here: Marat witnessed the accident and was at the scene. However, it is not clear that the third factor, a close relationship to the injured party, is met, since the plaintiff and the driver were friends, not relatives. Thus, the example poses two issues under the *Dillon* approach. *First,* is each of the factors a *prerequisite* to recovery, or only a consideration in making a case-by-case assessment of the foreseeability of serious emotional distress? And *second,* is friendship a close enough relationship to satisfy the third *Dillon* factor?

The *Dillon* court did not hold that all three criteria must be satisfied to allow recovery. Rather, it suggested that they were relevant "factors" in the foreseeability analysis. 441 P.2d at 921. However, the California Supreme Court subsequently held that each of the *Dillon* factors must be satisfied to support recovery for indirect infliction. *Thing v. La Chusa,* 771 P.2d 814, 829-830 (Cal. 1989). In other words, *Thing* converts the *Dillon* factors from relevant considerations to absolute prerequisites to recovery. The court in *Thing* acknowledged that it was "arbitrary" to require each factor, but concluded that "drawing arbitrary lines is unavoidable if we are to limit liability and establish meaningful rules for application by litigants and lower courts." 771 P.2d at 828.

While the California court now requires all three factors to be present, other courts will likely continue to view the *Dillon* factors as relevant rather than essential. See, e.g., *Paugh v. Hanks,* 451

N.E.2d 759, 766 (Ohio 1983). Marat would obviously have a better chance of recovery in a state that views the factors as guidelines rather than absolute prerequisites to recovery.

If a "close relationship" is required, will friendship satisfy it? Most cases involve recovery for family members, and it seems very doubtful that the courts will go beyond the family sphere in allowing recovery. Several California cases have refused to do so. See *Kately v. Wilkinson*, 195 Cal. Rptr. 902, 905-907 (Cal. App. 1983) (emotional distress recovery denied under *Dillon* analysis for witnessing injury to close friend, but allowed on products liability theory); *Elden v. Sheldon*, 758 P.2d 582 (Cal. 1988) (refusing to allow indirect infliction claim resulting from injury to cohabiting lover of accident victim); but see *Dunphy v. Gregor*, 642 A.2d 372 (N.J. 1994) (allowing recovery to unmarried cohabitant fiancee of victim); *Graves v. Estabrook*, 818 A.2d 1255 (N.H. 2003) (same);[5] *Paugh v. Hanks*, 451 N.E.2d at 766-767 (blood relationship not necessarily required).[6] Doubtless, the advent of same-sex marriage will spawn further cases probing the relationship requirement.

c. Example 1a indicates that some courts have allowed recovery for distress due to injury to another person under the impact rule. However, it is likely that many courts would refuse to extend indirect infliction claims to cases like this, in which the negligent infliction plaintiff is not a close relative of the injured party, for the same policy reasons already discussed. But, typically, there's a case that allowed recovery on similar facts. See *Condor v. Wood*, 716 N.E.2d 432 (Ind. 1999).

3. Although it is hard to imagine a scenario more likely to inflict emotional distress than this, Cardet's parents are unlikely to recover under any of the common approaches to indirect infliction claims. They have not suffered an impact. They are not within a zone of physical danger. And the *Dillon* factors are not satisfied, since they have not witnessed traumatic injury to their child.

Cases like this have repeatedly defeated the efforts of courts to develop consistent standards for recovery for emotional distress. After the court establishes a purportedly clear rule such as zone-of-danger or *Dillon*, a case like this comes along which cries out for relief but doesn't

fit the rule. Very frequently, the court then writes a confusing decision that blurs the lines but comes out "right."

For example, some California courts have allowed recovery in indirect infliction cases that don't meet the *Dillon* standards if the defendant owed a "direct" duty to the bystander. See, e.g., *Huggins v. Longs Drug Stores California, Inc.*, 14 Cal. Rptr. 2d 77 (Cal. Ct. App. 1992) (concluding that parents who administered improper dose of medication to infant could recover for distress resulting from injury to infant, despite failure to meet *Dillon* test, since pharmacist owed them direct duty to provide proper dosage).[7] Some cases have purported to use a straight foresee-ability standard in hard cases, which certainly would favor recovery here, but would lead to a dramatic increase in such claims, and difficult issues as to the limits of foreseeability. See, e.g., *Masaki v. General Motors Corp.*, 780 P.2d 566, 575-576 (Haw. 1989) (recovery allowed based on foreseeability though parents did not witness the accident); but see *Kelley v. Kokua Sales and Supply*, 532 P.2d 673 (Haw. 1975) (recovery denied where decedent died of a heart attack in California upon being informed of his relatives' death in Hawaii). See also *Wages v. First Natl. Ins. Co. of America*, 79 P.3d 1095 (Mont. 2003) (requiring only that severe distress be foreseeable from the negligent act).

Hard Cases Make Sad Law

4. a. In this example Roget is in the zone of danger but does not know it, since the car approached from behind. Must he be *aware* of the risk to himself in order to recover for distress at the injury to his daughter? The logic of the zone-of-danger test would not seem to require this; the rationale is that the defendant can foresee injury to Roget because he is close to the accident, so it is not unreasonable to hold the defendant liable if Roget suffers emotional distress rather than physical injury.

This seems like the right answer, and many courts would probably so hold. However, some zone-of-danger cases suggest that the bystander plaintiff must *both* be in the zone *and* fear for his own safety before he can recover for distress at injury to another. See, e. g., *Rickey v. Chicago Transit Auth.*, 457 N.E.2d 1 (Ill. 1983).

b. A court that sticks by the zone-of-danger rule will provide no relief on these facts. Carnot is simply not in any physical danger. His distress at witnessing his wife's suffering is foreseeable and doubtless severe, but this arbitrary line cuts him out.

It is unclear whether Carnot would recover if the *Dillon* standards applied. Carnot suffered emotional distress from witnessing his wife's medical crisis, but at the time he was not aware that it resulted from negligence on the part of the nurses. Must he be aware that the injury is being caused by negligence, if he satisfies all the *Dillon* criteria? Logically, such awareness seems unnecessary. The gravamen of the indirect infliction claim is traumatic distress caused by the defendant. This comes from witnessing the injury, whether the bystander realizes that it results from negligence or not. This logic was followed in *Mobaldi v. Board of Regents,* 127 Cal. Rptr. 720, 727-728 (Cal. App. 2nd Dist. 1976),[8] which allowed recovery on analogous facts.

Indeed, it seems unnecessary that the indirect infliction victim witness the defendant's negligent act at all. The mother who sees a car hit her child suffers the same degree of distress whether it resulted from the driver's negligence or that of a mechanic who failed to properly repair the brakes two weeks earlier. Yet it is not clear that recovery will be allowed in cases of antecedent negligence. Typically, there are cases going both ways. See *Love v. Cramer,* 606 A.2d 1175, 1178 n.4 (Pa. Super. 1992), *appeal denied, Cramer v. Love,* 621 A.2d 580 (indicating that Pennsylvania law requires bystander to witness the negligent act); compare *Kearney v. Philips Indus., Inc.,* 708 F. Supp. 479 (D. Conn. 1987) (allowing recovery where bystander only witnessed resulting injury, not the negligent act that caused it).

c. This change in the facts challenges the line drawn in *Dillon.* In *Dillon* the direct victim actually was the bystander's child; here, Cordet mistakenly thought he was. The impact on Cordet could still be traumatic; indeed, in the case upon which this example is based *(Barnes v. Geiger,* 446 N.E.2d 78 (Mass. 1983)) the bystander really did suffer a cerebral hemorrhage and die. If the defendant's duty to bystanders were based solely on foreseeability, it seems clear that this plaintiff would recover. But in this area, as in others, public

policy frequently requires that the limits of the defendant's duty be drawn well short of foresee-ability. Although the Massachusetts courts use an approach much like *Dillon*, *Barnes* denied recovery, emphasizing the practical need to limit liability:

> Daily life is too full of momentary perturbation. Injury to a child and the protracted anguish placed upon the witnessing parent is, on the scale of human experience, tangible and predictable. Distress based on mistake as to the circumstances is ephemeral and will vary with the disposition of a person to imagine that the worst has happened. We are unwilling to expand the circle of liability . . . to such an additional dimension, because to do so expands unreasonably the class of persons to whom a tortfeasor may be liable.

Id. at 81. Whenever courts draw a line like this, ivory tower academics (who don't have to decide the case) will argue that the line is arbitrary. Such caviling is easy; of course the line is arbitrary. Still, it must be drawn.

d. Here again, foreseeability and practical politics suggest different results. It is obviously foreseeable that a mother would be traumatized by seeing her child nearly killed by a car. Yet allowing recovery would again expand the ambit of liability substantially. The *Barnes* court would deny recovery on these facts: "Whether the mistake be as to the identity of the victim . . . or the gravity of the injury, the anxiety, perforce, is transitory, and a 'fleeting instance of fear or excitement' . . . does not present a set of circumstances against which a tortfeasor can fairly be asked to defend." 446 N.E.2d at 81. Some courts have required that the direct victim suffer serious injury if bystanders are to claim for indirect infliction (see, e.g., *Portee v. Jaffee*, 417 A.2d 521, 527-528 (N.J. 1980)), but others have not. See *Paugh v. Hanks*, 451 N.E.2d at 767 (direct victim need not suffer actual physical harm).

e. This example tests the limits of the *Dillon* requirement that the indirect victim witness the injury. Many cases have turned on whether the relative must be on the scene, see or hear the accident, arrive immediately, or simply see the injured victim in pain. Recovery has usually been denied where relatives learn of an accident later, but this case is closer, since Carnot arrives in the immediate aftermath of the accident.

The Introduction to this chapter distinguished between grief at injury to another and the trauma of witnessing a shocking event.

Here, the parent has suddenly come upon the child in a desperate condition immediately after being pulled from the pool, amid frantic efforts to revive him. This is a sudden, terrible shock. It does no violence to the *Dillon* requirement of witnessing the injury to hold it met here. The court so held in *Nazaroff v. Superior Court,* 145 Cal. Rptr. 657 (Cal. Ct. App. 1978), but *Nazaroff* was overruled in *Thing v. La Chusa,* 771 P.2d at 830, which held that the bystander plaintiff must actually witness the injury-causing event itself in order to recover. Courts have drawn various fine distinctions in applying *Dillon's* "contemporaneous observance" requirement. See, e.g., *Brooks v. Decker,* 516 A.2d 1380 (Pa. 1986) (recovery denied to father who rushed to the scene, saw the ambulance arrive, saw his son's bicycle on the ground, and accompanied his injured son to the hospital); *Stump v. Ashland, Inc.,* 499 S.E.2d 41 (W. Va. 1997) (recovery allowed where plaintiffs were at the scene and knew victims were being harmed by fiery crash, but their view was obscured by flames); *Gabaldon v. Jay-Bi Prop. Mgmt. Inc.,* 925 P.2d 510 (N.M. 1996) (bystander must either be there when the injury occurs or arrive before emergency medical personnel). One of the most liberal cases is *Ferriter v. Daniel O'Connell's Sons, Inc.,* 413 N.E.2d 690 (Mass. 1980), which allowed recovery where plaintiffs did not witness the accident but rushed to the hospital and saw the seriously injured victim there. Compare *Colbert v. Mooba Sports, Inc.*, 135 P.3d 485, 490-495 (Wash. App. 2006) (father who arrived at lake during efforts to locate daughter, and three hours later saw her body pulled from water, could not recover for negligent indirect infliction).

f. Danton satisfies the three basic *Dillon* factors, but must also show that he has suffered "physical injury" as a result of the distress from witnessing the accident. In most cases the bystander plaintiff does not suffer dramatic physical injury such as a heart attack or cerebral hemorrhage. Yet, if the courts require resulting physical injury, plaintiffs will try to come up with something. Many tedious, unsatisfactory cases consider whether headaches, upset stomach, loose bowels, depression, social withdrawal, insomnia, perspiration, muscle tension, loss of appetite, and other general complaints satisfy the "resulting physical injury" standard.

Because such symptoms are subjective and hard to disprove, the resulting physical injury requirement has failed miserably as a bright line test to corroborate distress. In the same way that skeptical courts turned the impact requirement into a token, they have eviscerated the "resulting physical injury" requirement by finding vague complaints sufficient. See *Sullivan v. Boston Gas Co.*, 605 N.E.2d 805 (Mass. 1993) (discussing range of symptoms that satisfy the requirement, and approving virtually any evidence that corroborates plaintiff's claim of distress). As with the other requirements, however, some courts have taken a tougher line. See, e.g., *Muchow v. Lindblad*, 435 N.W.2d 918, 921-922 (N.D. 1989) (loss of sleep and weight insufficient).

g. This case will fail under the *Dillon* standard, since the parent was not on the scene and did not witness the accident. See, e.g., *Harmon v. Grande Tire Co.*, 821 F.2d 252 (5th Cir. 1987). This result makes sense, if recovery is to be limited to the trauma of witnessing the injury itself, as opposed to the sudden grief of learning that a loved one has been injured. Yet this parent *has* suffered a traumatic experience, which is foreseeable and attributable to the defendant's conduct. The nice distinctions made by the indirect infliction rules will make little sense to this plaintiff in light of the emotional suffering the defendant has inflicted upon her. If she lives in Montana, she has a good shot at recovery, however. See *Wages*, 79 P.3d 1095 (Mont. 2003).

Consortium Compared

5. a. This is a proper element of a loss of consortium claim. DeFarge does not seek damages for the shock of witnessing injury to Belle, but for the interference with her ability to associate with Belle while she is hospitalized *after* the accident. However, this claim is for loss of "filial consortium," that is, for interference with the relationship to a child. As the introduction states, courts are divided on whether parents may recover for loss of consortium with a child. Many have refused to allow such claims.

b. This is a claim for distress at the thought that Belle has suffered serious injury. In one sense, it looks like an indirect infliction case,

since DeFarge is distressed due to the injury of another. But it is not based on sudden shock at the scene of the accident itself, but the distress and grief of learning that her daughter has been injured. She would experience the same grief if she had not been with her at the time of the accident, and learned of it at home. This does not meet any of the usual tests for indirect infliction of emotional distress.

Arguably, this is like Example 1a, in which a passenger who suffered impact in an accident sought emotional distress damages from witnessing injuries to the driver. However, in that example the plaintiff saw the injuries immediately at the scene. Here, DeFarge passed out so she did not perceive the injury to Belle.

c. The example here is ambiguous. Does DeFarge seek damages for *Belle's* emotional reaction of withdrawal from social activities, or for the loss of her own (DeFarge's) opportunity to engage in such activities with Belle? If the claim is for Belle's social withdrawal itself, this is an element of Belle's negligence claim, not DeFarge's. Plaintiffs who suffer physical injury are always entitled to prove their full damages, including emotional damages like Belle's, that result from or accompany physical injury. Chapter 18, pp. ***-***.

If DeFarge seeks damages for loss of the opportunity to engage in social activities with Belle as they did previously, or to relate to her due to her emotional withdrawal, this would be a proper element of a loss of consortium claim in states that recognize a parent's right to recover for loss of consortium with a child. Note again that the injury claimed is the ongoing impairment of DeFarge's relationship with Belle after the accident, not the trauma of witnessing the accident itself.

d. This chapter considers consortium claims together with indirect infliction claims because both are injuries to one person as a result of a separate injury to another. But consortium claims are substantially broader than infliction of emotional distress claims, since loss of consortium compensates a variety of losses due to impairment of the relationship to an accident victim, including interference with social and recreational aspects of the relationship. The loss of the opportunity to play tennis with Belle, while not strictly a form of emotional distress, is a loss the jury may consider in valuing DeFarge's consortium claim.

e. This is not an indirect infliction claim — at least, not in the sense in which the courts have recognized them. It stems from DeFarge's sadness at seeing her daughter cope with a disability, not from witnessing the injury that gave rise to it. Nor is it, strictly speaking, within the ambit of a loss of consortium claim. It is not a claim for Belle's inability to do things with DeFarge, or to relate to her emotionally and socially. It is a form of grief distinct from either of the claims addressed in this chapter.

As previously noted, the legal distinction between DeFarge's depression from watching Belle struggle with disability and the emotional impairment of their relationship due to Belle's injury may be too subtle for most juries. Their award for emotional damages is likely to be a general one, based on their overall impression of the impact Belle's injury has had on DeFarge.

f. This is obviously not a claim for emotional distress, nor is it properly recoverable on a loss of consortium claim. Even if DeFarge loses rent due to Belle's injury, she may not sue the negligent driver for it. Belle will recover directly for her lost future wages in her negligence action against the other driver. If DeFarge could recover for the contributions Belle would have made to the rent from her future wages, the defendant would be made to pay the same loss twice.

It is not unusual for third parties to suffer substantial secondary losses as a result of an injury. If Belle is an indispensable executive, for example, her company may suffer serious economic losses from her absence. Generally speaking, however, courts have refused to allow recovery for these types of derivative economic losses to others. J. Diamond, L. Levine & M. Madden, Understanding Torts §10.04.

g. Marlene has a better claim than DeFarge for indirect infliction of emotional distress, since she was in the car and saw Belle's injuries at the scene. This would probably state a claim for indirect infliction under the impact rule (see Example la) and the zone-of-danger rule. It would also probably satisfy the *Dillon* factors, since siblings have generally been considered close enough relatives to recover under *Dillon.*

However, Marlene will almost certainly not recover for loss of consortium, since most courts have denied consortium recovery to

siblings. Once again, this has nothing to do with foreseeability; impairment of Marlene's relationship to her sister is highly likely when Belle is seriously injured. It is another example of the practical need to keep liability within manageable limits.

It is not surprising that most courts have extended indirect infliction claims to siblings but barred their claims for loss of consortium. Cases in which siblings witness traumatic injury to accident victims are unusual. But many seriously injured accident victims will have siblings who suffer loss of consortium. Thus, allowing sibling recovery for indirect infliction does not expand liability substantially, while allowing sibling recovery for loss of consortium clearly would.

6. Yes, she could, if the jurisdiction recognizes claims for loss of consortium with a child. DeFarge's claim is not for the trauma of witnessing the injury; it is for the interference with her ability to relate to Belle caused by Belle's injury. DeFarge suffers this interference equally, whether she witnessed the injury or not. In most cases, consortium plaintiffs will not have witnessed the underlying injury to the direct victim. But this is irrelevant to recovery for loss of consortium.

7. If the jury is to assess damages for loss of consortium, it has to have a sense of what the consortium plaintiff has lost. Thus, evidence about the quality of the relationship between the direct victim and the consortium plaintiff before and after the accident is relevant and admissible. The jury will hear evidence about how the spouses related to each other, their recreational activities together, the closeness of their relationship, their social life and sex life, their division of functions within the home, and the impact the injury has had on all these aspects of their marriage. *Davis v. Caterpillar, Inc.*, 787 So. 2d 894 (Fla. Ct. App. 2001), review dismissed, 817 So. 2d 845 (Fla. 2002), for example, presented the following evidence of loss of consortium:

> Mrs. Davis worked at a Wal-Mart store at the time of the incident. She visited her husband in the hospital every day for over a month. When he came home, she quit her job for two years to take care of him. She changed his dressings day after day, cleaned his wounds, massaged his leg, bathed him, helped him dress and took him to his numerous doctor's appointments. She designed and sewed pants with a zipper in the leg to make his dressing easier. Mrs. Davis is 70 years old. She continues to work because she now provides the family's sole financial support. Mr. Davis continues to be very dependent upon her. Mrs.

> Davis has suffered through her husband's irritability, frustrations, sexual dysfunction and nightmares, in addition to her own stresses. She is now the family's sole provider and caretaker.

The *Davis* court held that an award of $35,000 on these facts was clearly inadequate compensation for her loss of consortium.

Evidence of consequential losses to the spouse of an injured party, like that in the *Davis* case, is powerful and emotional evidence that may have a significant impact on the jury. And, typically, the consortium claim will be heard with the personal injury claim of the direct victim, in a single trial. No defendant can be enthusiastic about the jury hearing all this. Thus, the assertion of consortium claims ups the ante for the defendant, and may drive up the settlement value of the case.

Another Distinction that Makes Another Difference

8. In each of these cases, the plaintiff suffered emotional distress due to fear of an injury to *herself,* rather than fear of or witnessing injury to another. These are often referred to as "direct infliction" cases, as opposed to "bystander" cases, in which the plaintiff seeks recovery after witnessing injury to another. In Example 3, for example, in which Cardet is unintentionally locked in the school bus, she would likely suffer emotional distress as a direct victim, just as her parents would as indirect victims.

   The standards applicable to direct infliction cases are even less clear than those for indirect infliction. Courts have not even consistently made the distinction between direct and indirect infliction, or recognized that standards developed in one context may not work in another. A few courts continue to apply the impact rule to such cases. Some apply the zone-of-physical-danger rule. Some may focus on resulting physical injury, or on whether the defendant owed the plaintiff a preexisting duty. A few appear only to require that distress be foreseeable and serious. See generally Minzer, Nates §5.02.

   Originally, I contemplated including a separate chapter on direct infliction. Efforts to draft one, however, convinced me that as a result of the utterly disorganized state of the case law on the subject, a separate chapter would spawn more frustration than enlightenment.

An Elementary Example

9. This example is deceptively simple. The *Dillon* factors are clearly met, since Antoinette is closely related to the direct victim, witnesses the accident and is close at hand. However, satisfying the *Dillon* factors merely proves that DuBarry *owed Antoinette a duty* to avoid negligently inflicting emotional distress upon her. It does not show that DuBarry breached that duty of care, and the facts here suggest that she didn't. She did not drive negligently, but was overtaken by a sudden illness that prevented her from controlling her car at all. See, e.g., *Cohen v. Petty*, 65 F.2d 820 (D.C. Cir. 1933) (no liability when driver fainted from sudden illness).

    Students often get so caught up in the special standards for allowing indirect infliction claims that they forget that those standards only address the issue of whether a duty of care is owed. These are still claims for negligence, and that means that all four elements of a negligence claim must be proved to recover. In other words, the special standards for indirect infliction claims are not a separate set of elements which support recovery in themselves, but rather prerequisites to establishing *one* of the usual elements of a negligence claim, duty. If they are met, the plaintiff must still shoulder the burden of proof on the other three as well. Here, DuBarry will fail to establish that old stand-by, Element #2, breach of the duty of due care.

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1. W. Shakespeare, Hamlet, act 3, sc. 1.

2. "[A]s law is an instrument of governance rather than a hymn to intellectual beauty, some consideration must be given to practicalities." *Newman-Green, Inc. v. Alfonzo-Larrain R.*, 854 F.2d 916, 925 (7th Cir. 1988), *rev'd on other grounds*, 490 U.S. 826 (1989).

3. See, however, Example 2a for an important and seemingly illogical limit on recovery under the zone-of-danger rule.

4. *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99, 103 (N.Y. 1928).

5. However, New Hampshire refused to allow indirect infliction recovery to a bystander plaintiff who had been dating the direct victim for about six months, though not living with her. *St. Onge v. MacDonald*, 917 A.2d 233 (N.H. 2007).

6. Although *Paugh* viewed the close relationship as only a factor, not a prerequisite to recovery, a subsequent Ohio case denied recovery to a plaintiff who witnessed the electrocution death of a friend. *Smith v. Kings Entertainment Co.*, 649 N.E.2d 1252 (Ohio Ct. App. 1994).

7. This dubious holding was overruled by the California Supreme Court. 862 P.2d 148 (1993). But many other equally dubious holdings in hard emotional distress cases have not been.

8. *Molbaldi* was overruled on other grounds, *Baxter v. Superior Court*, 563 P. 2d 871 (1977).

CHAPTER 15

Caveat Actor: Strict Liability for Abnormally Dangerous Activities

INTRODUCTION

Many students come to law school with the belief that an actor who causes injury to another is *always* liable for that injury. However, in cases governed by negligence law, this is not the case. Recovering in an action for negligence requires proof that the defendant breached the duty of due care. Since many accidents result from unexpected circumstances, unknowable mechanical defects, weather conditions or other nonnegligent causes, injured parties are often unable to recover, even though another person caused their injuries.

In *Cohen v. Petty*, 65 F.2d 820 (D.C. Cir. 1933), for example, the plaintiff was denied recovery where the defendant suffered a sudden fainting spell, lost control of his car and injured the plaintiff. The plaintiff lost in *Cohen* because the defendant did not owe her an absolute duty to avoid injuring her, but only a duty to *exercise reasonable care* to prevent injuries from his driving. Where injury results despite the exercise of reasonable care, that duty has not been breached, and the injured party cannot recover under a negligence standard.

However, the negligence standard is not the only possible basis for imposing tort liability. In some situations tort law imposes either more demanding or lesser duties of care on actors. For example, many courts hold

that common carriers owe their passengers "the highest degree of care," clearly a more stringent standard than negligence. See Prosser & Keeton on Torts, pp. 5th ed. 208-209. In other situations, courts hold that a defendant owes a lesser duty than the exercise of reasonable care. For example, many courts hold that a landowner only owes a trespasser a limited duty to avoid willful or wanton injury due to conditions on her property. Dobbs' Law of Torts §273.

This chapter deals with situations in which the law imposes a very heavy duty on actors, a duty to avoid injury to the plaintiff entirely or pay for any resulting injuries. When such a duty exists, the defendant is liable regardless of the care with which she conducts the activity. "Strict liability is liability imposed without regard to the defendant's negligence or intent to cause harm." Restatement (Third) of Torts: Liability for Physical and Emotional Harm, Scope Note to chapter 4. The liability flows not from carelessness, but from the very choice to conduct the activity at all. Such "strict liability" is not premised on fault in the conventional sense of the term, but on the policy choice to place accident losses from the activity on the actor rather than on its victims. The defendant, it is said, "acts at her peril" in conducting such activities. No matter how much care she takes to avoid injuries to others, she will be held "strictly liable" if such injuries result.

SOME HISTORY

Although strict liability is often thought of as a controversial recent development in the law of torts, all early common law causes of action were apparently "strict." Liability was imposed simply for injuring another, regardless of fault. C. Peck, Negligence and Liability Without Fault in Tort Law, 46 Wash. L. Rev. 225, 225-226 (1971). In the last 150 years, however, fault has come to the fore in the law of torts. Today, most tort claims require either intentional conduct or negligence.

Despite that predominance, strict liability has continued to apply in some areas. For example, keepers of wild animals have long been held strictly liable for injuries caused by them. If Springsteen keeps a boa constrictor in his apartment and Boa escapes through a heating duct and injures Neville, Springsteen is liable, even if he took every precaution to prevent Boa's

escape:

> An owner or possessor of a wild animal is subject to strict liability for physical harm caused by the wild animal.

Restatement (Third) of Torts: Liability for Physical and Emotional Harm §22(a). Springsteen's duty is not just a duty of extreme care, it is a duty to prevent the injury entirely or pay the resulting damages. If the injury results, precautions are no defense.

The rationale for imposing strict liability for keeping wild animals is easy enough to see. Keeping a wild animal in a community is an uncommon, unnecessary, and highly dangerous activity. Given the low utility, inappropriate location, and high risk of such activity, it might be appropriate to ban it entirely; doubtless many communities do. If such conduct is tolerated, strict liability makes good sense for several reasons. *First*, those who are tempted to keep a tiger or two will hopefully give serious thought to the risk of liability. Some may decide to forgo the questionable pleasures of tiger keeping rather than risk the broad liability it may entail. *Second*, those who simply can't do without a tiger will at least take all possible precautions to restrain them, in order to avoid liability. *Last*, under strict liability the tiger's victims will at least be compensated for injuries resulting from an arguably frivolous or even antisocial choice by the owner.

There is an obvious analogy between this arcane doctrine of strict liability for wild animals and the broader strict liability doctrine that traces to *Rylands v. Fletcher*, 1 Ex. 265 (1866), *aff'd*, 3 H.L. 330 (1868). The defendant in *Rylands* had introduced a dangerous force — a large body of water — onto his land, which escaped unexpectedly and injured his neighbor's property. There was no evidence that the defendant had been negligent in his efforts to contain the hazard, but the court held that the keeping of this metaphorical tiger supported strict liability for the resulting damage:

> We think that the true rule of law is that the person who, for his own purposes, brings on his land, and collects and keeps there any thing likely to do mischief if it escapes, must keep it in at his peril, and if he does not do so, he is prima facie answerable for all the damage which is the natural consequence of its escape.

Rylands v. Fletcher (1861-1873), All E.R. 7. (Blackburn, J., Exchequer Chamber opinion). Unfortunately, the decision in *Rylands* was not clearly premised on the very sensible policy underlying the wild animal cases.

Although neither nuisance nor trespass directly applied,[1] the rationale of *Rylands* appeared to limit such liability to activities on land of the defendant that injure land of an abutter. In addition, Lord Cairns, in the House of Lords opinion, appeared to narrow Blackburn's rationale still further. He suggested that strict liability only applied to "non-natural" uses of land *(Rylands v. Fletcher* at 339), evidently referring to unusual activities that are out of place in the area where the defendant chooses to conduct them.

Regardless of these doctrinal complexities, the underlying spirit of *Rylands* is to impose strict liability on those who (like tiger keepers) impose grave and truly unusual risks on the community. Since *Rylands*, the doctrine of strict liability for abnormally dangerous activities has shed much of the doctrinal baggage of its origins in *Rylands*, and come to focus increasingly on this factor. *Rylands* contained the kernel of an idea that has grown to much greater proportions since.

If an activity poses such high risk, one might ask why it is not simply banned entirely. Life is risky enough without people blowing off dynamite, spraying the unsuspecting with pesticides, and terrorizing them with tigers. Legislatures often *do* ban dangerous activities under particular circumstances or in particular places. But many activities that pose unusual risk are also unusually productive: Try clearing the way for a road with a pick and shovel sometime, and you will gain a renewed appreciation for the social value of dynamite. Strict liability allows such socially useful activities, but requires them to bear the accident costs associated with them.

THE CURRENT DOCTRINE

Today, many jurisdictions accept the principle that actors should be held liable without fault for injuries resulting from activities that pose an unusually high risk of injury. The Third Restatement of Torts restates the rule as follows:

> **Section 20. Abnormally Dangerous Activities**
> (a) An actor who carries on an abnormally dangerous activity is subject to strict liability for physical harm resulting from the activity.

Restatement (Third) of Torts: Liability for Physical and Emotional Harm §20.

The rationale for strict liability in such cases is based partly on the high level of risk posed by such activities. In part, it is also based on the unilateral nature of the risk the defendant has created. Many ordinary activities entail risk — take driving, for example. But drivers and accident victims typically share in creating the risks of driving, which unusual activities that support strict liability generally involve a large risk created solely by the defendant. "Typically, the victim is a passive, uninvolved third party" (Restatement (Third) of Torts: Liability for Physical and Emotional Harm §20 cmt. e) with little ability to avoid the risk posed by the activity. And in part, liability is premised on the unusual nature of the activity, which may be useful, but that judges believe should pay its own way if it is to be tolerated.

Economic concepts of cost avoidance and loss spreading also support strict liability for high risk activities. Strict liability encourages those who conduct high risk enterprises to avoid costs in two ways. *First*, the threat of liability will encourage actors to forgo these risky activities entirely. Because it makes the actor pay for all injuries associated with the activity, strict liability encourages her to consider alternative ways of achieving the same goal: Perhaps the same cellar can be dug with a backhoe instead of blasting. Thus, imposing strict liability may lead to less high risk activity and fewer accident losses from it. See Restatement (Third) of Torts: Liability for Physical and Emotional Harm §20 cmt. b; M. Geistfeld, Should Enterprise Liability Replace the Rule of Strict Liability for Abnormally Dangerous Activities? 45 UCLA L. Rev. 611,652-658 (1998).

Second, because actors who conduct abnormally dangerous activities must compensate even for blameless injuries, strict liability encourages them to reduce the cost of accidents by taking extra precautions. Thus, the threat of liability will make high-risk activities safer, though it cannot make them completely safe.[2]

Third, strict liability places the loss from high-risk activities on the party who can most easily *spread the costs* of the enterprise by adding the cost of compensation for accidents resulting from the activity to the price of the product. This policy also supports strict liability for abnormally dangerous activities. A blasting company, for example, can spread the cost of blasting accidents (including nonnegligent accidents) by purchasing liability insurance to pay the damages. It will redistribute this cost to consumers of its service by raising the price of its product. *Chavez v. Southern Pacific Transp. Co.*, 413 F. Supp. 1203,1209 (E.D. Cal. 1976). By contrast, if the cost of a blasting

injury falls on the victim, she will have no means of reducing its impact by spreading the loss to others.

Of course, the increased cost of blasting due to strict liability may lead to a reduction in the amount of blasting done, but if so, this is because the price, adjusted to include the accident costs it imposes, *reflects the true cost of the activity.* Generally, economists consider such "internali-zation" of the costs of an enterprise (requiring it to "pay its way") a good thing, rather than imposing the injury costs of the enterprise on accident victims who derive no benefit from it. Under a negligence regime, unlike strict liability, the costs of *nonnegligent* accidents are externalized to their victims, since those victims cannot recover these costs from the defendant.

DEFINING ABNORMALLY DANGEROUS ACTIVITY

The hardest issue for courts has been defining what activities should subject an actor to strict liability. The First Restatement of Torts confined strict liability to "ultrahazardous activities." Restatement (First) of Torts §519. The Second and Third Restatements, however, apply strict liability to "abnormally dangerous" activities. Restatement (Second) of Torts §519; Restatement (Third) of Torts: Liability for Physical and Emotional Harm §20.

The Second Restatement suggested six factors relevant to determining whether an activity is abnormally dangerous. These include

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

Of course, this section of the Second Restatement is not "the law" of strict liability unless a court adopts it or the legislature enacts these standards. However, a fair number of state court cases have relied on these Second Restatement factors in analyzing strict liability cases. The Third Restatement, however, redefines "abnormally dangerous activity" as follows:

(b) An activity is abnormally dangerous if

(1) the activity creates a foreseeable and highly significant risk of physical harm even when reasonable care is exercise by all actors; and
(2) the activity is not one of common usage.

Restatement (Third) of Torts: Liability for Physical and Emotional Harm §20(b). This reformulation of strict liability requirements eliminates the last two enigmatic factors listed in the Second Restatement. The drafters of the Third Restatement do not explicitly explain why they reject factor (f), the value of the activity to the community. However, they argue that "the point that the activity provides substantial value or utility is of little direct relevance to the question whether the activity should properly bear strict liability." [3]This factor has never had much support in the case law, so they may have concluded that it is not justified by the reported decisions — the Restatement is, after all, supposed to "restate" the law, not make it. See G. Boston, Strict Liability for Abnormally Dangerous Activities, 36 San Diego L. Rev. 597, 664 (1999) (this factor "rarely, if ever" important to the outcome of cases). This factor was apparently included in the Second Restatement to avoid burdening locally important, economically fragile industries with the extra expense associated with strict liability. It was criticized by many, including Prosser's own treatise,[4] as reintroducing a "Hand formula" negligence analysis into strict liability doctrine. See *Koos v. Roth*, 652 P.2d 1255, 1261-1262 (Or. 1982) (refusing to consider this factor in determining liability standard).

Factor (e), the inappropriateness of the activity to the area where it is carried on, is also eliminated by the the Third Restatement formulation. Partly, this factor is reflected in the "common usage" factor, which is given increased emphasis in §20(b)(2) of the Third Restatement. At the end of the day, it is unlikely that a court will reject strict liability simply because the defendant does it in an appropriate place. For example, it is "appropriate" to store mining wastes in retaining pools near the mine, or to blast rock for a road where the rock is found, but most courts would impose strict liability on these activities anyway.

The central thrust of §20 — like §§519 and 520 of the Second Restatement — is that strict liability should apply to activities that pose unusual and irreducible risk. Strict liability has been applied, for example, to blasting, large artificial ponds for retention of mining wastes, crop dusting,

fumigation, storage of large quantities of gasoline, rockets, experimental aircraft, and use of radioactive materials. Each of these activities involves forces or substances capable of causing extensive damage if not properly controlled. Each usually goes forward without mishap, but can misfire badly without negligence. The risk of such activities may differ only in degree from other activities, but the extra risk has been enough to convince courts to apply strict liability to them.

THE "COMMON USAGE" FACTOR IN DEFINING ABNORMALLY DANGEROUS ACTIVITIES

Importantly, the Third Restatement elevates "not in common usage" from a factor to a necessary element of a strict liability claim. If an activity poses unusual risk to others, why should the plaintiff be put off with the explanation that the danger is a common one? One reason is historical: This factor traces to Lord Cairns's requirement in *Rylands* that the injury result from a "non-natural" use. 3 H.L. 330, 340 (1868). Whatever his Lordship actually meant by this enigmatic phrase,[5] many strict liability cases have concluded that strict liability only applies if the defendant's activity was unusual or extraordinary as well as dangerous. See cases cited in Restatement (Third) of Torts: Liability for Physical and Emotional Harm §20, reporter's note to cmt. j. This suggests that an activity might give rise to strict liability in an area where it is rare, but not in another where it is more common. Some cases bear this out: One court refused to impose strict liability for drilling an oil well in rural Oklahoma,[6] but another held a defendant strictly liable for drilling one in downtown Los Angeles.[7]

Under §20 of the Third Restatement, an activity that involves great and irreducible risk will not support strict liability if it is a matter of common usage. Restatement (Third) of Torts: Liability for Physical and Emotional Harm §20(b)(2). A classic example is driving. Doubtless, more people are injured in a week by the automobile than are injured in a decade by blasting. Yet, because it is so common (and so useful), courts have not applied strict liability to driving. Recovery for motor vehicle accidents still requires a

showing of negligence, and accident victims who cannot make that showing go uncompensated.

One rationale for the "common usage" exclusion is that activities that are common, such as driving or building excavation, often involve creation of reciprocal risks between actor and victim. The plaintiff who is hit by a car at one time probably travels by car herself at others, and thus imposes a similar risk of injury on others. By contrast, those who conduct unusual activities such as fumigation or blasting impose hazards on the community that are generally not imposed on them by others. See G. Fletcher, Fairness and Utility in Tort Theory, 85 Harv. L. Rev. 537, 543-548 (1972); Restatement (Third) of Torts: Liability for Physical and Emotional Harm §20 cmt. j. It is not surprising that courts impose strict liability on actors who impose a risk on the community disproportionate to the general risks they are exposed to themselves.

This rationale helps to explain the difference in the common law's treatment of liability for injuries caused by wild and domestic animals. Keeping a wild animal involves an unusual danger seldom matched by similar activity of one's neighbors. Large dogs, on the other hand, are a common risk. A great many more people are bitten by dogs than by tigers, but under the common law, dog-bite victims have usually been required to prove negligence in order to recover.

RECAP AND CLOSING COMMENTS

The Second Restatement's multifactor approach to strict liability has been embraced by a good many courts. The Third Restatement suggests a somewhat simpler analysis, but is largely consistent with the thrust of the Second. Under both formulas, strict liability should apply to activities so inherently dangerous that the level of risk will remain high despite all reasonable efforts to reduce it. If reasonable care can make the activity generally safe, courts will not impose strict liability. See *Indiana Harbor Belt R.R. Co. v. Am. Cyanamid Co.*, 916 F.2d 1174, 1177 (7th Cir. 1990); see generally G. Boston, Strict Liability for Abnormally Dangerous Activities: The Negligence Barrier, 36 San Diego L. Rev. 597, 653-659 (1999). If reasonable care cannot eliminate a substantial risk of grave physical injury,

strict liability will probably apply, even though the activity is socially valuable and conducted conscientiously. The defendant's best argument to avoid strict liability in such cases is that the activity is one of "common usage." Whether or not courts expressly adopt the Third Restatement formulation in place of the widely adopted Second Restatement, they will probably decide cases almost entirely on the two factors emphasized in the Third.

Abnormally dangerous activities are not the only example of strict liability in American tort law. The most common is strict products liability, which holds a manufacturer or seller strictly liable for injuries resulting from the sale of defective products. Strict products liability is based on different rationales than strict liability for abnormally dangerous activities, and requires proof of different elements. We will cope with its complexities in the next two chapters.

The examples below illustrate the application of strict liability for abnormally dangerous activities. In analyzing them, assume that the Third Restatement formulation applies, unless otherwise indicated.

Examples

Clearing the Air

1. Franklin Pest Control Company is called in to fumigate an apartment house. The process calls for spraying the premises with Vikane, a toxic chemical that kills bugs. Unfortunately, Vikane is also toxic to people.

   Prior to spraying the building, Ciccone, an employee of Franklin, carefully investigates to be sure that the chemical fumes cannot spread through the party wall into the adjacent apartment building. She is assured that the party wall is an impenetrable fire wall, and her own inspection confirms this. Unfortunately, a crack, almost impossible to find, exists in the wall. The chemical fumes spread through the wall and overcome Prince in the next building.

Prince sues Franklin for his injuries. The company argues that it took all reasonable precautions and had no reason to suspect that the fumes could travel into Prince's building. Assume that the court concludes that fumigation is a strict liability activity and agrees that the company's conduct was

reasonable. Is Franklin liable to Prince?

A Dull Fthudd

2. Franklin Company's tank truck delivers Vikane to an apartment building for use in the fumigation. The driver carefully backs up to the loading dock, checking his mirrors and beeping as he goes. Unfortunately, Jackson, a child, runs impulsively behind the truck and is hit. Jackson sues Franklin Co. for his injuries. At trial, Judge Fudd instructs the jury as follows:

> I instruct you that the process of fumigation with Vikane is a strict liability activity. If you find that the plaintiff's injury took place in the course of the defendant's fumigation activities, then the defendant may be found liable without proof of negligence.

   a. By instructing the jury that strict liability applies to the activity of fumigation, Judge Fudd has decided that question as a matter of law. Was that proper?
   b. Who will object to Fudd's instruction, and why is it improper?

3. On the facts of Example 1, Prince sues Ciccone, the employee who sprayed the Vikane, for his injuries. Should the court apply a negligence or strict liability standard in determining liability?

Driving to Endanger

4. Neville is driving a Petrosur Oil Company tank truck containing gasoline on Interstate 591 when Dean, driving a pickup truck, cuts in front of him. Neville swerves to the right to avoid a collision and tips over. The tank car ruptures, and the gasoline explodes and injures Hendrix, who was driving in the opposite roadway. Hendrix sues Petrosur for damages and claims that Petrosur is strictly liable for his injuries.
   a. Would strict liability apply under the holding of *Rylands v. Fletcher*, quoted on p. 329?
   b. If the Third Restatement applied, would Neville be barred from relying on strict liability because the activity did not take place on the land of the defendant?

c. Under both the Second and Third Restatements, it is relevant whether the activity is a "matter of common usage." Is transportation of gasoline a matter of common usage?

d. Would strict liability apply under the Second Restatement?

5. Based on the facts in Example 4, Petrosur claims that it is not liable, even if gasoline hauling is a strict liability activity, since the accident resulted from the negligence of Dean. How should the court rule?

6. Assume that after the truck fell over, but before the gasoline exploded, a state trooper was stationed in the road waving down vehicles before they reached the scene. Hendrix, in a hurry and thinking there was just an ordinary accident, ignores the trooper, proceeds up the road and is injured when a spark from his car ignites the gasoline vapors from the overturned truck. Petrosur claims that liability should be reduced or denied due to Hendrix's contributory negligence. How should the court rule?

7. Baez Construction Company is engaged in the construction of a skyscraper in a small but growing city. A worker drops a plank from the seventh floor and injures a passing pedestrian. Is Baez strictly liable?

Crying over Spilled Pseudomonomethane

8. Ronstadt Plastics Company has a major plant in a suburban area near Nashville. As part of its process for manufacturing certain plastic toys, Ronstadt keeps a large tank of pseudomonomethane on its property. Pseudomonomethane is not explosive, caustic, or flammable. It is easy to work with and essential to Ronstadt's manufacturing process. However, it has been identified as a very potent carcinogen if ingested.

   While one of Ronstadt's delivery trucks is arriving at the plant, it loses its brakes (nonnegligently, we will assume) and careens off the road and into the tank. The tank is knocked over, and pseudomonomethane spills on the surrounding earth. The chemical migrates underground and enters the city's water supply, requiring the closing of its wells. The city sues for damages, and argues that Ronstadt is strictly liable for the damage to its water supply. How should the court

rule?

Cause for Concern

9. Guthrie Hospital uses hydromegasulfate, a highly explosive chemical, in several sophisticated medical applications. Because the chemical is so explosive, Guthrie stores it in a heavy-gauge tank on its grounds, two hundred feet behind the hospital.

   One morning, the cashier at the hospital is held up at gunpoint. He alerts the police, who respond and chase the culprit out the back door. An officer fires a warning shot, which unfortunately hits the tank on a ricochet. The tank explodes, injuring Dean, who was emptying trash into a nearby dumpster. Assuming that the storage of hydromegasulfate is a strict liability activity, is Guthrie strictly liable for Dean's injury?

10. One of the most famous strict liability cases is *Foster v. Preston Mill Co.*, 268 P.2d 645 (Wash. 1954). In *Foster*, the plaintiff ran a mink farm. Mink, it seems, are of "exceedingly nervous disposition." *Foster*, 268 P.2d at 648. When the defendant conducted blasting operations to build a road several miles from the plaintiff's farm, many of the mother mink were so upset by the noise that they killed their young. The farmer sued, but the defendant was not held liable. Why not?

Explanations

Clearing the Air

1. Franklin can hardly be faulted here for the way in which it conducted its operation. Ciccone investigated carefully, and only proceeded after she was satisfied that it was safe to do so. If liability turned on a showing of negligence, Prince would not recover.

   However, liability does *not* turn on a showing of negligence, since strict liability applies. Prince may recover by showing that his injury was caused by the defendant's conduct of the activity, no matter how carefully it was done. Franklin is liable, since its use of the toxic chemical caused his injuries.

   The defendant's plea, "but we didn't do anything wrong!" has

considerable appeal, but it does not carry the day in a strict liability case. (If it did, it wouldn't be very strict, would it?) The basis of strict liability is not fault, but the choice to engage in the activity in the first place. Because of the nature of that activity, courts place the damages flowing from that choice on the actor, rather than those who suffer injury, even blameless injury, from it. See *Old Island Fumigation, Inc. v. Barbee*, 604 So. 2d 1246, 1247-1248 (Fla. Dist. Ct. App. 1992) (imposing liability on similar facts "regardless of the level of care exercised in carrying out th[e] activity"); but see *Dow Chemical Co. v. Ebling*, 723 N.E.2d 881, 908-909 (Ind. App. 2000), *rev'd on other grounds*, 753 N.E.2d 633 (2001) (rejecting strict liability for pesticide use under Second Restatement test).

A Dull Fthudd

2. a. Judge Fudd may be on the dull side at times, but he has quite properly decided the applicable liability standard as a matter of law. The decision to impose strict liability is a policy decision as to the nature of the duty owed in the conduct of the activity. This is a question of law for the court, just as the existence of a duty of care is an issue of law in a negligence case. If the jury were allowed to decide whether fumigation is a strict liability activity, they would not only be applying the rules of law, but *making* them as well. This is the court's job. Restatement (Third) of Torts: Liability for Physical and Emotional Harm §20 cmt. l.

Of course, the judge's decision whether or not to apply strict liability will require Judge Fudd to take evidence and weigh the facts under the standard for strict liability. Fudd will have to consider how toxic Vikane is, how quickly it spreads, whether it is easily detected, alternative means of fumigation, and other factors. Although facts must be considered (just as they must be, for example, in deciding whether a duty is owed to avoid emotional distress to a bystander in a negligence case), it is the court which must balance the Restatement factors in deciding whether strict liability is appropriate.

b. Franklin, the defendant, will object to the instruction, because it suggests that it is strictly liable for any injury that takes place in the course of fumigation. It makes sense, though, doesn't it, to confine

strict liability to the types of risks that make the activity abnormally dangerous. Although Jackson was injured while Franklin was in the general course of its fumigation activities, he was not injured by the peculiar risk that makes fumigation "abnormally dangerous." His injury arose from related, ordinary activity incident to fumigation. Delivering Vikane by truck is no more likely to cause this kind of accident than delivering topsoil or lumber or collecting garbage by truck. Fumigation is not a strict liability activity because of the risk of truck accidents, but rather due to the risk of Vikane poisoning, which has nothing to do with this case.

The Second Restatement explicitly bars strict liability for such collateral injuries:

> §519(2). This strict liability is limited to the kind of harm, the possibility of which makes the activity abnormally dangerous.

Accord: Restatement (Third) of Torts: Liability for Physical and Emotional Harm §29 cmt. l. This provision would also bar strict liability if a Franklin employee poked a resident in the eye with the chemical applicator, or an employee of a blasting company dropped a box of dynamite caps on the foot of a passerby.

3. The question here is whether an employee who conducts abnormally dangerous activity is strictly liable for resulting injuries, as well as the enterprise for which she works. The Second Restatement is ambiguous on the point: It makes "one who carries on an abnormally dangerous activity" strictly liable. Restatement (Second) of Torts §519. Section 20 of the Third Restatement is similarly unclear.

Certainly, Ciccone participated in the creation of the unusual, nonreciprocal risk that injured Prince. But so did the secretary who made the appointment for the fumigation, the driver who delivered Vikane to the apartment building, and the workers who dug Rylands' reservoir. If individual negligence is not required, it is hard to know which individuals who participated in some manner in creating the risk would be subject to strict liability.

In addition, the rationale for strict liability suggests that it is the *enterprise* undertaking the activity that should be strictly liable, not employees who carry out the operation. The owner or corporation makes

the decision to conduct the abnormally dangerous activity and derives profit from doing so. It is in a position to decide how much fumigation it will undertake, whether alternative safer products should be used, the precautions that will be taken, and how to insure the risk or spread the risk of loss through the price of the service. Strict liability is meant to place the loss on those who make such decisions about the activity. See Restatement (Second) of Torts §519 cmt. d (stating that "the defendant's enterprise" should be required to pay its own way through strict liability). Although there is little authority on the point, it appears that Franklin Company, not Ciccone, should be held strictly liable for Prince's injury; your author has found no case imposing such liability on the employee.

Driving to Endanger

4. a. Petrosur would not be liable under *Rylands*, since the accident did not arise from conduct of an activity on the defendant's property that caused injury on surrounding property. *Rylands* dealt only with dangerous activities on the land of one person, which "escaped" and caused injury on the land of another. Indeed, the later English cases rather rigidly confined *Rylands* to this situation. In *Read v. J. Lyons & Co.*, 1947 A.C. 156 (1947), the court held that *Rylands* did not apply to a case in which a government inspector was injured on the premises of the defendant's munitions plant, since there was no "escape" from the defendant's property!

   b. Although *Rylands* imposed strict liability for land use activities, nothing in the Third Restatement suggests that it is limited to injuries caused by activities on the defendant's land. A number of activities that meet the criteria for abnormally dangerous activities in the Second and Third Restatements will not arise directly from land use by the party conducting the activity or the injured party. The Third Restatement (echoing a similar comment in the Second) rejects any limitation of strict liability to cases involving land use. Restatement (Third) of Torts: Liability for Physical and Emotional Harm §20 cmt. d. Thus, strict liability may apply in Hendrix's case even though the accident did not arise from an abnormally dangerous use of real property.

Note, too, that the damage in this case is personal injury, not property damage as in *Rylands.* Under the Restatement, however, strict liability encompasses personal injury claims as well as property damage claims. See Restatement (Third) of Torts: Liability for Physical and Emotional Harm §20(a) (liability for "physical harm" from abnormally dangerous activities).

c. Most people would say, based on common sense, that hauling gasoline on an interstate highway *is* a matter of common usage. It happens every day, all over the country. It would be hard to take a trip of any length on an interstate without seeing several gasoline trucks along the way.

However, this phrase may refer not to how visible the activity is, but to the number of people who engage in the activity. See, e.g., Restatement (Second) of Torts §520 cmt. i (noting that use of explosives, while frequent, is "carried on by only a comparatively small number of persons . . ."). If this is the test, gasoline hauling looks a lot less "common." It is a highly specialized activity performed by a relatively small number of entities. Similarly, tens of thousands of buildings may be fumigated every year; in this sense fumigation is "common." (A quick look at the Boston Yellow Pages indicated that there are about 150 fumigation companies in the Boston area alone.) But it is still a specialized activity carried on by a small number of experts in the field, rather than an every day activity that ordinary people undertake. In this sense it imposes an unusual, nonreciprocal risk and may be found not a matter of "common usage." *Luthringer v. Moore.*, 190 P.2d 1, 8 (Cal. 1948).

However, the fact that only specialists engage in an activity is not dispositive. The draft Third Restatement suggests that activities such as electric and gas transmission are in "common usage," even though they are conducted by a small number of specialized personnel, in part because the benefits of the activity are widely enjoyed in the community. Restatement (Third) of Torts: Liability for Physical and Emotional Harm §20 cmt. j. Given this nonobvious conception of "common usage," some courts would doubtless conclude that transportation of gasoline is a matter of common usage.

d. Under the Second Restatement, the court would have to balance the

six factors in §520, and different courts might draw the balance differently. Gasoline hauling is likely to satisfy the first three factors. Although it does not usually cause injury, gasoline is highly flammable. If it does explode, resulting injuries are likely to be severe indeed. The argument might focus on whether the risk is one that cannot be adequately controlled by reasonable care. Certainly, accidents can be kept to a minimum by reasonable care, but explosions still happen. So it is a close case on the first three factors.

As the analysis immediately above suggests, however, there is considerable doubt as to whether this would be characterized as a matter of common usage. Perhaps not; the test is not whether it happens daily, or people see it in their travels (they clearly do in this case) but something more elusive, involving an evaluation of how specialized the activity is, when and where it is conducted, and the nonreciprocal risk it imposes on others. Under the Second Restatement, common usage is only one factor to be considered along with others. So Petrosur might be held strictly liable even if the court concludes that gasoline hauling is of common usage. Under the Third Restatement, by contrast, the court will not apply strict liability if it concludes that gasoline hauling is a matter of common usage — that is a requirement, not a factor, to impose strict liability.

The last two factors in §520 of the Second Restatement do not support strict liability. Gasoline hauling is appropriate to an interstate highway, which is probably the safest place to haul it. And, availability of gasoline is obviously of great value to the community.

In *Siegler v. Kuhlman*, 502 P.2d 1181 (Wash. 1972) the court applied strict liability to the transportation of gasoline. While the court adopted the provisions of the Second Restatement, its opinion concentrated almost exclusively on the extreme risk that gasoline hauling poses. This suggests that in some cases, the risk factors are alone sufficient to support strict liability, even if the other factors weigh against it. For example, the *Siegler* court was unimpressed by the argument that major highways are an "appropriate" place for gasoline hauling:

> That gasoline cannot be practicably transported except upon the public highways does not decrease the abnormally high risk arising from its transportation.

502 P.2d at 1187. But see *Biniek v. Exxon Mobil Corp.*, 818 A.2d 330, 338-339, (N.J. Super. 2002). Despite the balancing required under the Second Restatement, *Siegler* and some other courts appear to take the common-sensical position that, if an activity is not just dangerous, but damned dangerous, the enterprise ought to pay regardless of its common use or social value. See also *Koos v. Roth, 652* P.2d 1255, 1261-1262 (Or. 1982) (emphasizing importance of the extraordinary danger of the activity and questioning the relevance of the last three Second Restatement factors).

5. In Example 1, the defendant argued that it should not be held liable, since it conducted the activity with reasonable care. Petrosur's defense here goes a bit further. It argues that, not only was it *not* negligent, but that someone else *was.* The accident was caused by Dean's negligent driving. Since there is a faulty cause of the accident, Petrosur argues, the party at fault should bear the liability.

   This defense is unlikely to prevail. The accident was caused not only by the negligence of Dean, but also by the unusual risk that gasoline hauling imposes on the community. If Dean had hit an ordinary car, he might have caused injury to an occupant of that vehicle, but not an explosion that would injure Hendrix many feet away. The accident results in part from the peculiar risk Petrosur has imposed on the community. It is not unreasonable to apply strict liability even though the accident was *also* caused by a third party's negligence. See Restatement (Second) of Torts §522(a). But see *Seigler* at 1188 (Rosellini, J., concurring) (majority should not be read to apply strict liability where third party's negligence causes accident).

   Looked at another way, one of the risks of hauling gasoline around the countryside is that the hauler may encounter a negligent driver, leading to an accident that triggers a dangerous explosion. *As* long as drivers remain human,[8] that risk is impossible to eliminate. Under strict liability, the actor who chooses to engage in the activity that poses this risk is liable for any resulting injuries.[9]

6. Many courts have held that the plaintiff's contributory negligence is not a defense to a strict liability claim. "The reason is the policy of the law that places the full responsibility for preventing the harm resulting from

abnormally dangerous activities upon the person who has subjected others to the abnormal risk." Restatement (Second) of Torts §524 cmt. a. Other authorities suggest that, since strict liability is not based on negligence, plaintiff's negligence should not be relevant either. Last, it has been questioned how, assuming comparative negligence applies, one is to compare negligent conduct with the defendant's nonnegligent conduct of an abnormally dangerous activity.

None of these explanations seems entirely satisfying. The rule "involves the seemingly illogical position that the fault of the plaintiff will relieve the defendant of liability when he (the defendant) is negligent, but not when he is innocent." Prosser & Keeton at 565. In this case, Hendrix could have avoided injury entirely by use of due care, even though the injury stemmed from a strict liability activity. In terms of accident prevention, it makes sense to give him an incentive to do so. The Third Restatement therefore recognizes a plaintiff's negligence as a damage-reducing factor in strict liability cases. Restatement (Third) of Torts: Liability for Physical and Emotional Harm §25.

Courts have been less sympathetic to the plaintiff who *deliberately* exposes himself to the risk posed by a strict liability activity. (That is probably not the case here, because Hendrix, although he ignored the trooper, did not fully comprehend the danger ahead.) The Second Restatement would bar a plaintiff from recovery in a strict liability case if she "knowingly and unreasonably subject[s] [her]self to the risk of harm from the [abnormally dangerous] activity." Restatement (Second) of Torts §524(2). However, the Third Restatement rejects this approach in favor of treating even a plaintiff's deliberate choice to encounter the danger as a form of comparative negligence, which reduces the plaintiff's recovery rather than fully barring recovery. Restatement (Third) of Torts: Liability for Physical and Emotional Harm §25 cmt. e. This is in accord with current treatment of assumption of risk in both negligence cases (see pp. 550-552) and strict products liability cases (see pp. 379-381).

7. The construction of high rise buildings certainly imposes risks on the community, including the risk of objects falling from high above the street. Although this building may be unusually high for the area, the court will probably not impose strict liability. The risk of falling objects

is a common one, as is construction activity in general. Many engage in it in the community, and many are subject to it. In addition, although such activity may cause serious harm, it does not pose the extreme risk of an explosion or a dam collapse, which may injure many or wipe out an entire community. Last, most of the risks of ordinary construction work can be reduced to a minimum by precautions in the course of the work.

Other arguably dangerous but very common activities have similarly been shielded from strict liability. For example, courts have not generally applied strict liability to distribution of water, electricity, or natural gas. See, e. g., *New Meadows Holding Co. v. Washington Water Power Co.*, 687 P.2d 212, 217 (Wash. 1984) (natural gas transmission).

Crying over Spilled Pseudomonomethane

8. In this case, pseudomonomethane carries the potential for very widespread harm if it gets into the water supply. However, unlike volatile agents like nitroglycerine or gasoline, it has no unusual tendency to cause an accident. The example suggests that the likelihood of an accident taking place from storing pseudomonomethane is no higher than from storing molasses, water, or anything else. This argues against imposing strict liability.

   Nor is there is any indication that the risk of damage from storing pseudomonomethane is irreducible. Careful handling will not *absolutely eliminate* the risk of a spill, but there are few activities from which the risk of harm can be completely eliminated. Presumably, it applies where, despite due care, there remains an unusual risk of an accident that simply cannot be eliminated. This is true of the activities in the earlier examples — fumigation with poisonous gas, transportation of gasoline, storage of explosive chemicals — but it is not true of storing pseudomonomethane, which is not explosive, volatile, or flammable. This chemical is very nasty *if* it escapes, but it is no more likely to escape than many other relatively innocuous substances.

   In *Indiana Harbor Belt R. Co. v. American Cyanamid* Co., 916 F.2d 1174 (7th Cir. 1990), the court, in overruling a district court decision imposing strict liability for a spill of a highly toxic chemical during shipment, relied heavily on factor (c) from §520 of the Second

Restatement. The court (speaking through Judge Posner, a leading advocate of economic analysis of tort doctrine), emphasized that courts make defendants strictly liable to encourage them to relocate activities, to substitute other, less hazardous ways of accomplishing the task, or to reduce the extent of the activity. 916 F.2d at 1177. Where the risk can be substantially controlled by due care, Posner concludes, such extreme measures are not called for, and strict liability should not be imposed. 916 F.2d at 1179.

It seems likely that other courts, however, would impose strict liability even though a toxic chemical is not unusually likely to escape. In *Rylands*, the court spoke of a thing "likely to do mischief if it escapes" without suggesting that the force had to be one that is especially likely to escape. Some courts appear to focus primarily on the extent of the threat *if the chemical does escape.* See, e. g., *State, Department of Envtl. Protection v. Ventron*, 468 A.2d 150, 157 (N.J. 1983); Harper, James & Gray §14.5 at 224; see also Restatement (Second) of Torts §520 cmt. g:

If the potential harm is sufficiently great, however, as in the case of a nuclear explosion, the likelihood that it will take place may be comparatively slight and yet the activity be regarded as abnormally dangerous.

The rationale for strict liability supports placing the pollution loss from an accident like this on the operator, who creates and uses chemicals that pose a risk of widespread injury, is able to take steps to reduce the risk or substitute safer alternatives, and can insure against the risk it imposes on the community. Some legislatures have imposed strict liability for the costs of cleaning up toxic discharges. See, e.g., N.J. Stat. Ann. §58:10-23.11g(c). Such statutes reflect the same policy underlying common law strict liability, that the risks associated with unusually hazardous activities should be borne by the industries that generate them.

Cause for Concern

9. In this case, the plaintiff's injury results from the hazardous activity, but the intervening act that causes the explosion is (at least arguably) unforeseeable. Were this a negligence case, most courts would conclude

that the storage of the chemical was not the proximate cause of the resulting harm. So the example poses the issue of whether proximate cause limitations applicable to negligence cases apply to strict liability claims as well.

The Second Restatement would allow recovery in strict liability cases even if an unexpected act intervened:

> The reason for imposing strict liability upon those who carry on abnormally dangerous activities is that they have for their own purposes created a risk that is not a usual incident of the ordinary life of the community. If the risk ripens into injury, it is immaterial that the harm occurs through the unexpectable action of a human being, an animal or a force of nature.

Restatement (Second) of Torts §522 cmt. a. This reasoning makes sense. In this case, the hospital chose, for its own purposes, to impose the explosion risk on the community. The premise of strict liability is that it is fair to impose the unavoidable losses from such high risk activities on the actor rather than the victim.

However, some cases reject the Restatement view, and deny recovery where the accident results from unforeseeable events, natural disasters or intentional acts of third persons, even though the risk that makes the activity abnormally dangerous causes the injury. See *Smith v. Board of County Commissioners*, 146 N.W.2d 702, 704 (Mich. Ct. App. 1966), *aff'd*, 161 N.W.2d 561 (1968) (excessive rainfall).

Such holdings illustrate the firm grip that the fault concept holds on the judicial mind. Negligence law limits liability to foreseeable accidents because the defendant is not negligent in failing to foresee the unforeseeable. But the basis for strict liability is unusual risk, not fault. The defendant is held liable for introducing a risk into the community that poses extreme danger if it miscarries, regardless of why it miscarries. Since the source of liability is creating the risk itself, imposing foreseeability limitations seems an unwarranted "judicial retreat from the logic of strict liability." J. Fleming, The Law of Torts 319 (7th ed. 1987). See also Harper, James & Gray §14.5 at 225-232 (arguing persuasively against foreseeability limitations on strict liability).

10. Arguably, the defendant's conduct in this case was not the proximate cause of the plaintiff's harm. Blasting would foreseeably cause concussion damages, or hurl rocks on neighboring property, but it seems

well beyond anticipation that it would cause the damages in this case. However, this in itself might not suffice to prevent recovery. *First*, as Example 9 explains, the Second Restatement view is that strict liability should not be limited to foreseeable harm. See Restatement (Second) of Torts §522 (actor liable even if harm is caused by "unexpectable . . . action of an animal . . ."). *Second* (though I didn't say so in the example), in *Foster* the plaintiff had *told* the defendant that his blasting was causing the mink to kill their young, and only sought damages for those killed after giving notice, 268 P.2d at 646-647. Thus, it is hard to argue that the harm was unforeseeable.

The better ground for denying strict liability in this case is that the type of harm caused was not the type that made defendant's conduct abnormally dangerous. Blasting creates a serious, irreducible risk of concussion, throwing of debris, and vibration of structures, not the scaring of mink. Under the Restatement (and the reasoning of *Foster)*, strict liability is limited to the type of harm that makes the conduct abnormally dangerous. See Restatement (Third) of Torts: Liability for Physical and Emotional Harm §29 cmt. l; *Foster*, 268 P.2d at 647. Thus, the court refused to apply a strict liability standard to the case.

Even if the court refused to impose strict liability, wouldn't the defendant be liable on a negligence theory, since it was on notice of the risk? The testimony showed that to suspend blasting operations until the whelping season was over would have cost the defendant a full year of logging and required it to shut down its mill. In light of this, and the unusual sensitivity of the mink, the plaintiff evidently declined to proceed on a negligence theory.

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1. Trespass did not lie, because the injury was not direct, which was required at the time. Neither did nuisance, because the injury resulted from a single incident, rather than a continuing interference with the plaintiff's use and enjoyment of his property. See Prosser & Keeton at 545.

2. Economic analysts may dispute this, on the ground that the rational economic actor takes the same level of precautions under strict liability or negligence: That is, she will take precautions to the point where the expense of the precautions outweighs the projected liability for the activity. See R. Posner, Tort Law: Cases and Economic Analysis at 4-5. My intuition tells me, however, that if *I* kept a tiger, and knew I had to pay for any resulting injuries, I would keep it *very* carefully indeed, regardless of what the economic literature says about the efficient level of precautions.

3. Restatement (Third) of Torts: Liability for Physical and Emotional Harm §20 cmt. k.

4. See Prosser & Keeton at 555.

5. Arguably, all human economic activity is "non-natural." Most courts have read the phrase to refer to an unusual or inappropriate use. Prosser & Keeton at 545-546. Lord Cairns, however, may have meant

only that the defendant had introduced a force onto his property (there, an accumulation of water) which did not occur there by operation of nature. See F. H. Newark, Non-Natural User and *Rylands v. Fletcher*, 24 Modern L. Rev. 557 (1961).

6. *Sinclair Prairie Oil Co. v. Stell*, 124 P.2d 255 (Okla. 1942).

7. *Green v. General Petroleum Corp.*, 270 P. 952 (Cal. 1928).

8. I rather hope that they will continue to be, Google notwithstanding. Count me a Luddite.

9. Of course, Dean will be liable as well. The fact that Petrosur is strictly liable does not affect Hendrix's right to sue Dean for negligence.

CHAPTER 16

Strict Products Liability: Basic Theories of Recovery

INTRODUCTION

The term *products liability* refers to claims for injuries caused by commercial products. Examples of such cases abound: A plaintiff is injured by a snowblower that lacks an adequate blade guard; a user of a prescription medication suffers an adverse side effect; a passenger in a car is injured when the brakes unaccountably fail; a child is caught under an electric garage door. This chapter addresses the basic theories of recovery available to such plaintiffs, with an emphasis on the cause of action for "strict products liability."

BACKGROUND: PRODUCTS LIABILITY THEORIES OTHER THAN STRICT LIABILITY

The recognition of "strict liability" for injuries due to defective products was one of the most dramatic developments of twentieth-century tort law. But why did it happen? Why weren't negligence law and other traditional

remedies deemed adequate to remedy this class of tort claims?

A. Negligence Claims

Plaintiffs have long pleaded negligence claims in actions for injuries caused by products, and still do. But there are some significant hurdles to negligence recovery in products liability cases. For many years, the concept of "privity" barred many negligence claims against manufacturers. The privity requirement, relied on in the oft-cited case of *Winterbottom v. Wright,* 152 Eng. Rep. 402 (Ex. 1852), held that a seller of goods only owed a duty of care to the purchaser of the product. Under *Winterbottom,* if a manufacturer sold a defective stagecoach to a transit company, and a passenger was injured due to a defect in the coach, the manufacturer was not liable. The manufacturer was only "in privity" with its direct buyer, the transit company, and therefore only owed a duty of care to the transit company. The same principle applied if the defect caused the coach to veer off the road into a pedestrian: The lack of privity between the pedestrian and the manufacturer precluded recovery.

However, the privity requirement was rejected in *MacPherson v. Buick Motor* Co., 217 N.Y. 382 (N.Y. 1916), and virtually all courts today would follow *MacPherson.* See Restatement (Third) of Torts: Products Liability §1 cmt. a. Courts now hold that a manufacturer owes a duty of care to all those who may foreseeably be injured by its products. Restatement (Second) of Torts §395 cmt. h, i. So, if that were the only problem with the negligence remedy, courts might not have felt the need to deploy other remedies to deal with product injuries.

But there are other problems with negligence claims for product injuries. It is often difficult to prove that a manufacturer's negligence led to the defect that injured the plaintiff. Even with good quality control, a small number of units of a product may come off the assembly line with defects. Although a plaintiff can invoke res ipsa loquitur in such cases, the jury may deny negligence recovery, accepting the defendant's argument that although it used due care such defects may still occur.

Another problem with negligence liability is that it will frequently provide no remedy against the available defendant. Suppose that a Colorado manufacturer's table saw is marketed through a chain of wholesalers, and ultimately sold to the plaintiff by a hardware store in Indiana. If the plaintiff

is injured using the saw in Indiana, the manufacturer might not be subject to personal jurisdiction there. See *Asahi v. Superior Court,* 480 U.S. 102 (1987). The hardware store, which clearly would be subject to jurisdiction in Indiana, would very likely not be liable in a negligence action. It simply sold a product it bought from a wholesaler, probably without ever taking the saw out of its box or doing anything to prepare it for use. It is hard to see in such a case what act of the retailer falls below the standard of due care.

B. Breach of Express Warranty

Plaintiffs have also invoked several contractual theories of recovery for injuries due to product defects. One such theory is breach of express warranty under Article 2 of the Uniform Commercial Code. Section 2-313 of the Code allows recovery if a seller makes specific representations about the qualities of a product, and the buyer is injured due to the failure of the goods to fulfill those representations. This sounds pretty good, but is frequently a limited remedy. First, it only applies when specific representations were made to the buyer about the product feature that caused the injury. Statutory notice provisions, which require the buyer to notify the seller of the breach within a short time or be barred from recovering on the warranty, may also limit the remedy. See, e.g., *Greenman v. Yuba-Power Products, Inc.*, 377 P.2d 897, 900 (Cal. 1963) (noting notice requirement under California statute). Traditionally, the buyer also had to prove that she had relied on the warranty. Under the Uniform Commercial Code reliance is not required, but a good many courts require that the express warranty form part of "the basic of the bargain." See §2-313 cmt. 3. And, of course, the claim only arises if the feature that was the subject of the warranty causes the injury. If the seller warrants that a vehicle "has excellent brakes," and it doesn't, a plaintiff could sue for breach of the warranty if the brakes fail, but not if some other defect in the product causes her injury.

C. Breach of Implied Warranty of Merchantability

Another, somewhat broader contractual theory supporting recovery for injuries from product defects is breach of the "implied warranty of merchantability." In most states today this remedy is governed by the

Uniform Commercial Code, which provides that a seller warrants (among other warranties) that its goods are "fit for the ordinary purposes for which goods of that description are used." U.C.C. §2-314(2)(c). This warranty arises by operation of law; it is not based on any representations of the seller. Thus, a plaintiff may recover by showing that the defendant was a dealer in goods of that kind, sold the goods, that they were not fit for the ordinary purposes for which they were sold, and that she suffered personal injury as a result of their unfitness for that purpose.

The implied warranty remedy approaches a strict liability cause of action, since the warranty arise automatically and allows recovery without any showing of negligence or misrepresentation by the seller. However, it also has limitations. First, in some states implied warranties may be disclaimed, if it is done clearly. U.C.C. §2-316. Second, the Code contains alternative provisions that states may adopt concerning who may recover for breach of the implied warranty. One alternative limits recovery to "any individual who is in the family or household of the immediate buyer or the remote purchaser or who is a guest in the home of either . . ." U.C.C. §318 (alternative A). In a state that adopts this version of the section, the class of potential plaintiffs is quite limited. Injured employees, bystanders, or passengers in the buyer's car, for example, would not be within the scope of this warranty. (Other states, however, have adopted broader versions of §318, which effectively allow any reasonably foreseeable plaintiff to recover.) Third, in some states the warranty claim requires timely notice of the breach to the seller.

D. Misrepresentation

Another potential source of recovery for persons injured by products is the tort of misrepresentation. The plaintiff establishes a misrepresentation claim by showing that the defendant made a misrepresentation (either intentionally, recklessly, negligently, or innocently) about a fact material to the transaction, that the plaintiff acted in reliance on that misrepresentation, and that she suffered injury because the product was not as represented by the seller. Restatement (Second) of Torts §402B; Restatement (Third) of Torts: Products Liability §9.

One advantage of the misrepresentation claim is that the plaintiff may recover even if the product is not defective, as long as failure to live up to the representations led to the plaintiff's injury. If an all-terrain vehicle, for

example, has a tendency to tip in certain situations, but the seller represented that it would not, the buyer could sue for misrepresentation, even if there was no defect in the vehicle. But the plaintiff must establish that she was actually aware of the seller's representation, and relied upon it in deciding to make the purchase or in using the vehicle.

Like the other remedies described, misrepresentation is a limited remedy. The most obvious limit is that there must have been an inaccurate representation by the seller about the particular characteristic of the product that led to the plaintiff's injury. If no relevant representation was made, the plaintiff has no claim. Another problem with the misrepresentation remedy is that it may not support recovery by third parties such as bystanders.

THE DEVELOPMENT OF STRICT LIABILITY FOR DEFECTIVE PRODUCTS

In the mid-1960s, courts began to recognize a broader approach to products liability — strict liability for product defects. The seminal case was *Greenman v. Yuba Products, Inc.*, 377 P.2d 897 (Cal. 1963), in which Justice Traynor held a manufacturer strictly liable for an injury caused by a defective power tool. *Greenman* held that strict liability was appropriate in order "to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves." Id. at 901.

Since *Greenman*, courts have articulated several policy reasons for imposing strict liability on manufacturers for injuries caused by their products. The increasing sophistication of products makes it difficult for consumers to assess their risks, emphasizing the need for manufacturers to do so. The lack of any personal relationship between manufacturers and consumers means that buyers cannot rely on such relationships to assure quality. Instead, they must rely on information provided by the distant manufacturer. In addition, manufacturers encourage purchase of their products by extensive advertising. Courts have viewed such aggressive efforts to stimulate sales as fairly involving a quid pro quo: that manufacturers stand behind their products when they cause injuries. Other

courts have argued that manufacturers should be held liable for injuries from defective products because they can redistribute that liability, through insurance, to all users of the product. Thus, the price of the product will reflect its true cost, rather than "externalizing" accident costs to innocent victims. In addition, the risk of liability will encourage manufacturers to make their products safer and to discover and disclose product risks that the consumer might not recognize. See generally, *Dobbs' Law of Torts* §450.

Shortly after *Greenman,* strict products liability gained momentum when the American Law Institute added §402A to the Second Restatement of Torts. The Restatements of the Law are drafted by the American Law Institute (ALI), an organization of eminent lawyers, scholars, and judges. The goal of the Restatements is to restate and clarify areas of the common law. The ALI, of course, has no authority to pass statutes or decide cases; thus, the adoption of §402A, endorsing strict liability for defective products, did not "create a cause of action" for strict liability. However, the Restatements are frequently influential, and it is doubtful that any provision in a Restatement has had more impact on courts than §402A. The Reporter for the Second Restatement was Dean William Prosser, the dean of torts scholars of his day. His "restatement" of strict products liability in §402A, along with the *Greenman* case, virtually created the tort of strict products liability.

Restatement (Second) of Torts, section 402A.

Special Liability of Seller of Product for Physical Harm to User or Consumer

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

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

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

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

Let's tease out the elements of the claim created by §402A. It authorizes recovery

1. by a *user or consumer*
2. from *a seller,*
3. who is *engaged, in the business of selling the product*
4. for *physical harm*
5. caused by a *defective product*

6. that is *unreasonably dangerous.*

Note that §402A says nothing about how the product came to be defective and dangerous. Fault is not — on the face of §402A, anyway — an element of the claim, which is why the commentary to §402A declares that it creates "strict liability, making the seller subject to liability to the user or consumer even though he has exercised all possible care in the preparation and sale of the product." Section 402A cmt. a. However, in practice, courts have construed §402A to require proof of fault in many products liability cases, making many such claims almost indistinguishable from a negligence claim. (More to come on this below.)

The claim for strict products liability defined in §402A was quickly adopted in many states. Some courts simply adopted §402A verbatim as their law of strict products liability. "If ever a Restatement reformulation of the law were accepted uncritically as divine, surely it is section 402A of the Second Restatement of Torts."[1]

TYPES OF PRODUCT DEFECTS

Under §402A, a manufacturer is liable for injuries resulting from the "defective condition" of its products. Such product defects usually fall into one of three categories: manufacturing defects, design defects, and warning defects.

A. Manufacturing Defects

Cases based on manufacturing defects present the most straightforward type of products liability claims. In these cases, the plaintiff alleges that the product was defective because it did not meet the manufacturer's own specifications for the product. Suppose, for example, that a medical instrument has a structural defect due to contamination in the steel, and breaks while in use during an operation, injuring the patient. The gravamen of the plaintiff's claim is that the instrument was defectively manufactured — it did not come off the assembly line as the manufacturer intended. Or, a

computer hard drive is somehow miswired, so that it catches fire when turned on. Again, the problem alleged is that the computer failed to meet the manufacturer's own design, and was consequently defective and dangerous.

Today, manufacturing defect claims are the only true "strict" products liability claims recognized in most states. The plaintiff recovers by showing that the product does not meet the manufacturer's own specifications for the product, and as a result the product was dangerously defective. If the product does not match the product specifications, it does not matter how the defect occurred. The plaintiff need not show that negligence led to the defect, or that the manufacturer should have discovered the defect. She need only establish that the defect existed, made the product unreasonably dangerous, and caused her injury. For example, if it turns out that the steel used in the medical instrument had an undetectable flaw when it was purchased by the manufacturer, the manufacturer would still be liable. The basis of the liability is selling the defective product, not faulty conduct that leads to the defect. It is commonly said that the gravamen of the claim is "the condition of the product, not the conduct of the defendant." See, e.g., *Olson v. A.W. Chesterton Co.*, 256 N.W. 2d 530, 540 (N.D. 1977).

B. Design Defects

A product can also be defective if its design makes it unnecessarily dangerous to the user. A power saw, for example, may be quite safe with a blade guard, but pose a risk of serious injury without one. A punch press with an exposed switch may lead to accidents when it is started inadvertently, while a recessed switch would eliminate the risk. Probably the lion's share of products liability claims are based on the theory that the product was defectively designed because it failed to eliminate the risk of injuries from its use. Frumer & Friedman, Products Liability §11.03[l][c].

Surely, however, a manufacturer should not be liable simply because its product involved *some* risk of injury. If so, auto makers would be liable for all motor vehicle injuries, knife manufacturers would pay for all cut fingers, and drug sellers would pay for even the most unexpected and unavoidable side effects of their medications. These products involve some risk of injury, but are often not *unreasonably* dangerous. Since many products cannot be functional without imposing some level of risk, products liability law needs some standard for distinguishing acceptable designs from those that pose

unacceptable risks. “The goal of both design engineers and the law should be to promote in products an ideal *balance* of product usefulness, cost and safety.” D. Owen, Defectiveness Restated: Exploding the “Strict” Products Liability Myth, 1996 U. Ill. L. Rev. 743, 754 (footnote omitted).

Section 402A provides that a product is “unreasonably dangerous” if it is “dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics.” Restatement (Second) of Torts §402A cmt. i. A good many courts have applied this test, which focuses on the consumer’s expectations about the product. Others, however, have used a risk/ utility balancing approach to design defect cases. Under this approach, the factfinder decides, applying a number of factors, whether the product’s design represents a fair balance between the cost of designing the product to prevent the risk of injury, the effect the redesign would have on the utility of the product, and the extent of the risk that the product poses.

> [I]n evaluating the adequacy of a product’s design pursuant to this latter standard, a jury may consider, among other relevant factors, the gravity of the danger posed by the challenged design, the likelihood that such danger would occur, the mechanical feasibility of a safer alternative design, the financial cost of an improved design, and the adverse consequences to the product and to the consumer that would result from an alternative design.

Barker v. Lull Engineering, 573 P.2d 443, 455 (Cal. 1978).

The choice between the consumer expectations test and the risk/ utility test has been a hotly disputed one. While many courts have applied §402A’s consumer expectations test, the drafters of the ALI’s Third Restatement of Torts: Products Liability, adopted in 1997, chose to endorse the risk/ utility test. Restatement (Third) of Torts: Products Liability §2(b) and cmt. d.

Ironically, while plaintiffs’ advocates tend to favor the consumer expectations approach, that test does not always support broader liability than the risk/ utility approach. Some products might meet consumer expectations but not satisfy the risk/ utility test. A consumer might, for example, think a machine with an exposed switch was a reasonable design, or not have thought anything about it one way or the other. However, if the switch could easily be relocated to avoid inadvertent start-ups, the design might fail the risk/utility test. In *Halliday v. Sturm, Ruger & Co.*, 792 A.2d 1145 (Md. 2002), the plaintiff argued that simple design changes in a hand gun would have prevented the death of a three-year-old child, who was killed playing with the gun. But the court, applying the consumer expectations test, held that the

product had functioned exactly as expected, and was not defective, even if a simple redesign would have prevented the accident. The *Halliday* court's choice to invoke the consumer expectations test doomed the plaintiff's case, while a risk/ utility test might have gotten the case to a jury.

Yet the consumer expectations test has several advantages plaintiffs embrace. It is more intuitive, leaving more leeway to the jury to make a common sense evaluation of the product. And, proving a design defect under this approach does not require the plaintiff to demonstrate a safer way to design the product. She need only show that the product was less safe than a reasonable consumer would expect. This may allow the plaintiff to establish her claim without hiring an expensive expert witness to testify about alternative designs that would have eliminated the danger that injured the plaintiff. In some cases, a product may not live up to consumer expectations, even though it cannot be redesigned to be safer. Consumers may reasonably anticipate that a product will function safely (and the manufacturer's advertising may create such expectations), although it in fact poses serious risks that the consumer would not anticipate. An interesting article on the controversy between the tests (H. Bowbeer, T. Cavanaugh & L. Stewart, *Timmy Tumble v. Cascade Bicycle Co.:* A Hypothetical Case Under the *Restatement (Third)* Standard for Design Defect, 30 U. Mich. J.L. Ref. 511 (1997)) offers the example of a dirt bike with a shock absorber that fails in certain circumstances. A consumer might well expect the bike to function more safely than it does, yet be unable to suggest a redesign that would eliminate the risk. If so, it might be defective under the consumer expectations test, even if there is no feasible safer alternative design.

The Third Restatement endorses the risk/ utility approach to design defects, but also requires the plaintiff to establish that "a reasonable alternative design" would have eliminated the risk that injured the plaintiff. Restatement (Third) of Torts: Products Liability §2(b). This can be an imposing evidentiary problem, involving evidence of costs of materials, production techniques in a specialized industry, complex price calculations, and analysis of the collateral effects of the hypothetical alternative design on function and marketability of the product.[2] The evidence must show that "the suggested alternatives are not only technically feasible but also practicable in terms of cost and the over-all design and operation of the product." *Wilson v. Piper Aircraft Corp.*, 577 P.2d 1322, 1327 (Or. 1977).

If the plaintiff cannot demonstrate a reasonable alternative design that

would eliminate a product risk, then the product is presumably not defective under the Third Restatement approach. Yet it may still pose more danger than consumers would expect. In such cases the design would be defective under the consumer expectations test, but not under the Third Restatement. Some detractors of the Third Restatement argue that the consumer expectations approach is preferable because some products — such as cigarettes and asbestos — may be unreasonably dangerous even if they cannot be designed to be safer. Others endorse the risk/ utility test in general, but argue that the plaintiff should be able to prove that a design is defective, because it poses excessive risk, even if she cannot demonstrate a feasible alternative design that would eliminate the danger.

Some courts have held that a product is defective if it fails *either* the consumer expectations test or the risk/ utility test. See, e.g., *Barker v. Lull Engineering* Co., 573 P.2d 443 (Cal. 1978). If Maryland accepted that position, the *Halliday* plaintiff could have argued that even if the gun was as safe as a consumer would expect it to be, it was defective, because it could have been made safer without impairing its function.

Cases since the adoption of the Third Restatement (in 1997), with its strict risk/ utility approach to design defect claims, including the reasonable-alternative-design requirement, have been mixed. Some courts have continued to apply the consumer expectations test, rejecting the risk/ utility test entirely. See, e.g., *Ford Motor Co. v. Treio*, P.3d 649, 656-657 (Nev. 2017); *Green v. Smith & Nephew AHP, Inc.*, 629 N.W.2d 727, 741-742 (Wis. 2001). A good many others have accepted the Third Restatement standard but also continued to endorse the consumer expectations test as an alternative way of showing design defect. See, e.g., *Izzarelli v. R.J. Reynolds Tobacco Co.*, 136 A.3d 1232, 1244 (Conn. 2016); *Aubin v. Union Carbide Corp.*, 177 So. 3d 489, 510-512 (Fla. 2016). However, it appears that the majority of states now apply the Third Restatement approach.

Regardless of which test a state adopts, design defect claims will generate a vigorous defense from manufacturers. A manufacturing defect claim alleges that a single unit of a product was defective, because something went awry in the manufacturing process. When the plaintiff claims that the product design is defective, a lot more is at stake, since a design defect claim asserts that all units of the product are defective. A finding that the product's design is unreasonably dangerous suggests that the product should not be marketed at all, unless it is redesigned to reduce the risk of injury. In addition, such a

finding may lead other users injured by the same product to sue for their injuries, and to assert that the manufacturer is estopped from denying that the product was defective.

C. Defects Due to Failure to Warn

The third common type of strict products liability claim involves failure to warn the user of dangers associated with a product's use. Many products are safe if used as intended, but pose risks of injury if not properly used. A hay baler may pose a risk of entangling the user if the gears are not disengaged before clearing obstructions. A drug may pose a risk of adverse reactions if taken with alcohol. A solvent may prove useful and safe, if the user wears gloves while applying it, but cause serious allergic reactions to exposed skin.

In such cases, the user is often the "cheapest cost avoider": She can avoid the risk posed by the product at a low cost, by taking precautions in using it, while redesigning the product to eliminate the risk would be considerably more costly — or impossible. However, if the user is to avoid the risk, she must have clear directions and warnings to allow her to do so. Thus, a product may be safe enough with the appropriate warnings and directions, but unreasonably dangerous without them. Plaintiffs frequently allege that a product, though reasonably designed, was defective for failure to provide such warnings of the dangers posed by its use.

What dangers does a manufacturer have the duty to warn users about? Because each case turns on its facts, it is hard to articulate a standard other than that of reasonable care. The manufacturer should consider the extent of the risk, the likelihood that it will arise, the user's likely understanding about the danger, the means available to convey a warning, the likelihood that too many warnings will decrease the effectiveness of each, and other factors in deciding which warnings to give. The Second Restatement suggests that a consumer should be warned if a danger is "not generally known, or if known is one which the consumer would reasonably not expect to find in the product." Restatement (Second) of Torts §402A cmt. j. The Restatement (Third) of Torts: Products Liability throws similar language at the problem: "[W]arnings must be provided for inherent risks that reasonably foreseeable product users and consumers would reasonably deem material or significant in deciding whether to use or consume the product." Section 2 cmt. i; see also id., first paragraph (detailing factors the court should consider in assessing

the adequacy of a warning). This language, studded with references to reasonable conduct, suggests that "strict" liability for failure to warn turns basically on a reasonableness standard. "In effect, warning claims are negligence claims, as a number of courts recognize." Dobbs, Hayden & Bublick, Dobbs' Law of Torts §464 (footnote omitted).

If a warning is required, it must be an *adequate* warning, that is, one calculated to clearly alert the user to the danger and how to avoid it.

> [T]he warning must plainly describe the *Nature* of the risk; its *Severity;* its *Scope;* and the means *of Avoidance.* . . . To illustrate, the Nature of the risk might be conveyed by language like, "Radioactive," "Live Electricity," "Poisonous." Severity could be described by language such as "2000 Volts," "Severe Burns if Used Without Protective Clothes," "No Antidote." Scope might be stated by, for example, "Unprotected Exposure Causes Chronic Respiratory Illness." Means of Avoidance could be explained by language like "A Facemask Must be Worn," or "If Contact With Skin Or Eyes, Irrigate with Water For 20 Minutes and Seek Medical Attention Immediately."

J. Diamond, L. Levine & M. Madden, Understanding Torts 299-300 (1996). Here again, the jury will likely be instructed to assess the adequacy of the warning under a general reasonableness analysis.

A product may also be defective because it provides inadequate directions for use or assembly. Directions are different from warnings, and both may be required. In *Midgley v. S.S. Kresge Co.*, 127 Cal. Rptr. 217 (1976), for example, a telescope, which was safe if properly assembled, caused injury to the plaintiff's eye, because the sun filter was not properly installed. The court held the telescope was defective without proper instructions for installing the sun filter.

THE SECOND AND THIRD RESTATEMENT APPROACHES COMPARED

The Third Restatement of Torts: Products Liability "restates" strict products liability law in somewhat different terms than §402A. First, it explicitly categorizes products liability claims as manufacturing defect claims, design defect claims, or failure to warn claims. Section 2(b). It also adopts the risk/ utility test for design defect claims, rather than §402A's consumer expectations test. Id. In addition, it requires the design defect plaintiff to establish that a reasonable alternative design was available. Id.

The Third Restatement also takes the position that there should be one unified claim for injury due to product defect, replacing the melange of claims that courts have recognized based on negligence, warranty, and strict liability. Thus, liability under the Restatement would exist, no matter what theory the plaintiff asserted in her complaint, only if the liability standard of Restatement (Third) §2 was met. See §2 cmt. n. This too does not reflect settled law. In many states, a claim for strict products liability, whether based on case law or a state products liability statute, may be asserted along with other claims based on negligence or breach of warranty. See, e.g., *Singer v. Federated Dept. Stores, Inc.*, 447 N.Y.S.2d 582 (N.Y. Sup. 1981); *Nicolodi v. Harley-Davidson Motor Co., Inc.*, 370 So. 2d 68 (Fla. App. 1979) (discussing products liability cases brought on multiple theories).

Not all changes in the Third Restatement will be widely accepted. Its standard for design defects, in particular, has met fierce opposition from plaintiff advocates. A good many courts continue to endorse the consumer expectations test, either instead of or as an alternative to the risk/ utility test. It is also likely that many courts will also continue to allow plaintiffs to try their cases on negligence, warranty, and strict liability theories simultaneously. Indeed, §402A remains the law in a fair number of states today, though frequently embellished with local quirks and quiddities.

The Third Restatement has been criticized for attempting to establish a new products liability regime, rather than "restating" current doctrine. This criticism may be accurate, but it is also ironic: When Dean Prosser drafted §402A of the *Second* Restatement, it was directly supported by only one case! While Restatements are generally meant to clarify and organize accepted doctrine, they have on occasion pushed the law into dramatically new channels. Section 402A is probably the most striking example of a Restatement taking the law in a new direction rather than summarizing accepted principles.

STATUTORY CHANGES TO PRODUCTS LIABILITY LAW

For the most part, strict products liability law, like most tort law, is *state*

law.[3] The principles of strict products liability developed through the common law process, that is, by decisions in individual cases. The right to recover on a strict products liability claim, the types of defects that would support recovery, and the applicable defenses were established through judicial opinions. Statutes in the strict products liability area were rare.

Recently, however, several states have supplemented or displaced their common law principles of products liability by enacting statutes that define and limit products liability claims. These statutes may address myriad issues, including limitations periods in products liability cases; definitions of product defect; the relation of product liability claims to other available theories; the effect of plaintiff's fault, misuse, or assumption of the risk; the state-of-the-art defense; privity requirements (or the lack thereof); limitations on the liability of sellers; the nature of the warnings required; limits on particular claims (such as tobacco or firearms cases); punitive damages; the effect of compliance with safety statutes; and many other issues. Some states have attempted to simplify products liability litigation by creating an *exclusive statutory tort remedy* for injury from defective products. See, e.g., Conn. Gen. Stat. §52-572n(a); Kan. Civ. Prac. Code Ann. §60-3302(c). In those states, a plaintiff sues under the statute, and cannot assert common law claims asserting negligence, breach of implied warranty or other product liability theories.[4] This chapter reviews general principles of products liability doctrine, but remember that the devil is in the details, and the product liability details may very well be covered by statute in your state.

HOW STRICT IS "STRICT PRODUCTS LIABILITY"?

If strict liability means that the defendant is liable for causing an injury without fault, only manufacturing defect cases satisfy that definition in most states today. In manufacturing defect cases (almost certainly the least common of the three categories),[5] the manufacturer is liable simply for selling a product that turns out to be defective, without proof of any fault.

In design defect cases, however, the plaintiff must establish that the product design was inadequate, under a standard that looks much like a

negligence test. Under a risk/utility standard, the jury must decide whether the manufacturer made a reasonable trade-off, in designing its product, between risk and the expense of preventing that risk. This "Hand formula" type assessment of the design decision is very close to the reasonable person standard of negligence law. Arguably, design defect liability is "strict" if a court uses the consumer contemplation test, which theoretically only considers the nature of the product sold, rather than the defendant's conduct in designing it. But this too can be conceptualized as negligence, the unreasonable choice to market a product that does not satisfy consumer expectations for safety.

Similarly, in warning cases, the question basically comes down to whether the manufacturer made a reasonable choice in deciding not to warn, or in the nature of the warnings it provided. Thus, while courts frequently refer to "strict products liability," a strong case can be made that, in all but manufacturing defect cases, Dean Prosser's dramatic §402A remedy has become a negligence claim with a good many specialized rules, but a negligence claim nonetheless.

In working through the examples below, assume that §402A of the Second Restatement applies, unless otherwise indicated.

Examples

Parameters of Strict Products Liability

1. In each of the following cases, there is an issue as to whether strict liability under Restatement (Second) §402A would apply. Can you spot the problem in each?
   a. Menendez buys an Acme framing machine for use in his picture framing business. For some reason, the machine repeatedly breaks down, leading Menendez to suffer delays and lose business.
   b. Fun & Fitness Gyms provides exercise facilities for busy professionals with fancy jobs. It buys an exercise machine from Ace Equipment Company, but decides it is too small for its purposes and buys a bigger model. It sells the smaller machine to Florio, a

customer. Florio is injured when the machine tips over while he is using it in his basement. He sues Fun & Fitness under §402A.

c. Paramount Construction Company buys a concrete mixing truck directly from Constantine Truck Bodies, a manufacturer of trucks. Due to a design defect, sand added to the mix escapes into the gears that turn the mixer, destroying the mixer. Paramount brings suit against Constantine under §402A.

d. Merriman goes to Scott Motors, the local Ford dealership, to test drive a new Ford. She takes it for a spin, but when a car stops short in front of her and she hits the brakes, they fail. She is injured, and sues Scott Motors, claiming a design defect in the brakes under §402A.

e. Argento Electric installs wiring in Porazzo's house. One of Argento's electricians strips the insulation too far back off a wire, causing a fire that extensively damages the house. Porazzo sues Argento Electric under §402A.

Responsibility Without the Blame

2. Computex Corporation manufactures computers. It sells a computer to Tech Store, a computer products store, which resells it to Gutierriez. She takes it home and plugs it in. It catches fire, and the fire damages her home.

   Investigation reveals tiny teeth marks on the wires inside the computer — mice had evidently gotten in at some point during the manufacturing process and chewed off some insulation, allowing a short circuit that started the fire. Gutierriez sues Tech Store and Computex on a strict products liability theory. Will either defendant be liable to her?

3. Gutierriez brings a strict liability claim against Computex, on a manufacturing defect theory. In a second count in her complaint, she seeks recovery on a negligence theory. Is this proper?

4. Assume that investigation reveals that the offending mouse must have gotten in at Tech Store's retail store, rather than during the manufacturing process. Which defendant, if either, would be liable to Gutierriez under §402A?

5. Assume instead that the fire resulted from a printed circuit board inside the computer. Computex had bought the circuit board from Allied Wiring Corporation and installed it, without alteration, in the computer. Somehow, the circuit board had been misprinted, leading to the fire. Who would be liable to Gutierriez under §402A?

Designs and Defects

6. In *Pouncey v. Ford Motor Co.*, 464 F.2d 957 (5th Cir. 1972), the blade of a radiator fan broke off, striking Pouncey in the face. Examination revealed (according to the plaintiff's expert, anyway) a high level of impurities in the steel in the blade, which would tend to make it more prone to breakage. Is this a manufacturing defect case or a design defect case? Why do we care?

7. Algren develops a taste for Smirnoff Vodka in college. She becomes an alcoholic, her husband leaves her, and she loses her job. She sues Smirnoff's, alleging that its vodka is defective and unreasonably dangerous because it can lead to alcoholism.
   a. Under §402A, how do you think the court would go about rejecting Algren's claim that vodka is defective and unreasonably dangerous?
   b. Algren sues instead for failure to warn that consumption of vodka may lead to addiction. What result?

8. Perini purchased a Honda motorcycle, and was injured in a collision with a car. When he was hit, the motorcycle fell over, and his right leg, under the cycle, was crushed. He sues, claiming that the cycle should have had crash bars that would have protected his legs in a crash of this type.

   If you represented Perini, and had the choice to sue in a jurisdiction that would apply the consumer expectation test to this design defect case, or alternatively, one that would apply the risk/ utility test, which would you think preferable for your client's case?

Liability for Failure to Warn

9. Durabrand Power Tools makes a stamping machine for metal

fabricators. The machine has an on/off switch away from the stamping area, but no guard to protect the operator's hands from entering that area. Such a guard could be included, but it would reduce the speed of production somewhat. On the bed of the machine, directly in front of the operator, is a warning label, in large red letters: WARNING: KEEP HANDS FROM STAMPING AREA TO AVOID SERIOUS INJURY OR AMPUTATION! Gainor, using the machine, is distracted by a coworker. She turns, and her hand drifts into the stamping area and is seriously injured. What is the best argument that Durabrand should be liable under principles of strict products liability?

10. Parker purchases an electric hedgeclipper from his local hardware store, Acme Hardware Company. The clipper was purchased fully packaged from Garden Products, Inc., the manufacturer, with directions inside and various warnings on the clipper itself as well as in the directions. Acme never opens the box, but sells the clipper to Parker still in the package. Parker is injured using the clipper when the clipper dips into a puddle and Parker receives a shock. Neither the directions nor the clipper provided any warning about the danger of shock through this type of occurrence.

    Parker sues Acme Hardware, alleging strict liability for failure to warn. Assuming that there should have been a warning about this risk, will Acme Hardware be liable to Parker?

Limits of the Duty to Warn

11. Lawrence Ladder Company makes stepladders. Paoli buys a Lawrence step ladder for use in painting his house. As he is trying to reach a high point on the side of the house, he puts one foot on the next-to-the-top step of the ladder, and the other on the little paint shelf opposite to it. The paint shelf collapses, and Paoli falls. He sues Lawrence, alleging that it failed to warn him of the danger of climbing on the paint shelf. Lawrence argues that it owes no duty to warn consumers of dangers from the *misuse* of its products. Will its argument prevail here?

12. Juarez buys a set of oversized wheels for her pickup truck. The tires bear a label stating that they should not be installed on a truck larger than a

certain size. Plaintiff installs the tires on hers, even though it is larger than the specified size. She is injured when the truck rolls over in an emergency stop. Juarez brings a products liability claim, arguing that the warning on the tires was inadequate. Is it?

Material Risks

13. Leahy Pharmaceuticals develops a new drug for depression, called Perzac. Leahy tests the drug thoroughly for three years before placing it on the market, and discovers several side effects, including a 3 percent risk of a psychotic reaction. It markets Perzac, warning of several side effects but not of the risk that the drug may cause a psychotic reaction. Collier takes Perzac, has a psychotic reaction, and brings suit against Leahy, alleging it is liable for selling Perzac without a warning of the danger of psychotic reactions.[6]
    a. Leahy argues that it is not liable, because the benefits of the drug justify marketing it, even if it does cause an adverse reaction in some patients. What would Collier argue to counter this argument?
    b. Leahy argues that it is not liable, because only 3 percent of patients experience the adverse reaction, too small a percentage to merit a warning. How do you think the court would rule on this argument?

Elements, Elements

14. Daniel suffered respiratory injuries when Shroeder, a coworker in a restaurant, poured chlorine bleach instead of cleaning fluid into a deep fat fryer. Shroeder testified that he was in a hurry, grabbed the bottle by mistake, and poured it into the fryer. The chlorine vaporized, injuring Daniel's lungs. She sued the manufacturer of the bleach, alleging that the label on the bleach bottle should have contained a warning against exposing it to heat. What problems do you anticipate Daniel will have in proving her failure-to-warn claim?

Explanations

Parameters of Strict Products Liability

1. a. Section 402A allows recovery for "physical harm" caused by defective products that are unreasonably dangerous. Here, Menendez has not suffered physical harm — meaning, generally, personal injury or damage to property. He has suffered loss of business due to the failure of the machine to perform as expected. Section 402A was not intended to cover this type of claim. Fundamentally, this loss is a commercial loss due to the failure of the goods to live up to contractual expectations. Courts have generally held that the buyer should be left to contractual remedies for the failure of the product to meet contractual requirements. See Frumer & Friedman, Products Liability §13.07[1][a].

   b. The problem here is that Fun & Fitness is not "engaged in the business of selling such a product." Its business is providing exercise facilities, not selling exercise equipment; this sale was an aberration, rather than its regular business. Section 402A limits liability to sellers who are in the business of selling the product that caused the injury.

> The basis for the rule is the ancient one of the special responsibility for the safety of the public undertaken by one who enters into the business of supplying human beings with products which may endanger the safety of their persons and property, and the forced reliance upon that undertaking on the part of those who purchase such goods.

   Restatement (Second) of Torts §402A cmt. f. Most of the rationales for strict liability do not apply to a situation like this. Fun & Fitness is not in a position to spread the cost of this product injury, since it neither regularly makes nor sells exercise equipment. It is not in a position to improve the design of the equipment, in any direct way, since it doesn't design them. It doesn't advertise or promote the sale of exercise machines, so it cannot be said to have induced the sale or promoted reliance on its expertise.

   c. Here, the damage caused by the product defect is to the product itself. There's a fair argument that this constitutes "physical harm thereby caused to the ultimate user or consumer, or to his property." Restatement (Second) §402A. After all, the defect did cause physical harm to the user's property, the truck itself. However, most courts applying §402A have held that when a defect causes injury to the product itself, rather than to other property, the owner is limited to

contractual remedies. The Third Restatement also takes this position. Restatement (Third) of Torts: Products Liability §21 cmt. d.

d. Under §402A it is proper to sue a retailer as well as a manufacturer. Scott Motors is a "seller . . . engaged in the business of selling such product," so it is a proper defendant under §402A. But Merriman's problem here, if it is one, is that there hasn't been a sale. Merriman is a customer, but not yet a buyer when she is injured. Section 402A speaks of "one who sells any product . . ." and here Scott hasn't sold it yet.

However, it is unlikely that a court would take this literally, when the product was offered for sale by a seller. The rationale for strict liability involves the distribution of products that impose risks on users. This product has done that, even though it has not yet been purchased. Requiring sale to the consumer smacks of the old privity requirement; §402A, by contrast, allows recovery by many plaintiffs who never bought anything from the defendant. ("It is not even necessary that the consumer have purchased the product at all. He may be a member of the family of the final purchaser, or his employee, or a guest at his table, or a mere donee from the purchaser." Restatement (Second) §402A cmt. 1.) Thus, Scott probably won't prevail on the argument that it is not liable because the sale never transpired. For a case rejecting the argument, see *Rivera-Emerling v. Fortunoffs of Westbury Corp.*, 721 N.Y.S.2d 653, 654-655 (App. Div. 2001); see also Restatement (Third) of Torts: Products Liability §20(b) cmt. f (definition of seller or distributor includes one who provides car for test drive).

e. The problem here is that the claim does not arise from the sale of a defective product. It arises from faulty installation, which is the provision of a service. Section 402A creates a remedy for dangerously defective products, not for faulty rendition of services. Porazzo will likely have to look to other remedies, either under contract or negligence law.

The issue would be closer if Argento's electricians installed defective wiring, manufactured by Superior Electric, and a defect in the wire caused the fire. Clearly, Superior would be liable under §402A, as a seller (to Argento) of the defective wire. But would Argento be a "seller" on those facts? Surely the cost of the wire is

incorporated into its contract price for the work, so in some sense it is a seller of the wire. But the sale is incidental to Argento's main work — electrical installations. Similarly, a plumber may provide a gasket for sealing gas lines when installing a new gas stove. Doubtless, a charge for this will appear on the plumber's bill, but most courts would hold that the plumber is not primarily "engaged in the business of selling such product" (Restatement (Second) of Torts §402A(1)(A)) and therefore not liable under §402A. See, e.g., *Cafazzso v. Central Medical Health Services, Inc.*, 668 A.2d 521 (Pa. 1995) *Johnson v. Zimmer Spine Inc.*, 2008 WL 11449246 (D. Nev.) (Aug. 8, 2008) (medical provider not strictly liable for defect in medical device implanted during surgery).

Responsibility Without the Blame

2. Both Computex and Tech Store will be liable to Gutierriez under §402A. They each are in the business of selling computers, and both sold one that was defective and unreasonably dangerous, and led to physical harm to Gutierriez's house. Computex, of course, did not sell it to Gutierriez, but that isn't required under §402A: Manufacturers and intermediate sellers (such as wholesalers) are liable to consumers injured by the products they sell, as well as the retailer who directly deals with the consumer. Privity is not a requirement.

   In this case, neither Computex nor Tech Store did anything negligent; the mouse was the guilty party. Although the defect here is neither a failure of the manufacturing materials nor misassembly, the manufacturer and retailer are still liable. It is enough under §402A to establish that the seller sold a defective product. The plaintiff need not establish that the product was defective due to negligence.

   This case would come out the same way under the Restatement (Third) of Torts: Products Liability. Under §2(a) of the Products Liability Restatement, sellers are strictly liable for manufacturing defects in their products, "even though all possible care was exercised in the preparation and marketing of the product." Several of the rationales for strict liability support this result, including the manufacturer's ability to spread the cost of accidents from product defects through price, the incentive that liability will give manufacturers to inspect products

carefully, and the inability of the consumer to protect herself from such defects.

3. In many states, it is proper to assert multiple tort theories for recovery in a products liability case. The adoption by courts of a cause of action for strict products liability was meant to expand plaintiffs' remedies, not to bar their resort to traditional causes of action that might also apply. A plaintiff might sue for negligence, breach of implied warranty, breach of express warranty, misrepresentation, and strict products liability, if the evidence supports each theory.

   The elements of a negligence claim and a manufacturing defect claim are slightly different. On her negligence claim, Gutierriez will have to establish that Computex failed to exercise reasonable care in making or inspecting the computer. As Example 2 illustrates, she doesn't have to show that to recover on a strict liability claim for defective manufacture. Often, there will be little point to asserting the negligence claim if strict liability applies, but in some states statutes of repose or limitations or other defenses might defeat one claim but not the other.

   As the Introduction indicates, some states have passed products liability statutes that create an exclusive remedy for injuries from defective products. Because claims for misrepresentation, negligence, and strict liability overlap in some respects, but differ in others, some states have sought to simplify products liability cases by limiting the plaintiff to a single "products liability" claim. See, e.g., N.J.S.A. 2A:58C-lb(3), *Canty v. Ever-Last Supply Co.,* 685 A.2d 1365 (N.J. Super. 1996) (New Jersey Products Liability Act signaled intention of legislature to replace common law negligence theories in products liability area with statutorily defined cause of action). In these states, Gutierriez would have a single claim defined by the statute.

4. In this case, Tech Store would be liable but Computex would not. Computex sold the product, but it was not defective when it left Computex's control. It is not strictly liable for defects that occur later. Similarly, it would not be strictly liable for a defect that arose from shipping or weather damage after the product was shipped. The product was defective, however, when it was sold by Tech Store, so it would be

liable to Gutierriez under either §402A or the Third Restatement §2(a).

5. This is another manufacturing defect case, but here the defect is in a component Computex purchased and incorporated into its finished product. Computex will be liable for the fire. The defective component made the finished product defective, since it was unreasonably dangerous and led to the fire. Again, Computex did not do anything "wrong," but is strictly liable for the damage caused by its defective product.

   Both Allied Wiring and Tech Store will also be liable to Gutierriez under §402A, since they also sold the defective product that led to the fire. Allied sold the defective printed circuit board. As a seller, it remains responsible for damages caused by that product, even if it is incorporated into a finished product and resold to a consumer. See, e. g., *Jenkins v. T & N P.C.,* 53 Cal. Rptr. 2d 642, 645 (Cal. App. 1996); see generally Restatement (Third) of Torts: Products Liability §5 and cmt. b.

Designs and Defects

6. You can't really answer this question without more information. If the blade that broke was like all blades on Ford radiator fans — if they all had the same level of impurities in the steel — this is a design defect case. Pouncey would argue that Ford's design choice to use that type of steel in its fans was inappropriate, in light of the risks of failure of the blades. If, however, discovery revealed that the level of impurities in this fan blade was an aberration, the case would be a manufacturing defect case, since the fan blade did not conform to Ford's own design specifications for the product.

   Classifying the case matters, because if it is a manufacturing defect case, the plaintiff need not shoulder the expensive burden of proving that the design was defective, under risk/ utility analysis or a consumer expectations standard. (What consumer really has any expectations at all about this?) It need only show that the fan did not conform to manufacturing specifications, and that the resulting defect led to Pouncey's injury. If that is true, Ford would be "strictly" liable for Pouncey's injury.

7. a. It appears that Algren's claim is based on design defect rather than manufacturing defect. She does not claim that the vodka was adulterated in some way, but that vodka, in its intended form, is unreasonably dangerous. If the claim were accepted, Smirnoff would be liable to all alcoholics, since they marketed the product in an unsafe form.

The court will almost certainly reject Algren's argument, based on the fact that vodka, while it has risks, cannot be made safer without fundamentally altering its nature. It would be great if we could have unlimited vodka without hangovers or addiction. But that isn't one of the choices. If products liability law dubs alcohol defective and unreasonably dangerous because it poses risks, it condemns the entire product, since it can't be redesigned and still be vodka. While courts might be willing to brand some such products unreasonably dangerous (cigarettes and asbestos are two possible candidates) they have generally been unwilling to assume the role of arbiters of public conduct in this way. Consequently, courts have seldom concluded that products that pose risks, but cannot serve their intended purposes without those risks, are defective.

> Good whiskey is not unreasonably dangerous merely because it will make some people drunk, and is especially dangerous to alcoholics; but bad whiskey, containing a dangerous amount of fusel oil, is unreasonably dangerous. . . .

Restatement (Second) of Torts §402A cmt. i. The Third Restatement takes a similar position. Restatement (Third) of Torts: Products Liability §2 cmt. d. Under the consumer expectations test, the product passes muster because consumers understand its dangers and accept them as inseparable from the product itself. Under a risk/utility test, vodka is not defective, since it can't be redesigned to be completely benign and still be vodka; there is no reasonable alternative design.

b. Since the court will not likely hold that vodka is "defectively designed," Algren tries a failure to warn theory. Even if it is reasonable to market a product that poses risks, a manufacturer may be liable for failure to warn users of risks from its use. But here the risk is so generally known that the court will almost certainly hold that a warning is unnecessary, simply because there is no duty to tell

people what they already know. In *Garrison v. Heublein, Inc.*, 673 F.2d 189 (7th Cir. 1982), the court rejected the failure to warn argument in an alcohol case on this theory.

It might be different if the risk were less generally understood. For example, until recently the effect of alcohol on unborn children was not general knowledge, though it was likely understood by medical personnel and distillers. A claim for failure to warn of potential damage to fetuses might have prevailed in those circumstances. This risk is one that cannot be eliminated. While it may not warrant a ban on alcoholic products, it is appropriate to warn pregnant women of this risk, so they can avoid it.

8. The consumer expectations test very likely would be less favorable in this case. Most consumers would probably recognize the risk that a motorcycle will be knocked over, and that if it is, a rider's leg may be crushed underneath it. They would probably be surprised to learn that cycles can be fitted with crash bars that offer protection against leg injuries. Thus, the cycle without such crash bars probably comports with most consumers' expectations.

   However, a fair case can be made by design experts that the cycle could be made safer with little effect on its operation. In a jurisdiction that applies the risk/ utility approach, this evidence might establish that the cycle was defective, even though it was as safe as most consumers would expect it to be. See *Camacho v. Honda Motor Co., Ltd.*, 741 P.2d 1240 (Colo. 1988), in which the court splits on the proper test to use in a case with similar facts.

Liability for Failure to Warn

9. Gainor should argue that a warning was an insufficient response to the danger posed by the machine. Instead, the manufacturer should have eliminated the risk altogether by designing a guard that would prevent the operator's hands from entering the stamping area. Although a guard would have slowed production somewhat, under a risk/utility analysis this loss in production speed is likely outweighed by the increased safety. It is foreseeable — indeed, almost inevitable — that an operator's hands will end up in the stamping area now and then, due to

some form of accident, the temptation to adjust the work despite the danger, or sheer inadvertence, as in Gainor's case. If that is true, the machine is probably defective if it lacks a guard.

Assuming that a reasonable design required a guard, Durabrand's argument that it provided a *warning* of the danger likely will not avoid liability. Interestingly, §402A appeared to endorse the defendant's argument here. See §402A cmt. j (product not defective if a warning was given, and a product could be safely used if the warning was heeded). Courts, however, have generally rejected comment j, as does the Third Restatement. Restatement (Third) of Torts: Products Liability §2 cmt. 1 (when safer design is possible, warning not adequate alternative). The manufacturer should not be able to avoid liability for a defective design by giving notice of the danger it should have designed out of the product. It would frequently be cheaper for the manufacturer to warn of a defect in its product than to redesign the product to make it reasonably safe. If a warning were a defense to design defect liability in such situations, it would undermine the incentive to make products safer. Thus, the court will almost certainly reject the argument that the warning is a proper substitute for a safer design. Accord: *Weigle v. SPX Corp.*, 729 F.3d 724, 738-739 (7th Cir. 2013).

10. Because a reasonableness standard governs products liability claims for failure to warn, some authorities question whether there is really a difference between negligence and strict liability in failure to warn cases. This example illustrates one significant difference. Surely, if Parker sued Acme Hardware for negligence, he would lose. They didn't do anything negligent. They just bought a packaged product from a presumably reputable manufacturer and resold it to a customer. It was Garden Products that packaged the product without adequate warnings. But under §402A, Acme is a "seller," and would be liable if the warning is inadequate. It will likely have an action against Garden Products for indemnification, but Parker will still be able to sue the local seller for his injury. See, e.g., *In Re Shigellosis Litigation*, 647 N.W.2d 1, 5-6 (Minn. App. 2002); see generally Restatement (Third) of Torts: Products Liability §2 cmt. o. For a dramatic example of such liability see *Marcon v. Kmart Corp.*, 573 N.W.2d 728, 731 (Minn. App. 1998), in which Kmart was held liable for some $8 million for failure to warn of a risk

from using a sled it had sold. Ordinarily, Kmart, as a seller, could seek indemnification from the manufacturer, which was primarily responsible for providing adequate warnings. However, the manufacturer was bankrupt.

A number of states now limit the plaintiff's right to sue downstream sellers, either by statute or judicial decision. Indiana, for example, limits products liability claims to the manufacturer of the product or component that caused the injury, unless the manufacturer is not subject to personal jurisdiction in the action. Ind. Code §34-20-2-3, §34-20-2-4. See also Del. Code, tit. 18, §7001(b).[7] These statutes reflect the view that the manufacturer, who designs the product, fabricates it, and decides what warnings to give, should bear liability for injuries it causes. In states that allow suit against the retailer, the retailer will have a right of indemnification — reimbursement — from the manufacturer if it is held strictly liable to the plaintiff.

Limits of the Duty to Warn

11. The example raises the question of whether manufacturers can be strictly liable for failing to warn a consumer about the dangers of various ways she might misuse their products.

In *Greenman v. Yuba Power Products, Inc.*, Judge Traynor spoke of strict liability for a product's "intended" use. 377 P.2d 897, 901 (Cal. 1963). Similarly, §402A refers to dangers in "normal handling and consumption." Restatement (Second) of Torts §402A cmt. h. Since consumers can come up with all kinds of ridiculous ways to misuse a product, Lawrence's argument that it should not be required to warn Paoli of the dangers posed by unintended uses is a credible one.

The case law, however, has generally recognized a duty to warn of *foreseeable* misuses that result from human nature acting upon opportunity. It is highly foreseeable that a user, stretching to reach the top of a window, will be tempted to gain some altitude by putting one foot on that paint shelf. If it is dangerous to do so, that danger can be averted by a warning. Many courts have held that defendants have a duty to warn of such foreseeable misuses. See Frumer & Friedman, Products Liability §12.05; see generally D. Owen, Defectiveness Restated: Exploding the "Strict" Products Liability Myth, 1996 U. Ill. L.

Rev. 743, 780-781. It is likely that this approach will continue in jurisdictions that adopt the Third Restatement, which imposes liability for "reasonably foreseeable uses and risks." Restatement (Third) of Torts: Products Liability §2 cmt. 1.

Of course, Paoli may be *negligent herself* for trusting her weight to the paint shelf without inquiry. If so, her negligence can be taken into account under principles of comparative negligence or assumption of risk, rather than concluding that the manufacturer had no duty to warn of this misuse. (This is analyzed in detail in the next chapter.) If the manufacturer can avoid serious and foreseeable accidents from such foreseeable misuse by printing a warning on the shelf, products liability standards should encourage it to do so.

12. This notice is almost certainly inadequate. Arguably, it isn't a warning at all; it's an instruction about how to use the product. It is frequently insufficient to simply instruct consumers not to use a product in a particular way. A true warning should inform the consumer of the nature and extent of the risk posed by ignoring the instructions. As one court stated,

> it may be doubted that a sign warning, "Keep off the Grass," could be deemed sufficient to apprise a reasonable person that the grass was infested with deadly snakes. In some circumstances a reasonable man might well risk the penalty of not keeping off the grass although he would hardly be so daring if he knew the real consequences of his failing to observe the warning sign. . . ."

Post v. American Cleaning Equip. Corp., 437 S.W.2d 516, 520 (Ky. 1968). Without a sense of the reason for obeying instructions, people have a human tendency — whether reasonable or not — to ignore them if obedience is inconvenient. To really affect consumers' behavior, a warning must convey the nature and gravity of the risk of ignoring instructions. "Warning! Use of these tires on trucks heavier than 2,000 pounds may cause serious injury or death from rollover accidents!" would be an obviously more effective warning.

Material Risks

13. a. This argument is easily refuted. Leahy Pharmaceuticals argues that the benefits Perzac provides to most users make *it* reasonable to

market the drug, even if a few users suffer side effects. But Collier hasn't challenged Leahy's decision to market Perzac. He claims that while it was reasonable to market the drug despite the small risk of psychotic reactions, users *should have been warned* about that risk. When a drug is widely beneficial, yet presents risks to some users that cannot be eliminated, warnings give users the information they need to make choices about the product. If Collier had been warned of the risk of psychotic episodes, she could have made an informed decision whether to run that risk or avoid the product. Because the drug had no warning of the risk of a psychotic reaction, Collier was unable to make that choice.

So, Leahy can't defend the failure to warn claim on the ground that its choice to market Perzac, despite the risk, was a reasonable one. A manufacturer must be reasonable both in choosing to market a drug that poses risks, and in informing users about the risks it cannot eliminate from that product. See Restatement (Third) of Torts: Products Liability §2 cmt. k.

b. Leahy's argument here is that it had no duty to warn of the risk, because it was a small one. Many cases consider whether a risk was sufficiently substantial to merit a warning. In deciding whether a warning of a particular hazard should be given, courts have taken a general reasonableness approach, considering such factors as the gravity of the risk, how likely it is, whether the user will already be aware of it, and whether adding another warning to the product would decrease the effectiveness of *other* warnings. See generally Dobbs' Law of Torts §464. Because warnings are easy to provide, they will usually be warranted if the risk is one the ordinary consumer would want to know about. While the need for a particular warning is usually a question of fact, it is likely that a manufacturer should warn of a serious reaction suffered by 3 percent of users.

In the medical malpractice area, some courts hold that a patient should be warned of all risks she would consider material in deciding whether to undergo the procedure. See, e.g., *Scott v. Bradford,* 606 P.2d 554 (Okla. 1979). Logically, a similar standard might be applied to products liability failure to warn claims, but has apparently been invoked only occasionally. See Dobbs' Law of Torts §464.

Elements, Elements

14. One problem Daniel faces is convincing a jury that this type of misuse of the product is sufficiently likely that the defendant should have warned about it. Manufacturers can't warn about *everything*, since excessive warnings tend to undercut the impact of each one.[8] Nor can manufacturers anticipate every preposterous manner in which people will, in the fullness of time, misuse their products.

    Assuming that Daniel could convince a jury that a warning of this risk was needed, she faces another elemental problem: causation. Given Shroeder's testimony, it appears that even if the label had warned about this risk, Shroeder never would have read it, since he grabbed the bottle in haste and poured without examining the label. Products liability plaintiffs, like other tort plaintiffs, must establish that the defendant's defective product was a "but for" cause of her harm, that is, that the injury would not have happened if the product had not been defective. See Chapter 10, p. 201 ff. Here it seems likely that the injury would have happened the same way even if the manufacturer had provided an adequate warning to keep the bleach away from heat, since Shroeder would not have read it. Don't lose sight of the fact that causation must always be proved in a products liability case, as in other tort cases.

    Defendants frequently raise this argument when the plaintiff admits that she did not read the label or directions on a product. Courts have sometimes resolved the problem by creating a presumption that an adequate warning (perhaps with exclamation points, red capital letters, or a skull and crossbones, prominently placed) *would* have been read. But even this helpful presumption may be rebutted when the evidence indicates — as it probably does here — that an adequate warning would not have come to the user's attention.

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1. D. Owen, Defectiveness Restated: Exploding the "Strict" Products Liability Myth, 1996 U. Ill. L. Rev. 743, 744 (footnotes omitted). Professor Owen indicates that only five states "never did succumb to the new religion" of strict products liability. 1996 U. Ill. L. Rev. at 745.

2. The Third Restatement throws a bone to consumer-expectations advocates, however, by providing that consumer expectations about product dangers are relevant to the risk/ utility analysis in a design defect case. Restatement (Third) of Torts: Products Liability §2 cmt. g.

3. Congress does have authority to regulate interstate commerce. United States Constitution, Article I §8 clause 3. Interpreted liberally, this could support a good deal of federal tort legislation–including, persumably, a federal statute governing claims for product liability. But so far Congress has not broadly

regulated tort law through the Interstate Commerce Clause.

4. For a lengthy compendium of state products liability statutes, see Frumer & Friedman, Products Liability, vol. 8, app. C.

5. One study concluded that design defect claims constituted 75 percent, and warning claims, 18 percent of strict products liability claims. See Owen, Montgomery & Keeton, Products Liability and Safety — Cases and Materials 24 (3d ed. 1996).

6. Leave aside for the moment the question of *who* must be warned of the risks from the drug. Under the "learned intermediary" doctrine, drug manufacturers can frequently discharge the duty to warn of drug risks by warning the medical providers who prescribe them.

7. Some statutes bar *any* strict products liability claim against the retailer or wholesaler. See, e.g., Neb. Rev. St. §25-21,181; S.D.C.L. §20-9-9.

8. The defensive tendency to overwarn in order to limit liability has been referred to as "warnings pollution." D. Owen, Defectiveness Restated: Exploding the "Strict" Products Liability Myth, 1996 U. Ill. L. Rev. 743, 766.

More Products Liability: Common "Defenses" to Strict Products Liability Claims

INTRODUCTION

The previous chapter considered the elements a plaintiff must establish to recover on a claim for "strict products liability."[1] We saw that strict products liability allows an injured party to recover against a *seller* for *personal injury or property damage* caused by *defective* products. We also saw that proof that a product was defective depends on the type of defect alleged. A plaintiff who claims injury from a manufacturing defect may recover by proving that the product was dangerously defective, but need not prove that negligence by the manufacturer led to the defect. However, in design defect and failure to warn cases, the plaintiff must make a showing that looks very much like negligent conduct by the manufacturer.

This chapter considers a number of "defenses" that are commonly asserted in strict products liability cases to defeat liability. The word "defense" is in quotation marks because several of these issues are probably not, strictly speaking, affirmative defenses. The term *affirmative defense* refers to evidence offered by a defendant that may avoid liability, even though the plaintiff proves the basic elements of her claim. Several of the issues covered here are true affirmative defenses, including comparative negligence and assumption of the risk. But others, such as the state-of-the-art

"defense," the argument that a danger was "open and obvious," and the "defense" of misuse, might better be characterized not as defenses, but as challenges to the plaintiff's ability to make a prima facie case of product defect.

While the issues reviewed in this chapter arise in products liability cases in every state, their treatment varies considerably from one state to another. For example, a plaintiff's negligence may bar a products liability recovery entirely in one jurisdiction, reduce it in others, and have no effect at all in others. This chapter emphasizes basic arguments that defendants commonly raise in products cases to avoid liability, and the various approaches the states have taken in analyzing those arguments. Remember that tort law is state law, so every state makes its own. Thus, states may, and do, take different approaches to defenses in strict products liability cases.

THE EFFECT OF PLAINTIFF'S NEGLIGENCE

Let's start with a true affirmative defense, contributory or comparative negligence. In strict products liability cases, as in traditional negligence cases, defendants frequently argue that the plaintiff should be barred from recovering because her own negligence contributed to her injury. For example, suppose that Accu-Cut Corporation makes a saw with a blade that tends to stick if used to cut stock that is thicker than one inch. Ramirez, the plaintiff, uses the saw and senses that something isn't right, but continues to work. On one cut, the saw sticks and the board kicks back, injuring Ramirez. The saw may well be defective, because it tends to throw the work back (or because of failure to warn not to use it for thicker cuts). However, Ramirez may also have contributed to his injury, by continuing to cut the stock despite this problem.

A. The Background: Treatment of Plaintiff's Fault in Negligence Cases

In cases brought on a negligence theory, such "contributory negligence" by a plaintiff barred her entirely from recovery in most states until the 1960s.

Since then, however, contributory negligence has been replaced in most states by comparative negligence. Under comparative negligence, a plaintiff whose negligence contributed to an injury may still recover, but her recovery will be reduced by the percentage of fault the jury attributes to her. If, for example, Ramirez sued Accu-Cut on a negligence theory, and the jury concluded that Ramirez was 30 percent at fault for continuing to use the saw for thick cuts, his damages would be reduced by 30 percent. In a good many states, Ramirez would be barred from any recovery if his negligence reached a certain level — either 50 or 51 percent. For a full discussion of comparative fault see Chapter 25.

B. Evolution of Treatment of Plaintiff's Fault in Strict Products Liability Cases

When §402A was added to the Restatement (Second) of Torts in 1965, contributory negligence — which fully barred the negligent plaintiff from recovery — was the general rule in *negligence* cases. However, the drafters concluded that contributory negligence should not bar recovery on a strict products liability claim. Restatement (Second) of Torts §402A cmt. n. Strict liability was thought of as a different type of liability, intended to place the risk of injury from defective products on the seller, even if the plaintiff's negligence was also a cause of her injury. Early cases under §402A followed comment n, refusing to bar plaintiffs in strict products liability cases even if their negligence was a factor in causing their injury. See Prosser & Keeton at 712.

However, as states abandoned the complete bar of contributory negligence in negligence cases in favor of comparative negligence, litigants inevitably began arguing that comparative negligence principles should apply to strict products liability claims as well. Indeed, in many products liability cases, the plaintiff asserts both a negligence claim and a strict products liability claim, based on the same underlying conduct of the defendant. It seems odd that the plaintiff's negligence would reduce her recovery on the negligence count, but be ignored on the strict liability count in the same case.

One argument against applying comparative fault to strict products liability claims is that it requires the jury to compare apples and oranges. In a negligence case, the jury compares the defendant's negligence to the

plaintiff's. But how do you compare a defendant's *strict liability* for selling a defective product to the plaintiff's *negligence* in using it? These are conceptually different types of conduct: The defendant's liability arises without any fault at all (at least, in manufacturing defect cases), while the plaintiff's fault is based on negligence.

On the other hand, reducing recovery for a plaintiff's fault furthers several goals of tort law. It encourages care by plaintiffs, and causes negligent plaintiffs to share the loss caused in part by their negligence. The common sense of this approach has led many states to apply comparative fault to strict products liability claims as well as negligence claims. Dobbs' Law of Torts §470. In these states, the jury is instructed to assign a percentage of causal responsibility to the seller-defendant for selling the defective product, and to the plaintiff, for her negligence in using the product. If the jury finds the seller 70 percent responsible, for example, and the plaintiff 30 percent responsible, the plaintiff will recover 70 percent of her damages. Although it may be a bit conceptually messy to assign percentages of "responsibility" to these different types of conduct, experience indicates that juries manage to do it reasonably well, and apportioning responsibility in such cases probably serves the goals of tort law better than ignoring the plaintiff's fault entirely.[2]

Because the jury compares strict liability to negligence in such cases, some states now call their statutes comparative "responsibility" statutes rather than "comparative negligence" statutes. See, e. g., Tex. Civ. Prac. & Rem. Code Ann. §33.001 ("proportionate responsibility"); see also Restatement (Third) of Torts: Apportionment of Liability, Topic 1 (entitled "Basic Rules of Comparative Responsibility"). Others still call their statutes "comparative fault" schemes, but define fault broadly, to include the sale of a defective product. The Arkansas comparative fault statute, for example, applies to "any act, omission, conduct, risk assumed, breach of warranty, or breach of any legal duty which is a proximate cause of any damages sustained by any party." Ark. Code Ann. §16-64-122(c). The broad phrase "breach of any legal duty" surely includes strict liability for selling a defective product. Similarly, the Maine comparative fault statute applies (in addition to negligence claims) to a "breach of statutory duty or other act or omission that gives rise to a liability in tort or would, apart from this section, give rise to the defense of contributory negligence." 14 Me. Rev. Stat. Ann. §156. This too would include a strict products liability claim.

Note that adopting comparative negligence in strict products liability cases has a very different impact than adopting it in negligence cases. States switched to comparative negligence in negligence cases to allow plaintiffs *some recovery*, even if they were partly responsible for their own injury. Under the harsh contributory negligence doctrine, a plaintiff whose negligence contributed at all to her injury recovered nothing. Under comparative negligence, a negligent plaintiff now recovers reduced damages. But switching to comparative negligence for strict products liability claims often leads to a smaller recovery for plaintiffs. Under the approach of §402A cmt. n, the products liability plaintiff *recovered fully despite her negligence.* Switching to comparative responsibility principles in strict products liability cases means that a negligent plaintiff will recover less than before, because her negligence (ignored before) will reduce her damages.

Today, the effect of a plaintiff's negligence in a strict products liability case varies from state to state. A few states still adhere to the approach of comment n of the Second Restatement, that a plaintiff's negligence is irrelevant to a strict products liability claim. In these states, a negligent plaintiff recovers fully despite her negligence in using the product. "A strong majority" [3] of states, however, now treat such negligence as a partial defense to a strict products liability claim. A negligent plaintiff's damages will be reduced by the percentage of fault the jury assigns to her. If the applicable comparative fault statute bars a plaintiff from recovery if she is 50 percent or more at fault, the same rule is applied to strict products liability claims. See generally Restatement (Third) of Torts: Products Liability §17. Last, at least one state, North Carolina, treats contributory negligence as a full defense to a strict products liability claim. Any negligence of the plaintiff bars her from recovery entirely. See *Nicholson v. American Safety Utility Corp.*, 488 S.E.2d 240, 244 (N.C. 1997). See now N.C. Gen. Stat. §99B-4(3).

ASSUMPTION OF THE RISK

Just as the adoption of comparative negligence has spread from negligence cases to strict products liability cases, it has also affected the treatment of another traditional defense, assumption of the risk. To understand current approaches to assumption of the risk in strict products liability cases, we need

to recall how that defense has evolved in negligence cases.

A. The Background: Treatment of Plaintiff's Assumption of Risk in Negligence Cases

Fifty years ago, most courts held that a plaintiff who recognized a risk and made a deliberate choice to encounter it was barred from recovering from the defendant who created the risk, even if the defendant was negligent in creating the risk. See Restatement (Second) of Torts §496A. Suppose, for example, that Quentin, an obviously intoxicated driver, offered Tanaka a ride, and Tanaka accepted and was later injured due to Quentin's negligent driving. Under the concept of assumption of the risk, a negligence claim by Tanaka would be barred by his deliberate choice to accept the risk of driving with Quentin. See id., illus. 2. The idea was that the plaintiff's deliberate choice to proceed in the face of clear knowledge of the danger constituted a kind of consent to the risk posed by the defendant's conduct, even if it had been negligently created by the defendant. See generally Chapter 24.

The advent of comparative negligence has altered the treatment of assumption of the risk in negligence cases. Today, many states that have comparative negligence regimes treat a plaintiff's conscious choice to encounter a risk as a form of negligent conduct. Thus, the jury will be instructed to assign the plaintiff a percentage of fault for deliberately encountering the risk, just as they do for other forms of plaintiff's negligence. Consequently, assumption of the risk, like other forms of plaintiff's negligence, becomes a partial defense to a negligence claim rather than a complete bar to recovery. In the drunk driving case, for example, the jury might find Tanaka 30 percent at fault for choosing to ride with Quentin, and Quentin 70 percent at fault for driving while intoxicated. If so, Tanaka would recover 70 percent of his damages. In states that treat a plaintiff's deliberate choice to engage in the risk as comparative negligence, the separate defense of assumption of the risk is abolished. See, e.g., Mass. Gen. Laws ch. 231, §85.

A few states, however, continue to treat conscious assumption of the risk as a separate and full defense to a negligence action, even though they otherwise apply comparative negligence to account for a plaintiff's negligence. See, e.g., *Kennedy v. Providence Hockey Club, Inc.*, 376 A.2d

329 (R.I. 1977); see generally Dobbs, Hayden & Bublick, Dobbs' Law of Torts §470. This is clearly a minority position, but you should keep in mind that despite the strong trend toward applying comparative negligence, not all states have abolished the separate assumption of the risk defense.

B. Evolution of Treatment of Assumption of the Risk in Strict Products Liability Cases

With assumption of the risk, as with plaintiff's negligence, the evolution of the law in negligence cases has affected strict products liability claims as well. When the American Law Institute adopted §402A, it took the position that a plaintiff's deliberate assumption of the risk (unlike contributory negligence) should bar her from recovery entirely on a strict products liability theory.

> [T]he form of contributory negligence which consists in voluntarily and unreasonably proceeding to encounter a known danger, and commonly passes under the name of assumption of risk, is a defense [to liability] under this Section as in other cases of strict liability. If the user or consumer discovers the defect and is aware of the danger, and nevertheless proceeds unreasonably to make use of the product and is injured by it, he is barred from recovery.

Restatement (Second) §402A cmt. n. Strict products liability cases initially followed this approach. See, e.g., *Johnson v. Clark Equipment Co.*, 547 P.2d 132 (Or. 1976); Annot., Products Liability: Contributory Negligence or Assumption of Risk as a Defense under Doctrine of Strict Liability in Tort, 46 A.L.R.3d 240 §5 (1972).

In recent years, however, a good many states that have adopted comparative negligence, and treat assumption of risk as a form of negligence in *negligence* cases, have adopted the same approach for *strict products liability* claims as well. That is, they now treat a plaintiff's conscious choice to encounter the risk posed by a defective product as a form of comparative fault. See, e.g., Iowa Code Ann. §668.1 (applying comparative negligence to "unreasonable assumption of risk"); Utah Code Ann. §78B-5-817(2) (defining fault to include assumption of the risk). The Restatement (Third) of Torts: Products Liability adopts this position — that assumption of the risk should be treated as a form of plaintiff's "responsibility" that reduces rather than bars recovery. "The majority position is that all forms of plaintiff's failure to conform to applicable standards of care are to be considered for the

purpose of apportioning responsibility between the plaintiff and the product seller or distributor." Restatement (Third) of Torts: Products Liability §17 cmt. d.

Once again, however, the law is not uniform on the point. Some states have continued to treat a plaintiff's conscious assumption of the risk as a complete defense in strict products liability cases. See, e.g., *Tafoya v. Sears Roebuck & Co*., 884 F.2d 1330, 1341 (10th Cir. 1989) (applying Colorado law); Miss. Code Ann. §11-1-63(d); see generally Restatement (Third) of Torts: Products Liability §17, reporter's note to cmt. d. So, though it is frustrating to students, who would like to know "what the law is," the law again varies from state to state. A plaintiff's conscious assumption of the risk posed by a defective product will reduce her recovery in many states, but in a few it still stands as a complete defense. In these latter states, a plaintiff who doesn't recognize the danger posed by a product, but should (i.e., who is negligent, but has not consciously assumed the risk), will have her damages reduced to account for her negligence. A plaintiff who recognizes the danger and proceeds to use the product, however, will recover nothing.

THE "DEFENSE" OF MISUSE

While cases sometimes refer to a "misuse defense," misuse of a product may affect a strict products liability claim in several ways. Sometimes misuse defeats the plaintiff's prima facie claim, because it indicates that the product was not defective; in other cases, it constitutes a form of plaintiff misconduct that reduces or bars recovery.

Let's start with misuse that defeats the plaintiff's initial proof of a strict products liability claim. Sometimes people use a product in truly unforeseeable ways, ways so unusual that the manufacturer, when it made the product, would not reasonably have anticipated them. In these cases, a court (or a jury) may find that the product was not defective, even though it was dangerous when used as the plaintiff did, because it was never designed to be put to that use. In *Venezia v. Miller Brewing Co*., 626 F.2d 188 (1st Cir. 1980), for example, the plaintiff sued the manufacturer of a beer bottle that shattered when he threw it against a telephone pole, injuring his eye. The court held that the manufacturer could not be held liable for the plaintiff's

injury, because beer bottles are not designed to withstand such "use."[4] A court might hold the same way if the plaintiff inhaled spark plug cleaner to get high, or used a revolver to drive a nail.[5] In these examples, the plaintiff's "misuse" is not an affirmative defense, but rather prevents the plaintiff from establishing a prima facie case. She cannot establish that the product was defective, since she does not show that it was used for a purpose the manufacturer intended or should have foreseen. Such a use is "so unusual that the average consumer could not reasonably expect the product to be designed and manufactured to withstand it." *Findlay v. Copeland Lumber Co.*, 509 P.2d 28, 31 (Or. 1971).

It is conceptually tidier to view such misuse as defeating the plaintiff's proof of her prima facie case, rather than as an affirmative defense — the plaintiff simply cannot prove that the product was defective. However, courts often hold that the plaintiff loses in such cases due to a "misuse defense," and several states have adopted statutes that expressly make "misuse" an affirmative defense. See, e.g., Ariz. Rev. Stat. §12-683(3). It is important to recognize, however, that in cases like this the plaintiff loses entirely, since the manufacturer was not bound to make its product safe for an unforeseeable use.

In other strict products liability cases, the plaintiff's injury may be caused by a defect in the product, but also by her own misuse of it. Take, for example, the plaintiff who stands on the paint shelf of a stepladder. This is not the intended use of the shelf, but it is a foreseeable one. Consequently, the maker of the ladder probably has a duty to warn against that use. The plaintiff may well convince a jury that the ladder was defective without a warning of this. But it is also true that the reasonable person should know better than to stand on the paint shelf. Doing so is a negligent misuse by the user.

In cases like this ladder example, the plaintiff has used the product in a foreseeable manner, and may be able to prove that it was defective without a warning. The defendant, however, pleads the plaintiff's negligent misuse as an affirmative defense. ("Even if the ladder was defective for lack of a warning about standing on the paint shelf, you were negligent too, since the reasonable person would realize that it was dangerous to stand on it.") The treatment of this type of misuse varies, as explained above in discussing comparative negligence. Some jurisdictions ignore a plaintiff's negligence in strict products liability cases. If she is injured in one of those states, the plaintiff's misuse in stepping on the shelf will not affect her strict products

liability claim against the manufacturer. Other jurisdictions, a clear majority now, treat such negligent misuse by a plaintiff as a form of comparative fault, and reduce her recovery to account for it. In those states, the plaintiff would be assessed a percentage of fault for misusing the shelf as a step, and her recovery would be reduced by that percentage.

But suppose that the plaintiff fully appreciated the danger of misusing the product, and proceeded to misuse it that way anyway? For example, the plaintiff realizes that a table saw should have a guard, and that hers does not, but uses it anyway, confident that she can avoid injury. Here, the plaintiff's "misuse" could be characterized as conscious assumption of the risk, the deliberate choice to encounter a risk created by the defective product. And here again, the effect of such deliberate misuse will vary from state to state. Some states still treat such deliberate misuse as a complete defense, as §402A recommends. Other states — now most — treat it as a form of plaintiff's fault.

Misuse of a product may undermine a plaintiff's strict products liability claim in yet another way: She may misuse a product in such an unexpected way that she loses based on ordinary proximate cause analysis. Here's a classic example. In *Daniell v. Ford Motor Co.*, 581 F. Supp. 728 (D.N.M. 1984), the plaintiff deliberately locked herself in a car trunk, intending to commit suicide. She then changed her mind, but was unable to get out, because the trunk lid had no inside release. The car may have been defective for lack of a release, but the court held that even if it was defective, Ford would not be liable for such an unforeseeable occurrence as the plaintiff's failed suicide attempt. In this case, the bizarre nature of the plaintiff's misuse barred recovery even if she proved that the product was defective.

Products liability law would be conceptually cleaner if courts stopped treating the concept of "misuse" as a separate defense in products liability cases. The term adds little that isn't better accounted for by other concepts. When the plaintiff uses a product for an unforeseeable purpose, courts could simply hold that she has failed to prove that the product was defective. When the product is defective, but the plaintiff contributes to her injury through negligent or deliberate misuse, courts could address that conduct through the affirmative defense of plaintiff's fault or assumption of risk. If the misuse led to a completely unforeseeable type of harm (as in the *Daniell* case), the court could resolve the case under traditional proximate cause analysis. See generally Dobbs, Hayden & Bublick §471.

However, under current strict products liability law the term *misuse* is frequently invoked in each of the contexts discussed above. The term is enshrined in statutes in some states as well. So the concept is certain to remain important in strict products liability cases. To understand its use, you need to recognize the different roles that the plaintiff's misuse may play: that it may defeat proof of defect, establish an affirmative defense to the claim (or partial defense), or establish that the resulting harm was unforeseeable.

THE OPEN AND OBVIOUS DANGER "DEFENSE"

Another argument defendants raise in product liability cases is that the danger that injured the plaintiff was "open and obvious." Suppose that a cook gets cut while using an Accu-Cut knife, and sues Accu-Cut for failing to warn him of the danger of cuts. Accu-Cut will no doubt argue that it is not liable for failure to warn, because the risk of being cut by a knife is open and obvious. This is another phrase that is loosely used. Sometimes the fact that a danger is obvious is no defense at all. In other cases in which a danger is obvious and cannot be eliminated from the product, obviousness defeats a plaintiff's prima facie case for failure to warn, since there is no need to warn people of dangers they fully understand.

Distinguish two types of open and obvious dangers: ones that can't be designed out of a product, and ones that can. Suppose Sno-Begone Company markets a snow blower on which the snow-throwing blades are completely exposed. The owner stumbles against the blades and is injured. The danger of the exposed blades may be obvious, but the snow blower is still unreasonably dangerous, because this obvious danger *should have been designed out.* Because it is easy to add a shield over the blades, this design fails either the consumer expectations test or the risk/ utility test. Since that is true, Sno-Begone cannot avoid liability by claiming that the danger was open and obvious. Although the danger is obvious, it should not be there at all. Sno-Begone cannot avoid liability by arguing that while its product design was unreasonably dangerous, it was obviously so. If this argument worked, manufacturers would not have a duty to design reasonably safe products. And

the more egregiously dangerous the design was, the less risk the manufacturer would run of being held liable. When the danger can be eliminated at a reasonable cost, it should be, whether it is obvious or not. Sno-Begone should not be permitted to avoid liability by claiming that the danger posed by its machine was blatant.

Compare the knife case. The danger of cutting a finger with a sharp knife is obvious. But here, the risk is not the result of a design flaw; to do its job, a knife must be sharp. Although the knife poses a risk of cuts, it is not an unreasonable risk, and can't be eliminated without undermining the utility of the product. So the design of the knife is not defective, despite the danger of cuts.

However, the plaintiff may argue that even if the knife had to be sharp, it should have included a warning of the risk of cuts. "If you couldn't design this risk out of the knife, at least you *could have warned me about it.*" In other words, the plaintiff is thwarted on her design defect theory, and tries a failure-to-warn theory instead. Here, the obviousness of the danger plays a different role. If a danger is obvious, there is no need to warn about it, because people know about obvious dangers (whichever they are, but they surely include cuts from knives). So, the plaintiff will lose on her *design defect* claim, because the danger is inseparable from the product, reasonably designed. And she will lose on her *failure to warn* claim, because the manufacturer has no duty to warn people of dangers they already understand. If the danger is *not* obvious, however, the user may not understand it, and the manufacturer may be liable on a failure to warn claim if it does not warn of it.

JUST ONE MORE: THE STATE-OF-THE-ART "DEFENSE"

Here's one more "defense" that is probably not logically a defense at all. During the formative period of strict products liability law, the 1960s to the 1980s, a hotly disputed issue was whether a product was defective if it posed dangers that were unknown at the time of sale, and could not reasonably have been discovered through investigation and testing. Suppose, for example, that a drug manufacturer marketed a drug, after reasonable testing, without any

reason to anticipate that it might cause an allergic reaction. However, after widespread use by large numbers of patients, it became clear that the drug leads to an allergic reaction in a small percentage of users. If a user who suffered a reaction brought suit on a strict products liability theory, the manufacturers would argue that given the state of the art at the time they sold the drug — that is, the state of scientific knowledge about its risks — they had no reason to anticipate this type of injury. It would be unfair, they argued (and still argue, vehemently), to hold them liable for marketing a drug that posed a risk they could not recognize when they marketed it.

Under a negligence standard, this seems right. But in those heady days when §402A swept the nation, the thinking was that strict liability was *not* negligence liability; it was *strict* liability, based on the seller's distribution — with or without fault — of a defective product. Arguably, if the drug lacked a warning of a dangerous side effect, or if its design entailed an unacceptable risk of injury, it was defective, whether or not the seller could have known of the defect.

While one treatise suggests that rejecting the state-of-the-art defense would impose a duty that "could only be met, perhaps, by hiring Merlin, the magician of Arthurian legend, who lived backwards,"[6] several of the rationales for strict liability support liability for such unknowable defects. These include the ability of the manufacturer to insure and distribute the loss, reliance by consumers on the safety of products, and the incentive that liability provides to ferret out product risks. In the early days of §402A, several courts, convinced by these arguments, rejected the state-of-the-art defense in strict products liability cases, holding instead that manufacturers were liable for failure to warn of unknowable dangers of their products. See, e.g., *Beshada v. Johns-Mansville Products Corp.*, 447 A.2d 539, 546-547 (N.J. 1982).

However, most of the more recent cases have rejected this position, concluding that manufacturers are not liable for failing to warn of a danger unless they knew or should have known of the need for a warning. *Vassallo v. Baxter Healthcare Corp., 696* N.E.2d 909 (Mass. 1998); *Fibreboard Corp. v. Fenton*, 845 P.2d 1168 (Colo. 1993); F. Vandall, Constricting Products Liability: Reforms in Theory and Practice, 48 Vill. L. Rev. 843 (2003). Even New Jersey, which started the brouhaha by rejecting the state-of-the-art defense in *Beshada*, subsequently endorsed it in *Feldman v. Lederle Labs.*, 479 A.2d 374 (N.J. 1984). Once again, however, there are contrary holdings.

See, e.g., *Sternhagen v. Dow Co.*, 935 P.2d 1139 (Mont. 1997), a comprehensive opinion rejecting the defense despite its recognition in the Third Restatement of Torts.[7]

While the state-of-the-art argument is frequently referred to as a defense, it may be conceptually clearer to conclude that the manufacturer has not committed a tort by selling a product that poses an unknowable risk of injury. This characterization matters, because if this is an element of the plaintiff's prima facie case rather than a defense, she will have the burden to establish that the manufacturer should have been aware of or discovered the danger before selling the product. Once again, the state of the law is mixed: Some states have treated it as a defense, and others have placed the burden on the plaintiff to establish that the risk could have been discovered by the seller. See G. Robb, A Practical Approach to Use of State of the Art Evidence in Strict Products Liability Cases, 77 Nw. U. L. Rev. 1, 7 (1982). See generally Owen & Daris on Product Liability §10:15.

There are many other interesting defensive issues in products cases, including preemption of state products liability law by federal law, the "learned intermediary" doctrine, the government contractor defense, and others. Those, however, are grist for an advanced products liability course. For now, let's focus on sorting out the five basic issues discussed above.

Examples

Some Apples and Oranges

1. Ortney sues Pretoria Motor Company for injuries she suffered when the brakes on a Pretoria sedan she was driving suddenly locked, causing an accident in which she was injured. Prior to the accident, Ortney had noticed that the brakes seemed "a little sticky," but had not taken the car in to have them checked. Ortney's complaint asserts a strict liability claim based on defective design of the brakes. Pretoria claims that Ortney was negligent, since she did not have the car serviced after noticing brake problems.
    a. If the jury found that the brakes were defectively designed, but also that Ortney was negligent for failing to have them checked, what judgment would the court enter, in a jurisdiction that applied §402A

of the Second Restatement of Torts?

b. How would this case be submitted to the jury in most jurisdictions today, and how would the judgment be fashioned based on the jury's findings?

2. Suppose, in Ortney's case, that Pretoria had raised the defense that Ortney had assumed the risk of the defective brakes. Assume that the jury concluded that Ortney fully understood the risk posed by the brakes and chose to use the car anyway.

   a. What judgment would result if the approach of §402A applied?

   b. What judgment would result in most jurisdictions today?

3. On the same facts, Ortney sues Pretoria on two theories. In Count One she alleges that Pretoria negligently designed the brakes. In Count Two, she alleges that Pretoria is strictly liable for selling the car with defective brakes.

   a. Is it possible that she could recover on both theories?

   b. Assume that Pretoria pleads, as a defense to each of Ortney's claims, that she was contributorily negligent for failing to have the brakes checked. The jury finds that the brakes were defective, but that Ortney was also negligent. If the approach of §402A applied to the strict liability claim, what judgment would result on each of Ortney's claims?

A Tough Question and a Tough Choice

4. Hedgepeth drives an oil delivery truck for a home heating oil business. When he tries to make a delivery to a West Dakota customer one morning, the pump on his truck doesn't function properly. He climbs on top of the truck and loosens the cap on the fill pipe, to allow some air into the tank to facilitate pumping. As he does so, he slips on the rounded surface of the tank and falls. He sues TankCraft, the manufacturer of the tank, for his injuries, claiming that the tank was defectively designed because there is no flat surface on top to walk on when servicing the tank. TankCraft claims that Hedgepeth, who testified in his deposition that the surface of the tank was sometimes "real slick"

from spilled oil, assumed the risk of slipping when he climbed onto the tank.

Assume that, since TankCraft does business in both West and East Dakota, Hedge-peth's lawyer could file his suit in either state. Assume that West Dakota treats assumption of the risk as a full defense to a strict products liability claim, but does not bar or reduce recovery if the plaintiff is negligent. Assume that East Dakota treats both assumption of the risk and plaintiff's negligence as forms of comparative fault that reduce recovery. Hedge-peth's lawyer concludes that whichever state hears the case would probably choose to apply its own products liability law to the case. In which state should Hedgepeth's lawyer file suit?

Use and Misuse

5. Pahti, an unhandy fellow, buys a can of paint to paint the living room of his apartment. When he gets home he realizes that he doesn't have a screwdriver to open the lid. So he uses a paring knife instead. Unfortunately, the blade of the knife breaks as he pries at the lid, and a piece goes into his eye. He sues Accu-Cut, the manufacturer of the knife, on a strict liability/ design defect theory. What is the manufacturer's best argument to avoid or reduce liability?

6. Carlino bought a pair of pajamas and glued white cosmetic puffs all over them to make a Halloween costume. While wearing the costume, she reached up above the stove and was burned when the puffs ignited.
   a. What strict liability theory might Carlino assert in an action against Acme Cosmetics, the manufacturer of the puffs?
   b. What defenses should Acme assert? How would you expect the court to rule on them?

The "Open and Obvious" Defense

7. Clancy is riding in the cargo area of a Ford pickup truck when it collides with another vehicle. He is thrown from the truck and injured. He sues Ford, claiming that the truck bed should have included a warning that persons riding in the truck bed could be injured when thrown from the vehicle in a collision. What argument will Ford make to defeat the

claim?

8. Let's revisit the situation in Example 9 from Chapter 16, in which Durabrand designed a stamping machine without a guard to prevent the operator's hands from getting caught in the machine, although a guard was feasible. Suppose that Durabrand did not provide a warning of the risk of injury to the user's hands from entering the stamping area. Gainor's hand drifted into the stamping area, she was injured, and she sues Durabrand on a strict products liability. She asserts that the product was defectively designed, and that Durabrand was liable for failing to warn her of the danger posed by the open stamping area.
   a. Durabrand argues that the design of the stamping machine was not defective, because the danger from putting her hands in the work area was "open and obvious." Consequently, since Gainor was clearly aware of the danger, Durabrand is not liable when she ignores the danger and suffers injury. Assuming that the danger is obvious to an ordinary user, does this prevent Gainor from proving a *design defect* claim?
   b. Durabrand moves for summary judgment on Gainor's *failure to warn* claim, arguing that it had no duty to warn her of a danger that was obvious to the user. How should the court rule?
   c. Durabrand argues that if the machine was defective, Gainor assumed the risk of getting her hands caught in the machine, and is therefore barred from recovery even if the machine was defective. How would this argument affect Gainor's recovery in most states today?

Unknowable Dangers

9. Let's revisit another example from Chapter 16, Example 13, in which Leahy Pharmaceuticals marketed Perzac for depression, without warning of the danger of a psychotic reaction. It subsequently turns out, after wide use by hundreds of thousands of patients, that it can cause such a reaction in a very small number of patients. Leahy argues that it is not liable for failing to warn of this risk, because it did not know about it, despite reasonable care in making and testing Perzac. How is the court likely to rule on this argument?

The State of Judge Fudd's Art

10. Pollard sues General Motors Corporation, claiming that he was injured in an accident driving a GM car because it did not have an airbag. GM argues that airbag technology had not been developed at the time Pollard bought his car, so it could not have been used to reduce collision injuries.

    a. How is GM's state-of-the-art argument here different from the state-of-the-art argument in the last example?

    b. Assume that Judge Fudd instructs the jury as follows:

> If you find that at the time the defendant marketed the car that was involved in the plaintiff's accident, no manufacturer provided airbags in its sedans, then the defendant is not liable for failing to provide airbags.
>
> If you represented the plaintiff, why would you argue that Judge Fudd's instruction is defectively designed?

11. Bernstein's hair catches fire while using a Holden Products hair dryer. Investigation reveals that the solder on an electrical connection in the hair dryer was contaminated, melted, and caused a short circuit, causing the temperature of the hair dryer to increase dramatically. In Bernstein's strict products liability action, Holden argues that such contamination can happen in the manufacturing process but that it is exceedingly rare, and that there is no known process for detecting it. Judge Fudd instructs the jury that if the defect could not have been detected under the state of the art at the time of the sale, Holden is not liable for Bernstein's injury. What is wrong with the Honorable Fudd's instruction?

Fish or Fowl? A Too Hard Hypothetical

12. Acme Chemical sells a solvent used for removing oil from metal. The solvent causes a serious rash if it comes in contact with the skin. However, the risk of this rash can't be eliminated if the solvent is to do its job. Acme places a boldface warning on the container that the user should always wear rubber gloves to avoid the risk of a serious rash. Trask reads the label, but he can't find his rubber gloves. In a hurry to finish a job, he uses the solvent without gloves, and suffers the rash. He sues Acme for his injury. The state applies comparative fault principles

in strict products liability claims, and treats a plaintiff's conscious assumption of the risk as a form of comparative fault.

a. If you represented Acme, what would you argue to defeat recovery?

b. If you represented Trask, what would you argue to keep his case alive?

c. Suppose that Trask had not read the label. How should his case come out?

Explanations

Some Apples and Oranges

1. a. Under §402A, the plaintiff's negligence — unless it constituted conscious assumption of the risk — was not a defense to a strict liability claim. Thus, Ortney would recover her full damages, despite her negligence in failing to have the brakes checked. For a dramatic example of this approach, which ignores the plaintiff's fault on a strict products liability claim, see *Kimco Development Corp. v. Michael D's Carpets*, 637 A.2d 603, 605-607 (Pa. 1993). In *Kimco*, a store ordered carpet backing and piled it all the way up to the ceiling. It ignited from the heat of the lights, leading to a serious fire. The jury found the store 80 percent at fault in causing the fire, but also found that the seller had failed to warn that the product was flammable. The court held that the store could recover fully for its fire loss, since the store's negligence was not a defense to its strict products liability claim for failure to warn.

   b. In most (though not all) jurisdictions today, the jury would be asked to find whether the brakes were defectively designed and also whether Ortney was negligent in failing to have the brakes checked. If they found that the design was defective, but that the plaintiff was also negligent in failing to have the brakes checked, they would assign percentages of fault to Pretoria for selling the defective product and to Ortney for her negligence. A judgment would then be entered based on these percentages of fault. For example, if they found Ortney 20 percent at fault and Pretoria 80 percent, Ortney

would recover 80 percent of her damages.

2. a. Section 402A ignored a plaintiff's contributory negligence, but treated assumption of the risk as a complete defense to a strict liability claim. Thus, if Ortney fully appreciated the dangerous condition of the brakes, but chose to take a chance and use the car anyway, she would be barred from any recovery under the §402A approach. Needless to say, this made a rather subtle distinction — between a negligent failure to check the brakes and a clear appreciation that they posed a particular danger — critical in a strict products liability case. If the jury found only the first — negligent conduct but no deliberate choice to encounter the risk — the plaintiff recovered fully. If they found that the plaintiff understood the risk and consciously encountered it, she lost entirely.

   b. Today, in most jurisdictions, even full appreciation of the danger posed by a defective product is not a complete defense to liability. The jury would be asked to assign a percentage of fault to Ortney for her choice to drive with knowledge of the danger. (Naturally, they might assign a higher percentage of fault for such a deliberate choice than they would for driving with vague concerns about the brakes.) Ortney's damages would be reduced to reflect her fault in deliberately using the car with awareness of the risk posed by the defective brakes.

3. a. Yes, it is possible. A product will frequently be defective due to negligence of the manufacturer in designing it. Indeed, if the risk/utility test applies to the design defect claim, a finding that the design was defective (because the manufacturer had not properly balanced risk and utility) would usually support a finding that the manufacturer was negligent as well. If the jury finds that the design was unreasonably dangerous, they presumably also would find that Pretoria was negligent for using that design.

   b. If the jury found that the brakes were defective because Pretoria was negligent in designing them, Ortney would recover on her negligence claim. However, if the jurisdiction applied comparative negligence, her negligence would reduce her recovery on the negligence claim. For example, if the jury had found Ortney 20

percent negligent, she would recover a judgment for 80 percent of her damages on the negligence count. (In a contributory negligence jurisdiction, she would lose entirely.)

However, the jury's finding that she was negligent would have no effect on the strict liability count. Under the approach of §402A, contributory negligence was not a defense to a strict liability claim, so Ortney would recover fully on the strict liability claim. The judge should enter judgment on the negligence claim for 80 percent of Ortney's damages, but on the strict liability count for 100 percent of those damages. Of course, the plaintiff could not recover twice (or almost twice) by recovering on two theories. But she could choose to enforce the strict liability judgment for her full damages and thus recover fully despite her negligence.

This anomaly — that the same events could lead to judgments for different amounts based on the same conduct — is eliminated in jurisdictions that apply comparative fault to strict products liability claims. The plaintiff's negligence is treated the same way on the strict liability count and the negligence count, as a damage-reducing factor rather than as a full defense.

A Tough Question and a Tough Choice

4. This is the kind of tactical decision that litigators often face in trying to serve their clients' interests. The problem is that it is not clear whether Hedgepeth will be found to have assumed the risk of his injury by climbing on the tank, even though it was sometimes "real slick." If the jury concludes that he fully appreciated this danger, and chose to encounter it, he will lose entirely under West Dakota law, based on the assumption of risk defense. If, on the other hand, the jury concludes that he was simply negligent for disregarding a risk that the tank would be slippery, he would recover fully, with no deduction for his negligence, since West Dakota does not reduce recovery in strict products liability cases based on a plaintiff's contributory negligence. So West Dakota is either the best or the worst choice, depending on the subtle factual distinction between consciously assuming a specific risk and acting negligently without fully appreciating the consequences of that choice.

   If Hedgepeth sues in East Dakota he will probably recover

something. The assumed East Dakota law treats plaintiff's fault as a damage-reducing factor, whether the jury characterizes his conduct as assumption of risk or negligence. So this is the conservative choice. But, the jury might find him pretty careless for walking on top of the tank, so this could mean a substantially reduced recovery.

There is no "answer" to this question. It is a difficult judgment to make, based on counsel's assessment of the likelihood that a jury would label Hedgepeth's conduct as assumption of the risk. Adventurous lawyers might "roll the bones" by suing in West Dakota. The more timid would likely opt for the safer course and sue in East Dakota.

Use and Misuse

5. The knife manufacturer might argue that Pahti was negligent to use a paring knife to open a can of paint. However, in some jurisdictions, a plaintiff's negligence is not a defense at all, and in most, it is only a partial defense, under comparative negligence rules. A better argument would be that Pahti had used the knife for an unforeseeable purpose for which it was never intended. If the court (or the jury) finds that this is true, Accu-Cut would not be liable at all. To recover on a strict products liability theory, Pahti must prove that the knife was defective when used for the purpose for which it was intended, or at least for a purpose that Accu-Cut should have anticipated that it would be used. If this is an unforeseeable misuse (which it probably is), the knife is not defective, even though it was unfit for that use.

   Surely this limitation on strict liability makes sense. Accu-Cut, in designing knives, can't be expected to contemplate its use for a screwdriver, a splint, or other idiosyncratic uses that might occur to a buyer. They are entitled to focus on the risks and utility of the knife as a knife, and perhaps for other closely related, foreseeable uses. A knife can't be all things to all people; if manufacturers had to design products for all possible uses, they could never design a decent knife.

6. a. Carlino might argue that the puffs were defectively designed because they were flammable. However, it seems doubtful that cosmetic puffs, generally used individually for applying or removing cosmetics from the skin, are defective even if they are flammable. A

stronger argument (though still somewhat shaky) is that Acme could foresee this type of misuse, and therefore should have included a warning with the puffs of the danger that they would catch fire. Acme need not design its puffs for that use, the argument goes, but it should at least warn people of the danger of that foreseeable misuse.

b. Acme might argue that Carlino was contributorily negligent for using the puffs for a Halloween costume. This argument would be based on misuse as a form of negligence. However, a jury might find that she *wasn't* negligent for doing so, in light of the low risk of igniting one's clothes. And, if she was negligent, that would not necessarily reduce her recovery, since in some states contributory negligence is not a defense to strict products liability claims. (In other states, however, her negligence would reduce recovery in proportion to her fault.) Acme might also argue that Carlino was negligent for getting too close to the stove. If she was, the effect of that negligence, as just stated, varies from state to state.

However, Acme's best argument is that gluing the puffs onto a Halloween costume is not a foreseeable misuse of the product. Again, this is not really an affirmative defense, but an argument that Carlino cannot establish an element of her prima facie case: that the puffs were used for a purpose for which they were intended, or a foreseeable misuse. If they are put to some truly bizarre alternative purpose, they are not defective if they fail to serve that purpose safely. In *Trivino v. Jamesway Corp.*, 539 N.Y.S.2d 123 (N.Y. App. Div. 1989), on which this example is loosely based, the trial court granted summary judgment for the manufacturer, but the appellate court reversed, holding that it was a jury question whether this use of the puffs was an unforeseeable misuse.

Last, Acme might argue that the danger of the puffs igniting was obvious. If so, a warning would not be necessary, since users would be aware of it. The *Trivino* court held that this, too, was a jury question, so the plaintiff survived the summary judgment motion.

The "Open and Obvious" Defense

7. While manufacturers have a duty to warn users of the dangers of their products, including the dangers of misuse, they do not have to warn of

dangers that the user would already know about. It is probably foreseeable that consumers will misuse the cargo area of a pickup truck as a passenger compartment, but surely the danger of being thrown from the open bed of a pickup truck is "open and obvious." The duty to warn extends to dangers that the consumer would not readily understand from her common knowledge. Here, the obviousness of the danger obviates the need to warn of it, because the user very likely already knows about it. In *Maneely v. General Motors Corp.*, 108 F.3d 1176, 1180 (3d Cir. 1997), on which this example is based, the court rejected the plaintiff's failure to warn claim on this ground.

Naturally, there will be close questions as to when a danger is obvious. Does the manufacturer, for example, have a duty to warn of the danger of choking on a marshmallow? A Montana trial judge held that this danger was obvious, but in *Emery v. Federated Foods, Inc.*, 863 P.2d 426 (Mont. 1993), the appellate court reversed, on the ground that whether the danger was obvious was a jury question. A Michigan appellate court held that a manufacturer had a duty to warn of the risk of diving into the shallow end of its pool (see *Glittenburg v. Wilcenski*, 435 N.W.2d 480 (Mich. App. 1989)) but was reversed by the Michigan Supreme Court. It held (but with a dissent!) that the manufacturer owed no duty to warn of this danger, because it was open and obvious. *Glittenburg v. Doughboy Recreational Industries*, 491 N.W.2d 208 (Mich. 1992).

8. a. In this example Durabrand designed a machine that posed an unreasonable risk of injury to users. Since the danger could be substantially eliminated by a guard, the design is defective. Durabrand argues, however, that it is not liable because the danger posed by the machine was "open and obvious" to users.

In Example 9 from Chapter 16, Durabrand warned of the danger of hands getting caught in the machine. However, this warning did not avoid liability, since the danger could have been eliminated by a better design. If it was liable in that case, it surely should be liable here too, where its design is unreasonably dangerous and it does not warn of the danger. The machine is defective because the danger should not exist at all: The machine should be designed with a guard that eliminates the danger. Durabrand should not be allowed to

defend a design defect claim by arguing that it designed an *obviously* dangerous product. The machine should not have been marketed in that form at all. If Durabrand's argument were accepted, it would mean that the more egregious the danger of its product, the greater the protection it would enjoy from design defect liability.

b. Durabrand's "open and obvious" defense to the failure to warn claim is more credible. There is no duty to warn of obvious dangers; if the danger here was indisputably obvious, Durabrand might get summary judgment on the failure to warn claim. In many cases, however, whether the danger was obvious will be a factual question appropriate for the jury to decide.

So here, the open and obvious defense might defeat a failure to warn claim, but the obviousness of the danger does not defeat the claim for defective design, based on the theory that the danger should have been designed out of the product. Indeed, the obviousness of the danger strengthens the argument that it was defectively designed.

c. As the Introduction indicates, most states have now folded the concept of assumption of the risk into their comparative negligence schemes. Thus, the jury would be instructed to assess Gainor's knowing choice to use the machine despite the clear danger posed by the exposed stamping blades and determine whether to assign her a percentage of fault for making that choice. Her recovery would be reduced to reflect the percentage of fault assigned to that choice.

Some states, however, do not recognize the assumption of the risk defense in the workplace context, on the theory that employees don't really have a choice about completing workplace tasks with the equipment supplied to them. See, e.g., *Johansen v. Makita U.S.A., Inc.*, 607 A.2d 637, 642 (N.J. 1992).

Unknowable Dangers

9. As the Introduction indicates, some cases have held that a product is "defective" if it lacks warning of a danger, even if the manufacturer had no reason to know of that danger when it marketed the product. See, e.g., *Beshada v. Johns-Mansville Products Corp.*, 447 A.2d 539, 546-547 (N.J. 1982). The logic for this is that strict products liability is based

not on the conduct of the manufacturer, but on the unreasonable risk posed by the product. If such a danger turns up, the consumer has been exposed to it whether or not the manufacturer could have anticipated it.

However, most courts today would accept Leahy's argument that it is not liable for "unknowable" dangers posed by its product, as long as it had conducted reasonable testing before marketing the drug. These courts hold that if the risk could not have been anticipated based on the state of scientific knowledge and reasonable testing at the time of sale, the manufacturer is not liable for injuries resulting from that risk. See, e. g., *Potter v. Chicago Pneumatic Tool Co.*, 694 A.2d 1319 (Conn. 1997); *Barton v. Adams Rental, Inc.*, 938 P.2d 532, 539 (Colo. 1997); Restatement (Third) of Torts: Products Liability §2 cmt. a (product only defective if dangers reasonably foreseeable at time of distribution). Acceptance of the state-of-the-art defense is one of several ways in which "strict" products liability has converged with negligence law in the post-§402A era.

The State of Judge Fudd's Art

10. a. The prior example involved a claim of failure to warn of the side effect of a drug. A drug may not be defective, even if it poses a risk of side effects, if an adequate warning is given of those side effects, so users (and their doctors) can make adequate judgments about whether to use them. But a manufacturer cannot warn of a danger it doesn't know exists.

In this case, by contrast, the argument is that given the technology available at the time the defendant sold the car, it was not feasible to design an effective airbag. Just as it should not be liable for failing to warn of risks it could not anticipate, the manufacturer argues, it also should not be held liable for omitting safety devices that were not technologically feasible at the time of manufacture. This argument is based on the same underlying premise, that the limits of scientific and technical knowledge should be considered in determining the manufacturer's liability for product injuries.

Courts that accept the state-of-the-art defense are likely to accept it in both the warning and design contexts. It seems axiomatic that a state that follows the Third Restatement of Products Liability would

accept the state-of-the-art defense in design defect cases. The Third Restatement requires the plaintiff, in order to prove a design defect, to show that a reasonable alternative design existed that would have eliminated the danger. Restatement (Third) of Torts: Products Liability §2(b). The essence of the state-of-the-art argument in this context is that no safer design was feasible at the time of manufacture.

b. Judge Fudd's instruction suggests that the car was not defective for failure to provide an airbag unless at least one other manufacturer was using them when it sold the car to Pollard. This is not an accurate instruction, even in a jurisdiction that recognizes the state-of-the-art defense. That defense provides that a manufacturer is not liable for failure to include a safety feature if, in light of the technology available at the time it sold the product, it would not have been aware of the need for the feature, or had the technical means to provide it. This argument, that "no manufacturer would have been aware of the need for this, or been able to provide it," is quite different from the argument that "no manufacturer *was doing it* at the time I sold the product." As Judge Learned Hand opined in a different context, "a whole calling may have unduly lagged in the adoption of new and available devices." *The T.J. Hooper*, 60 F.2d 737, 740 (2d Cir. 1932). The state-of-the-art argument is that an adequate safety device *could not* reasonably have been provided at the time of sale, not that no manufacturer was doing so.

   On the other hand, evidence that no other manufacturer provided airbags is certainly probative on the issue of feasibility. As in negligence cases, this type of evidence is admissible, but not dispositive. See Restatement (Third) of Torts: Products Liability §2 cmt. d.

11. The problem here is that Judge Fudd has imported the state-of-the-art defense from the design defect/ warning context and applied it to a manufacturing defect case. The gist of the state-of-the-art defense is that a manufacturer cannot be faulted if the design of its product is reasonably safe, in light of the technology available at the time it designed and sold the product. Similarly, the trend in the cases applies the state-of-the-art defense to failure to warn claims as well: A

manufacturer does not have a duty to warn of product risks it could not have discovered, in the exercise of reasonable care and pre-sale investigation, before it sold the product.

Here, however, Holden's argument is that there was no technologically feasible way to detect this type of manufacturing defect, and consequently, it should not be held liable for failing to detect it. The argument isn't a bad one; Holden is in some sense just as "blameless" for failing to detect this problem as it would be for failing to institute a design that wasn't technologically feasible. Yet, Professor Dobbs suggests that "know-ability of risks is logically no part of the manufacturing defect case." Dobbs, The Law of Torts at 1033. Manufacturing defect cases, are, after all, the last bastion of "true" strict liability in the products area. Holden's argument would probably not prevail in most jurisdictions. However, several products liability statutes appear to apply the state-of-the-art defense even to manufacturing defect cases. See Iowa Code §668.12; Ky. Rev. Stat. §411.310.

Fish or Fowl? A Too Hard Hypothetical

12. a. Here, Trask has misused the solvent, by ignoring the warning. What effect should Trask's misuse have on his claim? Should it bar it, or reduce his recovery? Acme should argue that Trask cannot show that its solvent was defective, because used as directed it is safe. It could not design the risk of the rash out of the product, and it warned users of that risk. It will argue that it has the right to expect users to use products according to adequate instructions and warnings. If the product is safe when so used, Acme argues, the product is not defective, so Trask cannot make a prima facie case of strict products liability. And the necessary warning was given. What more can it do? If, in spite of all that, it is liable for Trask's injury, it seems like a form of absolute liability; it is held liable no matter what it does if the product causes injury.

    b. Trask would doubtless argue that it is foreseeable that users will sometimes ignore the warning and use the solvent without gloves. Since such misuse is foreseeable, the product is defective if it is dangerous for that use. Trask's recovery should be reduced to reflect his fault in ignoring the need for gloves, but not barred entirely.

Even if his choice would constitute conscious assumption of the risk, the example states that the relevant law treats assumption of risk as a form of comparative fault, so Trask's recovery should be reduced, not barred. Under this approach, Trask might still recover substantial damages.

Most courts would hold, I think, that when Acme provides a product that is reasonably safe when used as directed, and warns of dangers that cannot be designed out of the product without undermining its function, the product is not defective. On this logic, Trask should lose entirely. Otherwise, Acme is liable despite offering a reasonably safe product, and providing adequate warnings of the irreducible dangers associated with its use.

> Where warning is given, the seller may reasonably assume that it will be read and heeded; and a product bearing such a warning, which is safe for use if it is followed, is not in defective condition, nor is it unreasonably dangerous.

Restatement (Second) of Torts §402A cmt. j. See *Uptain v. Huntington Lab. Inc.*, 723 P.2d 1322, 1326 (Colo. 1986). Some states also have statutes that deny recovery if the plaintiff ignores adequate product directions or warnings. See, e.g., Ariz. Rev. Stat. §12-683(3); N.C. Gen. Stat. §99B-4(1).

However, a few cases have treated the plaintiff's failure to follow directions in such circumstances as a form of comparative fault. See, e.g., *Malen v. MTD Products, Inc.* 628 F.3d 296, 313 (7th Cir. 2010) (applying Illinois law); *Barnard v. Saturn Corp.*, 790 N.E.2d 1023, 1029-1030 (Ind. App. 2003) (finding that the decedent ignored adequate warnings should be assessed as fault under the comparative negligence statute). See now *Campbell Hausfeld/ Scott Fetzer Co. v. Johnson*, 109 N.E. 3d 953 (Ind. 2018) (overruling *Barnard*).

c. Assuming that Trask would lose if he had read the label, on the ground that the product was not defective, he also should lose if he didn't read the label. The logic in the first case is that the solvent is not defective, so long as an adequate warning is given, so Trask cannot make out a strict products liability claim. If that is true when he reads the label, it is equally true when he doesn't.

1. This chapter uses the term *strict products liability* to refer to claims under §402A of the Second Restatement of Torts, §2 of the Third Restatement of Torts (Products Liability), or similar state law, authorizing recovery for injuries caused by defective products.

2. As Judge Richard Posner has wryly observed, the law "is an instrument of governance, not a hymn to intellectual beauty." *Newman-Green, Inc. v. Alfonzo-Larrain R.*, 854 F.2d 916, 925 (7th Cir. 1988).

3. Restatement (Third) of Torts: Products Liability §17 cmt. a.

4. For a ridiculous example of this unforeseeable use concept, consider *May v. Gillette Safety Razor Co*., 464 N.E.2d 401 (Mass. App. Ct. 1984). In *May*, the plaintiff swallowed a razor blade. *His* estate sued Gillette, alleging that it was not (as it was represented) made of stainless steel, and therefore did not show up on an x-ray! The court refused recovery, on the ground that a razor blade is not defective even if it will not show on an x-ray. Gillette was not bound to design a razor blade with this use in mind.

5. See *Jimenez v. Sears, Roebuck and Co*., 904 P.2d 861, 872 (Ariz. 1995) (Martone, J., concurring).

6. Frumer & Friedman, Products Liability §12.02[4].

7. See Restatement (Third) of Torts: Products Liability §2, reporter's note at 104-107.

PART V

Damages for Personal Injury

CHAPTER 18

Personal Injury Damages: The Elements of Compensation

INTRODUCTION

Plaintiffs bring lawsuits for a variety of reasons, but when the cause of action is in tort, the reason is almost always to obtain monetary compensation for the injury.

We might well pause for a moment to ask whether this makes sense. If Krutch runs down Gray, breaking Gray's leg, why should the legal system respond by ordering Krutch to pay money to Gray? Aren't there other responses that would make more sense? Perhaps the court should order Krutch to perform services for Gray, take a driving course, or publicly acknowledge responsibility. Or maybe the court should provide social services to Gray, or retraining, or visits from neighbors, or who knows what.

Such responses to personal injury might be more creative than the impersonal transfer of dollars from the defendant (or his insurer) to the plaintiff. But the fact is that the usual balm the law provides to personal injury plaintiffs is money. Such payments are called "compensatory damages," and it is sometimes said that they are intended to "repair[] plaintiff's injury or . . . mak[e] him whole as nearly as that may be done by an award of money." Harper, James & Gray §25.1 at 493.

Clearly this goal is an idle dream in many cases: No amount of money

could possibly compensate an active, healthy adult rendered paraplegic in an auto accident, a child disfigured by severe burns, or a patient brain-damaged by excessive anesthesia. These plaintiffs can never be put back in their pre-injury position, and none of us would incur their injuries for any sum. However, while money damages may seem an inadequate response to such injuries, they do help. A paraplegic with a two-million-dollar trust fund is a lot better off than he would be with no money and impaired earning power, and a remedy that provides the trust fund is, if imperfect, still a good deal better than nothing. And so tort law endeavors to provide the injured plaintiff a sum of money adequate to *compensate* him, though certainly not to *restore* him to his pre-injury position.[1]

THE SINGLE RECOVERY RULE

Perhaps the most fundamental point to grasp about tort damages is that the plaintiff must seek compensation for all his losses from the tort in a single trial. That is, he must prove both past damages and any future losses he is likely to experience from the injury — such as future medical expenses, lost wages, or medical complications — at the time of trial. The rationale for the rule is not hard to discern. Without it, cases would have to be reopened every time the plaintiff incurred further losses due to an injury, to allow recovery for those additional losses. There is simply no way the judicial system could entertain such repeated claims; it is hard enough to provide even a single hearing for the numbers of cases that confront the courts today.

While this "single recovery rule" makes administrative sense, it places the plaintiff in a difficult, at times untenable position. As the sage has noted, "the art of prediction is very unpredictable . . . particularly when it pertains to the future."[2] It is often very difficult to anticipate whether the plaintiff will need future operations, have his work-life expectancy shortened, or incur a further disability due to his injury. Under the single recovery rule, however, the plaintiff must make just such predictions about events that may lie far in the future — and prove them by a preponderance of the evidence.

Even if such future problems *may* arise, they may not be sufficiently likely to support a damage award under the single recovery rule. Most courts hold that the plaintiff can recover for future consequences of an injury if he

proves that they are a reasonable *probability* (Minzer, Nates, eds., Damages in Tort Actions §9.06[6][b]), but an award may not be based on "mere conjecture or speculation." Id. If the plaintiff might need future surgery, but probably will not, most courts would not allow him to recover damages for it. If, then, he actually does require the surgery, he will be barred by the single recovery rule from bringing a second suit for the losses associated with that surgery. Similarly, if the plaintiff cannot prove that the injury will prevent him from working, he will not receive damages for future lost earning capacity. If in fact he is unable to return to work, that loss will go uncompensated.

Of course, this can work both ways: The plaintiff might prove that he is likely to require future surgery, and recover damages for it, but then do better than expected and not require surgery. If so, he will have received damages for a loss he ultimately did not incur, but will not have to return the damages recovered for that future risk.

THE ELEMENTS OF COMPENSATORY DAMAGES

The three usual components of compensatory damages are medical and related expenses, lost earnings and earning capacity, and pain and suffering. Let's examine each of these in a little more detail.

A. Medical Expenses

The plaintiff is entitled to compensation for all medical costs of diagnosing and treating the injuries resulting from the tort, such as doctor and hospital bills, medicines and special therapeutic equipment, rehabilitation therapy, travel for medical treatment and ongoing nursing care. These services are incurred to cope with the consequences of the accident, and their cost should be shifted to the tortfeasor who caused the injury rather than borne by the victim.

Past medical expenses are often fairly easy to calculate. The plaintiff can submit medical and hospital bills and offer expert testimony to prove the

reasonable value of these losses. But even such tangible economic losses as medical costs become extremely difficult to calculate if they will extend for a significant period into the future. Under the single recovery rule, the plaintiff must offer proof of what his future medical expenses will be, years or decades before they occur, and the jury must attach dollar sums to these future expenses based on the evidence before them.

For example, if the jury concluded that the plaintiff would probably require future surgery to relieve muscle problems related to a burn injury, they would have to determine the proper sum to compensate him for the medical expenses of that operation, even though it might occur 20 years down the road. They would also have to value the associated pain, any resulting loss of earnings, the costs of rehabilitation, and so forth. Needless to say, any sum the jury awards for such future contingencies would be charitably viewed as a rough approximation. Measuring such damages may not be "a leap in the dark, but it is certainly a leap into the deep dusk of twilight." D. Dobbs, Law of Remedies, Practitioner Treatise Series, vol. 2, §8.1(1) at 361 (2d ed. 1993).

B. Lost Earnings and Earning Capacity

The second component of compensatory damages is lost earnings and earning capacity. Lost earnings refers to *past* income losses due to the injury, that is, earnings lost between the time of injury and the time of trial. Clearly, if the plaintiff was out of work for ten weeks because of the injury, the tort-feasor should compensate him for the wages lost as a result. Lost earning *capacity* refers to loss of *future* earning potential. If the injury will prevent the plaintiff from going back to work for a period of time, it has affected his ability to continue to earn money in the future. Under the single recovery rule, he must be compensated at trial for this future loss.

Lost earnings, like past medical expenses, can usually be calculated fairly accurately, based on the plaintiff's earnings record for the period immediately prior to the accident, evidence of his likely advancement had he not been injured, and evidence concerning changes in the salary structure of his employer up to the time of trial. But future earning capacity is seldom so easily assessed. First, the jury will have to determine how long the plaintiff would have worked if he had not been injured. This may depend on the type of work he did, his life expectancy, state of health *prior to* the injury, and

level of interest in his work. Other factors that might have led him to retire early must also be considered, such as a spouse's retirement, an unrelated medical condition which could cause him to move to a different climate, or an anticipated inheritance.

Second, the jury will have to determine what type of work the plaintiff would have done if he had not been injured. For plaintiffs with a long-established work history, this may be clear, but in other cases it is not. Maybe the plaintiff was working as a secretary for a year to pay off some loans, but planning to enter business school the year after. Maybe he graduated magna cum laude from Berkeley, but was working as a truck driver for a while as a lark. Maybe he was earning $150,000 as a partner in a law firm, but hated his work passionately and would not have lasted another six months. (Imagine the difficulty defense counsel would have proving that crucial but subjective fact.) To compound the problem, suppose that he was not working at all when injured, but likely would have returned to the work force at some point. Or consider the case of a plaintiff five years old at the time of the injury, with no work history, educational history, or other basis for estimating his future income potential.

Even if it is reasonably clear what work the plaintiff would have undertaken, the jury will have to decide what his salary would have been during those years. Ideally, this projection would include such factors as prior advancement in his job, the projected future fortunes of his employer, the general state of the sector of the economy in which he worked, the prospects that he would have been promoted or moved to a more lucrative position with another employer, possible alternative employment he may be able to find after his injury, and doubtless many others unique to each plaintiff's circumstances.

In addition, if the plaintiff is really to be fully compensated for future lost earnings, the jury should consider fringe benefits, such as health insurance, a company car, educational credits, bonuses, and stock options. And how about retirement? If the defendant's tortious conduct has deprived the plaintiff of the opportunity to build a retirement fund partially funded by the company, this benefit should also be calculated. Here again, in assessing such damages, the jury is called upon to make judgments that would intimidate the most experienced actuary.

C. Pain and Suffering

The third component of damages, "pain and suffering," can cover a lot of ground. It certainly includes physical pain from the impact of an accident, but it also includes ongoing pain from a wound, or long term discomfort from a permanent condition such as a limp or weakened back. It also includes the pain of medical procedures (such as surgery, grafting, or physical therapy) to treat the injuries.

Beyond these obvious connotations, the phrase also includes many other types of mental suffering from the consequences of the injury, such as the humiliation, anguish, or embarrassment suffered from living with permanent disfigurement, the frustration of dealing with disability caused by the injury, the fright associated with a traumatic accident, fear of a recurrence of the accident, or depression induced by the injury and its consequences. Thus, "pain and suffering" is a catch-all term that can encompass almost any kind of subjective reaction to the accident or its consequences. "[T]he unitary concept of 'pain and suffering' has served as a convenient label under which a plaintiff may recover not only for physical pain but for fright, nervousness, grief, anxiety, worry, mortification, shock, humiliation, indignity, embarrassment, apprehension, terror or ordeal." *Capelouto v. Kaiser Found. Hosp.*, 500 P.2d 880, 883 (Cal. 1972).

Obviously, such sensations are highly subjective; there is no scale or mathematical process jurors can use to reach a dollar figure to compensate the plaintiff for them. They must simply pick a number based on their sense of the severity of the loss the plaintiff has suffered. The judge might give the jury an instruction like this on assessing damages for pain and suffering:

> In assessing damages, if you have occasion to do so, the law allows you to award to plaintiff a sum that will reasonably compensate him for any past physical pain, as well as pain that is reasonably certain to be suffered in the future as a result of the defendant's wrongdoing.
>
> There are no objective guidelines by which you can measure the money equivalent of this element of injury; the only real measuring stick, if it can be so described, is your collective enlightened conscience. You should consider the evidence bearing on the nature of the injuries, the certainty of future pain, the severity and the likely duration thereof.
>
> In this difficult task of putting a money figure on an aspect of injury that does not readily lend itself to an evaluation in terms of money, you should try to be as objective, calm and dispassionate as the situation will permit, and not to be unduly swayed by considerations of sympathy.

G. Douthewaite, Jury Instructions on Damages in Tort Actions 274 (1988). Basically, this instruction throws the matter to the jury without guidance, but

with a plea for them to be objective even if there are no objective guidelines to apply.

LOSS OF ENJOYMENT OF LIFE

In addition to the unpleasant sensations and emotions usually associated with the concept of pain and suffering, tort victims also frequently suffer loss of the opportunity to engage in many of life's pleasurable activities. If his leg is maimed in the accident with Gray, Krutch will doubtless suffer the physical pain and mental anguish generally associated with such injuries. But he may also lose the ability to play tennis, to take walks in the woods, to carry his son to school, to dance, or to enjoy many of life's other common, pleasurable experiences. These functional impairments go beyond the usual connotations of "pain and suffering," but are also common consequences of serious injuries.

Such impairments are often profound — perhaps the most profound — consequences of physical injury. Imagine, for example, that Krutch's most cherished activity is playing the violin, and that he suffers a hand injury that prevents him from doing so. Or suppose that the accident destroys his sense of sight or taste. Certainly, these are grievous losses above and beyond the sensation of physical pain or fear immediately stemming from the injury.

Many courts describe these losses, aptly enough, as "loss of enjoyment of life." Most courts recognize that such losses are compensable, but the cases are split over whether damages for loss of enjoyment are analytically a type of "pain and suffering" or a separate element of compensatory damages. Some courts treat loss of enjoyment as a form of pain and suffering: The mental suffering that comes from the plaintiff's realization that he can no longer engage fully in life's pleasure. Courts that take this approach will refuse to give the jury a separate instruction on "loss of enjoyment" damages, on the ground that it duplicates the pain and suffering instruction and invites the jury to compensate the plaintiff twice for the same losses. See, e.g., *McDougald v. Garber,* 536 N.E.2d 372, 375-377 (N.Y. 1989).

Other courts have recognized loss of enjoyment as a distinct category of compensable damages. See, e.g., *Thompson v. National R.R. Passenger Corp.,* 621 F.2d 814, 824 (6th Cir.), *cert. denied,* 449 U.S. 1035 (1980), in

which the court concluded that "pain and suffering compensates the victim for the physical and mental discomfort caused by the injury; and loss of enjoyment of life compensates the victim for the limitations on the person's life created by the injury." See also *McGee v. A C and S, Inc.*, 933 So. 2d 770 (La. 2006) (allowing separate item on special verdict slip for loss-of-enjoyment damages); *Boan v. Blackwell*, 541 S.E.2d 242, 243-245 (S.C. 2001). Courts that take this view allow the trial judge to instruct the jury separately on loss of enjoyment of life. Plaintiffs' counsel naturally prefer such a separate instruction, since it emphasizes the distinct nature of loss of enjoyment damages and invites the jury to consider them apart from a general pain and suffering award.

It is probably not of great consequence whether loss of enjoyment is characterized as part of pain and suffering or as a separate component of compensatory damages. The important thing is that everyone — the lawyers, the judge, and the jury — understands that, whatever called, such restrictions on the plaintiff's "ability to function as a whole person" *(Canfield v. Sandock*, 563 N.E.2d 1279 (Ind. 1990)) are proper elements in the assessment of damages. Plaintiff's counsel may introduce evidence of all the ways in which the plaintiff's injury has impaired his ability to engage in activities he previously enjoyed. Where such evidence is offered, the judge should explain to the jury that they are entitled to compensate the plaintiff for these losses, in addition to the physical pain and emotional distress traditionally associated with "pain and suffering."

THE ELUSIVE CONCEPT OF "DISABILITY"

Although all states recognize the basic categories of damages discussed above, some courts may use different terms, such as "disability" or "permanent impairment" in discussing compensatory damages. These terms often overlap with several concepts already discussed, particularly loss of enjoyment and lost earning capacity.

In its strictest sense, "disability" or "permanent impairment" refers to the injured party's *condition*, not to the losses suffered as a result of that condition:

> Disability and permanent injury refer to states of ill health that preclude an injured person from

> carrying on normal activities of life in the manner which would have been possible had the injury in question not occurred.

Minzer, Nates §4.02[2][cJ. While this definition sounds similar to loss of enjoyment, it is more accurate to view loss of enjoyment as the *consequence* that flows from the plaintiff's disabled condition. For example, the loss of a leg is an impairment or disability. The loss of the opportunity to engage in activities as a result of that disability — running marathons, hiking, or whatever — constitutes a consequential loss of enjoyment for which damages may be awarded.

However, many courts use the terms "disability" and "permanent impairment" loosely as the equivalent of "loss of enjoyment of life." These courts will instruct the jury that they may assess damages for the plaintiff's "disability," but will not instruct separately on loss of enjoyment damages: It would frequently allow double counting to instruct the jury to award damages for both disability and loss of enjoyment. See P. Hermes, Note, Loss of Enjoyment of Life — Duplication of Damages Versus Full Compensation, 63 N.D. L. Rev. 561, 579 (1987).

There is also frequent confusion between "disability" and lost earning capacity. Here again, the *condition* of being disabled leads to the *consequence* of lost earning capacity. If the jury is instructed to award damages for lost earning capacity, the instructions should make clear that they should not award the same losses under a separate "disability" instruction, even though the earnings loss stems from the disability. On the other hand, it is quite possible to have disability without loss of earning capacity: If Krutch is a computer programmer who loses a leg in an accident, for example, he might return to work in a few weeks with little or no loss of salary. Yet clearly he has suffered a permanent, serious disability — in the sense of interference with enjoyment of life — that should be compensated.

ECONOMIC vs. NONECONOMIC DAMAGES

The elements of damages discussed above are often grouped into *economic* and *noneconomic* damages. Lost earnings, lost earning capacity, and medical and other out-of-pocket expenses are considered *economic* or *tangible* damages, since they are actual dollar losses that can be calculated. By

contrast, pain and suffering and loss of enjoyment are *noneconomic* or *intangible* damages which the jury has no mathematical or accounting basis for valuing. Infliction of emotional distress and loss of consortium also fall into this category.

The distinction between economic and noneconomic damages has become increasingly important in recent years. A good many legislatures, reacting to large increases in insurance costs, have enacted caps on noneconomic damages such as pain and suffering and loss of consortium. For example, Idaho Code §6-1603 provides:

> (1) In no action seeking damages for personal injury, including death, shall a judgment for noneconomic damages be entered for a claimant exceeding the maximum amount of two hundred and fifty thousand dollars ($250,000).[3] . . .

Other states have enacted caps on noneconomic damages in particular types of cases, such as medical malpractice:

> (a) In any action for injury against a health care provider based on professional negligence, the injured plaintiff shall be entitled to recover noneconomic losses to compensate for pain, suffering, inconvenience, physical impairment, disfigurement and other nonpecuniary damage.
>
> (b) In no action shall the amount of damages for noneconomic losses exceed two hundred fifty thousand dollars ($250,000).

Cal. Civ. Code §3333.2. Needless to say, statutes of this type do not warm the hearts of the plaintiff's bar, since they reduce plaintiffs' recoveries and counsel's contingent fees. They represent a legislative compromise between the ideal of full compensation and the reality of limited resources. The debate about such compromises has been heated, and continues to be. A major indictment of damage caps is that they limit the recovery of those who need it most: Plaintiffs with lesser injuries recover fully for their intangible damages, while those most seriously injured may recover only a fraction of their intangible damages. A good argument can be made that a *floor* on intangible damages would be more fair. This approach would bar recovery for intangible losses where the economic loss (and therefore, presumably, the underlying physical injury itself) is minor, but preserve full recovery to victims of catastrophic injury.[4]

While the terminology courts use in analyzing compensatory damages may vary, the fundamental inquiry does not. The jury must assess the plaintiff's situation after the injury compared to his situation before. They must consider his physical and emotional suffering from the injury, his lost

opportunities, both economic and personal, as a result of the injury and the economic costs of dealing with the injury. From this analysis they are to distill a sum of money damages to "compensate" him for all losses he has suffered or will suffer in the future from the injury. The examples below explore these damage issues in the context of particular cases.

Examples

The Art of Prediction

1. Mendel, a 25-year-old truck driver, is injured in a traffic accident and rendered permanently paraplegic. He sues the other driver. If you represented Mendel, for what types of future medical and therapeutic expenses would you seek compensation?

2. Assume that Mendel only suffers a concussion in the accident. He has minimal medical expenses, but testifies that he has developed tinnitus, or ringing in the ears, as a result of the impact. Tinnitus is a recognized medical condition, but it is very hard to corroborate its existence by medical tests. Mendel testifies that the ringing is always there, that it is a constant irritant, that it has made him irritable and difficult with his family. He continues to work as a construction worker, but the condition interferes with his ability to concentrate on many leisure activities, such as card playing or reading. It also makes it very difficult for him to get to sleep, so that he is always tired.

   Assume that liability is clear, and that medical costs and lost earnings are negligible. The defendant's insurer offers $35,000 to settle Mendel's claim. If you represented Mendel, would you take it?

3. Audubon, a 42-year-old naturalist, is seriously injured in an accident involving his car and Darwin's. The evidence at trial indicates that Audubon is totally disabled. Due to his injury, his life expectancy has been shortened from 31 years to 20 years, and his work life expectancy from 25 years to zero. Stated another way, before the accident Audubon could have expected, based on statistical tables, to live to the age of 73, and work to the age of 67. However, due to his injuries he will now likely live only to the age of 62, and will not return to work. The

evidence also indicates that he will continue to endure pain, embarrassment, and other psychic injuries from the accident until his death.

a. If Darwin is found liable, for what time period should the jury assess damages for Audubon's lost earning capacity?

b. Assuming that Audubon will continue to experience pain and mental anguish from the accident as long as he lives, for what period should the jury assess damages for pain and suffering?

c. Should the jury award damages to Audubon for the shortening of his life span?

d. For what period should the jury award damages for loss of enjoyment of life?

The Single Be-Fuddlement Rule

4. Muir, a shipyard worker, contracts asbestosis, a respiratory disease caused by exposure to asbestos. He sues General Yards, the shipyard, for negligently failing to warn him of the danger of working with asbestos. At trial, he produces evidence of the pain and suffering he suffers from the disease, his medical expenses, and his impaired earning capacity. He also offers expert testimony that 20 percent of those who contract asbestosis later go on to develop cancer as well, and of the likely medical effects of this type of cancer. Counsel for General Yards objects to all evidence relating to the cancer risk. What is the basis of the evidentiary objection and how should Judge Fudd rule on it?

Unpredictable Predictions

5. Beebe is a college graduate with a degree in economics. She is also a mother of three. She worked as an administrative assistant at a college until her first child was born. Now, she has three children and does not work outside the home. She is injured in an auto accident and permanently disabled. If she sues the other driver, should she recover for lost earning capacity?

6. Thoreau, a 12-year-old child, is thrown from an off-road vehicle and

sustains serious injuries. As a result, he is left with a limp and permanent weakness in his right arm and leg. Thoreau had never worked prior to the injury.

a. In an action against the manufacturer of the vehicle, could Thoreau recover for loss of earning capacity?

b. Assume (though it is unlikely on these facts) that the jury found that Thoreau would be unable to work at all due to the injury. What evidence would be relevant to ascertaining the value of his lost earning capacity?

c. Assume that the jury concludes that Thoreau would have earned $900,000 as a laborer over his work life expectancy, had he not been injured, and that, due to his injury, he will not be able to do any kind of heavy work. Should they award him that sum as damages for lost earning capacity?

Missing Elements

7. Agassiz, a 79-year-old retired botanist, is hit by a concrete block which falls from the fifth floor of an apartment house. He is rendered permanently unconscious by the blow, and is maintained in a comatose state by various invasive procedures such as breathing and feeding tubes. Prior to the accident, Agassiz lived on his pension and Social Security, which he continues to receive. The medical bills for his treatment are truly impressive; luckily, they are covered by Medicare and his supplemental health insurance.

   a. Should Agassiz recover for pain and suffering?

   b. Should he recover for loss of enjoyment of life?

   c. Should Agassiz recover for the medical expenses for treatment of his injury?

   d. Should he recover for lost earning capacity?

An Emotion Motion

8. Watson is seriously burned in an intersection accident between a car in which he is riding as a passenger and a dump truck driven by Muir. One

of the two vehicles ran a red light, causing the collision. As a result of the accident, he is hospitalized for many months, is severely disfigured, suffers ongoing pain and a variety of humiliating and depressing side effects of his injuries. He will also require continuing treatment, including many operations, for the rest of his life. He sues for his injuries.

As trial approaches, one of the lawyers moves to "bifurcate" the trial, that is, to try the issue of liability first, and have the jury decide whether Muir negligently caused the accident before presenting evidence to the jury on Watson's damages.

a. Which lawyer probably made the motion, and why?

b. What are the arguments in favor of granting the motion?

c. What are the arguments against granting the motion?

9. Assume that Watson's case goes to trial on liability and damages. At trial, Watson's counsel seeks to introduce evidence that Agassiz, a plaintiff in another recent lawsuit, received a jury award of $5.3 million in damages for burns. Should the evidence be admitted?

Explanations

The Art of Prediction

1. You are probably not an expert in the medical treatment of paraplegia — though you might become one if you represented Mendel. But it is not hard to imagine the wide variety of medical problems that may result from paraplegia, and are likely to continue or worsen throughout the patient's life. Mendel, at 25, has a very long life expectancy, even if it is diminished somewhat by the injury. Over the years, he will likely require operations to cope with the consequences of his immobility, including, perhaps, plastic surgery to deal with sores on his body. He will need long-term physical therapy to preserve as much mobility as possible. He will need vocational training and counseling, sexual counseling, home care, special equipment, and home modifications to accommodate his condition. He will likely be hospitalized from time to time for more intensive care. He will need continuous medical

monitoring and prescription medications, and may develop a variety of diseases that must be treated as well. He is likely to require psychotherapy as well to assist in adjusting to his disability. For a fuller discussion of the medical consequences of paraplegia, see Minzer, Nates, ch. 126.

Naturally, Mendel himself knows little or nothing of all this, and probably does not want to think about it. His counsel must develop the proof based on Mendel's past treatment, current condition, and expert medical and actuarial testimony. Counsel must learn a great deal about the day-to-day effects of her client's condition, including such unglamorous realities as bowel and bladder control, bed sores, and muscle atrophy. Medical specialists will testify about the likely course of treatment his condition will require over the years, the probable prognosis for his long-term health, likely complications and corrective surgery, and the types of ongoing nursing and therapeutic services and medicines he will need. An accountant or economist will also testify as to the likely costs of such care, extrapolating out years or decades into the future, depending on the plaintiff's life expectancy.[5]

The defendant will likely present opposing experts on these issues, who reach substantially different conclusions concerning the required treatment and its projected cost. Ironically, the members of the jury, probably unschooled in either medical care or accounting, will then have to assign a sum to this element of damages based on their assessment of the evidence.

2. This is typical of the type of judgment attorneys must make all the time about the value of tort cases. Actually, it is simpler than most: Since negligence is admitted, Mendel's counsel does not have to consider the risk that he will be unable to establish that crucial element. In addition, since earnings and medical costs are negligible, the only real issue is the value of the intangible damages for tinnitus.

   Of course, Mendel's counsel does have to consider whether the jury will believe his client. Since the symptoms cannot be corroborated by objective measures, Mendel's testimony will be critical. If the jury concludes that he is making up the injury, they may find against him even though the defendant admits negligence: You have to prove all four elements to recover for negligence, including damages.

If we assume that Mendel is credible, and that the testimony of family and coworkers corroborates his story, the question then becomes what the injury is "worth." As the introduction states, there is no objective measure for such intangible damages, so it becomes very difficult to predict the number a jury will attach to it. Any settlement will be based on educated guesses of counsel as to what would happen if they went to trial. As an indication of how uncertain the damages may be, I gave the facts of Mendel's case to my Torts class, and asked the students to decide, individually, what they would award if they were on the jury. Their figures (offered about 20 years ago) ranged from $20,000 to over $500,000.[6]

If Mendel's counsel concludes that the jury would award $50,000 for this, he might still settle for $35,000. He has to consider the costs of trial and the risk that the jury will disbelieve his client. On balance, it might be a reasonable choice to accept. Obviously, if counsel expects a considerably higher verdict at trial — as the figures from my class suggest he might — he should hesitate to accept the insurer's offer.

3. a. The goal of tort damages is to "place the victim in the same position he would have been in if he had not been injured." If Audubon had not been injured, he would have had income up until the age of 67. Due to the accident, all of those earnings are lost. Most courts would hold that Audubon can recover for lost earning capacity based on his *pre-accident* work life expectancy, even though he is not now able to work, and will (statistically speaking) die eight years before he would have retired.

Arguably, calculating the future wages for the entire period overcompensates Audubon somewhat. If he had not been injured, he would likely have had his income for his full work life expectancy but would also have expended a large part of that on his living expenses. For the period from age 62 to 67, however, Audubon will not incur those expenses, due to his premature death (again, statistically speaking). It would be more accurate to require the jury to deduct the living expenses for that period from the earnings. Sounds a bit coldblooded, though, doesn't it? Darwin's counsel may hesitate to raise the argument, since it sounds like he is trying to take advantage of the fact that the accident has shortened Audubon's life

expectancy.

b. Damages for pain and suffering compensate the victim for having to endure physical and psychic pain, humiliation, and anguish caused by the injury. The award should be based on the period during which he will actually experience pain and suffering. In Audubon's case, he will have to endure these (again, statistically speaking) for 20 more years. Pain and suffering damages should be awarded for his 20-year post-accident life expectancy, not based on his pre-accident life expectancy.

c. This is an interesting issue. It is hard to deny that the loss of 11 years of life is grievous. It seems that Audubon ought to be compensated for that. On the other hand, if Audubon had been killed in the accident, he would have received no compensation for his lost years: Wrongful death actions compensate the *survivors* for their losses, not the decedent for his. See Chapter 19. But then, one of the rationales for the rule in death cases is that you cannot compensate the dead. Audubon is still alive. If we award him damages for his lost years, he can at least live out the years he has left a bit more pleasurably.

   The courts are split on whether loss of life expectancy is a proper element of damages. English courts have allowed limited recovery for reduced life expectancy, but most American courts have denied it. See Minzer, Nates, §8.07[9]. Several cases have recognized this as compensable, however, and there may be a trend in this direction. See, e. g., *Alexander v. Scheid, 726* N.E.2d 272, 280 (Ind. 2000); *Morrison v. Stallworth*, 326 S.E.2d 387, 393 (N.C. Ct. App. 1985).

   Even courts that deny recovery for lost life expectancy per se will often allow the jury to consider, as a part of pain and suffering, the mental anguish the plaintiff suffers from the *realization* that he will likely die before his time. In addition, since Audubon's lost earning capacity is assessed on the basis of his pre-accident life expectancy, this element of his "lost years" will be considered in assessing damages.

d. This is another interesting question. Loss of enjoyment damages compensate the plaintiff for her inability to participate in activities that she enjoyed prior to the accident. The types of losses included

are legion, from walks in the park to playing softball with the kids to sky diving to bocci to sitting on the front porch and watching the world go by. Had the accident not taken place, Audubon would have engaged in whatever activities he fancied for as long as he was able, in many cases up to the end of his life. Due to the accident, he can no longer do so. The loss of enjoyment damages should be assessed with regard to his pre-accident life expectancy, not his reduced expectancy after the accident.

If a court accepts this view and allows damages for loss of enjoyment based on Audubon's pre-accident life expectancy, this recovery will also partially substitute for a separate award for the lost years themselves. Naturally, a large part of the value of Audubon's lost 11 years is the enjoyment of the activities and sensations of life during that period. If the jury can compensate for this loss, they are effectively invited to compensate for the lost years themselves. There may be a technical distinction — they are not supposed to give an award for the loss of life per se — but it is one which is likely to elude most juries.

The Single Be-Fuddlement Rule

4. Doubtless, General Yards has objected to the evidence because it only indicates a 20 percent chance that Muir will develop cancer. Most courts hold that plaintiffs are entitled to recover for future injuries that are "reasonably probable," but 20 percent does not meet this standard. If Muir's evidence is insufficient to prove that cancer is a probable consequence, the jury should not hear it.

Obviously, Muir is in a very difficult position here. If he sues for his asbestosis damages, he will not recover any cancer damages in that action, and under the single recovery rule, he may be barred from bringing a second suit if he develops cancer later. Some courts have reached this conclusion under the single recovery rule. See, e.g., *Gideon v. Johns-Mansville Sales Corp.*, 761 F.2d 1129, 1136-1137 (5th Cir. 1983) (under Texas law, plaintiff must recover for present harm and all future consequences that will probably develop in the future). If Judge Fudd presides in such a jurisdiction, he should deny admission of the cancer evidence and Muir would recover nothing for this risk.[7]

Other courts, however, have recognized an exception to the single recovery rule, on the ground that cancer is a separate disease giving rise to a separate cause of action. See, e.g., *Pustejovsky v. Rapid-American Corp.*, 35 S.W.3d 643, 647-654 (Tex. 2000) (declining to follow *Gideon).* These courts would allow Muir to sue again if he contracts cancer in the future. If the Honorable Fudd presided in a state that takes this view, he would *still* deny admission of the cancer evidence in the initial action, but Muir would be able to recover for cancer in a later suit if he develops it.

This latter approach relieves the plaintiff from the difficulties of proof posed by the single recovery rule, but it has several serious implications. First, it will multiply litigation, since plaintiffs who have already sued for asbestosis will be entitled to sue again. In addition, this approach seriously erodes the single recovery rule, since plaintiffs will make the same argument in other types of cases where further complications of an injury arise that were not compensated in the original suit.[8]

There is a third possibility in such cases. The court could award damages to the plaintiff in the initial action for her *increased risk* of developing cancer. For example, if the risk is 20 percent, the jury could determine the damages that the plaintiff will incur if cancer develops, and award her 20 percent of that. This tracks the approach taken by some courts in loss-of-a-chance cases, and shares some of the same problems discussed with regard to that approach in Chapter 11, pp. 224–225.

Unpredictable Predictions

5. Although she was not working outside the home prior to the accident, Beebe certainly should receive damages for lost earning capacity. The fact that she was not working at the time does not mean that she would not have worked later. The odds are very good that a woman in her position would return to the work force when her children were older, if only to help with the staggering cost of college. Beebe's capacity to do so has been destroyed, and she is entitled to compensation for that. Estimating her lost earning capacity, of course, will be difficult, since she has little in the way of a track record on which to predict her earning

potential. The jury will simply have to do their best based on testimony about her background, interests, and opportunities, and economic testimony concerning wage trends for the type of work she would likely have undertaken in later years.

Beebe would be entitled to an award for loss of earning capacity even if she testified that she had no intention to work in the future, since the injury has deprived her of the *option* to work, should circumstances require her to do so. "The theory is that the injury has deprived the plaintiff of a capacity he would have been entitled to enjoy even though he may never have profited from it." *Hunt v. Bd. of Supervisors of the La. State Univ.*, 522 So. 2d 1144, 1152 (La. *Ct.* App. 1988).

6. a. Surely Thoreau should not be denied recovery for loss of earning capacity simply because he has no earnings history. It would make no sense to refuse recovery to a child plaintiff who is injured before starting to work, and perhaps loses *all* his potential earnings, while an adult who only lost part of his would be fully compensated for that loss. The jury should compensate Thoreau for his lost future earning capacity, even though it is exclusively a *future* loss and he has no earnings history.

While it is clear that Thoreau has a right to recover for lost earning capacity, it is less clear whether he has actually lost earning capacity, and, if so, how much. His partial disability would certainly interfere with his earning capacity if he were likely to become a manual laborer, but the interference might be minimal if he becomes a computer programmer or a stock broker. At the time of trial, Thoreau had no earnings history, no profession, probably no special skills or interests upon which to base a prediction of what work he would have chosen absent the injury. Thus, it will be very difficult for the jury to determine whether he has lost earning capacity. Yet they must decide, and might well conclude that an injury of this magnitude is likely to reduce his earning power. If they do, they may award damages, in some roughly appropriate amount, to compensate for the loss.

b. In arriving at a figure, the jury must decide what Thoreau was likely to have earned if he had not been injured, which turns on the kind of work he would have chosen. To predict this, the jury may consider

such factors as Thoreau's character, his health and physical skills, his record in school, his IQ, his background (including his parents' occupations and education), the likelihood that he would have finished high school and gone on to college, and his interests, as well as government statistics about earnings for different occupations and education levels. On the basis of such factors, the jury must determine Thoreau's pre-accident earning capacity. The result will of course be a gross approximation, but on balance preferable to denying compensation for a very serious economic loss.

Ironically, Thoreau's award may be higher if the evidence shows that he was academically deficient or less intelligent. If he shows strong intellectual ability, he may have lost little earning capacity, since he can still perform the work he would likely have chosen if he had not been injured. By contrast, a plaintiff with weaker academic skills would more likely make his living through some form of manual labor. A disabling injury would have a greater impact on his earning capacity and lead to a greater award.

Issues like future earning capacity often present very delicate problems of proof for defense counsel. Consider the issue of lost earning capacity for a 14-year-old boy killed by a police officer in the course of arrest. The jury has just heard the tearful testimony of the boy's mother about how diligent he was and how he hoped to grow up to be a firefighter. Now, counsel for the officer must present proof that the decedent had a long history of juvenile delinquency, truancy, failure at school, and general bad character, and that his most likely future was one of crime and incarceration. This evidence is clearly relevant to the issue of lost earning capacity, but it requires considerable skill to place it before the jury without alienating them.

c. The jury's calculation of Thoreau's loss begins rather than ends with the determination of what he would have earned. Thoreau's lost earning capacity cannot be measured solely by what he could have earned *before* the injury. The jury must make a separate assessment of what he can earn *after* the injury. While Thoreau won't be able to do heavy manual labor, he may still be able to perform many other kinds of work. If he can work, his award for lost earning capacity should be based on the difference between his earning potential before and after the injury. Thus, the jury should consider what type

of work Thoreau will be able to do with his disability, and determine the amount he is likely to earn from that work. They should then subtract that amount from the $900,000 he would have earned to determine the damages for lost earning capacity.

Once the jury has determined an amount for lost earning capacity, they will have to reduce this figure to "present value." Since Thoreau will receive the award today to compensate for losses over a number of years, the amount must be reduced to account for the interest Thoreau can earn on the award over the years.[9]

Missing Elements

7. a. Agassiz has suffered a very serious injury, but a number of the usual elements of compensatory damages will not apply to his case. The facts suggest that he was rendered unconscious immediately by the blow. If so, he has not suffered any conscious pain and suffering. Most courts hold that a plaintiff must be conscious to recover for pain and suffering, since pain and suffering compensates subjective discomfort resulting from the injury, and unconscious patients do not experience these symptoms.

This basic fact of damages doctrine has led to strained, sometimes unseemly efforts by plaintiffs' counsel to prove that the victim was conscious, *if* only for a second, since such proof opens the door for the jury to award damages for this highly subjective element.

b. Agassiz has lost the ability to enjoy virtually all of life's pleasures. If that isn't loss of enjoyment, what is? Interestingly, the cases are divided on the question of whether a comatose patient can recover for loss of enjoyment. A leading New York case denies recovery, on the ground that the unconscious patient cannot benefit in any way from an award for loss of enjoyment, and consequently such an award would serve no compensatory purpose:

> Simply put, an award of money damages in such circumstances has no meaning or utility to the injured person. An award for the loss of enjoyment of life "cannot provide [such a victim] with any consolation or ease any burden resting on him . . . He cannot spend it upon necessities or pleasures. He cannot experience the pleasure of giving it away."

McDougald v. Garber, 536 N.E.2d 372, 375 (1989) (quoting *Flannery v. United States*, 718 F.2d 108, 111 (4th Cir. 1983)), *cert. denied*, 467 U.S. 1226 (1984).

This holding has been controversial. For one thing, there can be no doubt that the plaintiff has suffered a grievous loss: Basically, he has lost *all* of life's enjoyment, whether he is aware of it or not. Had the plaintiff been totally disabled, but remained aware of it, he would have received full compensation for loss of enjoyment. It hardly seems appropriate that an even more seriously injured plaintiff should receive nothing for this loss. In addition, tort victims sometimes do obtain recoveries that they cannot enjoy, as where the estate of a decedent recovers damages in a survival action for predeath pain and suffering.

Other courts have allowed loss of enjoyment damages to comatose plaintiffs, on the theory that the loss of life's pleasures is an objective loss suffered by the plaintiff, whether or not he subjectively comprehends or experiences it. See, e.g., *Eyoma v. Falco*, 589 A.2d 653, 658-662 (N.J. Super. 1991); *Flannery v. United States*, 297 S.E.2d 433, 438-439 (W. Va. 1982).

c. This fairly simple question requires a complex answer. There is in the law of damages a quizzical doctrine called the "collateral source rule," which frequently holds the defendant responsible for losses to the plaintiff even though those losses are actually paid by a third party. For example, if a plaintiff incurs $5,000 in medical bills, but her health insurer pays most of it, she is still entitled, under the collateral source rule, to collect the full $5,000 from the defendant. Similarly, if plaintiff loses $30,000 in wages, but is compensated by his disability insurance policy for the loss, the defendant must still pay $30,000 for the loss.

This bewildering rule is often justified on the ground that the defendant should not obtain a windfall from the plaintiff's foresight in obtaining (and paying for) insurance protection against these losses. See generally Minzer, Nates, §17.01. Whether or not this rationale is convincing, the rule has been applied to many types of collateral source payments, including Medicare, private insurance, continuation of wages by the plaintiff's employer, unemployment compensation, worker's compensation, and others. See generally

Minzer, Nates, §§ 17.03-17.06.

Although the collateral source rule has been very widely applied, it has also been widely criticized, since it compensates plaintiffs for losses that they do not actually incur. Many recent statutes have limited the rule in an effort to control insurance costs, at least for certain types of cases or certain types of collateral benefits. See, e.g., Mich. Laws Ann. §600.6303 (requiring reduction of damages for collateral payments, adjusted for premiums plaintiff paid to obtain collateral source protection). If Agassiz's case were governed by the Michigan statute, he would recover very little despite the very substantial expense of his medical care.

d. Although lost earnings and earning capacity are basic elements of tort damages, Agassiz will presumably not recover anything for this category of damages. Agassiz has not lost his pension or Social Security income: They are still paid to him after his injury, just as they were before, and at 79, he would be unlikely to go back to work. If he has not suffered a loss of these items due to the accident, the defendant need not compensate for them.

Even if the collateral source rule applies in Agassiz's jurisdiction, Agassiz will still have no claim for these lost benefits. The collateral source rule bars the defendant from taking advantage of the fact that plaintiff's loss from the injury has been compensated by a third party. But Agassiz is entitled to be paid his pension and Social Security regardless of his state of health, and will continue to be paid them despite the injury. Thus he hasn't lost these benefits; the collateral source rule is irrelevant to this element of his damages.

In the final analysis, Agassiz's case is troubling. He has suffered catastrophic injury, yet most of the big-ticket elements of compensation — pain and suffering, loss of enjoyment, and lost earnings — will hardly figure at all in his damages. Depending on the status of the collateral source rule, he may not even be compensated for medical costs.

An Emotion Motion

8. a. The motion will virtually always be made by the defendant's counsel. If the trial is bifurcated, and liability is tried first, the jury

will hear the evidence about the collision, the relative positions of the vehicles, the skid marks, the speed, and so on, and then go out and deliberate on the issue of which party ran the red light. If they find that Muir was not negligent, the trial will be over: Watson can't recover if Muir wasn't negligent. Defendant's counsel would very much prefer that the jury decide this relatively mundane issue without hearing the emotionally charged evidence about Watson's frightful injuries and continuing suffering. Who could hear such testimony and not want to do something for him? Who could dispassionately consider closely conflicting liability evidence without visions of the debilitated Watson haunting the deliberations? Jurors understand that Watson will go away empty handed if they find that Muir was not negligent. It seems almost too much to ask of them to set aside the testimony about Watson's injuries in deciding that question.[10]

b. There are several strong arguments for bifurcating trials in such circumstances. The first has already been suggested, that the jury will be more objective about the liability issues if they have not heard extensive testimony about Watson's grievous injuries. Another is that trying liability first can save a great deal of time. The damages testimony in Watson's case will be extensive, probably including expert witnesses, treating physicians and other health professionals, medical actuaries, and Watson himself. If the jury finds that Muir was not negligent, all the time devoted to hearing that extensive damages testimony will be saved. Further time will be saved in closing arguments and in instructing the jury if the trial is bifurcated, since only the liability issues need be considered and argued during the liability phase of the trial.[11]

c. One argument against bifurcation is that the same witnesses may testify on both liability and damages issues — for example, the plaintiff and the eye witnesses to the accident. The trial may lose coherence if these witnesses are called, examined on liability issues, and then recalled later to testify on damages. In addition, the plaintiff's injuries are sometimes relevant to the liability issues. For example, the location of Muir's injuries may assist the jury in deciding how the collision took place. In a surgical malpractice case,

the nature of the plaintiff's neurological injuries may assist the jury in determining whether she received excessive anesthesia.

The decision to bifurcate the trial rests in the discretion of the trial judge, which is unlikely to be reversed on appeal. Traditionally, many judges favored letting plaintiffs try their cases as they please, and then sending the whole case to the jury. In an age of judicial management and overcrowded dockets, however, the efficiency and fairness arguments for bifurcation have begun to find more favor in the courts. See, e.g., 22 N.Y. Uniform Trial Ct. Rules §202.42(a) (judges encouraged to bifurcate liability and damages issues in personal injury cases).

9. The introduction to this chapter emphasizes the subjective, unguided nature of the jury's decision on the intangible aspects of damages. Wouldn't it reduce this subjectivity somewhat if juries were able to compare awards made by other juries in similar cases?

Perhaps it would, but the evidence will almost certainly be excluded. To understand why, ask yourself what *Muir's* counsel would do if the judge admitted this evidence of the damages awarded in Agassiz's case. Naturally, she would want to distinguish Agassiz's case from Watson's, by showing that Agassiz's injuries were worse than Watson's, for example, or that he had a longer life expectancy than Watson. She would also cast about for other burn cases in which juries had awarded substantially *less.* Each party would expect the other to reveal the cases they planned to use before trial, and the parties would then do discovery and prepare evidence about them all. Pretty soon, the court would be trying not one burn case, but twenty.

Even if Agassiz's case were closely comparable to Watson's, the damage award in Agassiz's case is not an objective measure of the proper award. It is simply *another jury's* effort to value an inherently ambiguous loss. It is difficult to see why the Watson jury should give it any more credence than they would give their own judgment on the point.

On the other hand, giving the jury guidance about a reasonable range of verdicts would certainly improve the system; currently, they receive essentially no guidance in determining intangible damages. The only method of controlling damage verdicts is for judges to order a remittitur

— to give the plaintiff a choice between accepting a lesser amount or facing a new trial. This provides some protection against extreme awards, but still leaves a wide range of discretion to the jury. A number of commentators have suggested that juries should receive a list of verdicts in similar cases, with information about the injuries in those cases and the amounts awarded. See, e.g., O. Chase, Helping Jurors Determine Pain and Suffering Awards, 23 Hofstra L. Rev. 763 (1995). See *Jutzi-Johnson v. United States*, 263 F.3d 753, 759-760 (7th Cir. 2001) (suggesting that judge, as trier of fact should consider awards in similar cases to avoid "standardless, unguided exercise of discretion"); but see *Jentz v. ConAgra Foods, Inc.*, 2013 WL 498736 (refusing to consider other awards in diversity case governed by Illinois law and tried to a jury).

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1. Two other types of damages, nominal damages and punitive damages, are not addressed in this chapter. Nominal damages may sometimes be granted if the plaintiff proves the elements of a tort but has suffered no actual damages. Punitive damages are sometimes awarded in tort cases to punish the defendant for particularly egregious conduct, and to deter such conduct in the future. Punitive damages may be awarded in addition to compensatory damages.

2. This bon mot, like so many others, has been attributed to Yogi Berra, but I don't have an official citation.

3. Section 6-1603 provides for annual adjustments to the cap to reflect general changes in wage levels.

4. A common problem with statutory damage caps is that legislatures enact them and forget them. Over time inl1ation radically decreases the value of the award allowed by the cap. The California limit, for example) was enacted in 1975, and has not been raised in the ensuing decades. Thus, $250,000 would be "worth" well over $1,000,000 today, but a severely injured California plaintiff may still only recover $250,000 for noneconomic losses.

5. These experts will command substantial fees for their assistance in trial preparation and for their testimony. In the ordinary case, the fee will be advanced by plaintiff's counsel as part of the costs of suit. Ultimately the plaintiff will have to reimburse her counsel for these expenses (ranging sometimes into five figures) out of the judgment or settlement the defendant pays.

6. A fair number of students reached their awards by calculating a sum for each minute, hour, or day that Mendel must live with the problem. One student gave two cents per minute; another allotted $10,000 per year; a third, a dollar an hour. The resulting awards were in the $300,000 to $500,000 range given Mendel's life expectancy.

7. Even in such a jurisdiction, Muir may be able to recover for the present fear that he will contract cancer in the future. Some courts have viewed this as a separate form of mental distress which, if reasonable, is compensable. See generally Minzer, Nates §13.05.

8. Your author's dire prediction that cases like *Pustejovsky* would undermine the single recovery rule has yet to prove true. It is very hard to find cases taking this approach outside the asbestos context. See, e.g., *Faulkner v. Caledonia County Fair Assoc.* 869 A.2d 103 (Vt. 2004). In *Faulkner*, the plaintiff suffered a head injury and recovered damages from the defendant. Eight years later she was diagnosed with epilepsy, allegedly due to the same blow. The court rejected the plaintiff's argument (based on the asbestos/ cancer cases) that she could bring a second action. I guess Berra is right. See p. 406, n. 2.

9. For example, if the jury concludes that Thoreau will lose $40,000 in salary in the tenth year after trial, it may significantly overcompensate him to award $40,000 to replace that year's earnings. If Thoreau gets $40,000 today and invests it, it could well double in ten years.

10. "Plaintiff in this case seeks damages for physical injuries, death and pain and suffering on behalf of himself and his deceased wife and children. In support of such damages, he will offer detailed evidence of extreme pain and suffering, including burning flesh and screams of pain. Courts in this Circuit have recognized that 'evidence of harm to a plaintiff, regardless of the cause, may result in sympathetic jurors more concerned with compensating plaintiff for his injury than whether or not defendant is at fault.'" *Zofcin v. Dean*, 144 F.R.D. 203, 205 (S.D.N.Y. 1992) (quoting from *Buscemi v. Pepsico, Inc.*, 736 F. Supp. 1267, 1272 (S.D.N.Y. 1990)).

11. Even if the jury finds the defendant negligent, bifurcation can save time, since, once liability is established, the likelihood of settlement increases dramatically.

CHAPTER 19

Compensating Somebody: Wrongful Death and Survival Actions

INTRODUCTION

We think of "the olden days" as full of dangers, and thank our stars that we live in a "civilized" era. But no one can emerge from the course in Torts without a sobering sense of how dangerous industrialized society is. A few generations back, the major risks were natural ones: disease, natural disasters, and unruly fellow creatures. Today, these have been surpassed by human contrivances, especially that very mixed blessing, the internal combustion engine.

Too often, the products of human genius cause catastrophic injury and untimely death. This chapter addresses two distinct but related types of claims arising from such deaths. First is the *wrongful death* claim, which is a claim for damages for tortiously causing the death of another. Second is the *survival* claim, which is an action brought by the representative of the estate of a deceased person (called in legal parlance a "decedent") for injuries suffered by the decedent before her death.

Although these actions both arise because of the death of the tort victim, they are quite different. Wrongful death statutes usually allow damages for the losses suffered by surviving relatives, such as the loss of economic support or society of the decedent. The survival action, by contrast, allows

the estate of a decedent to enforce a tort claim for damages suffered by the decedent *before* death, which she could have enforced personally had she lived.

Suppose, for example, that Mozart and Haydn are listening to a symphony at the local concert hall when a chandelier, negligently installed by Handel, falls from the ceiling. Mozart is killed instantly. Haydn suffers serious injuries, is hospitalized for seven months, and finally dies of his injuries. At common law, the estates of these decedents would have had no remedies for their injuries, regardless of whether they were negligently inflicted. Under modern tort law, however, Mozart's death would give rise to a claim for wrongful death. Haydn's would support both a survival claim for his pre-death losses (such as pain and suffering, medical expenses, and lost wages) and a wrongful death claim, since he ultimately died of his injuries.

THE ACTION FOR WRONGFUL DEATH

Let's first consider the claim arising from Mozart's death. Mozart died instantly; his estate has no claim for predeath pain and suffering, hospital bills, or disability caused by the accident. The sole injury to be recompensed is the death itself. The issue raised is whether Mozart's estate or his surviving relatives have any claim against Handel for negligently causing his death.

Under the English common law, the answer for five or six centuries was "no." Lord Ellenborough put it clearly in *Baker v. Bolton:* "In a civil court, the death of a human being could not be complained of as an injury." 170 Eng. Rep. 1033 (1808). If the rule was clear, the reasons for it were less so. The scholars suggest that it was rooted in the early English "felony-merger doctrine," which barred civil suits to recover damages for acts that constituted a felony. Felonies were punishable by death and forfeiture of the felon's property to the crown. Since causing the death of another, either intentionally or negligently, was a felony, there would be no defendant left to sue for wrongful death, and no property from which to collect a judgment. See *Moragne v. States Marine Lines, Inc.,* 398 U.S. 375, 382 (1970). So there was no point to such a claim.

Other reasons for the common law position were grounded in policy rather than history. Some cases argued that allowing claims for wrongful

death would lead to "runaway" damages from sympathetic juries, or that it is somehow immoral to put a price on human life. S. Speiser, Recovery for Wrongful Death and Injury §1:5 (4th ed. 2005) (hereinafter "Speiser").

Whatever the rationale for the common law rule, the result was that "it was cheaper for the defendant to kill a person than to scratch him." Prosser & Keeton at 942. Prosser's treatise notes the wry suggestion that this rule explains "why passengers in Pullman car berths rode with their heads to the front" and that "the fire axes in railroad coaches were provided to enable the conductor to deal efficiently with those [sic] were merely injured." Prosser & Keeton at 942, n.24. Such speculations make the point well enough: It is manifestly indefensible to allow recovery for personal injury, but bar recovery entirely where the victim suffers the ultimate injury, death.

Although it is easy to criticize the early common law rule, most American courts initially followed it without question. In the American states, as in England, it has been the legislatures, not the courts, which have established the right to recover for wrongful death. England reversed course in 1846, when Lord Campbell's Act authorized a cause of action for wrongful death. Since that time, all American states have enacted statutes (often referred to as "Lord Campbell's Acts") that authorize recovery for wrongful death.

THE STATUTORY RIGHT TO SUE

Because actions for wrongful death are based on statutes, they differ from state to state. However, many still track quite closely the language of Lord Campbell's Act. The North Dakota statute, for example, provides:

> Whenever the death of a person shall be caused by a wrongful act, neglect, or default, and the act, neglect, or default is such as would have entitled the party injured, if death had not ensued, to maintain an action and recover damages in respect thereof, then and in every such case the person who, or the corporation, limited liability company, or company which, would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured or of the tort-feasor, and although the death shall have been caused under such circumstances as amount in law to felony.

N.D. Cent. Code §32-21-01.[1] Statutes like this allow recovery for wrongful death if the decedent would have had a cause of action herself had she been injured instead of killed. Thus, an "action for wrongful death" is not a

separate tort in itself, it is an action for a recognized tort — such as battery, negligence, or a products liability claim — in which the victim is killed rather than injured. In a wrongful death claim based on negligence, for example, the plaintiff must prove the same elements as in a personal injury negligence claim: duty, breach, causation, and damages. The proof of the first three elements will be the same as in an injury case. The major difference between a wrongful death case and other negligence cases involves the last element, damages.

WRONGFUL DEATH DAMAGES: WHO GETS COMPENSATED?

Damages in personal injury cases compensate the injured person herself for the losses resulting from the accident, such as medical expenses, lost wages, or pain and suffering. Wrongful death statutes, however, do *not* compensate the decedent herself; it is obviously impossible to compensate the decedent for anything. The best the law can do is to compensate survivors who were close to the decedent for the losses *they* suffer as a result of the decedent's death. Thus, wrongful death statutes authorize damages for the economic or emotional losses to the survivors of the decedent, not the loss suffered by the decedent herself.

Assessing the damages to the survivors raises two thorny questions: Which survivors, and for what losses? As to the first question, most wrongful death statutes limit the recovery to the losses suffered by close relatives as a result of the decedent's death. For example, the Virginia statute provided until 1992[2] that the recovery is for the benefit of

> (i) the surviving spouse, children of the deceased and children of any deceased child of the deceased or (ii) if there be none such, then to the parents, brothers and sisters of the deceased . . . or (iii) if the decedent has left both surviving spouse and parent or parents, but no child or grandchild, the award shall be distributed to the surviving spouse and such parent or parents.

Va. Code §8.01-53. South Carolina's statute is a little different:

> Every such action shall be for the benefit of the wife or husband and child or children of the person whose death shall have been so caused, and, if there be no such wife, husband, child or children, then for the benefit of the parent or parents, and if there be none such, then for the benefit of the

heirs of the person whose death shall have been so caused. . . .

S.C. Code §15-51-20.

Provisions of this type authorize damages to general classes of relatives likely to be closest to the decedent. If there are none in the closest class, the next group is considered, and so on. Like all efforts to deal generally with human relationships, these legislative classifications may miss the mark in particular cases. Mozart might be survived by a live-in lover to whom he was very close, and a son who had ignored him for 30 years. Under the Virginia statute, the son's losses would be the measure of damages. Or, Mozart might leave no close relatives. Surely, the gravity of his death is just as profound in such a case, but under the South Carolina statute the only loss to be compensated in such a case would be the losses of remote heirs, who perhaps never saw or cared about Mozart and will consequently be unable to prove substantial damages. However, in most cases the beneficiaries named in the statutes — husbands and wives, children, parents and siblings — are the ones likely to suffer most from the death of the decedent.[3]

Under many wrongful death statutes, the beneficiaries do not bring suit themselves. The executor or administrator of the estate is empowered to bring the action, but the damages are measured by the losses to the statutory beneficiaries and are distributed by the executor or administrator to them. Many statutes provide that the recovery does not become part of the decedent's estate. See, e.g., Ala. Code Tit. 6-5-410(c); R.I. Gen. Law 10-7-10. The major consequence of this is that the recovery does not go to pay the decedent's creditors. Even *if* the victim dies in debt, the wrongful death damages will go to the survivors the action is meant to compensate, rather than to pay the decedent's debts.

MORE ON DAMAGES: WHAT LOSSES ARE COMPENSATED?

The second thorny question is what losses of the survivors are compensable under wrongful death statutes. The death of a loved one entails many losses. Some are concrete and quantifiable, such as loss of financial support or household services rendered by the decedent. Others are intangible, such as

the loss of companionship, sexual consortium, advice, and emotional support, the same types of losses which are compensated as "loss of consortium" when the victim survives. See Chapter 14, pp. 308–311. In addition to these long-term losses from the death of the decedent, the survivors also suffer tangible immediate losses (funeral and burial expenses) and intangible immediate losses (the grief and mental anguish of learning of the death).

Historically, many wrongful death statutes limited damages to the "pecuniary losses" resulting to the specified survivors, that is, direct financial contributions or services the decedent would have rendered to the survivors. The New Jersey wrongful death statute, for example, provides that the jury may give damages for "the pecuniary injuries resulting from such death, together with the hospital, medical and funeral expenses incurred for the deceased. . . ." N.J. Stats. §2A:31-5. The reason for this limitation is historical: Although Lord Campbell's Act provided that the jury should award the statutory beneficiaries "such damages as they may think proportioned to the injury," the Act was early held to authorize only pecuniary damages. *Blake v. Midland, Ry. Co.*, 118 Eng. Rep. 35 (1852). Many of the American statutes either explicitly incorporated the "pecuniary loss" measure of damages (as the New Jersey statute does) or were initially interpreted to authorize only such damages. Under such statutes, damages for intangible losses such as loss of the society, sexual relationship, or advice and counsel of the decedent were not compensable.

Unless the decedent leaves a dependent spouse or children, the "pecuniary loss" standard, strictly construed to include only economic contributions the decedent would have made to the beneficiaries, is highly restrictive. In many cases, actual pecuniary losses in the nature of lost financial contributions from the decedent will be impossible to prove. If Mozart is survived by his parents only, who are financially secure, they would likely suffer no compensable damages under a strict "pecuniary loss" standard, and hence recover only funeral and burial expenses. The same may be true if he is survived by adult children or siblings who are financially independent.[4] And, of course, the standard — if literally applied — provides no recovery for the primary loss the survivors suffer: the loss of the opportunity to be with, learn from, and receive solace and emotional support from the decedent.

The inadequacy of the pecuniary loss standard is most glaring when the decedent is a young child. In such cases, the emotional loss to the parents is

frightful, yet there is seldom evidence or likelihood of actual financial loss to the survivors. Such compelling cases have led many courts to evade the strictures of the pecuniary loss standard by tortured interpretation. In *Green*

> *v. Bittner*, 424 A.2d 210 (N.J. 1980), for example, the New Jersey Supreme Court allowed recovery under a "pecuniary loss" standard for the pecuniary value of the companionship and advice a daughter would have provided to her parents as they grew older. See also *Clymer v. Webster,* 596 A.2d 905, 914 (Vt. 1991) (loss of comfort and companionship of adult child "is a real, direct and personal loss that can be measured in pecuniary terms").

Clearly, *Green* and *Clymer* have stretched the concept of pecuniary loss far beyond its ordinary meaning. Such cases have deliberately blurred the distinction between a financial loss and a noneconomic loss that can be compensated — in some sense — by an award of money, in order to allow substantial damages in cases in which the survivors suffer little financial loss but great emotional loss as a result of the death. This parallels the modern trend to allow recovery for loss of consortium in injury cases, at least to the spouse of the direct victim, and sometimes to her children or parents. It hardly makes sense to allow consortium recovery for *impairment* of these relationships when the direct victim is injured, but to deny recovery for similar losses (by strict interpretation of the term "pecuniary loss") when the relationship is completely *destroyed* because the direct victim is killed.

Some legislatures have responded to this incongruity by amending their statutes to provide that the term "pecuniary loss" *includes* such elements as loss of companionship or mental anguish. See, e.g., Ark. Stat. 16-62-102(f)(l) (including spouse's loss of services and companionship and mental anguish as pecuniary loss). Others have simply amended their wrongful death statutes to authorize recovery for intangible damages *as well as* more typical pecuniary losses such as financial contributions and services by the decedent. The Kansas statute, for example, allows the "heirs at law" to recover pecuniary losses, as well as the following:

> (1) Mental anguish, suffering or bereavement;
> (2) loss of society, companionship, comfort or protection;
> (3) loss of marital care, attention, advice or counsel;
> (4) loss of filial care or attention;
> (5) loss of parental care, training, guidance or education; and
> (6) reasonable funeral expenses for the deceased.

Kan. Stat. Ann. §60-1904(a). This statute clearly allows recovery for many types of intangible emotional losses due to the death of the decedent. It even allows damages for grief, which is usually barred in actions for loss of consortium, and is barred under many wrongful death statutes as well. However, a separate section of the Kansas statute tempers the liberality of this damages provision by limiting the nonpecuniary damages to $250,000. Kan. Stat. Ann §60-1903(a). Other statutes, however, authorize unlimited damages for pecuniary and consortium damages alike. The Hawaii statute, for example, provides that:

> such damages may be given as under the circumstances shall be deemed fair and just compensation, with reference to the pecuniary injury and loss of love and affection, including (1) loss of society, companionship, comfort, consortium, or protection, (2) loss of marital care, attention, advice or counsel, (3) loss of care, attention, advice, or counsel of a reciprocal beneficiary as defined in Chapter 572C, (4) loss of filial care or attention, or (5) loss of parental care, training, guidance or education, suffered as a result of the death. . . .

Haw. Rev. Stat. §663-3(b).

AN ALTERNATIVE APPROACH

A few states take a different approach to wrongful death damages, focusing on the loss to the decedent's *estate* from his premature death. See, e.g., N.H. Rev. Stat. Ann. §556:12, which allows the jury to consider (as to damages caused by the death itself) "the reasonable expenses occasioned to the estate by the injury, the probable duration of life but for the injury, and the capacity to earn money during the deceased party's probable working life." Under statutes of this type, damages are frequently measured by calculating the decedent's future earnings, subtracting the amount the decedent would have spent on living expenses, and reducing the net figure to "present value." The rationale for this measure is that whatever the decedent saved from his income would have gone either to support his family while he was alive or into his estate and been distributed to his heirs or legatees after death.

The loss-to-the-estate rule provides a purely economic measure of damages, and shares some of the problems of the strict pecuniary loss rule. The loss-to-the-estate formula might not support any damages for the death of a retired person who lives on her current income. Similarly, there would be

no loss to the estate of even a young person whose earnings did not exceed her living expenses. See F. McChesney, Problems in Calculating and Awarding Compensatory Damages For Wrongful Death Under the Federal Tort Claims Act, 36 Emory L.J. 149, 162-164 (1987) (concluding that persons with incomes below $20,000 in 1980-1981 dollars are unable to save at all). It seems likely that in many cases where strict application of the loss-to-the-estate standard or pecuniary loss standard would lead to no recovery, juries have ignored such instructions on the measure of damages and assessed a reasonable figure according to their own sense of justice.[5]

DAMAGES FOR LOSS OF LIFE ITSELF

In one sense, Lord Ellenborough's pronouncement that "the death of a human being could not be complained of as an injury" remains true. Although the loss of life itself is perhaps the most grievous loss imaginable, most wrongful death statutes do not authorize damages for the years of living that the decedent would have enjoyed but for the wrongful death. See generally Speiser §6:45. Some of the economic value of these lost years is compensated, under either the loss-to-survivors approach or the loss-to-the-estate approach, since damages are awarded for lost earnings that would have gone to the decedent's survivors. However, the most basic loss of the *experience* of living, the opportunity to enjoy life in all its richness, is not.

As stated earlier, the loss of life itself was viewed as beyond compensation, since the decedent obviously cannot benefit from any compensation awarded; any award for these lost years would simply be a windfall to her survivors. In addition, courts and legislatures have doubtless feared that, if juries were allowed to award damages for the decedent's lost years, verdicts would be too speculative and difficult to control. Thus, wrongful death statutes have focused on the damages to the survivors or the estate, since these are viewed as more certain and more obviously compensatory.

SURVIVAL STATUTES: PRESERVING CLAIMS

FOR PREDEATH DAMAGES

So much for the erstwhile Mozart; now let's consider Haydn's case. He also died as a result of Handel's negligent act. Consequently his estate or survivors will have a cause of action for wrongful death. But he suffered other injuries as well from Handel's negligence: He lingered for seven months, suffered pain and suffering, incurred medical expenses, and was out of work and unable to enjoy his usual activities. Had he recovered at the end of those seven months, instead of dying, he would have had a right to sue for these losses. Shouldn't his estate be able to sue for these predeath damages, even though he died?

The common law took a hard line on these cases as well. Tort cases were classified as "personal" actions, and under the common law personal actions could only be prosecuted by the injured person herself. Speiser §1:13.[6] Haydn could sue for his injuries while alive, but no one else could do it for him. If he died before bringing suit, the estate had no right to pursue the claim. If he brought suit but died before the suit went to a verdict or judgment, most courts held that the action "abated" and could not be prosecuted further. The principle applied to the defendant as well. If a person caused an injury, a tort action had to be brought against her personally; if she died before suit was brought, the plaintiff could not sue her estate.

This hoary common law principle, like the bar on recovery for wrongful death itself, has been supplanted by statute. Most states now have "survival" statutes which provide that causes of action "survive" rather than abating at the death of either the tortfeasor or the injured party.[7] Note that it is the *claim itself* that survives, not the plaintiff or defendant: The very point of a survival statute is that the party need not survive for suit to be brought. Typically, where the injured party dies, the statute authorizes the decedent's executor or administrator to bring suit (or continue one already in progress) to recover for the decedent's injuries. While the statutes vary, the Maine survival provision is simple and representative:

> No personal action or cause of action is lost by the death of either party, but the same survives for and against the personal representative of the deceased. . . .

Me. Rev. Stat. Ann. 18-A §3-817(a). Under a provision such as this, Haydn's estate could still recover for Haydn's predeath injuries, whether or not suit had been brought before Haydn died. If Haydn had not brought suit before

his death, the executor or administrator of his estate could file suit. If Haydn had sued but died before the case was decided, his executor or administrator would be substituted as the plaintiff and continue the litigation.

A simple diagram may help to distinguish survival actions from wrongful death actions. Figure 19-1 is a time line, running from the point of Haydn's injury forward. At common law, Haydn had to bring suit himself, while alive, to recover for any damages he incurred during Period A, the period after the injury but before his death. If he did not sue, or died before a suit went to judgment, no recovery was allowed for the predeath damages. Under a survival statute, however, Haydn's estate is authorized to bring an action, after Haydn's death, for such damages. These damages will include medical expenses, lost wages, and pain and suffering Haydn sustained from the date of the accident until his death.[8] Since Haydn died from his injuries, the wrongful death statute also authorizes a separate action for damages caused by the death itself, that is, losses incurred by his survivors during Period B, after Haydn's death.

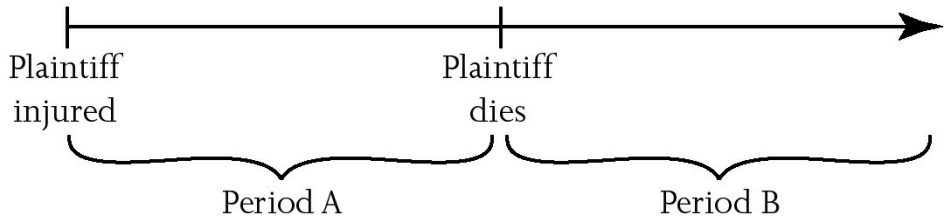

Figure 19-1

The rationale for allowing causes of action to survive where the tort victim dies is not far to seek. Although a survival action, like a wrongful death action, cannot compensate the decedent, the recovery usually goes into the decedent's estate and passes to her heirs. Though the decedent takes no direct benefit from the action, she may at least take solace before death in the knowledge that *somebody* will be compensated for the tort, and that those somebodies will be of her choosing. In addition, there is an obvious anomaly between allowing recovery if a tort suit goes to judgment a day before the victim dies, but not if judgment is entered the day after.

Survival statutes similarly allow recovery in cases where the *tortfeasor* dies. At common law, the plaintiff was out of luck if the tortfeasor died

before she sued for her injuries. However, under a survival statute, the plaintiff may bring suit against the decedent's estate for the tort. The plaintiff in such cases is as much in need of compensation whether the defendant lives or dies. If the defendant leaves substantial assets, it seems reasonable that they should go to compensate the victim. In addition, in many cases the decedent's insurer is effectively the defendant, since it will defend the action and pay any damages awarded. It seems inappropriate that the insurer should get a windfall and the injured person go uncompensated if the negligent person fortuitously dies before recovery is awarded.

Although often associated with wrongful death statutes, survival statutes do not apply only in cases where the defendant's negligence causes death. Under a statute like Maine's, Haydn's damage claim survives whether he dies of the injuries suffered in the accident or of unrelated causes. Similarly, his claim would survive if Handel died from the accident or any other cause. Handel's administrator or executor would simply be substituted as the defendant in the action.

Because wrongful death and survival claims are based on statutes, there is a good deal of variation on the approaches discussed above. However, the basic patterns are fairly uniform. The following examples illustrate those patterns. For an example of a complaint that asserts claims under both a survival statute and a wrongful death statute, see Chapter 20, p. 464.

Examples

A Dandelion from the Bluebook Garden

1. The following statement sometimes sprouts, weedlike, in my spring bluebooks:[9] "If the plaintiff cannot prove a claim for negligence, she may be able to recover damages for Smith's death under the applicable wrongful death statute." Can you articulate the misconception that underlies this statement?

Laws of Relativity

2. Purcell is run down and killed instantly. He is survived by his parents, whom he has not seen for 30 years, and a disabled sister, for whom he is

the sole source of support.

a. Who would be entitled to damages under the Virginia statute quoted at p. 432?

b. Who would be entitled to damages under the South Carolina statute quoted at p. 432?

3 Assume that Purcell is survived by an adult son, his disabled sister, and his elderly parents, with whom he has a close relationship. Who would be entitled to damages for his death under the version of the Virginia statute quoted at p. 432?

4. Assume the same facts given in Example 3, but that the case arose under the Hawaii statute, which authorizes damages for both pecuniary and intangible damages "suffered as a result of the death of the person; by the surviving spouse, reciprocal beneficiary, children, father, mother, and by any person wholly or partly dependant upon the deceased person." Haw. Stat. §663-3. Who will recover, and how will the damages for each beneficiary be ascertained?

5. What will be the result under the South Carolina statute if Purcell dies without leaving any close relatives?

6. Brahms, a highly successful musician, dies leaving an adult daughter with a large income, a six-year-old son, a wife who does not work outside the home, and an elderly mother whom he frequently helps out financially. What damages could each recover if the Virginia beneficiary provision quoted at p. 432 applied and

a. the measure of damages was limited to pecuniary loss, strictly construed?

b. the applicable measure of damage was the same as the Kansas statute quoted at p. 435?

c. the "loss to the estate" measure of damages applied?

"The Lawsuit Was a Success but the Plaintiff Died"

7. Verdi and Vivaldi are seriously injured when Strauss drops a tuba from a

scaffold above the stage. Verdi survives for a year in constant pain and is unable to work. He then dies of his injuries. Vivaldi suffers a broken arm, is out of work for three months, and suffers permanent reduction of function in the arm.

a. What causes of action would Verdi and Vivaldi have against Strauss at common law?

b. If the Maine survival statute quoted at p. 438 applied, what damages could Verdi's estate recover in the survival action?

c. If Verdi's executor sought damages under the survival statute, could he also sue for wrongful death?

8. Assume that Verdi suffers a broken hip from the accident and is laid up in bed. Six months later, he dies of an unrelated stroke, without having brought any suit against Strauss for his tuba injury. What actions may his executor or administrator bring against Strauss, if any?

Consorting with Confusion

9. On the facts in Example 8, could Jane Verdi, his widow, bring an action against Strauss for loss of consortium under the survival statute?

10. Assume that Verdi dies instantly when the tuba falls on him, leaving his widow, Jane, who is appointed administratrix of his estate. Six months later, before suit is brought against him, Strauss dies.

a. What statute is implicated here, the wrongful death statute or the survival statute?

b. Assume that the applicable wrongful death statute only authorizes recovery for pecuniary loss and is strictly construed to encompass solely economic losses. Jane's complaint includes a count for wrongful death, and a second count for loss of consortium with her husband. What is the problem here?

c. Assume that Jane, still hoping to recover for consortium losses due to her husband's death, adds a third count in her complaint, asserting a "claim for negligence" and asking for consortium damages on that claim. What is the problem with this count?

Substance and Procedure in the Law of Wrongful Death

11. Mahler, a student from North Dakota studying at the University of Kansas, is killed in an accident on a school trip. The accident takes place in Tennessee. His parents retain you to bring an action to recover for his death. What crucial strategic question will you need to confront at the outset in representing them?

Judge Fudd on an Off Day

12. Assume that Mendelssohn, a drummer, gets knocked off the stage by Brahms during a performance. He dies immediately from his fall, and his estate sues Brahms for wrongful death. Brahms pleads as a defense that Mendelssohn was contributorily negligent for standing behind Brahms at the edge of the stage during the crescendo. Assume that contributory negligence is a complete defense to a negligence action in the relevant jurisdiction. Assume also that the language of the applicable wrongful death statute is the same as the North Dakota wrongful death provision quoted on p. 431. At trial, the Honorable Fudd instructs the jury as follows:

> If you find by a preponderance of the evidence that the decedent was contributorily negligent, and that his negligence was a proximate cause of the accident which led to his death, then you must find for the defendant.

Is Fudd's instruction proper?

Explanations

A Dandelion from the Bluebook Garden

1. This statement is based on the premise that there is a distinct "cause of action for wrongful death" apart from the traditional torts live plaintiffs can recover for. That isn't so. Wrongful death statutes typically allow recovery if the decedent would have had a right to recover if she had lived. See, e.g., the language in the North Dakota statute, p. 427. If the injured party could have recovered for negligence, had she lived, the personal representative may recover if the negligence caused the

decedent's death. If the decedent would have had a battery claim had she lived, the representative may recover when the battery causes death. And so on. In other words, there is no separate tort called "wrongful death." Wrongful death statutes create a remedy for existing torts when those torts lead to the death of the victim.

Laws of Relativity

2. a. The Virginia statute allows recovery to siblings and parents if the decedent does not leave a spouse, child, or grandchild. That is true here, so both the sister and the parents are eligible to receive damages for the death. However, it appears unlikely that the parents will be able to prove substantial damages, since they have been cut off from Purcell for many years. Thus, if the damages are assessed to the sister and parents according to their actual losses, she will receive a substantial award and they will receive little or nothing.

   b. Under the South Carolina statute, the action is "for the benefit of the parent or parents" if there is no spouse or child. Thus, it appears that only they would be entitled to damages, while the sister, who suffered compelling losses, would not be entitled to recover.

3. In this example, Purcell is survived by a number of close relatives, all of whom may have suffered compensable losses, at least if the measure of damages includes consortium losses such as companionship, advice, and comfort. However, the version of the Virginia statute quoted on p. *** limits the recovery to the son. He falls within the class of beneficiaries in clause (i) of the statute, and the statute apparently denies recovery to parents and siblings if there are clause (i) beneficiaries. Cf. *Carroll v. Sneed*, 179 S.E.2d 620, 623 (Va. 1971) (suggesting that presence of a child precludes any recovery to parents under the Virginia statute).

   Obviously, specifying classes of beneficiaries in this way can lead to pretty unsatisfactory results. Although it is likely in this case that the heaviest losses, both pecuniary and emotional, were suffered by the elderly parents and dependant sister, they would obtain no compensation, while the lesser losses of the son will be the sole measure of damages. One wonders if courts haven't found some way around such results, despite apparently clear statutory language. See Prosser &

Keeton at 947 and accompanying notes (suggesting that some cases have winked at the statutory limits, but others have not).

The Virginia legislature later amended the wrongful death statute to allow recovery for dependent relatives in some cases. It now allows recovery for

> (i) the surviving spouse, children of the deceased and children of any deceased child of the deceased, and the parents of the decedent if any of such parents, within 12 months prior to the decedent's death, regularly received support or regularly received services from the decedent for necessaries, including living expenses, food, shelter, health care expenses, or in-home assistance or care, or (ii) if there be none such, then to the parents, brothers and sisters of the deceased, and to any other relative who is primarily dependent on the decedent for support or services and is also a member of the same household as the decedent or (iii) if the decedent has left both surviving spouse and parent or parents, but no child or grandchild, the award shall be distributed to the surviving spouse and such parent or parents or (iv) if there are survivors under clause (i) or clause (iii), the award shall be distributed to those beneficiaries and to any other relative who is primarily dependent on the decedent for support or services and is also a member of the same household as the decedent or (v) if no survivors exist under clause (i). (ii), (iii), or (iv), the award shall be distributed in the course of descents as provided for in §64.2-200. . . .[10]

It isn't clear that Purcell's sister will fare any better under this amended version. Is she included the first tier or the second tier? It isn't clear whether the phrase "and to any other relative who is primarily dependent on the decedent for support or services and is also a member of the same household as the decedent" modifies only clause (ii) or both clauses (i) and (ii). If it only modifies the second clause, Sis is out of luck, since Purcell did leave a son. Even if the phrase including other relatives applies to clause (i), Sis would still have to live with Purcell to be eligible for recovery.

4. The Hawaii statute avoids the problem illustrated in Example 3, because it authorizes damages for close relatives who suffer loss from the decedent's death without setting priorities that exclude other beneficiaries. (A fair number of statutes now take this approach. See generally Speiser §3:1.) Thus, Purcell's son, parents, and sister would be entitled to recover. Presumably, their awards would depend on the actual pecuniary and consortium losses each proves at trial. If, for example, the son is estranged from the decedent, the jury would likely award him minimal damages, while the dependent sister's damages would presumably be very substantial.

This statute obviously provides greater flexibility in assessing the wrongful death damages of various survivors, but it is also quite open ended, leading to greater exposure. If the victim is Bach, who has 20 children, a close relationship to his parents, and several live-in siblings, the defendant may be hit with a very substantial verdict.

5. The last clause of the South Carolina statute provides that, if there are no statutory beneficiaries, the recovery will go to those who inherit the decedent's estate. Thus, if Purcell leaves no close relatives, the wrongful death recovery will be distributed to his heirs, probably collateral relatives such as cousins, nieces and nephews, and aunts and uncles.

   However, the damages assessed will still have to be based on actual damages suffered by these collateral relatives. The more distant these survivors are, the more difficult it will be for them to prove substantial damages — either economic or emotional — as a result of Purcell's death.

6. a. Under the Virginia beneficiaries provision, the wife and children would recover, but presumably the mother would not, since she is not in the first class of beneficiaries. Under a strict pecuniary loss standard, the wife and children would recover damages for the lost financial contributions and household services Brahms would have rendered to them. As to the adult daughter, this is likely to be small, but it will clearly be substantial as to the wife and son, who were entirely dependent on Brahms for support.

   It should include, for example, the cost of maintaining the son for 12 years at home, and quite likely four more years of college. If the evidence supports it, the damages might also include four more years in medical school or seven studying mathematical linguistics in graduate school. There might also be proof that Brahms would have made monetary gifts to his children over the years, for tax reasons or maybe even out of the goodness of his heart. The wife's damages might include the cost of her support for the balance of her life expectancy, and perhaps the loss of the inheritance she would have received had Brahms accumulated a substantial estate and predeceased her. Funeral and burial expenses would also be recoverable under a pecuniary loss standard.

b. If the Kansas damages provision applied, Brahms's survivors would recover fully for the pecuniary losses discussed above, and up to $250,000 for grief, mental anguish, and consortium losses.[11]

In a jurisdiction that authorized unlimited recovery for consortium losses, the eligible beneficiaries would all be entitled to full recovery for the loss of society, care, counsel, and guidance that they suffered due to Brahms's death, in addition to proven pecuniary loss. However, if a provision like the Virginia statute applied, limiting the eligible beneficiaries, the mother would not recover anything for economic or consortium losses, since she is not within the first tier of beneficiaries.

c. Under the loss-to-the-estate theory, the damages are often calculated by determining how much the decedent would have earned, subtracting the amount he would have spent on his own maintenance, and then discounting the resulting figure to present value. This figure represents the excess income the decedent could have contributed to his survivors or left to them in his estate.

Obviously, this measure provides nothing for consortium losses, and will not support a substantial award if the decedent had little income. In other cases, however, the loss-to-the-estate measure of damages will yield a much higher award than the loss-to-survivors approach. Consider a case in which the decedent is survived by his elderly parents. Under the loss-to-survivors approach there will likely be little in the way of provable financial loss to the parents. Even if the relevant statute allows recovery for consortium losses, they will be limited due to the parents' relatively short life expectancy. Thus the award in a loss-to-survivors state is unlikely to approach the loss-to-the-estate measure, which considers the decedent's future income stream over decades.[12]

The analysis of this example must go one step further, however, because the example asks how much *each* beneficiary would receive. In a jurisdiction that uses the loss-to-the-estate measure of damages, the *estate* will recover the decedent's lost income, minus personal consumption. But how will the recovery then be distributed to the actual beneficiaries? Here, for example, it is clear that Brahms's minor son has suffered a greater loss than the adult daughter. At least some loss-to-the-estate statutes provide that the

proceeds of the wrongful death recovery shall be distributed as general assets of the estate. See, e.g., N.H. Rev. Stat. Ann. §556:14 (damages "shall become a part of the decedent's estate and be distributed in accordance with the applicable provisions of law"). Very likely, the statute of distribution would call for equal distribution to the two children in this case despite the difference in the losses they suffered as a result of the decedent's death.

"The Lawsuit Was a Success but the Plaintiff Died"

7. a. This example illustrates the anomalous effects of the common law abatement rule. Under that rule Vivaldi would recover in full for his injuries, since he lived, and is personally able to bring this "personal" cause of action. At common law, however, Verdi's claim abated at his death unless he obtained judgment against Strauss before he died. His estate had no right to sue for his predeath losses, such as the pain and suffering, lost wages, and disability he experienced during the year before he died. Nor did Verdi's estate have a cause of action for wrongful death, since the common law barred wrongful death claims as well.

b. In Maine, as in most states today, Verdi's claim would survive his death and could be enforced by the representative of his estate. But remember that the survival action is for Verdi's *predeath* losses from the tort. It is not a claim for wrongful death, it is for the losses Verdi suffered before death that he could have recovered himself had he lived. Thus, his executor or administrator could recover for his predeath pain and suffering, lost wages, medical bills, and other compensable damages suffered during the year that he lingered.

c. Absolutely. The right to sue under the survival statute for losses suffered by the victim before death does not bar the right to sue for wrongful death. The two actions address distinct injuries, and may benefit different parties. The survival action compensates Verdi's estate for damages he suffered before death that he could have recovered himself if he had lived. The wrongful death action (in most jurisdictions) compensates the survivors (whichever are eligible under the statute) for their losses as a result of the death.

8. In this case, Verdi had a claim against Strauss for his injuries in the accident, but he died of an unrelated cause before bringing suit to enforce it. Under a survival statute the right survives to his estate, regardless of the cause of his death. The rationale for survival statutes is that the tortfeasor should compensate the victim's estate for the damages the victim suffered before dying, even though the victim dies before suing for those injuries herself. This rationale applies equally, whether the victim dies of injuries inflicted by the tortfeasor or from an unrelated cause. Thus, Verdi's estate may recover under the survival statute for the medical expenses, lost wages, and pain and suffering from the time of the injury until his death, even though the hip injury did not cause his death.

   However, Verdi's executor or administrator would not have a wrongful death claim in this example. Verdi died of a stroke, not the broken hip suffered in the accident. Under basic negligence law, Strauss cannot be held liable for damages he didn't cause.

Consorting with Confusion

9. Verdi's widow has a claim against Strauss for loss of consortium, but the survival statute has nothing to do with it. Survival statutes allow a decedent's estate to bring a claim *the decedent* could have brought before death. The consortium claim is Jane's own claim for her consortium losses as a result of Verdi's injury, suffered during the period when he was incapacitated. She is seeking recovery for her own loss, the inability to relate to Verdi in the same way she did before, due to his injury. This is her own claim, and she will bring it in her own name.

   Her consortium claim will be limited to the impairment of her relationship with Verdi during the six months he was incapacitated by the accident. The relationship was then cut off entirely by his death from an unrelated cause.

10. a. Both the wrongful death and survival statutes come into play here. Verdi's estate has no "survival claim," because he did not suffer any predeath damages; he died instantly. However, the survival statute is still implicated, because *the tortfeasor* died. Under the old common

law approach, tort claims abated if the tortfeasor died. So, at common law, neither Verdi nor his estate could have sued Strauss's estate; the negligence claim would die with Strauss. However, most states now have survival statutes that allow a claim to survive against the estate of a tortfeasor. See, e. g., the Maine survival statute quoted at p. 438.

So Jane, as administratrix of Verdi's estate, will be able to sue Strauss's estate. Her claim is for the wrongful death of Verdi, under the relevant state wrongful death statute, but it is the survival statute that provides that this claim "survives" the death of Strauss, allowing Jane to bring that claim against his estate. Her suit will be an action for wrongful death, and will be entitled *Jane Verdi, Administratrix v. Estate of Strauss*.

b. In this case, the applicable wrongful death statute only authorizes recovery for the actual economic losses Jane suffers as a result of Verdi's death (because the "pecuniary loss" provision is strictly construed). It makes no provision for the consortium losses she sustains as a result of the destruction of her relationship to her husband. So Mrs. V. has simply asserted a separate count in her complaint for loss of consortium as well.

This creative effort to circumvent the limits of the wrongful death statute will fail. Because Verdi died instantly, Jane's loss of consortium claim is for the loss of his company, companionship, advice, support, and society *after* death. It is, in other words, a claim for damages resulting from the death. But these damages are *not* allowed under the applicable wrongful death statute, which has been construed to limit recovery to "pecuniary loss" in the strict sense. Since the right to recover for wrongful death is defined by the statute, the court will confine recovery to that allowed by the statute itself, and dismiss Jane's second claim.[13]

There is certainly a strong policy argument for Jane's position, however. Had Verdi survived, she would have been entitled to recover for the impairment of her relationship with him while he was incapacitated, under a count for "loss of consortium." See Example 8. Why shouldn't she have the same right when the relationship is completely cut off by his death? Does it make sense to retain the pecuniary loss measure of damages for wrongful death where much

broader compensation is provided for consortium losses when the direct victim is merely injured?

This argument has led many states to amend their wrongful death statutes to authorize broad consortium damages in wrongful death cases. For example, if the Kansas provision on p. 435 applied, Verdi's widow could recover damages for loss of society, companionship, advice, counsel, and so forth, the same elements compensated under loss of consortium where the direct victim is merely injured.

c. The problem here is that the claim for negligence is really no different from the claim for wrongful death. A wrongful death claim must be based on a recognized tort that the decedent could have asserted had he survived. Here, that claim would be negligence, for carelessly dropping the tuba on Verdi. The wrongful death action is simply a negligence action in which the injury resulting from the defendant's negligent act is death. To sue separately for negligence is simply to state the same thing another way.

A slightly different route to the same conclusion is based on the fact that there was no right to recover for wrongful death at common law. The right is defined by statute, and recovery is limited to the terms of the statute. Thus, Verdi's wife has a claim under the wrongful death statute, but no separate right to assert a common law negligence claim against Strauss for causing Verdi's death. Thus, her third count does not state a claim for which relief can be granted.

Substance and Procedure in the Law of Wrongful Death

11. This chapter illustrates that the extent of the damages available for wrongful death varies dramatically from state to state. For the most part, tort law is state law, and each state is free to create its own rules, whether by statute or judicial decision, without regard to what the rules are in another state. Some states inevitably will have more generous rules than others.

A corollary of this basic tenet of tort law is that a plaintiff may fare a lot better under one state's tort law than under another state's. In the case on which this example is based,[14] Kansas imposed (at the time) a $100,000 cap on intangible damages, while North Dakota had no cap.

Since the case involved the wrongful death of a college student, who was probably not making financial contributions to his parents, the intangible damages were probably the major item of damages. Thus, the case would be "worth" a lot more under North Dakota law than under Kansas law. (No one argued for Tennessee law, another candidate.)

So, as counsel for Mahler's family, you might choose to sue in North Dakota, on the premise that it would be likely to apply its own statute to the wrongful death of a North Dakota domiciliary. But there might not be personal jurisdiction over all of the defendants in North Dakota for a Tennessee accident.

Alternatively, you might sue in Tennessee or Kansas, but argue that the court should *apply North Dakota law to the case.* In every case involving multi-state contacts, the court must decide which state's law to apply to the case. Every state has pesky "choice-of-law" rules about this, and they do not always lead courts to apply their own law. In this instance, the court in Tennessee concluded that the North Dakota statute should apply, since the claim was for the death of a North Dakota domiciliary.

The point is that, given the wide variation in tort rules, and the often broad reach of personal jurisdiction, there is room for creative lawyers to maximize their clients' opportunities by choosing a favorable forum. Even if they can't sue in the state with the most advantageous tort law,[15] they may still be able to convince the court in another state to apply that state's tort law, due to important contacts of the case with that state. So, before bringing suit, you should consider the wrongful death statutes of the states in which suit might be brought, and the choice-of-law rules of those states, in order to maximize the chances of having the case decided under the most favorable wrongful death statute.

Judge Fudd on an Off Day

12. Fudd is only "off" here because he's right on. The North Dakota statute, like many wrongful death acts, authorizes wrongful death recovery for claims that "would have entitled the party injured, if death had not ensued, to maintain an action and recover damages in respect thereof. . . ." If Mendelssohn had lived and brought suit, he would not have been entitled to "recover damages in respect thereof," since his contributory

negligence would have been a complete defense (the example assumes). Consequently, the wrongful death suit is barred as well.[16]

An argument can (as always) be made to the contrary. The wrongful death recovery is for the benefit of the survivors. If *they* have not been negligent, arguably their recovery should not be reduced. But most courts have considered themselves bound by statutory language like North Dakota's, or by the obvious fact that the decedent's conduct would have barred recovery if he had survived.

An interesting variant on this issue is the situation in which a beneficiary of the wrongful death action is a negligent cause of the death. Suppose, for example, that the decedent's father was the statutory beneficiary but was driving negligently at the time of the accident and was a cause of the accident that caused the son's death. Most cases under the loss-to-the-survivors type of wrongful death statute bar (or reduce, under comparative negligence) recovery by the negligent beneficiary. See generally Speiser, ch. 15. However, in jurisdictions that measure damages by the loss to the estate, the father might recover despite his negligence. Under that approach, the *estate* is the beneficiary; it is to be compensated for the decedent's pecuniary losses, and who actually inherits the assets in the estate may be viewed as an irrelevant fortuity. See *In Re Estate of Infant Fontaine,* 519 A.2d 227 (N.H. 1986) (mother, as heir of deceased unborn child, was entitled to recover half of proceeds of wrongful death action, even though her negligence was a cause of the accident that caused child's death, since the estate, not the heirs, was the beneficiary of the wrongful death recovery).

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1. The North Dakota statute, in language taken verbatim from Lord Campbell's Act, makes the tortfeasor liable "although the death shall have been caused under such circumstances as amount in law to felony." Although the felony merger doctrine never applied in the American states, this irrelevant clause repudiating the doctrine was copied into many American wrongful death statutes.

2. The statute was amended in 1992. This is the pre-1992 version, used for illustration purposes. The current version is discussed in the analysis of Example 3.

3. For an excellent example of a court allocating a wrongful death recovery among various relatives under the Virginia wrongful death statute see *Meeks v. Emiabata,* 2015 WL 6760491 (W.D. Va. 2015). The court in *Meeks* allocated small awards to two relatives with distant relationships to the decedent, and very substantial awards to two other relatives with very close relationships to him.

4. Some states interpret their wrongful death statutes to allow recovery for loss of inheritance. See Speiser §6:35. This would allow some recovery for pecuniary loss even if the decedent was making no contributions to the statutory beneficiaries before he died. Presumably, the plaintiff would still have to

show that the beneficiary would have inherited the decedent's estate, *and* that he or she was in the class of beneficiaries eligible to take under the wrongful death statute.

5. The New Hampshire statute includes a separate provision for recovery of consortium losses *in addition to* the pecuniary loss-to-the-estate measure.

6. Like so many issues, the common law dealt with this one by throwing a little legal Latin at it: "actio personalis moritur cum persona," translated "a personal action dies with the person." Speiser §1:13 n.l.

7. Not all states allow survival in all types of cases, however. Idaho, for example, has enacted statutes allowing for survival of certain claims, but not for most tort claims. See *Estate of Shaw v. Dauphin Graphic Machines, Inc.*, 392 F. Supp. 2d 1230 (D. Idaho 2005), *rev'd on other grounds sub. nom. Shaw v. Daughin Graphic Machines, Inc.*, 240 Fed. App. 177 (9th Cir. 2007).

8. Some survival statutes do not allow recovery by the estate for predeath pain and suffering. See, e.g., Ariz. Rev. Stat. §14-3110.

9. Do any of you know what a bluebook is any more? Back in the day nervous law students wrote their exams in them. They had blue covers.

10. Va. Stat. §801.53.

11. An interesting question is how the $250,000 allowed for consortium damages under the Kansas statute would be allocated, if the intangible damages exceed that amount. Presumably, the options would be proportional to the actual damages, or pro rata (equal shares). Suppose, for example, that the jury came back with $300,000 in consortium losses for the wife, $200,000 for the son, and $100,000 for the daughter. Under a proportional approach to distributing the $250,000 authorized in the statute, the mother would get $125,000 ($300,000/600,000ths), the son $83,333 (200,000/600,000ths), and the daughter $41,667 (100,000/600,000ths). Under a pro rata approach, each would get $83,333.33 (one-third of $250,000).

12. However, the parents should only recover for the decedent's future accumulations up to the date of their own life expectancy, a significant limit as well.

13. At least one court has refused to follow this reasoning. See *Giuliani v. Guiler,* 951 S.W.2d 318 (Ky. 1997), which *did* recognize a common law loss of consortium claim due to the death of a parent, even though the relevant wrongful death statute did not allow consortium damages for the death of a parent. A strong dissent argued for the position in the text above. Compare *Bratcher v. Galusha,* 417 Mass. 28, 30-31 (1994) (rejecting similar claim made by parents of the decedent; court declined to "rewrite or ignore the plain language of the statute"). As Oliver Wendell Holmes once said, "No generalization is worth a damn, including this one."

14. *MacDonald v. General Motors Corp.*, 110 F.3d 337 (6th Cir. 1997).

15. Of course, even if all defendants could be sued in the state with the most generous measure of wrongful death damages, that state might choose, under its choice-of-law rules, to apply the law of *another state* to the case. But there is a subtle yet clear tendency of courts to apply forum law where there is a basis to do so.

16. In a comparative negligence jurisdiction, the decedent's negligence will reduce recovery in a wrongful death case, just as it would have if the decedent had survived. Prosser & Keeton at 955.

PART VI

Interlude: Pleading a Personal Injury Case

CHAPTER 20

Some Legal Anatomy: Thinking Like a Tort Lawyer

INTRODUCTION

If you had chosen medical school, your course in human anatomy would probably have been broken down into topics, like the brain, the circulatory system, the digestive system, the skeletal system, and so on. But bodies don't operate that way, they function as a unified system in which all elements interact to form a living organism.

Similarly, while most of the chapters in this book, like the Torts course itself, focus on particular elements or types of tort claims, cases do not arrive in lawyers' offices in such neat categories. Accidents present complex, miscellaneous, unorganized facts that lawyers must reconceptualize in terms of the theoretical framework of tort law. The challenge of a torts practice is to fit these unorganized real world facts into the recognized elements and defenses of a negligence claim. This chapter provides a brief opportunity to look at tort claims the way a practitioner does, to reason from raw data to legally supportable claims for damages.

To begin with, remember that the plaintiff must prove all the basic elements of a negligence claim in order to recover. If Bernhart is injured in a boating accident, the fact that she is seriously injured and needs compensation is not enough to support recovery. She must also prove that the

pilot of the other boat was negligent, and that her negligence caused the accident. If Terry sells stock at a serious loss after an inaccurate financial statement is published by the corporation's accountants, she will still not recover if the court concludes that the accountants owed her no duty, or that the drop in value of the stock was not caused by the accountants' negligence. A torts chain is only as strong as its weakest link; you have to examine the whole chain to give a realistic assessment of the chances of recovery.

In addition, while we often speak broadly of a "claim for negligence," many types of negligence claims require more specific analysis. A plaintiff cannot recover for infliction of emotional distress, for example, simply by showing that the defendant's negligent conduct caused her distress. Courts have imposed additional requirements to limit emotional distress claims, such as physical contact, the *Dillon* standards, or presence in the "zone of danger." See generally Chapter 14. Similarly, plaintiffs seeking recovery for loss of consortium must show more than negligence, causation, and damages: Courts generally conclude that a defendant only owes a duty to avoid loss of consortium if a close relationship exists between the plaintiff and the direct victim. See Chapter 14, pp. 308–311. Similarly, in wrongful death cases, only certain parties are allowed to recover. See Chapter 19. Counsel must analyze such cases with a view to these constraints on recovery for negligence.

Third, counsel must consider carefully what damages are recoverable in a negligence case. The fact that a defendant is liable does not necessarily mean that she is liable for every loss the plaintiff has suffered. This may be true because the law limits the types of damages recoverable (as in wrongful death cases), because the defendant did not cause all the plaintiff's damages (as in some multiple tortfeasor situations), or because, as a matter of policy, the law refuses to shift the loss for certain damages, under a proximate cause or duty analysis.

Without further ado, let's explore some of these limitations on negligence recovery based on the facts of this relatively simple accident case:

> Isadora Dunton was a famous opera star. On March 1, 2018, she and her husband Booth were pulling out of their driveway on to Main Street in the town of Elkton, West Dakota. Burton came speeding around a curve and hit their car broadside. Isadora, who was three months pregnant at the time, was severely injured. John, son of Isadora and Booth, was playing basketball in the driveway, about 25 feet from the point of the accident, heard the collision, and ran to the scene immediately. Isadora suffered the loss of sight in one eye and multiple internal injuries, and was hospitalized in serious condition. The baby suffered fetal distress and cardiac arrhythmia from the trauma of the accident, and was stillborn a week later. Four months later, on July 1, Isadora died as a result of her injuries.

Booth suffered minor facial lacerations. John was extremely upset by the accident. He subsequently became withdrawn, suffered a severe decline in his high school grades, and more or less "dropped out." Lydia, a married daughter of Isadora, was also seriously affected by the accident. She became tense, impatient with her husband, cried a lot, and had difficulty sleeping. She also became difficult to work with and was skipped over for promotion. She also missed her mother.

Garrick was Isadora's costar in many important productions and a close personal friend. He was extremely upset by her injury, suffered a nervous breakdown, and never quite fully recovered. Unable to find a comparable costar, his career was limited thereafter to minor supporting roles.

Burton, the other driver, was also seriously injured. He died a year later of unrelated causes.

The following examples consider the elements, special requirements, and limitations on relief for the different types of claims that may be asserted based on the Dunton accident. In analyzing the claims, focus on the claims that the plaintiffs could raise, even if some claims may be vulnerable to legal or factual challenge by the defendant or appear strategically dubious. Assume that West Dakota has a survival statute, a wrongful death statute that authorizes pecuniary and loss of consortium damages for survivors, and that it recognizes claims for spousal consortium in personal injury cases but has not decided whether children can recover for loss of parental consortium.

Examples

Setting the Stage

1. Assume that Isadora did not initiate suit before her death. Booth, the administrator of her estate, comes to you after her death, to inquire about potential claims for damages as a result of her physical injuries.
   a. What would you advise Booth about the effect of Isadora's death on the right to recover for her injuries?
   b. What would you advise Booth about the effect of Burton's death on Isadora's claims?

Act One

2. Booth retains you to bring an action against Burton for damages for Isadora's injuries. Which of the following elements of damages would you claim in a *survival* action for predeath losses suffered by Isadora?

a. pain and suffering
b. lost future earning capacity
c. loss of enjoyment of life
d. medical bills
e. loss of consortium with members of her family

3. Assume that Booth also wishes to assert a *wrongful death* claim resulting from Isadora's death. Which of the following elements of damages would you seek in the wrongful death claim?
   a. pain and suffering
   b. lost earning capacity
   c. loss of enjoyment of life
   d. loss of consortium suffered by Booth and other family members due to Isadora's death

Act Two

4. Booth also inquires as to claims he may assert on behalf of the deceased child Isadora was carrying at the time of the accident. What would you advise him as to the prospects of recovery for the child's death, and the elements of damages?

5. Booth also inquires as to the claims he may assert on his own behalf as a result of the accident.
   a. What would you advise Booth as to the elements of damages for his own physical injuries?
   b. What would you advise Booth as to his right to assert claims for loss of consortium?
   c. What would you advise Booth concerning other claims he might have?

6. Booth brings John with him. John is also interested in asserting claims against Burton's estate. What claims may he have, and what problems do you anticipate in recovering on them?

7. A week after your interview with Booth and John, Lydia comes in to inquire about possible claims against Burton. What claims may she have, and what problems do you anticipate in recovering on them?

Supporting Actors

8. Next to come in is Garrick, Isadora's costar in the opera. What would you advise him as to his rights against Burton arising from the accident?

Putting the Show on the Road

9. Draft a complaint seeking relief on behalf of Isadora's estate, Booth, John, and Lydia. Assume that the West Dakota law allows both survival and wrongful death claims and recognizes fetal wrongful death claims, but has not yet addressed claims for loss of consortium on behalf of parents or children. Assume also that it is unclear what the standards are in West Dakota to state an adequate claim for negligent infliction of emotional distress.

Explanations

Setting the Stage

1. a. The right to recover for Isadora's injuries depends on the applicable survival and wrongful death statutes, which vary from state to state. Thus, you might advise Booth, as lawyers frequently do, that you don't know whether suit can be brought, but will find out. However, if you were an experienced West Dakota practitioner, you would probably be familiar with the local law on these issues.

As Chapter 19 explains, virtually all states have modified the common law doctrine denying recovery for wrongful death. Here, for example, West Dakota's wrongful death statute authorizes recovery of pecuniary and consortium damages suffered by Isadora's survivors as a result of her death and the survival statute authorizes Booth, as Isadora's executor, to recover for predeath losses Isadora suffered as a result of the accident.

b. The question here is whether Isadora's claims "survive" the death of Burton, the tortfeasor. Most states now provide by statute that tort claims survive the tortfeasor's death and may be brought against the tortfeasor's estate. This is true regardless of the cause of the tortfeasor's death. Thus, it makes no difference here that the cause of Burton's death was unrelated to the accident.

Act One

2. a. Most survival statutes allow recovery by the estate of a deceased tort victim for losses suffered by the decedent prior to death. Under these survival statutes, the estate recovers any damages the plaintiff sustained from the date of the accident until her death, and which she could have recovered herself if she had survived.

Had Isadora survived and filed suit herself, she could have recovered for pain and suffering. Thus, the physical pain and emotional anguish she sustained during this four-month period as a result of her injuries should be proper elements of damages in the survival action.

Of course, any recovery under the survival claim will not compensate Isadora for having suffered it; she is beyond compensation in any worldly sense. Consequently, a few states view recovery for pain and suffering as a "windfall to the heirs" (see Prosser & Keeton at 943) and bar recovery for pain and suffering in survival actions. See, e.g., Ariz. Rev. Stat. Ann. §14-3110. Most states, however, allow recovery for the decedent's predeath pain and suffering: If these damages are not allowed in the survival action, the *defendant* will get a windfall due to the victim's death. Although these damages cannot benefit her, at least her survivors, through her estate, can receive the benefit of the recovery.

b. Lost future earning capacity refers to the tort victim's loss of the ability to earn money in the future, that is, after the trial. See Chapter 18, pp. 408–409. Under most survival statutes, this is not a proper element of a survival claim, which only encompasses losses suffered prior to death. Minzer, Nates §21.03. Only her *predeath* lost earnings, for the four months from the accident until her death, would be properly sought under the survival claim. Her future

earning capacity will be taken into account in assessing the damages for wrongful death. See Example 3b.

Here again, there are statutory variations. In a few states, lost earning capacity *is* allocated to the survival claim. See, e. g., *Wetzel v. McDonnell Douglas Corp.*, 491 F. Supp. 1288 (E.D. Pa. 1980). In a state with a statute of this type, the court must be very careful to assure that these same damages are not assessed again under the wrongful death claim.

c. All states recognize that an injured plaintiff's loss of the ability to enjoy normal activities and pleasures of living is a compensable element of damages in tort actions. As Chapter 18 indicates, some states view this as included in pain and suffering, while others treat "loss of enjoyment of life" as a distinct element of damages. Presumably Isadora's estate would recover for her loss of enjoyment of life during the four months she survived, since this is a loss she suffered prior to death, for which she could have recovered herself had she lived. However, as with her earnings, she cannot recover for *future* loss of enjoyment in a survival action.

   As noted above, a few states specifically bar claims for pain and suffering in survival actions. If the Dunton case arose in one of these states, counsel for Burton's estate would doubtless argue that the exclusion for pain and suffering damages also bars recovery for the related loss of enjoyment damages.

d. Isadora's medical expenses incurred prior to death would be included in the survival claim. These are losses she suffered prior to death as a result of the defendant's negligence. Had she lived, she would have been able to sue for them herself. The estate steps into her shoes for purposes of enforcing this predeath claim.

e. This is a tricky question. Isadora does not have a claim for loss of consortium as a result of her *own* injuries. Consortium claims are claims by family members of an injured person, alleging that the injury has impaired the injured person's ability to interact with those family members. Booth, John, and Lydia may have consortium claims based on the impairment of Isadora's ability to relate to them as a result of her injury, but Isadora will not. Her claim for impairment of her ability to relate to others caused by her injuries is

a "loss of enjoyment" claim, which is part of the survival claim for her predeath damages. See Example 2c.

3. a. Neither Isadora's estate nor her survivors would have a claim for future pain and suffering because Isadora, due to her death, will not experience any. Had she lived and sued, she might well have had such a claim, since she would have faced the prospect of continued suffering. (As Example 2a indicates, the claim for her predeath pain and suffering would be part of the survival claim in most states.)

b. Under most wrongful death statutes, the decedent's survivors may recover for pecuniary support they would have received from the decedent. See generally Chapter 19, pp. 434–435. This recovery will not exactly equal Isadora's lost earning capacity; it only includes that part of her future earnings that would have gone to support the survivors. Certainly John would have a substantial claim, since he was still at home and dependent on his parents for support. Booth might also recover such damages under the wrongful death statute. Because Isadora was very successful, her income doubtless contributed substantially to the family's lifestyle. The loss of this income is a pecuniary loss to Booth, even if he is still able to support himself in the food-and-shelter sense of the term without it.

Lydia, however, will have a harder time making out a claim for pecuniary losses due to Isadora's death, since she was financially independent. However, if she could prove that Isadora made gifts to her from time to time (as wealthy, tax-conscious parents are known to do) she might claim that she has also suffered pecuniary losses compensable under the wrongful death statute.

c. If Isadora had lived but been disabled, either temporarily or permanently, she would have had a claim for future loss of enjoyment of life caused by any impairment she sustained as a result of the accident. For example, if she survived the accident but lost an eye, this would interfere with Isadora's enjoyment of life as long as she lived. However, since she died as a result of the accident, there will be no claim for loss of enjoyment of life for any period after her death. Recovery for any damages due to her death is governed by the wrongful death statute, which compensates survivors for their losses due to the decedent's death, not the decedent for hers. While there is

surely no greater loss of enjoyment than the loss of life itself, this is a loss to Isadora, not her survivors.

d. Under many wrongful death statutes, immediate survivors of the decedent are entitled to compensation for consortium-type damages — their loss of the comfort, companionship, advice, society, and counsel of the decedent — for the period after the decedent's death. See, e.g., Kan. Stat. Ann. §60-1904, quoted at Chapter 19, p. 435. Since the West Dakota wrongful death statute authorizes recovery for these emotional damages (the Introduction tells us), Booth and Isadora's children will recover for this loss for the future years they otherwise would have enjoyed their relationship with Isadora.

Act Two

4. For many years, the courts barred claims for injury or death of a fetus, on the theory that no *duty* was owed to an unborn child. Prosser & Keeton §55 at 367. More recently, many states have allowed such claims, but others have held that the term "person" in their wrongful death statutes does not apply to a fetus, and passed the buck to the legislature to change the rule. See, e.g., *Witty v. American Gen. Capital Distrib., Inc., 727* S.W.2d 503 (Tex. 1987).[1] Thus, whether there is a claim for the unborn child's death will turn on how the court interprets West Dakota's wrongful death statute.

   If the wrongful death statute allows recovery for causing the death of a fetus, the damages will depend on the terms of the wrongful death statute. Many such statutes authorize damages for both pecuniary and consortium losses to closely related survivors such as parents and siblings. Naturally, assessing the monetary contributions this child would have made to her parents in the future, or the quality of the relationship that would have developed between the child and her family, is a surreal process. Certainly, the losses could be great, since the relationship is destroyed from the outset and all monetary contributions the child might have made are lost. If this claim is allowed, it will introduce a very emotional and uncertain element into the trial that will doubtless have great settlement value from the plaintiffs' point of view.

   Are there any other claims you might assert on behalf of the

deceased child? The facts indicate that Isadora miscarried a week after the accident, and that during that period the baby suffered fetal distress and cardiac arrhythmia. This suggests that the baby, though in utero, suffered pain and suffering prior to the miscarriage. Advancing medical knowledge suggests that fetuses have a good deal more awareness than previously thought. As plaintiff's counsel in this case, you might draw on this advancing medical knowledge to argue for a new type of claim for "fetal pain and suffering."

Presumably, such claims would be asserted under a survival statute, as an injury suffered by the child prior to death. It is highly doubtful that a state that rejects fetal wrongful death claims would recognize a claim for its predeath pain and suffering, but the argument might be accepted in a jurisdiction that allows fetal wrongful death claims.

Issues like fetal suffering prior to death are grim to contemplate. As plaintiff's counsel, however, it is your job to contemplate them, and to seek compensation for such losses if they may be allowable. It is through such constant probing of the boundaries by creative plaintiff's counsel that tort law grows.

5. a. You would advise Booth that he is entitled to sue for his medical bills, pain and suffering, and lost wages, and for property damage to the car if he owned it. However, you would also advise him that these damages are not likely to be great, since he suffered minor injuries. Clearly, the substantial claims available to Booth are for his intangible damages — his emotional distress and loss of consortium claims arising from the serious injuries sustained by Isadora.

   b. Booth's loss of consortium claims will be based on the injuries to other family members that impair their ability to relate to Booth. For example, Booth would certainly have a loss of consortium claim resulting from the injury to Isadora, his wife, since her serious injuries impaired her ability to relate to Booth as she had before. However, this consortium claim will be limited to the four-month period prior to her death. The loss of Isadora's consortium suffered by Booth *as a result of* her death is part of the wrongful death claim discussed earlier. Since the West Dakota wrongful death statute authorizes damages for loss of the relationship with the decedent, Booth will recover damages for this post-death loss. But he will do

so under the wrongful death statute, and will have no separate "loss of consortium" claim for the post-death period. If he were allowed to sue for post-death "loss of consortium," and for the same losses under the wrongful death statute, he would recover twice for the same loss.

Booth has also lost the ability to relate to his unborn child due to the child's death. However, this claim is also a claim for post-death loss of consortium, and will be compensable, if at all, under the wrongful death statute. See Example 4.

It is also possible that Booth has a claim for loss of consortium with his son John, due to John's injuries. A few jurisdictions allow a parent to recover for loss of consortium with an injured child, though many do not. See Chapter 14, p. 310. The facts suggest that John has suffered emotional injuries from witnessing the accident and that these emotional injuries have affected his ability to relate to others. However, allowing Booth to assert a consortium claim as a result of this injury to John involves piling one claim for indirect injury (Booth's consortium claim for interference with his relationship to John) onto another indirect injury claim (John's indirect infliction of emotional distress claim due to witnessing injury to Isadora and Booth). The results could be fairly absurd if courts allowed such addons to the third and fourth power. This claim is doubtful, and if it was made to a jury, might be viewed by them as overreaching.

c. Booth will likely have a claim for indirect infliction of emotional distress. He witnessed traumatic, serious injury to Isadora and was himself injured in the same accident. If West Dakota followed the zone of danger rule Booth would recover for indirect infliction of emotional distress, since he was within the zone of danger created by Burton's negligence. If the *Dillon* factors applied, he would also recover, since he was present and witnessed injury to his wife. Even in a jurisdiction that retains the impact rule, it is likely that Booth could assert this claim. He suffered an impact in the accident, which opens the door to related emotional distress, probably including distress from witnessing injury to Isadora. See p. 311, Example 1a.

6. John suffered no direct impact or physical injury in the accident. However, he did rush to the scene immediately and witness the

traumatic impact of the accident on members of his family. Whether he can recover for this depends on West Dakota's law on indirect infliction of emotional distress. Courts following the impact rule would deny recovery. Under the zone-of-danger approach, John's claim would turn on whether John was close enough to the collision to be endangered by it (how about flying debris?). Under the *Dillon* approach, John will state a claim if the court concludes that he "witnessed" injury to close family members by hearing the crash, even though he did not see it. (See Chapter 14, Example 1c for a discussion of this issue.)

Some jurisdictions also require resulting physical symptoms in order to recover for indirect infliction. The facts indicate that John became withdrawn and his grades went down. Although it would be hard to characterize these as physical symptoms, some courts might find such dubious "physical injuries" sufficient. See Chapter 14, Example 4f.

John may also have a claim for loss of consortium with Isadora for the four-month period prior to her death. Clearly her injuries impaired her ability to relate to John. Many jurisdictions do not allow children to sue for loss of consortium with their parents, but some do. The result will turn on how West Dakota decides this issue. However, John's claim for loss of the relationship with Isadora for the period after her death is com-pensable, if at all, under the wrongful death claim.

Last, John, as an eligible beneficiary under the wrongful death statute, will be entitled to recover pecuniary losses he has suffered due to Isadora's death. These losses could be substantial, including the cost of his present support and a future college education. They are separate from his consortium losses and must be based on separate proof of Isadora's expected financial support of John.

7. Lydia suffered no physical injuries, but apparently did experience a great deal of emotional distress. However, it is highly doubtful that she can recover on an indirect infliction claim. Most jurisdictions limit indirect infliction claims to those who are in the zone of danger or witness the accident or its immediate aftermath.

   Lydia might seek recovery for loss of consortium. Like John's claim, the result will depend on whether West Dakota allows children to recover for loss of consortium due to injury to their parents. If such claims are recognized in West Dakota, Lydia's recovery on this claim

will be limited to the four months during which Isadora survived. Her claims for loss of consortium with Isadora for the period after her death, like John's, will be governed by the wrongful death statute. Even states that deny loss of consortium claims for an *injured* parent may allow the children to recover for consortium losses under their wrongful death statutes if the parent is killed.

Even if the wrongful death statute allows damages for consortium losses, the court will probably not allow the jury to award consortium losses for such extended consequences as Lydia's missed promotion. Loss of consortium is meant to compensate for the interference with the relationship with the directly injured party, not for collateral economic consequences of that interference. The defense would doubtless argue that such attenuated consequences were not "proximately caused" by Burton's negligence.

Supporting Actors

8. Garrick has suffered serious injury due to the negligence of Burton, but it is very unlikely that he will recover damages from Burton's estate. Certainly, Garrick has no indirect infliction claim, since he is not related to Isadora, did not witness traumatic injury to anyone, suffered no impact, and was not in the zone of danger. Nor does he have a loss of consortium claim: Such claims are limited to family members, not operatic partners.

But doesn't he have a just plain "negligence" claim? Burton had a duty to drive carefully, he didn't, and his negligence caused injury to Isadora and consequent damages to Garrick. This is true, but most courts would hold that Burton's *duty* to drive with due care was owed to other drivers, perhaps to family members, but not to others who suffer secondary emotional or economic losses as a result of the accident. Other courts might reach the same result by holding that Burton's negligence was not the "legal cause" or "proximate cause" of the consequential injuries suffered by Garrick. Even if Garrick's injuries are foreseeable, the court must draw the line on secondary damages at some point, as a matter of policy. See generally J. Diamond, L. Levine & M. Madden, Understanding Torts 168-171 (5th ed. 2013). Whether on duty or proximate cause grounds, virtually all courts would reject Garrick's

claim.

Putting the Show on the Road

9. The complaint below is an example of the type of complaint that might be filed in the *Dunton* case. In reading the complaint, consider how the various claims for relief have been drafted to allege the elements necessary to support the claims. After the complaint are some notes on the reasoning underlying it.

STATE OF WEST DAKOTA

SUPERIOR COURT
CHEYENNE COUNTY

CIVIL ACTION NO. 19-1341

BOOTH DUNTON, Individually and as the Administrator of the estates of ISADORA DUNTON and BABY DUNTON, JOHN DUNTON and LYDIA DUNTON

PLAINTIFFS

v.

ELIZABETH BURTON, executrix of the estate of ROBERT BURTON,

DEFENDANT

COMPLAINT AND DEMAND FOR JURY TRIAL

PARTIES

1. Isadora Dunton is an individual, formerly residing at 43 Keane Drive, Elkton, West Dakota, who died on July 1, 2018, of injuries suffered in the motor vehicle accident which is the subject of this action.

2. Baby Dunton is the child of Isadora and Booth Dunton, who died on March 8, 2013 of injuries suffered in the motor vehicle accident which is the subject of this action.

3. The plaintiff Booth Dunton is an individual residing at 43 Keane Drive, Elkton, West Dakota. He is the widower and duly appointed administrator of the estates of Isadora Dunton and Baby Dunton.

4. The plaintiff John Dunton is the minor son of Isadora and Booth Dunton. He resides at 43 Keane Drive, Elkton, West Dakota.

5. The plaintiff Lydia Dunton is the daughter of Isadora and Booth Dunton. She resides at 1138 Lankton Boulevard, Elkton, West Dakota.

6. The decedent Robert J. Burton is an individual, formerly residing at 12 Lake Street, Burns, West Dakota, who died on February 15, 2019.

7. The defendant Elizabeth Burton is the daughter and duly appointed executrix of the estate of Robert J. Burton.

FACTS

8. On March 1, 2018, the decedents Isadora Dunton and Baby Dunton were passengers in a 2004 Volvo station wagon, driven by the plaintiff, Booth Dunton.

9. At approximately 11:05 a.m., Booth Dunton started the car in the family driveway at 43 Keane Drive, Elkton, West Dakota, and began to back out of the driveway onto Keane Drive, in order to proceed in an easterly direction on Keane Drive.

10. As the car backed into Keane Drive, a Ford Taurus, driven by the decedent Robert J. Burton, came around the corner, traveling east at an excessive speed and without keeping a proper lookout, in violation of West Dakota St. Ann. Tit. 32, §§90 and 93.

11. As a result of his negligent driving, the decedent Robert J. Burton was unable to stop his vehicle or avoid colliding with the plaintiffs' vehicle backing out of the driveway at 43 Keane Drive.

12. As a direct and proximate result of the negligence of the decedent, Robert J. Burton, his vehicle collided violently with the Dunton vehicle, demolishing the Dunton vehicle and causing serious personal injuries to Isadora Dunton, Booth Dunton, and Baby Dunton.

13. As a direct and proximate result of the accident, the decedent Isadora Dunton suffered multiple internal traumas and extensive damage to her left eye, causing permanent blindness. She was taken to Elkton General Hospital, where she remained in the intensive care unit until her death on July 1, 2018 from injuries suffered in the accident.

14. As a direct and proximate result of the accident, the decedent Baby Dunton suffered traumatic injuries, resulting in fetal distress and cardiac arrhythmia. On March 8, 2018, Isadora Dunton miscarried, causing the death of Baby Dunton.

15. As a direct and proximate result of the accident, Booth Dunton suffered multiple lacerations requiring medical treatment, experienced pain and suffering, extreme emotional distress and temporary disability, and lost wages in excess of $2,000.

16. At the time of the accident, the plaintiff John Dunton was standing in the driveway at 43 Keane Drive, in the immediate vicinity of the collision. He witnessed the accident, rushed to aid the injured members of his family and observed his mother and father covered in blood and suffering from extreme shock and pain.

17. As a result of the accident and the injuries suffered by her parents, the plaintiff Lydia Dunton has suffered serious emotional distress, inability to sleep, difficulties at work, and other damages.

18. At all times relevant to the events in this action, the plaintiffs and their decedents were in the exercise of due care.

FIRST CLAIM FOR RELIEF:
WRONGFUL DEATH OF ISADORA DUNTON

19. The plaintiff repeats and realleges the allegations in paragraphs 1 to 18 of the complaint.

20. As a result of the collision proximately caused by the decedent Robert Burton's negligence, Isadora Dunton suffered extensive personal injuries which led to her death on July 1, 2018, at the age of forty-three.

21. As a result of the death of Isadora Dunton negligently caused by the decedent Robert Burton, her husband Booth Dunton and her children John and Lydia Dunton have been deprived of both the financial support and the comfort, companionship, advice, society, and counsel they would have received from Isadora Dunton had she lived.

Wherefore, the plaintiff Booth Dunton, in his capacity as administrator of the estate of Isadora Dunton, seeks damages under the West Dakota Wrongful Death Statute, West Dakota St. Ann. Tit. 12 §143, on behalf of Booth Dunton, John Dunton, and Lydia Dunton, for the loss of financial support, comfort, companionship, advice, society, and counsel of the decedent Isadora Dunton, and for funeral and burial expenses, together with interest and costs of suit.

SECOND CLAIM FOR RELIEF:
SURVIVAL CLAIM FOR PREDEATH DAMAGES OF ISADORA DUNTON

22. The plaintiff repeats and realleges the allegations in paragraphs 1 to 18 of the complaint.

23. As a result of the collision proximately caused by the decedent Robert Burton's negligence, Isadora Dunton suffered extensive personal injuries, emotional distress, pain and suffering for a period of four months prior to her death, suffered loss of the normal pleasures and enjoyment of life over the four month period, lost substantial earnings from her work as a soloist with the West Dakota Civic Opera, and incurred great medical and other expenses for her care, all of which she would have been entitled to recover in an action against the defendant had she survived.

Wherefore, the plaintiff Booth Dunton, in his capacity as administrator of the estate of Isadora Dunton, seeks damages under the West Dakota survival statute, St. Ann. Tit. 12 §147, on behalf of the estate of Isadora Dunton, for her lost earnings, medical expenses, pain and suffering, and loss of enjoyment of life from March 1, 2018 until her death on July 1, 2018, together with interest and costs of suit.

THIRD CLAIM FOR RELIEF:
WRONGFUL DEATH OF BABY DUNTON

24. The plaintiff repeats and realleges the allegations in paragraphs 1 to 18 of the complaint.

25. At the time of the accident, the decedent Isadora Dunton was pregnant with a baby girl, the decedent Baby Dunton,

26. As a result of the collision proximately caused by the decedent Robert Burton's negligence, Isadora Dunton suffered extensive personal injuries which led to the death and miscarriage of her child, Baby Dunton, on March 8, 2018.

27. As a result of the death of Baby Dunton negligently caused by the decedent Robert Burton, the plaintiffs Booth Dunton, Lydia Dunton and John Dunton have been deprived of both the financial support and the comfort, companionship, advice, society, and counsel they would have received from Baby Dunton had she lived.

Wherefore, the plaintiff Booth Dunton, in his capacity as administrator of the estate of Baby Dunton, claims damages under the West Dakota Wrongful Death Statute, West Dakota St. Ann. Tit. 12 §143, on behalf of Booth Dunton, for the loss of financial support, comfort, companionship, advice, society, and counsel of the decedent Baby Dunton, as well as for funeral and burial expenses, together with interest and costs of suit.

FOURTH CLAIM FOR RELIEF:
SURVIVAL CLAIM FOR PREDEATH DAMAGES OF BABY DUNTON

28. The plaintiff repeats and realleges the allegations in paragraphs 1 to 18 of the complaint.

29. As a result of the collision proximately caused by the decedent Robert Burton's negligence, Isadora Dunton suffered extensive personal injuries which caused the child Baby Dunton to suffer cardiac arrhythmia and extreme fetal distress from the date of the accident until her death, injuries for which she could have recovered herself had she lived.

Wherefore, the plaintiff Booth Dunton, in his capacity as administrator of the estate of Baby Dunton, claims damages under the West Dakota survival statute, St. Ann. Tit. 12 §147, on behalf of the estate of Baby Dunton, for the pain and suffering she experienced from March 1, 2018 until her death on March 8, 2018, together with interest and costs of suit.

FIFTH CLAIM FOR RELIEF:
BOOTH DUNTON'S CLAIM FOR PERSONAL INJURIES

30. The plaintiff repeats and realleges the allegations in paragraphs 1 to 18 of the complaint.

31. As a result of the collision proximately caused by the decedent Robert Burton's negligence, Booth Dunton suffered facial lacerations, incurred lost wages and medical bills, experienced pain, and suffering, and was temporarily disabled.

Wherefore, the plaintiff Booth Dunton, suing in his individual capacity, seeks damages from the defendant for pain and suffering, medical expenses, lost wages, and loss of the enjoyment of life suffered as a result of his injuries, together with interest and costs of suit.

SIXTH CLAIM FOR RELIEF:
BOOTH DUNTON'S CLAIM FOR LOSS OF CONSORTIUM
WITH ISADORA DUNTON

32. The plaintiff repeats and realleges the allegations in paragraphs 1 to 18 of the complaint.

33. As a result of the collision proximately caused by the decedent Robert Burton's negligence, Isadora Dunton suffered extensive personal injuries which led to her death on July 1, 2018.

34. As a result of the serious personal injuries suffered by Isadora Dunton, the plaintiff Booth Dunton suffered the loss of his wife's comfort, companionship, advice, society, and counsel from the date of the accident until her death on July 1, 2018.

Wherefore, the plaintiff Booth Dunton claims damages from the defendant for loss of consortium with his wife, Isadora Dunton.

SEVENTH CLAIM FOR RELIEF:
JOHN AND LYDIA DUNTON'S CLAIMS FOR
LOSS OF CONSORTIUM WITH ISADORA DUNTON

35. The plaintiffs repeat and reallege the allegations in paragraphs 1 to 18 of the complaint.

36. As a result of the collision proximately caused by the decedent's negligence, Isadora Dunton suffered extensive personal injuries which led to her death on July 1, 2018.

37. As a result of the serious personal injuries suffered by Isadora Dunton, her children Lydia Dunton and John Dunton suffered the loss of their mother's comfort, companionship, advice, society, and counsel from the date of the accident until her death on July 1, 2018.

Wherefore, the plaintiffs Lydia and John Dunton claim damages from the defendant for loss of consortium with their mother, Isadora Dunton.

EIGHTH CLAIM FOR RELIEF:
BOOTH DUNTON'S CLAIM FOR
NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

38. The plaintiff repeats and realleges the allegations in paragraphs 1 to 18 of the complaint.

39. As a result of the collision proximately caused by the decedent's negligence, Isadora Dunton suffered extensive personal injuries which led to her death on July 1, 2018. Booth Dunton was also present and sustained personal injuries in the accident.

40. Immediately after the collision, Booth observed his wife in extreme pain, shock and distress from the injuries suffered in the accident.

41. As a result of the terrifying experience of observing the accident and its aftermath, Booth Dunton suffered immediate emotional trauma and permanent psychic damage, as well as direct physical injury.

Wherefore, the plaintiff Booth Dunton claims damages from the defendant for negligent infliction of emotional distress.

NINTH CLAIM FOR RELIEF:
JOHN DUNTON'S CLAIMS FOR
NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

42. The plaintiff repeats and realleges the allegations in paragraphs 1 to 18 of the complaint.

43. As a result of the collision proximately caused by the decedent's negligence, Isadora Dunton suffered extensive personal injuries which led to her death on July 1, 2018.

44. At the time of the accident, John Dunton was standing in the immediate vicinity of the collision, and immediately became aware that his parents had been involved in a serious accident.

45. Immediately after the collision, John Dunton rushed to the scene and observed his mother and father in extreme pain, shock and distress from the injuries suffered in the accident.

46. As a result of the terrifying experience of observing the accident and its aftermath, John Dunton suffered both immediate emotional trauma and long term psychological damage. Since the accident, he has become withdrawn and uncommunicative, has received low grades, lost touch with his friends, and shows other signs of post traumatic stress syndrome.

Wherefore, the plaintiff John Dunton claims damages from the defendant for negligent infliction of emotional distress.

TENTH CLAIM FOR RELIEF:
BOOTH DUNTON'S CLAIM FOR PROPERTY DAMAGE

47. The plaintiff repeats and realleges the allegations in paragraphs 1 to 18 of the complaint.

48. As a result of the collision proximately caused by the negligence of the decedent, Robert J. Burton, the 2015 Volvo station wagon in which the Dunton family was riding was damaged beyond repair.

Wherefore, the plaintiff Booth Dunton, as owner of the vehicle, claims damages from the defendant for its fair market value, together with the costs of substitute transportation incurred as a result of the collision.

The plaintiffs claim trial by jury on all issues in this action.

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Comments on the Dunton Complaint

Barrymore, the Duntons' counsel, has put a lot of thought into drafting this complaint based on the facts of the Dunton accident. Doubtless, there are problems with some of the claims, either because it is not clear that they are legally sufficient, or because of difficulties of proof. Barrymore's job at this stage is to determine which claims may be legally and factually supportable, not to determine which will actually prevail at trial.

The comments below reflect some of the analysis which went into drafting this negligence complaint.

1. Barrymore has broken down the various claims both by parties and by the particular types of claims. As the Introduction suggests, she has taken these miscellaneous facts and reconceptualized them in terms of legally recognized claims for tort damages. For example, the First Claim for Relief seeks damages for wrongful death of Isadora, and the Second for the predeath damages to Isadora. Even though these claims are both based on injuries to the same person and are both asserted by the same plaintiff, it facilitates an understanding of the claims to set them forth separately because negligence law analyzes the claims differently.

2. Barrymore has included some claims in the complaint even though it is unclear whether they are legally sufficient. For example, the Second Claim for Relief seeks damages for Isadora's loss of enjoyment of life for the period from the accident until her death. It may be unclear under West Dakota law whether such damages can be recovered in the survival action. As long as the estate *may* be entitled to such damages, the estate may properly assert them; nothing requires them to confine their claims to those which are absolutely certain to be recognized as legally valid. See Fed. R. Civ. P. 11(b)(2) (authorizing assertion of claims which are supported by existing law or a nonfrivolous argument for extension or changes in existing law).

   Similarly, the Seventh Claim for Relief alleges loss of consortium claims on behalf of John and Lydia, though it is unclear whether West Dakota law will recognize claims for loss of parental consortium.

Barrymore has also included the frontier theory of a survival claim on behalf of Baby Dunton, though this one is a very long shot indeed. If such claims were clearly not viable, it would be improper to assert them, but where there may be a right to recover on these claims, Barrymore is entitled to present them and let the court decide whether they are legally cognizable.

Although Barrymore may have given considerable thought and research to these various unresolved issues, the complaint holds no hint of the doubts she may entertain about the strength of these claims. Defendant's counsel will have to assess their viability and challenge those which she concludes are legally unsound.

3. Other parts of the complaint reveal how the Duntons' counsel crafted the allegations to reflect the substantive requirements of each theory of relief. For example, the Ninth Claim for Relief, seeking recovery for negligent infliction of emotional distress upon John, alleges that John immediately arrived on the accident scene and viewed his injured relatives in a sorry state. Paragraph 45. Barrymore may anticipate that West Dakota will adopt the *Dillon* approach to indirect infliction claims, which focuses on the immediacy of the event, the nearness of the bystander to the accident, and the closeness of the relationship of the bystander to the injured victims.

The allegations in Paragraph 44 lay the groundwork for an indirect infliction claim under the zone-of-danger rule as well. Barrymore has alleged that John was in the "immediate vicinity" of the accident. It is not entirely clear that he *was* in the zone of danger: The facts indicate that he was 25 feet from the collision. But it is not clear that this is too far away either, so the allegation leaves the door open to litigate the issue. Similarly, she has alleged symptoms that John suffered as a result of his emotional distress which might suffice to establish "resulting physical injuries" if West Dakota law turns out to require this.

Similarly, in Booth's count for negligent infliction of emotional distress, Barrymore realleges that Booth was a direct victim of the accident. See para. 39. Should West Dakota stick with the requirement of impact to support an emotional distress claim, this allegation will lay the groundwork for an argument that he can sue for *indirect* infliction because he suffered an impact. See Chapter 14, Example la.

Barrymore's complaint does not specifically allege that any one of these standards for recovery applies. It is not necessary to allege the exact legal standard in the complaint, but it is important to allege facts that demonstrate that the legal standard — whichever one the court ultimately applies — can be met.

4. Barrymore has given thought to other problems of proof as well. For example, she has alleged that Burton's driving violated several West Dakota statutes. Presumably, she has included these allegations to lay the groundwork for an instruction to the jury that Burton was "negligent per se" for violating these statutes. See Chapter 8.

5. The damage allegations in the various claims also reflect Barrymore's analysis of the substantive law. For example, the wrongful death claims seek damages for the financial support and consortium losses of the survivors, presumably echoing the language of the West Dakota wrongful death statute. See the "wherefore" clauses in the First and Third Claims for Relief. (Note that recovery is sought in the First Claim for Relief on behalf of Booth, John, and Lydia, for wrongful death of Isadora. But recovery is only sought on behalf of Booth in the Third Claim for Relief for wrongful death of Baby Dunton. This presumably reflects the fact that parents and children, but not siblings, are in the "first tier" of beneficiaries under the West Dakota wrongful death statute.) The survival claims, by contrast, seek damages for losses suffered prior to death. Note also that Barrymore has been careful to assert the various claims on behalf of the proper plaintiffs. The survival and wrongful death claims are asserted by Booth as administrator of the estates of Isadora and Baby Dunton, while the other claims are asserted on behalf of the individuals named in each claim.

6. Some issues considered by counsel have not made their way into the complaint at all. There is no claim at all for Booth's loss of consortium with John due to John's emotional distress claim. (See the discussion of this claim in Example 5b.) Counsel may have concluded that this is too long a shot, and that including it would detract from the overall credibility of the complaint. (A similar conclusion might have been warranted with regard to the Fourth Claim for Relief, the survival claim

on behalf of Baby Dunton.)

7. Naturally, the questionable claims in Barrymore's complaint will not go unnoticed. Burton's counsel will likely challenge the legal sufficiency of some claims, such as the claim for prenatal pain and suffering and John and Lydia's claims for loss of parental consortium.

   She will also probe, through discovery, the plaintiffs' ability to prove their allegations. For example, damages for the wrongful death of Baby Dunton will be very difficult to establish, not to mention the creative claim for her pain and suffering prior to death. Indeed, proof problems led the Duntons' counsel to omit one claim entirely, Isadora's claim for indirect infliction of emotional distress for witnessing injury to Booth. Without her testimony it would be very difficult to establish this claim.

   Burton's counsel will also challenge the plaintiffs' ability to prove causation on some claims. Even if John is entitled to recover for infliction of emotional distress, for example, he will have to establish that his withdrawal and poor performance in school were caused by witnessing the injury to Isadora, rather than other causes, such as the usual catatonia of the teenage years.

8. A colleague with a wealth of litigation experience suggests that a very practical consideration would figure heavily in this case: Because of Isadora's success, and the wrongful death claims, the potential damages in this case are great, probably much greater than Burton's estate, even with insurance, will be able to pay. This has several implications. First, it may make sense to leave out some lesser or dubious claims in order to focus the jury on the big ticket issues in the case, since the entire judgment will not likely be paid anyway. Second, since the judgment is not likely to be fully paid, conflicts may arise among the various plaintiffs concerning the allocation of any payments received. Counsel will have to be very careful to make sure that all plaintiffs are aware of this problem, and to consider the possibility that conflicts among the plaintiffs might call for separate representation.

   A third implication is that counsel will surely want to look for other potential defendants, to tap their resources as well. If, for example, poor road design contributed to the accident, counsel should consider a claim

against the city or town that maintains the road. Or, if brake problems contributed, a claim against the repair shop or manufacturer could also increase the potential recovery.

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1. See now Tex. Civ. Prac. & Remedies Code §71.001(4), enacted in 2003, which defines an "individual" to include an unborn child for purposes of the Texas wrongful death act.

PART VII

Liability of Multiple Defendants

CHAPTER 21

Joint and Several Liability: The Classic Rules

INTRODUCTION

We saw in the chapters on causation that a plaintiff will frequently have claims against more than one tortfeasor, where several have contributed to causing her injury. This chapter, and the next, address the manner in which tort law distributes the damages in such cases. This chapter deals with the traditional common law rules governing the liability of "joint tortfeasors." The next analyzes principles of contribution, the right of a tortfeasor who has paid the plaintiff's claim to seek partial reimbursement from other defendants liable for the same injury.

JOINT TORTFEASORS DISTINGUISHED FROM JOINT CONDUCT

First, let's distinguish the case of "true" joint tortfeasors from the much more common type of joint and several liability discussed in this chapter. True joint tortfeasors are parties who agree to engage in a course of tortious

conduct. Suppose that Kelvin and Curie go looking for Marconi, planning to beat him up. They find him, and Curie breaks his jaw. Because Kelvin and Curie acted in concert to injure Marconi, both are liable to him, even though it was Curie who administered the blow. Although Kelvin didn't hit Marconi, he encouraged and participated in the common scheme to injure Marconi. Tort law traditionally held — and still holds — actors involved in such joint conduct liable for the acts of either, in much the same way that conspirators are criminally responsible for the acts of other conspirators. See Restatement (Third) of Torts: Apportionment of Liability §15. Similarly, if Ford and Hudson decide to race their cars on the highway, they are both liable if one of their cars hits Lenoir, since they jointly engaged in the negligent conduct that led to Lenoir's injury.

Such "true" joint tortfeasor cases, in which parties agree to engage in tortious conduct, are relatively rare. It is much more common for the independent conduct of two actors to combine to injure the plaintiff. Suppose, for example, that Fermi was a passenger in Joule's car, which collided with a truck driven by Edison due to negligence by both drivers, and that Fermi suffered a broken collar bone. Here, Edison and Joule did not act together, probably did not know each other, may not even have known of the other's presence. However, their independent acts have contributed to cause a single injury. As we saw in the discussion of causation, the negligence of each is a "but for" cause of the harm, even though they did not act together.

The traditional common law rule was — and still is in a good many states today — that each tortfeasor in a case like Fermi's is liable to the plaintiff for her full damages, since his negligence was a "but for" cause of the plaintiff's injury. Courts generally refer to the defendants in such cases as "joint tortfeasors." This is clearly loose language, though universally used. Fermi and Edison did not do anything "jointly," in the sense that Kelvin and Curie did in the battery example, since they acted separately, without agreement. It is the resulting *injury* that is joint, not the actions of the defendants. The phrase "joint tortfeasors" simply means that the defendants both contributed to a single, indivisible injury to the plaintiff and are each fully liable for that injury.

Here is another example to drive home the point. Watt, a worker on a construction site, negligently leaves an excavation unguarded, and Planck, an oblivious jogger, bumps Curie and knocks her into it, breaking her leg. Here again, Curie would have negligence claims against both Watt and Planck for

her injuries, since the negligence of each defendant contributed to causing the harm. Watt and Planck are, in the common parlance, joint tortfeasors, each fully liable for Curie's injury.

It is often said that the defendants in cases like the Fermi and Curie examples are "jointly and severally liable" for the injury. This means that each is liable for the full amount of the plaintiff's damages, and may be sued for those damages either singly or along with the other tortfeasors. If the plaintiff prevails in an action against joint tortfeasors, she is entitled to a judgment against each for her full damages. For example, if the jury found both Joule and Edison liable for Fermi's injury, and found Fermi's damages to be $27,000, the court would enter judgment against both Joule and Edison for $27,000. Fermi would obtain a judgment like that in Figure 21-1, on p. 480. Alternatively, had she sued Fermi alone she would have gotten a judgment against him for the full $27,000.

Joint and several liability did not apply, however, if the defendants caused separate damages. Suppose that Farmer Jones and Farmer Smith both decided to burn the stubble off their fields on a windy day, and both fires got away. If Farmer Jones's fire burned two acres on the west side of Doe's property, and Farmer Smith's burned five acres on the east side, it stands to reason that Jones would pay for the two-acre fire but not for the five-acre fire caused by Smith. Jones's negligence caused the two-acre fire, but (assuming that Jones and Smith acted independently) was not a "but for" cause of the five-acre fire, so Jones was not liable for it. The same was true for Smith, who was liable for the five-acre fire but not the two-acre blaze. In such cases, where the damages could rationally be apportioned separately to the tortfeasors, the courts would do so. Restatement (Second) of Torts §881.

SATISFACTION OF JUDGMENTS

Under the judgment in Figure 21-1 (p. 480), Fermi would be entitled to collect his $27,000 from either Edison or Joule. Of course, he could not get $27,000 from each of them, for a total of $54,000. The plaintiff was entitled to one full "satisfaction" of his damages from joint tortfeasors, but no more. Thus, if Joule paid Fermi $27,000, the judgment was deemed satisfied, and Fermi could not collect any additional amount from Edison. Similarly, if he

obtained a judgment against Edison and Edison paid, Fermi could not collect from Joule for the same injuries. Dobbs, Hayden & Bublick §488.

Suppose, however, that Fermi sued Edison alone and obtained a judgment for $27,000, but Edison was unable to satisfy the judgment. Early cases held that once Fermi obtained a judgment against one tortfeasor, the judgment extinguished his claim against all the tortfeasors, so that he could not sue Joule separately if Edison failed to pay. The theory was that the plaintiff had a single, indivisible claim, which could only be sued upon once. Dobbs, Hayden & Bublick §491. However, the courts later came around to the position that, as long as Fermi's judgment had not been *satisfied*, he was entitled to sue Joule for the same injury, and try to collect from him instead. Or, if Edison had a $10,000 insurance policy, and paid that much, Fermi could seek a separate judgment against Joule and collect the remaining $17,000 from him.

Suppose that Joule was a close friend of Fermi's (or his boss) and Fermi, understandably reluctant to sue Joule, sued Edison only. At common law if a joint tortfeasor like Edison were found liable and paid the judgment, he had no right to force other tortfeasors to "contribute" to the judgment. Edison was liable for the damages, was justly made to pay them, and had no complaint if Joule got off without paying. The courts refused to adjust the loss as between the wrongdoers, just as it refused (under the doctrine of contributory negligence) to adjust a loss between a negligent plaintiff and a negligent defendant. This classic no-contribution rule is no longer the law in most states, but it was for many years. See Chapter 22, which analyzes the basic principles of contribution among joint tortfeasors, and Chapter 26, which illustrates some of the current variations.

STATE OF WEST DAKOTA

COOK COUNTY, SS; ENRICO FERMI, Plaintiff v. MAX JOULE THOMAS EDISON, Defendants	CIVIL ACTION NO. 18-1305 JUDGMENT

This action came on for trial before the Court and a jury, Honorable Constance Pallotta, presiding. The issues having been duly tried and the jury having rendered its verdict, it is Ordered and Adjudged

That the plaintiff Enrico Fermi recover from the defendants Thomas Edison and Max Joule the sum of $27,000 with interest thereon at the rate of 7% as provided by law, and his costs of action.

Dated at Cody, West Dakota, this 25th day of May, 2019.

_____ Justice

_____ Clerk of Court

Figure 21-1

SETTLEMENT AND RELEASE OF CLAIMS

Other issues arose if Fermi settled his claim against one tortfeasor and then sued the other. Suppose, for example, that Fermi settled with Joule, agreeing to release his tort claim against Joule for $13,000. When the plaintiff settled with a tortfeasor, he would ordinarily give that defendant a “release” in exchange for payment of the settlement amount. The release would waive all

of the plaintiff's claims against that defendant arising out of a particular accident or dispute. Figure 21-2 is a simple example of a release.

A Practical Question

1. If Joule, as a joint tortfeasor, is fully liable for the entire injury to Fermi, and the likely damages are close to $30,000, why would Fermi let him off the hook for $13,000? (Explanations begin on p. 487.)

RELEASE AND SETTLEMENT OF CLAIM

In consideration of thirteen thousand dollars ($13,000), receipt of which is hereby acknowledged, I, Enrico Fermi, of Saginaw, West Dakota, on behalf of myself and my heirs, legal representatives and assigns, hereby release Max Joule of Johnstown, West Dakota, or his heirs or representatives, from all liability, claims, demands, rights or causes of action incident to property damage and personal injury sustained by me in an automobile accident that occurred on May 4, 2017 at Johnstown, West Dakota, involving an automobile driven by Max Joule. This release covers all claims which I had, now have or may have in the future against Max Joule, his heirs or representatives arising out of the May 4, 2017 accident.

By executing this instrument, I do not waive any claim or claims that I may now or hereafter have against any person, firm or corporation other than Max Joule, the releasee named herein. I understand that Max Joule does not, by making the payment set forth above, admit any liability or responsibility for the above-described accident or the consequences thereof.

In witness whereof, I have executed this release at Saginaw, West Dakota, on July 29, 2019.

Signature Enrico Fermi

Figure 21-2

At common law, giving one tortfeasor a release was a tricky business, because the early cases held that a release to one tortfeasor released the

plaintiff's claims against *all* joint tortfeasors. If Fermi gave a release to Joule, he was deemed to have released Edison, Watt, and any other possible defendants as well, regardless of the amount Joule paid for the release. Historically, there were several reasons for the rule. First, the plaintiff was considered to have a single cause of action for her injuries, even though each defendant was fully liable on that cause of action. *Cooper v. Robert Hall Clothes, Inc.*, 390 N.E.2d 155, 157 (Ind. 1979); Dobbs' Law of Torts, §491. By giving a release to any tortfeasor, Fermi relinquished the cause of action itself. Thus, he was barred from bringing a subsequent suit on that cause of action against another tortfeasor.

A second, less formalistic rationale for the common law rule that a release barred suit against other tortfeasors was the concern that the plaintiff would settle successively with each tortfeasor and collect more than the value of her claim. Since each tortfeasor was liable for the full amount of the plaintiff's damages, a plaintiff could divide and conquer by extracting substantial settlements from each. Fermi, for example, might settle with Joule for $18,000 and with Edison for $18,000. Both might have the incentive to accept the settlement, since it is $9,000 less than the (assumed) $27,000 value of the claim. If they both settled, Fermi would be overcompensated by $9,000 ($36,000 − $27,000). The rule that a release barred suit against the other tortfeasors prevented this: Once Fermi gave a release to Joule, Edison would have no incentive to settle, since the release barred suit against Edison as well as Joule.

The release rule applied even if the plaintiff tried to limit the release to the settling tortfeasor. Thus, the second paragraph of Fermi's release in Figure 21-2, which states that it does not affect his claims against any other joint tortfeasor, was given no effect. Under the common law view, Fermi was trying to have his cake and eat it too, that is, to continue to prosecute a cause of action that had been surrendered by the release.

Another Practical Question

2. Did the common law release rule encourage or discourage settlements?

This early rule that a release of one tortfeasor released them all was later abandoned, for several reasons. First, the formalistic view that the claims

against Joule and Edison constitute a single, indivisible cause of action is no longer accepted. In recent decades, courts have recognized that, even if Fermi's *damages* are indivisible, he has independent claims for those damages against each tortfeasor. Consequently, it is no longer logical to infer that he abandons claims against one tortfeasor by settling with another.

Second, the release rule prevented settlements with individual tortfeasors who were willing to pay a part of the plaintiff's damages, but not to pay enough to induce the plaintiff to release her entire claim. This led to creative efforts by lawyers to find a way of settling with one tortfeasor without relinquishing the right to sue others. The most common device for evading the common law release rule was the "covenant not to sue," by which the plaintiff covenanted (agreed) not to sue the defendant on the claim. In theory, she had not surrendered her claim, but merely promised that she would not bring a law suit to enforce it against the settling defendant.[11] This was fighting formalism with formalism. The actual effect of the covenant not to sue was the same as the release: Plaintiff gave up her claim against the defendant in exchange for a money payment. But, since it did not technically "release" the claim, plaintiffs argued that they were still entitled to sue other joint tortfeasors on the claim.

Because the release rule was an obstacle to sensible settlement of tort claims, some courts sanctioned its evasion through the covenant not to sue. In these states, the common law rule that a release barred any further suit against other tortfeasors became a dead letter. Counsel simply styled the settlement agreement as a covenant not to sue instead of a release, thus achieving settlement with one tortfeasor without waiving the right to sue others. Defendants went along with the practice, because they also benefitted from such settlements: They could settle legitimate claims without having to pay more than their fair share of the plaintiff's damages. Thus a kernel of common sense was rescued from a shell of outdated legal doctrine.

Other courts, rather than endorsing evasion of the release rule through the covenant not to sue, have overruled it outright. In these jurisdictions, a release or covenant not to sue given to one tortfeasor does not release other parties, unless the release so stipulates. See Restatement (Third) of Torts: Apportionment of Liability §24(b). Under this approach, the release in Figure 21-2 would preserve Fermi's right to sue Edison, since it not only shows no intent to release Edison, but affirmatively states that it does not.

Through one of these avenues, most states have arrived at the same basic

approach to settlements: The plaintiff may settle with one tortfeasor, and go to trial against others. Under the traditional joint and several liability rules, any judgment she obtained against the remaining defendants would be reduced, dollar for dollar, by the amount paid to her by the settling tortfeasor.

These joint and several liability rules have been changed in many states over the past 20 years or so. Some states now apply "several liability," under which individual tortfeasors pay only a part of the plaintiff's damages. Others apply joint and several liability in some circumstances, but several liability in others. These variations are explored in Chapter 26. However, no matter where you practice, it is important to understand the traditional joint and several liability rules. First, these rules continue to apply to all cases in some states, and to some cases in most states. Second, you have to understand the basic doctrines to grasp the elegant variations state legislatures have recently grafted onto them.

Examples

Sue and Sue Alike

3. Bell is driving home late at night when her car dies. She pulls into the breakdown lane, but fails to put on her hazard lights or put out flares. Marconi negligently fails to see her, drifts into the breakdown lane and hits Bell's car, injuring Thatcher, a passenger in Bell's car. Thatcher sues Marconi for damages. If the jury concludes that Bell and Marconi were both negligent, and assesses Thatcher's damages at $60,000, what verdict should it render against Marconi, assuming it has been properly instructed on the principles of joint and several liability (and understood them!)?

4. Suppose that Thatcher had sued both Bell and Marconi, the jury found both negligent, and assessed the damages at $60,000.
   a. What verdict should the jury render?
   b. How much could she collect from each defendant?

5. Whiting and Hahn, two employees of an electrical contractor, are working together to install wiring in Pringle's house. They agree that

Whiting will stop in the basement to cut off the power to an exposed junction box on the wall, but Whiting forgets to do it. An hour later, Shattuck, a plasterer, negligently swings his ladder into the junction box, causing a short circuit and resulting fire. Pringle's house sustains $50,000 in damages.

a. Which of the three are liable for the damage?

b. How much is each liable for?

c. Assume that Pringle settled with Whiting for $40,000, and gave her a release. She then sues Shattuck for her injuries. In a jurisdiction that applied the strict common law release rule, what would the court do?

d. What would the court do if Whiting paid Pringle $40,000 and Pringle gave Whiting a covenant not to sue, in a jurisdiction that allowed evasion of the common law release rule through a covenant not to sue?

6. In the Edison/Joule example in the Introduction, the negligence of Edison and Joule caused Fermi $27,000 in damages. Without regard to history, one sensible and seemingly fair solution would be to split the damages, that is, to hold Edison liable for $13,500 and Joule for the same amount.

   a. Why would this solution appear illogical to a traditional common law judge?

   b. Suppose in a jurisdiction that applies joint and several liability, that a bill came before the legislature to introduce this approach to the liability of multiple tortfeasors. Who would oppose it, plaintiffs or defendants?

Dissatisfaction of Judgments

7. Erg sues Kelvin for negligence in causing a fire and recovers a judgment for $16,000. Kelvin, who is bankrupt, does not pay. Can Erg now sue Volt, whose negligence also caused the fire, to recover for the fire damage?

8. Suppose that Erg settles his claim against Kelvin for damages arising from the fire, for $7,000, the amount of Kelvin's insurance coverage.

Now he sues Volt for the same injuries.

a. If the jury finds that Erg's damages are $16,000, and a judgment is entered against him for that amount, how much will Volt have to pay?

b. Suppose that Kelvin settles for $7,000. Volt is held liable at trial, but only has $5,000, and pays that. Can Erg sue Planck, another tortfeasor who allegedly caused the fire?

c. Assume that Erg sued Volt, after settling with Kelvin for $7,000, and the jury determined that Erg's total damages were $4,500. What would Volt have to pay?

d. Assume that Erg settled with Kelvin for $4,000, and in a subsequent action against Volt the jury determined his damages to be $16,000. How much must Volt pay to Erg? How much must Kelvin pay to Volt?

9. Erg settles with Kelvin for $7,000, and then goes to trial against Volt. At the close of trial, Volt asks the judge to instruct the jury that Erg has already received $7,000 in compensation for his injuries.

a. Should the jury be told this?

b. If they are, what else should they be told as well?

Joint and Several Liability

10. Bethune is driving a backhoe during the construction of a storm drain. She negligently backs up without looking or sounding her beeper and hits Maltby, a passing pedestrian, breaking her leg and knocking her over next to the excavation. DeWolfe, a construction worker down in the pit, negligently throws a large stone up out of the excavation without looking. The stone hits Maltby on the head, causing a severe concussion. She sues them both for her injuries.

a. Are they jointly and severally liable to Maltby?

b. Suppose that this case goes to trial against both Bethune and DeWolfe. The jury finds them both negligent, and that Maltby's total damages are $60,000. What judgment should the judge enter against each defendant?

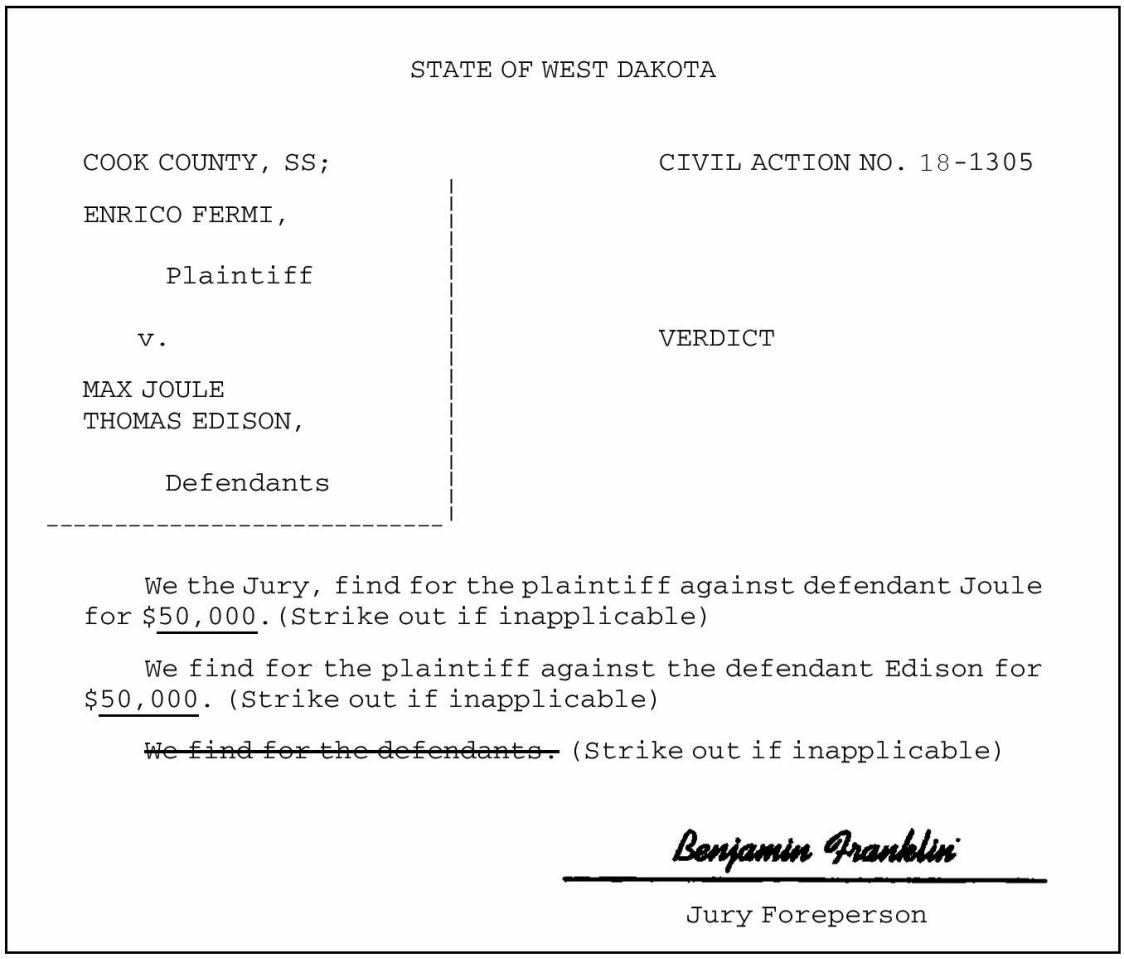
Bewitched, Bewildered, and BeFuddled

11. Assume that Fermi suffered a serious back injury in his accident with Joule and Edison. The undisputed evidence shows that he was out of work for six months, suffered $26,000 in lost wages, paid $21,000 in medical bills, and sustained serious pain and suffering, as well as some permanent disability.

    At trial, Judge Fudd instructs the jury as follows:

    If you find that the defendants were both negligent, and that the negligence of each defendant was a cause of the plaintiff's injuries, then you must find the defendants liable for the full amount of damages suffered by the plaintiff.

    The jury comes back with the verdict in Figure 21-3. Fermi's attorney is amazed that the jury could have awarded only $50,000 in damages, which allows a mere $3,000 over the proven economic losses to compensate Fermi for pain and suffering and disability. Something, she suspects, has gone amiss in the jury's deliberations.



STATE OF WEST DAKOTA

COOK COUNTY, SS;

ENRICO FERMI,

Plaintiff

v.

MAX JOULE
THOMAS EDISON,

Defendants

CIVIL ACTION NO. 18-1305

VERDICT

We the Jury, find for the plaintiff against defendant Joule for $50,000. (Strike out if inapplicable)

We find for the plaintiff against the defendant Edison for $50,000. (Strike out if inapplicable)

~~We find for the defendants.~~ (Strike out if inapplicable)

Benjamin Franklin

Jury Foreperson

Figure 21-3

a. What do you think the jury did, and how did Judge Fudd's ambiguous instruction lead them to do it?

b. How should the plaintiff have avoided the problem?

Joint Sheepfeasors

12. Farmer Jones's prize field of Kentucky bluegrass is eaten clean when Herder's and Shepherd's sheep escape from their pens. Investigation reveals that both Shepherd and Herder were negligent and that 30 of Shepherd's sheep got into Jones's field and 10 of Herder's got in. Are Shepherd and Herder jointly and severally liable to Jones?

Explanations

A Practical Question

1. There are many reasons why a plaintiff might settle a claim against one tortfeasor for less than the full value of her damages. She might have doubts about her ability to prove that the particular party is liable, and therefore settle for less than the full value of her claim to account for the risk that she would lose entirely at trial. (The reasonable risk-averse client would obviously prefer $13,000 in hand to a 25 percent chance of collecting $27,000.) The plaintiff might know that the party is unable to pay more than the insurance coverage available, so there is little point in obtaining an unenforceable judgment for more. She might not want to try the case against a particular party, due to jury sympathy or an anticipated aggressive defense by that party. It might also cost more to pursue the case against that defendant than she gives up by settling, perhaps due to the need for expensive expert testimony to prove negligence by that defendant.

   In addition, tort claims often involve intangible damages such as pain and suffering or disfigurement. In such cases, neither party knows what value the jury will place on the plaintiff's injuries. Thus even a plaintiff who expects to win at trial may settle for less than the apparent full value of the claim, to avoid the risk that a jury will return a meager verdict. Thus, a settlement against Joule for $13,000 may make good sense for Fermi, even if he believes that a jury would give him a $27,000 verdict. It makes particularly good sense if Fermi *retains his right to sue Edison,* since he may still collect the balance of his damages from him. The $13,000 he collects from Joule would be credited against the later judgment, but he would still be made whole despite his settlement with one of the tortfeasors.

Another Practical Question

2. The common law release rule discouraged settlements. Because a release barred the plaintiff from suing any other party on the same claim, a plaintiff would only settle with one of several tortfeasors if the amount offered came close to the amount she would likely recover if she tried the case against them all. In other words, the settlement against one had to be good enough to induce the plaintiff to abandon her claims against

everyone; she couldn't settle with one tortfeasor for part of her damages with the hope of recovering more from someone else. Since the common law rule forced the plaintiff to set a high price on settlement, individual defendants in a multidefendant case would be less likely to ante up the amount necessary to settle the case.

Sue and Sue Alike

3. The jury should render a verdict against Marconi for $60,000. His negligent driving was a "but for" cause of the harm. Consequently, he is a tortfeasor. Under joint and several liability he is liable to Thatcher for her full damages.

   It is true that Bell is a tortfeasor too, since her negligence was another cause of the accident. Under principles of joint and several liability, Thatcher was free to sue either of the tortfeasors and recover her full damages. She could, of course, have sued them both. But she didn't have to. She could choose . . . and it was not uncommon for a plaintiff like Thatcher to choose *not* to sue the driver of the car she was in.

4. a. If Thatcher sued both drivers, and both were found liable, she would get a verdict against each for $60,000.

   b. Thatcher could collect $60,000 from either defendant. Each was jointly and severally liable for the whole damages she suffered, so either could justly be made to pay the entire judgment. Of course, if she collected it from one, she could not seek $60,000 more, or any amount more, from the other. Once her judgment was satisfied, she had no further rights against either tortfeasor.

5. a. In this case, Whiting was negligent in failing to cut off the power, and Shattuck was negligent in swinging the ladder into the junction box. Their independent acts together caused the fire. Thus, they are joint tortfeasors in the sense that their separate negligent acts concurred to cause indivisible harm to Pringle. Both are liable to her.

   What of Hahn, who was working with Whiting? The facts do not indicate that she was negligent, since she was not responsible for cutting off the power. Nor is she liable for Whiting's negligence

simply because she was working on the same job with her. That would be a tough rule indeed, making employees liable for the torts of any co-worker.

It is true that she and Whiting agreed that Whiting would turn off the power. But agreeing to split up the work in a particular way is quite different from agreeing to engage in tortious conduct. This is not a "joint tort" situation, like the concerted action example in which two drivers engage in a drag race. There, two actors consciously engaged in negligent conduct together, which they knew created unreasonable risks to others. Here, while Hahn and Whiting were both engaged in the construction work, Hahn did not agree to engage in any negligent course of conduct with Whiting. Thus, Hahn is not liable for the negligence of Whiting.[2]

b. Under traditional causation analysis, both Whiting and Shattuck were causes of the fire, since the negligence of each was a but-for cause leading to it. Thus, each caused the plaintiff's entire loss, and was held liable for that entire loss. As joint tortfeasors, Whiting and Shattuck would each be liable for $50,000.

c. Under the strict common law release rule, a party who gave a release of her claim to any tortfeasor surrendered her right to sue all possible defendants on that claim. Thus, Pringle would be barred from bringing any further suit on the same claim against Whiting or Shattuck. If this rule applied, Pringle's suit would be dismissed.

d. In a jurisdiction that held that a covenant not to sue did not waive any rights against other tortfeasors, Pringle would still be entitled to bring suit against Shattuck. However, if she recovered a judgment for $50,000, the $40,000 already paid by Whiting in settlement of the claim against her would be credited against the judgment. Shattuck would only have to pay $10,000.

6. a. Logically, there is no reason why the multiple tortfeasor problem could not be dealt with by dividing the plaintiff's damages in this way. If there were two tortfeasors, each would be liable for half the damages; if there were seven, each would be liable for a seventh, and so on.

However, this pragmatic solution was antithetical to the

conceptual approach of the common law, which viewed both Edison and Joule as having caused *all* of Fermi's damages, not half. But for Edison's negligent driving, no accident would have taken place, and Fermi would have suffered no injury. Because of Edison's negligence (helped along, admittedly, by Joule's as well), Fermi suffered $27,000 in damages. The same was true of Joule. Because both defendants had caused the full harm, courts refused to divide the damages in half.[3]

b. Plaintiffs would resist this Solomonic solution fiercely. Under the traditional rules of joint and several liability, both Edison and Joule were fully liable. If Edison were insolvent, Joule would still have to pay the full damages under the classic rules. By contrast, if the rule were changed so that each was "severally" liable for half the damages, Fermi would collect $13,500 from Joule and nothing from an insolvent Edison. Thus, Fermi would be the loser if Edison were unable to pay. Under joint and several liability, however, *Joule* takes the risk of Edison's insolvency, and the plaintiff has twice the chance of being fully compensated for his injuries.

Dissatisfaction of Judgments

7. Under the earlier cases, the answer to this question was "no." A judgment was treated like a release of all tortfeasors; that is, getting a judgment on a tort cause of action was deemed to extinguish the underlying cause of action, leaving the judgment instead. But that rule later gave way to the more recent common law rule stated in the introduction, that a judgment against one tortfeasor did not bar suit against another, unless the first judgment was satisfied. Thus, Erg could still sue Volt and get a second *judgment* for her damages, but could not *collect* more than her actual assessed damages.

8. a. Because no plaintiff was entitled to more than one full satisfaction of his damages, Volt would get a credit against the $16,000 judgment for the $7,000 Erg has received in settlement from Kelvin. Thus, he would have to pay $9,000 to Erg.

b. At this point, Erg has received $7,000 in settlement from Kelvin and $5,000 from Volt under the judgment. He is still short $4,000. Since

he has not yet received full satisfaction of his damages, he can still bring suit against Planck to recover for the remaining $4,000.

c. In this example, Erg settled with Kelvin for more than the jury ultimately determines Erg's damages to be. Volt would get a credit for the settlement, and that would more than cover the judgment amount. Volt would pay nothing. On the other hand, Kelvin would not get anything back either. A deal is a deal; he bought his peace, and he cannot later claim that he paid too much for it.

d. Here again, Volt gets a credit for the settlement amount. He will be liable to Erg for $12,000 (the $16,000 judgment minus the $4,000 paid by Kelvin in settlement). He will have paid more than half of the damages, but at common law this did not give him any right of contribution from Kelvin. As stated previously, the common law had no trouble requiring Volt to pay the *full $16,000* in damages he had caused. Thus, courts were not troubled if, on facts like these, he paid some lesser amount but still more than his "share." Even today, many jurisdictions protect settling tortfeasors like Kelvin from claims for contribution.

9. a. Usually, there is no reason to tell the jury that Erg has received some compensation by settling with Kelvin. The jury's job is to determine Erg's damages and to decide whether Volt is liable for them. The mention of a settlement figure is only likely to distract them from that task. They might, for example, infer that $7,000 is the value the plaintiff places on her claim, which may not be the case at all. (See Explanation 1, which suggests a number of reasons why a plaintiff will settle low with one tortfeasor.)

In most cases, the better course is to tell the jury nothing about the settlement, and to let the judge adjust the resulting verdict to give Volt a credit for the settlement. If the jury finds Erg's damages to be $24,000, for example, the judge would apply the dollar-credit rule by entering judgment against Volt for $17,000.[4]

b. If the jury is told of the settlement, they ought to be told what to do about it: They should be told to determine the plaintiff's damages without regard to the settlement, and then to render a verdict by reducing the damages by the settlement amount. It will be less

confusing, however, if the judge tells the jury nothing about the settlement and simply reduces the verdict to account for it herself.

Joint and Several Liability

10. a. In this example, Bethune and DeWolfe are joint tortfeasors as to part of Maltby's injuries, but not as to all of them. The negligence of both Bethune and DeWolfe caused the concussion. Maltby would not have been hit by the stone if Bethune had not knocked her into harm's way, or if DeWolfe had not negligently thrown the stone out of the pit. It is a case of successive negligent acts that together cause the harm. So long as DeWolfe's subsequent negligence is foreseeable, it does not insulate Bethune from liability. As to Maltby's concussion, Bethune and DeWolfe are joint tortfeasors.

However, DeWolfe is not a joint tortfeasor with Bethune in causing Maltby's broken leg. DeWolfe's negligence had no part in causing the broken leg, which happened before DeWolfe entered the picture. Thus, Bethune would be solely liable for this injury, but both would be liable for Maltby's concussion damages.

b. The problem here is that the jury's general verdict does not separate the leg damages from the concussion damages. As to Bethune, it doesn't matter, since she is liable for both. The judge should enter a judgment against her for $60,000. But DeWolfe should only be held liable for the concussion damages, and the jury's verdict doesn't indicate how much they are.

The court should avoid this problem by using a special verdict form that asks the jury to specify the amount of damages the plaintiff has suffered from the leg injury and the amount attributable to the concussion. Then the judge can enter judgment against Bethune for the total damages and against DeWolfe for the separate amount attributed to the concussion.

Bewitched, Bewildered, and BeFuddled

11. a. It is very likely that the ambiguity in Judge Fudd's instruction led the jury to render a verdict that does not convey their intended meaning. The jury in this case probably found Fermi's damages to be

$100,000 (a more likely figure given the extent of his intangible injuries), and thought it was rendering a verdict that would require *each* defendant to pay $50,000, for a total of $100,000.

Unfortunately, under principles of joint and several liability, the jury's verdict slip only makes Joule and Edison liable for a *total* of $50,000. Fermi can collect that amount from either, or part from each, but cannot receive more than a total of $50,000. (Compare the judgment in Figure 21-1.) Judge Fudd's instruction was open to this misinterpretation, since it required the jury to find "the defendants" liable for the plaintiff's full damages, not *each* defendant liable for the plaintiff's full damages.

The verdict slip in Figure 21-3 compounded the judge's error. The verdict slip simply indicates which defendants are found liable, and how much each is liable for; it does not clearly state the plaintiff's total damages or that the jury must find each defendant liable for the plaintiffÂ‘s full damages.

b. The plaintiff could have avoided this problem by pointing out the ambiguity in the judge's instruction before he gave it. Counsel for all parties will be given a chance to review proposed jury instructions before the judge instructs the jury, so that they may object to instructions that wrongly state the applicable law. If plaintiff's counsel had realized the problem, she could have asked Judge Fudd to revise the instruction along the following lines:

> If you find that both defendants were negligent, and that the negligence of each defendant was a cause of the plaintiff's injuries, then you must find each defendant liable for the full damages suffered by the plaintiff.

The distinction between this instruction and Judge Fudd's is not very great, but the difference in the effect of the two is dramatic. If the jury understood the instruction, and it actually intended the plaintiff to recover $100,000, this instruction would clearly require them to return a verdict for $100,000, not $50,000, against each defendant.

A cogent criticism of jury trial is that juries often do not understand the subtleties of their instructions. Their verdict must be based on instructions on complicated principles that they are given once, often orally. To put the matter in perspective, consider whether

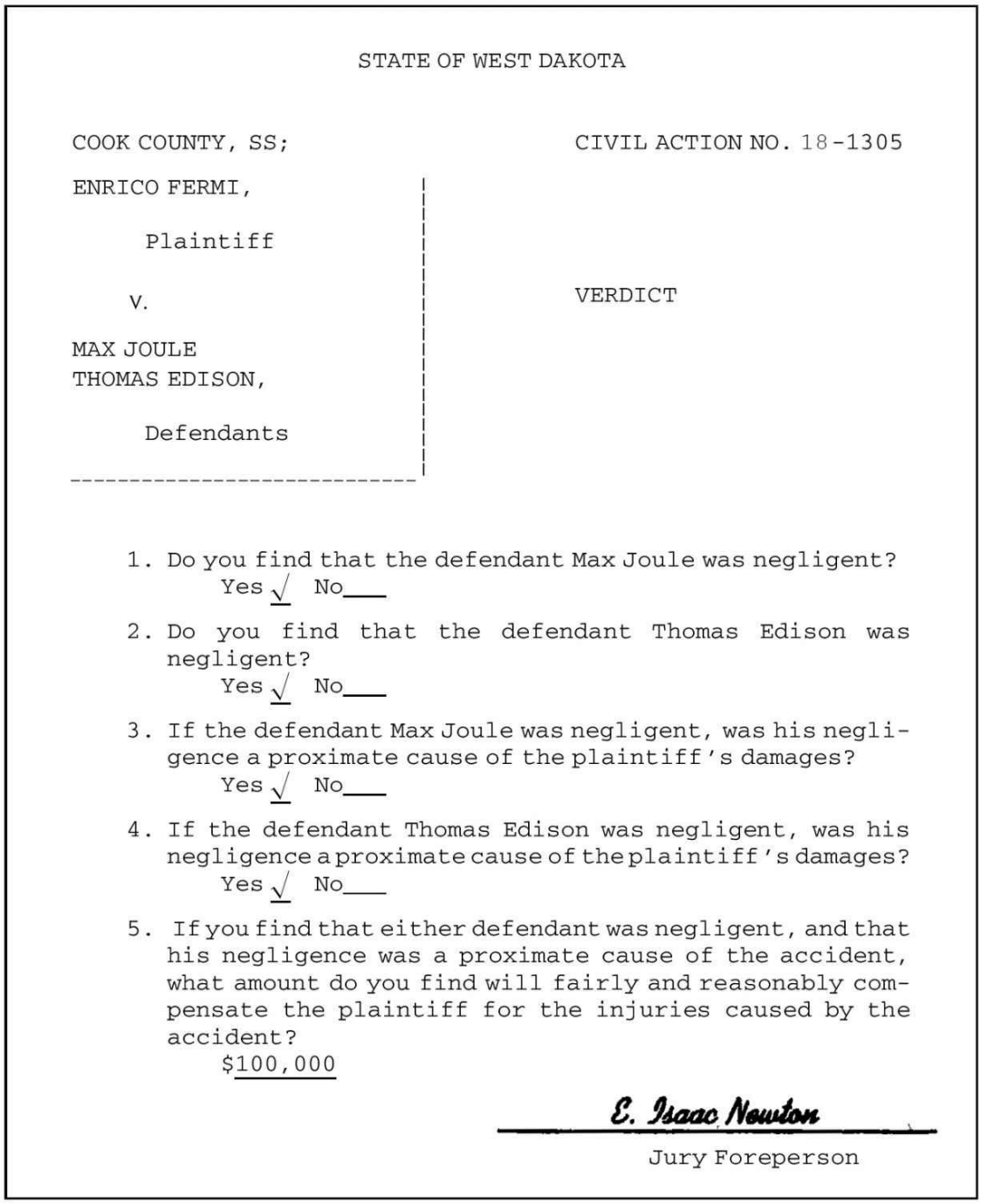
you, after brief treatment of joint and several liability in your torts class, would feel prepared to go into a jury room and apply these rules accurately to an actual case.

Fermi's lawyer could also have reduced the risk of jury misunderstanding by asking the court to use a special verdict form like that in Figure 21-4, which requires the jury to make specific factual findings on negligence and damages. Under this verdict, the jury does not have to fully understand the governing liability rules. So long as they answer the factual questions accurately, the court can enter an appropriate judgment under joint and several liability principles. If the jury had rendered the verdict in Figure 21-4, the judge would have clearly understood that the jury intended Fermi to recover $100,000, and would have entered judgment against each defendant for that amount.

Joint Sheepfeasors

12. As the Introduction states, defendants are held jointly and severally liable for the plaintiff's damages if the damages cannot rationally be apportioned among them, if they are "indivisible." Here, it is doubtless impossible to determine which sheep ate which blades of grass, but there is a basis for a rough apportionment of the damages based on the number of sheep of each defendant that joined the repast. Assuming a sheep is a sheep when it comes to appetite, it is a fair inference that Shepherd's sheep ate about three-quarters of the grass, and Herder's ate the other quarter. Most courts would apportion the damages between Shepherd and Herder on that basis, rather than holding them jointly and severally liable. Restatement (Second) of Torts §433A cmt. d.

    While courts will endeavor to make such apportionment, even where it requires some approximation, it is worth reiterating that in most cases that is simply not possible. When two negligent acts combine to cause a broken back, a fatal heart attack, or a fire that burns the plaintiff's barn, it is simply not possible to ascribe part of the injury to one defendant's negligence and part to the other's. In this large class of cases, joint and several liability has been the classic rule because apportionment is not a feasible alternative.



STATE OF WEST DAKOTA

COOK COUNTY, SS;

CIVIL ACTION NO. 18-1305

ENRICO FERMI,

Plaintiff

v.

MAX JOULE
THOMAS EDISON,

Defendants

VERDICT

1. Do you find that the defendant Max Joule was negligent?
   Yes √ No___
2. Do you find that the defendant Thomas Edison was negligent?
   Yes √ No___
3. If the defendant Max Joule was negligent, was his negligence a proximate cause of the plaintiff's damages?
   Yes √ No___
4. If the defendant Thomas Edison was negligent, was his negligence a proximate cause of the plaintiff's damages?
   Yes √ No___
5. If you find that either defendant was negligent, and that his negligence was a proximate cause of the accident, what amount do you find will fairly and reasonably compensate the plaintiff for the injuries caused by the accident?
   $100,000

E. Isaac Newton

Jury Foreperson

Figure 21-4

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1. For example, a covenant not to sue might provide that the plaintiff "covenants with Max Joule, of Saginaw, West Dakota, his heirs, legal representatives and assigns, to never institute any suit or action at law or in equity against Max Joule by reason of any claim I now have or may hereafter acquire relating to an accident that occurred on May 4, 2017, at Johnstown, West Dakota. . . ."

2. As another example, suppose they agreed that Whiting would go to the hardware store for supplies while Hahn started work, and Whiting had an accident on the way. Clearly, he alone would be liable for

the accident.

3. On the other hand, once courts accept the concept of contribution between joint tortfeasors, essentially the same division may ultimately result, if one tortfeasor pays the full judgment and sues the other for contribution.

4. There may be some cases, however, when the jury should be informed at least of the *fact* of settlement, if not of the amount. The settling tortfeasor will frequently testify at trial. The fact that she no longer has a direct stake in the matter could affect her incentive to testify favorably to one or another of the parties. If so, the other party may have a good argument for informing the jury that the settlor no longer faces personal liability in the action.

CHAPTER 22

Honor Among Thieves: Basic Principles of Contribution

INTRODUCTION

The last chapter explored the common law rules governing the liability of joint tortfeasors. As that discussion indicates, where joint and several liability applies, each tortfeasor who contributed to an indivisible injury is fully liable for the plaintiff's damages. This reflects the fundamental policy choice underlying joint and several liability, that the plaintiff should be fully compensated as long as at least one of the tortfeasors is able to pay the judgment.

However, the rule of joint and several liability can lead to unfair results. Suppose that Nash negligently left his bicycle in the road, and Benchley, not looking where he was going, drove into it, lost control of the car, and injured Twain. Under the common law, Twain could sue either Nash or Benchley for his injuries. The plaintiff was in control, and could choose to impose the full loss on either of the joint tortfeasors. If Benchley was his brother-in-law, Twain could keep peace in the family by suing Nash instead. If he sued Nash and recovered, Nash would have to pay Twain's full damages, and Benchley would pay nothing, even if he also caused the accident.

Of course, in many cases the plaintiff took the prudent course of suing all possible defendants, since he might only prove that one was negligent, or that

the negligence of one had caused the injury. But even if Twain sued both Nash and Benchley in our example, and recovered judgment against both, he could still choose to *collect* the judgment from either one. So he could still target Nash and let Benchley off the hook entirely if Nash was able to pay.

For many years, courts held that if Nash did pay, he had no right to force Benchley to "contribute to the judgment," that is, to reimburse him for part of the damages he had paid to Twain. The common law, with its somewhat moralistic view of these matters, had no problem with the fact that Nash ended up paying the entire judgment. Nash was a wrongdoer, had caused Twain's injuries, and could fairly be made to pay. Justice was done between the plaintiff and the defendant, and that was that. Nash would not be heard to complain that Benchley had gotten off scot free, so long as Nash had actually caused the damages he was forced to pay.

Although the common law rule denying contribution from joint tortfeasors was widely applied for many years, it was also widely criticized. Prosser sums up the attack with his usual incisiveness:

> There is an obvious lack of sense and justice in a rule which permits the entire burden of a loss, for which two defendants were equally, unintentionally responsible, to be shouldered onto one alone, according to the accident of a successful levy of execution, the existence of liability insurance, the plaintiff's whim or spite, or the plaintiff's collusion with the other wrongdoer, while the latter goes scot free.

Prosser & Keeton at 337-338. Most critics of the no-contribution rule accepted the basic proposition that each defendant should be fully liable to the *plaintiff*. However, they argued that a defendant who paid the plaintiff's damages should be able to redistribute the loss by making the other tortfeasors contribute to the payment of the common liability.

Most states have responded to such criticism by creating a right to contribution among joint tortfeasors, either by statute or by judicial decision. Many statutes creating the right to contribution were modeled closely on the Uniform Contribution Among Tortfeasors Act, a model contribution statute drawn up in 1955.[1] This chapter introduces the basic principles of contribution, using the Uniform Act as an example. The relevant sections of the Uniform Act are set forth on pp. 504–505 below.

THE RIGHT TO CONTRIBUTION

The Uniform Act starts out by creating the right to contribution among joint tortfeasors:

> 1(a) Except as otherwise provided in this Act, where two or more persons become jointly or severally liable in tort for the same injury to person or property or for the same wrongful death, there is a right of contribution among them even though judgment has not been recovered against all or any of them.
>
> (b) The right of contribution exists only in favor of a tortfeasor who has paid more than his pro rata share of the common liability, and his total recovery is limited to the amount paid by him in excess of his pro rata share. No tortfeasor is compelled to make contribution beyond his pro rata share of the entire liability. . . .

These provisions of the Uniform Act allow a negligent tortfeasor[2] who has paid more than his "pro rata" share of the plaintiff's damages to recover contribution from other tortfeasors who are liable for the same injury. Suppose, for example, that Twain recovered a judgment of $20,000 against Nash for his injuries in the auto accident, and Nash paid the judgment. Section 1(a) of the Uniform Act authorizes Nash to recover contribution from Benchley, if Benchley was "jointly or severally liable in tort for the same injury. . . ." Thus, to establish his right to contribution, Nash would have to show that Benchley was also liable to Twain for his injuries in the accident.

Section 1(b) determines *how much* Nash can seek from Benchley. It authorizes Nash to seek contribution for amounts above his (Nash's) "pro rata" share. In this context, "pro rata" means equal. If there are three tortfeasors, the pro rata share of each is one-third; if there are five, it is one-fifth, and so on. Since there are two tortfeasors in the example, Nash's pro rata share is one-half. Thus, if he paid the $20,000, he could recover one-half the judgment, or $10,000, from Benchley. If there were four tortfeasors, the pro rata shares of each would be $5,000. On those facts, if Nash paid the $20,000 to Twain he would only be entitled to $5,000 from Benchley, since §1(b) limits each tortfeasor's liability for contribution to his pro rata share. Nash would have to go after the other two tortfeasors for their shares to obtain full contribution. If all three paid their shares to Nash, Nash would collect $15,000 in contribution and end up paying $5,000 of the judgment, his own pro rata share.

ENFORCING THE RIGHT TO CONTRIBUTION

Suppose that Twain had sued Nash alone and recovered his $20,000 judgment. As indicated above, Nash could not simply demand $10,000 from Benchley. Under §1(a), Benchley is only liable for contribution if he is a joint tortfeasor. Thus, before he could recover contribution from Benchley, Nash would have to prove that Benchley was *also liable to Twain* for the damages Nash had already paid.

The simplest way for Nash to do this would be to bring Benchley into the original suit when Twain sued him. Most states allow a defendant in Nash's position to "implead" a joint tortfeasor for contribution, that is, to make him a party to the original suit. See, e.g., Okla. Code of Civ. Proc. tit. 12 §2014 (allowing defendant to implead a person who may be liable to him for all or part of plaintiff's claim against him); Ct. R. Super. Ct. Civ. §10-11 (same). If Nash impleaded Benchley, the court would determine in a single trial whether Benchley and Nash were liable for Twain's injury. If both were found liable and Nash then paid the judgment (remember, he is still fully liable to *Twain* based on the principle of joint and several liability), he would make a motion in the original suit for contribution from Benchley. Section 3(b) of the Uniform Act expressly authorizes such orders for contribution in the original suit.

Suppose, however, that Twain sued Nash only, and Nash did not (or could not)[3] implead Benchley. If Nash were found liable, and paid the judgment, he could then bring a separate action for contribution against Benchley. This is a new lawsuit. Nash is the plaintiff, Benchley is the defendant, and the claim is for recovery of Benchley's pro rata share of the judgment which Nash has paid. Section 3 of the Uniform Act authorizes such separate suits for contribution (see §3(a)) and establishes limitations periods for them (§3(c), (d)). Figure 22-1 is a simple example of a complaint for contribution.

Like all pleadings, Nash's complaint is basically commonsensical. Since Benchley was not a defendant in the original action, it has never been determined that he is in fact liable for Twain's injuries. Thus, to obtain contribution Nash must allege and prove that Benchley is liable to Twain for the accident due to his negligence. See paras. 8, 9. He also alleges each of the further requirements for contribution established in the statute: That he

(Nash) has been sued by the injured plaintiff and held liable for the same injury (paras. 3-6), that he has paid more than his pro rata share (paras. 7, 10), and that he is entitled to pro rata contribution under the statute (para. 10). The relief demanded in the last paragraph of the complaint is, of course, Benchley's pro rata share of the judgment.

EFFECT OF SETTLEMENT ON THE RIGHT TO CONTRIBUTION

It is not unusual for the plaintiff to settle with one tortfeasor and proceed to trial against others.[4] Suppose that Twain settles with Nash for $2,000,

STATE OF WEST DAKOTA
SUPERIOR COURT

GALLATIN COUNTY, SS: CIVIL ACTION NO. 19-0129

OGDEN NASH,

Plaintiff

v.

ROBERT BENCHLEY,

Defendant

COMPLAINT FOR CONTRIBUTION

1. The plaintiff Ogden Nash is an individual residing at 14 Stow Street, Sutter, West Dakota.

2. The defendant Robert Benchley is an individual residing at 2116 Twelfth Street, Bridger, West Dakota.

3. On March 11, 2017, Mark Twain commenced a civil action, captioned *Twain v. Nash,* Civil Action No. 12-219, against Ogden Nash in the Superior Court for Glacier County, West Dakota.

4. The claim in *Twain v. Nash* arose out of an accident which took place on Maple Street in the town of Sutter, West Dakota, on June 7, 2016. Twain was injured in that accident when a collision between a bicycle owned by Ogden Nash and a car driven by Robert Benchley caused the Benchley car to swerve into him.

5. The plaintiff in *Twain v. Nash* alleged that his injuries resulted from the negligence of Nash in leaving his bicycle in the road.

6. On November 7, 2018, the court entered judgment against Ogden Nash in *Twain v. Nash,* in the amount of $20,000 plus interest and costs.

7. On December 15, 2018, Nash, the contribution plaintiff in this action, satisfied the judgment in *Twain v. Nash* by paying $20,279 to the plaintiff in that action, including $63 in post-judgment interest and $216 in costs.

8. At the time of the accident which gave rise to the judgment in *Twain v. Nash,* the contribution defendant, Benchley, was also negligent in failing to keep a proper lookout. As a result of his negligence, he drove into the bicycle, swerved and ran into Twain. Such negligence was a proximate cause of the accident.

9. As a result of his negligence, the contribution defendant Benchley is a joint tortfeasor fully liable for the injuries sustained by Twain.

10. Plaintiff in this action has satisfied the judgment in *Twain v. Nash* in full. Thus, he has paid more than his pro rata share of the common liability and is entitled to contribution from Benchley under the provisions of West Dak. Stat. Tit. VII, §1(a) and (b) (the West Dakota Contribution Among Tortfeasors Act), in the amount of one-half of the judgment.

11. The plaintiff in this action has demanded payment from Benchley of his pro rata share of the judgment, but he has refused to pay.

WHEREFORE, the plaintiff demands judgment against the defendant in this action in the amount of $10,139.50, plus costs of suit.

_____

By his attorney
Angela Wu
42 River Street
Sutter, West Dakota 68534
(123) 335-8895

Figure 22-1

releasing his claim against Nash only, and then recovers a judgment against

Benchley for $20,000. What is the effect of Nash's settlement with Twain on Benchley's right to recover contribution from Nash?

Here are the relevant provisions of the Uniform Act:

> 4. When a release or convenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death:
>
> (a) It does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide, but it reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater; and,
>
> (b) It discharges the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor.

The first clause of §4(a) reverses the common law rule that releasing one tortfeasor released them all. Under §4(a), Twain may still sue Benchley even though he gave a release to Nash. However, if Benchley is found liable, §4(a) provides that Benchley will get a credit against the judgment for the amount Nash paid in settlement. This codifies the equitable principle that the plaintiff is entitled to full satisfaction of her judgment, but no more. In this example, if Twain recovered a $20,000 judgment against Benchley, Benchley would only have to pay $18,000 after the credit for the $2,000 Nash paid in settlement.

However, §4(b) of the Uniform Act *bars Benchley from recovering contribution from Nash*, the settling tortfeasor. Thus, on these facts Benchley will pay $18,000 of Twain's damages, while Nash pays only $2,000. Naturally, this provision has little appeal for Benchley. If Nash had not settled, and both he and Benchley had been found liable, Benchley could still have been forced to pay $20,000 to Twain, but he would have had the right to recover $10,000 in contribution from Nash (the amount Benchley had paid in excess of his pro rata share). Thus, he would only have been out $10,000. Why should he have to pay an extra $8,000 simply because Twain made a deal with Nash? Isn't this provision grossly unfair to the remaining defendant?

There are several arguments in favor of barring contribution from a settling tortfeasor. *First*, the purpose of settling a lawsuit is to buy one's peace, to extinguish the liability, close the file, and get on to other things. If Benchley is free to come back against Nash for contribution, Nash has gained little by settling. He is still exposed to $10,000 in liability (his pro rata share), and has simply paid $2,000 of it early. If contribution from the settling tortfeasor is not barred, there is little incentive to settlements, which are generally encouraged as a civilized, less expensive alternative to litigation.

Second, Benchley is free to settle too. Indeed, the risk of paying an outsized share encourages him to do so. Thus, the settling tortfeasor's immunity promotes settlements. In many cases the plaintiff will settle with all tortfeasors rather than risk a loss at trial. In a sense, everyone wins in this scenario.

Third, it may turn out that Nash settled for *more* than his pro rata share. When Nash settles, he does not know how much a jury will award in damages. In our hypo, they awarded Twain $20,000 for his injuries, but damages are very difficult to predict; they might have given $50,000. To avoid that risk, Nash might pay $16,000 to settle the case instead of $2,000. If he did, and the jury later assessed the damages at $20,000 in Twain's suit against Benchley, Benchley would only have to pay Twain $4,000 — the $20,000 judgment minus the $16,000 Nash paid in settlement (Benchley gets a credit for the settlement under the Uniform Act, §4(a), second clause). As you can see, these possibilities make settlement an interesting business for all parties involved.

Fourth, the statute contains a good faith requirement. Uniform Act §4. If the court is convinced that Twain and Nash colluded by settling for an insufficient amount, it need not bar contribution from Nash.

PRO RATA CREDITS FOR SETTLEMENTS

An alternative way to take account of a settlement with one tortfeasor would be to give the remaining tortfeasor a pro rata credit for the settlement instead of a dollar credit. Under this approach, Twain would be viewed as selling half of his cause of action to Nash by settling with him. Thus, he could only recover from Benchley on the other half. Suppose, for example, that Nash settled for $2,000, and Twain later recovered a $20,000 judgment against Benchley. Under the pro rata credit approach, Twain would be viewed as having sold half of his claim for the $2,000. Obviously, if the jury determines later that his damages are $20,000, that half of the claim was worth $10,000, and Twain badly undersold it. Under the pro rata credit approach, he would be entitled to collect only one-half of the judgment, or $10,000 from Benchley. He would receive only $12,000 in total. By contrast, under the dollar credit approach he would get $18,000 (the judgment amount minus the

amount of the settlement) from Benchley and $20,000 altogether.

Let's do one more example of the pro rata approach to accounting for settlements. Assume that there were three tortfeasors in Twain's case, and that he settled with Nash for $2,000. Under the pro rata approach, Twain would be viewed as selling one-third of his claim for that amount. When he later obtained a judgment against the other two tortfeasors for $20,000, it would be reduced by one-third ($6,666) to account for the settlement. He could then collect $13,333 from either of the remaining defendants. He would thus collect a total of $15,333 ($2,000 from Nash and $13,333 under the judgment).

The pro rata method of accounting for settlements has gained renewed popularity under comparative negligence, with the important modification that the pro rata shares are not equal, but proportional to the percentage of negligence ascribed to the tortfeasors at trial. Under this approach, if Nash settled for $2,000, and he was later found to be 40 percent at fault in causing Twain's damages, the other tortfeasors would get a 40 percent credit against the judgment to account for Nash's settlement. Again, the logic is that Twain has sold that part of the common liability represented by Nash for the settlement amount. We'll explore this approach in more detail in Chapter 26.

A Tactical Question

1. Accounting for the settlement under this pro rata approach seems more fair. Twain gets what he bargained for from Nash, as well as Benchley's fair share of the damages from him. What is the disadvantage of this variation? (Explanations begin on p. 508.)

CAN A SETTLING TORTFEASOR SEEK CONTRIBUTION?

Now let's look at the other side of the equation. Suppose that Twain settles with Nash for $16,000, and gives Nash a release of his liability. Later, Nash is surprised to learn that the jury in the suit against Benchley assessed Twain's damages at $20,000. Benchley has lucked out: under §4(a) of the

Uniform Act, which provides for a dollar credit for Nash's settlement, he will only have to pay Twain $4,000. Can Nash, the settling defendant who overpaid, recover $6,000 in contribution from Benchley? The Uniform Act says no:

> 1(d) A tortfeasor who enters into a settlement with a claimant is not entitled to recover contribution from another tortfeasor whose liability for the injury or wrongful death is not extinguished by the settlement. . . .

Under §1(d) Nash has no right to seek contribution from Benchley, since Twain only released Nash, not both defendants. Since Nash made an unfavorable settlement (at least, unfavorable in retrospect), he ends up paying more than he would have if he had lost at trial and paid half the judgment. Even here, however, he may still "win" in some sense. He has saved the expense of trying the case, and he has avoided the risk — always difficult to assess — that the jury would award much higher damages, say, $100,000. If Nash had not settled, and the jury had done that, he would have paid at least $50,000, and perhaps $100,000 if Benchley were insolvent.

Since the adoption of comparative negligence, many states have modified the basic contribution principles of the Uniform Act. Some of the current permutations are explored in Chapter 26. However, it is important to master the basic principles of contribution, both because they remain applicable in many cases and because it is impossible to understand varying approaches to contribution without appreciating the basic concepts from which they have evolved. In analyzing the following examples, assume that the Uniform Act applies unless otherwise stated. The relevant provisions of the Act are as follows:

> **Uniform Contribution Among Tortfeasors Act**
>
> (1)(a) Except as otherwise provided in this Act, where two or more persons become jointly or severally liable in tort for the same injury to person or property or for the same wrongful death, there is a right of contribution among them even though judgment has not been recovered against all or any of them.
>
> (b) The right of contribution exists only in favor of a tortfeasor who has paid more than his pro rata share of the common liability, and his total recovery is limited to the amount paid by him in excess of his pro rata share. No tortfeasor is compelled to make contribution beyond his pro rata share of the entire liability. . . .
>
> (c) There is no right of contribution in favor of any tortfeasor who has intentionally . . . caused or contributed to the injury or wrongful death.
>
> (d) A tortfeasor who enters into a settlement with a claimant is not entitled to recover contribution from another tortfeasor whose liability for the injury or wrongful death is not extinguished by the settlement. . . .
>
> (2) In determining the pro rata shares of tortfeasors in the entire liability (a) their relative degrees of

fault shall not be considered; (b) if equity requires the collective liability of some as a group shall constitute a single share; and (c) principles of equity applicable to contribution generally shall apply.

(3)(a) Whether or not judgment has been entered in an action against two or more tortfeasors for the same injury or wrongful death, contribution may be enforced by separate action.

(b) Where judgment has been entered in an action against two or more tortfeasors for the same injury or wrongful death, contribution may be enforced in that action by judgment in favor of one against other judgment defendants by motion upon notice to all parties to the action.

(c) If there is a judgment for the injury or wrongful death against the tortfeasor seeking contribution, any separate action by him to enforce contribution must be commenced within one year after the judgment has become final by lapse of time for appeal or after appellate review.

(d) If there is no judgment for the injury or wrongful death against the tortfeasor seeking contribution, his right of contribution is barred unless he has either (1) discharged by payment the common liability within the statute of limitations period applicable to claimant's right of action against him and has commenced his action for contribution within one year after payment, or (2) agreed while action is pending against him to discharge the common liability and has within one year after the agreement paid the liability and commenced his action for contribution.

(e) The recovery of a judgment for an injury or wrongful death against one tortfeasor does not of itself discharge the other tortfeasors from liability for the injury or wrongful death unless the judgment is satisfied. . . .

(f) The judgment of the court in determining the liability of the several defendants to the claimant for an injury or wrongful death shall be binding as among such defendants in determining their right to contribution.

(4) When a release or covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death:

(a) It does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide; but it reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater; and,

(b) It discharges the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor.

In analyzing the examples below, assume that joint and several liability and the Uniform Contribution Act apply.

Examples

Burning Issues

2. Rogers, owner of a small business, gives a Fourth of July barbecue for his employees behind the building. Impatient for the barbecued chicken, Dunne throws gasoline on the coals, and Thurber throws a lighted match into the grill. The resulting fire causes extensive damage to the building. Rogers brings a negligence suit against Dunne for the damage, and gets

judgment for $42,000.

a. Could Dunne obtain contribution from Thurber at common law? If so, how much?

b. Could Dunne obtain contribution from Thurber under the Uniform Act? If so, how much?

3. Dunne is held liable for $42,000. He pays Rogers $21,000, and refuses to pay any more, arguing that Thurber is responsible for the other $21,000. Will the court order Dunne to pay him any more?

4. Rogers gets a judgment against Dunne for $42,000, but Dunne does not pay. Could Rogers sue Thurber for the damage if the Uniform Act applied?

Fudd Fudges the Figures

5. Rogers sues Dunne and Thurber, and gets a judgment against them both for $42,000. Dunne pays Rogers $34,000, all he is able to. He then makes a motion for contribution from Thurber and Judge Fudd orders Thurber to pay Dunne $17,000. What is wrong with Fudd's order?

Permutations

6. Assume that Rogers sued both Dunne and Thurber, and the jury found Thurber liable, but not Dunne. After paying Rogers the $42,000 judgment, Thurber seeks contribution from Dunne. May he recover contribution, and, if so, how much?

7. Assume that Rogers sued both Dunne and Thurber, and the jury found them both liable. After paying Rogers $42,000, Thurber seeks $21,000 in contribution from Dunne. Dunne, however, argues that White, another guest at the picnic, was *also* negligent in starting the fire, because he placed the grill much too close to the building and left the trash sitting next to it. How much must Dunne pay in contribution?

8. Rogers sues Dunne, Thurber, and White for their negligence in starting the fire. He recovers a judgment against all three for $42,000 and tries to

collect it from White. Unfortunately, White has no money and pays nothing, so Rogers demands payment from Dunne, who pays the entire judgment. Dunne then seeks contribution from Thurber. How much will he get?

Some Unsettling Cases

9. Rogers sues Dunne and Thurber for the fire damage. Dunne offers to settle with Rogers for $12,000. Rogers accepts, and releases Dunne from liability in exchange for payment of that amount. Rogers then recovers a judgment for $42,000 against Thurber. (In analyzing this example, assume that Dunne and Thurber are the only tortfeasors.)
   a. How much will Rogers collect from Thurber if the Uniform Act applies?
   b. After paying Rogers, Thurber seeks contribution from Dunne. How much will he recover if the Uniform Act applies?
   c. How much would Rogers collect from Thurber if the relevant contribution statute gave Thurber a pro rata credit for Dunne's settlement?

10. Assume that Rogers settled with Dunne for $35,000 and gave Dunne a release of his liability only. Subsequently, Rogers sues Thurber. The jury finds Thurber liable for the fire and assesses $42,000 in damages.
   a. Assuming that the Uniform Act applies, how much must Thurber pay Rogers?
   b. After the judgment is entered and Thurber satisfies it, Dunne sues Thurber for contribution. How much would he receive under the Uniform Act?
   c. Assume that this settlement took place in a jurisdiction that gives the remaining defendant a pro rata credit for settlements by other tortfeasors. How much would Rogers collect altogether?

Confusion Worse Confounded

11. Assume that Rogers sues four tortfeasors, Dunne, Thurber, Mauldin, and Burgess. Dunne settles for $15,000. Rogers recovers judgment against

the others for $100,000.

a. Assume that the Uniform Act applies. How much can Rogers collect from Thurber?

b. How much can Thurber recover in contribution from Mauldin?

12. Porter, driving a Reliable Furniture Company truck, collides with Simon's car. The car is thrown onto the sidewalk, injuring Allen. Allen sues Porter, Simon, and Reliable Furniture Company (on the ground that it is liable for Porter's torts in the scope of employment). The jury finds that the negligence of both drivers caused the accident, and awards Allen $60,000 in damages. Simon pays the judgment. How much can he obtain in contribution from Porter? From Reliable?

Unlucky Number 13

13. Assume, after the accident described in Example 12, that the parties exchange papers at the scene, fill out accident reports, and go their separate ways. Simon, a patent lawyer and a worrywart, looks up the statute of limitations and discovers that it is two years. He worries daily for two years, waiting for the process server to serve him with papers in a lawsuit by Allen. She never shows; the magic date passes without incident. Simon breathes a deep sigh of relief.

    Not so fast, Simon. Why should he continue to worry?

A Sense of Proportion

14. Assume that Allen, on the facts of Example 12, sued Simon and Porter in a jurisdiction that applies comparative negligence. At trial, the jury finds that Simon was 20 percent at fault in causing the accident, and Porter was 80 percent at fault. It determines that Allen's damages are $100,000.

    a. If Porter pays the judgment, what could he get in contribution from Simon under the Uniform Act?

    b. What might be a more logical way to redistribute the judgment between the two tortfeasors?

Explanations

A Tactical Question

1. Under the pro rata credit approach, plaintiffs have less incentive to settle than under the dollar credit approach. In a state that applies the dollar credit approach, Twain can still recover his full damages, even if he settles with Nash for less than Nash's full share: Benchley is still liable for the entire judgment, and will only get a credit for the amount Nash actually paid. For example, if Twain's damages are $20,000, he can settle with Nash for $5,000 and recover $15,000 from Benchley.

   However, under the pro rata credit approach, Twain gives up 50 percent of his claim when he settles with Nash. If he settles for $5,000, and the jury assesses his damages at $20,000, he will end up with only $15,000, five from Nash and ten from Benchley (the $20,000 judgment minus Nash's pro rata share). Here is a comparison of the results under the two approaches:

	Settlement w/Nash	**Jury Award at Trial**	**Benchley Pays**	**Plaintiff Receives**
Dollar credit approach:	$5,000	$20,000	$15,000	$20,000
Pro rata credit approach:	$5,000	$20,000	$10,000	$15,000

Thus, under the pro rata credit approach, a plaintiff is unlikely to sell half of his claim for much less than half its value.

Burning Issues

2. a. As the introduction indicates, there was no right at common law to demand contribution from a joint tortfeasor. If Dunne paid the judgment, he had no recourse against Thurber and was stuck with the entire liability, simply because Rogers chose to sue him instead of Thurber.

   b. Dunne has no right to contribution under the Uniform Act.

Surprised? Well, this answer is a little bit cute. The facts do not indicate that Dunne has paid anything to Rogers. The right to contribution arises in favor of a tortfeasor who has *paid* more than his pro rata share, not one who has been found liable. Uniform Act §1(b). The difference between incurring a judgment for $42,000 and paying over $42,000 is dramatic; it is the difference between a bird in the hand and a bird in the bush.

Assuming that Dunne paid the $42,000 to Rogers, he would have a right to pro rata contribution from Thurber under the Uniform Act. He would be entitled to recover $21,000 from Thurber, *if* he proved that Thurber was also liable to Rogers for negligently causing the fire. Since Rogers only sued Dunne, Thurber has never been adjudged liable for the fire. Thus, Dunne would have to bring a contribution action against Thurber and prove Thurber's negligence in that suit before he could recover contribution.

3. Assuming that joint and several liability applies, the court will order Dunne to pay the entire judgment. The Uniform Act, like many contribution statutes, does not alter the fundamental premise that each tortfeasor is *fully liable* to the plaintiff. The plaintiff may still sue whichever tortfeasor he chooses, and collect the damages from whichever he chooses.

   Contribution only deals with adjusting the payment of the damages among the defendants, after one has paid more than his share of the judgment. Dunne may pay Rogers $42,000 and seek $21,000 from Thurber, but he cannot pay $21,000 and force Rogers to chase Dunne for the balance. That, in essence, would make the two tortfeasors "severally" liable for their pro rata shares, rather than "jointly and severally" liable for the plaintiff's full damages.[5] The very purpose of joint and several liability is to assure the plaintiff's right to collect fully from any one of the tortfeasors.

4. At early common law, a judgment against one tortfeasor barred suit against others who might also be liable. The rationale was that a tort claim was a "single cause of action." Once sued upon, it was extinguished and replaced by the judgment. See Chapter 21, p. 482. The courts later abandoned that approach, however, replacing it with the rule

that a plaintiff could bring a second action against another party responsible for his injuries, so long as the prior judgment had not been fully satisfied. Section 3(e) of the Uniform Act codifies this later approach, which allows a plaintiff who has obtained a judgment against one tortfeasor to sue other tortfeasors until his claim is fully satisfied. Under §3(e), Rogers's judgment against Dunne does not bar him from suing Thurber, since the judgment has not been paid.

Fudd Fudges the Figures

5. The Uniform Act allows a tortfeasor who has paid "more than his pro rata share" of the liability to recover contribution. Section 1(b). Dunne's pro rata share would be $21,000, one-half of the judgment. Since he has paid more than that, and Thurber has been held liable for the injury as well, Dunne is entitled to contribution. Fudd was right in awarding him contribution. His error was in determining the amount.

   You can see the logic for Fudd's order; it makes Thurber absorb half of Dunne's payment. The Uniform Act, however, provides otherwise. Under §1(b), Dunne can recover from Thurber "the amount paid by him in excess of his pro rata share." Dunne's pro rata share is $21,000, Since he has paid $34,000, he can recover $13,000 in contribution from Thurber.

   The logic of the Uniform Act provision is illustrated by considering what would happen if Fudd's order were upheld. Thurber would pay $17,000, but he would still be liable to Rogers for $8,000, the part of Rogers's judgment that he has not yet collected. If Thurber paid $17,000 to Dunne and Rogers then demanded $8,000 more from him, he would end up paying $25,000, $4,000 more than his pro rata share, while Dunne paid $17,000, $4,000 less than his.[6]

   The Second Restatement of Torts took the position that a tortfeasor could not seek contribution at all until the plaintiff had been fully paid. See §886A(2) and cmt. f. Presumably, the logic for this position is that, if Thurber only has limited funds, Rogers should get first crack at them: Thurber should not pay contribution to Dunne and be left unable to satisfy the remainder of Rogers's judgment. However, §1(b) of the Uniform Act does not include a similar requirement.

Permutations

6. Since Dunne is not liable to Rogers, he is not liable to Thurber for contribution. A tortfeasor may only recover contribution from someone who is liable to the plaintiff. See Uniform Act §1(a) (authorizing contribution "where two or more persons become jointly or severally liable in tort"). He can hardly be liable for contribution as a joint tortfeasor if he isn't a tortfeasor at all, and that's what the jury decided in this case. See Uniform Act §3(f) (providing that the findings as to the liability of the various defendants in the plaintiff's suit are binding in a subsequent contribution action).

7. Under the Uniform Act, any person who "becomes jointly liable in tort for the same injury" is liable to contribute to the damages. Although White was not sued in the original action, he may still be a joint tortfeasor. Rogers might have decided not to sue him for myriad reasons; that decision does not necessarily mean that he is not "liable" for the injury. If his negligence contributed to the accident, he should be counted in calculating the pro rata shares of each tortfeasor. Thus, when Thurber seeks contribution, the court will have to determine whether White was also negligent in order to calculate Dunne's pro rata share. If it determines that White was also a tortfeasor, it will order Dunne to pay one-third of the judgment to Thurber ($14,000) instead of one-half.

8. Clearly, Dunne is entitled to contribution from Thurber. If White were solvent, Dunne could recover $14,000 from Thurber and $14,000 from White. Since White cannot pay, shouldn't Thurber pay $21,000?Section 1(b) of the Uniform Act suggests that Dunne would only recover $14,000, since it provides that "[n]o tortfeasor is compelled to make contribution beyond his pro rata share of the entire liability." Thurber's pro rata share is one-third, or $14,000; under $1(b), he can only be required to pay that to Dunne. If this is the answer, Dunne, having paid $42,000, will end up $28,000 out of pocket, because he cannot collect contribution from White. The burden of White's insolvency would fall on him.

   Most courts view contribution as an equitable doctrine; on facts like these they would likely require Thurber to pay $21,000 in contribution

to Dunne. See Restatement (Second) of Torts §886A cmt. c (when one tortfeasor is insolvent, court may "do what is fair and equitable under the circumstances" in ordering contribution). This flexibility to account for the circumstances is preserved in §2(c) of the Uniform Act, which provides that, in determining the pro rata shares, "principles of equity applicable to contribution generally shall apply." Under this provision, the court would likely require Thurber to pay $21,000 in contribution to Dunne, despite the language of § 1(b).

Some Unsettling Cases

9. a. Thurber is still liable for the full judgment, but he receives a dollar credit for the amount of the settlement with Dunne. Uniform Act §4(a). Thus, he will have to pay Rogers $30,000. As this example illustrates, once Dunne has settled, Thurber risks paying more than half of the damages unless he settles as well.

b. As the introduction indicates, §4(b) of the Uniform Act bars contribution from a settling tortfeasor. Thurber will not be able to force Dunne to pay anything above the $12,000 he paid to settle with Rogers. This gives defendants a strong incentive to settle cases. If Dunne can induce the plaintiff to settle for less than half of the likely damage amount, he will avoid paying his full "share" of the liability.

Thurber might argue that the settlement is so low that it is not "in good faith," that Rogers and Dunne have conspired to force Thurber to bear the brunt of the damages by settling for an unreasonably low amount. However, many factors affect the parties' judgment about how much a claim is worth, and many of these factors are quite subjective, such as the risk that the settling defendant's negligence cannot be proved at trial, or the adverse effect of having a sympathetic defendant before the court. Due to such factors, it is doubtful that the court will find that the settlement was in bad faith simply because Dunne paid less than his pro rata share of the plaintiff's damages.

c. Under a pro rata credit approach, Rogers effectively sells half of his claim to Dunne by settling with him. He would then be entitled to collect one-half of the damages verdict from Thurber. If the total damages found by the jury are $42,000, Rogers would collect

$21,000 from Thurber, and $12,000 from Dunne, for a total of $33,000. Naturally, this approach makes plaintiffs cautious about settling with the first tortfeasor.

10. a. Under joint and several liability, Thurber is liable for the full amount of Rogers's damages, but gets a dollar-for-dollar credit for the amount paid in settlement. He must pay Rogers $7,000 ($42,000 − $35,000).

b. Dunne is barred from seeking contribution from Thurber by § 1(d), which provides that a settling tortfeasor cannot obtain contribution unless he has obtained a release of the other tortfeasor's liability as well as his own. The example indicates that Dunne received a release of *his* liability, but not Thurber's; thus, he cannot ask Thurber to contribute. Dunne cannot undo his bargain by seeking contribution if his settlement turns out to be higher than his share of the damages awarded. If Dunne had settled for *less* than half the damages assessed, he would not have had to pay contribution to Thurber. See Example 9b. Under the Uniform Act it works both ways, or, more accurately, neither way. If Dunne makes a good deal, he shifts more than half of the damages to Thurber. If he makes a bad deal, as he did here, he ends up paying more than half himself.

c. In a pro rata jurisdiction, Rogers is viewed as having sold half of his claim to Dunne by settling with him. Thus, he may collect only the other half of the $42,000 judgment from Thurber, or $21,000. This amount, together with the $35,000 he obtained in settlement from Dunne, comes to $56,000 for a case in which the jury has determined the damages to be $42,000. Under the pro rata credit approach, the *plaintiff* gets the advantage of a favorable settlement; she collects more than the jury's damage award. Compare Example 10a, which illustrates that the *nonsettling defendant* gets the benefit from a high settlement in a dollar credit jurisdiction.

Confusion Worse Confounded

11. a. Rogers can recover $85,000 from Thurber. The Uniform Act gives Thurber a dollar credit for Dunne's settlement (§4(a)) but he remains jointly and severally liable for the remaining damages.

b. Under §1(b) of the Uniform Act, each tortfeasor may only be made to pay up to its pro rata share of the "common liability." The problem here is determining Mauldin's share: Are there three shares (the three defendants who lost at trial) or four (those three plus Dunne, the settling tortfeasor)?

Dunne is certainly a party who could be held "jointly or severally liable in tort for the same injury . . . ," so it seems that he ought to be included. If so, there are four tortfeasors, and Mauldin must contribute $25,000. However, if this is true, Thurber could recover only $25,000 from Burgess, too. He'd get $50,000 back and end up paying $35,000 himself.

Despite the argument for this result based on the language of the Act, it makes more sense to divide the $85,000 liability that is "common" to *the remaining tortfeasors* equally. Under this approach Thurber would recover $28,333 from Mauldin, the same amount from Burgess, and end up paying that amount himself. It seems likely that a court would reach this result, under §2(c) of the Uniform Act and basic principles of equity.

12. At first glance, it seems that there are three tortfeasors, so that Simon should get $20,000 from Porter, another $20,000 from Reliable, and end up paying $20,000 himself. However, there really aren't three tortfeasors in this example, only two. Simon was negligent and Porter was negligent. Reliable is not a tortfeasor itself; rather it is a party responsible for the negligence of Porter.

Under the doctrine of respondeat superior, Reliable can be made to pay for Porter's tort. For example, Allen could demand $60,000 from Reliable under this judgment, since Porter is liable for the full damages under joint and several liability and consequently, Reliable is liable for the same amount under respondeat superior. By the same logic, Reliable could be made to pay any contribution amount that Porter must pay. Since there are two tortfeasors, there are two pro rata shares; if Simon pays the judgment, Porter would be liable to contribute $30,000 to Simon. Under respondeat superior, Reliable could be made to pay that share, but the fact that it is liable for Porter's share does not make it a third tortfeasor. See §2(b) of the Uniform Act, which provides that, where equity so requires, "the collective liability of some as a group

shall constitute a single share."

Unlucky Number 13

13. If Simon were a tort lawyer, he would realize that he isn't off the hook. Maybe Allen didn't sue him, but maybe she *did* sue Porter. If she did, and if she wins, and if Porter pays, he can then come after Simon for contribution *within one year after he loses to Porter*.[7] In other words, a losing defendant can seek contribution against another tortfeasor long after the original plaintiff is barred from suing that tortfeasor directly. This provision is necessary: Otherwise, Allen could defeat Simon's right to contribution by suing Simon alone, just before the limitations period ran.

    Figure 22-2 illustrates how Porter could come knocking on Simon's door some four-and-a-half years after the statute of limitations had run on a direct claim against Simon.[8]

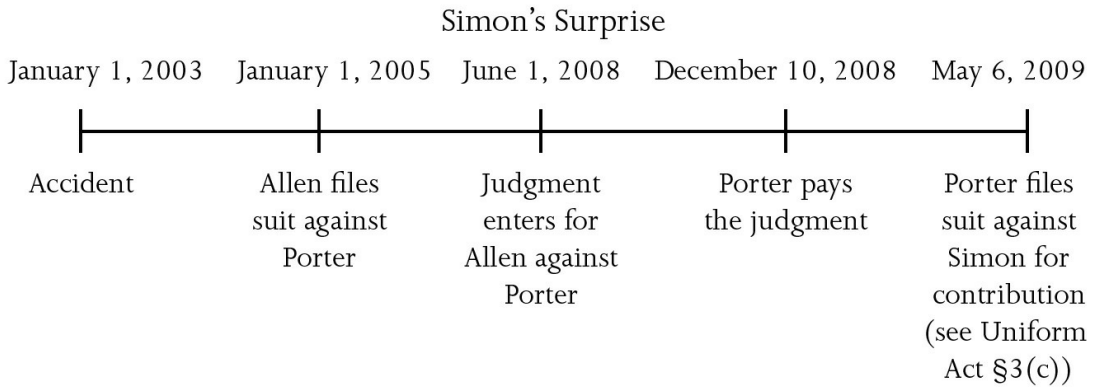

Figure 22-2

A Sense of Proportion

14. a. Under the Uniform Act, Porter would receive one-half, or $50,000 in contribution from Simon.

    b. Wouldn't it make more sense to redistribute the judgment in proportion to the fault of the parties? Under this approach, since Porter was 80 percent at fault and Simon 20 percent, Simon would

pay Porter $20,000 in contribution. Had Simon paid the judgment, he would have obtained $80,000 in contribution from Porter. This proportional approach to contribution has rapidly gained popularity in comparative negligence jurisdictions.[9] It is analyzed in more detail in Chapter 26.

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1. Uniform Contribution Among Tortfeasors Act, 12 U.L.A. 201 (2008). An earlier version of the Uniform Contribution Among Tortfeasors Act was promulgated in 1939. It was superseded by the 1955 Act.

2. The Uniform Act, like most contribution statutes, bars contribution claims by an intentional tortfeasor. See §1(c), quoted at p. 504. The Restatement of Torts: Apportionment of Liability, however, would allow intentional tortfeasors to seek contribution. Restatement (Third) of Torts: Apportionment of Liability §23 cmt. l. The discussion in this chapter assumes that all claims are based on negligence.

3. Nash might not be able to implead Benchley, for example, if the court in which Twain brought suit lacked personal jurisdiction over Benchley.

4. Some of the reasons for doing so are explored in Chapter 21, Example 1.

5. Many states have now switched from joint and several liability to several liability, at least in limited classes of cases. Some examples are given in Chapter 26, pp. 601–602.

6. I suppose he could then demand contribution from Dunne, but that seems like a circuitous means of redistributing the loss.

7. See Uniform Act §3(c).

8. As a practical matter, if Allen sues Porter, Simon is likely to find out. One of the parties will doubtless want to depose him in the action, and he will likely be called to testify at trial as well.

9. Some states have switched from pro rata contribution to comparative or proportional contribution simply by dropping the word “not” from §2(a) of the Uniform Act. In these states, the defendants’ “relative degrees of fault shall be considered” in determining contribution, so each ends up contributing to the judgment in proportion to her fault. See, e.g., Mich. Comp. Laws §600.2925b.

CHAPTER 23

Please Pass the Liability: Respondeat Superior and Nondelegable Duties

INTRODUCTION

The last two chapters have considered the allocation of liability in cases involving "joint tortfeasors." As those chapters indicate, when more than one party's negligence contributes to an injury, each negligent party is liable, but may be able to seek contribution from other tortfeasors. This chapter addresses the related situation in which one defendant incurs liability, not due to his own negligence, but due to the negligence of another. We focus on two common examples of such "vicarious liability": liability of an employer for the torts of its employees, and liability of one who employs an independent contractor for torts committed by the independent contractor.

RATIONALES FOR IMPOSING VICARIOUS LIABILITY ON EMPLOYERS

The common law has long accepted the premise that employers should be liable for the torts of their employees in the scope of employment. The

premise is sufficiently entrenched to merit its own legal Latin, “respondeat superior,” which is loosely translated, “let the master respond.” While virtually all jurisdictions impose liability on employers for the torts of their employees, the rationales for the respondeat superior doctrine have varied.

It is sometimes said that the employer should pay because she can select and control her employees, and thereby prevent injuries due to negligence. It is doubtless true, as a general matter, that employers can reduce accidents by requiring their employees to exercise care, and that making employers liable for employees’ torts gives them an incentive to enforce careful conduct. However, employers frequently have no realistic chance of preventing a particular negligent act by an employee, as when an employee drives alone to pick up a package or goes out alone to repair an elevator. Employers cannot hover over their employees from minute to minute, and, as an actuarial matter, even employees who are carefully selected and supervised will be negligent on occasion, despite the employer’s most rigorous efforts to promote safety.[1] When they are, the employer is liable even if it took stringent measures to prevent accidents. This liability, in other words, is truly vicarious; it flows automatically from the employee’s tort, regardless of the care the employer exercised in selecting or supervising him.

More skeptical observers have suggested that respondeat superior liability is simply a device to provide a “deep-pocket” defendant able to pay the plaintiff’s damages. Prosser & Keeton at 500. Certainly it serves this purpose in many cases, since employers are more likely to have the resources to pay judgments than their employees. Yet, if vicarious liability is imposed solely to assure a deep pocket, it might equally well be imposed on *any* party with substantial resources: We could make millionaires vicariously liable for torts, or any insurance company with a headquarters building over 25 stories, or — what the heck — how about the government? Clearly, while assuring compensation is a factor, respondeat superior is intended to assure that such compensation comes from a party that is fairly made to pay it.

Another rationale cited for the doctrine is that employers are in a position to spread the costs of accidents by purchasing liability insurance and raising the price of their products to reflect the inherent accident costs of the enterprise. This argument, like economic analysis of tort law in general, looks at the issue not as a matter of individual fairness or blame, but rather as a question of the overall societal impact of placing the cost of accidents in one place or another. Respondeat superior encourages employers to insure; the

cost of insurance gets incorporated into the price of the product, which consequently reflects more accurately the actual costs of producing it, including the accident costs. This argument makes sense, but, like the deep-pocket argument, courts would probably not accept it if they did not view respondeat superior as inherently fair as well.

Perhaps the most basic rationale for the doctrine is that the employee acts for the master in the performance of the master's work. In the course of that work, he creates risks to further the master's goals, including the risk of injuries due to negligence. Where such risks are created for the master's benefit, it seems intuitively fair to ascribe the conduct to the party for whose benefit it was undertaken. As stated in an early English case, "the reason that I am liable is this, that by employing [an employee] I set the whole thing in motion; and what he does, being done for my benefit and under my direction, I am responsible for the consequences of doing it." *Duncan v. Findlater, 7* Eng. Rep. 934, 940 (H.L. 1839). On the simplest level, if the master did not have the work done by another, he would have to do it himself, and would be liable for any torts committed in doing so. Under respondeat superior, the acts done at the master's bidding are treated, for liability purposes, as though he had performed them himself.

THE MEANING OF "EMPLOYEE"

An employer is only liable for the torts of a worker if the worker is its employee and acts in the scope of his employment. In many cases it is unclear whether a party who acts for another is an employee or instead acts as an independent contractor. Suppose, for example, that Bogart hires Bacall to maintain his yard. Bacall could be an employee or an independent contractor, depending on the particular facts of the relationship. If Bogart provides all the tools, pays Bacall by the hour, determines when she will work and exactly what she will do, Bacall would likely be characterized as an employee. On the other hand, if Bacall works with her own truck and tools, comes whenever she chooses, is paid by the season, provides her own insurance, and decides for herself what needs to be done to make the yard sparkle, she would likely be characterized as an independent contractor.

It is often stated that a person is an employee (or, in common law

parlance, a “servant”) if the employer has the right of control over the person in the performance of the work.

> An employee is an agent whose principal controls or has the right to control the manner and means of the agent’s performance of work.

Restatement (Third) of Agency §7.07(3). However, this control test does not clearly resolve close cases, since even independent contractors are subject to some degree of control. Doubtless Bogart would have the authority to tell Bacall not to use chemical fertilizer, or to trim the rose bushes in the fall rather than the spring, even if Bacall’s business was independent in most respects. Thus, courts have elaborated a number of factors that they consider in determining whether an actor is an employee. The Third Restatement of Agency, for example, lists the following factors:

- **The extent of control which the master is authorized to exercise over the details of the work.** Clearly, the more supervisory authority the employer has to specify how the work will proceed, the more likely it is that the worker will be viewed as an employee.
- **Whether the actor is engaged in a distinct occupation or business.** If Bogart employs a handy person to work around the house, she will more likely be viewed as an employee than if he calls in a computer repair person or an electrician.
- **Whether the type of work is customarily performed under the employer’s supervision or by a specialist without supervision, and the extent of the skill required.** If the work involves a skilled task typically hired out to a specialized contractor, it will more likely be viewed as a contract situation. If Bogart hires Greenstreet to move his house, Greenstreet is more likely to be viewed as an independent contractor than if he is hired to wash it.
- **Who supplies the tools, other equipment, and place of work.** If Bacall goes to Bogart’s place of business every day to sew shirts and uses Bogart’s sewing machines and material, she will probably be viewed as an employee. On the other hand, if she does piecework at home on her own machine, she may be an independent contractor.
- **The length of time for which the person is employed.** Frequently, persons hired for a single purpose and a brief period look more like independent contractors, since there is less of a relationship and a

greater likelihood that she was called in to perform a specific task in her own manner. However, like the other factors, this one does not always help. If Bogart hires Bacall for a fall afternoon to rake leaves, she will likely be viewed as an employee. If he hires her for a season to maintain the grounds, she may well be a landscaping contractor.

- **Whether the person is paid on a time basis or by the job.** Workers hired by the hour or the week tend to be viewed as employees, since they are at the employer's "beck and call" on a regular basis. By contrast, contractors are typically hired to accomplish a given end result — such as building a house or repairing a bridge — without detailed supervision during the process, and paid a flat sum to accomplish that result.
- **Whether the employer is in business, and whether the work is part of the employer's regular business.** If Bogart is a jeweler, and hires Bacall to cut diamonds, a court is likely to infer that she is an employee. On the other hand, if he hires her to renovate his jewelry store, the more likely inference is that she is an independent contractor hired on a one-time basis to accomplish a particular task.
- **The parties' belief as to the nature of the relation.** It is relevant, though not dispositive, that the parties view the relation as an employment relation, or otherwise. This belief may be reflected in various arrangements. For example, an employer is likely to pay employment and worker's compensation taxes, to provide insurance, and to comply with various other regulatory requirements regarding employees. The fact that the employer has treated the worker as an employee is suggestive that the master/servant relation actually exists.

See Restatement (Third) of Agency §7.07 cmt. f. This multifactor test for determining employment status is widely accepted, not only in the context of tort liability, but in others as well. See, e.g., §3121(d)(2) of the Internal Revenue Code (stating that common law test applies in determining employment status under the Internal Revenue Code). Like so many legal standards these days, this test is hardly cut and dried, and will often pose questions of fact for the jury. On the other hand, while ambiguous cases arise, in most cases it is pretty clear whether the individual is an employee or an independent contractor.

ACTING IN THE SCOPE OF EMPLOYMENT

Even if the court concludes that Bacall was Bogart's employee at the time that she negligently injured the plaintiff, Bogart will only be liable for her negligence if she acted in the scope of her employment. Bogart obviously is not liable for private acts of Bacall, but only those properly attributable to her employment.

Isn't the law tiresome in the way it finds interpretive problems around every corner? Perhaps so, but these interpretive problems arise from the necessary process of determining the outer limits of a principle. Unless we are to hold Bogart liable for everything Bacall does, we must define the limit of his responsibility. He should not be liable if Bacall gets in a motor vehicle accident over the weekend, because her driving is unrelated to her work for Bogart. Even if she gets in the accident on her lunch hour, Bogart should probably not be liable. This trip is for her own purposes, outside of Bogart's premises and control. On the other hand, Bogart clearly would be vicariously liable if Bacall hit a passing pedestrian with a ladder while working as a house painter for Bogart's painting company. Since this act took place in the course of and for the furtherance of the employer's work, it seems fair that it should pay.

The Third Restatement of Agency offers the following definition of "scope of employment":

> An employee acts within the scope of employment when performing work assigned by the employer or engaging in a course of conduct subject to the employer's control.

Restatement (Third) of Agency §7.07(2). This definition works well enough in the easy cases, but is less helpful in the close ones, such as acts that are incidental to the work experience but do not directly further the work. Suppose, for example, that Bacall starts a fire while smoking on the job or bumps into a visitor while on the way to the bathroom. These acts do not directly arise from the performance of the work, but they are normal incidents of the work experience.

Although early cases limited "scope of employment" to acts intended to directly further the employer's business, the tendency in more recent cases is to hold incidental acts in the course of the work (such as lunch or smoking breaks) within the scope of employment. They take place at the employer's

place of business, during working hours, and are related in a general way to the accomplishment of the work. If the rationale for vicarious liability is that the risks engendered by an enterprise should be absorbed and distributed by that enterprise, it seems supportable to hold the employer liable for such incidental risks. *George v. Bekins Van & Storage Co.*, 205 P.2d 1037, 1043 (Cal. 1949); see Restatement (Third) of Agency §7.07 cmt. d (personal acts during the work day within scope of employment as "incidental to the employee's performance of assigned work").

VICARIOUS LIABILITY FOR INTENTIONAL TORTS

Another difficult problem is determining when employers will be held vicariously liable for intentional torts by employees. Intentional torts require, by definition, a deliberate decision by the actor to invade another's rights. In almost all cases, such deliberate invasions are unwanted, discouraged, and probably forbidden by the employer. There is some force, therefore, to the employer's argument that he should not be held liable for such acts in clear contravention of his wishes.

Despite these arguments, courts do hold employers liable for at least some intentional torts. For example, courts have fairly consistently held employers liable where an employee commits an intentional tort in order to serve (however misguidedly) the employer's purposes. Dobbs' Law of Torts §429. An employee of a repossession company who assaults an owner while repossessing his car is clearly trying to do her job. Similarly, a bouncer who uses excessive force in evicting a patron from a bar is motivated to serve his employer, albeit overzealously. He is probably not doing it the way the employer wants him to, but neither is an employee who is negligent. Once again, if the basis for respondeat superior is that the employer's business has created the risk, these cases appear to be good candidates for application of the doctrine.

A second category of cases involves brawls that arise in the course of the work. For example, Bacall, while delivering pizzas for Bogart, might get into a dispute with another driver at a traffic light and punch him, or two

assembly-line workers might argue about the proper way to do the job, causing one to hit the other with a wrench.

Bacall's punch is arguably in the scope of employment, since the altercation occurs while she is making a delivery for her employer. The fight is not meant to accomplish the work, but the dispute arises during and because of the work done for the employer.

The cases tend to impose vicarious liability in this scenario, on the theory that the tort is incidental to the work, in the same sense that a smoking break or a trip to the bathroom is. See R. Brill, The Liability of an Employer for the Wilful Torts of His Servants, 45 Chi.-Kent L. Rev. 1, 11-14 (1968). One court suggests that vicarious liability applies in this class of cases if the assault arises "in response to the plaintiff's conduct which was presently interfering with the employee's ability to successfully perform his duties." *Miller v. Federated Department Stores, Inc.*, 304 N.E.2d 573, 580 (Mass. 1973).

Even under a broad test of this type, some scenarios will not support liability even though they occur during the employee's work. Suppose that Bacall, while delivering the pizza, saw Stewart, an acquaintance who owed her money, stopped the car and punched Stewart for refusing to pay. This may have happened "when performing work assigned by the employer" (Restatement (Third) of Agency §7.07(3)), but most courts would not impose liability on the employer for this act of personal pique. Here's a nice statement of this ambiguous line between intentional torts that invoke respondeat superior and those that do not:

> the line separating a master's *respondeat superior* liability from a servant's individual responsibility for the latter's on-duty assault is drawn somewhere between a servant's venting purely personal spleen on a third party and the point at which the servant continues to press the master's interest with mistaken vigor and in an inappropriately aggressive manner.

Baker v. St. Francis Hosp., 126 P.3d 602, 609 n.3 (Okla. 2005) (Opala, J, concurring and dissenting in part).

A third common scenario involves sexual misconduct in the course of medical care or pyschotherapy. See, e.g., *Lisa M. v. Henry Mayo Newhall Memorial Hosp.*, 907 P.2d 358 (Cal. 1995) (sexual assault by ultrasound technician during examination); *Birkner v. Salt Lake County*, 771 P.2d 1053 (Utah 1989) (social worker engaged in sexual activity with patient during counseling). The acts in these cases clearly do not serve the employer's purposes, but they are a peculiar risk of certain kinds of work. Few courts

would have held an employer liable for these torts 50 years ago; today, the cases are mixed. Some courts, taking a broad view of the costs an enterprise should absorb, will impose liability. See, e.g., *Fahrendorff v. North Homes, Inc.*, 597 N.W.2d 905 (Minn. 1999); *Plummer v. Center Psychiatrists, Ltd.*, 476 S.E.2d 172 (Va. 1996). Others, emphasizing the personal motivation of the tortfeasor, deny recovery. See, e.g., *Birkner*, 771 P.2d at 1058-1059 (citing a gazillion cases).

The Restatement of Agency would resolve intentional tort cases based on the distinction between serving the employer's purposes and "an independent course of conduct not intended by the employee to serve any purpose of the employer." Restatement (Third) of Agency §7.07(2). This test appears to narrow the ambit of liability somewhat. For example, under this test, a fight after a traffic accident would likely not be held in the scope of employment. Although the employment provides the occasion for the employee's assault, the assault hardly serves a purpose of the employer. See id. illus. 7-9.

A related issue arises when an employee's official position facilitates commission of an intentional tort. In *White v. County of Orange*, 212 Cal. Rptr. 493, 495-496 (Cal. Ct. App. 1985), for example, a deputy sheriff stopped a motorist and threatened to rape and murder her. In *Lo v. Superior Court, 79* Cal. Rptr. 2d 561 (Cal. Ct. App. 2d Dist. 1998), a judge threatened a defendant with adverse treatment in sentencing if she did not engage in sexual acts with him. Even courts that would generally deny recovery for such assaults may find the employer liable in these cases, based on the special authority vested in the tortfeasor that created a unique risk of abuse. See Restatement (Second) of Agency §219(2)(d) (employer liability when agent is aided by the agency relationship in committing tort); see also *Doe v. Forrest*, 853 A.2d 48 (Vt. 2004) (sheriff's department could be liable under §219(2)(d) for acts of police officer who used his authority to force store clerk to perform sexual acts).[2]

In another common scenario, the employee's tort has no relation to accomplishing the master's purpose, but the employment simply furnishes the opportunity for a completely unrelated tort. For example, a waiter might steal money from a customer's purse. In this scenario, the intentional tort is *related* to the employment, in the "but for" sense that the job creates the opportunity for the tort, but the tort is not motivated by the work or by any work-related purpose. See, e.g., *Effort Enterprises, Inc. v. Crosta*, 391 S.E.2d 477 (Ga. Ct. App. 1990) (employer not liable where employees stole jewelry

while moving other items into plaintiff's house). Virtually all courts deny recovery against the employer in these cases.

Courts that take a broad approach to vicarious liability may formulate broader tests than the traditional "motivation to serve" or Third Restatement approach. Some courts have held that the employee's act must be foreseeable in the sense that it is "not . . . so unusual or startling that it would be unfair to include the loss caused by the injury among the costs of the employer's business." *Leafgreen v. American Family Mut. Ins. Co.*, 393 N.W.2d 275, 280-281 (S.D. 1986). Others have simply required the conduct to be foreseeable or incidental to the work. *Martinez v. Hagopian*, 227 Cal. Rptr. 763, 766 (Cal. Ct. App. 1986). Such tests, while broader than the traditional test, are too malleable to help much with the hard intentional tort cases. The Third Restatement rejects a forseeability test as too broad and unfair to employers. Restatement (Third) of Agency §7.07 cmt. b.

Ultimately, the disparate results in the intentional tort cases "represent differing judgments about the desirability of holding an employer liable for his subordinates' wayward behavior." *Faragher v. City of Boca Raton*, 527 U.S. 755, 798 (1998). In other words, the outcome is a policy choice upon which courts differ. Such opposite outcomes in similar cases tend to frustrate students — and professors — who would like to see all the cases cleanly resolved by a single rule. Unfortunately no such universal rule exists, nor will there be one as long as we have 50 different states entitled to make their own tort law.

THE CONSEQUENCES OF INDEPENDENCE

While employers are generally liable for the torts of their employees in the scope of employment, they generally are *not* liable for torts of an independent contractor, even though they arise from the contractor's work for the employer. Restatement (Second) of Torts §409. (For the sake of clarity, I will call the party who hires an independent contractor the "owner," rather than the "employer" throughout this chapter.) This "rule of insulation" from tort liability (C. Morris and C. Morris Jr., Morris on Torts 256 (2d ed. 1980)) will often influence the way parties structure their business relationships. Owners may choose to hire independent contractors to perform work rather than using

their own employees, simply to insulate themselves from tort liability. Of course, where the owner knows he is avoiding a potential liability, the contractor knows that he is assuming it. Consequently, the cost of insuring against tort liability will be considered in setting the price of the work.

EXCEPTIONS TO THE RULE: NONDELEGABLE DUTIES

While hiring an independent contractor usually insulates an owner from liability for torts in the course of the work (Restatement (Third) of Torts: Liability for Physical and Emotional Harm §57), it will not always do so. In some situations, courts have refused to allow owners to insulate themselves from liability, *even if* they use a contractor to do the work. In such situations, it is often said that the owner's duty of care is "nondelegable," so that the owner remains liable for tortious injury from the performance of the work, even though the tort was committed by an independent contractor.

The phrase *nondelegable duty* is something of a misnomer. The owner *has* delegated the work to an independent contractor in these cases; what the courts mean is that the owner may delegate the *work* but cannot delegate away the *liability* for tortious acts in the course of the work. Like the employer under respondeat superior, the owner is liable in these cases *vicariously* for the torts of the independent contractor.

The Third Restatement of Torts specifies a number of situations in which vicarious liability is commonly imposed on the party hiring an independent contractor. For example, courts often hold a duty nondelegable (so that the hiring party is vicariously liable for negligent performance) if the contract work involves "a peculiar risk" of physical harm during performance. Restatement (Third) of Torts: Liability for Physical and Emotional Harm §59. The Restatement offers an example in which the plaintiff is injured by high-voltage electricity. Id. at illus. 2. Installing electricity is not so irreducibly dangerous as to be deemed "abnormally dangerous" (see Chapter 15), but it does involve unusual risk. For another example, see *McMillan v. United States*, 112 F.3d 1040 (9th Cir. 1997) (clear cutting of large trees held nondelegable because inherently dangerous). The evident rationale for

imposing vicarious liability on the hiring party in such cases is that she should be aware that special precautions are necessary in such activities, and should assure that they are taken or incur liability if they are not.

Similarly, vicarious liability will likely be imposed on a party who hires a contractor to perform construction or repair on instrumentalities that involve unusual danger, such as transmission of high-voltage electricity or blasting. Restatement (Third) of Torts: Liability for Physical and Emotional Harm §60. Here again, the unusual danger inherent in the work, which necessarily imposes a risk of injury and is done for the owner's benefit, supports holding the owner liable for the contractor's torts in the course of such activities.

Courts have also held owners vicariously liable for negligence of their contractors in the course of work done in a public place. Restatement (Third) of Torts: Liability for Physical and Emotional Harm §64. Under this exception an electric company would be liable, for example, if it hired an independent tree surgeon to trim trees along its power lines over the sidewalks, and the tree surgeon caused an accident by cutting a branch down in the path of the plaintiff's car. Similarly, owners are vicariously liable for torts of their independent contractors in maintaining highways and other public property and in maintaining premises open to the public for business purposes. Id. at §64(b). Vicarious liability in these cases is presumably based on the wide risk created by work done in public places and the obvious need for particular care to protect the public from injury.

It has been said repeatedly that "the rule [insulating the owner from liability for an independent contractor's torts] is now primarily important as a preamble to the catalog of its exceptions." *Pacific Fire Ins. Co. v. Kenny Boiler & Mfg. Co., 277* N.W. 226, 228 (Minn. 1937). However, this catchy phrase is a bit of an overstatement. In many garden-variety cases independent contractors are solely liable for their torts. If Bogart hires Bacall to resurface his driveway, and she backs into the street causing an accident, most likely she alone will bear the liability. If he hires an electrical contractor to rewire his office, most likely the contractor alone will be liable if she negligently starts a fire in the course of the work.

It is not possible to catalog here all situations in which courts have applied the nondelegable duty doctrine. For a full discussion of categories of nondelegable duties, see the Restatement (Third) at §§57-65. The central point of this discussion is to illustrate that the contractor's independence does not always absolve the owner of responsibility, since courts often refuse, for

policy reasons, to allow owners to wash their hands of the matter by hiring out the work.

LIABILITY FOR THE OWNER'S OWN NEGLIGENCE

The nondelegable duty theory will frequently allow a plaintiff injured by a contractor's negligence to recover from the owner who hired the contractor, even though the owner has exercised due care. However, it is important to remember that owners can be negligent too; frequently, a plaintiff will have a claim against the owner based on his *own* negligence in connection with the contract work.

An owner may be negligent in various ways even though the work is delegated to an independent contractor. He may hire a contractor who is clearly incompetent to perform the type of work required. He may fail to properly supervise the contractor. He may fail to require the contractor to take necessary precautions, or specify that the work be done in an inappropriate manner. He may fail to inspect the work after it is done, or negligently perform work over which he retains control. See generally Restatement (Second) of Torts §§410-415 (detailing bases of liability for owner's negligence in connection with contract work); see now Restatement (Third) of Torts §55. In such cases, the owner is liable for his *own* negligence, not vicariously liable for negligence of the contractor.

Frequently, a plaintiff will assert claims against the owner based on both the owner's own negligence and on vicarious liability theories, but it is important to distinguish these two bases for holding the owner liable. Even if there is no basis for holding the owner vicariously liable, he must still answer for his own conduct in connection with the work.

The examples below illustrate the nature and the limits of vicarious liability, both for the acts of employees and of independent contractors.

Examples

Respondeat Inferior

1. Grant, an employee of Metro Studios, is sued by Bergman, a passerby, for injuries arising from an accident caused by Grant in the course of making a movie. Grant answers the complaint, denying liability on the ground that he was acting in the scope of his employment for Metro at the time of the accident. Bergman moves to strike the defense as insufficient. Should the motion be granted?

2. Based on the accident, Bergman sues Grant and Metro (on a respondeat superior theory) for her injuries. Both are held liable for Bergman's injury, for which the jury awards $50,000 in damages.
   a. If Grant pays Bergman $50,000, how much can Bergman collect from Metro?
   b. Grant pays the judgment and seeks contribution from Metro. What result?
   c. Assume that Metro pays the judgment. How much should it be entitled to collect from Grant?

3. Assume, on the facts of Example 1, that the movie was a western. Grant, while waiting for a scene to begin, was sitting on his horse, Trigger, who bolted when a tourist unexpectedly exploded a firecracker. Bergman, another tourist watching from the sidelines, was knocked down by Trigger. Would Metro be liable to Bergman under respondeat superior?

Expert Employment

4. Kildare, a physician with a general practice, is hired to conduct physical exams for Apex, a large manufacturing company. Apex specifies which employees will be examined, what the examinations will entail, what lab tests will be required, and how long Kildare has to submit his reports. The parties agree that Kildare will examine the patients at his office, will conduct a minimum of 20 exams per month, and that he will be paid a set amount for each exam. Kildare negligently injures Garbo during a physical, and she sues Apex. Is Apex liable on the basis of respondeat superior?

5. Freud, a psychiatrist, is hired by Columbia Hospital, a mental health facility, to conduct psychotherapy with inpatients at the hospital. Freud

agrees to spend ten hours per week at the hospital, to treat patients designated by Columbia, and to accept one-fourth of a full-time salary and associated benefits for her work. The parties agree that Freud shall have sole authority over the method of treatment of the patients she sees; however, she is subject to the general administrative regulations of the hospital concerning such matters as treatment notes, guidelines for medicating patients, informed consent, and others. Jones, one of Freud's Columbia patients, commits suicide, and his survivors sue Columbia for alleged negligence of Freud in failing to take steps to prevent the suicide. Should Freud be found to be an employee of Columbia for respondeat superior purposes?

Forewarned and Forearmed

6. Rogers is a sales clerk for the Wild West Gun Shop, which sells firearms and ammunition. Evans, his boss, repeatedly reminds him that he is not to sell to minors. Garner, a 15-year-old, comes into the shop, and Rogers (who is aware of Garner's age) sells him a box of cartridges. Garner is injured using the cartridges and sues Wild West. Would respondeat superior apply?

The Master's Business?

7. Larry, a house painter for Beta Construction Company, is painting an office with an electric paint sprayer when Curley, a fellow employee, happens by. Larry, in a spirit of horseplay, chases Curley around the room, aiming the sprayer at him and threatening to paint him blue. Unfortunately, he pulls the spray hose too far, knocking over the spray pump and spilling paint on the floor. The paint seeps through the ceiling and ruins office equipment in Moe's office below. Is Beta liable for the damage?

8. Grimsley, a pitcher for the Baltimore Orioles, is harassed by fans while warming up in the bullpen. Thoroughly annoyed, he finally heaves the ball at the fans, injuring Flynn. Flynn sues the Baltimore Orioles Baseball Club. If you represented Flynn, which of the tests below concerning the scope of respondeat superior liability would you prefer to

see the court apply?

- an act motivated by a purpose to serve the employer
- abuse of a position of authority based on the employment
- an act that responds to a present interference with the performance of the employer's work
- an act that is foreseeable and incidental to the performance of the employer's work.

9. Hyde, a child care worker at Child Haven Day Care Center, secretly abuses three children who are cared for at the center. The children sue Child Haven for damages. Which of the various tests for holding the employer liable for an intentional tort would be most favorable to the plaintiffs?

10. Jones, a teacher in a program for severely mentally disabled children, beats one of the children with a ruler for urinating in his pants. The school rules specifically forbid corporal punishment. Can the school district be liable under respondeat superior?

Respondeat Judge Fudd

11. Charles Electronics tries to make employees feel appreciated. Often, on Friday afternoon, Loy, the assembly supervisor, would buy beer for the crew, and they would all tip a few before heading home for the weekend. One Friday, Nick, one of the assembly workers, had five beers before leaving, and then headed downtown to meet his wife for dinner. On the way, he injured Nora in an accident. She sues Charles Electronics for her injuries.

    At trial, after the above facts are proved, Judge Fudd indicates that he will give the following instruction:

    > If you find that, at the time of the accident, Nick was not in the course of his work for the defendant, and was not acting to further the purposes of the defendant, then you must find for the defendant.

    What objection should Nora raise to the proposed instruction?

12. Colbert, an employee of Alpha Highway Construction Company, is

ordered to keep watch over a large air compressor that powers several jack hammers used in making road cuts. At midmorning, she slips off to place a bet with a bookie. While she is gone, the machine malfunctions, and the hose whips across the street injuring Gable. He sues Alpha for his injuries. Is Alpha liable for Colbert's conduct under respondeat superior?

Déja Vù

13. Tracy hires Hepburn Construction Company to rebuild the fire escapes on its apartment building, which immediately abuts Main Street. In the course of the work, a Hepburn employee negligently attaches a load of iron railings to a crane cable, and they fall, injuring Stewart, a passerby. Stewart sues Hepburn, the contractor, which denies liability. It argues that the duty of care was nondelegable because it involves a risk of injury unless special precautions are taken, so that Tracy is liable for the tort. Is this a good defense?

14. Stewart sues both Hepburn Company and Tracy, and both are found liable for Hepburn's negligence. Hepburn pays and seeks contribution from Tracy. What result?

Nondelegable Nonnegligence

15. Assume, on the facts of the Hepburn example, that the load of iron railings was not negligently attached, but fell when the crane's hoisting cable snapped. Although the cable was new, subsequent metallurgical analysis revealed that it had an undetectable defect, which caused it to snap under a normal load. Is Tracy liable for Stewart's injury?

Delegable Duties

16. Tracy hires Hepburn Construction Company to build a garage for him. In the course of the work, Cagney, a Hepburn employee, is required to cut two-by-fours on a table saw. He fails to use the blade guard, and the force of the blade throws a piece of wood into the air, injuring Stewart's eye as he passes by on the street. Is Tracy liable?

17. Assume that Tracy hires Hepburn Construction to rebuild the fire escapes on its high rise. A Hepburn employee leaves a metal railing on the ground, protruding onto the sidewalk. Colbert trips over it and is injured. Is Tracy, the owner, liable for her injury?

Explanations

Respondeat Inferior

1. The judge should grant the motion to strike this defense. Grant is evidently under the impression (as many of my students are initially) that an employee is not personally liable for his torts in the scope of employment, since the employer is liable under respondeat superior. On the contrary, while respondeat superior provides *another*, potentially more solvent target for the plaintiff, the doctrine does not bar suit against an employee for his own tortious conduct. Both may be sued, and frequently both will be.

2. a. Bergman cannot collect anything further from Metro. Metro, as Grant's employer, is liable along with Grant for the judgment. Bergman could try to collect it from either the tortfeasor or the vicariously liable employer, but cannot collect it twice. Once Grant pays, her judgment has been "satisfied."

   b. Contribution statutes allow a tortfeasor who has paid a judgment to recover part of the judgment from other tortfeasors. It does not apply between Grant and Metro, however, because they are not joint tortfeasors. Metro is not a tortfeasor at all, but rather is vicariously liable for the tort of someone else. Although Metro is liable to Bergman under respondeat superior, it need not reimburse Grant, who caused the injury, if he pays the judgment. Respondeat superior exists to assure that the *plaintiff* can collect from Metro; it is not intended to insulate the actual tortfeasor from incurring the loss. If Grant pays, he will not recover any reimbursement from Metro.

   c. Most courts hold that an employer who pays the damages caused by his employee is entitled to indemnity — full reimbursement — from the employee, since the employee's negligence actually caused the

injury and gave rise to the liability. Indemnity, unlike contribution, involves situations in which one party is liable for another's tort, yet is able to seek reimbursement for the *entire* damages from the other. (Another common example of indemnity is a retail seller who is held liable without fault for selling a defective product, but has a right of indemnity from the manufacturer who actually produced the product.)

Although employers held liable under respondeat superior have a right of indemnity from the negligent employee, it is seldom exercised. An action for indemnity would frequently be futile, since the employee is unable to pay. In addition, such losses are often paid by an insurance policy covering both the employer and employee. And, of course, such actions do not make for positive employee relations.

3. Respondeat superior makes the employer liable for torts committed by its employees in the scope of employment. This question does not suggest that Grant did anything negligent. If he did not, he is not a tortfeasor. Since he would not be liable to Bergman, neither would Metro.

   Put another way, respondeat superior liability is not strict liability; it does not make employers liable for all *injuries* caused by their employees in the scope of employment. It makes them liable for *torts* committed by employees in the scope of employment. If Bergman's injury is a pure accident, caused by the unforeseeable act of the tourist, Grant is not liable and neither is Metro.

   Trigger, by the way, is not an employee or a tortfeasor. Animals can't commit torts, though they can cause injuries. An employee may be liable for those injuries if her negligence somehow leads to that injury. If Grant had failed to protect the tourists from the horses in some appropriate manner, Grant (and therefore Metro) would be liable for the injury caused by Trigger. But this would be due to the negligence of Grant, not Trigger.

Expert Employment

4. Although Apex exercises some control over Dr. Kildare's work, the

court will very likely conclude that he has acted as an independent contractor. Kildare is a practicing physician, a professional whose business is entirely distinct from that of Apex. He is hired to perform a task it requires, but that is not a normal part of its business. He works at his own office, using his own tools and equipment and is paid on a per capita basis. He doubtless schedules the exams according to his own availability and continues to see other patients as well.

It is true that Apex has specified in detail what it wants Kildare to do, but this is true in many contract situations. On a complex road construction job, for example, there will be hundreds of pages of specifications, yet it is clear that a contractor is being hired to perform the entire job for a fixed price. While Apex has specified particular aspects of the exams, it will clearly not hover over Kildare to control his detailed performance of the exams. Apex has contracted for a specified result; it has not hired Kildare to work for it on a day-to-day basis, subject to detailed supervision.

5. Although Freud, like Kildare, is a physician, she will likely be held an employee of Columbia on these facts. Freud comes to Columbia to deliver services that are part of the hospital's basic function. She is paid as a salaried employee. True, she only works part time, but nothing in the test for employment suggests that part-time workers cannot be employees. Columbia assigns Freud her patients, provides her work space, and treats her like an employee for benefits purposes. She is also subject to Columbia's general administrative supervision while working there.

   On the other hand, if the fundamental test for employment is the right to control the details of the work, Freud has an argument that she cannot be an employee: As a doctor, she is bound by the ethical code of the medical profession to exercise independent medical judgment in the treatment of patients. If Columbia cannot control her in the performance of her central task, the treatment of patients, how can she be an employee?

   If this argument were accepted, virtually any professional or skilled worker would have to be viewed as independent. Accountants, lawyers, clergy, and psychologists, for example, frequently work for institutions, and look in virtually all other respects like employees, yet are bound by

codes of conduct. Similarly, architects and engineers, as well as pilots, plumbers, electricians, and myriad other skilled workers are subject to statutory codes that prevent their employers from exercising complete control over their work. Yet their employers do exercise broad control over the administrative aspects of their work life: when they work, where they work, what projects they undertake, how they are paid, their general conduct, their benefits, and many others. In such cases, courts have held professionals employees if the employer exercises control over these other aspects of their work. See Restatement (Third) of Agency §7.07 cmt. f (skilled professionals may be employees despite wide discretion in performance of the work).

Forewarned and Forearmed

6. The issue here is whether Rogers's act is in the scope of employment where Wild West expressly prohibited it, but Rogers sold to a minor anyway. Since one of the rationales for vicarious liability is that the employer can control negligence of its employees, you might think that where the employer exercised that control but the employee was negligent anyway, the employer would avoid respondeat superior liability.

   The cases generally hold otherwise: The employer is liable despite its exercise of care to prevent negligence by its employees. See Restatement (Third) of Agency §7.07 cmt. c and illus. 2. This result actually makes a good deal of sense. *First*, while it may seem unfair in the particular case, across-the-board liability will provide an incentive for Wild West to continue to work to prevent injuries. Perhaps it will discipline Rogers or increase employee education efforts. *Second*, as a practical matter, allowing the employer to avoid liability by offering evidence of its care to prevent accidents would introduce a broad new issue — the employer's general quality-control measures — into the suit. *Third*, inducing employers to minimize injuries is only one of the rationales for respondeat superior. Others, such as encouraging loss spreading, internalizing the costs of an enterprise, and placing the loss on the party for whose benefit the risk was created, still support application of the doctrine in this case.

The Master's Business?

7. Although horseplay of this sort is common in the course of many jobs, it obviously does not further the purposes of the employer; Beta hardly pays Larry to chase other workers with the spray gun. On the other hand, smoking does not further the employer's purposes either. Like smoking, a certain amount of joking among coworkers is a foreseeable part of the ordinary course of the work experience, takes place in the workplace and during the course of the work, and serves to relieve the tedium of repetitive work.

   Acts of horseplay have been held "in the course of employment" in worker's compensation cases, on the following rationale:

   > Men do not discard their personal qualities when they go to work. Into the job they carry their intelligence, skill, habits of care and rectitude. Just as inevitably they take along also their tendencies to carelessness and camaraderie, as well as their emotional make-up. In bringing men together, work brings these qualities together, causes frictions between them, creates occasions for lapses into carelessness, and for fun-making and emotional flare-up . . . [t]hese expressions of human nature are incidents inseparable from working together.

   Hartford Accident & Indem. Co. v. Cardillo, 112 F.2d 11, 15 (D.C. Cir. 1940); see *Varela v. Fisher Roofing Co. Inc.*, 572 N.W.2d 780 (Neb. 1998) (worker who fell from roof while arm wrestling with coworker in scope of employment). However, this rationale has not been generally accepted in respondeat superior cases involving horseplay, which frequently deny recovery against the employer on the ground that horseplay does not further the work in any way. See, e.g., *Bryant v. CSX Transp., Inc.*, 577 So. 2d 613, 615-616 (Fla. Dist. Ct. App. 1991); *Thomas v. Poole, 262* S.E.2d 854, 857 (N.C. Ct. App. 1980).

   Liability would likely be imposed for horseplay under broader scope-of-employment tests. It is certainly a "foreseeable risk" of the employment, clearly "incidental" to the work, and would satisfy a test that imposes liability for acts that are "an outgrowth" of the performance of the work. The test suggested in the Third Restatement of Agency, however, denies recovery for "an independent course of conduct not intended . . . to serve any purpose of the employer," Restatement (Third) of Agency §7.07(2). This formula would likely deny recovery in most horseplay situations, though the result seems dubious.

8. Flynn would likely lose under a more traditional test, such as whether the act was motivated in part by a desire to serve the employer. Grimsley's act is motivated by annoyance, not any effort to prepare to enter the game. Nor would Grimsley be viewed as having a position of authority that facilitated this intentional tort. On the other hand, his act certainly does appear motivated by "present interference" with the ability to serve the master's purposes, since the heckling interfered with his concentration while warming up.[3] A fuzzy foreseeability test would also probably get Flynn to the jury, since this kind of harassment and retaliation is increasingly common in an age of declining manners. The Third Restatement of Agency would likely bar recovery, since heaving baseballs at fans is hardly intended to serve any purpose of the employer. See id. at §7.07(2).

9. Most of the tests for imposing respondeat superior liability for intentional torts would not support liability on these facts. Surely it does not further the employer's purposes or stem from present interference with the accomplishment of the work. The best argument would be that Child Haven has placed Hyde in a position of authority over the children that creates a unique risk of the intentional tort. The opportunity to commit the tort in this case arises from Hyde's work with children, and his position of authority over them assists him in doing so.

    If respondeat superior is meant to assure that enterprises internalize the costs of risks they create, liability on these facts may be warranted. Although child abuse is the last thing any day care center wants, its activity does create the risk of such abuse. However, many courts, swayed by the repugnant nature of the conduct, the purely personal motivation of the employee, and the obvious damage the conduct does to the employer's interests, would deny recovery. See, e.g., *Worcester Ins. Co. v. Fells Acres Day Sch., Inc.*, 558 N.E.2d 958, 967 (Mass. 1990).

10. This example is based on *Tall v. School Commissioners*, 706 A.2d 659 (Md. Ct. App. 1998). The *Tall* court held that the teacher's intentional tort fell outside the scope of employment, relying heavily on the fact that corporal punishment was forbidden by the district's rules.

    The decision reflects a very narrow view of respondeat superior.

First, as Example 6 indicates, it is well established that an act is not necessarily outside the scope of employment because it violates an employer's rules. Second, there are some strong arguments for respondeat superior liability in this case. Jones may have been acting in the scope of employment even under the most traditional test: His act was likely intended to serve the district's purpose by disciplining a student for disruptive behavior. See Restatement (Third) of Agency §7.07(2) (conduct within scope of employment "when performing work assigned by the employer or engaging in a course of conduct subject to the employer's control"). Alternatively, the beating may have arisen from the employee's frustration created by the work, like the traffic argument cases discussed in the introduction. Many cases support respondeat superior liability in such situations. Although Jones's conduct was unauthorized, even reprehensible, its connection to the employment activity is still strong, much stronger, for example, than the child abuse in Example 9.

Respondeat Judge Fudd

11. Judge Fudd's mistake here is to focus on Nick's driving as the sole basis for imposing respondeat superior liability on Charles. Nora's counsel should hasten to point out to him that the negligent act of another employee — Loy — may also subject Charles to liability.

    Even if Charles is not vicariously liable for Nick's driving, since the work day was over and Nick was on his way to dinner, it very likely *is* liable for the negligence of Loy in furnishing alcohol to Nick. Many courts would find that this act was in the scope of Loy's employment. Doubtless, such efforts to maintain employee morale, while peripheral to the physical production of the company's products, are intended to further the work of the employer in a general way, as do company picnics, the firm dinner dance, and similar happy occasions. Thus, if Loy was negligent in providing alcohol to Nick, this will provide a separate basis for holding the employer liable. Nora should explain to Judge Fudd that his instruction is insufficient, because her claim against Charles is based not only on Nick's negligence, but also on Loy's.

12. If you really thought about this one, it shouldn't have given you much of

a problem. Certainly, placing bets is not in the scope of Colbert's employment, but Gable's claim is not based on Colbert's act of placing a bet; it is based on her negligent supervision of the compressor. There is no question that this is part of Colbert's assigned duties, that she has negligently performed that duty, and that Gable's claim arises out of this negligence. Even though the claim arises from an omission to act as the work required, rather than a negligent act, Alpha will be liable for it. See Restatement (Third) of Agency §7.07 illus. 3.

Déja Vù

13. It is entirely likely that the duty here is nondelegable, since lifting heavy objects with a crane above the sidewalk poses an obvious risk to the perambulating public unless special precautions are taken. Restatement (Third) of Torts §§59, 63. However, finding the duty nondelegable would not relieve Hepburn, the independent contractor, of liability. Just as respondeat superior does not bar suit against a negligent employee, the fact that an owner is vicariously liable in nondelegable duty situations does not bar the plaintiff from suing the contractor for its negligence. It simply means that the owner is liable for it as well. Thus, the fact that the duty is nondelegable is not a proper defense for Hepburn.

14. Here again, as in the analogous circumstances of Example 2, Tracy is not liable to the contractor for contribution. He is not a joint tortfeasor, or any other kind of tortfeasor; he is vicariously liable for damages caused by Hepburn's tort. Because his liability arises from Hepburn's negligence, he is entitled to indemnity from Hepburn if he pays the judgment, but Hepburn has no right to contribution or indemnity from Tracy.

    If Tracy, the building owner, pays the judgment, it is much more likely to seek indemnity in this context than in the employer/ employee situation. A contractor is more likely to have adequate resources and insurance to cover the loss. Indeed, Tracy's lawyer should be careful to include a clause in the contract requiring evidence that Hepburn is fully insured, so that this right of indemnity would protect his client from absorbing losses caused by Hepburn's negligence.

Nondelegable Nonnegligence

15. This accident did not result from negligence by Hepburn's employees, since the defect was undetectable. If its employees were not negligent, Hepburn would not be liable for Stewart's injury. If so, Tracy would not be liable either. Declaring a duty "nondelegable" does not mean that the owner is strictly liable for *any* accident that occurs in the course of the work. It only means that he is vicariously liable for his contractor's *tortious* conduct. Tracy, as the owner, would be liable if Hepburn was negligent in failing to take necessary precautions, but if Stewart was injured without negligence, he has no claim against Hepburn, and therefore none against Tracy either.

    Although Hepburn's employees were not negligent in causing the cable to snap, Stewart's counsel should consider whether they may have failed to take other appropriate precautions. It may be, for example, that if the worksite was properly cordoned off, Stewart would not have been within range of the railings. If such special precautions were necessary, and Hepburn failed to take them, Tracy could be held vicariously liable for that negligence.

Delegable Duties

16. Sawing two-by-fours may well be dangerous if the special precaution of putting the safety guard down is not taken. On the other hand, virtually *any* activity other than bookkeeping or playing chess involves some risk of injury if it is not done cautiously. If a duty is nondelegable whenever some appropriate precaution is omitted, the owner would be liable under the peculiar risk exception whenever its contractor is negligent. The exception would swallow the general rule that the contractor, not the owner, is liable for his torts.

    Clearly, the special precautions exception is meant to apply to a narrower class of cases involving unusual risks.

> The situation is one in which a risk is created which is not a normal, routine matter of customary human activity, such as driving an automobile, but is rather a special danger to those in the vicinity, arising out of the particular situation created, and calling for special precautions.

Restatement (Second) of Torts §413 cmt. b. The examples offered by the

Restatement, demolishing a building or digging an excavation (see §413 cmt. c), clearly involve unusual dangers not encountered in sawing boards to build a garage.

17. As the Introduction notes, courts often hold that activities involving peculiar risk give rise to "nondelegable duties." This means that, while an owner can hire an independent contractor to conduct the work, the owner remains liable for tortious injuries that result from the unusual risks the work poses. For example, a building owner can't hire a contractor to take down a skyscraper and avoid liability if, due to the contractor's negligence, falling debris injures a passerby. This is dangerous work, done for the owner's benefit. Declaring the duty of care in the course of such work "nondelegable" means that, even though the owner contracts out the work, it can be sued for injuries negligently caused by the contractor, much as if it had done the work with its own employees.

    However, the owner's vicarious liability in these nondelegable duty cases only applies to the particular risks that led the court to impose vicarious liability, not for any negligent act that takes place in the course of the job. Suppose, for example, in the skyscraper case, that the contractor sent an employee to the hardware store, and she had an accident on the way. The contractor would be liable for that, but the owner of the building would not. While a building demolition contract may require driving, demolition gives rise to a "nondelegable" duty because of the risk of damage from falling debris, not from driving, an ordinary activity that may take place in any kind of work.

    Similarly, in this example, the risk that makes the work nondelegable is the risk of falling objects if special precautions are not taken, not the risk that an obstruction would be left on the sidewalk. This is "collateral negligence" that could take place in any kind of construction. Hepburn will be liable for Colbert's injury, but not Tracy. See Restatement (Second) of Torts §426; Restatement (Third) of Torts §57 cmt. f.

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1. Vicarious liability may even *increase* the risk of negligence in many cases, since the employee, knowing that the employer will be liable, will have less incentive to exercise due care. Note, An Efficiency Analysis of Vicarious Liability Under the Law of Agency, 91 Yale L.J. 168, 172-173 (1981).

2. The Third Restatement of Agency appears to reflect a narrower version of this basis for liability, confining it to situations in which "actions taken by the agent with apparent authority constitute the tort or enable the agent to conceal its commission." Restatement (Third) of Agency §7.08.

3. In the case upon which this example is based, the court held that the Orioles could be liable under this test. See *Manning v. Grimsley*, 643 F.2d 20, 24-25 (1st Cir. 1981).

PART VIII

The Effect of Plaintiff's Conduct

CHAPTER 24

The Once and Future Defense: Assumption of the Risk

INTRODUCTION

The late nineteenth century was the formative era of the common law of negligence. It was a time of rugged individualism, which emphasized freedom of action, personal initiative, and the right of self-determination. The ideal was the Horatio Alger type, the self-made entrepreneur who grasped the myriad possibilities of an expanding nation through strong character and hard work. Doubtless, the reality of most people's lives had little to do with this ideal, but it still conditioned the thinking of the time, including legal thinking.

It is not surprising that judges steeped in such ideas should accept the principle that the individual is master of his own fate, with the right to choose a course of action and the responsibility to accept the consequences of the choice. The concept of contributory negligence, that a plaintiff whose careless acts contributed to his injuries should bear the consequences, is an example. Another example, also with roots in the nineteenth century, is the doctrine of assumption of the risk.

The basic premise of assumption of the risk is that a person who is aware of a risk, and knowingly decides to encounter it, accepts responsibility for the consequences of that decision, and may not hold a defendant who created the risk liable for resulting injury. The premise was articulated in nineteenth-

century terms by Professor Bohlen:

> The maxim *volenti non fit injuria* [that to which a person assents is not deemed in law an injury] is a terse expression of the individualistic tendency of the common law, which, proceeding from the people and asserting their liberties, naturally regards the freedom of individual action as the keystone of the whole structure. Each individual is left free to work out his own destinies; he must not be interfered with from without, but in the absence of such interference he is held competent to protect himself . . . the common law does not assume to protect him from the effects of his own personality and from the consequences of his voluntary actions or of his careless misconduct.

F. Bohlen, Voluntary Assumption of the Risk, 20 Harv. L. Rev. 14 (1906). Based on this individualistic premise, assumption of the risk became an established shield to negligence liability, just as the analogous privilege of consent avoids liability for intentional torts.

Many of the early cases applying assumption of the risk arose in the context of injuries to workers on the job. A worker might accept employment in a factory with unguarded vats of molten metal, or requiring work on high scaffolds without railings. If he fell into the vat or off of the scaffold, the employer would argue that, by taking the job with knowledge of the working conditions, he had assumed the risk of injury from the known conditions of employment, and could not complain of the consequences of that choice.[1] Other cases arose in the context of injuries on land of another, where a guest or other licensee suffered injury due to an openly dangerous condition, such as an unfenced quarry or icy steps. As in the employee cases, the owner would argue that the plaintiff who chose to enter the premises with knowledge of open and obvious dangers accepted responsibility for possible injuries from those known risks.

In these and other contexts, courts accepted the argument that the plaintiff's knowing choice to encounter danger relieved the defendant of responsibility for resulting injury, even if the defendant *negligently created the risk* that caused it. Assumption of the risk became a companion defense along with contributory negligence. It differed, of course, in that assumption of the risk required a showing that the plaintiff actually knew of a danger and chose to proceed. If the plaintiff should have known of a risk, but did not, contributory negligence would apply but assumption of the risk would not.

An example may help to illustrate the relationship between assumption of risk and contributory negligence. Suppose that Newman lent his car to Knieval, and told him that the brakes didn't work. If Knieval shrugged and said he would go slow and use the emergency brake, he assumed the risk of

injury from the defective brakes. He might well be negligent in making such a conscious choice; if so, he both assumed the risk and was contributorily negligent. On the other hand, if Newman did not tell Knieval about the brakes, but Knieval noticed that the pedal felt loose before he started the car and didn't investigate before driving, he was probably contributorily negligent but did not assume the risk of the defective brakes. He was negligent because he should have checked the brakes when he noticed a problem. But he did not assume the risk of defective brakes, because he did not make a deliberate choice to drive without brakes with full knowledge of the risk.

The assumption of risk principle is confusing in practice because it has been applied in a variety of situations. Some of these overlap negligence analysis, while others are confusingly similar to contributory negligence. In addition, courts have not been consistent in the way they classify assumption of risk cases. See C. Gaetanos, Essay — Assumption of Risk: Casuistry in the Law of Negligence, 83 W. Va. L. Rev. 471, 473 (1981) (noting five different classification schemes adopted by various torts scholars). Despite this confusion, it is important to come to grips with assumption of the risk, because, unlike contributory negligence, assumption of the risk is clearly *not* a wave of the past. In at least some of its incarnations, the doctrine is recognized today and will continue to be in the future.

This chapter is intended to give you an understanding of the basic situations in which courts have applied the concept of assumption of the risk, and of the areas in which it remains a "once and future defense."

EXPRESS ASSUMPTION OF THE RISK

Perhaps the clearest assumption of the risk cases are those in which the plaintiff expressly agrees that she will not hold the defendant liable for injury she suffers from a risk created by the defendant. Suppose, for example, that Knieval decides to try skydiving, and hires Newman to teach him the sport. Newman may agree only if Knieval consents in writing not to hold Newman liable for any resulting injuries. Or, Newman might agree to let Knieval use his land for motorcycle-jumping practice, conditioned on a similar promise not to sue for any resulting injuries.

As a general matter, such express agreements to assume a risk, even a negligently created risk, are enforced by the courts. Restatement (Third) of Torts: Apportionment of Liability §2. The nineteenth-century belief in individual initiative and freedom of choice persists, including the right to make silly choices, or even dangerous ones, and accept the consequences. Some people prefer that life should be interesting rather than safe, and such venturous souls may claim substantial accomplishments, such as discovering America and going to the moon. To a great extent, our culture continues to support such choices, even where there is little social value gained by accepting the risk.[2] Allowing participants to agree in advance to accept the risk of injury from high-risk activities (that is, to agree *not* to sue if such injuries occur) promotes the availability of exciting and varied opportunities, by insulating providers from the high cost of injuries resulting from the activity.

While the principle of express assumption is generally accepted, it has been hedged around with some qualifications. *First,* it is essential that the consent to accept the risk is freely given: A consent extracted from a party with little bargaining power is inconsistent with the free-choice principle underlying the doctrine, and will not be honored by the courts. For example, courts have struck down contractual "consents" to unsanitary living conditions in public housing or negligent treatment in local hospitals, on the theory that the plaintiff has no meaningful alternative, and therefore has not really consented at all. Similarly, courts have held that providers of quasi-monopolistic public services, such as rail or electric service, cannot condition service on the passenger's acceptance of the risk of injury. Here again, the lack of choice makes the consumer's "consent" illusory. Interestingly, although assumption of the risk doctrine developed in the employment context, it is now generally held that the inequality of bargaining power inherent in the employment relationship bars express assumption of the risk by employees. Restatement (Second) of Torts §496B cmt. f; Prosser & Keeton at 482.

A second qualification, which also follows from the rationale of assumption of the risk, is that the plaintiff must clearly consent to accept the particular risk that led to the injury. For example, some courts have held that a provision releasing the defendant from "all claims for personal injury" does not waive recovery for injury due to *negligence* of the defendant, since it does not sufficiently bring home to the plaintiff the extent of the risks she is

accepting. See Harper, James & Gray §21.6 at 251; but see *Boyce v. West, 862* P.2d 592, 598 (Wash. Ct. App. 1993) (release held to encompass negligence though it did not specifically refer to negligence). Generally, contractual clauses assuming risk (also called waiver of liability or exculpatory clauses) are drafted by the party providing the risky activity — the skydiving school, the quarry owner that allows rock climbing for a fee, the horseback riding ranch. Such releases are construed against the drafter, and must be clear in stating the risks allocated to the participant.

Contractual assumptions of risk are also limited by general contractual principles concerning the understanding of the parties. Thus, an agreement to assume the risk of injuries will not extend to collateral risks beyond their contemplation. For example, if Ruth signs a general waiver of liability for injuries from playing in a baseball game, he would realize that he was assuming usual risks of playing baseball, such as being hit by the ball or another player. But he would not have in mind the risk of a sink hole in the base paths. If he fell into one, he would probably not be barred by express assumption of the risk, since the parties did not have this risk in mind at the time of contracting.[3]

Last, there is an important limit on enforcement of releases that warms the hearts of plaintiffs' lawyers. Most courts will not enforce an advance release of tort liability if the defendant's conduct in causing the injury was grossly negligent, reckless, or wilful or wanton. See Dobbs' Law of Torts §232. Whether a defendant's conduct was simple negligence *or really* negligent is often one of fact — which means a jury question. Thus many plaintiffs have survived the inevitable motion to dismiss based on the release by arguing that a jury must decide whether the defendant's conduct was worse than simple negligence. In a tort case it is always good to live to fight another day.

IMPLIED ASSUMPTION: INHERENT RISK CASES

A plaintiff may also accept risks simply by engaging in an activity with knowledge that it entails certain risks. Many activities involve a risk of injury even if conducted with due care. In such cases participants assume the risks

of injuries from the inherent dangers of the activity. Here are a few examples:

- The plaintiff, after watching patrons at a fair try to maintain their balance on an inclined, moving belt called “The Flopper,” buys a ticket, steps on the belt, and is thrown off, fracturing his knee cap.
- The plaintiff decides to take wilderness survival training in Minnesota in midwinter. The plaintiff gets lost in a snowstorm and suffers serious frostbite.
- The plaintiff goes skating at the defendant’s skating rink, is hit by a poor skater who loses control, and is injured when she hits the wall of the rink.
- The plaintiff takes rock climbing instruction and is injured when a seemingly solid rock is dislodged by a climber and falls on her.

In each of these cases, the defendant has offered an activity to the plaintiff, which he is under no duty to offer, and which the plaintiff is under no duty to attempt. That activity cannot be conducted without certain unavoidable risks of injury (“a risk that goes with the territory” Dobbs’ The Law of Torts §237), even if conducted with due care, and the plaintiff has chosen to engage in the activity. As in the express assumption cases, the plaintiff considers the trade-off worthwhile, and accepts the possibility of injury because she enjoys the activity.

As in the express assumption cases, courts have honored the choice to encounter risk in implied assumption cases too. Plaintiffs who choose to engage in unavoidably risky activities assume the inherent risks of the activity, and have no claim for injuries resulting from those risks. Although this is often described as assumption of the risk of injury, the defendant has actually not breached the duty of due care in such cases. It is not negligent to organize a flag football league, to run a horseback riding ranch, or to offer hang gliding instruction, even though these activities involve some risk of injury. The plaintiff who knowingly engages in such sports impliedly accepts the inherent risks they entail, and cannot sue the defendant who offered it to her simply because those inherent risks lead to injury.

Because primary asumption of the risk is based on the fact that certain risks are inherent in the activity and unavoidable at a reasonable cost, primary assumption only applies where that is in fact the case. If Henne goes ice skating, she accepts the risk that she may be hit by other skaters. This is an

obvious danger inherent in the sport. It does not result from negligence of the operator, and it cannot be eliminated at a reasonable cost. However, Henne would not assume the risk of a dangerous condition in the ice or a broken handrail along the edge. These risks are not inherent in the activity itself; they are dangers created by negligent operation of the rink. The plaintiff does not impliedly accept these risks by merely deciding to go skating.

Dobbs, Hayden & Bublick argue that the term "assumption of risk" should not apply to inherent risk situations at all; they are simply situations in which the defendant acted reasonably and the plaintiff suffered injury from a reasonable risk of the activity. Dobbs, Hayden & Bublick §238. This makes good sense; the plaintiff in these cases cannot prove her prima facie case of negligence, because the defendant has not breached the duty of due care. It would be clearer to ask in these cases whether the defendant violated the duty of care than to use assumption of the risk terminology. *See Blackburn v. Dorta*, 348 So. 2d 287, 291 (Fla. 1977). However, courts frequently analyze these as "primary assumption of the risk" or "primary implied assumption of the risk" cases. As a result, these situations (in which there is no negligence because the risk the defendant created was reasonable) are frequently confused with other cases (discussed immediately below) in which assumption of risk is properly viewed as a defense.

SECONDARY IMPLIED ASSUMPTION: THE NEGLIGENT DEFENDANT AND THE VENTUROUS PLAINTIFF

In the situations discussed immediately above, the defendant created reasonable risks that plaintiffs chose to encounter. However, a plaintiff may also encounter risks created by a defendant's *unreasonable* conduct. Here are some examples:

- The defendant lends plaintiff his car. She notices that the car swerves sharply to the left while braking, but proceeds anyway, and is injured when she brakes for a light and swerves into an oncoming car.
- The defendant is setting off fireworks in the public street. Plaintiff,

anxious to see the show, stands next to him and is injured when a firecracker explodes.

- The defendant waxes part of the floor of his store while open for business. The plaintiff sees the wet floor, but anxious to get a box of Wheetabix for breakfast, walks on the wet floor and falls.
- The defendant riding stable provides the plaintiff an unruly horse. The plaintiff, after watching the horse start and buck, decides to try to ride it anyway.

In each of these cases, unlike the inherent risk cases discussed above, the defendant breached the standard of due care by creating an unreasonable risk. If that negligence injured the plaintiff before she became aware of the risk, the defendant would be liable. For example, if the plaintiff who borrowed the car was injured the first time she applied the brake, she could sue, because it is negligent to lend someone a car without informing the person of known defects that may cause injury. Similarly, if the plaintiff in the fireworks example was an unsuspecting passerby, she could recover for her injury in the explosion, since it is negligent to explode firecrackers in the immediate vicinity of others.

However, in these cases the plaintiff, after becoming aware of the unreasonable risk created by the defendant, chooses to encounter it, and suffers injury as a result. This type of case is often called “secondary assumption of the risk” or “secondary implied assumption,” presumably because the plaintiff’s choice is secondary to (comes after) the negligence of the defendant. In secondary assumption situations the plaintiff has been injured due to the defendant’s negligence, but the defendant argues that the plaintiff’s conscious choice to encounter the negligently created risk should bar her recovery.

Arguably, the defendant should still be liable in these cases: He has created a risk through his negligence that injured the plaintiff. On the other hand, the plaintiff has freely chosen to encounter it for her own purposes, be it enjoyment of the fireworks display, immediate access to Wheetabix, or available but unsafe transportation. Just as the plaintiff’s acceptance of deliberate invasions of her person prevents liability for an intentional tort (under the consent privilege), plaintiff’s choice to encounter a negligently created risk should arguably avoid liability as well.

True to its individualistic assumptions, the common law held that the

plaintiff, by knowingly encountering a danger created by the defendant's negligence, "assumed the risk" of resulting injury, and was barred from suing for that injury. Restatement (Second) of Torts §496C. Under secondary assumption of risk, the courts honored the plaintiff's willingness to confront negligently created risk, just as they honored her willingness to encounter inherent risk under the related doctrine of primary assumption of the risk. However, in secondary assumption cases, the doctrine really was an affirmative defense, since it barred the plaintiff from recovering even though she could establish a prima facie case of negligence by the defendant.

REASONABLE AND UNREASONABLE ASSUMPTION

In secondary assumption cases, the plaintiff's decision to encounter the risk may be either reasonable or unreasonable. The decision to stand next to an adolescent playing with fireworks will virtually always be unreasonable. It might be reasonable to drive a car with bad brakes to get a heart attack victim to the hospital, but not to get to a poker game on time. A rescuer's decision to rescue a child from a fire is eminently reasonable, though it knowingly subjects the rescuer to a risk of injury.

Where the plaintiff's decision to encounter the risk was unreasonable, assumption of the risk overlapped with contributory negligence: By definition, the reasonable person does not voluntarily encounter unreasonable risks. At common law, both defenses could be pleaded. If the plaintiff's choice to encounter the risk was an unreasonable one, that choice would constitute both contributory negligence and assumption of the risk. Either defense sufficed to bar the plaintiff's recovery.

Where the plaintiff *reasonably* assumed a risk, contributory negligence would not bar recovery, because the plaintiff was not negligent. *However*, assumption of the risk still did. The basis for the defense was individual choice, not fault. Even if the plaintiff chose to encounter the risk for good reason, the courts still "honored" the choice by denying recovery.

NINE LIVES: ASSUMPTION OF RISK IN THE COMPARATIVE NEGLIGENCE ERA

The advent of comparative negligence has sparked some controversy about the continued role of secondary implied assumption of the risk. Under comparative negligence, the plaintiff's negligence reduces her recovery, but does not usually bar it. Suppose, however, that the plaintiff's negligence consists of unreasonable but knowing assumption of the risk (secondary implied assumption); should it bar or reduce recovery? For example, assume that the defendant owns a warehouse without a fire alarm or sprinkler system. Gallo knows this, but decides to store her goods there because it is cheaper. This decision may well be negligent. It is also, however, a deliberate, knowing acceptance of the risk.

At common law, this case posed no problem: *Either* contributory negligence or assumption of the risk barred recovery entirely. In a comparative negligence state, however, if Gallo's conduct were treated as negligence, it would reduce her recovery rather than bar it entirely. On the other hand, if unreasonable assumption of the risk persists as a separate defense, *she would still be fully barred.* There is an argument for the latter result, since assumption of the risk is based on consent to encounter a risk, not on fault. If Gallo has accepted the risk with full knowledge, arguably the long-standing assumption of risk rule denying recovery should continue to apply.

Despite this argument, most comparative negligence jurisdictions conclude that secondary *unreasonable* assumption of the risk should be treated as a form of negligence. Under this approach, the jury assigns a percentage of negligence to Gallo's unreasonable choice to accept the risk, and her recovery is reduced by that percentage. Some comparative negligence statutes specifically require this result.[4] In other states, this same sensible result has been reached by judicial interpretation. See *Blackburn v. Dorta*, 348 So. 2d 287 (Fla. 1977); see generally Schwartz, Comparative Negligence §9.04[b].

It is fairly easy to conclude that comparative negligence displaces unreasonable secondary assumption of risk, because unreasonable assumption is by definition a form of negligence. It is more difficult to decide how *reasonable* secondary assumption should be meshed with comparative

negligence. Suppose, for example, that the warehouse without a sprinkler was the only place within 75 miles of Gallo's home, and she was required to go away on business for three months. The decision to take the small risk of a fire loss might well be reasonable on such facts. If so, how should the decision affect her recovery under a comparative negligence statute?

Arguably her knowing choice to take the risk should not affect her recovery at all, since it was (by definition) a reasonable choice, and recovery is only to be reduced for negligence. Some cases have taken this position. See *Rini v. Oaklawn Jockey Club,* 861 F.2d 502 508-509 (8th Cir. 1988) (a well-reasoned case applying Arkansas law), see also Restatement (Third) of Torts: Apportionment of Liability §3 and cmt. c. However, a few have argued that reasonable secondary assumption should completely bar recovery. Comparative negligence statutes only address the effect of the plaintiff's *fault,* but the rationale for assumption of risk as a defense is knowing *consent* to take a risk, not fault. Arguably, the passage of a comparative negligence statute, which modifies the effect of plaintiff's *negligence,* should not affect the defense of reasonable assumption of risk. See, e.g., *Siglow v. Smart,* 539 N.E.2d 636, 640-641 (Ohio Ct. App. 1987). Restatement (Second) of Torts §496A cmt. (c)(3).

The 1980s, the era of Ronald Reagan and the collapse of communism, witnessed a renewed emphasis on the nineteenth-century values of individual responsibility and freedom of choice. This megatrend has even found expression in obscure corners of tort law like assumption of risk. While it appeared that secondary assumption of the risk would fade away with the advent of comparative negligence, some cases and articles have argued for retaining reasonable secondary assumption as a complete defense. See, e.g., *Ford v. Gouin,* 266 Cal. Rptr. 870 (Cal. Ct. App. 1st Dist. 1990), *aff'd by a divided court,* 834 P.2d 724 (Cal. 1992); P. Rosenlund & P. Killion, Once a Wicked Sister: The Continuing Role of Assumption of Risk Under Comparative Fault in California, 20 U.S.F. L. Rev. 225, 278-283 (1986); R. Spell, Stemming the Tide of Expanding Liability: The Coexistence of Comparative Negligence and Assumption of Risk, 8 Miss. C. L. Rev. 159 (1988).[5]

The major anomaly of this approach, of course, is that it totally bars recovery by a plaintiff who made a *reasonable* choice to assume a risk, while a plaintiff's unreasonable assumption only reduces recovery under comparative negligence. Those who advocate a separate defense of

reasonable assumption of risk argue that this is not inconsistent, since the defense is based on consent, not on fault. However, if plaintiff's "consent" to encounter the risk bars recovery where her decision is reasonable, it seems logical that it should *also* bar recovery where it is unreasonable. Yet, under most comparative negligence regimes, unreasonable assumption of the risk is treated as a form of plaintiff's negligence, which reduces a plaintiff's recovery rather than barring it. Since that is true, it seems consistent to treat a plaintiff's reasonable choice to encounter a risk negligently created by the defendant as nonnegligent conduct, which should not reduce or bar her recovery from the defendant.

AN ATTEMPTED SUMMARY

All of this is a bit confusing, partly because the courts are inconsistent in the way they analyze the various assumption of risk situations. In some cases, it is clear that the judges themselves did not fully grasp the distinctions, or could not agree with their colleagues about the proper approach to choose. Here is an attempt to describe the current state of the law on assumption of the risk:

- Express assumption of the risk, that is, the waiver by advance agreement of the right to sue the defendant for her negligence, remains a viable defense. Such waivers will not be enforced in certain contexts involving essential services, and they may be construed narrowly, but usually they will be honored by the courts.
- Implied primary assumption of the risk, properly construed, reflects the idea that an activity may entail risks of injury even when carefully conducted by the operator. If a participant is injured due to those inherent risks, she will lose an action against the operator because she will not prove negligence. A skier hit by another skier, or a spectator hit by a foul ball at a baseball game, will likely lose because it was not negligent to offer the activity, even though such injuries occasionally happen. Courts may still declare in such cases that the "plaintiff assumed the risk" of injury, but the real basis for rejecting the claim is that the operator was not negligent.

- Cases of secondary assumption of risk arise when the defendant *was* negligent, and that negligence created a dangerous situation. The plaintiff became aware of the negligently created risk, encountered it, and suffered injury.
  - If the plaintiff's choice to encounter the risk was an unreasonable one, this is negligent conduct. Most courts that apply comparative negligence treat this form of assumption of risk as a type of plaintiff's fault. Thus, the jury will be instructed to assign a percentage of fault to the plaintiff if they find that she negligently chose to encounter the risk. In this type of jurisdiction, there is no separate defense of secondary assumption of the risk, so the jury will be told nothing about it. See, e.g., *Davenport v. Cotton Hope Plantation Horizontal Property Regime*, 508 S.E.2d 565 (S.C. 1998).
  - A few jurisdictions continue to treat secondary assumption of the risk as a separate defense.[6] In these jurisdictions, the defendant's deliberate choice to encounter the risk will bar her recovery, rather than being treated as a form of comparative negligence.
  - If a plaintiff makes a knowing choice to encounter the risk negligently created by the defendant, and that choice is a reasonable one, most courts today that apply comparative negligence would allow the plaintiff to recover fully, since her conduct was not faulty and should not reduce recovery.[7] A few, however, may still analyze this as a matter of choice rather than fault, and bar such plaintiffs from recovery entirely.
  - Jurisdictions that continue to apply contributory negligence may still recognize secondary implied assumption of the risk as a complete defense. See, e.g., *Morgan State University v. Walker*, 919 A.2d 21 (Md. 2007).

Hopefully, the following examples will help you to understand the basic situations in which the assumption of risk issue arises, and the different ways each may be resolved.

Examples

False Assumptions

1. Killey decides to ski the Big Mountain Ski Bowl. He arrives at the ski area, buys a small lift ticket that attaches to the lapel of his ski jacket, and starts to ski. While riding in the chairlift up to the expert trails, he is injured when the chair separates from the drive cable and falls to the ground. When he threatens to sue Big Mountain, its lawyer points out the following language printed on the back of the lift ticket: "The purchaser assumes all risks of injury from any source whatever, arising in the course of the activities authorized by this ticket, whether due to the negligence of the ski operator or third persons, or any other cause." Is Killey barred by express assumption of the risk?

2. Assume the same facts, except that before he began skiing, Killey was required to read and sign a form containing the following language: "The undersigned acknowledges that skiing is a hazardous sport; that bare spots, ice, changing snow, bumps, stumps, stones, trees, and other hazards exist in any ski area. By purchasing this ticket, the purchaser recognizes such dangers, whether marked or unmarked, accepts the hazards of the sport and the fact that injury may result therefrom, and agrees to assume all risk of such injuries." Is Killey barred from recovering for his chairlift injury by express assumption?

3. Gavin decides to go skydiving and signs up for lessons with Freeflight Skydiving Inc. Freeflight requires him to sign the following release:

> I understand and acknowledge that skydiving is a dangerous sport involving a serious risk of injury. By engaging in the sport, I recognize the risk of injury from skydiving, assume all risk of injury from doing so, and agree not to sue Freeflight Skydiving Inc. for any injury that may result from my participation in it.

On his first dive, Gavin suffers a punctured ear drum as a result of the rapidly changing air pressure. Although he had realized that he might suffer broken bones or even death from a failed parachute, Gavin never understood that there was a risk of injuries to his ears from skydiving. He sues for damages and Freeflight raises the release as a defense. Has Gavin assumed the risk?

Negative Implications

4. On the facts of Killey's ski lift accident, is he barred from suing Big

Mountain by primary implied assumption of the risk?

5. Killey skis the expert slopes at Big Mountain. While coming down a particularly steep slope he is hit by another skier who had negligently failed to notice a turn in the trail and lost control. Killey's leg is broken. Is he barred from suing Big Mountain by primary implied assumption of the risk?

6. Rogers, a novice at horseback riding, goes to the Circle-R Ranch to ride. While out on the trail a rattlesnake glides across the trail, startling Rogers's horse. The horse rears, throwing Rogers to the ground and injuring him. Rogers sues the Ranch for his injuries, and the Ranch pleads assumption of the risk as a defense. Rogers claims that the defense does not apply because he did not know that snakes would cause a horse to rear and throw a rider.
   a. What form of assumption of the risk, if any, is implicated *in* this case?
   b. Assuming that Rogers really did not know of this risk, is he barred from recovery?
   c. In what way has Circle-R "pleaded wrong" in raising its defense?

Taking Negligence to Newcastle

7. Hermit, who lives on a little-traveled rural road, hitches a ride to town for supplies with a passing driver. It is apparent to Hermit that Driver has been drinking heavily. However, Hermit climbs aboard, and is injured when Driver swerves into a ditch.
   a. What type of assumption of risk, if any, applies here?
   b. What would be the effect of Hermit's conduct in a jurisdiction that applies common law contributory negligence and assumption of risk doctrine?
   c. How would his conduct affect his right to recover in a comparative negligence jurisdiction?

8. Farmer, who also lives on a little-traveled rural road, suffers a serious leg injury while harvesting wheat. He hails a passing car and beseeches

the driver, Hillary, to take him to the hospital. Hillary says, “Look, my brakes are acting up, but if you’re willing to chance it, I’ll take you.” Farmer agrees and is injured when the brakes lock at a traffic light and the car is hit from behind. Which type of assumption of risk, if any, applies in this case?

9. Assume that Hillary said nothing about the brakes. However, Farmer watched Hillary apply the brakes several times during the ride, and observed that they locked abruptly as soon as applied. Anxious to get medical help, Farmer stays aboard.
   a. What type of assumption of the risk, if any, would this entail?
   b. Assume that, after Farmer realizes that the brakes are bad, they lock at the light and Farmer is injured. Would Farmer be barred from recovery in a jurisdiction that applies the common law contributory negligence and assumption of risk doctrines?
   c. On the same facts, would assumption of the risk bar recovery in a comparative negligence jurisdiction?

Judge Fudd Assumes the Risk

10. Dewey, a teacher in a West Dakota high school, agrees to participate in a “donkey basketball” game for the school scholarship fund. The game is what it says it is; the players play basketball while riding donkeys provided by the Buckeye Donkey Basketball Company. It is really very funny and a lot of students would gladly pay to see their teachers make such asses of themselves. Before the game, an employee of Buckeye explains to the teachers that the donkeys sometimes stop short and lower their heads, and there is a small risk of falling off. In the middle of the game, Dewey’s donkey executes such a maneuver, and Dewey is thrown, suffering a dislocated shoulder. He sues Buckeye for his injuries. West Dakota has adopted a comparative negligence statute that provides for reducing plaintiff’s damages to account for his fault. The statute also provides that “the defense of assumption of the risk is abolished.” At trial, Buckeye’s lawyer asks Judge Fudd to instruct the jury that they should find for the defendant if they conclude that Dewey assumed the risk of being thrown. Judge Fudd responds, “Counsel, I

don’t see how I can grant that instruction. It says right in the statute that assumption of the risk is abolished.” Is Fudd right in rejecting the assumption of the risk argument?

A Little Knowledge of a Dangerous Thing

11. Pearson is driving down a little used country road behind Moses, a poky Sunday driver. Frustrated and hurried, he decides to pass. There is a curve in the road and Pearson can’t see whether a car is coming the other way. Pearson attempts to pass but hits Henderson, who is driving in the opposite lane and speeding. Pearson sues for his injuries. Would he be barred by assumption of the risk if the jurisdiction applies the traditional assumption-of-risk doctrine?

Legal Shape-Sorting

12. Try to fit the following examples into the categories discussed in the Introduction.
    a. Mansfield rents a rustic cabin 200 miles away, sight unseen, for his family’s summer vacation in the North Woods. When they arrive, they discover that the cabin is not quite finished, and there is no railing on the stairs to the second floor. On the fifth day of their stay, Mansfield stumbles on the stairs and falls off due to the lack of a railing.
    b. Bohlen borrows a table saw from Wade to use in putting a porch on his house. The saw had a kill switch on the side which, when engaged, would cause the blade to stop if the wood going through the saw was pushed too hard. This prevents the wood from kicking back and injuring the user. Wade had disabled the kill switch, however, by “hotwiring” around it, because it slowed down the work when the kill switch engaged. Bohlen is not very familiar with table saws, does not realize the switch has been disabled, and is injured when a piece of wood is thrown back at him by the blade.
    c. James, an experienced mason, is working on a scaffold three stories above the street, putting the brick facade on a new building. When he goes to break for lunch, he remembers that another worker

borrowed the ladder that he had used to climb the scaffold, but has not returned it. Impatient to get to lunch, he starts to climb down the angled supports of the scaffolding, and is injured when he slips off.

d. Dobbs sees a small child playing obliviously in the path of a driver backing out of a driveway without looking. He rushes to rescue the child and is hit by the car.

Risk Twist

13. Story and Holmes attend a football game together. They have a few beers. Well, they have *quite* a few beers. After the game they get in Story's car, and Story drives off. Ten minutes later they have an accident, when Cardozo pulls out of a side street without looking and broadsides Story's car. Holmes sues Cardozo.

    a. What brand of assumption of risk is implicated by Holmes's conduct?

    b. What effect should his conduct have on his right to recover from Cardozo?

Explanations

False Assumptions

1. As the Introduction states, parties can assume risks, including the risk of another's negligence, by an express agreement to do so. And the language in this release clause is certainly broad enough to cover the accident Killey suffered, since it specifically refers to injury "from any source whatever" and includes negligence of the operator. If Killey has accepted the release clause, he would be barred.

   However, the gravamen of assumption of risk is the plaintiff's choice to assume the risks. Courts are wary of applying the doctrine of express assumption unless the party clearly chose to accept the risks that were being allocated to her. Killey will argue that he did not assume the risk of injury because he never knowingly agreed to the terms of the release. Since the terms were placed in fine print on the back of the lift ticket, where most people would not even read them, the court is likely

to agree. See Restatement (Second) of Torts §496B cmt. c: "it must appear that the terms were in fact brought home to him and understood by him, before it can be found that he has accepted them." See also Restatement (Third) of Torts: Apportionment of Liability §2 cmt. d (size of print a factor in determining whether release is enforceable).

2. Clearly not. While he has assumed many of the risks of skiing itself by signing this form, it contains no language assuming the risk of negligent maintenance of the facility. The purchaser would not contemplate such negligence as one of the inherent hazards of skiing. In fact, by enumerating various natural risks, the form tends to confirm that other risks, such as negligent maintenance of the equipment, were not within the contemplation of the clause. Consequently, because the language does not clearly include this risk, Killey has not assumed it.

3. This is an interesting problem. On the one hand, Gavin has expressly agreed to assume responsibility for injuries resulting from skydiving, and Freeflight provided the service with an understanding that this allocation of the risks would protect it from liability. On the other hand, if assumption of the risk turns on knowing acceptance of the risk, Gavin did not assume this risk, since he did not realize (whether he should have or not) that ear problems might result.

   This case would likely turn on the basic contracts concept of the intent of the parties. If it is clear from the language of the release and the circumstances that Gavin understood that he was assuming the risk of *any* injury, anticipated or not, the release would probably be enforced. Express assumption usually honors the parties' choice in allocating the risk. If the parties clearly allocated this one to Gavin, he is likely to be barred by his express assumption of it, even though he did not know what the risk was. See Restatement (Second) of Torts §496D cmt. a (plaintiff may expressly assume unknown risk if agreement so intends); Prosser & Keeton at 489 (plaintiff may "consent to take his chances as to unknown conditions").

   Perhaps, as a matter of good lawyering, Freeflight's counsel should draft the release to reveal as many potential risks as possible. A release that specifically refers to the risk of ear damage clearly demonstrates that this risk was within the parties' contemplation at the time of

contracting. (A release that described in detail all the risks involved might, of course, have a depressing effect on business.) The release should also specify that the plaintiff assumes the risks of the activity, even if he is not aware of them. This strengthens the argument that the plaintiff has chosen to accept all the risks, not just the ones she expected to encounter.

Negative Implications

4. Primary assumption applies where the defendant has not breached a duty of due care, since the risk that injures the plaintiff is inseparable from the activity itself. The defendant is not liable in such cases, because it is not negligent, even though the activity it offered involves some risk. Primary assumption would bar Killey from suing if he were injured from the inherent risks of skiing, such as patches of icy snow, sharp drops in expert trails, trees along the side of the trail, bare spots, and others. But he does not assume the risk that the chair lift will fall off the cable. That is not an inherent risk of the sport if it is conducted with due care.

5. The issue here is whether negligent acts of other skiers are an inherent risk of skiing that skiers assume by engaging in the sport. I would think so. Just as a quarterback can expect some overzealous hits, and a jockey some aggressive jockeying for position on the track, a skier should expect that there will be a few overconfident hot dogs on the expert slopes who will fail to keep a proper lookout or attempt maneuvers beyond their skills. It appears likely that, by choosing to ski the expert slopes, Killey assumes the risk of this accident. Stated another (and, I think, clearer) way, it is likely that Big Mountain is not negligent in conducting a ski operation, even though it entails this risk.

6. a. The question here is whether primary implied assumption of the risk applies; that is, was Circle-R reasonable in offering horseback riding even though it entails a risk that a snake might cause a horse to start and throw a rider? If such events are rare, and generally do not result in riders being thrown, it may be reasonable to offer horseback riding to the public despite this risk. Thus, the basic issue is the traditional Handformula question as to whether, in light of the

magnitude of the risk and the extent of injury to be anticipated from snake-starting, Circle-R was reasonable to offer the activity (or to offer it without some special precaution, such as a snake eradication program along its trails).

Although I don't know much about horseback riding — or snakes — I'll guess that Rogers's accident is a pretty rare occurrence, so that Circle-R would not be deemed negligent for subjecting its patrons to this risk. If so, many courts would say that Rogers "assumes the risk" of snakes causing a horse to buck, and deny him recovery for his injury. But it would be analytically clearer to reach the same result on the simple ground that Circle-R was not negligent.

b. If Rogers didn't know about the snake-starting risk, how can he assume it? If the premise underlying assumption of the risk is *subjective acceptance* of the risk, the doctrine shouldn't apply to Rogers, and he ought to recover.

However, in primary implied assumption cases, the real premise for denying recovery is lack of negligence, not the plaintiff's choice. Plaintiffs like Rogers lose because Circle-R's conduct was reasonable, not because they consciously accepted the risk of snakes. Similarly, a first-time skier hit by another would doubtless be denied recovery, even if she did not understand the risk of a collision.

Although this makes sense, the case law often obscures the point by using assumption-of-the-risk language, which seems to require that the plaintiff actually perceives and appreciates the risk. Rogers will rely on such language to argue that he isn't barred if he didn't actually know the risk. The confusion in this area is such that he might even win on this argument. But, analytically, he shouldn't.

c. If the issue here is whether Circle-R acted reasonably in offering horseback riding, it can raise the issue in its answer simply by denying negligence; there is no need to plead an "affirmative defense" of assumption of the risk in this type of case. Indeed, pleading "no negligence" has an important advantage to Circle-R, since, if the issue is negligence, *Rogers* will bear the burden of proof on it; whereas, if the issue is an affirmative defense, Circle-R will.

However, careful counsel, knowing of the confusion in this area, will doubtless throw in assumption of the risk as a defense, out of

concern that — if the judge thinks of it as a defense — they will have waived the issue. Thus, the confusion gets perpetuated.

Taking Negligence to Newcastle

7. a. Hermit has not expressly agreed in advance to assume the risk here. Nor is this implied primary assumption: Drunk driving is not an inherent risk of accepting a ride in a car. This is an example of secondary implied assumption of the risk. Hermit becomes aware of negligent conduct of Driver which poses a risk of injury to him, yet, fully appreciating the risk, chooses to encounter it. More specifically, this is *unreasonable* secondary assumption since Hermit need not get to town immediately and should have waited for a more suitable chauffeur.

   b. At common law, assumption of a risk barred recovery entirely, even if the risk was negligently created by the defendant. The gist of the action, as reiterated before, was consent and free choice, and here Hermit made a misguided but informed choice to proceed despite the risk. The common law "honored" Hermit's right to choose by barring him from recovering from Driver.

      Since Hermit's choice was unreasonable, it would constitute contributory negligence as well. At common law Hermit would have been barred from recovery by either defense.

   c. Under most comparative negligence regimes, Hermit's unreasonable decision would be treated as negligent conduct, and would be compared to the negligence of the defendant in assessing liability. If, for example, the jury concluded that Hermit was 33 percent responsible for his injuries for riding with a drunk driver, they would reduce his damages by 33 percent. Thus, unreasonable secondary assumption reduces damages under most comparative negligence statutes, but no longer acts as a complete bar. But, as the Introduction indicates, a few states continue to treat it as a full defense analogous to consent.

8. Hillary clearly is negligent for driving with defective brakes; he would, for example, be liable to the driver of the other car in this case. But Farmer has *expressly* assumed the risk in this case. Hillary has no duty

to take Farmer into town, but has offered to do so if Farmer is willing to accept the risk of injury due to the defective condition of the brakes. The principle of free choice says parties can make such arrangements to assume the risk. Farmer has agreed in advance not to hold Hillary liable for the risks to which he is exposed. While express assumption is usually by contract, it need not be, and consideration is not essential to make the assumption binding. See Restatement (Second) of Torts §496B cmt. a.

It is true that this case looks a good deal like reasonable implied secondary assumption as well. Hillary is negligent for driving with defective brakes, and Farmer decides, for a compelling reason, to take the risk. However, since Farmer agrees in advance to relieve Hillary of a duty of care, it is best classified as express assumption. Note that the characterization makes a big difference in the outcome of the case: If it is express assumption, Farmer will be barred; if it is secondary implied assumption, he probably would not be. See Example 9c.

9. a. This is probably an example of reasonable implied secondary assumption of the risk. Secondary assumption arises when the defendant negligently subjects the plaintiff to a risk, and the plaintiff becomes aware of the risk yet chooses to encounter it anyway. Hillary owes Farmer a duty of due care, and violates that duty by giving him a ride in a car with faulty brakes. However, when Farmer becomes aware of the risk posed by Hillary's negligence, he stays aboard because of the exigency caused by his injury. Although he signals no agreement to Hillary, he accepts the risk for his own sufficient reasons.

b. Assuming that Farmer's decision was reasonable under the circumstances, contributory negligence would not bar his recovery. However, in a jurisdiction that applied common law principles, he would still be barred by assumption of the risk, since he understood the risk and chose to encounter it. The basis for the defense was individual choice, whether reasonable or unreasonable. So long as the choice was made with full understanding of the risk, the defense applied. Note the symmetry under the common law approach between express assumption and reasonable secondary implied assumption. Whether the plaintiff agreed in advance to take on the risk, as in Example 8, or impliedly agreed by staying on board, as

here, the result was to bar recovery despite the defendant's negligence.

The best argument for avoiding assumption of the risk in a case like this would be that Farmer did not fully comprehend the nature of the risk posed by the brakes. Because secondary assumption turns on appreciation of the specific risk that causes injury, the defense only applies if the risk is fully understood. Many courts have rescued plaintiffs from the assumption of risk defense by holding that they did not appreciate the *exact* risk that led to the injury. See, e.g., *Gault v. May, 79* Cal. Rptr. 858 (Cal. Ct. App. 1969) (although plaintiff was aware that roller skate pulled to left, she did not know of defective wheel, which caused injury). Here, Farmer might argue that, though he realized there was *something* wrong with the brakes, he did not realize that they would lock completely, and therefore did not assume the risk.

c. The result in a comparative negligence jurisdiction depends on the way the jurisdiction treats reasonable secondary assumption. As the Introduction indicates, most states conclude that reasonable secondary assumption of the risk should not reduce or bar the plaintiff's claim. In these states, Farmer would recover fully, despite his understanding of the risk posed by the brakes. In a few states, however, secondary assumption — whether reasonable or unreasonable — remains a complete defense. In these states, Farmer would lose, because he chose to encounter the risk, even if that was a reasonable choice.

A court in a comparative negligence state might even hold that Farmer is barred by reasonable assumption of the risk, even though Hermit would not be barred in Example 7. The logic would be that the comparative negligence statute specifies that unreasonable assumption of risk be treated as a form of plaintiff's fault, which reduces but does not bar her recovery. But reasonable assumption is not negligence, and therefore is not addressed by the comparative negligence statute. Hence, the court is still free to analyze it as a form of voluntary acceptance of the risk, a separate defense based on choice.

This last approach seems particularly dubious. It seems anomalous that Hermit should recover substantial (albeit reduced)

damages while Farmer takes nothing. In addition, if reasonable assumption of risk is a bar, Farmer's lawyer is placed in the bizarre position of trying to prove that Farmer was negligent, but only a little: Since unreasonable assumption of risk is treated as damage-reducing conduct under the comparative negligence statute, a minimally negligent plaintiff will recover most of her damages. But if plaintiff argues that her conduct was completely reasonable, and the jury agrees, she recovers nothing!

Judge Fudd Assumes the Risk

10. Although the comparative negligence statute here appears to broadly eliminate assumption of risk, it must be read in light of the purposes of the comparative negligence statute and the various meanings of assumption of risk. This provision almost certainly was intended to make the plaintiff's choice to encounter a negligently created risk a damage-reducing factor rather than a complete bar to recovery. In other words, it calls for treating the *defense* of secondary implied assumption like negligence by the plaintiff.

    However, Buckeye's argument is not really based on the *defense* of assumption of the risk. Buckeye is arguing that it was not negligent to offer donkey basketball, even though it entails a small risk of injury. In other words, its argument is based on *primary* implied assumption of the risk, or, more clearly, the simple argument that Buckeye was not negligent. This is not a "defense" at all, but challenges the plaintiff's ability to establish an element of her prima facie case — breach of the duty of due care.

    A number of comparative negligence statutes include language abolishing the "defense" of assumption of the risk. See, e.g., Mass. Gen. Laws ch. 231 §85. Only by fully understanding the different ways in which the phrase "assumption of the risk" has been used can you clearly evaluate the effect — and the limits — of a provision such as this. Here, if Buckeye's counsel had phrased his argument in terms of due care, he could have avoided confusing Judge Fudd with assumption of the risk concepts entirely, and sidestepped any implication that his argument was based on a "defense" that had been abolished.

A Little Knowledge of a Dangerous Thing

11. In a sense, Pearson assumes a risk by passing on the curve. He knows a car could be coming, and that if so a collision may result. But the risk here is general. If recognizing that an act is unreasonably risky constitutes assumption of the risk, virtually any conscious negligent act would qualify. A carpenter who works too close to a bulldozer would assume the risk of being hit. A window washer who leans too far out would assume the risk of a fall. A driver who feels tired would assume the risk of an accident from falling asleep.

    The cases suggest that the plaintiff must be aware of a very specific risk in order to assume it. Certainly, Pearson would assume the risk of a collision if he saw Henderson coming and could see that he was speeding. He probably would assume it even if he saw Henderson but didn't know that he was speeding. In either case, he perceives a very specific danger and decides to chance it. This is qualitatively different from realizing that the potential for danger exists and that it would be wiser to avoid it by being more cautious.

    Of course, in a comparative negligence jurisdiction that treats secondary implied assumption of the risk as a form of negligence by the plaintiff, it won't be necessary to decide whether the risk here is specific enough to be assumed. Even if it is, Pearson's choice is treated as negligence, which reduces but does not bar his recovery. Since the effect is the same in these jurisdictions whether dubbed assumption of the risk or negligence, the court can avoid the difficult task of characterizing it as one or the other.

Legal Shape-Sorting

12. a. The owner is negligent to rent out a cabin with dangerous stairs, so Mansfield can probably make a prima facie case for liability. However, the owner will assert as a defense that Mansfield assumed the risk by using the stairs anyway. The reasonable person would probably not turn around and go home just because the stair lacked a railing; likely she would just be a bit more careful negotiating the stairs. Thus, this is probably reasonable secondary assumption by Mansfield. Whether Mansfield's decision bars recovery will depend

on how the jurisdiction treats reasonable assumption of risk.

b. This is not assumption of risk at all. Bohlen did not knowingly decide to take the risk of operating the saw without the switch; he never knew the switch existed or appreciated the risk of using the saw without it. He may be contributorily negligent for failing to learn more about a dangerous power tool before using it, but he has not deliberately chosen to encounter the risk that caused his injury.

c. This is unreasonable secondary assumption of the risk. The other worker was negligent in failing to return the ladder, but James has deliberately encountered the resulting unreasonable risk. As an experienced mason, James is aware that it is dangerous to climb on these supports, but he decides to do so anyway rather than wait for someone to return with the ladder. This was an unreasonable choice, a negligent choice, but it was also knowing assumption of the risk. In most comparative negligence jurisdictions, it would be treated as a damage-reducing factor like other negligence by the plaintiff.

d. You may have already come across the "rescue doctrine" in Torts class. The doctrine holds that injury to a rescuer is foreseeable, and therefore the negligence of the person who made the rescue necessary is a proximate cause of resulting injury to the rescuer. See, e. g., *Wagner v. Intl. Ry. Co.*, 133 N.E. 437 (N.Y. 1921). But why aren't these cases resolved under assumption of risk doctrine instead? They appear to be the very paradigm of reasonable implied secondary assumption of the risk: The plaintiff becomes aware of a risk negligently created by the defendant, and makes an eminently reasonable choice to encounter it.

A few courts *have* barred recovery to a rescuer on the ground of assumption of the risk. See, e.g., *Siglow v. Smart*, 539 N.E.2d 636 (Ohio Ct. App. 1987). See also *Eckert v. Long Island R.R. Co.*, 43 N.Y. 502 (1871) (Allen, J., dissenting) (arguing that rescuer should be barred by assumption of the risk). The Second Restatement avoids this harsh result, however, by concluding that rescue is not "voluntary":

> The plaintiff's acceptance of a risk is not voluntary if the defendant's tortious conduct has left him no reasonable alternative course of conduct in order to . . . avert harm to himself or another.

Restatement (Second) of Torts §496E(2)(a). This is a laudable result, but it raises a fundamental question about the meaning of secondary assumption of the risk. If Dobbs's choice here is not voluntary, is a plaintiff's choice to confront a negligently created risk ever voluntary? In most cases, the plaintiff does not *prefer* to be confronted with the risk negligently created by the defendant; she would rather that the defendant had not been negligent in the first place. Here Dobbs would prefer not to have confronted the risk created by the driver's negligence. Similarly, in the vacation home example, the vacationer would have preferred that the stairs have a railing.

The plaintiff in these cases reluctantly goes forward to meet the danger, but in a sense her decision is not "voluntary," since she would prefer not to have been put to an unpalatable choice of alternatives in the first place. See K. Simons, Assumption of Risk and Consent in the Law of Torts: A Theory of Full Preference, 67 B.U. L. Rev. 213, 218-224 (1987), which argues that the doctrine should only apply where the plaintiff "fully prefers" to encounter the risk created by the defendant, rather than being placed in a position of having to choose between several unpalatable alternatives.

Risk Twist

13. a. Holmes deliberately chose to drive with Story, even though he knew he had been drinking heavily. As in Example 7, this would be secondary implied assumption of the risk. That is, after recognizing Story's negligent conduct, Holmes has elected — by getting into the car with him — to take the risk created by it.

b. In most comparative negligence jurisdictions, a plaintiff's conscious, unreasonable choice to encounter a risk like this would be treated as a form of negligence, which would reduce the plaintiff's recovery. However, Holmes's conduct should have *no effect* on his recovery in this case. Holmes unreasonably chose to accept the risk of negligence by Story in driving while intoxicated. But Holmes was not injured by that risk — as far as the example indicates, Story's driving was fine. Holmes was injured by negligent driving *by Cardozo.* Thus, whether we call Holmes's conduct negligence in

riding with Story or voluntary acceptance of that risk, that conduct was not the proximate cause of his injury. It isn't negligent to drive with a drunk driver because *some other driver* might drive carelessly and cause a collision. Consequently, Holmes's choice should not affect his recovery from Cardozo at all.

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1. "Assumption of risk . . . developed in response to the general impulse of common law courts at the beginning of this period [the industrial revolution] to insulate the employer as much as possible from bearing the 'human overhead' which is an inevitable part of the cost — to someone — of the doing of industrialized business. The general purpose behind this development in the common law seems to have been to give maximum freedom to expanding industry." *Tiller v. Atl. Coast Line R.R.*, 318 U.S. 54, 58-59 (1943) (footnotes omitted).

2. Witness the widespread resistance to mandatory seatbelt or helmet laws. For an interesting defense of the socially constructive role of risk-taking in self-actualization, see D. Judges, Of Rocks and Hard Places: The Value of Risk Choice, 42 Emory L.J. 1, 11-26 (1993).

3. Express assumption may also be barred in situations where it would undermine legislative intent. For example, if a statute mandated certain safety standards for public stadiums (such as number of exits or a maximum number of patrons), a court would likely refuse to enforce a release on the plaintiff's ticket accepting risks of injury due to negligence covered by the statute. Stadium operators should not be allowed to avoid the statutory purpose by requiring the protected class to waive its protection in order to see the game. See generally A. Cava & D. Wiesner, Rationalizing a Decade of Judicial Responses to Exculpatory Clauses, 28 Santa Clara L. Rev. 611, 630-638 (1988).

4. The Washington comparative negligence statute, for example, defines "fault" to include "unreasonable assumption of risk." Wash. Rev. Code Ann. §4.22.015. The evident purpose of such a provision is to treat unreasonable assumption as a damage-reducing factor rather than a complete bar to recovery.

5. The following passage from the Spell article, for example, is reminiscent of the nineteenth-century arguments for assumption of the risk:

> Notions of choice do not go so far as to afford the plaintiff, who once stood at the threshold of action armed with both knowledge of the risks ahead and the opportunity to avoid those risks, the ability to cast back upon the defendant the cost of his choice. The more equitable approach is to enforce the "fundamental principle" of assumption of risk that "where the plaintiff has voluntarily and intelligently consented to relieve the defendant of liability for certain known risks, the plaintiff's choice should be enforced."

8 Miss. C. L. Rev. at 171 (quoting from the Rosenlund & Killion article at 255).

6. See, e.g., *Kennedy v. Providence Hockey Club*, 376 A.2d 329 (R.I. 1977); see generally V. Schwartz, Comparative Negligence §9.03.

7. See, e.g., *Rini v. Oaklawn Jockey Club*, 861 F.2d 502, 508-510 (8th Cir. 1988) (applying Arkansas law).

CHAPTER 25

Casting the Second Stone: Comparative Negligence

INTRODUCTION

Somewhere in the Bible lies the telling maxim: “Let he who is without sin cast the first stone.” A rich understanding of human experience lies behind this phrase; for few of us are so pure that we can forswear responsibility for life’s vicissitudes or piously condemn others without considering our own failings.

For many years, the common law refused to account for this basic truth in tort cases. The contributory negligence doctrine reflected the absolutist moral view that the plaintiff who was blameless was entitled to full vindication in a court of law, but that one who shared the taint of sin in any degree must be sent forth to languish in the wilderness. Today we are less pious and more pragmatic about accident causation. This more “modern” view is reflected in the widespread adoption of comparative negligence, which replaces the all-or-nothing approach of contributory negligence with a system that reduces a party’s damages to account for her fault.

I hesitate to call this a “modern” view, because there is nothing new about it, really. Comparative negligence was apparently known to those most practical of lawmakers, the Romans, and has prevailed widely in civil law countries since the nineteenth century.[1] American admiralty practice also

adopted a rough form of comparative negligence: Under the "equal division rule," if two ships were at fault in a collision, the court divided the damages equally, regardless of their relative degrees of fault. Suppose, for example, that the Queen Mary collided with the Queen Elizabeth, and sustained $200,000 in damage. If both ships were partly at fault in causing the collision, the owners of the Queen Mary would recover $100,000. This was true even if the Queen Mary's skipper was 1 percent at fault and the Queen Elizabeth's was 99 percent to blame. This may seem like a crude system, but it was a substantial retreat from contributory negligence: Under contributory negligence, the Queen Mary's owners would have recovered nothing at all.

Dissatisfaction with the all-or-nothing feature of contributory negligence also led several states to experiment with a *slight/gross* comparative negligence system. Under an early Nebraska statute, for example, a plaintiff whose negligence was "slight" compared to that of the defendant was allowed to recover, but her recovery was reduced "in proportion to the amount of contributory negligence attributable to the plaintiff." Neb. Rev. Stat. §25-21,185. This provision changed the result in those cases in which contributory negligence operated most harshly: where the plaintiff was only minimally negligent. However, even under the slight/gross system, if the jury found that plaintiff's negligence was more than "slight," the traditional contributory negligence rule applied, and plaintiff lost entirely.[2]

Such early systems showed that the contributory negligence rule was not immutable, but it was not until about 1965 that this trickle of reform turned into a flood. Since that date, most states have replaced contributory negligence with one form or another of comparative negligence. In some states the change has come from the courts — since contributory negligence is a judicial doctrine, some courts have been willing to abandon it by judicial decision. In many, however, comparative negligence has been introduced by statute. At this writing, only four states retain the contributory negligence doctrine.

PURE COMPARATIVE NEGLIGENCE

Most states have adopted either *pure comparative negligence* or several common variations (called "modified comparative negligence"), which are

described below. Under pure comparative negligence, advocated by most scholars, an injured party may recover, regardless of her degree of fault, but her recovery is reduced by her percentage of fault. For example, the Washington (state) statute provides in part:

> In an action based on fault seeking to recover damages for injury or death to person or harm to property, any contributory fault chargeable to the claimant diminishes proportionately the amount awarded as compensatory damages for an injury attributable to the claimant's contributory fault, but does not bar recovery. . . .

Wash. Rev. Code Ann. §4.22.005. Assume that the Queen Mary's skipper was 40 percent at fault in causing the collision. Under a pure comparative negligence statute like Washington's, the owners of the Queen Mary would recover, but their damages would be reduced by 40 percent to reflect the Queen Mary's contribution to the accident. Thus, they would recover 60 percent of their damages, or $120,000. If the Queen Mary was only 1 percent at fault, they would recover 99 percent of their damages. If the Queen Mary was 99 percent at fault and suffered a million dollars in damages, its owners would recover $10,000 (1 percent of $1,000,000).

While there is a pleasing symmetry about pure comparative negligence, it has had its critics too. It may not seem "fair" to pay damages to one who is the overwhelming cause of his own misfortune. If the Queen Mary's skipper was 99 percent at fault, the Queen Elizabeth's owners may be understandably reluctant to pay its owners a penny, much less $10,000, which is one million pennies.

MODIFIED COMPARATIVE NEGLIGENCE

Many states have compromised between the extremes of contributory negligence on the one hand and pure comparative negligence on the other. The slight/gross system was an early example, but it proved hard to apply, due to the difficulty in defining "slight" negligence and controlling jury verdicts based on such an amorphous standard. A more popular approach, particularly in states that have switched to comparative negligence by statute rather than judicial decision, has been *modified* comparative negligence. Modified comparative negligence systems, like the slight/gross system, bar

the claimant from any recovery if her negligence reaches a certain level, but they set the level at the point where the plaintiff's negligence either equals or exceeds that of the defendant.

The Kansas comparative negligence statute, for example, provides that a party's negligence will not bar her recovery

> if that party's negligence was less than the causal negligence of the party or parties against whom a claim is made, but the award of damages to that party must be reduced in proportion to the amount of negligence attributed to that party.

Kan. Stat. Ann. §60-258a(a). This statute is typical of the *not-as-great-as* form of modified comparative negligence. Under this approach, the plaintiff recovers her damages, reduced by her percentage of fault, so long as her fault was not as great as that of the defendant or defendants. A plaintiff who was 45 percent at fault would recover 55 percent of her damages under this type of statute, but a plaintiff who was 70 percent negligent would recover nothing. In the frequent scenario in which the jury concludes that the parties were equally at fault, the plaintiff loses, since her fault is as great as that of the defendant.

The other common system of modified comparative negligence allows the plaintiff to recover reduced damages so long as her negligence was *not greater than* that of the defendant:

> Contributory negligence shall not bar recovery in an action by any person or his legal representative to recover damages for negligence resulting in death or injury to person or property, if such negligence was not greater than the negligence of the person against whom recovery is sought or was not greater than the combined negligence of the persons against whom recovery is sought. Any damages sustained shall be diminished by the percentage sustained of negligence attributable to the person recovering.

N.J. Stat. Ann. §2A:15-5.1. This approach is the same as the not-as-great-as system in every case except where the plaintiff's negligence is equal to the defendant's. While the plaintiff loses in the 50/50 case in a not-as-great-as state, she recovers 50 percent of her damages in a not-greater-than state like New Jersey. Since juries frequently conclude that the parties are equally at fault, this can change the result in quite a few cases.

Modified comparative negligence is perhaps less logically defensible than pure comparative negligence. Suppose that Hobbes is 51 percent at fault in causing an accident and suffers $100,000 in damages. Suppose also that Mill, the other driver, is 49 percent at fault, suffers $100,000 in damages and

counterclaims for his injuries. In a modified comparative negligence jurisdiction, Hobbes recovers nothing; he will absorb all of his own loss, and pay Mill $51,000 as well (since Mill is only 49 percent at fault and thus entitled to recover his damages reduced by 49 percent). This disparity in recovery hardly seems justified on the basis of a 2 percent difference in the negligence of the parties. By contrast, under pure comparative negligence, Hobbes would recover $49,000 from Mill, and Mill would recover $51,000 from Hobbes.[3]

Despite examples like this, most states that have adopted comparative negligence by statute have chosen one of the modified forms. Perhaps the best explanation, other than pure political compromise between contributory and comparative negligence, is that of a sponsor of the New Hampshire statute, whose "sandlot instinct" rebelled against allowing recovery to a party who is primarily to blame for her own injury.[4]

Under both pure and modified systems, the seeming precision of the calculations is obviously illusory. It is people — usually ordinary people sitting as jurors — who apply the comparative negligence rules to actual cases. Affixing exact percentages of negligence in complex accidents at a trial four or five years after the fact is a dubious business. However, as Dean Prosser persuasively notes, any system of assigning damages in negligence cases is inherently imprecise:

> [A] division of the plaintiff's damages [on the basis of comparative fault] is at least more accurate than one based on the arbitrary conclusion that 100 percent of the responsibility rests with the plaintiff and none whatever with the defendant, or, if the last clear chance is applicable, 100 percent with the defendant and none with the plaintiff — both of which are demonstrably wrong. Nor is such an estimate in itself any more foolish, or more difficult, than the one which assigns $2,000 as fair value and compensation for the pain of a broken leg, or the humiliation of a disfigured nose, to say nothing of estimates based on a prognosis of speed of recovery, future earnings or permanent disability.

W. Prosser, Comparative Negligence, 51 Mich. L. Rev. 465, 475 (1953).

WHO IS COMPARED?

Some practical problems arise in applying comparative negligence to specific cases, especially under modified comparative negligence. A basic question is

who gets compared to whom. For example, assume that Rousseau's car collides with Locke's and Rousseau suffers $100,000 in damages. He sues Locke for negligent driving and the City of Paris for leaving a pothole in the road, which contributed to causing the accident. At trial, the jury concludes that Rousseau was 45 percent at fault, Locke 15 percent, and the city 40 percent. In a modified comparative negligence jurisdiction (of either type) Rousseau will lose if his fault is compared to that of each defendant *individually,* since his negligence is greater than either of theirs. However, if his fault is compared to the *total negligence* of the defendants together, he can still recover 55 percent of his damages, since 45 percent is less than their combined total of 55 percent.

Some states take the harder line on this issue, comparing the plaintiff's negligence to that of each defendant individually. These states bar the plaintiff from recovering from any defendant who is less negligent, though he may recover from others who are more negligent. Most modified comparative negligence states, however, compare the plaintiff's negligence to the combined negligence of the defendants. See V. Schwartz, Comparative Negligence §3.05[c][i] (5th ed. 2016).

There are cogent arguments for both approaches. Comparing Rousseau's negligence to all defendants combined seems unfair since Locke will be held liable to Rousseau for $55,000 (55 percent of $100,000), even though he was only 15 percent to blame and Rousseau's fault was three times greater. That result looks like pure comparative negligence, since a party more at fault recovers from one less at fault. On the other hand, comparing the plaintiff's negligence to each defendant's individually places a plaintiff at a disadvantage if there are multiple parties: She may lose even if her negligence is substantially less than 50 percent. It also leaves defendants who are found more negligent than the plaintiff holding the bag for others who contributed to the accident but were less negligent than the plaintiff. For example, if Rousseau were 35 percent at fault, the city 40 percent, and Locke 25 percent, the city would be liable for 65 percent of Rousseau's damages (since it is more negligent than him), while Locke would not be liable at all if his negligence is compared separately to Rousseau's.

WHAT IS COMPARED?

Another basic issue in applying comparative negligence is what is compared among the parties: is it the *negligence* of each party, or the degree to which each party's negligence *caused* the plaintiff's injury? This problem is conceptually difficult: How do you distinguish causation from the extent of negligence? It is hard to think about degrees of causation: Either the negligence contributed to the accident or it didn't. Suppose, for example, that Montesquieu makes a left turn without putting on his turn indicator, and is hit head on by Milton, who is doing 75 m.p.h. in a 35 m.p.h. zone. Most jurors would find Milton more to blame, but that both acts equally "caused" the harm. If the goal of comparative negligence is to place the greater burden on the more culpable party, it seems that Milton should be found substantially more responsible than Montesquieu.

Changing the example a bit, assume that Montesquieu was driving while severely intoxicated and made the same left turn without looking, leading to the same accident with the speeding Milton. On these facts, as in the first example, both parties contributed to causing the accident, but the relative culpability of the parties is more nearly equal, and most juries would ascribe a higher percentage of fault to Montesquieu than in the first example.

Dean Prosser is emphatically of the view that it is the degrees of negligence of the parties that is compared. See W. Prosser, Comparative Negligence, 51 Mich. L. Rev. 465, 481-482 (1953). Many statutes appear to take this position, since they require the jury to consider the comparative "fault" or "negligence" of the parties. However, the Uniform Comparative Fault Act explicitly requires the jury to consider both:

> In determining the percentages of fault, the trier of fact shall consider both the nature of the conduct of each party at fault and the extent of the causal relation between the conduct and the damages claimed.[5]

As a practical matter, it probably doesn't matter in most cases which approach is taken. Assessing fault is not a scientific process; the jury makes an intuitive judgment about the culpability of each party without focusing on the technical distinction between negligence and causation. However, one thing can be said with certainty: If the plaintiff's negligence was not an actual cause of the injury the jury should not consider it. If the plaintiff is hit from behind while stopped at a light, irrelevant negligence in failing to get her brakes checked should not reduce her recovery.

CAVEAT: A FUNDAMENTAL FUNDAMENTAL OF COMPARATIVE NEGLIGENCE

A final, fundamental point should be made here, and it is one that is easily missed. Comparative negligence regimes allow a plaintiff who is partly at fault to recover reduced damages, and provide a formula for calculating those reduced damages. But the adoption of comparative negligence, by itself, does *not* change the basic rule of joint and several liability, under which each defendant is liable for the entire judgment awarded to the plaintiff. Nor does adoption of comparative negligence, of itself, change the basic contribution rules governing the redistribution of damages among the defendants.

For example, if Rousseau recovers from Locke and the city in the example on page 571, he will be entitled to 55 percent of his damages, or $55,000. If traditional joint and several liability principles are still followed in the relevant jurisdiction, both Locke and the city would be liable to Rousseau for $55,000. Put another way, the adoption of comparative negligence does *not* mean that the plaintiff's judgment will be apportioned to the defendants in proportion to their negligence. In the Rousseau case, the city will not be ordered to pay $40,000 of the judgment, and Locke only $15,000. Judgment will enter against each for $55,000, because, under joint and several liability, each defendant who is liable to the plaintiff is liable for the entire judgment. Rousseau will be entitled to collect $55,000 from either Locke or the city.[6] If Locke pays he can seek contribution from the city, or vice versa, under applicable principles of contribution. See Chapter 22.

Since the adoption of comparative negligence, many states have also changed the traditional principles of joint and several liability and contribution. Chapter 26 explores some of the changes to contribution principles and joint and several liability that have been prompted by the adoption of comparative negligence. But it is important to understand that the adoption of comparative negligence *does not in itself change these principles*, and some states that have adopted comparative negligence still apply traditional approaches to both contribution and joint and several liability.

The following examples illustrate the application of the various types of comparative negligence to actual cases. Assume in analyzing them that joint and several liability applies. After the examples and explanations, there is a short discussion of special verdicts, with several examples to illustrate how

comparative negligence issues are usually submitted to the jury.

Examples

Comparing Comparative Negligence

1. Paine is injured when his hand is caught in a printing press operated by Burke. He sues Burke for negligence. The jury finds that Paine has suffered $60,000 in damages, and that each party was 50 percent at fault.
   a. How much would Paine recover in a jurisdiction that applies a not-as-great-as form of comparative negligence?
   b. How much would Paine recover in a not-greater-than jurisdiction?
   c. How much would Paine recover under a pure comparative negligence approach?
   d. How much would Paine recover in a jurisdiction that retains contributory negligence?

2. Assume that Paine sued both Burke and Calkins, who had recently repaired the press. The jury finds that Paine was 65 percent negligent in causing his own injuries, that Burke was 15 percent negligent and that Calkins was 20 percent negligent. Paine's damages are again $60,000.
   a. Would Burke or Calkins be liable to Paine if the suit were brought under pure comparative negligence?
   b. How much would Burke or Calkins be liable for in a pure comparative negligence jurisdiction, if anything?
   c. Assume that the accident takes place in a state that applies the not-as-great-as approach. Who would be liable to Paine?
   d. Who would be liable under the not-greater-than approach?

3. Assume that the jury found Paine 33 1/3 percent negligent, Calkins 33 1/3 percent negligent, and Burke 33 1/3 percent negligent. Paine's damages are again $60,000.
   a. How much would Paine recover from each defendant under pure comparative negligence?

b. How much would he recover under the not-as-great-as version of modified comparative negligence?

c. How much would he recover under the not-greater-than approach?

Judgments, More or Less

4. Descartes sues Mill, Calkins, and Newton for injuries arising from a boating accident. The jury concludes that Descartes was 25 percent at fault, Mill was 10 percent at fault, Calkins was 25 percent at fault, and Newton was 40 percent at fault. They assess Descartes's damages at $100,000. Assume that the suit is brought in a not-as-great-as jurisdiction which compares the negligence of the plaintiff to that of each defendant individually.

   a. Who may Descartes recover from?

   b. Will Descartes recover $75,000, $61,538, or $40,000?

   c. Assume that the applicable comparative negligence statute allows recovery if the plaintiff's negligence was not as great as that of the defendant or defendants, and that the plaintiff's negligence is compared to the defendants as a group. Assume further that Newton is insolvent. How much could Descartes recover from Mill?

5. Suppose, on the same facts, that Descartes had sued only Mill. How much, if anything, would he recover from her?

Judge Fudd Redux

6. Pascal sues Hume for negligently dropping a board on him from a ladder. Hume claims that Pascal was also negligent, for philosophizing under the ladder during construction. The case is tried before the indomitable Fudd, sitting in a pure comparative negligence jurisdiction. The Honorable Fudd instructs the jury as follows:

   > If you find that the plaintiff was negligent, then you must reduce the damages awarded in the proportion that the plaintiff's negligence bears to the defendant's.

   The jury finds that Pascal suffered $60,000 in damages, that he was 20 percent at fault and that Hume was 80 percent at fault.

a. How much should the jury award to Pascal under Judge Fudd's instruction?

b. What is wrong with the instruction and how much did the error cost Pascal?

c. What should the instruction be?

7. Assume, on the facts of Example 6, that Pascal claims that Hume had the last clear chance to avoid the injury by warning him that the board was falling. In a contributory negligence jurisdiction, this, if proved, would require the jury to disregard Pascal's negligence. See generally Prosser & Keeton at 462-468. Should the judge instruct the jury to disregard Pascal's negligence if they find that Hume had the last clear chance to avoid the accident?

8. Assume that Hume was also injured in the foregoing fiasco, when Pascal jumped back, knocking over the ladder. He counterclaims against Pascal in the suit for his own injuries, and the jury assesses his damages at $200,000. They assign the same percentages of negligence to Pascal (20 percent) and to Hume (80 percent).

a. What judgments would result in a contributory negligence jurisdiction?

b. What judgments would result in a pure comparative negligence jurisdiction?

Comparing Apples and Outrages

9. Hamilton, a tenant in the Philosophers' Corner condominium complex, was assaulted in his unit when Sly, a burglar, broke in through the front door. (Unfortunately, the lock was loose but Hamilton had not had it repaired.) Hamilton sues Spencer Security Co., the company that provided security for the complex, claiming that they failed to adequately patrol the premises.

a. Assume that the case takes place in a jurisdiction that requires the jury to consider the fault of all tortfeasors, not just the parties before the court. What will Spencer Security argue should be done in apportioning fault?

b. What is the best argument that the jury should be told to ignore Sly in apportioning fault?

c. What is the best argument that the jury should be told to include Sly in apportioning fault?

d. Why would Spencer care whether Sly is included in apportioning fault?

Explanations

Comparing Comparative Negligence

1. a. Paine will not recover at all in a not-as-great-as jurisdiction, since his negligence was as great as that of Burke. This form of comparative negligence bars a plaintiff from recovery if her fault equals (or exceeds) the defendant's.

   b. In a not-greater-than jurisdiction, Paine would recover $30,000. He is not barred from recovery, because his fault was not greater than Burke's. However, his damages will be reduced by his percentage of negligence (.50 × $60,000).

   c. The result in a pure comparative negligence jurisdiction is the same as in the last example. Paine may recover but his fault reduces his recovery proportionally, to $30,000.

   d. Paine would recover nothing in a contributory negligence jurisdiction, since his negligence contributed in part to causing the accident. Under contributory negligence, a plaintiff whose fault contributed to the accident could not recover, even if the defendant was more faulty.

2. a. Both Burke and Calkins are liable to Paine under pure comparative negligence, since both were negligent. The fact that Paine was *more* negligent than either of them does not bar him from recovering under a pure comparative negligence statute. It will, however, reduce the amount he recovers proportionally.

   b. In a pure comparative negligence jurisdiction, Paine's judgment will be reduced by 65 percent to reflect his negligence. He will therefore

recover $21,000 ($60,000 − (.65 × 60,000)). As the Introduction indicates, in some jurisdictions Burke and Calkins will both be liable to Paine for this amount, since they are jointly and severally liable for the damages their negligence contributed to causing. Even though each was considerably less at fault than Paine, each is liable to Paine for $21,000.

c. Neither defendant is liable to Paine under the not-as-great-as form of comparative negligence, since Paine's negligence was greater than that of the defendants. This case, in which the plaintiff is primarily at fault, demonstrates the most marked difference between pure and modified comparative negligence systems. Under pure comparative negligence, plaintiff recovers, with a reduction for his percentage of negligence. Under modified comparative negligence, he loses entirely.

d. Paine loses under the not-greater-than approach too, since his negligence was greater than that of the defendants. Both forms of modified comparative negligence bar the plaintiff from recovery if he is more than 50 percent at fault.

3. a. In a pure comparative negligence jurisdiction, Paine would recover his full damages, $60,000, reduced by his own percentage of fault, or $40,000 ($60,000 − (.333 × 60,000)). Each defendant would be liable for the $40,000 judgment, assuming that joint and several liability applies.[7]

b. The answer here depends on whether the jurisdiction compares Paine's negligence to that of Burke and Calkins individually, or to the total negligence of all defendants. Most comparative negligence statutes provide for comparison to the combined negligence of all defendants. Under this approach, Paine's negligence would be compared to the combined negligence of Burke and Calkins. Paine would recover, since his negligence (33 1/3 percent) is less than that of Burke and Calkins combined (66 2/3 percent). His recovery would be reduced by 33 1/3 percent, to $40,000, to account for his negligence.

If the traditional rules of joint and several liability apply, Paine will get a judgment for $40,000 against each defendant. Note again,

as in Example 1, that pure and modified comparative negligence systems reduce Paine's damages in the same manner. The difference is that under modified comparative negligence, Paine loses entirely if his fault reaches a certain percentage.

If this case were tried in a state which applies the not-as-great-as approach, but compares the plaintiff's negligence to *each defendant individually,* Paine would lose entirely, since his fault is as great as that of each of the other defendants.

c. Under the not-greater-than approach Paine would recover even if his negligence were compared to Locke's and Calkins's individually. Because his negligence is not greater than that of either defendant, he is entitled to recover. His recovery will be reduced by his percentage of fault, so he would recover a judgment for $40,000 against each defendant, assuming joint and several liability applies.

Judgments, More or Less

4. a. Since the case arises in a state that compares the plaintiff's negligence to each of the defendants individually, Descartes may recover against Newton, because his negligence was not as great as Newton's. But he cannot recover from Calkins, since his negligence equals Calkins's. And, *a fortiori,* he cannot recover from Mill, who was less at fault.

b. Descartes will recover $75,000 from Newton, his total damages reduced by his own percentage of negligence. This may seem unfair to Newton, since it makes Newton bear the damages (adjusted for Descartes's negligence), even though two other parties who contributed to it are not liable at all. Wouldn't it be fairer to ignore the negligence of the other defendants, and compare Descartes's negligence (25 percent) to the combined total of his and Newton's (25 percent + 40 percent, or 65 percent), the only liable defendant? That's how I got the $61,538 figure, which reduces Descartes's damages by 25/65ths of $100,000. Alternatively, it may seem appropriate to make the one liable defendant pay only his percentage of negligence. This approach would yield the $40,000 figure.

Maybe that would be fairer, but a good many comparative negligence statutes do not change the basic principle that those

defendants who are liable are liable for the plaintiff's damages, reduced only by her percentage of fault. They do *not* limit a defendant's liability to her own percentage of negligence (unless the jurisdiction has adopted several liability). If the rule seems unfair, remember that under the common law approach, every defendant who was found negligent at all was *fully* liable to the plaintiff, even if other tortfeasors also contributed to the injury. In this case, Newton at least has his liability reduced to account for Descartes's contribution to the accident. But if Mill and Calkins are not liable (because they are less negligent than the plaintiff, and they are each compared to the plaintiff individually), Newton will end up holding the bag. He will have to pay the $75,000 judgment without getting any contribution from them (since they are not liable at all), even though their negligence also contributed to the accident.

c. If we compare Descartes's negligence to that of the defendants combined, his is less than theirs (25 percent versus 75 percent). So he is entitled to a judgment for his damages, reduced by his percentage of negligence, against all three defendants. Descartes would get a judgment for $75,000 against each defendant.

   Newton, the example assumes, can't pay. However, if joint and several liability applies, Descartes could collect $75,000 from Mill (or Calkins). After paying, Mill may be able to get some of the judgment back from Calkins, under contribution principles, but won't get any back from Newton.[8] Thus, the example illustrates that a fairly minor player in the accident can end up bearing substantial liability, if the jurisdiction compares the plaintiff's negligence to that of the defendants as a group.

   Under this version of modified comparative negligence, more plaintiffs will recover, since their negligence is less likely to exceed that of all defendants together. More defendants will end up splitting the damages, since they will be liable even if they were less negligent than the plaintiff. The judgment will likely then be spread among them through contribution.

5. This example introduces a perplexing problem. In assessing percentages of negligence, should the jury only consider the parties to the lawsuit, or should they consider all persons who may have contributed to causing

the accident? Here, if only Descartes and Mill are considered, and the jury must make their causal negligence add up to 100 percent, they might well assign Descartes more than 50 percent of the negligence. If they do, Descartes loses, even though, if all the actors involved in the accident were assigned percentages, his would drop below 50 percent.

Clearly, this gives Descartes an incentive to sue all potential defendants. By divvying up the liability among more parties, he will probably drive his percentage of fault down, which means his judgment will be bigger. And, if we assume the jurisdiction compares his negligence to that of the defendants as a group, by suing more defendants he increases the chance that their collective fault will exceed his. On the other hand, it is not always possible to sue all tortfeasors. Some may be bankrupt, immune from suit, never identified (as in the case of a hit-and-run driver), or not subject to personal jurisdiction.

Approaches to this problem vary. Some courts have held that the plaintiff's negligence should only be compared to that of the parties before the court at trial. See, e.g., *Shantigar Foundation v. Bear Mountain Builders*, 441 Mass. 131 (2004). This seems somewhat artificial — Calkins and Newton were involved in the accident, may have been the major causes of it, but the jury is required to ascribe 100 percent of the fault to Mill and Descartes. This may also make Descartes's recovery turn in part on procedural factors, such as whether some tortfeasors have filed for bankruptcy or can't be sued in a particular state.

Other jurisdictions require the jury to consider all actors who may have contributed to the accident in assigning negligence percentages. See, e.g., *Allied Signal Inc. v. Fox*, 623 So. 2d 1180, 1182 (Fla. 1993). In these states, the parties before the court will litigate the negligence of other tortfeasors who are not present at trial. Although this can be awkward, it allows a more realistic assessment of the percentages of fault of the parties, since all contributors to the accident are considered. In other states, some absentees, but not others (such as immune tortfeasors) are considered. See generally V. Schwartz, Comparative Negligence §15.05.[9]

Judge Fudd Redux

6. a. Under Judge Fudd's instruction, the jury should reduce Pascal's award by 20/80, or 25 percent, "the proportion that his negligence bears to the defendant's." He would recover $45,000.

   b. The judge's error has cost Pascal $3,000. The problem with the instruction is that it asks the jury to relate the plaintiff's negligence to the defendant's, rather than to the total negligence of all parties. The proper method would be to reduce Pascal's award by 20/100, to $48,000.

   c. Jury instructions frequently require the jury to "reduce the total amount of plaintiff's damages by the proportion or percentage of negligence attributable solely to the plaintiff." It would be even clearer to instruct as follows:

> If you find that the plaintiff was negligent, then you must reduce the damages awarded to the plaintiff by the proportion which her negligence bears to the total negligence of all parties.

This instruction makes it clear to the jury that the Pascal's recovery is to be reduced by his percentage of fault (20%), not just compared to that of the defendant.

If the judge uses a special verdict form, she may avoid having to instruct the jury at all on the proper method for calculating the plaintiff's recovery. The jury makes simple factual findings, and the judge fashions a judgment by applying the comparative negligence rules of the state to those findings. Use of special verdicts is discussed at p. 584 ff. in this chapter.

7. The issue posed here is whether the last clear chance doctrine applies in a jurisdiction that has changed over to comparative negligence. The last clear chance doctrine provided a means of avoiding the harshest applications of contributory negligence. The court would find for the plaintiff, despite her negligence, if the defendant had the last chance to avoid the accident (and hence was at least arguably the more negligent party). Here, Pascal argues that, since Hume had the last clear chance to avoid the accident, his (Pascal's) negligence should be ignored entirely, as it was before the adoption of comparative negligence.

Once comparative negligence is adopted there is no need for a doctrine that ignores the plaintiff's negligence simply because the

defendant was (arguably) more negligent. If the defendant is more negligent, she can be assigned a higher percentage of negligence, but the plaintiff's negligence can still be taken into account. On this rationale, most courts have concluded that the last clear chance doctrine does not apply under comparative negligence. See Schwartz §7.02 (discussing both positions); see also Restatement (Third) of Torts: Apportionment of Liability §3 cmt. b (advocating abrogation of last clear chance under comparative fault). If the court adopts the majority position, Pascal would still be assigned a percentage of negligence, which would reduce his damages, even though Hume had the last chance to avoid the accident.

As Chapter 24 explains (see pp. 547–549), many jurisdictions have similarly concluded that secondary unreasonable implied assumption of the risk should not be a complete bar to recovery once comparative negligence is adopted. Instead, the plaintiff's unreasonable decision to encounter a risk should be considered a form of "fault" that the jury uses in assessing her percentage of negligence.

8. a. In a contributory negligence state, neither party would recover, since each was partially at fault. The court would enter a judgment dismissing each party's claim against the other.

   b. There is nothing to prevent an injured defendant from recovering from a plaintiff under comparative negligence. After all, if Hume had gone to court first, he would have been the plaintiff; he shouldn't be prejudiced by merely losing the race to the courthouse. Thus, if both parties are injured, and both are negligent, each may be entitled to some recovery in a pure comparative negligence jurisdiction. Here, Pascal would recover $48,000 from Hume ($60,000 reduced by his 20 percent of fault) and Hume would recover $40,000 from Pascal ($200,000 reduced by 80 percent).

Comparing Apples and Outrages

9. a. Spencer will argue that the jury should apportion the fault among Hamilton, Spencer, and Sly, the burglar. If the jury is so instructed, they will presumably assign a large percentage of fault to Sly, the intentional tortfeasor, and a lesser percentage to Spencer, which

merely failed to prevent the criminal act.

b. The title of this chapter is "comparative negligence." The doctrine arose as a substitute for the earlier doctrine of contributory negligence, which applied where both the plaintiff and the defendant were negligent. Traditionally, contributory negligence was *not* a defense to an intentional tort. So there is a strong argument that legislatures that enacted "comparative negligence" statutes never intended that intentional conduct should be compared to negligence, as Spencer argues here.

c. In a state that generally requires the jury to consider the fault of all tortfeasors (including absent tortfeasors), ignoring Sly (the party with the lion's share of the fault) seems totally artificial. If an absent party whose conduct was merely negligent will be considered, it is hard to see why a more faulty party — the intentional tortfeasor — should be ignored.

Cases like this may arise in many contexts. A school district might be sued for negligently hiring a bus driver who sexually abuses a child. A psychiatrist might be sued for failing to warn of a dangerous patient who assaults a family member. A hotel might be sued for negligent security after a guest is assaulted in the parking garage. In such cases, the liability of the negligent defendant may depend on how the intentional tortfeasor is treated in allocating fault.

Some of the cases on the point have turned on the wording of the state's comparative negligence statute. In *Welch v. Southland Corp.*, 952 P.2d 162 (Wash. 1998), for example, the court looked at the definition of "fault" in the Washington comparative fault statute, and concluded that the legislature had not intended comparison of negligent and intentional conduct. Other courts, however, have held that intentional tortfeasors should be compared, noting the artificiality of making the comparison in these cases without including them. "To penalize the negligent tortfeasor in such circumstances not only frustrates the purposes of the [comparative fault] statute, but violates the commonsense notion that a more culpable party should bear the financial burden caused by its intentional act." *Weidenfeller v. Star, 2* Cal. Rptr. 2d 14, 16 (1991). The Restatement (Third) of Torts: Apportionment of Liability would allow apportionment to intentional tortfeasors. See §1 cmt. b, c.

However, it is hard to view this as a "restatement" of the law, since the cases are sharply divided on the issue. See *Whitehead v. Food Max of Mississippi, Inc.*, 163 F.3d 265, 281-282 (5th Cir. 1998) (citing numerous cases taking both positions).

d. Maybe Spencer wouldn't care. If joint and several liability applies, assigning a percentage of fault to Sly will not reduce Spencer's liability: It will be liable for the plaintiff's damages, reduced only by the plaintiff's percentage of fault. In fact, including Sly in the apportionment might have the effect of driving down the plaintiff's percentage of fault. For example, if the jury only considers the fault of Hamilton and Spencer, they might find Hamilton 25 percent at fault, for failing to repair the lock, and Spencer 75 percent at fault, for failing to patrol. If they consider Sly as well, however, they might assign Hamilton 10 percent of the fault, Spencer 20 percent, and Sly 70 percent. On these assumptions, and the further assumption that joint and several liability applies, Spencer pays more — 90 percent of Hamilton's damages instead of 75 percent — if Sly is considered.

   On the other hand, if the jurisdiction has moved to *several liability*, under which each defendant only pays in proportion to its fault, including Sly makes a dramatic difference in the outcome. Spencer now pays 20 percent of Hamilton's damages if fault is apportioned to Sly, but 75 percent if Sly is ignored. Since Sly probably can't pay his part of the judgment, Hamilton loses big time if Sly's fault is considered. Naturally, it has been plaintiffs who argue vehemently against including intentional tortfeasors in the apportionment of fault.

SPECIAL VERDICTS: GUIDING THE JURY IN APPLYING COMPARATIVE NEGLIGENCE

While comparative negligence may be fairer than the all-or-nothing contributory negligence rule, it is more complicated for a jury to apply. Under contributory negligence, the jury's role was clear. If it found that the

plaintiff was negligent, it rendered a verdict for the defendant, since any negligence barred the plaintiff from recovery. If it found that the plaintiff was not negligent, but that the defendant was, it decided how much the plaintiff should be awarded in damages to compensate her for her injuries, and came back with a verdict for the plaintiff for that amount.

Under comparative negligence, by contrast, the jury must decide the percentage of negligence of each party, including the plaintiff, and perhaps of absent tortfeasors as well. It must then determine the value of the plaintiff's damages, and apply the comparative negligence statute to reduce those damages and render a verdict for the reduced damages against the appropriate defendants. Since the jurors presumably know little about comparative negligence, they must be fully instructed as to how to compare the negligence of the parties, the effect of the plaintiff's negligence, and how the damages are to be reduced.

These instructions will be complicated. If the jury simply renders a general verdict ("verdict for plaintiff for $50,000" or "verdict for the defendant"), it will be impossible to know whether they understood and followed the instructions. Many states address this problem by authorizing or requiring the use of special verdicts, which ask the jury to make factual determinations about the negligence of each party and damages and leave it to the court to apply the comparative negligence statute to fashion a proper judgment. For example, if the Rousseau case (described on p. 571) were tried in a pure comparative negligence jurisdiction, the court might use a special verdict form like that in Figure 25-1 (see p. 585).

STATE OF WEST DAKOTA

SUTTER COUNTY — SUPERIOR COURT
NO. 19-3217

JOHN J. ROUSSEAU,

Plaintiff,

v.

JOHN LOCKE,
CITY OF PARIS

Defendants

SPECIAL VERDICT

We, the jury in the above entitled case, find the following special verdict on the issues submitted to us:

Issue #1: Were the defendants, or either of them, negligent? (Answer ''yes'' or ''no'')

Answer: Defendant John Locke YES

Defendant City of Paris NO

[If you answered ''yes'' as to either defendant, then answer the next issue]

Issue #2: Was the negligence of the defendant, or either of them, a proximate cause of the injury to the plaintiff? {Answer ''yes'' or ''no'')

Answer: Defendant John Locke YES

Defendant City of Paris —

[If you answered ''yes'' to Issue #2 as to either defendant, please answer Issue #3]

Issue #3: Was the plaintiff negligent? (Answer ''yes'' or ''no'')

Answer: YES

[If you answered ''yes'' to Issue #3, then answer the next issue]

Issue #4: Was the plaintiff's negligence a proximate cause of his injury? (Answer ''yes'' or ''no'')
Answer: YES

[If you answered ''yes'' to both Issue #1 and Issue #2, then answer the next issue]

Issue #5: Without taking into consideration the question of reduction of damages due to the negligence of the plaintiff, if any, what is the total amount of damages suffered by the plaintiff?

Answer: $40,000

[If you have answered Issues #1, 2, 3 and 4 ''yes,'' then answer the following issue]

Issue #6: Assuming that 100 percent represents the combined negligence of the plaintiff and of the defendant[s] whose negligence contributed as a proximate cause to plaintiff's injury, what proportion of such combined negligence is attributable to the plaintiff and what proportion is attributable to each defendant?

Answer: To plaintiff: 55%

To defendant Locke 45%

To defendant City of Paris 0%

Total: 100%

J. Stuart Mill
Jury Foreperson

Figure 25-1

A special verdict form like Figure 25-1 allows the court to ensure that the more complex comparative negligence rules are properly applied. The jury is simply instructed to make the necessary factual findings concerning the negligence of each party and the plaintiff's resulting damages. The jury fills in these findings on the special verdict form. After the jury renders the special verdict, the judge applies the comparative negligence statute to its findings by

reducing the plaintiff's damages to account for her negligence and entering judgment against the defendants who are liable under the statute, or if the statute requires, entering a judgment for the defendant. The special verdict procedure simplifies the jury instructions, since the judge does not have to explain to the jury how to compare the negligence of the various parties in fashioning a final judgment.

For example, if the Rousseau case were tried under pure comparative negligence doctrine, and the jury rendered the special verdict in Figure 25-1, the judge would enter judgment for Rousseau against Locke for $18,000 (45 percent of $40,000), but dismiss the claim against the city, since the jury did not find it negligent. If the case had been tried in a modified comparative negligence state, the judge would enter judgment for both defendants, since the plaintiff was more than 50 percent negligent.

Examples

Verdicts and Judgments

10. Assume that the jury returned the special verdict shown in Figure 25-2 (see p. 588), in a not-greater-than state that compares the plaintiff's negligence to the aggregate negligence of the defendants.
    a. What judgment should the judge render?
    b. What if the jurisdiction compared plaintiff's negligence to each defendant individually? (See p. 590 for analysis.)

11. One of the advantages of the special verdict is that the jury need not be given complicated instructions on the effect of their factual findings. For example, they do not need to know that the plaintiff will lose if she is more negligent than the defendant in a modified comparative negligence state. All they need do is find the actual percentages, since the judge fashions the verdict based on their findings. However, a good many states require the judge to inform the jury of the effect of finding the plaintiff more negligent than the defendant, even though logically it is unnecessary — or perhaps even an impediment to objective decision making — for them to know. See, e.g., Iowa Code Ann. §668.3(5). Under such a statute, the judge would give an instruction like this in a

state which applies the 50 percent bar rule:

STATE OF WEST DAKOTA

SUTTER COUNTY — SUPERIOR COURT
NO. 19-3217

JOHN J. ROUSSEAU,

Plaintiff,

v.

JOHN LOCKE,
CITY OF PARIS

Defendants

SPECIAL VERDICT

We, the jury in the above entitled case, find the following special verdict on the issues submitted to us:

Issue #1: Were the defendants, or either of them, negligent? (Answer ''yes'' or ''no'')

Answer: Defendant John Locke YES

Defendant City of Paris YES

[If you answered ''yes'' as to either defendant, then answer the next issue]

Issue #2: Was the negligence of the defendants, or either of them, a proximate cause of the injury to the plaintiff? (Answer ''yes'' or ''no'')

Answer: Defendant John Locke YES

Defendant City of Paris YES

[If you answered ''yes'' to Issue #2 as to either defendant, please answer Issue #3]

Issue #3: Was the plaintiff negligent? (Answer ''yes'' or ''no'')

Answer: YES

[If you answered ''yes'' to Issue #3, then answer the next issue]

Issue #4: Was the plaintiff's negligence a proximate cause of his injury? (Answer ''yes'' or ''no'')

Answer: YES

[If you answered ''yes'' to both Issue #1 and Issue #2, then answer the next issue]

Issue #5: Without taking into consideration the question of reduction of damages due to the negligence of the plaintiff, if any, what is the total amount of damages suffered by the plaintiff?

Answer: $100,000

[If you have answered Issues #1, 2, 3 and 4 ''yes,'' then answer the following issue]

Issue #6: Assuming that 100 percent represents the combined negligence of the plaintiff and of the defendant[s] whose negligence contributed as a proximate cause to plaintiff's injury, what proportion of such combined negligence is attributable to the plaintiff and what proportion is attributable to each defendant?

Answer: To plaintiff: 45%

To defendant Locke 50%

To defendant City of Paris 5%

Total: 100%

J. Stuart Mill

Jury Foreperson

Figure 25-2

> If the plaintiff's negligence is as great as or greater than the negligence of the defendant, she may not recover. If the plaintiff's negligence is less than that of the defendant, she may recover her damages, reduced in proportion to her negligence in causing the accident.

Who wants the jury to be given this instruction, the defendant or the plaintiff?

12. Assume that the relevant state applies pure comparative negligence. The jury fills out the form as shown in Figure 25-3 below at p. 591.
    a. What mistake did the jury make?
    b. What should the judge do about it?

Explanations

Verdicts and Judgments

10. a. The judge should enter judgment for Rousseau for $55,000 against both Locke and the City of Paris. Rousseau is entitled to recover since his negligence is not greater than that of all defendants combined, but his $100,000 in damages will be reduced by 45 percent. If joint and several liability applies, both defendants are liable for the resulting judgment of $55,000, despite the disparity in their degrees of negligence.
    b. If the jurisdiction compared the plaintiff's negligence to each defendant's individually, the judge would enter a judgment for Rousseau against Locke for $55,000, and a judgment dismissing Rousseau's claim against the City of Paris, since Rousseau's negligence is greater than the city's negligence.

11. Naturally, the plaintiff will seek this instruction, since it alerts the jury to the fact that, if they find the plaintiff as faulty as the defendant (or more at fault), she will lose entirely. Realistically, this is likely to influence a jury in a close case to find the plaintiff 49 percent negligent instead of 50 percent (or 55 percent, or 60 percent for that matter). Statutes that require an instruction like this recognize the practical reality that juries often structure their findings to divide the damages in close cases, and

that in a practical torts world there is nothing particularly shocking about that.

12. a. The special verdict here indicates that the jury has failed to follow its instructions. If the city's negligence was not a proximate cause of the accident, as the answer to the second question indicates, the jury should not have included it in assigning the percentages of negligence at the end. The jury may have concluded that, as long as *some* defendant's negligence caused the accident, both could be liable. Or, perhaps the jurors misunderstood proximate cause (now really, how could they?) to mean the most important cause, and they answered

STATE OF WEST DAKOTA

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SPECIAL VERDICT

We, the jury in the above entitled case, find the following special verdict on the issues submitted to us:

Issue #1: Were the defendants, or either of them, negligent? (Answer ''yes'' or ''no'')

Answer: Defendant John Locke YES

Defendant City of Paris YES

[If you answered ''yes'' as to either defendant, then answer the next issue]

Issue #2: Was the negligence of the defendant, or either of them, a proximate cause of the injury to the plaintiff? (Answer ''yes'' or ''no'')

Answer: Defendant John Locke YES

Defendant City of Paris NO

[If you answered ''yes'' to Issue #2 as to either defendant, please answer Issue #3]

Issue #3: Was the plaintiff negligent? (Answer ''yes'' or ''no'')

Answer: YES

[If you answered ''yes'' to Issue #3, then answer the next issue]

Issue #4: Was the plaintiff's negligence a proximate cause of his injury? (Answer ''yes'' or ''no'')

Answer: YES

[If you answered ''yes'' to both Issue #1 and Issue #2 , then answer the next issue]

Issue #5: Without taking into consideration the question of reduction of damages due to the negligence of the plaintiff, if any, what is the total amount of damages suffered by the plaintiff?

Answer: $100,000

[If you have answered Issues #1, 2, 3 and 4 ''yes,'' then answer the following issue]

Issue #6: Assuming that 100% represents the combined negligence of the plaintiff and of the defendant[s] whose negligence contributed as a proximate cause to plaintiff's injury, what proportion of such combined negligence is attributable to the plaintiff and what proportion is attributable to each defendant?

Answer: To plaintiff: 10%

To defendant Locke 75%

To defendant City of Paris 15%

Total: 100%

J. Stuart Mill

Jury Foreperson

Figure 25-3

"no," since it found Locke much more negligent. For whatever reason, the jury's factual findings are inconsistent; it has assigned negligence percentages to all parties despite its finding that the city's negligence was not a proximate cause of Rousseau's injuries.

b. If the jury comes back with this verdict, the judge can reinstruct them on proximate cause and send them back to deliberate further and clarify their verdict. This may well "save the trial" if the jury comes

back with a consistent verdict after the supplemental instruction.

Consider what would have happened if the jury had simply been asked to render a general verdict in this case. If it mistakenly considered the city's negligence, even though it did not cause the injuries, it probably would have come back with a verdict against each defendant for $90,000 (Rousseau's damages reduced by his 10 percent negligence). This would look on the surface like a perfectly permissible verdict, even though in fact it was based on a misunderstanding of the law. The general verdict often hides such mistakes. That is its virtue or its vice, depending on how you look at it.

Interestingly, although the special verdict appears to make so much sense in comparative negligence cases, not all states favor them. Some require the court to use a special verdict; others permit them, and one or two, remarkably, *bar* them entirely, despite their obvious utility in revealing the jury's reasoning process. See, e.g., Vt. Stat. Ann. tit. 12 §1036 (requiring use of general verdict).

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1. See E. Turk, Comparative Negligence on the March, 28 Chi.-Kent L. Rev. 189, 239-244 (1950).

2. This Nebraska statute was replaced by a modified comparative negligence statute for cases arising after February 8,1992. See Nebraska Laws 1992, L.B. 262 §19.

3. See R. Keeton, Comment on *Maki v. Frelk,* 21 Vand. L. Rev. 906, 911 (1968).

4. D. Nixon, The Actual "Legislative Intent" Behind New Hampshire's Comparative Negligence Statute, 12 N.H.B.J. 17, 24-25 (1969).

5. Uniform Comparative Fault Act §2(b), 12 U.L.A. 45 (Supp. 1994). The Uniform Comparative Fault Act is a model act, written by the National Conference of Commissioners on Uniform State Laws, an organization devoted to encouraging uniform state legislation on issues of general applicability. See also Restatement (Third) of Torts: Apportionment of Liability §8 (also noting relevance of causation in assessing percentages of fault).

6. No, he cannot collect $110,000. If Locke pays the judgment, Rousseau could not collect anything from the city; it would plead "satisfaction" of the judgment, that Rousseau had been fully paid. That defense would bar any further recovery from the city.

7. Of course, Paine could only collect a total of $40,000. See n. 6, p. 574.

8. Under the bedrock principle that you can't get blood out of a stone.

9. An interesting related issue is how to compare the parties' negligence in a multi-*plaintiff* case. Is the negligence of each plaintiff compared to the negligence of the defendants, or is the negligence of all the parties, plaintiffs and defendants, calculated to add up to 100 percent? In *Churchill v. F/V Fjord, 892* F.2d 763, 772 (9th Cir. 1989), for example, the following percentages of negligence were assigned at trial: P1, 20 percent; P2, 20 percent; D1, 35 percent; D2, 25 percent; D3, 0 percent. The appellate court reversed, holding that the negligence of each plaintiff must be compared *separately* against the negligence of the defendants. Thus, in calculating each plaintiff's negligence, the jury must ignore the negligence of the other plaintiff, just as they ignore the negligence of absent tortfeasors in a state that considers only the negligence of parties before the court.

CHAPTER 26

The Fracturing of the Common Law: Loss Allocation in the Comparative Negligence Era

INTRODUCTION

Until recently, negligence doctrine developed largely through the evolutionary process of case law. Successive court opinions refined basic principles such as duty, breach, and causation, and affirmative defenses such as assumption of the risk and contributory negligence. Throughout this formative era, there was never any doubt that legislatures had the power to change such common law principles. Indeed, dramatic changes were made by statute in certain areas, such as workers' compensation and wrongful death. But these were exceptions; for the most part, negligence law was common law.

In the last few decades, however, legislatures have gotten heavily into the business of restructuring the common law of torts. A prime example, of course, is comparative negligence, which has been adopted by statute in many jurisdictions. Many states have also enacted statutes placing caps on noneconomic damages, creating screening panels for medical malpractice cases, and limiting the scope of the collateral source rule.

Legislatures have been especially tempted to tinker with two traditional doctrines governing the allocation of negligence damages: joint and several liability and contribution. Recent statutes have fractured these fairly

straightforward doctrines into a profusion of idiosyncratic approaches, many applicable only in a single state. These legislative changes to the principles allocating damages among tortfeasors illustrate a movement, found in many areas of the law, from general principles that work well in the broad run of cases (but may operate unfairly in some), to more precise, detailed rules that may be more "fair" but also introduce administrative complexities.

This chapter illustrates some of the changes legislatures have made to basic doctrines governing liability of multiple tortfeasors. It is not intended to make you an expert in the details of any state's doctrine, but rather as a case study of the extent to which legislatures have fractured previously monolithic common law principles in the search for greater equity.

COMPARATIVE NEGLIGENCE: THE CATALYST FOR CHANGE

As earlier chapters explain, before comparative negligence the defendants' responsibility for damages was determined by principles of joint and several liability and contribution. Each tortfeasor was fully liable for the plaintiff's damages. A tortfeasor who paid the plaintiff was usually entitled to collect "pro rata" contribution from the other tortfeasors. That is, the tortfeasors shared the damages equally; if there were two tortfeasors, the one who paid would recover half in contribution from the other, if there were six, each paid a sixth, and so forth.

In most states, these principles were well established before the advent of comparative negligence. While the adoption of comparative negligence did not automatically change them, it provided new information about the relative fault of the parties which suggested that the classic principles were too blunt.

Suppose, for example, that Nell sued Fagan and Twist for negligence, and the jury found Nell 20 percent at fault, Fagan 70 percent at fault, and Twist a mere 10 percent at fault. If Nell's damages were $100,000, she would be entitled to recover $80,000, her full damages reduced by her percentage of negligence. Under joint and several liability, Fagan and Twist would each be liable for the $80,000, the plaintiff's damages adjusted to account for her

negligence.[1] Under traditional contribution doctrine, whichever defendant paid that amount would recover a pro rata share, or $40,000, from the other (assuming the contributing tortfeasor was able to pay).

However, in light of the parties' percentages of negligence, these results appear inequitable, Twist, who was found only 10 percent at fault, will argue that he should not be liable to Nell (who was twice as faulty) for $80,000, as he would be under joint and several liability. Similarly, he will argue that if Fagan pays the judgment, Fagan should get much less than half of it (which he would get under pro rata contribution) back from Twist, since Twist was only one-seventh as faulty as Fagan.

LOGICAL IMPLICATIONS: PROPORTIONAL CONTRIBUTION

Perhaps the most obvious implication of comparative negligence is that contribution among tortfeasors should be in proportion to their degrees of fault. Under this approach Fagan would contribute seven-eighths of the judgment ($70,000) and Twist would contribute one-eighth ($10,000). Because the defendant's relative degrees of fault are determined in comparative negligence cases, this appears both simple and fair: The proportions can be calculated from the jury's verdict, and tortfeasors who are more "faulty" will pay more than those who are less so. If each defendant is able to pay, each will end up contributing to the judgment in proportion to the fault assigned by the jury.[2]

Some tinker-prone legislatures have adopted such "proportional" or "comparative" contribution. The Rhode Island contribution statute, for example, provides:

> The right of contribution exists among joint tortfeasors; provided however, that when there is a disproportion of fault among joint tortfeasors, the relative degree of fault of the joint tortfeasors shall be considered in determining their pro rata shares.

R.I. Gen. Laws §10-6-3. Under a statute like this, after the plaintiff has been paid, the judgment will be redistributed among the defendants through contribution in proportion to the tortfeasors' percentages of fault, rather than

equally or “pro rata.”

While proportional contribution distributes the loss in proportion to the fault of the parties, calculating the defendants’ shares is more complex under proportional contribution than it is under pro rata contribution. Instead of simply dividing by the number of tortfeasors, judges and juries have to deal with fractions. In the example, Twist should bear 10/80ths of the judgment ($10,000) and Fagan 70/80ths ($70,000). (The proportions can be calculated by adding the defendants’ percentages of negligence together to form the denominator of the fraction; each individual tortfeasor’s percentage will form the numerator for that tortfeasor.) If Fagan paid Nell her $80,000 (remember that he is liable for the whole judgment under joint and several liability), he would receive 10/80ths ($10,000) from Twist, and absorb 70/80ths ($70,000) of the judgment himself.

These fractions don’t seem so bad; this amount of increased complexity is clearly worth it for the gain in fairness. As the following examples illustrate, however, applying proportional contribution not only requires judges to dust off their math skills but also raises administrative problems. In considering these examples, don’t get bogged down in the math; the concept of proportional contribution, and the complexities it can raise, are the main point. (The explanations begin on p. 604.)

Examples

Out of Proportion

1. Flite sues Micawber, Heap, and Murdstone for negligence. The jury finds Flite 20 percent at fault, Micawber 50 percent, Heap 20 percent, and Murdstone 10 percent. They find Flite’s damages to be $60,000.
   a. Assume that the case takes place in a modified comparative negligence jurisdiction which compares the plaintiff’s negligence to that of all defendants combined. Assume further that joint and several liability and the Rhode Island proportional contribution statute apply. How much would Flite be entitled to collect from Heap?
   b. If Heap paid the judgment, how much would he recover in contribution from Murdstone if proportional contribution applies?

c. Assume that the case takes place in a modified comparative negligence jurisdiction that compares the plaintiff's negligence to that of each defendant individually, and allows her to recover from any defendant as long as she was not more negligent than that defendant. If Heap paid the judgment, and proportional contribution applied, how much would he recover from Micawber in contribution?

2. Suppose that Heap pays the judgment and seeks contribution from Turveydrop, who allegedly was *also* negligent in causing the accident, but wasn't sued by Flite. How should Turveydrop's liability for contribution be determined?

MORE LOGICAL IMPLICATIONS: PROPORTIONAL CREDIT FOR SETTLEMENTS

Once comparative percentages of fault are established, another logical implication is to give a proportional or comparative credit for a settlement with one tortfeasor, instead of the traditional dollar credit provided in the Uniform Contribution Among Joint Tortfeasors Act (see §4(a), p. 505). Suppose, for example, that Nell sued Fagan and Twist, and settled with Fagan for $25,000. She then tries her case against Twist, in a jurisdiction that requires the jury to assign percentages of negligence to all tortfeasors (including Fagan). The jury comes back with a finding that Nell was 20 percent at fault, Fagan 70 percent, and Twist 10 percent. It finds Nell's damages to be $100,000.

In a jurisdiction that retains joint and several liability, Twist would be liable to Nell for $80,000, her damages reduced by 20 percent to account for her negligence. If the jurisdiction applied the Uniform Act's dollar credit for settlements, Twist would pay $55,000 to Nell, after the dollar credit for Fagan's settlement payment.

Now, let's consider what Twist would owe in a jurisdiction that gives him a proportional credit for Fagan's settlement. Under this approach (advocated

in the Restatement (Third) of Torts: Apportionment of Liability §16), Fagan is viewed as selling his proportion of the ultimate judgment to Nell for the agreed settlement amount. Thus, Twist would get a $70,000 credit against the judgment for Fagan's proportion of their combined fault — 70/80ths of the $80,000 judgment. Twist would end up paying $10,000 to Nell under this approach, instead of $55,000 under the dollar credit approach.[3]

Another example may help. Assume that Nell had settled for $3,000 with Twist, and the jury returned the same $100,000 verdict when Nell went to trial against Fagan. Fagan would get a 10/80ths credit against the $80,000 judgment. He would end up paying $70,000 to Nell.

Example

Credit Transactions

3. Take the facts of Example 1, in which the jury found Flite (the plaintiff) 20 percent at fault, Micawber 50 percent, Heap 20 percent, and Murdstone 10 percent. They find Flite's damages to be $60,000. Assume that Flite settles with Heap for $22,000 before trial. Assume that the jurisdiction applies joint and several liability, compares plaintiff's fault to the combined fault of the defendants, and gives a proportional credit for settlements.
   a. How much is Murdstone liable for, before considering any credit for Heap's settlement?
   b. How much will Murdstone actually have to pay, after adjusting the judgment to account for Heap's settlement?
   c. How much will Flite collect altogether?

ULTIMATE IMPLICATIONS: SEVERAL LIABILITY

The adoption of proportional contribution does not change the principle of joint and several liability. It only changes the rules for *reallocating* the loss

once one of the tortfeasors has paid the judgment amount to the plaintiff. Thus, proportional contribution still requires a two-step process: a suit by the plaintiff that establishes her right to recover damages, followed by a second action for contribution by the tortfeasor who pays those damages (or a motion for contribution in the original action). Similarly, giving a proportional credit for settlements requires the entry of a judgment, followed by a proportional adjustment for the settlement.

Logically, wouldn't it be simpler to make the defendants separately liable to the plaintiff for their *respective shares of the judgment*? In Nell's action, for example, Fagan would be liable to Nell for 70/80ths of her adjusted damages ($70,000) and Twist would be liable for 10/80ths ($10,000). Nell would recover $80,000 (her raw damages reduced by her percentage of negligence) just as she did under joint and several liability, but each defendant would only be "severally" liable for her own portion of the damages.

Obviously, one great advantage of this approach is that it eliminates the need for contribution entirely: None of the defendants need seek contribution, since none pays in excess of his "share" of the damages. However, several liability has a great *disadvantage* from the plaintiff's point of view: It casts the burden of the insolvent tortfeasor on her. If Fagan cannot pay, Nell will only recover $10,000 under several liability, because Twist is not liable for Fagan's share. Under joint and several liability, by contrast, both tortfeasors would be liable to Nell for the entire judgment. If Fagan were insolvent, Nell could collect his share from Twist. Of course, this advantage of joint and several liability to the plaintiff carries a corresponding *disadvantage* to defendants: Under joint and several liability, Twist could end up paying the entire judgment if Fagan is insolvent, even though he was only 10 percent at fault.[4]

An increasing number of states have adopted several liability, either for all cases or for some situations. Utah's comparative negligence statute, for example, provides

> No defendant is liable to any person seeking recovery for any amount in excess of the proportion of fault attributed to that defendant under Section 78B-5-819.

Utah Code Ann. §78B-5-818(3). Similarly, Vermont's statute provides that

> Where recovery is allowed against more than one defendant, each defendant shall be liable for that proportion of the total dollar amount awarded as damages in the ratio of the amount of his or her

causal negligence to the amount of causal negligence attributed to all defendants against whom recovery is allowed.

Vt. Stat. Ann. tit. 12 §1036.

The following examples illustrate how Flite's case would come out under several liability. Assume in each example that the jurisdiction applies comparative negligence of the "not greater than" variety, compares the plaintiff's fault to the combined fault of all defendants, and has switched to several liability. Again, the examples illustrate that the attempt to make the rules more equitable carries its own problems of administration.

Several Examples

4. Assume the same facts as in Example 1: Flite sues Micawber, Heap, and Murdstone for negligence. The jury finds Flite 20 percent at fault, Micawber 50 percent, Heap 20 percent, and Murdstone 10 percent. They find Flite's damages to be $60,000.
   a. If all defendants are solvent, how much will Flite recover from each defendant under several liability?
   b. If Micawber pays the judgment against him, how much can he get in contribution from Murdstone?

5. Assume that Flite's case was litigated in a state that requires the jury to assign percentages to all tortfeasors, including tortfeasors who are not before the court at trial. Assume that Flite settled with Micawber for $9,000 before trial. The jury assigns 20 percent to Flite, 50 percent to Micawber, 20 percent to Heap, and 10 percent to Murdstone. The damages are again assessed at $60,000. How much should Heap and Murdstone pay to Flite?

One Among Several

6. Suppose that Flite sued Micawber only, that under the applicable statute the negligence is apportioned only to the parties at trial, and the jury determined that Flite was 25 percent at fault and Micawber was 75 percent at fault.
   a. Assuming again that the damages are $60,000, how much would

Micawber be liable for?

b. Could Micawber implead Heap and Murdstone in the action, to assure that their negligence is considered in allocating percentages?

7. Suppose that Flite sued Micawber and Murdstone only, that under applicable law only the negligence of parties before the court at trial is considered, and that the jury apportions the negligence 25 percent to Flite, 45 percent to Micawber, and 30 percent to Murdstone.

   a. Assuming again that the damages are $60,000, how much would Micawber and Murdstone be liable for?

   b. Suppose that, after getting the judgment against Micawber and Murdstone and collecting from Micawber, Flite learns that Murdstone is insolvent. Since he has not been fully compensated, he sues Heap, another tortfeasor he left out of his first action. How should Heap's liability be determined?

8. It is sometimes said that several liability makes more sense, because it allocates the loss according to the amount of damage caused by each tortfeasor. What would a classic old common law judge like Judge Fudd think about this reasoning?

9. Assuming that it appears that Murdstone's negligence was a relatively minor factor in causing the accident, how would you expect the switch to several liability to affect the dynamics of settlement negotiations between him and Flite?

POTPOURRI: A SAMPLING OF COMPARATIVE APPORTIONMENT STATUTES

All of this fine-tuning makes the classic liability rules look like pretty blunt instruments, though perhaps blissfully so. Yet recent statutes illustrate even more idiosyncratic variations on the basic allocation rules. Here are three statutes that illustrate the breadth of statutory approaches to apportioning

damages under comparative negligence.

Let's start with a fairly straightforward several liability statute. The Indiana comparative fault statute provides:

> (1) The jury shall determine the percentage of fault of the claimant, of the defendants, and of any person who is a nonparty. . . . In assessing percentage of fault, the jury shall consider the fault of all persons who caused or contributed to cause the alleged injury, death, or damage to property, tangible or intangible, regardless of whether the person was or could have been named as a party. The percentage of fault of parties to the action may total less than one hundred percent (100%) if the jury finds that fault contributing to cause the claimant's loss has also come from a nonparty or nonparties.
> (2) If the percentage of fault of the claimant is greater than fifty percent (50%) of the total fault involved in the incident which caused the claimant's death, injury, or property damage, the jury shall return a verdict for the defendants and no further deliberation of the jury is required.
> (3) If the percentage of fault of the claimant is not greater than fifty percent (50%) of the total fault, the jury shall then determine the total amount of damages the claimant would be entitled to recover if contributory fault were disregarded.
> (4) The jury next shall multiply the percentage of fault of each defendant by the amount of damages determined under subdivision (3) and shall enter a verdict against each defendant . . . in the amount of the product of the multiplication of each defendant's percentage of fault times the amount of damages as determined under subdivision (3).

Ind. Code Ann. §34-51-2-8(b).

The Iowa comparative fault statute retains joint and several liability only for defendants found at least 50 percent at fault. Even for them, joint and several liability only applies to economic damages, not to intangible or "noneconomic" damages:

> In actions brought under this chapter, the rule of joint and several liability shall not apply to defendants who are found to bear less than fifty percent of the total fault assigned to all parties. However, a defendant found to bear fifty percent or more of fault shall only be jointly and severally liable for economic damages and not for any noneconomic damage awards.

Iowa. Code Ann. §668.4.

Last, here's one that Oregon tried for a while, but was later replaced by another complex provision!

> (2) In any civil action arising out of bodily injury, death or property damage, including claims for emotional injury or distress, loss of care, comfort, companionship and society, and loss of consortium, the liability of each defendant for noneconomic damages awarded to plaintiff shall be several only and shall not be joint.
> (3) The liability of a defendant who is found to be less than 15 percent at fault for the economic damages awarded the plaintiff shall be several only.
> (4) The liability of a defendant who is found to be at least 15 percent at fault for the economic damages awarded the plaintiff shall be joint and several, except that a defendant whose percentage of fault is less than that allocated to the plaintiff is liable to the plaintiff only for that percentage of

the recoverable economic damages.

Or. Rev. Stat. §18.485 (superseded under 1995 Or. Laws ch. 696).

These statutes illustrate that the monolithic common law approach to allocating liability has yielded to a good many experiments in the "laboratory" of the states.[5] While these statutes fine-tune the liability rules in an effort to make the punishment fit the crime, they are also more complex for courts and parties to apply. Consider how the following case would come out under these fractured approaches to allocating liability.

Compound Fractures

10. Jingle sues Weller and Snubbin for negligence. After trial, the jury finds Jingle 20 percent at fault, Weller 60 percent, and Snubbin 20 percent. The jury further finds, by special verdict, that Jingle's economic damages are $20,000, and his noneconomic damages are $60,000.
    a. How much would Jingle recover from Weller under each statute?
    b. How much would he recover from Snubbin under each statute?

Explanations

Out of Proportion

1. a. Because Flite's negligence is less than the total negligence attributed to the defendants, she would recover a judgment of $48,000, her raw damages reduced by 20 percent. Under joint and several liability, each defendant, including Heap, would be liable for that amount. Proportional contribution does *not* change the principle of joint and several liability to the plaintiff; it simply changes the rules for reallocating the judgment after one of the tortfeasors pays it.

   b. To determine Murdstone's liability for contribution, it is necessary to calculate his proportion of the judgment. As the introduction indicates, Murdstone's proportion can be calculated by taking the total of the negligence percentages of all defendants as the denominator (here 80) and Murdstone's percentage (10) as the numerator. Multiply that fraction times the judgment amount, which

is $48,000. If Heap paid $48,000 to Flite, he should recover 10/80ths of it from Murdstone, or $6,000. He'll get 50/80ths ($30,000) from Micawber, and absorb 20/80ths ($12,000) himself.

c. The problem here is in determining the proportional shares. Since the jurisdiction compares the negligence of the plaintiff to that of each defendant individually, Flite cannot recover from Murdstone, who was less negligent. She can recover from Micawber, and from Heap, whose negligence was equal to hers. If joint and several liability applies, Heap and Micawber are still liable to Flite for $48,000, 80 percent of her damages. Heap pays the $48,000, and now seeks proportional contribution from Micawber.

Since Murdstone is not liable to Flite, he is also presumably not required to contribute to the judgment: It doesn't seem logical that a defendant should recover contribution from Murdstone when the plaintiff can't recover anything from him. Contribution statutes typically provide for contribution among parties "jointly liable in tort," or "liable for the same injury." Since Murdstone is not liable, he presumably cannot be forced to contribute.[6]

So, Heap and Micawber should contribute proportionally to the $48,000 judgment. Between them, they account for 70 percent of the fault. Presumably Heap should pay 20/70ths and Micawber should pay 50/70ths. Thus, Heap will recover 50/70ths of 48,000 ($34,286) in contribution from Micawber. He ends up paying $13,714, which is 20/70ths of $48,000.

2. Our theme is simplicity versus fairness. It is probably more equitable to make contribution proportional, but this example illustrates the price that must be paid in terms of increased complexity of administration. If all tortfeasors are parties to the first action, proportional contribution is fairly simple to administer: The jury's findings can be applied to redistribute the judgment according to the defendants' percentages of negligence. But the plaintiff need not sue every tortfeasor. Here, for example, Flite did not sue Turveydrop, and no negligence percentage was assigned to him. Heap, who paid the judgment, should be entitled to contribution from Turveydrop, but it is not clear how to calculate the proportion of the judgment Turveydrop should pay.

Some courts require the jury in comparative negligence actions to

assess percentages of negligence for *all* tortfeasors, even if the plaintiff has not made a claim against them and they are not before the court. (Others restrict the jury to assessing percentages for the parties before the court at trial.) However, even if Turveydrop were assigned a percentage in Flite's initial suit, it would not bind him, since he has not had the opportunity to litigate his proportion of negligence. See J. Glannon, Civil Procedure: Examples and Explanations 591, 601-602 (8th ed. 2018), Example 1 (explaining leniency of surly myrmidons toward parties who have not litigated issue in prior action). Alternatively, some comparative negligence statutes require the defendant to implead other tortfeasors in the original suit to obtain contribution from them. However, this has problems too, since there may not be personal jurisdiction over all tortfeasors in the plaintiff's initial action.

Since Turveydrop was not a party to the first action, it appears that the court in the contribution action would have to make a new finding of the relative percentages of negligence of all the parties, including Turveydrop. Turveydrop would be liable for the percentage allocated to him in the contribution action, but presumably the other tortfeasors would pay according to the percentages assessed against them in the original action. This is awkward — somehow, the accounting is not going to work out right — and imposes an additional burden on the court in the contribution action.

Credit Transactions

3. a. Under joint and several liability, Murdstone is liable for Flite's damages, $60,000, reduced by her 20 percent of fault, or $48,000. But he will get a credit against this amount for Heap's settlement.

   b. Murdstone is entitled to a proportional credit for Heap's settlement. The credit should be 20/80ths or 1/4 of the $48,000. (It is calculated by putting Heap's percentage over that of all defendants as a group, and then taking the credit against the judgment amount — not the raw damages.)[7] So Murdstone owes $36,000 to Flite.[8]

   c. Flite collects $58,000, the $36,000 he gets from Murdstone plus the $22,000 Heap paid in settlement. This is $10,000 more than the jury

decided she should get, since Flite made a good deal with Heap, who paid well in excess of his "share" of the fault. The Restatement (Third) of Torts: Apportionment of Liability approves this result. "Since the plaintiff bears the risk of an inadequate settlement (in which case the plaintiff will recover less than the damages determined by the factfinder), the plaintiff should also obtain the benefit of a favorable settlement." §16 cmt. e.

Of course, when Heap paid his $22,000 he didn't know what the jury would ultimately do, so he may have made a reasonable decision (even leaving legal fees and costs of going to trial aside). And remember, so long as joint and several liability applies, he could have ended up paying the whole $48,000 if he didn't settle and the other defendants were insolvent.

Although Flite made out well in this example, she could also end up collecting less than $48,000 if the court uses the proportional credit approach. If Heap had settled for $5,000, Flite would have collected a total of $41,000 ($36,000 from Murdstone or Micawber and $5,000 from Heap). These possibilities make settlement an interesting exercise for all parties.

Several Examples

4. a. Flite should recover a total of $48,000 if all defendants pay their several shares. Micawber is liable for 50/80ths of the damages after adjustment for Flite's negligence, or $30,000. Heap pays 20/80ths of the adjusted judgment, or $12,000. And Murdstone owes 10/80ths of $48,000, or $6,000. Their three several shares together total $48,000.

Thus, Flite recovers the same amount as she would under joint and several liability, as long as everyone is solvent.[9] The difference is that each defendant pays according to his proportion of negligence, instead of being liable for the full judgment. And, of course, Flite must *do the collecting* from each defendant; she cannot collect the full judgment from one and leave him to seek contribution from the other defendants. Since collecting judgments can be an arduous and expensive process in itself, this is a significant shift in the burden on the parties.

b. Micawber recovers nothing in contribution from Murdstone. The

judgment against Micawber will be for his share ($30,000) but no more, since he is only liable to Flite for his share. Thus, he has no right of contribution from any other tortfeasor because he never pays more than his "share." Nor does anyone have a right of contribution from him. This is an obvious advantage of several liability.

5. Under several liability, a tortfeasor who settles simply extinguishes liability for his share. There is no need to give anyone else a credit for the payment, because they are only separately liable for their own shares. If Micawber had not settled, his share would have been $30,000, but Flite settled this share for $9,000. The remaining tortfeasors are only liable for their shares. Heap would pay 20/80ths of $48,000, or $12,000, and Murdstone would pay 10/80ths, or $6,000.

   Thus, Flite would recover $27,000 altogether ($9,000 from Micawber, $12,000 from Heap, and $6,000 from Murdstone). She would collect less than her full judgment because she sold Micawber's share ("worth" $30,000 [50/80ths of $48,000]) for $9,000. Of course, when she settled with Micawber, she did not know how the jury would allocate fault, so her choice was at best a guess.

One Among Several

6. a. Here is another example that illustrates that several liability, while arguably more equitable, is also more complicated than it first appears. While several liability is meant to confine each defendant's liability to his share, the plaintiff has a good deal of control over what that share will be, since a tortfeasor's share depends on whose fault is considered. Here, since Micawber is the only defendant, and absent tortfeasors' negligence is not considered in this jurisdiction, he will be liable for 75 percent of the damages, or $45,000. Yet, in a several liability jurisdiction he will have no right to contribution, since he is only paying his share. Had Flite sued Heap and Murdstone as well, Micawber's percentage would presumably have been considerably smaller, since they were also partially at fault.

   It would seem that the logical way to address this problem would be to require the jury to assign shares to all tortfeasors, whether or not they are made parties to the action. Under this approach,

Micawber could reduce his share by proving that Heap and Murdstone were also negligent (and therefore assigned percentages of fault by the jury), even though they are not defendants. However, some jurisdictions that have moved to several liability only allow apportionment among the parties present at trial. See, e.g., Vt. Stat. tit. 12 §1036; *McCormack v. State*, 553 A.2d 566 (Vt. 1988).

b. Since the jurisdiction only allows the jury to consider the negligence of the parties to the suit, Micawber would clearly like to bring the other tortfeasors in as third-party defendants so that their negligence would also be considered. However, many impleader rules only allow a defendant to bring in other parties who may be liable to *him*, that is, to the defendant, not to the plaintiff. See, e.g., Fed. R. Civ. P. 14(a). Typically, other tortfeasors are brought in for contribution, but in a jurisdiction that applies several liability, there is no contribution. See Example 4b.

Some comparative negligence statutes authorize a defendant to prove that other tortfeasors were also partly at fault in causing the plaintiff's injury, even though they are not made parties. See, e. g., Ind. Code Ann. §34-51-2-8(b). This approach can be awkward, however, since the nonparties' negligence is being assessed, but they are not there litigating the issue before the jury. Any percentage of fault attributed to such an absent tortfeasor could not bind her if the plaintiff later sued her separately.

Other statutes deal with this problem, that a defendant sued alone risks disproportionate liability, by allowing that defendant to join other tortfeasors as additional defendants in the action, even though those tortfeasors would only be liable to the plaintiff, not to the original defendant for contribution (since there is no contribution under several liability). See, e. g., Conn. Gen. Stat. Ann. §52-102b (allowing defendant to join in the action a nonparty who is or may be liable for a proportionate share of the plaintiff's damages). One problem with this approach, however, is that it may not be possible to join the absent tortfeasor, because she was never identified, has settled, or is not subject to personal jurisdiction in the action.

7. a. Under several liability, each defendant would be liable in proportion to his or her fault. Micawber would be liable for 45 percent of Flite's

damages, or $27,000. Murdstone would be liable for 30 percent, or $18,000. Flite collects a total of $45,000 — he loses 25 percent of the damages ($15,000) because his fault is assessed at 25 percent.

b. This is another imponderable. Percentages have already been assigned to Micawber and Murdstone, but no room has been left to add Heap! If Flite now sues Heap, presumably percentages would only be assigned to Flite and him in the second trial. Thus Heap (like Micawber in Example 6) may be assigned a fairly high percentage of fault because he is the only tortfeasor before the court. If he were found 60 percent at fault and Flite 40 percent, and the damages are $60,000, what would he pay? Is his "several share" $36,000 (60 percent of $60,000)? If so, Flite collects $63,000 ($27,000 plus $36,000), which is much too high.

I don't know the answer to this problem, but it does illustrate that while several liability appears to be a simple means of distributing the damages, it entails some thorny administrative problems. Had all these been anticipated, some states might have resisted the urge to tinker, and stuck with the rough and ready older rules instead.

8. Judge Fudd would think this was arrant nonsense. Under traditional causation analysis any person whose act is a but-for cause of the harm has caused *all* the harm, not a part of it. That is still true under comparative negligence: the jury still must find that each defendant's negligence caused indivisible harm to the plaintiff before that defendant is liable. (If they caused divisible harm, they would be separately liable for that harm only. See Chapter 21, Example 12.)

Thus, the jury does not assign a party a 15 percent share of the negligence because she only caused 15 percent of the plaintiff's damages. When juries assign percentages of negligence, they are making findings as to how *faulty* each defendant was in causing the single, indivisible harm the plaintiff suffered. In finding one defendant 15 percent at fault and another 85 percent, they are saying that the one was considerably less negligent than the other, even though each was a but-for cause of *all* of the plaintiff's resulting damages.

9. Under several liability, Murdstone's potential damage exposure is much less than it is under joint and several liability, because he is only liable

for his percentage share of the total damages. He will therefore take a harder line in settlement negotiations than he could under joint and several liability, which exposes him to liability for the plaintiff's full damages. Under joint and several liability, plaintiff could argue, "Look, as long as the jury finds you negligent at all — even one percent — you are liable to me for the entire judgment." This is a forceful argument in many cases because, even though a plaintiff like Murdstone has a theoretical right of contribution from more negligent tortfeasors, they are often unable to pay.

Under several liability, this sword of Damocles is removed; Murdstone is only at risk for the share of fault that the jury assesses to him. If this is likely to be small, defendants like Murdstone are likely to be a good deal more stingy in considering settlement.

Compound Fractures

10. a. *Indiana:* Indiana's modified comparative negligence statute (subsection 3) allows the plaintiff to recover as long as her negligence is 50 percent or less. If this is true (as it is in Jingle's case), each defendant is severally liable in proportion to his percentage of fault. Jingle gets a judgment against Weller for 60 percent of his total damages ($80,000), or $48,000.

Iowa: Under Iowa's statute, a defendant who is more than 50 percent at fault is jointly and severally liable for the economic damages only. This distinction is sometimes found in comparative negligence regimes. Retaining joint and several liability for the "hard" losses like medical expenses and lost earnings makes it likely that these out-of-pocket losses will be paid. At the same time, imposing several liability for intangible damages, such as pain and suffering and loss of consortium, limits the exposure of defendants. The distinction may suggest that there is something less real about the intangible consequences of a serious injury. Or, it may reflect simple doubt that these intangible consequences can actually be recompensed by a money award.

Under the Iowa statute, Weller is liable for $16,000 for Jingle's economic damages. You take the $20,000 in economic damages and reduce it for Jingle's fault, to $16,000, Weller is liable for all of this

under the statute, since his fault is more than 50 percent. Weller is also severally liable for 60 percent of Jingle's $60,000 in noneconomic damages, or $36,000. So Jingle could collect a total of $52,000 from Weller.

Oregon: Under Oregon's (now superseded) statute, defendants are severally liable for noneconomic damages. But a defendant more than 15 percent at fault is jointly and severally liable for the economic damages (after reduction for the plaintiff's fault), if his percentage of fault is greater than the plaintiff's. Weller is more than 15 percent at fault, and his fault is greater than Jingle's, so subsection (4) of the statute applies. Weller is jointly and severally liable for Jingle's economic damages ($20,000) reduced by Weller's percentage of fault to $16,000. He is also severally liable (under subsection (2) for 60 percent of Jingle's $60,000 in noneconomic damages, or $36,000. He owes Jingle $52,000.

b. *Indiana:* Under the Indiana statute Snubbin is severally liable for 20 percent of Weller's $80,000 in damages, which is $16,000. That statute makes no distinction between economic and noneconomic damages.

Iowa: Since Snubbin is less than 50 percent at fault, his liability is several. He would owe Jingle $16,000, 20 percent of his $80,000 in total damages.

Oregon: Under subsection 4 of the Oregon statute, Snubbin's liability for economic damages would be joint and several. His percentage of fault is at least 15, and he is not less faulty than Jingle. His liability for noneconomic damages is several, under subsection 2. So he is liable for $16,000 for the economic damages[10] and $12,000 (20 percent of $60,000) for the intangible damages, for a total of $28,000.

Now, was that fun, or what?

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1. This assumes that Nell's negligence is compared to the defendants' combined negligence, as it is in most modified comparative negligence jurisdictions. See generally pp. 571-572.

2. In fact, so does the plaintiff, in a sense, since 20 percent of her damages is deducted from her recovery to account for her negligence.

3. Of course, when they settled, the parties did not know what percentages of negligence the jury would assign to them. So Twist may do better if Fagan settles, but also may do worse.

4. This assumes that Nell's fault is compared to the *combined* negligence of the defendants.

5. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

6. Most cases have so held. See, e.g., *Horton by Horton v. Orbeth, Inc.*, 342 N.W.2d 112, 113-114 (Minn. 1984) (refusing contribution on similar facts since there was no "common liability"); but see *Otis Elevator Co. v. F.W. Cunningham & Sons*, 454 A. 2d 335 (Me. 1983) (despite plaintiff's inability to recover, considerations of fairness support contribution from the less negligent tortfeasor).

7. Yes, you can reach the same result by taking a 20 percent credit against the raw damages. But I find it clearer to think of Heap having sold his portion of *the judgment*, and therefore using the judgment as the figure against which to take the credit.

8. Micawber is also liable for this amount. If Murdstone pays, he will be entitled to contribution from Micawber.

9. Some states that have adopted *several* liability include provisions to soften the blow to the plaintiff if one of the tortfeasors is insolvent. They provide for the reallocation of the uncollectible share among the other tortfeasors (or among the other tortfeasors and the plaintiff) in proportion to their *fault.* See, e.g., Ariz. Stat. Ann. *§12-2508* (reallocation among other defendants). Under the Arizona statute, if Heap were insolvent, 50/60ths of Heap's share ($10,000) would be reallocated to Micawber and 10/60ths (2,000) would be reallocated to Murdstone.

10. Jingle's $20,000 in economic damages must still be reduced to account for his fault, which brings them down to $16,000. Snubbin is jointly liable for this amount under subsection 4.