# Intentional Torts & Defenses

*Consider extent of liability (****causation****), appropriateness of* ***punitive damages****,* ***lack of insurance (by law)*** *for intentional torts.*

## Battery

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| Vosburg (kick)  Garrat (chair)  White (piano) | Where D’s act is **(1)** unlawful, **(2)** intentional, **(3)** with substantial certainty of contact; D is **SL** for damages that directly result. An act is **unlawful** when harm is intended or there is no license, explicit or implicit (e.g. playground). |
| R.2d §13 **Battery** | **(a)** intends harmful or offensive contact  **(b)** harmful contact directly or indirectly results |
| Mohr  (ear surgery) | Surgery is unlawful without **informed consent**. Complete immunity of person except w/r/t pleasantries and emergencies. |
| Kennedy  (surgery contrast) | Consent may generally permit a remedy in an area of the original incision; family members or general forms may provide consent. |
| Workers Compensation Acts | Protects employers from neg. claims, but excludes intentional harms. |

## Trespass & Conversion

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| Dougherty  (land survey) | An unauthorised intrusion into the **land** of another is a trespass for which there are **SL** damages; if nothing more than treading down grass. Subject to *emergency* and *defense of property exceptions.* |
| Intel Corp. (email) | Trespass to **chattels** requires actual harm to the property. |
| Conversion | **SL** property tort; liability follows the economic benefits of the property. E.g. A 🡪 B 🡪 C |
| Moore (DNA) | Ps may not sue on a theory of **conversion** for cells removed from the body. Public policy favoring medical research prevents extension of the property right. |

## Defenses

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| Courvoisier (policeman) | Ds not liable for **self-defense** that is **(1)** necessary, **(2)** reasonable, and **(3)** proportionate to the circumstances. |
| R.2d/Bird | **Traps** (e.g. spring guns) justified when D, if present, wd have been justified in the defense. |
| Kirby ($50) | Owners may use **(1)** necessary **(2)** reasonable and **(3)** proportionate force to **retake property**—only in *hot pursuit*. Except if property was willfully given. |
| Ploof (dock) | Trespass may be justified by **necessity**, whereupon landowner has no right to counter-trespass. |
| Vincent (ropes) | Where D intentionally acts on a necessity-based privilege, D is SL for compensatory damages. |

# Negligence

## Strict Liability vs. Negligence

### Introduction & History

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| Brown v. Kendall (dogfight) | Where D’s intentional action is (1) lawful (consider social benefit) and (2) contact is unintentional, then the question is whether D exercised due care. No intentional tort, no SL. |
| Rylands (resevoir) | **NUISANCE** - D is **SL** for damages that result from the escape of a thing (1) unnatural; (2) likely to cause mischief; (3) newfangled technology. Except if contrib neg, act of God, 3rd party action. |
| Collins (horse)  Losee (boiler) | Reject Rylands generally b/c of American ideas re: industry, progress; or specific’y whr P benefits from enterprise, activity. |
| Powell (RR sparks) | When no neg on part of D, **SL** rule imposes the cost to society upon the owner of a **newfangled product**. |
| Holmes, The Common Law | A duty to act reasonably w/r/t foreseeable harms provides man w/ the best guide to action… |
| Stone (cricket) | No **negligence** duty to prevent against unforeseeable (i.e. unprecedented) harms. |
| Hammontree (seizure) | D has a duty to exercise reasonable care of a person with the same condition. (no liability in this case) |

## Basic Standard of Care

### Reasonable Person

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| Roberts (old driver) | D’s with **disabilities** have a duty to regulate their own actions. |
| Daniels (minor) | **Minors** engaged in an adult activity (e.g. driving) are held to the same standard of care as adults. |
| Breunig (flying car!) | **Insane** held to the same standard of care, EXCEPT when (1) institutionalized; (2) sudden mental incapacity |
| Fletcher (blind P) | D, city must tailor its conduct to the reality that the public contains ppl w/ a **diversity of physical abilities**. |

### Calculus of Risk

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| Eckert (RR baby) | **Heroic action** to save human life cannot be negligent unless rash or reckless. Dst’g: hero consents to risk. |
| Terry & Seavey | Reasonableness in **hero** scenario may depend upon (1) Risk % (2) Value of P’s life (3) Value of child’s life (4) Utility/probability of success (5) % chance child survives w/o action (i.e. necessity %) |
| **Hand Formula**   * Carroll Towing * Osborne (car door) * Cooley (wires) | Risk Calculus: If **C < P x L**, then precaution is worthwhile  **Cost** of precaution < **Probability** harm x magnitude of **Loss**  \*C includes the comparative risk of the adopted precautions; burden is on P to show practicability |
| **Negligence Policy** | * Neg regime’s liability cliff may cause potential D’s to be too careful; SL yields optimal caution level * Neg regime does not spur reduction in activity levels as well as SL regime |
| Lyons (swerve) | “Sudden emergency” unnecessary; confuses juries calculating what’s reasonable under the circumstances |
| United Airlines | **Common carriers** have a duty of utmost care. |

### Custom

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| Titus (narrow RR) | D’s adherence to **custom** is dispositive. Shield. |
| Mayhew (mine) | **Custom** is not a defense when not consistent w/ ordinary prudence. |
| TJ Hooper (radios) | Despite no universal practice, not adoptin a practice is **negligent when costs outweigh the benefits**. |
| Lama (bedrest) | In the context of **medical malpractice**:   * **Custom** is dispositive * Cost of **disclosure** weighed against the probability and severity of harm; requires P to demonstrate disclosure would **cause** a reasonable person to chose a different treatment. |
| **MedMal Policy**  Studdert, Brennan & Mello | **Problems**: (1) Neg regime encourages defensive medicine, which drives up costs; (2) tort litigation tends to decrease the information flow after an adverse event;  **Reforms**: (1) damage caps make cases unattractive for P’s attorneys; (2) Expert panels (a la Workers Comp) in lieu of juries;  **Obstacles**: (1) P’s attorney bar; (2) skepticism of experts; (3) expressive function of tort; (4) use of expert panel may decrease communication b/w doctors and patients. |
| Canterbury  (back surgery) | Doctor has a **duty to disclose** risks UNLESS **(1)** patient is unconscious and harm from a failure to treat is greater than harm of treatment; **(2)** disclosure poses a threat to the patient’s well being. |

### The Role of Statutes & Regulation

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| Osborne (poison) | Violation of a statute may constitute **negligence per se**. (Consider: cts more likely to find liability in TORT) |
| Gorris (sheep) | For **negligence per se**, statute must be designed to prevent against the **type of harm** that occurred. (Consider: less likely to find liability in CONTRACT; BUT statute may be evidence of custom and feasibility) |
| Martin (headlights) | Violation of a statute w/o explanation may be **negligence per se as a matter of law**. (Consider: D acting against others’ safety) |
| Tedla (roadwalkers) | Violation of a statute may be only **prima facie evidence of neg**. (Consider P’s acting against own safety) |
| Uhr v. East Greenbush Cent. Sch. Dist. | Violation of a statute may imply negligence per se **only if the statute implies a private right of action**. Factors: **(1)** member of class leg enacted to protect; **(2)** private action promotes leg purpose; **(3)** private right consistent with the legislative scheme. |
| Dram Shop Statutes | OLD: shops not liable; drunk’s decision cut causal chain. NOW: some Jxs find liability based on **(1)** greater foreseeability of harm; **(2)** new attitudes re: alcoholism; **(3)** new norms re: drunk driving. Hand Formula. |

### Judge vs. Jury

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| Metropol. RR (UK) | Judge decides whether neg **may** reasonably be inferred; jury decides if neg **should** be inferred. |
| Baltimore&Ohio Ry  (stop/look/listen) | (Holmes) **Rule**: when the standard is clear it should be laid down once and for all by the ct. |
| Pokora (S/L/L) | (Cardozo) **Standard**: Judges may take the question from a jury only when one result obtains |

### Proof of Negligence

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| P’s evidence of Negligence | Insufficient as a matter of law 🡪  Sufficient: permissible inference of neg. 🡪  Rebuttable presumption of neg. 🡪  Dispositive: Neg as a matter of law 🡪 | D wins / no jury Q  D or P / jury Q  P (unless D shows evidence to create jury Q)  P wins / no jury Q |
| Byrne (flour barrel) | **Res ipsa** IF: **(1)** accident not normal w/o neg, **(2)** D has exclusive control over instrumentality, **(3)** P rules out other the 3 other possible causes: **(a)** P’s voluntary conduct, **(b)** 3rd party conduct, **(c)** Act of god.  THEN: burden shifts to D to show non-negligence. | |
| Colmenares (escalator) | For Res Ipsa: look to whether D had a **delegable duty** to control the instrumentality. | |
| Ybarra (surgery) | MedMal: where unusual injury occurs while P under anesthesia, liability falls on **all Ds who had control over P’s body** **or instrumentalities** that may cause the injury. Information forcing–D’s may cross-claim. | |

## Defenses Based on Plaintiff’s Conduct

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| Butterfield | Under CL **contributory negligence** is a complete defense. |
| Beems (brakesman) | No contributory negligence for P, brakeman, killed b/c foot was stuck. |
| Gyerman (stacks) | **D has burden** of proving all the elements of a contributory negligence defense, including causation. |
| LeRoy Fibre Co.  (stacks near tracks) | One’s rights to own property cannot be limited by the wrongs of another (in claims for contributory neg). Coase 🡪 entitlement shd disfavor cheapest cost avoider. |
| Derheim (seatbelt) | **Seatbelt defense**: depending on Jx, may reduce (comparative) or bar (contributory) the claim. May have no effect, given that non-use did not cause the accident. |
| Fuller (RR&buggy) | The party that had the **last clear chance** to avoid the accident bears the responsibility. (No longer necessary under comparative negligence regime). |
| American Axe | Where P voluntarily engages in an activity that has known or obvious danger, **primary assumption of the risk** is a complete bar. (Consider worker may quit or demand higher wages)  Workers assume the risk of their **fellow servants** negligence. (Consider freedom of contract) |
| Workplace Injury  Before Workers Comp | Employees faced 5 hurdles in claims against employers: must prove **(1)** negligence; and that **(2)** custom; **(3)** assumption of the risk; **(4)** contributory negligence; and **(5)** fellow servant rule – are not defenses. |
| Steeplechase (slide) | Where danger is an element of the appeal, **primary assumption of the risk** is a complete bar, EXCEPT IF: **(1)** risk is either too likely; **(2)** too severe; **(3)** latent risk. |
| **Primary vs. Secondary Assumption of the Risk** | **Primary**: D either does not have an ordinary duty of care (e.g. football) or there was no breach.  **Secondary**: D has a duty, but P undertook the activity w/ knowledge of D’s negligence. |
| Meistrich (ice rink) | Where P acts w/ knowledge of D’s negligence, **secondary assumption of the risk** is a complete bar. (Can be characterized as P’s negligence under a comparative negligence regime). |
| S-K-I Ltd. | **Waiver may be invalid** for public policy if: **(1)** business is publicly regulated; **(2)** business is one of practical public necessity; **(3)** business holds itself out as available to any member of public; **(4)** business has decisive bargaining strength; **(5)** in using superior bargaining strength, business presents adhesion contract with no opt out; **(6)** P is placed under control of seller and subject to risk of carelessness. |
| Comparative Negligence Policy | Does not bar, but reduces recovery in proportion to P’s fault. **(1)** harshness of all-or-nothing contributory negligence rule; **(2)** juries were adjusting verdicts anyway; **(3)** better to monitor w/ judicial oversight. **Pure** allows recovery in proportion to harm. **Modified** bars recovery when P is either 50% or 50.1% or more responsible. Depends on Jx.  BUT **(1)** Shd neg Ps be allowed to recover? **(2)**  Comparative neg introduces administrative complexity; **(3)** prolongs litigation, favors wealthy. |

## Causation

### Cause in Fact

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| Grimstad (lifevests) | No **but-for causation** in the absence of evidence that omitted precautions would have stopped the harm. |
| Lone Palm Hotel (lifeguard) | When **P cannot prove causation due to D’s negligence**, once P proves negligence burden shifts to D to disprove causation. |
| Zuchowicz (3xRx)  Calabresi only | When **(1)** a side effect is the result of a drug; AND **(2)** drug is negligently prescribed; THEN P has a **rebuttable presumption of causation**. |
| Union Stock Yards | Under **CL**, only joint not several liability. Ps choose D. (Spurred legislation softening the rule). |
| **Joint Liability** | Any D can be held 100% liable. (Assures Ps will be compensated; even when $D is less neg than P) |
| **Several Liability** | Each D responsible for only their share (either pro rata or proportionate neg – depends upon the statute). |
| Kingston (2 fires)  **Concurrent** | When **causes are concurrent** and each independently would cause the harm, each tortfeasor is jointly liable. (Supported by RTT §27) |
| Summers v. Tice  **Alternative** | When **(1)** P proves each D was negligent; **(2)** joins all potential Ds; and **(3)** proves one or the others caused the harm; THEN Ds are **alternately liable**. I.e. joint liability, but Ds may crossclaim. |
| **Enterprise Liability**  (bottle caps) | Industry liable as a whole when: **(1)** D’s joint control of the risks; **(2)** least cost avoiders; **(3)** providing remedy to innocent Ps |
| Lead Industry Ass’n | No recovery: **(1)** No mkt share liability b/c expansive time period (>100yrs); **(2)** lead paint not a fungible product; **(3)** no alternative liability b/c not simultaneous act, not all Ds joined; **(4)** lead does not have a signature harm; P cannot rule out other causes. |
| Sindell (DES#1)  **Mkt Share Liability** | **Mkt. share liability**: **(1)** All Ds are potential tort-feasors; **(2)** harmful product was fungible; **(3)** P unable to ID D, by no fault of P; **(4)** Substantially all potential Ds named. **THEN**: Ds liable in proportion to mkt share. |
| Hymowitz (DES#2) | Since mkt share liability based upon overall risk produced, no exculpation evidence allowed in indiv. cases. |
| MTBE | **Commingled product liability**: IFP proves harmful product of each D present; THEN P can use mkt share theory to determine liability of each D. P won’t reach 100%. |
| Herskovits (% loss) | **No lost chance**: P recovers only when >50% 🡪 <50% (PROBLEM: blanket release in some cases)  **Lost chance**: same, but when <50%, P recovers proportionately to % lost  **Proportionality**: P recovers proportionately to percentage loss all the time. |

### Proximate Cause

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| Proximate Cause | No prox cause when: **(1)** supervening cause; **(2)** unforseeable type of harm; **(3)** unforeseeable P; **(4)** too remote in time/place; **(5)** too much liability. |
| Ryan v. NY Ctr. RR | No cause of action when harm is **too remote** from the negligent act. (Here fire spread 130ft.) |
| Polemis (UK) | If D is guilty of a negligent act, he is responsible for all of the direct consequences, foreseeable or not. |
| Emergency rule | Intervening human acts that are ordinary and natural results of D’s neg are not supervening causes. |
| Palsgraf | P cannot recover unless D’s negligent act is negligent w/r/t P. **Foreseeable plaintiff**. |
| Wagon Mound #1 (UK-wharf) | P cannot recover unless for a reasonably foreseeable type of harm. **Foreseeable harm**. (Consider that P’s action played a role in the fire). |
| Wagon Mound #2 (UK-ship) | P recovers because fire deemed to be a reasonably foreseeable type of harm w/r/t the ship. (Consider P’s action did not play a role in the fire). |
| Smith v. Brain Leech & Co. | **Thin Skull Plaintiff**: P can recover for any direct consequences of D’s negligence. (Characterized as extent, not type of harm. |
| Steinheiser (schizophrenic car accident) | P allowed to reach the jury on the question of whether accident was the triggering event of the unforeseeable type of harm. D allowed to argue that illness may have developed in any event as a way of reducing *damages*. |
| Kinsman Transit  (drawbridge-flood) | US courts take into account: **(1)** directness of harm; **(2)** degree of unforseeability of type vs. extent of harm; **(3)** whether D’s negligence causes other damage for which it is already liable. |
| Mitchell (miscarriage) | OLD RULE: under **CL**, **fright/emotional distress** w/o contact CANNOT be causal basis for injury. |
| Dillon (sister) | **Zone of danger test**: may recover for **negligent infliction of emotional harm**. Factors: **(1)** physical proximity; **(2)** direct perception; **(3)** relationship to victim. P needs to prove **pathological diagnosis.** |

## Duty

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| Hurley (physician) | No liability for refusing to care for the sick. Generally no liability for non-feasance. UNLESS one takes an **affirmative step** to rescue. |
| Addie & Sons (kids)  Buch (immigrant) | Under **CL**, landowners owe no duty of care to trespassers. |
| CL Categories | **Trespassers** – no duty  **Licensees** – duty to warn of concealed danger  **Guests** – duty of reasonable care |
| Rowland (faucet)  California only | Rejects CL. Factors: **(1)** foreseeability of harm to P; **(2)** certainty of injury; **(3)** connex b/w injury + conduct; **(4)** moral blame; **(5)** prevention policy; **(6)** burden to Ds; **(7)** insurance scheme; **(8)** CL categories. |
| Kline (Mass Ave) | **Landlords** have duty to protect tenants against **probably & predictable 3rd party attacks** in common areas of bldg. IF: **(1)** notice of repeat criminal acts; **(2)** occurs on premises under LL control; **(3)** reasonable to expect re-offense; **(4)** LL has exclusive pwr to prevent.  Consider: **(1)** causation defense for LL; **(2)** burden-shifting when assailants unknown; **(3)** contrib. neg. |
| Tarasoff (insane) | One who **(1)** takes charge of a person, **(2)** who **makes credible threats to a 3rd party**, has a **duty to warn** the 3rd party to prevent future harm. |
| R.2d §319 | One who **(1)** takes charge of person **(2)** whom he knows or should know is likely to cause bodily harm to others if not controlled, has a **duty to control** the third person to prevent him from doing such harm. |
| Creates the danger | D’s have an affirmative duty to rescue if they **create the danger**, even if they created the danger non-negligently. |

# Strict Liability

## Foundations

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| Bushey | Employers are **vicariously liable** for actions of their agents if the action is done in the **scope of employment** (the action is **characteristic of the business activity** OR **serving the master**). |
| R.2d §519 | **Abnormally dangerous activity** is subject to **SL**, limited to the kind of harm which makes it dangerous. |
| R.2d §520 | **Abnormally dangerous activity**: **(1)** high degree of risk to person/property; **(2)** magnitude of potential harm; **(3)** inability to eliminate risks w/ care; **(4)** abnormality of the activity; **(5)** inappropriateness of place; **(6)** social value small compared with risks. |
| Indiana Harbor Belt RR (RR chemicals) | SL not appropriate for D where no: **(1)** Ability to ∆ location; **(2)** ∆ fundamental nature of activity; **(3)** abandon activity. (In this case SL would be appropriate to impose on the carrier, but not mfr) |
| R.2d **Nuisance** | Substantial non-trespassory invasion of another’s interest in use & enjoyment of land.   * **Intentional & Unreasonable** (3 cases): **(1)** **harm>utility** 🡪 injunction + damages; **(2) serious & compensable** 🡪 damages (no injunction); **(3)** **severe & non-compensable** 🡪 damages (possible effect of enjoining activity) * **Unintentional** (one time) & Otherwise Actionable as: **(A)** Neg; **(B)** Reckless; **(3)** Abnormally dangerous. |
| **CL Threshold Test** | When the harm is **substantial**, courts grant P an injunction. Unless D’s activity is in the public interest. P may sell the injunction back to D. |
| Coase Theorem | Assuming zero transaction costs, the socially benefitial activity will prevail regardless of where the law assigns the property right. BUT given transaction costs the placement of the legal rule may lead to inefficient outcomes. Generally, better to disfavor the cheaper cost avoider. |
| Ensign (dogs) | It is a consideration, but **not a categorical defense that P came to the nuisance**. |
| **Coming to the Nuisance** | *Economically efficient rule: of two incompatible land uses, the one which had but did not take the opportunity to avoid creating costs of incompatibility should bear the costs.* |
| Boomer (cement) | Where P seeks to enjoin and **(a)** P suffers little loss, **(b)** D suffers great loss, and **(c)** D’s activity has social & pvt utility, courts may grant an injunction which is vacated upon payment permanent damages to Ps. |
| **Spur v. Del Webb**  **(feedlot)** | **(1)** Shd D’s activity continue? **(2)** Who bears the cost that results from allocation of the property right?  Whr P gets a windfall by the allocation of a property right, P must compensate D for unjust enrichment. |

## Products Liability

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| Winterbottom (mail) | **Whr no K privity b/w P&D 🡪 no duty of care**. OLD CL RULE. Liability to 3rd parties only for products that **(A)** preserve/destroy human life (Winchester); **(B)** latent defect w/o notice (Kuellig putty concealment) |
| MacPherson v. Buick | If the nature of a thing is reasonably certain to be dangerous if used in a foreseeable way, then mfr has a duty of care to 3rd parties. *EVOLVING RULE.* |
| Escola v. Coca Cola  Traynor concurring | **Mfr is SL** when placing product into mkt, knowing it to be used w/o inspection, & P proves causation. Limited to normal proper use. |
| Henningsen v. Bloomfield Motors | Essentially SL for **manufacturing defects**. Non-disclaimable warranty of merchantability. SL runs from mfr to end user. *EVOLVING RULE.* |
| **Defective Warning** | **Cost** of warning with **Probability** of injury and **Magnitude** of injury  Duty of reasonable care (e.g. peanuts), but no duty for obvious dangers (e.g. knives). |
| Unusually unsafe products | Use may be permitted if danger is outweighed by not using (e.g. rabies vaccine) |
| R.3d Products §3 | Causation due to product defect may be inferred when: **(a)** incident is of a kind that ordinarily occurs as a result of defect; **(b)** P rules out causes other than the defect. |
| Speller (fridge) | Adopts R.3d §3: P is not required to prove the specific defect. |
| Micallef (printing) | P may recover form design defects that are **open and obvious** so long as the unintended use is reasonably foreseeable. |
| Barker v. Lull  2 Tests for **Defects**  (Cts use both) | **Consumer Expectations**: P shows that product failed to perform as reasonably expected by consumers.  **Risk-benefit**: **(1)** P shows proximate cause; **(2)** D shows no alt design is more cost-justified |
| MacDonald (stroke) | **Learned intermediary doctrine**: duty to warn only the doctor, EXCEPT where patient decision-making is more active (e.g. birth control) |
| Hood (blade guard) | If a product has been **altered in the specific way a warning forbids**, the alterations defeat liability. (Design defect may, however, survive some alterations) |
| Liriano (meat gndr)  Calabresi only | When D’s neg is wrongful b/c it’s likely to cause the type of harm that ensued, evidence of neg is enough to establish a prima facie case of cause-in-fact. Burden shift to D to show no factual cause. |
| Preemption | Congress may expressly or implicitly preempt: **(1)** Field Preemption or **(2)** Conflict Preemption: *(A) Impossibility preemption (B) Obstacle preemption.* |
| Geier (admin case) | When state tort law **conflicts** with the aims of the federal regulatory scheme, fed law trumps. |
| Wyeth (IV push) | No **federal preemption** in case of **warning labels**. FDA reg provides a floor, not a ceiling. |

# Damages

Generally, goals to consider regarding damages are: to provide **compensation**, **deterrence**, **administrability**.

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| Punitive Damages Policu | Requires more than negligence. (Policy: **(1)** extra damages offset concealment; **(2)** deter harmful activity; **(3)** no worries about over-deterence; **(4)** otherwise damages may be trivial; **(5)** substitutes for crim law: (a) crim system may be overburdened, (b) lower burden of proof allows for some level of justice. |
| Compensatory | Includes **pecuniary**/economic losses (e.g. lost wages and cost of care) as well as **non-pecuniary** damages (e.g. pain and suffering and loss of enjoyment of life). |
| McDougald (coma) | Cognitive awareness is necessary when considering loss of enjoyment of life. Loss of enjoyment is not sep category from pain and suffering. |
| Per Diem | At trial, lawyers may advise juries determining pain + suffering to put a numerical value on a small unit of time. That time is then multiplied out over Ps lifetime. (favors young victims, raises issues of wage discrimination across race and gender, considerations that P will remain in workforce) |
| Duncan (quad’gic) | Ct reduces based on other jury verdicts, considers P’s reduced life-expectancy due to the injury. |
| Damage Caps | Some Jxs limit the amounts that P’s can collect. |
| State Farm v. Campbell | In determining the Constitutionality of a punitive damage award, consider: **(1)** the degree of reprehensibility of D’s act; **(2)** disparity b/w harm or potential harm and the amt of damages. If greater than 9:1, presumptively unconstitutional; **(3)** the difference between punitive damages and other civil or criminal penalties authorized to punish Ds. |
| Grimshaw (pinto) | Company’s own CBA may be used as evidence suggesting a conscious disregard of a design defect. |
| Economic Damages | Ps allowed to recover for purely economic damages only in cases of intentional tort or for neg when P proves injury. Cf. evolution of emotional harm. |

# Tort Reform

1. **STATUTORY REFORM OF TORT DOCTRINE**
   * 1. Tort reform results from crises of increasing frequency of suits and increasing insurance liability costs.
     2. Historically, reforms have mostly modified the law governing damages in tort law.
     3. Most frequent reforms: absolute dollar ceilings on pain and suffering and punitive damages; limitations or elimination of joint and several liability; abolition of the collateral source rule.
     4. Two views on what spurred these legislative reforms
        1. The increase in the frequency and costs of suits spurred the need for Ds to predict the scope of liability.
        2. More cynical view: potential Ds wanted relief from the increased costs
2. **WORKERS COMPENSATION**
   * 1. Rise of industrial injuries led to strains on the tort system.
        1. Legal doctrines barred Ps’ recovery: assumption of the risk, contributory negligence, fellow servant rule
        2. Many workplace injuries were not the result of anyone’s negligence
     2. Compensation schemes have 3 components: **(A)** compensable event; **(B)** measure of recovery; **(C)** payment mechanism.
        1. Workers compensation modified (A) and (B), yielding systemic benefits in (C)
   1. THE COMPENSABLE EVENT
      1. Scheme permits compensation for non-negligently caused injury while abolishing tort liability for the employer.
         1. Only available defense is that P intended to cause his own injury or acted with wanton disregard.
   2. THE MEASURE OF RECOVERY
      1. Greater numbers entitled to compensation; resolution via an administrative board reduces administrative costs.
      2. The amount of recovery is limited to account for the increased ease of recovery.
         1. No recovery at all for pain and suffering; (2) Medical expenses are paid periodically as they are incurred; (3) Statutes set schedule of recovery (e.g. for lost eye, hand, use of legs, etc.), which reduces administrative costs.
   3. THE PAYMENT MECHANISM
      1. Because the employer remains liable the incentive to deter injuries/accidents remains
         1. In a sense the incentive is strengthened b/c an employer is **SL** for workplace injuries.
         2. Some studies show that Workers Comp has resulted in substantial safety incentive effects.
      2. **Critics** argue the benefits levels are too low; periodic payments encourage malingering; with the rise of fungible claims (e.g. stress, back pain) difficulty determining whether injury is work-related.
3. **AUTO NO-FAULT**
   * 1. First step was to require auto insurance for motorists, covering the cost resulting from accidents irrespective of neg
     2. Auto insurance does not squarely fit the workers comp mold b/c both parties in auto context are similarly situated
        1. Injurer & victim cannot be identified in advance; (2) Doesn’t necessarily follow that the uninjured party is the injurer
     3. Resolution: **victim SL for own harms**. Auto No-fault: **(1)** abolition of tort liability; **(2)** mandatory purchase of insurance.
   1. “PURE” NO-FAULT
      1. Compensable event is only in auto context; measure of recovery is reduced to a minimum, but drivers may elect to raise the minimum; compensation is paid by “first party” insurance.
         1. **Critics** argue that eliminating tort liability entirely would cause an increasing the accident rate; corrective justice requires the injurer to compensate the victim.
         2. **Proponents** respond that a driver who is not already sufficiently concerned for her own safety would not be deterred by the extra liability; administrative cost savings reduce the need for attorneys, give money to victims.
            1. Major resistance by attorneys and no adoption in any state of Pure No-fault.
   2. “REAL” NO-FAULT: Abolishes tort liability only for less serious injuries.
      * 1. Claims that surpass a monetary threshold or a verbal threshold (i.e. list of injuries) are allowed.
        2. **Critics** charge that it is no cheaper than the tort system
   3. “ADD-ON” NO-FAULT: Tort liability remains untouched; mandatory purchase of no-fault medical and lost-wage insurance.
4. **THE FUTURE OF NO-FAULT**
   1. MEDICAL NO-FAULT: Hard to ID the compensable event b/c people seek medical treatment when already ill or injured.
   2. PRODUCT NO-FAULT: Compensable event limited to something like “arising out of the use of defective products.”
   3. TARGETED NO-FAULT: E.g. National Childh’d Vaccine Injury Act; 9/11 Victim Compensation Fund; Gulf Coast
5. **RECAP – FINAL CLASS NOTES**
   1. Administrative Costs & Difficulty in Fact-finding in the Current System
      1. Greatest costs in the tort system comes from lawyers; more money goes to lawyers than injured Ps
      2. Highly technical issues do not lend themselves to tort; but even everyday matters (e.g. car accidents) difficult to prove.
      3. Issues of horizontal equity; current system accommodates enormous variation
   2. S flow of industrial injury introduced repeat players and repeat harm 🡪 Workers Comp system.
      1. More efficient; gave up on tort as way of ensuring optimal deterrence complete compensation; OSHA came in to provide ex ante deterrence; created risks of logjam and industry capture; risk of **ossification of compensation grids**.
   3. CONTEMPORARY EXAMPLES OF ALTERNATIVES: 9/11 & GULF COAST
      1. Set up ex post to handle claims against common D’s, common questions of fault and causation, but different damages.
      2. **Centralized decision-maker** provides: uniform criteria, fewer attorneys, overall less-expensive and time-consuming.
      3. Systems did not force Ps into the system; Ps could choose between predictability and a greater payout.
      4. Gulf Coast: the private tort system provided better results: more closure for Ds, higher payouts for Ps.
   4. MISC
      1. Even individualized claims can be aggregated w/in the tort system; easier when there are limited Ds, but possible when there are many Ds, but common questions supervene. Actions can be routinized.
      2. The actual system is fairly similar to a more formal system; BUT we have **more dynamic system w/ possibility for new systems of liability.**

# Checklist

**INTENTIONAL TORTS**

* BATTERY
* TRESPASS (land, chattels)
* CONVERSION

**MEDICAL MALPRACTICE**

* INFORMED CONSENT
* CUSTOM
* YBARRA – RES IPSA LOQUITUR
* ZUCHOWICZ – CAUSATION

**NUISANCE**

* COMMON LAW THRESHOLD TEST
* RESTATEMENT
* INTENTIONAL & UNREASONABLE (3 KINDS)
* UNINTENTIONAL & NEGLIGENT/RECKLESS
* ABNORMALLY DANGEROUS ACTIVITY

**STRICT LIABILITY**

* VICARIOUS LIABILITY
* NEGLIGENT HIRING
* NUISANCE
* ULTRA-HAZARDOUS
* MANUFACTURING DEFECTS

**DUTY - NEGLIGENCE**

* NEGLIGENCE
* HAND FORMULA
* DESIGN DEFECTS
* AFFIRMATIVE DUTIES
* DUTY TO WARN
* SPECIAL RELATIONSHIPS

**BREACH**

* NEGLIGENCE PER SE
* CUSTOM
* RES IPSA LOQUITUR

**FACTUAL CAUSE**

* JOINT LIABILITY
* SEVERAL LIABILITY
* ALTERNATIVE LIABILITY
* MARKET SHARE LIABILITY
* COMMINGLED PRODUCT LIABILITY
* LOST CHANCE
* LONE PALM PRESUMPTION OF CAUSATION
* ZUCHOWICZ OR LIRIANO (RES IPSA FOR CAUSATION)

**PROXIMATE CAUSE**

* POLEMIS
* TYPE OF HARM
* EXTENT OF HARM
* FORESEEABLE PLAINTIFF
* SUPERVENING CAUSE
* EMOTIONAL HARM

**DEFENSES**

* CONTRIBUTORY NEGLIGENCE – *PURE COMPARATIVE*
* PRIMARY ASSUMPTION OF THE RISK
* SECONDARY ASSUMPTION OF THE RISK
* SEATBELT
* LAST CLEAR CHANCE
* CUSTOM
* SELF-DEFENSE
* DEFENSE OF PROPERTY

**DAMAGES**

* PUNITIVE DAMAGES
* COMPENSATORY DAMAGES
* PECUNIARY DAMAGES
* NON-PECUNIARY DAMAGES
* PURELY ECONOMIC LOSS

**JUDGE vs. JURY**

* INSUFFICIENT OR DISPOSITIVE 🡪 JUDGE
* PERMISSIBLE OR REBUTTABLE 🡪 JURY