

Who was the lower cost avoider? Given this, what would have been the efficient outcome?

Torts ATTACK OUTLINE – Wyman – Fall 2008

Battery

ELEMENTS:

- (1) X acts,
- (2) **Intending** to cause
 - a) **harmful** contact (w/P), OR
 - b) **offensive** contact, AND
- (3) X's acts **cause such contact**

Intent Requirement:

- **Purpose** of causing offensive or harmful contact, **OR**
- Acting with **substantial certainty** that conduct will result in harmful contact.
 - Have to be *almost sure* (not just 75 % or something)
- Purpose/substantial certainty **of the offense** → don't have to show that they had in mind the full extent of harm, just that acting with purpose of harming person
- **Keep in mind:**
 - (1) **intent CAN be transferred** (intend to harm someone but harm someone else,)
 - (2) **Motive is irrelevant** (doesn't matter if believe are committing harmful contact to help person,)
 - (3) **Have to act volitionally WITH intent** (not just volitionally.)

Damages available: BOTH

Assault

ELEMENTS:

- (1) D Acts,
- (2) **Intending** to cause:
 - a) an **imminent harmful** contact, **OR**
 - b) an **imminent offensive** contact, AND
- (3) D's act must cause P to **reasonably [defined objectively] apprehend** an imminent harmful or offensive contact with P.

Damages available: BOTH

Defenses to Battery & Assault

Consent (justification)

- Express OR Implied
- Have to *actually* and *reasonably* believe that have consent
 - **Don't have to be correct**, just have to have reasonable basis (*O'Brien v. Cunard*)
 - Remember Facebook Hypo. Person must know they have consent, even if objectively demonstrated elsewhere.
- Can't benefit from consent if it resulted from fraud/coercion
- Courts will sometimes hold void as a matter of public policy

Self-Defense (justification)

- **Actual and reasonable belief** that need to injure another to avoid injury to self (OBJECTIVE standard)
 - NOT only of defamation or distress
 - (*Haeussler*)
- Must be **provocation**—WORDS usually NOT enough, but can contribute to overall belief.

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- Must be **imminent**—unless it reasonably appears there will be no later opportunity to prevent the danger.
- Can only use **proportional** force. (*Haeussler*)
 - Don't have to retreat from home BUT still must use only proportional force

Intentional Infliction of Emotional Distress (IIED)

ELEMENTS:

- (1) **Extreme and outrageous conduct**, AND
- (2) D must **act intentionally or recklessly to cause the severe emotional distress**, AND
 - **Reckless**—D must be *aware and consciously disregard* a substantial risk
 - i. **Risk**—gross deviation from SOC
 - ii. Doesn't have to be aimed at specific person
 - **Intentional**—intent is NOT transferable → has to harm the person aimed at
- (3) Must **cause such distress**
 - Don't need professional evidence BUT do have to prove (*Littlefield*)

Damages available:

- Compensatory (NO punitive damages → compensatory already kinda are)

NOTICE: for assault all have to prove is *apprehension* BUT here you have to show *severe emotional distress*

Trespass

Intentional invasion of another's land w/o that owner's consent

- No knowledge requirement → liable even if you thought it was your land
- "invasion"—*something w/in your control* (you, water, animal) has to go on the land
- Only owner or possessor can bring action

DEFENSES?

- (1) PRIVATE NECESSITY (*Vincent v. Lake Erie Transport Co.*)
 - P can't evict,
 - and can be held liable for damage caused in course of doing so
 - BUT D must pay for damage
- (2) Did P CONSENT to allow D to use her land?
 - What was the nature of that consent?
 - What was the scope of that consen

Respondeat Superior

A public or private employer is liable for its employees' actions **that fall within the scope of their employment** (*Wall-Mart Stores, Inc.*)

Strict Liability

Proves entire claim EXCEPT for ultra-hazardous activities, then just proves breach

Who was the lower cost avoider? Given this, what would have been the efficient outcome?

NEGLIGENCE *Misfeasance* (easy—history of recognizing duty) v. *nonfeasance* (hard—not well-established)

- (1) Injury—physical or financial
- (2) Duty
- (3) Breach (of requisite standard of care)
- (4) Causation—(a) causation in fact; AND (b) proximate cause
- (5) Defenses

Does P have standing to sue?

- Is P alleging injury to her/himself?
- Is P the next of kin or estate of a decedent upon whose behalf they're suing? If so, then go onto establish the rest of the elements as they apply TO THE DECEDENT!
- Is P alleging D's employee injured him? Respondeat Superior

INJURY CHECKLIST:

1. Is the injury to person or property? → keep going
2. Is the injury for lost income? → pure economic loss! **[FILED UNDER DUTY IN OUTLINE!!!]**
 - a. No recovery UNLESS odd circumstances
 - i. Natural resource cases w/o cause of action
 - ii. Tied reasonableness of different physical risk (*People Express*)
 - iii. Special relationship, where professional opinion is relied upon (auditor, lawyer)
3. Is the injury Emotional? → NIED **[FILED UNDER DUTY IN OUTLINE!!!!]**
 - a. Parasitic on physical claim → damages for ('pain and suffering')
 - b. Pure and unrelated to person/property injury? → keep going
 - i. Pass the zone of danger test? → recovery (*Gottshall*)
 1. Physical manifestation of emotional damage (e.g. shakes)
 2. Reasonable fear of physical danger leads to emotional damage
 - ii. Bystander? → recover if
 1. Reasonably foreseeable that accident would cause distress
 2. Proximity to accident (*Thing, La Chusa*)

DUTY CHECKLIST: (yes or no and what gives rise)

1. Questions checklist:
 - Did the conduct create a risk of physical harm
 - Did an actor voluntarily assume a duty
 - Is there a special relationship such that a duty is conferred on a third party?
 - Did negligence invite a rescue?
 - Did property cause the injury?
 - Is the bad actor a government agency?
 - THE BIGGIE: IS THERE A POLICY REASON FOR THERE NOT TO BE A DUTY????

Who was the lower cost avoider? Given this, what would have been the efficient outcome?

1. Did the conduct create a risk of physical harm? → Duty of reasonable care
 - a. No privity needed (McPherson)
 - b. Foreseeability of injury can imply duty (Mussivand)
2. Did an actor voluntarily assume a duty? → continue once started
3. Is there a 'special relationship' → Affirmative duty to rescue/protect third party [R3T 41]
 - a. Parent w/ dependent kids (*Applehans* + negligent parenting)
 - b. Custodian
 - c. Employer
 - d. Mental Health Pro. (*Tarasoff, Ewing*)
 - e. Social Host -- Rarely (*Kelly*)
4. Did an actor's negligence create the need for a rescue? → Rescuers
 - a. Negligence towards victim → duty to rescue
 - i. "Danger invites rescue" (*Wagner*)
 - b. Low contributory negligence standard
 - c. Is it this person's job to rescue? → firefighter rule
 - i. No recovery
5. Was someone injured by the condition of a property? → Premises liability
 - a. How categorize?
 - i. Trespasser: no willful/wanton injury
 1. know of regular? → duty to warn
 2. children who can't appreciate danger → duty to warn
 - ii. Licensee → duty to warn
 - iii. Invitee → reasonable care
 - iv. DON'T FORGET TO MENTION ROWLAND!
 - b. Concealed trap? → duty to warn regardless of status
6. Is the bad actor a government agency? → public duty rule

BREACH CHECKLIST: (what was the standard of care owed and was it breached?)

Reasonable Person Standard—**Would** a *reasonable person of ordinary prudence*, in D's position, have conducted themselves as D did?

1. Was the person a child?
 - a. Under 18 → Reasonable child standard
 - i. Under 5 → Tender Years doctrine
 - ii. DON'T FORGET NEGLIGENT PARENTING [*Applehans*]
2. Was there a physical disability?
 - a. IF so → reasonable person w/ that disability
 - b. NOT TRUE for insanity; the insane are liable for their torts [*Wagner*]
3. Use the **Hand Formula** to measure Reasonable Behavior?
 - a. Hand Formula helps B > PL → no liability [*Carroll Towing*]

Who was the lower cost avoider? Given this, what would have been the efficient outcome?

- i. Layman's terms: If the cost of prevention is higher than the increased probability times the cost of the bad event, then the preventative measure isn't worth it.
4. Did the Defendant follow **industry custom**?
 - a. If so → negligence is *less likely* [TJ Hooper]
 - b. Posner: Especially determinative if an indication of market risk allocation [Rodi Yachts]
 5. Is this a professional malpractice case?
 - a. If so → industry custom is determinative
 - i. Subject to the respectable minority rule
 - b. Medical malpractice: Is there informed consent?
 - i. Prudent patient standard: What a reasonable patient would want to know
 - ii. Reasonable physician standard: basically industry custom
 6. Was a statute violated?
 - a. If so → negligence per se
 - i. D violated statute
 - ii. Statute designed to protect against the type of accident caused
 - iii. Victim w/in class to be protected
 - iv. No 'excuse'
 1. Incapacity: childhood, disability, etc
 2. Reasonable care to try and comply
 3. Doesn't/shouldn't know of facts that make statute apply
 4. Statute confusingly presented to public
 5. Compliance result in greater risk of harm than non

Conditions for Imposing Res Ipsa: Flour case is paradigm!!!

- (1) **Injury must be of a type that doesn't occur w/o negligence** (Injury has to more probably than not result from negligence)
 - Strong limiting condition
- (2) **D must be in exclusive control of the harm-causing instrumentality**
 - D must be the one you can clearly point to as being responsible
 - *May or may not be able to invoke against multiple Ds*
- (3) **P must not have been responsible for or an active participant** in the injury
 - Another way of stating 2---if P is active participant, D could not have been in exclusive control.

ACTUAL CAUSE CHECKLIST:

1. **But-For Test:** But-For D's action, would P have been injured?
 - a. D must *actually* be proven a cause, not just one possibility among others (*Skinner*)
 - b. Did D's actions *increase the risk of harm* to P? (*Beswick*—private ambulance) YES—up to jury to decide whether risk was a substantial factor in producing the harm.
2. Is there **scientific evidence**? → Daubert Test
 - a. Testimony reliable?
 - b. Testimony grounded in scientific evidence

Who was the lower cost avoider? Given this, what would have been the efficient outcome?

3. Are there **multiple tortfeasors/causes?**

- a. Was each cause necessary for the harm? → joint and several liability
 - i. Eg: two cars crash, then hit pedestrian
- b. Was each cause sufficient for the harm? → substantial factor test
 - i. E.g.: Two fires from opposite ends of town burn building [*Anderson*]
- c. Is **market share liability** appropriate?
 - i. Only in DES cases!
 - ii. Good must be fungible! [*Skipworth*]
- d. **Alternative liability**: multiple tortfeasors, don't know which one
 - i. RESULT: burden of proof shifts to D
 - ii. E.g.: Shotgun to the face case [*Summers*]
 - iii. 4 part test
 1. P sues multiple actors
 2. P proves each actor exposed P to risk of physical harm
 3. P proves that one or more of D's caused the harm
 4. P can't reasonably be expected to prove which D caused the harm

PROXIMATE CAUSE CHECKLIST:

1. Four Tests

- a. **Foreseeability Test**: Was the injury one that could be reasonably foreseen?
- b. **Risk Rule**: was the injury the realization of a risk that made the D's action wrongful?
 - i. [R3T §29]
- c. **Directness Test**: Was the defendant close in space/time? [OUT OF FAVOR]
- d. **Grab Bag**: Some combo of the above.

2. Is there an intervening or superseding cause?

- a. Unforeseeable event different from what D should have anticipated
 - i. Gathering gunpowder; intervening cause [*Pollard*]
 - ii. Found hidden dynamite; not intervening [*Clark*]

DEFENSES CHECKLIST:

(1) Was P acting negligently also? (Same reasonable person standard)

- Comparative fault? REDUCES RECOVERY (may bar it too)
 - was P more or less than 50% negligent?
 - *Baldwin*—YES = get nothing
 - Contributory negligence BARS RECOVERY (but not so common to see this now)

(2) Is there a way to argue P assumed risk? ABSOLUTE BAR on RECOVERY

- Explicit?? (If so, is this void for policy reasons?)
- Implicit
 - Actually knew of (particular) risk
 - Voluntarily consented to bear that risk
 - NOT necessarily fulfilled b/c deliberately encounter danger (j-walker)
 - Protest, but then go anyway?
 - 3rd Restatement → this is obsolete
 - NO implicit assumption where there's duress (were P had no reasonable choice)

(3) Is there a way to argue that D has some sort of immunity?

Who was the lower cost avoider? Given this, what would have been the efficient outcome?

DAMAGES CHECKLIST: Use your outline.

- (1) Is D entitled to punitive damages? (*National By-Products*—common law test)
 - NOTE: Don't need malice on D's part BUT Negligence not sufficient—need more than simple carelessness
 - **Was D unaware his conduct was dangerous? Wanton disregard** (over threshold)—D need not know BUT
 - Conduct must pose *grave danger*; AND
 - *D had reasons to know of dangers of conduct*
 - **Was D aware her conduct was dangerous? Conscious indifference**—
 - D is aware his conduct creates a risk of injury; AND
 - That risk is substantially larger than necessary than the risk required to make the conduct careless.
 - **Guideposts:**
 - degree of reprehensibility of D's conduct
 - disparity b/t actual and potential harm suffered
 - difference b/t punitive damage awards by jury and civil penalties available for same wrongdoing.
 - **See long outline pg. 29 for guidelines for reviewing these awards**
- (2) Has P already gotten any money? Collateral Source Rule → Reduce total award by that amount, then go to (3)
- (3) Did D's employee cause the damage (and not D directly?)—Respondeat Superior—(**scope of employment** test)—Can risk fairly be regarded as typical (or broadly incidental) to enterprises undertaken by employer?
- (4) Are there multiple D responsible?
 - YES**
 - **Indivisible injury**
 - If the parties were working concurrently or in concert (both were needed for injury to occur) → joint and several liability
 - **POLICY NOTE:** If you argue J&S is possible, you should note that many states are backing away from this and suggest that it might be possible to see fault as divisible and award proportional damages—though we may not know which parts of the injury were caused by whom, we may be able to tell who was more negligent → divide accordingly
 - **Divisible injury**—apportion damages accordingly
 - NO**—whoever's responsible must pay
- (5) Was P comparatively at fault?
 - YES—reduce P's damages proportionately
 - Say if was **contributory negligence** D wouldn't have to pay
 - Say if were **divided damages situation**, damages would be split among
 - Is P more than 50% at fault? In some states this would bar recovery
 - NO—D must pay it all
- (6) Was this a maritime collision or stranding?
 - Also say **Divided damages** possible → damages divided evenly (not common now)
 - BUT this is uncommon—argue to go with previous analysis
- (7) Is this a wrongful death or survival action?
 - **Wrongful Death**—(brought by next of kin)
 - VICARIOUS claim—kin allowed to bring action b/c of what happened to victim
 - **Can recover**
 - Lost wages
 - Loss of companionship
 - Loss of guidance
 - **Can NOT recover**
 - Grief or anguish experienced
 - **Survival Action**—(brought by estate)

Who was the lower cost avoider? Given this, what would have been the efficient outcome?

- Claim is for harm decedent suffered up UNTIL death, NOT for loss of life
 - Medical Costs
 - Apprehension of imminent death
- NOTICE: here, law has traditionally discriminated against losses of easily identifiable groups: children, unmarried young persons, the poor, the elderly. Loss of guidance/companionship may help with this.
 - McClung, *Dead Sorrow*—we should allow people to collect for loss of life