Fall 2011

Richard Epstein – Torts – Attack Outline

1. **Intentional Torts**
   1. **Physical Harms**
      1. **Battery** – Intentional infliction of harmful or offensive bodily contact
         1. Intent
            1. Intent is to produce contact, not harm (*Vosburgh*)
            2. Person acts knowing the consequence is likely to occur (*Garrat*)
            3. Transferred intent – Intention to do harm to A results in harm to B (*Talmage*)
         2. Analysis
            1. Intent – Δ kicks Π 🡪 strict liability stranger
            2. Assumption of risk – Implied license, what is the scope of consent?
            3. Malice – Δ intended to do harm or had reckless indifference
      2. **Defenses to physical harms**
         1. Consent – conduct is no longer wrongful
            1. Stranger – *Mohr v. Williams* – consent to right ear, operated on left
            2. Consent Form – *Hoofnel v. Segal* – took uterus
            3. Implied Consent – *Schloendorff* – treat unconscious patient
            4. Agent – Courts will go with guardian’s opinion
         2. Insanity – *McGuire* – Insanity is not a defense, if Δ intended to strike Π, Δ is liable
         3. Self-defense – Use of reasonable force to prevent a threatened battery (assault)
            1. Δ must show reasonable belief of battery and used reasonable force to repel (*Courvoisier*) 🡪 Split on duty to retreat, ask if Π contributed to the mistake.
            2. Defense of others – RST §76 – defend 3rd person if you had right to self-defense
      3. **Policy for phys. harms** – strict liability in intentional torts puts costs on best cost avoider
   2. **Harms to Property**
      1. **Trespass to Land** – Enter land without permission from owner (*Doughtery v. Stepp*)
         1. Liability – After trespass, Δ is liable for consequences (*Brown v. Dellinger*); includes overstepping license (*Cleveland park club*)
      2. **Trespass to Chattels** – Taking/modifying/interfering with a chattel without permission from owner
         1. Modifying (*Blondell*), interfering (*Hamidi* – RAE – what constitutes burden?)
         2. Self-help remedy – remove my chattel from you, injunctive relief when inadequate
         3. Damages – Usually reduction in value
      3. **Conversion** – Treating someone’s property as your own (RST §223, *Poggi*) – cannot profit from mistake
         1. Must have and retain property right to seek liability (*Moore v. UC Regents*)
         2. Damages – return and rental if undamaged, forced sale @ market value otherwise
      4. **Defenses to Trespass to Property**
         1. Defense of property – Ask to leave; defend w/o wounding force; reciprocal force escalation 🡪 government intervention if Δ does not escalate force
         2. Cannot do by proxy (spring gun) what you can’t do in person (*Bird v. Holbrook*)
         3. Necessity – Owner must allow (*Ploof*) but will get damages/rental (*Vincent*)
         4. RAE – Strict liability makes Δ a single owner forcing minimization of total loss
2. **Negligence** – Duty, Breach, Causation, Damages
   1. **Analysis** – Show Δ did not meet standard of care
      1. What is the standard? Reasonable person.
         1. Supporting evidence? Custom/Statute 🡪 *Negligence per se*
         2. Information asymmetry? *Res ipsa loquitur*
      2. Cost/probility/severity 🡪 B < PL – *Hand* Formula
         1. If requirement is increased, would it make a difference?
         2. Consider marginal cost – does $1 investment = $1+ in savings?
      3. Cause in fact? 🡪 Run counterfactual
      4. Proximate cause? 🡪 Foreseeable? Intervening act?
   2. **Duty** – What would a reasonable person do under the same circumstance?
   3. **Breach** – *RST §828* – Conduct falling below the standard set by law
      1. Reasonable person – All people are held to the standard of a normally intelligent, reasonable person (*Vaughn v. Menlove*)
         1. Age – kids are held to their age, unless adult activity (*Daniels*); geezers are held to normal person (*Roberts*)
         2. Beginner/Expert – *RTT §12* – Beginners held to standard of profession. Experts same *unless* a representation of greater skill is made.
         3. Insanity – Not unless it strikes suddenly, w/o warning (*Breunig*)
         4. Physical Disability – Held to standard they are capable of (*Fletcher v. Aberdeen*)
         5. Emergency – taken into account to determine if actor performed rashly (*Eckert v. Long Island RR*)
      2. Custom – Violation/adherence is a permissive inference of negligence/no negligence (*Titus v. Bradford – Nypano*)
         1. *RST §295A cmt c* – Industry can’t adopt shitty methods to save time/$ at the expense of others (*TJ Hooper*)
         2. Custom doesn’t excuse providing notice (*Mayhew v. Sullivan Mining Co*)
      3. Malpractice
         1. Analysis
            1. Identify applicable custom – no locality rule, nat standard or widely accepted
            2. Prove Δ failed to follow
            3. Causal link between injury and failure to follow custom (fact and proximate)
         2. Informed Consent – Would a reasonable person in Π’s position be likely to attach significance to the risk in deciding whether to forego/postpone therapy?
            1. Exception – Emergency or when disclosure threatens detriment that outweighs informing
            2. Defense strategy

No duty to disclose obvious

No duty to disclose exceptionally rare conditions

* + - * 1. RAE – Standard consent and information forms solves this problem
    1. Statute and *Negligence per se* – NOTE statute trumps *Hand* Formula
       1. Analysis
          1. Violation of statute was cause of injury? (*Brown v. Shyne* – Chiropractor)
          2. Statute was intended to protect against this harm? (*Gorris v. Scott* – sheep)
          3. Π is in the class the statute is designed to protect? (*Herzog* – no lights hit ped)
          4. Excused? Compliance = risky, or reasonable effort made (*RTT §15a/b*)
    2. *Res ipsa loquitur*
       1. Analysis
          1. Doesn’t occur without negligence (*Byrne v. Boadle* – flower barrel)
          2. Caused by instrumentality in exclusive control of Δ

Consider chain of custody (*Benedict v. Eppley Hotel* – Chair w/o screws)

* + - * 1. Not due to voluntary action/contribution of Π (*McGonigal* – milk grenade)

Rule out act of 3rd party outside Δ’s control

Rule out act of God

* + - * 1. Burden shifts to Δ to exonerate – rebuttable presumption (*Ybarra v. Spangard*)
  1. **Cause in Fact** – Δ’s negligence was the cause of Π’s injury
     1. Analysis – Run the counter-factual. If it changes the outcome 🡪 Cause in fact
     2. Harmful substance – (*Gen elec v. Joiner* – PCB)
        1. Substance, Source, Exposure, Mechanism
        2. Admissibility of scientific evidence
           1. Frye – Only “generally accepted” data
           2. Daubert – district court determines what is adequate to establish causation
     3. Lost Chance
        1. *Herskovits* – Proportional below 50%, full if above 50%
        2. *Fennel* – 0/1 at the 50% mark
        3. Calc – (P(bad death) – P(good death))/P(bad death)
     4. Joint Causation – Multiple Sufficient Causes
        1. *Summers v. Tice* – Guy shot by one of two Δ
        2. *RTT §27* – each of multiple sufficient acts is regarded as factual cause of harm
        3. *RST §433a* – Apportionment when possible
        4. Temporal distinction – RAE – hit first for rent during Δt, all else just hit first
        5. Market share – *Sindell*
           1. Name most/all possible Δ
           2. Product is fungible (identical w/ same defect)
           3. Π can’t ID Δ through no fault of Π
           4. *Pro rata* apportionment unless a Δ can show market share
  2. **Proximate Cause** – Cause which, in natural/continuous sequence, produces injury
     1. Coincidence (Harm-Within-the-Risk)
        1. No – *Georgia Ry v. Price* – Train didn’t stop, woman burned by lamp @ hotel
        2. Yes – *Hines v. Garrett* – Train didn’t stop, woman raped walking home
        3. *RST §448* – Antecedent wrong persists til person reaches safety (3rd doesn’t break causation)
     2. Directness v. Foresight
        1. Foresight – *ex ante* was the harm foreseeable when Δ acted?
           1. *Wagon Mound #1* – Not liable when Π set Δ’s spilled oil on fire
           2. *Palsgraf* – innocent trigger
           3. *Heber v. Enos* – unforeseeable shock to gardening Π
        2. Directness – Beginning *ex post* is there a superseding cause that breaks causation?
           1. Δ’s negligence increased the risk remaining til risk is returned to pre-neg level
           2. In re Polemis – Board fell into hold with benzene
           3. *Marshall v. Nugent* – Truck cuts corner, Π hit by Δ trying to miss stalled car
     3. Compulsion/duress
        1. Danger invites rescue – *Wagner v. International Ry*
        2. Tuttle Rule – Δ’s negligence puts Π in duress and Π sustains injury during good-faith effort to minimize loss, Δ is liable (*City of Lincoln*)
     4. Thin Skull Π – Take Π as Π is
     5. NIED
        1. *Dillon* test – 29-states (exceptions listed below) (3-states go beyond)
           1. How close was Π to accident? (10-states zone of danger, 2-states impact)
           2. Did the shock result from direct emotional impact of watching?
           3. Was there a close relationship between Π and injured? No gay people
           4. Thing – distress must be beyond a disinterested witness
           5. RAE – allow recovery for physical but not mental harms

1. **Affirmative Duties**
   1. Common law – Misfeasance (liability) vs. Nonfeasance (no liability) 🡪 no duty to rescue
   2. Prior Conduct – duty to mitigate w/ reasonable care when Δ creates a risk (*Mongomery*)
   3. Δ can’t interfere or begin rescue and abandon leaving Π in worse position
   4. Duty to control 3rd parties – **Special relationships**
      1. Landlord/tenant – *Kline v. 1500 Mass Ave*
         1. Duty – precautions against foreseeable risk (lapse over t? Common/private area?)
         2. Causation
            1. Fact (counterfactual, know intruder/mode of attack? Would precaution help?)
            2. Proximate (was this foreseeable?)
         3. Did Π contribute to the harm?
      2. Nut jobs – Doctor/Patient
         1. Potential target is ID’d (*Tarasoff*)
         2. Doc facilitates crime (*Lundgren*)
         3. Breach explicit promise (*Long*)
         4. RAE – consider efficacy of warning over involuntary confinement
   5. Water Works – No duty to rate payers (privity, no way to insure affordably – *Moch v. Rensselaer*)
   6. **Gratuitous Undertaking** – Promises create duty to act with reasonable care
      1. Bailment – *Coggs v. Bernard*
         1. Bailee doing a favor – Good Faith
         2. Bailor doing a favor (Bailee uses the goods) – Strict Liability
         3. Bailee paid – Ordinary (reasonable) care
   7. **Owner/Occupier** (Premise) Liability – Duty to take ordinary care, fix known defects
      1. Common Law Categories (25-states, 1/3 states no licensee/invitee, keep trespass)
         1. Trespasser – no deliberate harm/wanton misconduct
            1. Known, habitual trespassers become licensees
            2. Attractive Nuisance – *RST §339*

Owner knows children are there, condition is dangerous, kids won’t recognize/discover, utility is low, burden to change is low

* + - 1. Licensee – Duty to warn of known dangerous conditions – no info asymmetry
         1. Recreational use statute – licensees, but only liability for willful/wanton
         2. Fireman’s rule – must warn of latent defects, strict liability for arson
      2. Invitee – Duty to investigate and correct latent dangers
    1. California – No tripartite distinction, everyone is invitee (*Rowland v. Christian*)

1. **Π’s Responsibility**
   1. **Contributory Negligence** – Π neg contributes proximately to injury 🡪 no recovery
      1. Last Clear Chance – duty to mitigate (*Butterfield* – riding fast, hits pole)
   2. **Assumption of Risk**
      1. Primary – Express (K) or presumed (*The Flopper* – Δ owes no duty)
      2. Secondary – Like contributory negligence – Π sees Δ’s negligence and still proceeds
   3. **Comparative Negligence**
      1. Pure – 13-states – *Li v. Yellow Cab* (also makes joint liability, no indemnity)
      2. Modified – Threshold – 21-states Π≤ 50%, 9-states Π<50%
         1. Note – high error rate with normally distributed data
      3. *Pro rata* – equal apportionment, not in use, RAE likes
         1. *Note* – low error rate with normally distributed data
2. **Multiple & Joint Tortfeasors**
   1. Joint and several – Each Δ is on the hook for everything, settlement reduces by value not proportion of settling Δ’s blame
   2. Several – Each Δ is on the hook for his proportion, settlement reduces by settling Δ’s proportion
      1. CA statute – Several liability for non-economic damages (pain and suffering)
   3. Indemnity/Contribution – *RST §886* – Π settles with Δ1, Δ1 can seek indemnity from Δ2 if Π has no claim or released claim against Δ2. Determine if system is *pro rata/tanto*
   4. Vicarious Liability – *Respondeat Superior*
      1. Tortfeasor is an employee of Δ? (doesn’t matter if act is forbidden by employer)
      2. Did not occur during frolic? *Ira S Bushey & Sons* – drunk sailor. Was Δ on the job?
      3. Independent Contractor? Δ is liable when IC is working on the premises (*Rylands*)
         1. *Petrovich* – Apparent and Implied Authority (made out to be employee and limited by employer) 🡪 no IC defense
3. **Strict Liability**
   1. *RTT §20* – Liability w/o fault when activity creates a foreseeable risk and is not of common usage
   2. *RST §519* – Liability for abnormally dangerous activities
      1. Factors – High degree of risk, high likelihood or big harm, inability to eliminate risk, not common usage, inappropriate where performed, no value to community
   3. *RT §519* – Liability for ultrahazardous activities despite reasonable care
      1. Ultrahazardous – risk of serious harm that cannot be eliminated with care and is not of common usage
   4. Defenses – Cause in fact, Act of God, 3rd party breaks causation, assumption of risk
4. **Products Liability**
   1. Manufacturing Defect – *RTT §2* – Product that doesn’t conform to design despite all possible care
      1. *RTT §3* – Circumstantial evidence – Inference of liability when harm doesn’t ordinarily occur without a defect and harm was not a result of something other than a defect (Speller v. Sears and Roebuck)
      2. *Escola v. Coca Cola* – Bottle explodes – RAE – was it mishandled?
   2. Design Defect – Foreseeable risk of harm from a product that can be avoided through alternate design
      1. Reasonable Alternative Design – Π redesigns through experts or otherwise
         1. Wade – Usefulness, Safety, Substitute, Ease of alternate, Can user avoid, Is user aware, Manufacturer spreads the loss
      2. Consumer Expectation – Article is dangerous beyond what is normally expected
      3. Open and Obvious/Statute – Alternate methods for detection of design defect/defense
   3. Warning Defect – Foreseeable risk avoided through additional warning/instruction
      1. Learned Intermediary – Duty to warn doc/pharm rather than patient
         1. Exception – direct advertising (*Ortho* – birth control)
   4. Defenses to product liability
      1. Π’s conduct – assumption of risk, contributory negligence
      2. Foreseeable misuse – No defense unless misuse is not reasonably foreseeable (*Lebouef v. Goodyear Tire*)
      3. Causation – Would it have failed either way? Did failure actually cause injury? Can Π prove through circumstantial inference (*RTT §3*)?
      4. Waiver – no waivers for personal injury
      5. Federal Preemption – Supremacy Clause – is there a fed law on point? Do we allow private right of action based on statute? Has there been industry capture in drafting?
         1. *Geier v. American Honda* – No need for airbag when reg says its ok
         2. *Wyeth v. Levine* – Drug injected against warning, woman lost arm, SC-USA allows warning defect action
      6. Economic Loss Rule – Damage sustained to the product are not actionable, only damage to “other” property and injury to persons result in product liability (*Casa Clara v. Toppino*)
   5. Analysis
      1. RST or RTT?
         1. *RST §402A* – Seller in business of selling unreasonably dangerous product is subject to liability for physical harm if it reaches Π without substantial changes, even if seller exercises all possible care
            1. No occasional sellers, no mishandling of product, only if dangerous beyond expectation, Π can assume the risk
         2. *RTT* – (*§1*) one who sells a defective product is liable for the harm caused, (*§2*) a product is defective when it has a manufacturing, design, or warning defect at time of sale, and (*§3*) circumstantial evidence is admissible (doesn’t normally occur, & not the fault of Π)
      2. Follow chain of custody 🡪 Manufacture, Transit, Use
      3. Is the defect the proximate cause of the injury?
         1. Manufacture – Failed either way? Failure cause harm?
         2. Design – Π redesign feasible/affordable? 🡪 *Wade Factors*
         3. Warning – Would more info change Π’s behavior?
      4. Π’s conduct – Π assume the risk? Comparative negligence?
      5. Foreseeable misuse –misuse foreseeable such that it should be considered in design?
      6. Waiver – No waiver for personal injury
      7. Is this preempted by Federal Law?
      8. Economic Loss Rule – *Casa Clara* – Only damage to “other” property or injury to persons result in product liability
5. **Damages**
   1. Elements – Pain and suffering, Medical expenses, Lost earnings
   2. Calculation – Per diem (value a small time unit and multiply out) or jury reports
   3. *McDougald v. Garber* – Botched C-section – Lady in vegetative state. No pain and suffering/future enjoyment if unable to experience pain or the loss