

# NYU School of Law Outline: Torts, Catherine Sharkey

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# 1 Tort Law Theories

There are different theories for the purpose of tort law. The two major theories are “corrective justice” versus “deterrence.”

This is mostly an academic distinction; there’s nothing in the actual law about corrective justice versus deterrence. However, most of the academics doing the distincting are judges...there is some value in being able to make a deterrence argument if your judge tends to be a deterrence proponent. Especially if you’re trying to extend tort law and recognize a new tort.

- “Corrective Justice” is the theory that the purpose of tort law is moral, intended to correct injustices.

If  $\Delta$  (defendant) has done a wrong to  $\pi$  (plaintiff), he has created a moral imbalance. For example, throwing a book at a person infringes her right to “physical body integrity,” and asserts a superiority which does not exist. One purpose, some would say the purpose, of a lawsuit would be to rectify that imbalance, through damages.

- This is the traditional, historical view. Torts used to be fused with criminal law, after all.
- Compensation is not the *goal* of tort law, but its effect.

- “Deterrence” is the theory that the purpose of tort law is to promote economic efficiency of harm.

There is an optimal, nonzero, number of accidents/injuries. We do not want to avoid accidents at all costs, because some accidents are too expensive to avoid. Spending \$10 to prevent \$100 of injury is good; spending \$100 to prevent \$10 of injury is not.

- “Cheapest cost-avoider”: Find liability on the part of whoever could have avoided the harm most cheaply.
- This is more recent; before the 1960s, nobody discussed the concept of deterrence.
- However, proponents of the deterrence view argue that the systems were set up to promote economic efficiency, even though it wasn’t a spoken goal.

- Other theories include:

- Loss distribution: the idea is to spread out costs over many people. This underlies insurance, or the methods by which the cost of a large lawsuit in product liability (for example) is passed on to the consumer through a small markup.

- Compensation: we are human, and we want to compensate people who are hurt. However, it is arguable that this is not a “goal” of tort law as much as a side effect.
- Redress of social grievances: tort law can sometimes put authority on trial, such as suing for asbestos-related illness or breast implant side effects.

## 2 Intentional Torts

The simplest form of tort, involving an intentional action. The elements:

- Intent
- Act
- Causation
- Damages

### 2.1 Physical Harms

- Battery: An unwanted touching. Requires intent to cause harm (or apprehension of harm), and harm actually occurs.
  - *Vosburg v. Putney*: “if the act is unlawful [such as a kick while in the classroom, as opposed to on the playing field at recess], the intent must be unlawful.”
  - *Garratt v. Dailey*: item “Eggshell Skull Rule”: There is no issue of whether the harm suffered is foreseeable; once you commit an intentional tort, you are liable for the full scale of damages.
  - Defenses To Battery
    - \* Consent: If  $\pi$  consented to the touching, it is not unwanted.
      - *Mohr v. Williams*: Even if  $\pi$  probably would have consented to the touching, as here where the doctor notices a problem when the patient is anesthetized, lacking consent any touching is a battery. Hence, consent forms. (Note, though, that there could still be negligence for wrongful death even given a consent form.)
      - *Hudson v. Craft*: *volenti non fit injuria* (“the voluntary is not injured”) does not apply to the third-party promoter, who did not follow the boxing regulations. Not to mention the promoter is the cheapest cost-avoider; people are going to box no matter what, so the place to put restraint is on the promoter.
    - \* Insanity: If  $\Delta$  is insane that may not be a defense.

- *McGuire v. Almy*: “Where an insane person by his act does intentional damage. . . he is liable for that damage in the same circumstances in which a normal person would be liable.” The Court also finds “that the jury could find that the defendant was capable of entertaining and that she did entertain an intent to strike and to injure the plaintiff and that she acted upon that intent.”
    - This is primarily a deterrence argument, to encourage the caretakers of the insane to take good care. Morally, it’s harder to make out why the defense was denied. There is also some concern over wealthy, insane people forcing their victims to bear the financial cost of getting injured.
  - \* Self-Defense, Defense of Others
    - *Courvoisier v. Raymond*: The standard for justification is whether  $\Delta$  shows that a reasonable man would believe his life in danger, or at least danger of great bodily harm.
  - \* Protection of Property
    - *Bird v. Holbrook*: “It is inhuman to catch a man by means which may maim him or endanger his life.” This  $\Delta$  had specifically set up his gun to fire, and specifically not posted a warning.
- Trespass to Land: Simply put, land is protected. This is a very strong privilege.
    - *Dougherty v. Shepp*: An unauthorized entrance is, in and of itself, a tort. The law protects interest in private property, period.
    - Defenses to trespass:
      - \* Necessity: If it is necessary to prevent injury, the strong privilege of private property can be overridden.
        - *Putnam v. Ploof*: Despite owning the dock,  $\Delta$  had no right to remove (via his servant)  $\pi$ ’s boat from his dock.  $\pi$  had to moor there to prevent harm to his boat and family (which did happen after it was unmoored). The privilege also does *not* hinge on  $\pi$  being free of negligence. . . if  $\pi$  was negligent in going out on the lake, that wouldn’t matter. Also, it doesn’t matter that there were other mooring points. Necessity is all.
        - *Vincent v. Lake Erie Transportation Co.*: Necessity is, however, an incomplete privilege. If the actions taken in necessity cause any damage to the owner, the other is liable for damages.

## 2.2 Emotional and Dignitary Harms

- Early on, there were no concepts of emotional harm, generally only “parasitic” damages attached to a physical harm.
- Assault: Causing apprehension of imminent physical harm.
  - *Tuberville v. Savage*: The intention and act make the assault, not the words.
- Offensive Battery: Words or actions designed to insult or offend without causing physical harm.
  - *Alcorn v. Mitchell*: Spitting in someone’s face. Battery where the harm is not physical, but “offensive contact.”
- False Imprisonment:
  - *Bird v. Jones*: “Three walls do not a prison make.” Inability to leave is key.
  - *Coblyn v. Kennedy’s, Inc.*: Demonstration of physical power where it’s “come with me or be harmed” is false imprisonment. Especially if there is no identification or context given by the jailer.
- Intentional Infliction of Emotional Distress: Words of a character “that are so extreme and outrageous that they fall outside the bounds of serious society.”
  - *Wilkinson v. Downton*: “Outrageous!” standard. If family, liable regardless of harm; if not family, only liable if there actually is harm.

## 3 Negligence

The majority of tort claims. We have a “sea of negligence” with pockets of strict liability. Elements:

- Duty
- Breach
- Causation
- Damages

### 3.1 Duty and Breach

- “Reasonable Person” Test
  - According to Justice Holmes, the staunch defender of negligence standards, each person owes a “duty of reasonable care.” But what does that mean?
  - *Roberts v. Ring*: A seven-year-old boy should not be held to the same standard of self-preservation as an adult; look to his age and maturity. But this is because it was self-protection. As to the elderly driver, “[w]hen one, by his acts or omissions causes injury to others, his negligence is to be judged by the standard of care usually exercised by the ordinary prudent man.”
  - *Daniels v. Evans*: “When a minor assumes responsibility for the operation of so potentially dangerous an instrument as an automobile, he should... assume responsibility for its careful and safe operation in the light of adult standards.”
  - *Breunig v. American Family Insurance Co.*: If you know of a mental condition you have, as here, you are under the same standard of care as if you are susceptible to heart attack or stroke. See *Hammonree*, down under Strict Liability. If you don’t know, of course, that’s another matter and you can’t be negligent for not knowing you have a sudden illness. Veith here did not take such care, though the condition existed in advance, so she was responsible.
  - What about gender?
    - \* *Daniels v. Clegg*: The Court applied a “reasonable woman” standard for carriage driving: the young woman driving couldn’t be expected to have “the same degree of competency” as a man.
    - \* *Tucker v. Henniker*: Throws out the same argument.
    - \* *Ocheltree*: A modern take. The majority opinion in the Fourth Circuit dismisses the Title VII claim, because the conduct would be equally insulting to men and women. The majority does not want to reify (make real) gender inequality, fearing a “neo-Victorian” treatment of women.
    - \* That was reversed in banc, though.
- Hand Formula/Calculus of Risk
  - The Hand Formula: Weigh B, the burden of adequate precautions, against  $P \times L$ ; P is the probability of the harm, and L is the gravity of the loss. If B is less, then not taking the burden of B is a breach of duty (small-n negligence, negligence *per se*). If B is more, then not so.
    - \* *United States v. Carroll Towing Co.*: Once we separate the collision (unpreventable, even if there was a bargee on board) from

the sinking, we ask whether the bargee on board might have prevented the sinking, and compare  $B$  to  $P \times L$ . Clearly,  $B$  is far less, so there is contributory negligence in not having a bargee on board.

- \* *Bolton v. Stone*: Three opinions. First, the jury verdict is reversed, because “the hitting out of the ground of the ball. . . was a realization of a reasonably foreseeable risk,” the defendants hadn’t done anything, and “the plaintiff in this case might. . . have been killed.”
- \* The House of Lords, though, point out that  $P \times L$  is so small that no one would have done anything.
- The Hand Formula examines burden versus the probability and risk. The calculus of risk, though, looks more just at the probability and risk. They seem to suggest that if the risk is high enough, there must be preventative action, no matter how costly.
- Why use the Hand Formula? Because this is law and economics. If the cost of taking precautions is higher than  $P \times L$ , we *might not want them to take the precautions!* The money spent can be put to better use elsewhere.
- *Andrews v. United Airlines*: Common-carriers are to be held to an extremely heightened standard of care. “Even a small risk of serious injury may form the basis of liability” if they could fix the problem practically, and the retrofitting of bins or adding netting would not bankrupt them.

- Industry Custom

- In the 19<sup>th</sup> century, there were conflicts over how much industry custom could be raised as a defense to (or even proof of) negligence.
  - \* *Titus v. Bradford, B. & K. R. Co.*: Custom is an “unbending test of negligence.” The master (the railroad) is “not bound to use the newest and best appliances,” and it is not the jury’s place to set up a standard that dictates customs or controls business.
  - \* *Mayhew*: “‘Custom’ and ‘average’ have no proper place” in defining ordinary care.
  - \* How do we reconcile this?
    - Maybe we view custom as helpful as a *metric*, not a dispositive fact; also, we can look to areas of the outer margins (when the custom has some reasonableness to it, it might be valid, but when it is unreasonable, ignore it).
    - There are also questions of the cost of the burden (Hand formula), the level of knowledge on  $\pi$ ’s part (employee versus independent contractor), and so on.

- *The T.J. Hooper*, Southern District of New York: Though there was no law requiring radios on tugboats such as the *T.J. Hooper*, custom dictated that they were part of “the necessary equipment.”
  - *The T.J. Hooper*, Second Circuit Court of Appeals: First, the District Court was wrong to say there was a general custom: most were toys “neither furnished by the owner, nor supervised by it.” However, second, “[custom] is never [negligence]’s measure.” And here, the custom, which is to not have a radio set, is not helpful; a properly-equipped tug *would* have a radio, plain and simple, custom notwithstanding.
  - Custom is usually looked at only as suggestive, and never alone; it is examined modulo a Hand formula or reasonable-person standard.
  - *Lama v. Borrás*: Medical malpractice is a separate and complicated area. Here, custom is looked upon with a lot of deference, “expert testimony is generally essential,” and custom tends to be the standard for treatment.
- Negligence Through Statutes or Regulations
    - *Gorris v. Scott*: Even where the statute supports a private negligence cause of action (see *Uhr v. East Greenbush* below),  $\pi$  must show that he falls within the class of protected individuals, and that the risk suffered fell within the class of risks envisioned by the statute. Here, where animals penned improperly in violation of an anti-disease Act were washed out to sea, that the Act was about disease and not animals’ safety barred recovery because the Act did not show negligence.
    - This was debated for a long time (probably still is). Posner: “if you were supposed to take action X to prevent risk A, action X would also have prevented risk B, and you don’t take the action, you are liable if risk B occurs, too, not just A.” Causation and damages would still need to be proved, of course.
    - *Martin v. Herzog*: Driving without lights (when this is a statutory violation) is negligence *per se*. However, there still must be causation, there can be excuses, and under *Tedla v. Ellman*, if a statute was designed to codify the common law, then exceptions under the common law should be considered to exist under the statute too. *Uhr v. East Greenbush Cent. Sch. Dist.*: There are three prongs to showing a statute (or administrative regulation) allows a private right of action if it is not stated directly, under *Cort v. Ash*.
      - \* Class of persons: is  $\pi$  “one of the class for whose particular benefit the statute was enacted”?
      - \* Class of risks: would recognizing a private right “promote the legislative purpose”?



- \* Legislative scheme: would creating a private right “be consistent with the legislative scheme”?
  - Here, given the facts—the immunity provision in the legislation and the fact that prior courts came to the same decision and the law didn’t change—the private right is not consistent.
  - Note that there could still be a common-law negligence case, but one was not stated here.
- Special Duties:
  - Affirmative Duties
    - \* No Duty to Rescue
      - Like it says: there is no universal duty to rescue, at least in stranger situations.
      - *Hurley v. Eddingfield*: Not even in the case of a doctor—though the State board may punish by stripping a license, that doesn’t make it compulsory to do it.
      - There is a fair amount of discussion of whether there should be (Posner’s worldwide contract versus Epstein’s forced-exchange). There are, in some cases, “good Samaritan” statutes, such as Vermont’s, but even that does not have a private right, just a fine of \$100.
    - \* Special Relationships
      - In some cases, where there are special relationships between people, there may be affirmative duties to prevent someone from causing harm.
      - *Tarasoff v. Regents of University of California*: A psychotherapist who predicts/determines that his patient poses a serious danger of violence to others bears a duty to “exercise reasonable care to protect the foreseeable victim of that danger.”
  - Duties of Owners and Land Occupiers
    - \* Traditionally, there were three categories of visitor-to-premises:
      1. Invitees, normally business invitees.
      2. Licensees or social guests
      3. Trespassers
    - \* Generally, nowadays the distinction between 1 and 2 is removed, but 3 is always a separate category.
    - \* *Rowland v. Christian*: Normally, the rule was that categories 2 and 3 take the premises as they find them, and the only duty owed by the landowner is to prevent “wanton or willful injury,” whereas invitees have an ordinary-care standard. However, there was a known exception for “concealed traps,” and the faucet here was clearly one.

- \* So *Rowland* could have been disposed of under the common law. But the court decided to destroy the distinction between the three types, because they had little if nothing to do with reality.
- \* Note that all that was required was a warning.

## 3.2 Causation

- Cause-in-Fact
  - The “empirical substrate,” or the “but-for” cause. Lacking the action, there would have been no harm. This, however, is not the end of causation.
  - *N.Y. Central R.R. v. Grimstead*: Would a buoy on board the ship have prevented the captain from drowning? Clearly it was a breach of duty to not have a life preserver. However, the drowning man couldn’t swim, the wife might not have found the buoy in time, or might not have been able to throw it to him. Here, the failure of the company to have the life preserver was not a “but-for” cause of the drowning.
- Proximate Cause
  - The “scope of liability,” or the “legal cause.” Most of the fighting about the scope of tort law reduces to a discussion of how broad to assign proximate causation.
  - *Ryan v. N.Y. Central R.R.*: Through careless management of the railroad, a spark sets woodshed O on fire, which in turn leads to house A catching, then house B, and so on. Only the woodshed’s owner can recover; we want to draw the line to prevent “a liability which would be the destruction of all civilized society.” There were other rationales, which are weak.
  - *Ryan* was discredited, but the principle was sound and it went further.
  - There are two tests for proximate cause.
    - \* The directness test: backwards-looking. Start with the damage and work backwards to determine what the proximate cause was. Especially look for intervening factors such as nature, or third parties’ actions.
    - *In re Polemis*: Arbitrator found a breach of duty of care; the question became whether the explosion that happened was caused by the breach. The court determines that once foreseeability has factored into the breach-of-duty calculation, they don’t use it again to examine the type of damage foreseeable by the breach of a duty.

- The charterers probably would have conceded that damage to the deck from the falling plank would be reasonable, but claimed that the explosion and fire were “too remote.” The court, though, went further.
- \* The foresight test: forwards-looking. Start with  $\Delta$ ’s actions and determine what the foreseeable harms are looking forward; these establish the scope of causation.
  - *Wagon Mound I*: There is clearly the duty, breach, and damages; is there causation?
  - The court rejects the directness test, saying it “does not seem consonant with current ideas of justice or morality.” They find no liability for the fire that damaged the dock, because  $\Delta$  could not have known the oil was flammable when spread on water like that.
  - *Wagon Mound II*: Here, the fire destroying another ship was considered foreseeable. The foreseeability test runs out the same, but some differences include a change in the court, possible contributory negligence, and different facts presented (in *II*  $\pi$  introduced evidence that  $\Delta$  did know the oil was flammable when spread).
  - *Viriden v. Betts and Beer Construction Company*: The defect in the roof was did not cause the injuries; the ladder collapse is what did it. And the foresight test cannot possibly include a defective ladder.
  - *Hebert v. Enos*: The foresight test cannot possibly include an electrocution by touching a water faucet because of a toilet overflowing, either.
- Negligent infliction of emotional distress: the court limits in two ways.
  - “No duty” conception: either there isn’t a duty as a matter of law, or else policy prevents the expansion to protect against fraud or the like.
  - Limitation of proximate cause.
- There were three tests for the rule for negligent infliction.
  - “Physical impact rule”: If there is physical impact you may recover for the subsequent emotional distress. This was brought to its logical extreme by the cases involving a mouse hair or getting tapped.
  - “Zone-of-danger rule”: If it was possible for you to be physically harmed, but you essentially got lucky, you may recover for the emotional damages.
  - *Dillon v. Legg*: Sets up a new three-part test, because allowing the sisters to recover but not the mother is insane.

1.  $\pi$  must be near the scene.
  2.  $\pi$  must be a firsthand witness.
  3.  $\pi$  must have a close relationship (usually read “family”).
- The “near the scene” rule is not in the Third Restatement, because it has been folded into “firsthand witness.”

### 3.3 Uncertainty

- *Res ipsa loquitur*: When all you have is circumstantial evidence.
  - *Colmenares Vivas v. Sun Alliance Ins. Co.*: Wigmore and Prosser’s three conditions:
    - \* The accident does not ordinarily occur in the absence of negligence.
    - \* The accident is caused by an agency or instrumentality in  $\Delta$ ’s exclusive control. (Relative to  $\pi$ ’s or a bystander’s control; contractors and other hirings of  $\Delta$  still qualify as exclusive.)
    - \* The accident is not due to any voluntary action on  $\pi$ ’s part.
  - Second Restatement replaces “exclusive control” with “other responsible causes are sufficiently eliminated” and insists the negligence is within  $\Delta$ ’s duty.
  - Third Restatement: “if the accident... is a type of accident that ordinarily happens as a result of the negligence of a class of actors of which  $\Delta$  is a member.”
  - *Ybarra v. Spangard*: *Res ipsa* can be used to defeat a “conspiracy of silence,” such as this medical malpractice claim. By inferring negligence on all parties’ parts, we encourage individuals to come forward with evidence in order to escape liability if they were not responsible.
  - *Morejon*: *Res ipsa* lets the jury infer negligence, but does not create a rebuttable presumption of negligence. If it created a presumption, then unless the defendant responded, there would be summary judgment, which is too strong. So we go with the weak form: inference.
- Collective Liability
  - Joint causation/concert of action: *Kingston v. Chicago & N.W. Ry.*, where both A and B caused the harm.
    - \* This damages “but-for” causation, because but for one of the fires, the property still would have burned.
    - \* However, the Court rules that the harm is indivisible, and as long as both fires were started by human agencies, the  $\pi$  may recover fully against either, because otherwise he would be screwed by the two  $\Delta$ s pointing fingers at each other.

- \* This is predicated, among others, on the fires being of the same size.
- Alternative liability theory: *Summers v. Tice*, where either A or B but not both caused the harm.
  - \* When we know that only one of the pool of  $\Delta$ s is the actual wrongdoer, but both were negligent and the harm was negligently caused, the burden of proof shifts to the  $\Delta$ s to *disprove* causation.
- Market share liability: *Sindell, Hymowitz, Skipworth, Thomas*, where in a sense all and none of the  $\Delta$ s caused the harm.
  - \* Rules for making out a MSL case, per *Sindell*:
    - There must be a specific time frame. Nine months of pregnancy (per the DES cases) is good; 100 years of lead-based-paint manufacture is not. (*Skipworth*.)
    - The pool of  $\Delta$ s must make up a “substantial share” of the market. Per *Hymowitz*, this is of the *national* market.
    - The product must be fungible. It must have the same compound or composition, and all formulations must pose the same risk. This was used in *Skipworth* because different forms of lead paint have different risks. However, *Thomas* fell out the other way, because lead carbonate, the active agent of the lead-based paint, was found fungible.
    - The  $\pi$  must be unable, through no fault of her own, to identify the source of the wrongdoing. (Which is self-evident.)
- Scientific Uncertainty
  - *Zuchowicz v. United States*: We know that Danocrine can cause PPH, which is what killed the decedent. However...
    - \* We don’t know whether the *overdose* caused the harm. It’s a matter of but-for causation: does the Danocrine lead directly to the overdose to the PPH?
    - \* Also, note that this was not a “signature injury.” Not relevant here, true, but important.
    - \* The Court takes the expert testimony of witnesses to suggest the causal relationship between overdose and PPH. There appears to be a burden-shifting, too: Danocrine causes PPH, there was a negligent overdose, so now  $\Delta$  must disprove causation.
    - \* Recall *Martin v. Herzog*, where violation of a statute is negligence *per se*. This applies here, in a way: violation of FDA regulations is negligence.
  - *Herskovits*: The diminution of a low chance of survival, from 39% to 25%, is enough to send a case to a jury. However, the damages would be limited to the premature death, “such as lost earnings and additional medical expenses, etc.”

- *General Electric Co. v. Joiner*: War of standards. Debate first over the *Frye* standard for scientific expert testimony versus the *Daubert*, then what the standard of review is under *Daubert*.
  - \* *Frye*: “General acceptance” test. If it is widely accepted in the scientific community, then it is accepted in court, required to be admissible, and deferred to.
  - \* *Daubert*: Shifted the role of gatekeeper to the trial judge. That judge decides what’s “junk science” and what isn’t, and more importantly, the appellate courts may only overturn that decision on an “abuse of discretion” standard. That is, just because the appellate division would have come out the other way isn’t enough: it needs to be found the trial court was abusing its discretion.
- *Daubert* hearings have, in effect, become mini-trials.

### 3.4 Plaintiff’s Conduct: Defenses to Negligence

- Contributory Negligence: Traditional doctrine which stated that if  $\pi$ ’s conduct contributed in any way to the causation of the incident,  $\pi$  could not recover.
  - *Gyerman v. United States Lines Co.*: Difficult to prove: burden of proof is on  $\Delta$  to show  $\pi$ ’s conduct contributed.
  - *LeRoy Fibre Co. v. Chicago, Milwaukee & St. Paul. Ry.*: “The rights of one man in the use of his property cannot be limited by the wrongs of another.” LeRoy was using his land properly, and  $\Delta$ ’s locomotive was negligently maintained. Even though LeRoy was probably the cheapest cost-avoider.
  - *Fuller v. Illinois Central R.R.*: “Last clear chance” doctrine. If  $\Delta$  had the “last clear chance” to avoid the accident, as with the locomotive seeing the buggy,  $\Delta$  is solely responsible.
- Assumption of Risk: Sometimes,  $\pi$  has “assumed” the risk of the activity.
  - “Primary” assumption of risk:
    - \* *Murphy v. Steeplechase Amusement Co.*: There is an inherent risk in the activity, which  $\pi$  is aware of (or a reasonable person would be aware of).  $\Delta$  is not negligent in his maintenance/control.  $\Delta$  is therefore not in breach of a duty.
    - \* Universal defense to negligence claims: “We were not negligent!”
  - “Secondary” assumption of risk:
    - \* *Meistrich v. Casino Arena Attractions, Inc.*:  $\Delta$  has breached his duty to the plaintiff, but  $\pi$  is aware of that breach and therefore is himself negligent.

- \* Only applies in jurisdictions with contributory negligence doctrines. If a jurisdiction has comparative negligence (below), collapses into determining  $\pi$ 's comparative negligence.
- Comparative Negligence:
  - *Li v. Yellow Cab Co. of California*: California Supreme Court makes judicial determination to shift to comparative negligence. Two forms:
    - \* “Pure” form: Apportions liability in direct proportion to fault in all cases.
    - \* “50%” system: If  $\pi$ 's liability is 50% or higher, no recovery.
  - California court chooses “pure” form, reasoning that a system which gives 51% of damages to a plaintiff who is 49% negligent, but nothing to a plaintiff 50% negligent, is unreasonable.

### 3.5 Multiple Defendants

- Joint Tortfeasors: Indemnity, Contribution, and Settlements
  - There are three forms of multiple- $\Delta$  approaches.
    - \* Joint Liability: Where  $\pi$  has been injured by multiple tortfeasors, he can recover 100% of the damages from any of them.
    - \* Several Liability:  $\pi$  can recover from each  $\Delta$  only for the percentage of harm caused
    - \* Joint and Several Liability:  $\pi$  can recover 100% of the damages from anybody, but at the same time, we do calculate percentage of harm.
  - Likewise there are two doctrines for how  $\Delta$ s can deal with *being* multiple-tortfeasors.
    - \* Indemnity: “You sued the wrong party! Sue him instead!”
    - \* Contribution: “I’m not solely responsible. Sue him too!” Either it becomes a joint lawsuit or the first  $\Delta$  sues the second afterward. The existence of a contribution rule is what separates joint liability from joint and several liability.
  - In *AMA v. Superior Court*, the dissent claims that the existence of comparative negligence (as decided in *Li* a few years earlier) should destroy the joint and several liability doctrine. If  $\pi$  can recover from all  $\Delta$ , in proportion to their damages, why give them the option to get 100% out of someone?
    - \* Largely, this is intended to help the innocent  $\pi$  recover fully, in case one  $\Delta$  is nonliquid or bankrupt.
    - \* The AMA case also has to get around the California civil code from 1957, which said there was only equal division, so the Court created a “comparative partial indemnity” doctrine. It’s a lot of weaselwording.

- *McDermott, Inc. v. AmClyde and River Don Castings, Ltd.*: There are three rules for how to handle accounting for the amounts paid by  $\Delta$ s who settle. Let's take our hypothetical of  $\pi$  suffering \$100, with  $\Delta_1$  accountable for 30% and  $\Delta_2$  accountable for 70%. But  $\Delta_2$  settles for \$5.
  - \* *Pro tanto* setoff with contribution: Thanks to joint and several liability,  $\pi$  can win the balance, \$95, from  $\Delta_1$ . At which point  $\Delta_1$  can sue  $\Delta_2$  for everything over his 30% share... in other words, both  $\Delta$ s pay the same. So there is no incentive to settle.
  - \* *Pro tanto* setoff without contribution: Now  $\Delta_1$  is on the hook for \$95 without any sort of remedy.
  - \* "Carving out": Now  $\pi$  can win only the amount corresponding to  $\Delta_1$ 's liability, in this case \$30. This is the preferred rule in this case, because it has no disadvantage to settling and the *pro tanto* rules have no clear advantages.
  - \* When you consider that courts don't really have tight control over the "good faith" requirements of settling, the last rule tends to be preferred.
- Vicarious Liability/Respondeat Superior
  - *Ira S. Bushey v. United States*: An employer can be held responsible for the actions taken by the employee. There is no hard-and-fast rule, but there are some guidelines:
    - \* Early cases limited vicarious liability to when the employee's purpose/motivation were to benefit the employer.
    - \* But Judge Friendly here brings in a foresight test: "Lane's conduct was not so 'unforeseeable.'"
    - \* He also points out the difference between this circumstance and, say, personal matters of the employee, such as his love life, even on company property.
    - \* Finally, "The damage takes place in a restricted area to which the Government insisted the man have access due to his employment."
  - Friendly seems skeptical of vicarious liability serving a deterrence function. It may simply be a compensation matter, giving the plaintiff a better chance to recover (since the employer can likely handle the loss better than the employee).
  - *Petrovich v. Share Health Plan*: What happens when a managed-care organization is, in some sense, running groups of physicians?
    - \* Technically, the physicians are independent contractors, and they are not considered employees. This is because the employer would have substantially less control, and besides, the contractor who hauls goods for fifty different contracting parties can't be said to be any one party's employee.



- \* There are two theories of liability: Apparent authority, and implied.
- \* Apparent authority depends on two factors: the HMO having held itself out as a provider of health care, and the patient justifiably relying on the HMO's conduct by looking for the HMO to provide health care. Both of which are apparent in this case.
- \* Implied authority is based on whether the HMO retains the right to control the manner of the work. In this case, the HMO's quality assurance reviews and control over referrals, plus their method of compensation, suggests authority.

## 4 Aside: Economic Analysis

### 4.1 Coase Theorem

- If there are zero transaction costs, the efficient outcome will occur regardless of the choice of legal rule.
- If there are positive transaction costs, the efficient outcome may not occur under every legal rule; the preferred legal rule is the rule that minimizes the effects of transaction costs.
- Nuisance law: imagine the entitlement of a factory versus the entitlement of clean air.
- There are four ways: two rules (property versus injunction), two places to put the entitlement (on the homeowner, translating as "smoke is a nuisance," or on the factory, translating as "smoke is not a nuisance.")
- If the homeowner and factory must bargain, strategic behavior is likely to prevent an agreement.
- And if there is more than one homeowner, they must get together to negotiate. And there may be freeloaders.
- So we choose a rule that will encourage the same result as with no transaction costs.

### 4.2 Primary and Secondary Accident Cost Reduction

- Automobile accident: we have a choice of rule (strict liability versus negligence).
- If considering only the driver's speed, strict liability would lead to the same as negligence: driving moderately.
- If considering the pedestrian's level of care too, strict liability would cause running (since it wouldn't matter), but negligence would cause walking; we must couple strict liability with comparative or contributory negligence.

- If considering the driver's level of care, strict liability with comparative or contributory will lead to the right result, but negligence will cause too little driving.

## 5 Strict Liability

Rare occasion, islands in a "sea of negligence." The elements:

- Act
- Causation
- Damages

### 5.1 Traditional Strict Liability; Ultrahazardous Activities

- *Hamontree v. Jenner*: California courts refuse to apply strict liability to automobile accidents.
  - Strict liability is preferable to  $\pi$ . There is no need to prove breach of a duty of care; in *Hamontree*  $\Delta$  had been seeing a doctor and taking his medication, so if negligence was the theory, that would be hard to prove.
  - It is arguable that more claims would arise under strict liability theories, but they would be simpler. No debates about duty or breach.
- Restatement (Second): Carrying on an "abnormally dangerous activity" is grounds for strict liability for *the kind of harm which makes the activity dangerous*. If dynamite falls on your foot you can't sue for strict liability just because it's dynamite.
- There is a six-factor test for defining "abnormally dangerous":
  - Existence of a high degree of risk.
  - Likelihood that the harm will be great.
  - Inability to eliminate the risk through reasonable care.
  - How much the activity is not common.
  - How much the activity is inappropriate to its location.
  - Balance of value versus danger.
- Restatement (Third): An activity is abnormally dangerous if:
  - It creates a "foreseeable and highly significant risk of physical harm even when reasonable care is exercised."
  - It is "not one of common usage."
- Note that the balancing act factor is gone.

- *Indiana Harbor Belt R.R. v. American Cyanamid Co.*: Judge Posner refuses to assign strict liability, saying the activity was not abnormally dangerous.
  - He lists the compounds more dangerous than the acrylonitrile which spilled.
  - He points out that there really isn't an alternative to this setup: the switching centers have to be in urban centers. (Balancing act test.)
  - He also points out that this can be settled with negligence: due care *would* have caught the problem.
- Even under strict liability, proximate causation and foreseeability can play in. And assumption of risk (primary, at least) is still alive and well. If you assume the risk, you can't sue for strict liability.

## 5.2 Trespass to Chattels; Conversion

- Trespass is a very protective tort. See trespass to land: there does not even have to be marked damage—the entrance is the tort.
- *Intel v. Hamidi*: trespass to chattels requires some sort of damage, and computers are not land but chattel.
- Conversion:
  - *Poggi v. Scott*: “the unwanted interference by defendant with the dominion over the property of the plaintiff from which injury to the latter results...neither good nor bad faith, neither care nor negligence, neither knowledge nor ignorance.”
  - That's why this is under the aegis of strict liability: there is no element of intent required. Act, causation, damages; that's it.

## 5.3 Private Nuisance

- “A nontrespassory invasion of another person's interest in their land.”
- The result can be an injunction, the “property rule,” or damages, the “liability rule.”
- It isn't enough to be intentional; it has to be both intentional and unreasonable. How to define unreasonable?
  - Cost-benefit analysis?
  - Threshold?
- *Fontainebleau Hotel Corp. v. Forty-Five Twenty-Five, Inc.*: In order to claim something is a “spite fence,” there has to be no other purpose. It's not enough to say “he could have built elsewhere,” because (not unlike *LeRoy Fibre*) he had the right to build wherever he wanted.

- There is no “ancient lights” policy in the United States.
- *Ensign v. Walls*: “Coming to the nuisance” claims don’t often hold up; Coase-based frameworks will be reluctant because they don’t want to prioritize first-in-time arguments, and besides, as areas change (say, becoming more residential), we don’t want to limit that because there are dog breeders in the area.
- *Boomer v. Atlantic Cement Co.*: An injunction is denied (as long as  $\Delta$  pays damages) because the court finds a disparity between the gain and the loss: the total loss by  $\pi$ s was \$185,000; the plant’s value in operations was \$45,000,000.
- Underlying question in nuisance: Where do we place the entitlement? This falls back to the Coase discussions.

## 6 Products Liability

### 6.1 Development of Doctrine

- We began with a “privity” limitation, which prevented the injured party from suing the remote supplier. The consumer could only sue the immediate vendor.
- This was smashed by *MacPherson v. Buick Motor Co.*, which allowed the driver who was not in privity with the remote manufacturer to sue under a negligence theory for a bad wheel.
- In *Escola v. Coca Cola Bottling Co.*, Justice Traynor concurred and urged that negligence should not be the standard, but that products liability should be built on strict liability. Of course, this “should, of course, be defined in terms of the safety of the product in normal and proper use, and should not extend to injuries that cannot be traced to the product as it reached the market.” His reasoning:
  - Deterrence (aka loss minimization or risk reduction):  $\Delta$  is the cheapest cost-avoider.
  - Injured people aren’t in a position to refute evidence of hazards or identify the defect’s cause, because they don’t know how the manufacturing works.
  - Consumers also aren’t in a position to judge the “soundness of a product.”
  - Insurance can work to minimize or spread out the losses, as can manufacturers through raising the prices.
  - Besides, here *res ipsa loquitur* is standing in for strict liability anyway. So let’s just go for SL.

## 6.2 Product Defects

- Manufacturing Defect
  - \* The traditional definition. See the bottle in *Escola*.
- Design Defect
  - \* There are two forms: Consumer expectation, and risk/utility.
  - \* Consumer expectation: A product is defective in design if it fails to perform as a consumer would expect (reasonably foreseeable, of course).
  - \* Risk/utility: A product is defective in design if the design's benefits are outweighed by the risk of injury.
  - \* *Castro v. QVC*: QVC sold a roasting pan claiming it was sufficient for a 25-pound turkey. Because there were multiple uses (it was a general-purpose pan too) the jury was instructed on both consumer expectations (breach of implied warranty) and risk/utility. It failed the risk/utility charge but since it couldn't actually handle a 25-pound turkey the consumer expectation test was satisfied.
  - \* *Barker v. Lull Engineering Co.*: The design of the lift loader here failed the risk-utility test, because it was unstable, didn't have restraints or protection for the operator, and so on.
  - \* Factors for risk/utility test:
    - Gravity of danger posed by design
    - Likelihood of danger
    - Mechanical feasibility of alternative
    - Financial cost of a change
    - Adverse consequences of the new design
- Failure to Warn
  - \* Depending on how we understand the failure to warn, this could be considered negligence or strict liability.
  - \* Strict liability: The product is defective if it lacks a warning.
  - \* Negligence: The product is defective if the reasonable warning is not there.
  - \* *Hood v. Ryobi America Corp.*: Too much warning is not helpful, as it may cause people to glaze over; there did not need to be a specific warning that removing the blade guards would cause the saw to detach. Also, the substantial modification defense, “ $\pi$  modified the product until it was no longer safe” defeats the defective-design case.
  - \* *Liriano*: There can be a failure-to-warn case even if there is a substantial-modification defense. But is there a failure to warn? It's obvious the product is dangerous. But in response, there is

the claim that the warning would tell the audience to be careful, and/or alert the audience to a safer alternative.

- \* *MacDonald v. Ortho*: Normally, as long as the manufacturer of a drug gives an “adequate warning” to a “learned intermediary,” such as a doctor, that is sufficient. However, birth control is an exception; because it is passively prescribed, and on a year-to-year basis, there should be more warning of the final consumer. Also, “we followed the FDA rules” is not always a sufficient defense (see the next section), and judges shouldn’t often take the “reasonable person” test out of juries’ hands.

### 6.3 Regulatory Compliance and Federal Preemption

- Under the Supremacy Clause of the U.S. Constitution, if there is a conflict between federal law (or agency decisions) and state law, the federal rules override the state’s.
- *Wyeth v. Levine* is the primary case under discussion. Levine claims that Wyeth failed to sufficiently warn doctors (under the “learned intermediary” theory) of the dangers of giving their drug through an IV push.
- The defense is that the drug company complied with all FDA regulations. Regulatory standards can be a sword (“you failed to comply; this is negligence”) or a shield (“we complied; that’s not negligence”).
- Only one state allows the shield to be complete, Michigan. Otherwise, it’s only some evidence.
- However, the sword is complete, because the FDA regulations are either a floor or a ceiling (optimal, that is).
- If the regulations are a floor, then violating is clearly a problem, but even if the companies meet that, they still might be short of what they should be at under state law. Hence, the shield is not total.
- Federal preemption might be the balancing factor, though.
- There are two types of preemption:
  - Express preemption: When Congress (or whichever agency) passes the laws and delegates authority, the statute will include a clause whether the FDA’s regulations preempt state tort law.
  - Implied preemption: There’s no clause, so we determine whether on a case-by-case basis the laws preempt. Two types here, too: Field (there is so much regulation there’s no room for state tort law) and Conflict. Conflict has two types: Impossibility (it is impossible to comply with both the regulation and the state tort law) and Obstacle/Frustration of Purposes (the state tort law would prevent, be an obstacle to, or be in tension with the purposes of the regulations).

- There is one key issue, whether new risks come to light between the approval and the injury. In that case, usually, the state tort law will be allowed.

## 7 Damages

### 7.1 Compensatory Damages

- Two types of compensatory: “economic” and “non-economic.” Also “special” and “general,” “pecuniary” and “non-pecuniary,” or “monetary” and “pain and suffering.”
- Economic damages:
  - Compensates for medical expenses, wages lost (present and future), and so on.
  - Tends to be easier to calculate than non-economic.
  - *O’Shea v. Riverway Towing*: Projecting economic damages, for example lost wages, can be tricky. We have to consider two states of the world: career path with versus without the injury.
  - Determining career path is tricky too. We’re concerned with “work life expectancy,” and women are considered to have lower than that: kids, and the like.
  - This can be a battle of experts: economists, accountants, actuaries.
  - Some judges find the race and gender based tables to be unconstitutional.
- Non-economic damages:
  - Compensates for “pain and suffering” or “loss of enjoyment of life” damages.
  - *MacDougald v. Garber*: One requirement is “cognitive awareness” of the loss suffered. This means no non-economic for death.
  - Non-economic is problematizing given they are “softer” damages. It’s hard to judge (some courts use a “per diem” system) and juries latch on to numbers.

### 7.2 Punitive Damages

- As described: Awarded to punish. Arguments for and against:
  - Deterrence: where compensatory damages don’t cut it punitive can become sufficient. Counterargument: Overdeterrence: pain and suffering already accounts for the punitive elements, this can be too much.

- Wealth: if people can absorb compensatory damages without thinking, they may need to be hurt more to be properly deterred. Counterargument: This feels biased against big business.
  - Underdetection: Doing stealthy bad actions may require punitive damages to account for when one wasn't caught or prosecuted. (Uses a multiplier theory, the multiplier is the multiplicative inverse of the probability of being caught.) Counterargument: This may be unconstitutional. We're giving damages for harms to non-parties.
  - Moral outrage: We need an outlet for our disgust of the reprehensibility of the crime. Better this than bashing in a wrongdoer's head. Counterargument: Besides that this is mob rule, there is research saying juries are good at coming up with understandings as is. Slapping on this element may lead to blockbuster damages.
- *BMW v. Gore*: Three factors. Reprehensibility of the offense, the ratio of punitive to compensatory, and comparable penalties. Lots of due process issues: the States having an appellate review system is a matter of procedure, so that's fine. But some justices believe that the Court shouldn't actually consider amounts, because that's substantive.
  - *State Farm v. Campbell*: While they don't want to draw a bright line, they will say that a 145:1 ratio is not reasonable (stick to single digits!), and further that while evidence of actions in other states *may* be included under the reprehensibility term, punitive damages may not be meted out *for* those actions.
  - *Mathis*: If conduct is wanton and willful, punitive damages are proper. Given  $\Delta$ 's actions to discourage lawsuits, and the size of their resources, punitive damages allow for lawsuits that would otherwise not become. Even though the ratio is 37:1.
  - *Exxon*: The Court emphasizes that the two major purposes of punitive damages are deterrence and punishment, not compensation; they also say that in this case, given the size of the compensatory damages, a 1:1 ratio is all they will stick with. No constitutional issues as there are in *Gore* and *State Farm*.