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