

## TORTIOUSLY, 1249

### I. INTENTIONAL TORTS

- a. Intent (RTT §1)
  - i. **Acts with purpose of producing consequence / acts knowing consequence is substantially certain to result**
  - ii. Transferred intent (*Talmage* – stick thrown hitting the not-intended target) across victims but not across torts.
  - iii. **Liability standard is the directness test**
  - iv. **Take your  $\pi$  as you find them**
- b. Battery (§13)
  - i. Intent to cause harmful contact (RST) **or**
  - ii. Intent to cause contact that is harmful (*Vosburg, Garratt, White*)
  - iii. Such harmful contact occurs.
    1. Contact need not to be direct (placing 100 proof vodka in someone's drink).
- c. Offensive Battery (§18)
  - i. Intent to cause offensive contact (deemed by a reasonable man)
  - ii. Excessive damages awarded to thwart honor duels (*Alcorn*)
  - iii. Does not require touching of the plaintiff's person (horse, scepter)
- d. Assault (§21)
  - i. Intent to cause harmful/offensive contact **or** imminent apprehension
    1. Can simply intend the battery, or not intend the battery but intend the apprehension.
  - ii. Victim must be placed in imminent apprehension (threat must be immediate, *Brower*)
  - iii. It's not as much that the  $\Delta$  intends on fulfilling the threat as the plaintiff believes it (*Hannaford*)
  - iv. May still be actionable even if  $\pi$  knows (1) he'll be able to defend himself, or (2) bystanders will intervene.
  - v. Conditional Threats (*Tuberville*):
    1. "If you were not an old man, I would knock you senseless" NO
    2. "If you don't sleep with me, I'll hit you." YES
- e. Trespass to Real Property
  - i. Intent to enter land (w/ or w/o knowledge that it's not yours)
  - ii. Not necessarily personal encroachment, or even at ground level (*Neiswonger* – airplane overflights; *Smith* – overhanging barn eaves)
  - iii. Trespassers are responsible for the damages that they cause when trespassing (*Brown, Cleveland Park Club*, §162)
  - iv. *Dougherty v. Stepp* (trespass w/o damage):  $\pi$  entitled to nominal damages even w/o physical damage to property.
- f. Intangible Trespass
  - i. *Van Wyk*:  $\pi$  "must prove physical damage to the property"
- g. Trespass to Chattels (§§ 217, 218)
  - i. Intent to use item is sufficient, not to deprive another of its use.
  - ii. If A lends oven to B, and C smashes it, C is liable to B as the "immediate possessor" (§219) and A as "entitled to future possession" (§220)

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- iii. Distinction between commitment of T2C and liability. Commitment requires (1) dispossession or (2) use/intermeddling, but *liability* requires (a) dispossession, (b) impairment, (c) substantial deprivation of use, or (d) harm to the chattel.
- iv. Intentional interference with possession.
- h. Conversion (§222A)
  - i. Overlap with T2C in dispossession. If property is merely damaged or possession temporarily interfered with, not conversion. But if stolen, or used for a substantial period of time, conversion.
  - ii. Distinction between trespass to chattels and conversion:
    - 1. Trespass to Chattels
      - a. (1) cause harm to chattels, but not to the extent that it can no longer be used or
      - b. (2) dispossess the owner of a chattel for a period of time long enough to deprive the owner of its use, but not to the extent that you've stolen it. In
    - 2. Conversion, you either
      - a. (1) take the item for a period of time (potentially indefinitely) as if it were yours, or
      - b. (2) harm the items to the extent that the owner can no longer use it.
  - iii. Good v. Bad Faith Conversions
    - 1. Does not affect *liability* but can affect *damages*
    - 2. Allows credit for labor expended to miners who removed  $\Delta$ 's gold in good faith (*Maye*)
  - iv. Traditional Trespass v. Conversion & Damage Calculations
    - 1. Conv: required to purchase chattel at full m.p. (*Munier*)
    - 2. Conv (2day): return + pay for loss of interim use a/o repairs
    - 3. T2C: diminished value or damages for deprivation of use
  - v. Medical Conversion: *Moore* – taking organs w/o explicit consent
    - 1. Not battery, because there was consent to extract the organ
      - a. Wouldn't be consent if fraudulently induced
    - 2. Not conversion, because he has abandoned the organ
      - a. After abandoning the "chattel" he no longer would be exercising dominion over it.
      - b. Finding liability for conversion would mean that Moore would have "a proprietary interest in each of the products that any of the defendants might ever create from his cells or the patented line."
    - 3. Reasons against medical conversion:
      - a. Policy considerations
        - i. In favor: right of patient to make autonomous medical decisions
        - ii. Against: right of innocent parties (researchers) to do socially beneficial things, as conversion comes with

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it liability against *all* those who use the cell, not just original thieves.

- b. Legislative resolution better suited
- c. Not necessary to protect patients' rights
- i. False Imprisonment (§35, 36)
  - i. Acts with the intent to confine or with substantial certainty that confinement will occur.
  - ii. Requirements *confinement* not simply inability to access area (*Bird*)
    - 1. Must be within a "bounded area" not "confined to Earth" or "to Taiwan"
  - iii.  $\Pi$  must *know* that he has been confined, and  $\Delta$  must know that  $\pi$  is confined
    - 1. Accidentally locking someone up in the meat locker is not FI
  - iv. Confinement does not occur simply because *an* exit has been blocked off, all exits must be blocked off, or the only available exit cannot be used without harm.
  - v. May also be imprisonment by coercion:
    - 1. Confiscating significant items of personal property
    - 2. Threats of physical harm for exiting
    - 3. Other threats that would cause a reasonable person to submit to confinement
      - a. Threats of physical force
      - b. Threats to property
      - c. Threats to a member of her family
  - vi. Privileges to Confinement:
    - 1. Consent
      - a. If given when entering a drug rehabilitation program
      - b. If given to interrogation by shop keeper (*Coblyn*)
        - i. Though limited, not to 5 hours
    - 2. Privilege to detain a customer to investigate apparent shoplifting
      - a. §120A: One who reasonably believes that another has tortiously taken a chattel upon his premises, or has failed to make due cash payment for a chattel purchased or service rendered there, is privileged, without arresting the other, to detain him on the premises for the time necessary for a reasonable investigation of the facts.
    - 3. Privilege to arrest
- j. Outrageous Conduct Causing Severe Emotional Distress (§46)
  - i. Intentional or Reckless
  - ii. Liable for the severe emotional distress and resulting bodily harm to the victim (*Wilkinson* –  $\Delta$  told  $\pi$  that her husband had been in a serious accident. She suffers severe emotional distress and illness, for which  $\Delta$  is liable for both)
  - iii. The general case is one in which the recitation of facts would lead the average community member to exclaim "outrageous"

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- iv. Some conduct might usually not be outrageous, but would be if  $\Delta$  knew that  $\pi$  was “particularly susceptible to emotional distress, by reason of some physical or mental condition or peculiarity.” *e.g.* handing a spider to an agoraphobic.
- v. See §46 for conduct directed at 1<sup>st</sup> or 3<sup>rd</sup> person.

### II. DEFENSES TO INTENTIONAL TORTS

- a. Contributory negligence
  - i. NOT a valid defense to intentional torts
- b. Consent (see below as to negligence and consent)
  - i. Implied Consent (*O'Brien v. Cunard*) – if plaintiff’s behavior may be seen as objective consent,  $\Delta$  had permission to operate.
  - ii. Emergency (*Schloendorff*) Dr. may seek permission/consent from a substitute guardian/family member, and if not available, consent is implied “where it is necessary to operate before consent can be obtained.”
  - iii. Non-Emergency: *Mohr* ( $\Delta$  operates on ear for which he had not received consent to operate): reasoning that someone would say yes is not implied consent unless it is an emergency situation.
  - iv. Criminal Consent (*Hudson v. Craft*: boxer in an illegal fight sues promoter). Maj.: *Consent to a crime is invalid* (illegal fight,  $\Delta$  no consent, and ability to sue promoter) vs. Min. (§61) consent is still valid *except* if the act is illegal because to protect members of a protected class, and the  $\pi$  is a member of the protected class. (Statutory rape included in RST, but conflicts w/ *Barton v. Bee Line, Inc.*)
  - v. Pro-Sports: No liability unless, as in “*Nabonzy* [kicking soccer goatee in the head] and *Hackbart* [striking football player in the head *after* play], flagrant infractions unrelated to the normal method of playing the game and done without any competitive purpose.”
- c. Insanity (§895J)
  - i. *McGuire v. Almy* (insane woman hits a nurse with a chair-leg). There is not a general insanity defense for torts.
    - 1. The only exception is when insanity means that there isn’t intent, and therefore isn’t an intentional tort. “A muscular reaction is always an act unless it is a purely reflexive action in which the mind and will have no share.” (*Polmatier v. Russ* – CT man kills father-in-law) (i.e. not if the intent is to hit a space alien)
    - 2. “[a]n insane person may have an intent to invade the interests of another, even though his reasons and motives for forming that intention may be entirely irrational.” (§895Jc)
    - 3. Public Policy Reasons for not allowing insanity defenses (*Breunig*)
      - a. Where one of two innocent persons must suffer a loss it should be borne by the one who occasioned it;
      - b. To induce those interested in the estate of the instance person (if he has one) to restrain and control him;
      - c. The fear an insanity defense would lead to false claims of insanity to avoid liability.
- d. Self-Defense (§§ 63, 65)

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- i. In general, only able to use force that actor reasonably believes is necessary to avert the threatened harm (§70, *Courvoisier*)
    1. Excessive force in self defense is comparative negligence (*Brown v. Robishaw*)
    2. Mistakes okay if based on reasonable perception (subjective??)
  - ii. Non-Lethal Force
    1. Excessive force in self defense is comparative negligence (*Brown v. Robishaw*)
    2. Δ not required to retreat if she can defend herself from non-deadly force - §63(2)(a)
  - iii. Lethal Force
    1. Must believe that death / serious bodily harm “can safely be prevented *only* with lethal force” §65(1)(b)
    2. Δ only required to retreat from deadly force if he will be completely safe by doing so - §65(3)
    3. No requirement to retreat from your own home at all - §65(3)(a)
  - iv. Defense of Third Parties
    1. Intervener has the right to use the same force to defend the third party that he could use to defend himself (§76)
  - v. Liability to Bystanders:
    1. Accidental harming of an innocent bystander by force reasonably intended in self-defense to repeal an attack by a third party is not-actionable (*Morris*, §75).
  - e. Defense of Property (§85)
    - i. May not use lethal means when a lesser precaution will suffice, as doing so indicates an intent to harm and thus battery (*Bird v. Holbrook*).
    - ii. Owner has no privilege to eject a “trespasser with privilege” until the reasonably perceived necessity has passed.
  - f. Necessity
    - i. You must generally not have other options.
    - ii. Not deemed a trespasser, but a licensee, when entering property to avoid harm to self (*Ploof*)
      1. Privilege extended even if in a position of necessity due to negligence
    - iii. Public Necessity: Private/government agents privileged to destroy private property to protect the interests of the community at large (*Mayor of New York v. Lord*)
    - iv. Damages: must pay for the damage done to others’ property in saving your own. Incentivizes’ actors to only save their property if less valuable than their own. (*Vincent*).
- III. NEGLIGENCE (BREACH)
- a. A Tort of Four Elements:
    - i. Duty of Reasonable Care
    - ii. Breach of that Duty
      1. Has the actor, if he has a duty, acted reasonably in the circumstances?

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- iii. Causation
  - 1. Cause In Fact
  - 2. Proximate Cause
- iv. Damages
- b. *Vaughan* (chimney in a haystack): Negligence is the failure to proceed in the way that a prudent man would under the circumstances.
  - i. Objective *not* subjective. Holmes: we couldn't know what a person's subjective idea of reasonable is, so how could we know if that person has deviated from that standard?
  - ii. If standard is subjective, thrust of negligence policy implications would be squelched.
- c. The Prudent Person, before acting, considers:
  - i. The foreseeable risks of his actions
  - ii. The likelihood of those risks materializing
  - iii. The extent of the risks posed by the actor's conduct
  - iv. Is there other, reasonable alternative conduct
- d. Variable Standards of Care
  - i. Age (RTT §11): *Roberts* (old man driving down the road at 5mph doesn't see a young boy dart out in time) – old age is not taken into account in assessing the negligence of an actor's conduct,
    - 1. However the physical disabilities that may arise *from* old age can affect the standard of care *if relevant* (i.e. standard of care of someone who cannot run).
  - ii. Children (§283A, RTT §10)
    - 1. Children under five years incapable of negligence (RTT §10(b))
    - 2. Std: reasonable person of age, intelligence and experience
    - 3. Exception is children engaged in adult activities(10(c)), held to an adult standard: motorcycle (*Daniels*), tractor (*Jackson*) or Speed Boat (*Dellwo*), but not golf cart (*Hudson-Connor*), skiing (*Goss*) or firearms (*Purtle*). Distinction might be need of a license?
      - a. Pub. Pol. reason is because other actors would expect an adult to be driving the boat, golf cart, etc. and would thus not modify their behavior accordingly.
  - iii. Beginners – held to the same standard unless  $\pi$  *knew*  $\Delta$  was a beginner
  - iv. Experts – held to the standard of their particular trade, “[u]nless he represents that he has greater or less skill or knowledge [than] normally possessed by members of that profession or trade....” (§299A, RTT§12)
  - v. Disabilities:
    - 1. Insanity [RTT 11(c)] Like intentional torts, “mental or emotional disability is not considered in determining whether conduct is negligent”
    - 2. Physical Disabilities [RTT 11(a)]: held to a standard of a reasonably careful person with the same disability. In *Poyner*, blind person found contributory negligent b/c the accident had nothing to do with the fact  $\pi$  was blind.

3. Sudden Incapacitation [RTT11(b)]: “The conduct of an actor during a period of sudden incapacitation or loss of consciousness resulting from physical illness is negligent only if the sudden incapacitation or loss of consciousness was reasonably foreseeable to the actor (and hence driving itself would be negligent)
  - a. Courts tend to exonerate people for sudden (and unforeseeable) *physical* but not *mental* incapacitation.
  - b. *Breunig v. American Family Insurance*: “it is unjust to hold a man responsible for his conduct when he is incapable of avoiding and which incapability was unknown to him prior to the accident.”
- vi. *Fletcher v. City of Aberdeen*: City has a heightened duty of care to anticipate disabled pedestrians and children.
- vii. Wealth – If the care required of a man depended on his income, then the poorest of people would have little if any duty of care to others. (*Denver & Rio Grande R.R. v. Peterson*)
- viii. Common Carriers (*Andrews*): owe passengers the “utmost” care, which may include measures that are not cost effective (not negligent w/ BPL)
- e. Calculus of Risk: determining if the  $\Delta$  has acted reasonably given the risk.
  - i. Governed at least mathematically by the *Hand* test:
    1.  $B \sim PL$  (at the margin)
      - a. B: burden of precaution
      - b. P: probability of the harm
      - c. L: extent of the harm
    2. Negligent if  $B < PL$ , and *not* negligent if  $B > PL$ .
    3.  $B = P_1L_1 + P_2L_2 + \dots + P_nL_n$  (all of the benefits of precaution)
  - ii. *Blyth*: Stoppers popped out, was not held negligent given the significant costs associated with burying the pipes deeper.
  - iii. *Cooley*: Electricity ran through the telephone wires, not negligent because the cost of reducing harm to  $\pi$  would be a greater increase to others.
    1. Incentivizes  $\Delta$ s to preserve/save the more valuable interest, by only mandating payment when  $\Delta$  has saved the less valuable interest.
  - iv. *Carroll Towing*: Birth of the *Hand* test:
    1.  $\Pi$ 's contributory negligent in *not* providing a bargee.
- f. Custom – Adherence is evidence of no-negligence, whereas deviation is evidence of negligence (RTT §13) – NOT preclusive
  - i. *Titus* (rr case): there is no negligence because the  $\Delta$ 's system for shifting of rail car bodies was “a regular part of the business of narrow-gauge railroads and the  $\pi$ 's evidence ma[de] no attempt to show that they way it was done here was either dangerous or unusual.”
  - ii. *Mayhew*: adoption a precaution that is custom of the industry is insufficient to avoid negligence if the negligent act itself is *not* custom
  - iii. *T.J. Hooper*: denies any conclusive weight to custom. While “in most cases reasonable prudence is in fact common prudence... a whole calling may have unduly lagged in the adoption of the new and available devices.”

- iv. Custom in the Medical Context:
  1. *Lama v. Booras*: - prima facie med. mal. Requirements
    - a. The basic norms of knowledge and medical care applicable to general practitioners or specialists
      - i. Two schools problem: when no single (medical) custom covers a given issue to determine if additional custom is accepted. Test (*Jones v. Chidester*): “considerable [#] of physicians, recognized and respected in their field.”
      - ii. Locality Rule: standard is not local, but *national* (*Brune*)
    - b. Proof that the medical personnel failed to follow these basic norms in the treatment of the patient
    - c. Causation
  2. *Helling*: T.J. Hooper in the medical context. Cost of precaution small in comparison to the benefits of early detection meant that custom is not always a shield against liability.
  3. Informed Consent: *Canterbury*:
    - a. Every human being of adult years and sound mind has a right to determine (consent to) what shall be done to his own body (*Schloendorff*)
    - b. The physician then must provide sufficient information as to risks such that the patient possesses enough information to enable an intelligent choice.
    - c. “The scope of the physician’s communications to the patient, then, must be measured by the patient’s need, and that is the information material to the decision. **Thus the test for determining whether a particular peril must be divulged is its materiality to the patient’s decision; all risks potentially affecting the decisions must be unmasked.**”
    - d. A risk is material (see above) when a reasonable person, in what the physician knows or should know to be the patients position, would be likely to attach significance to the risk or cluster of risks in deciding whether or not to forego the proposed therapy.”
    - e. Such significant can be determined by:
      - i. Incidence of injury
      - ii. Degree of harm threatened
      - iii. Death or serious disablement
      - iv. Potential disability dramatically outweighing the benefit of therapy
    - f. Causation: the patient would not have elected to have the surgery had s/he been properly informed of the risks:
      - i. Objective Standard
    - g. Exceptions for consent:



“substantive safety standards” enforced by the licensing requirement (RTT §14h)

- a. Negligence per se –
  - b. *Not* negligence per se – not licensed because of failure to renew in a timely manner (unlicensed pilot in *Michael v. Avitech*)
- v. Negligence per se only proves *negligence* not the *tort of negligence*. Must also prove causation – that violating the statute *caused* the accident.
1. *Martin v. Herzog*: car was not operating with lights on, but that didn't *cause* the accident.
- vi. Finally,  $\pi$  must actually *prove that the violation occurred*.
- vii. Superseding Causes (and their limitations) still relevant in causation for negligence per se: purpose of statute may be informative for harm w/in risk (*Ross*: unlocked car)
- viii. Implicit Private Right of Action (*Uhr*: § req'd schools to test children for scoliosis), applies the following test (citing *Sheehy v. Big Flats Community Day*)
1.  $\Pi$  a member of the class for whose benefit statute was enacted
    - a. *Uhr*, yes because it was designed to protect school children.
  2. Would recognition of P<sub>RoA</sub> promote legislative purpose
    - a. *Uhr*, yes because it would compel schools to comply with the legislation (and thus ensure testing) for fear of lawsuits.
  3. Is creation of P<sub>RoA</sub> consistent w/ legislative scheme (intent)
    - a. In *Uhr*, no because:
      - i. Statute provided for the creation of administrative remedies and regulations (its own enforcement scheme)
        1. Legislature clearly contemplated administrative enforcement of the statute.
      - ii. Statute provided that school districts should not be liable in connection with the tests.
      - iii. Given the Legislature's concern over the possible costs to school districts – as evidence by statutory immunity provision – the Legislature did *not* intend that the districts bear the potential liability for a program that benefits a far wider population
- ix. Statutory Compliance as a Defense:
1. Compliance is the bare minimum, not necessarily enough to escape negligence.
    - a. RTT §16(a): An actor's compliance with a pertinent statute, while evidence of non-negligence, does **not** preclude a finding that the actor is negligent for failing to adopt precautions in *addition* to those mandated by the statute.
    - b. §288C: Compliance with a legislative enactment or an administrative regulation does *not* prevent a finding of

negligence where a reasonable man would take additional precautions.

- h. Res Ipsa Loquitur – Circumstantial Means for Proving Breach
  - i. Reasons for Use:
    - 1. Smokes out the evidence when it's likely that  $\Delta$  has evidence to implicate/exonerate him.
      - a. *Ybarra* (aggressive RIL): When a  $\pi$  receives unusual [expert witness] injures while unconscious and in the course of medical treatment, all those  $\Delta$ s (regardless of number) who had *any* control over his body or the instrumentalities which might have caused the injuries may properly be called upon to meet the inference of negligence by giving an explanation of their conduct. Still must prove:
        - i. Trauma occurred *during* the operation
        - ii. *Someone* who was involved in the surgery caused the accident
      - b.  $\Delta$ 's then become severally liable
      - c. Goal (like in *Lone Palm*) is to shift the information burden to those who have it, when  $\pi$  is w/o it because of  $\Delta$ 's acts.
    - 2. Accident is more probably than not due to  $\Delta$ 's negligence
  - ii. Proof Components – (§328D / RTT 17)
    - 1. The event is of the kind which ordinarily does not occur in the absence of negligence
    - 2. Other responsible causes, including the conduct of the  $\pi$  and third persons, are sufficiently eliminated by the evidence,
    - 3. The indicated negligence is within the scope of the defendant's duty to the plaintiff.
  - iii. Proof Components (Wigmore on Evidence §2509)
    - 1. Event must be of a kind which ordinarily does not occur in the absence of someone's negligence
      - a. Must *more likely than not* have occurred due to negligence
        - i. *Byrne*: barrel falling out of a window
        - ii. Test: can you think of other likely reasons
          - 1. Car crosses the centerline?
            - a.  $\Delta$  could have had a stroke
          - 2. Tire explodes
            - a. Ran over a nail
      - b. If the likelihood *can't* be presumed, must prevent evidence negating the likelihood of *other* causes (RTT:LPEH §17d)
    - 2. Must be caused by an agency or instrumentality within the exclusive control of the defendant (Wigmore Requirement becoming phased out)
      - a. *Colmenares Vivas*: if the duty to the victim is a non-delegable one (duty of care to invitees), the fact that the instrumentality is handled by an independent contract shouldn't sink Res Ipsa. Exception (escalator maintenance)

- b. Hotel Room Furniture: Nope (at least partial *guest control*)
- 3. It must not have been due to any voluntary action or contribution on part of the plaintiff.
  - a. **NOT** the same as contributory negligence (*Byrne*):
    - i. CN: causing the accident / reacting ridiculously (apportionment of damages)
      - 1. running up towards the barrel as it falls (*Byrne*)
      - 2. letting go of the escalator hand rail (*Colmenares Vivas*)
    - ii. RIL3: causing the harm (is  $\Delta$  liable *at all*)
      - 1. doing something that would lead to the barrel falling in the first place (*Byrne*)
      - 2. causing the escalator to malfunction (*Colmenares Vivas*)
  - iv. After three components are proven, burden shifts to  $\Delta$  to prove the event was *not* due to negligence.
  - v. In practice:
    - 1. Court's role to determine whether the inference may be reasonably (or necessarily) drawn by the jury [§328D(2)]
    - 2. Jury's function is to determine whether the inference is to be drawn or not [§328D(3)]

#### IV. PLAINTIFF'S CONDUCT (§503)

- a. Contributory (Comparative) Negligence
  - i. *Butterfield* (galloping horse over pole):  $\pi$  not allowed to recover if s/he was not exercising ordinary care, and if such care would have prevented the accident.
  - ii. *LeRoy Fibre Co.* (flax stacks): the right of a man to operate his (real) property is not limited to the negligent behavior of another.
    - 1. Note that this was *not* the case for *Carroll Towing*, but can be distinguished as movable property versus real property.
    - 2. Holmes Concurrence:  $\pi$  cannot collect against  $\Delta$  when  $\pi$ 's use of his land is such that the harm would have occurred even if  $\Delta$  was *not-negligent* (i.e. locomotive engineer exercising due care but cinders fall out anyway)
    - 3. Push back to *LeRoy* Majority principle in *Kansas Pacific Ry*: "why should [ $\pi$ ] have it within his power to so use his property as to make it so hazardous for others to use theirs that such others must necessarily abandon the use of theirs."
  - iii. Seatbelts (*Derheim*) and Helmets (*Dare*)
    - 1. Abstention from use *not* a contributory negligence defense (though more so for Helmets than Seatbelts – see *Stehlik*)
      - a. Not wearing the seatbelt *exacerbated* the injury, but did not *cause* the injury
      - b. Would be difficult to determine which injuries were due to the seatbelt and others to the negligent defendant

- c. Slippery slope – is it then negligent not to use headrest, anti-lock brakes?
    - iv. Last Clear Chance (§§479, 480) – in contributory (not comparative) negligence states
      - 1. Bars contributory negligence defense when  $\Delta$  realized  $\pi$ 's negligence and had an opportunity to react so as to avoid the accident (§479)
        - a.  $\Pi$  is drunkenly walking down the road, and  $\Delta$  is speeding towards the intersection. CN barred when:
          - i.  $\Delta$  is distracted by jogger – yes - §479(b)(ii)
          - ii.  $\Delta$  panics and hits the gas – yes - §479(b)(i)
      - 2. Bars plaintiff from recovering from  $\Delta$  if, by exercising reasonable vigilance, could discover the danger and react in time, unless:
        - a.  $\Delta$  knows of  $\pi$ 's situation, and
        - b.  $\Delta$  realizes (or has reason to realize) that  $\pi$  is inattentive and thus unlikely to discover his peril in time to avoid harm, and
        - c. Thereafter is negligent in not taking the opportunity to prevent the harm.
  - v. Imputed Contributory Negligence
    - 1. Children & Parents: Neither the child nor the parent are barred from recovery by the negligence of the other (§488)
      - a. *Hartfield*: older rule in which parent's CN imputed to the child.
    - 2. Passengers: Driver's CN not imputed to passenger (§490) (*Dashiell*)
    - 3. Joint Enterprises: Contributory negligence of one member of the group precludes recovery against negligent non-members §491(1)
      - a. Two friends taking turns driving across the country
  - vi. Rescue: Legitimate rescues (as in *Wagner, Eckert*) are not contributory negligence unless it is "rash or foolish." See also Directness (Prox Cause)
- b. Causation for Contributory Negligence
  - i. Only if the  $\pi$ 's negligence is a "substantial factor in bringing about the harm" [§465(1)], otherwise same causation rules.
- c. Assumption of the Risk
  - i. The basic premise is that a person who is aware of a risk, and knowingly decides to encounter it, accepts responsibility for the consequences of that decision, and may not hold a defendant who created the risk liable for resulting injury.
  - ii. The risk has to be a specific one. If recognizing that an act is unreasonably risky constitutes assumption of risk, virtually all conscious negligent act would assume qualify.
    - 1.  $\Pi$  passes a slow car while on a turn, and hits a car that he hadn't seen previously.
  - iii. In Employment:

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1. *Lamson*: Employee was aware of the risk of working underneath an unsafe hatchet rack. After being told that he could either accept the conditions or leave, he effectively assumed the risk.
    - a. Could not have assumed the risk if unaware of it (§496D)
  2. Fellow Servant Rule (*Farwell* – note): employees assumed the risk of their fellow employees.
    - a. Unlike *Lamson*, did *not* require knowledge of dangerous condition
    - b. Assumption of risk by status alone
  3. Today: Workers Compensation Scheme
    - a. No assumption of risk defense
    - b. Lower payouts
- iv. Express Assumption of Risk:
1.  $\Pi$  expressly agrees that she will not hold  $\Delta$  liable for injury she suffers from a risk created by  $\Delta$ .
  2. A plaintiff who by contract or otherwise expressly agrees to accept a risk of harm arising from the defendant's negligent or reckless conduct cannot recover for such harm, unless the agreement is invalid as contrary to public policy (§496B)
    - a. Note factors:
      - i. A public service (*Tunkl*)
      - ii. Take it or leave it
      - iii. Risks opposed to expectations
    - b. In violation of public policy if it exhibits some or all of the following characteristics *Dalury* citing *Tunkl v. Regents of Univ. of Cal.*:
      - i. It concerns a business of a type generally thought suitable for public regulation
      - ii. The party seeking exculpation is engaged in performing a service of great importance to the public, which is often a matter of practical necessity for some members of the public.
      - iii. The party holds itself out as willing to perform this service for any member of the public who seeks it, or at least for any member coming within certain established standards.
      - iv. As a result of the essential nature of the service, in the economic setting of the transaction, the party invoking exculpation possesses a decisive advantage of bargaining strength against any member of the public who seeks [the party's] services.
      - v. In exercising a superior bargaining power the party confronts the public with a standardized adhesion contract of exculpation, and makes no provision

whereby a purchaser may pay additional reasonable fees and obtain protection against negligence.

- vi. Finally, as a result of the transaction, the person or property of the purchaser is placed under the control of the seller, subject to the risk of carelessness by the seller or [the seller's] agents.
  - c. But such risks do not extend beyond those beyond the  $\pi$ 's contemplation.
- v. Primary Assumption of Risk (*Murphy v. Steeplechase Amusement*)
  - 1.  $\Pi$  who choose to engage in unavoidably risky activities assume the inherent risks of the activity, and have no claim for injuries resulting from those *inherent* risks.
  - 2.  $\Delta$  isn't actually negligent at all.
  - 3.  $\Pi$  has assumed the inherent (and known) risks of the activity.
    - a. Primary Assumption: Getting knocked around when you're in a bounce house, being hit by another skier
    - b. **Not** Primary Assumption: Getting hurt when the bounce house collapses on top of you, a chairlift disassembling
- vi. Secondary (Unreasonable) Assumption of Risk
  - 1.  $\Delta$  *has* been negligent, but  $\pi$  has freely chosen to encounter the risk
    - a.  $\pi$  knows (§496D) that the bounce house is quite poorly built but gets in any way.
  - 2. Unreasonable in the sense that a reasonable man would *not* take the risk
    - a. Standing next to an adolescent playing with fireworks
    - b. Riding an obviously unruly horse
  - 3. Generally  $\pi$  is not entitled to recover for harm within that risk (§496C)
- vii. Secondary (Reasonable) Assumption of Risk
  - 1.  $\pi$  knowingly (§496D) accepts risks that a reasonable man would accept.
    - a. Driving a car without brakes to get to a hospital
    - b. Rescuing a child from an oncoming train (*Eckert, Wagner*)
    - c. Necessity
    - d. Personal Emergency
- viii. Ability to Recover Given Assumption of Risk
  - 1. Express Assumption of Risk
    - a. No recovery unless unconscionable, outside the scope of covered negligence
  - 2. Primary Assumption of Risk
    - a. No recovery because  $\Delta$  has not be negligent
  - 3. Secondary (Unreasonable) Assumption of Risk
    - a. Common Law: no recovery
    - b. Comparative Negligence: treated as a form of negligence and thus reduces the award
  - 4. Secondary (Reasonable) Assumption of Risk

- a. Allow the  $\pi$  to recover fully
  - d. *Comparative Negligence (Li)*
    - i. Pure (CA, NY, MI, FL):  $\pi$ 's recovery is simply reduced by their relative contribution to the injury
      - 1. Admittedly difficult to determine relative responsibility
      - 2. Probably more fair than a complete bar from recovery
      - 3. Does not have a negative effect on incentives to be careful
    - ii. Modified (WV): As soon as  $\pi$ 's contribution to the causation of the accident is  $\geq \Delta$ ,  $\pi$  gets nothing.
      - 1. A  $\pi$  49% at fault will get 51%, but a  $\pi$  50% will get nothing.
- V. CAUSE IN FACT
- a. Causation for Contributory Negligence
    - i. Only if the  $\pi$ 's negligence is a "substantial factor in bringing about the harm" [§465(1)], otherwise same causation rules.
  - b. But-For Causation
    - i. *Grimstad* –  $\pi$  BOP that harm would not have occurred but for  $\Delta$ 's negligence. Preponderance of evidence standard.
  - c. Cardozo & Trainer Principle
    - i. *Zuchowicz* –  $\pi$  may get to the jury if the proven negligence increased the risk of harm that befell the plaintiff / the burden shifts to the  $\Delta$  to prove that their negligence did *not* cause the harm.
  - d. Burden Shifting
    - i. *Haft v. Lone Palm Hotel* ( $\pi$ 's son and husband drowned because  $\Delta$  negligently failed to provide a lifeguard): when  $\Delta$ 's negligence caused the lack of evidence of causation,  $\pi$  must prove (1)  $\Delta$  was negligent, and (2) available facts strongly suggest "but for" then burden shifts to  $\Delta$  to "absolve themselves if they can."
  - e. Complications in Cause-In-Fact
    - i. Distinct Harms:
      - 1. Each  $\Delta$  is responsible for the distinct harm that they cause.
    - ii. Acting in Concert:
      - 1. An express or implied agreement to act tortiously?
        - a. Look at each other, then floor it / drag race
        - b. Robbing a bank, but one actor shoots a guard
      - 2. Joint and several liability
    - iii. Alternative Liability (§433B, *Summers*)
      - 1. Multiple tortfeasors, each acting negligently, only one's negligence actually caused the harm.
      - 2.  $\Pi$  unable to prove which  $\Delta$ 's negligence caused the harm
      - 3. Burden shifts to  $\Delta$  to exculpate themselves
      - 4. Joint and several liability
    - iv. Multiple Sufficient Causes
      - 1. One human and one act of God:  $\Delta$  is not liable
      - 2. One negligent actor and one non-negligent actor:  $\Delta$  not liable
      - 3. Two negligent actors, not-in-concert: J&S liability (*Kingston*)

- a. If one of the acts was much more significant than the other, then no liability.
  - v. Market Share Liability – *Sindell* (410)
    - 1. Requirements:
      - a. Fungible products
      - b. Several liability (no market share liability if acting in concert)
      - c. Not alternative liability, because it cannot be proven that one of the parties joined caused the harm /  $\Delta$ 's may have more information as to which party liable than  $\pi$  (*Ybarra*)
    - 2. Extensions
      - a. *McCormack*: parties unable to define their market share will be evenly assigned the difference between 100 and the combined shares of those who can.
      - b. *McCormack*:  $\pi$  may only collect up to the percentage of the market share of all parties joined.
      - c. *Brown*: several liability only.
      - d. Exculpation Evidence (*Hymowitz*): Drug manufacturers liable (in NYC) even if it could demonstrate with certainty that it did not produce the tablets in question.
      - e. Extensions (*Skipworth*) Exposure of  $\pi$  to market can't be too long, and the product must be fungible (mutually interchangeable). Mixed record in application to lead exposure cases (*Skipworth, Thomas*) but better record for blood products (*Smith, Ray*).
        - i. Concern in extending MSL to cases in which the culpable manufacturer may not be before the court.
  - vi. Lost Chance of Survival (*Herskovits* – lung cancer)
    - 1. Ex. had cancer been diagnosed at Stage 1 – 39% chance of survival. At stage 2 – 25% or of the 75 (100-25) who could die, 14 (75 – (100– 39)) would have survived had they been diagnosed at stage 1 –  $14/75 < 50\%$ , failing *Grimstad*.
    - 2. Ex. 2. Stage 1 – 89%, Stage 2 – 75%. Of the 25 who die, 14 could have been saved by accurate diagnosis.  $14/25 > 50\%$ . Passes *Grimstad*.
      - a. Majority (*Sisters of Charity, Grimstad*) – but for causation (50%+) necessary for any recovery.
      - b. Concurrence – Multiply the lost chance of survival by the damages caused directly by premature death: lost earnings and additional medical expenses.
  - f. Admissibility of Expert Testimony at Trial (*Joiner*)
    - i. Federal Rules of Evidence 702 – post *Daubert* – a witness who is qualified as an expert by knowledge, skill, experience, training or education may testify in the form of an opinion or otherwise if:

1. The expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
  2. The testimony is based on sufficient facts or data;
  3. The testimony is the product of reliable principles and methods; and
  4. The expert has reliably applied the principles and methods to the facts of the case.
- ii. Predecessor *Frye* standard had said that evidence should only be admissible if "generally acceptable to the scientific community."
  - iii. In *Joiner*, evidence excluded as the conclusions weren't warranted given the differences between the scientific experiments and  $\pi$ 's situation.

VI. DAMAGE CALCULATIONS

a. Joint & Several Liability:

- i.  $\Pi$  may choose from whom s/he will recover.

b. Indemnity

- i. Initially,  $\Delta$ s were not able to seek contribution from other liable  $\Delta$  (*Merryweather*)

- ii.  $\Delta$ 's were still allowed to seek full indemnity against co-defendants.

1. *Union Stock Yards Co. of Omaha*: Indemnity only if the acts of the  $\Delta$  (who didn't pay) "created the unsafe or dangerous condition from which the injury resulted" or in other words, was responsible for the "principal and moving cause".

- a. No indemnity if (as in *Union*) the defendants were equally culpable.

- b. Good application is vicarious liability, employer able to sue employee who was actually liable (*Gray*)

c. Partial Indemnity (Contribution)

- i. Allows the paying  $\Delta$  "to recover from his codefendants any amount above his own share"

1. In California, does *not* eliminate joint and several liability (see below), meaning that one  $\Delta$  still has to pay first, and is affected by settlement and insolvency of joint tortfeasors.

d. Apportionment Amongst  $\Delta$ s (Settlement)

- i. Pro-Tanto-2 / Credit Rule (*Am. Motorcycle Maj.*)

1. Joint & Several Liability

- a. If  $\Delta_1$  settles for \$30K, and at trial  $\Delta_1$  (70%),  $\Delta_2$  (20%),  $\pi$  (10%) of a \$100K injury,  $\Delta_2$  pays \$100 - \$30 - \$10 = \$60K

2. Policy Analysis (*McDermott*)

- a. Settlement is likely to be for much less than equitable share, so litigating  $\Delta$  may be royally screwed (-)

- i. Good-faith settlement hearings are helpful, but cannot fully remove the potential for inequitable allocation.

- b. Does leave the  $\pi$  whole (+)

- c. Encourages settlements because of the resulting inequity to the non-settling party (+)
- d. W/o fair settlement hearing, would be great for judicial economy – no need for  $\Delta$ 's fault to be adjudicated.
  - i. But such a fair hearing is important to avoid inequity.
- ii. Carve Out Rule (*McDermott + Am. Mtrcycle. Diss.*) (RTT:AL §16)
  - 1. Several Liability
    - a. If  $\Delta_1$  settles for \$10K, and at trial  $\Delta_1$  (70%),  $\Delta_2$  (20%),  $\pi$  (10%) of a \$100K injury,  $\Delta_2$  only pays \$20K.
  - 2. Policy Analysis (*McDermott*)
    - a. Doesn't lead to inequity as Pro-Tanto 2 does
    - b. While inequity doesn't promote settlement as above,  $\Delta$ 's still sufficiently encouraged to settle because of parties' desire to: avoid litigation costs, reduce uncertainty, maintain ongoing commercial relationships.
    - c. Settling  $\Delta$ 's share of responsibility would need to be determined, and thus less judicially efficient if Pro-Tanto is w/o good faith hearing.
- e. Apportionment Amongst  $\Delta$ s (Insolvency)
  - i. Joint & Several (*Am. Mtrcycle Maj.*)– whichever  $\Delta$  is chosen to pay will shoulder the other tortfeasor's liability as s/he will be unable to collect contribution
    - 1.  $\Delta_1$  (10),  $\Delta_2$  (60),  $\pi$  (30) -  $\Delta_2$  insolvent,  $\Delta_1$  pays 70
  - ii. Several Liability – *Brown v. Keill* (KS) – insolvent defendant's share deducted from total settlement ( $\pi$  screwed) (states moving in this direction)
    - 1.  $\Delta_1$  (10),  $\Delta_2$  (60),  $\pi$  (30) -  $\Delta_2$  insolvent,  $\Delta_1$  pays 10
  - iii. *Evangelatos*, RTT:AL §C21(a): insolvent share divided among parties (incl.  $\pi$ ) by proportion of fault.
    - 1.  $\Delta_1$  (10),  $\Delta_2$  (60),  $\pi$  (30) -  $\Delta_2$  insolvent,  $\Delta_1$  pays  $10 + 60(10/40) = 25$
- f. Children – parents are not (automatically) vicariously liable for their children's torts (*Weirum* – DJ case) nor is their negligence imputed (*American Motorcycle*)

## VII. PROXIMATE CAUSE

- a. New York Fire Rule
  - i. You only pay for the first structure that catches fire given actor's negligence, even if it is your own property (*Ryan*)
- b. Coincidence:
  - i. Not liable for harms when the actor's tort does *not* increase the risk of the resulting harm (*Berry, Central Georgia Ry.*, RTT §30)
- c. Directness (*Polemis*)
  - i. Responsible for all harms flowing directly from the negligence, but cut off by superseding causes:
  - ii. Efficient Intervening / Superseding Cause (§440)
    - 1. Must be tortious or an act of God.

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2. Cause must be *intervening* not *concurrent* to at least one of the theories of negligence (*Brower*)
3. Superseding (negligent) Cause may not be a foreseeable result of the negligence (§447):
  - a. Gasoline truck gets in an accident, spilling out gas all over the road:
    - i. Superseding: someone throws a torch
    - ii. Not Superseding: someone smoking a cigarette accidentally flicks a spark
  - b. Force of nature if extraordinary and not why the original actor is negligent (§451)
4. Intentional torts except when foreseeable (§448, *Hines*)
5. Not when the likelihood of another tort occurring is the *reason* why the first actor is negligent (§449, *Bigbee*) – harm w/in risk
6. Rescuers may not be efficient intervening actors for the harm sustained during their rescue attempt (*Wagner*, RTT 32)
  - a. See *McCoy v. American Suzuki Motor Corp* (462) for factors to determine when someone is a rescuer.
- d. Foreseeability (*Wagon Mound I*)
  - i. Liable for all harms that the actor knew or should have known.
    1. Objective not subjective standard
  - ii. Thin Skull Rule – liable for extra sensitive  $\pi$  – take  $\pi$  as you find him
- e. Harm within the Risk (*Marshall*, RTT §29)
  - i. “Liable for the harmful consequences which result from the operation of the risk, or of a risk, the foreseeability of which rendered the defendant’s conduct negligent.
  - ii. Is the risk of the harm that occurred one of the reasons why the act was negligent in the first place.

## VIII. DUTY

- a. Rescue
  - i. Subject to exceptions, no liability for *nonfeasance* / no duty to rescue (VT is the exception, *Seinfeld*)
  - ii. However, once you have begun rescuing someone, you must
    1. Do so with reasonable care (§324) – though most states limit liability for *gross* negligence
    2. If you stop rendering care, you are responsible for the damages for ceasing in excess of those that would have occurred had you never helped (§324(b))
  - iii. Doctors are not required to provide services to patients (*Hurley*)
- b. Owners Or Occupiers (no vicarious liability) –
  - i. Old Common Law
    1. Invitee (§§ 314A(3), 322) – business visitor or public invitee (invited as a member of the public for a purpose for which the land is held open to the public) – duty of reasonable care: must inspect (patrol) for and ameliorate dangerous conditions within a reasonable time after their occurrence

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2. Licensees – neither a trespasser nor an invitee – must ameliorate harms that owner knows about or should know about / warn licensee of concealed dangerous conditions (§342)
  3. Trespassers – no consent (explicit / implicit) or privilege (emergency) – no duty of care / only not to engage in willful/wanton/reckless conduct (*Buch*)
    - a. Exceptions / when reasonable care is due
      - i. Discovered Trespassers
      - ii. Frequent Trespassers: Knowledge that parties will be in a specific place.
  4. Lessor / Lessee & Lessee Guest (§357):
    - a. Lessor is liable to lessee and lessee's guest for harms caused by a failure to exercise reasonable care to prevent the property from a condition of disrepair (*Rowland*)
- ii. Today
1. Children – owners have a duty of reasonable care to children attracted to an *artificial* (not axes, rivers, creeks) condition (explosives, fires, rickety structures) and meet the requirements of §339. This duty of care only relates to the attractive nuisance itself: if attracted by the train set but drowns in the koi pond, not your fault.
  2. Different States' Treatment:
    - a. IL: collapses licensee & invitee together
    - b. CA: duty of reasonable care to everyone (*Rowland*)
- c. Affirmative Duties
- i. Special Relationships (§315)
    1. About *nonfeasance*, rather than *misfeasance* – the lack of doing something is negligent.
    2. Special Relationship to Victim (*Kline*, §§ 314A, 315(b))
      - a. Apartment Building Owner:
        - i. Unique position of being the only party able to protect the victims / residents cannot organize themselves
        - ii. Standard of care for *Kline* was the precautions that the building used when the  $\pi$  moved in.
        - iii. Case much less strong for areas that the owner does *not* control
        - iv. Cause-In-Fact problems: would the lack of precautions have prevented the assault from occurring?
      - b. Common carrier to passengers (§314A(1))
      - c. Innkeeper with guests (§314A(2))
    3. Special Relationship to Perpetrator (*Tarasoff*, §315(a), RTT 41)
      - a. Employer with employee (§317, RTT 41(b)(3))
        - i. Servant on work premises and/or using employer's chattel

- ii. Master knows / has reason to know of ability to control servant, and knows / should know of the necessity and opportunity to exercise such control
      - b. Mental health professional and patient (§319, RTT 41(b)(4))
        - i. No “imprecise threatened targets” (*Thompson*)
        - ii. Are there other means for alleviating the harm?
    - ii. Innocent Creation of Risk ((§§ 321, RTT 39, *Montgomery*)
      - 1. If you have non-negligently created a risk, you have a duty to exercise reasonable care to prevent or minimize harm
  - d. Gratuitous Undertakings (other than rescues)
    - i. Undertakings with Consideration:
      - 1. Action for contractual breach based on imputed reasonable care term (*Coggs*)
    - ii. Continuance of a behavior on which someone relies:
      - 1. *Erie Railroad*: duty to continue providing flagmen at crossings as motorists had come to rely on them.
      - 2. Failing to do so w/o proper notice is *misfeasance*.
    - iii. Gratuitous promise on which someone relies (RTT §42)
      - 1. Nonfeasance: failure to fulfill a promise (w/o consideration) on which the  $\pi$  detrimentally relies yields contractual liability under promissory estoppel (§90)
      - 2. Misfeasance (RTT 42):
        - a. Failure to exercise reasonable care in the undertaking increases the risk of harm beyond that which existed without the undertaking; or
          - i. Was  $\pi$  any worse off by  $\Delta$ 's negligent performance than she would have been had  $\Delta$  never promised to perform?
        - b. The person to whom the services are rendered or another relies on the actor exercising reasonable care in the undertaking
          - i. Would  $\pi$  have operated differently (to their advantage) if  $\Delta$  had failed to offer promise.

IX. STRICT LIABILITY

- a. Engagement in abnormally dangerous activities
  - i. Abnormally dangerous activity
    - 1. Historical:
      - a. *Rylands* (Blackburn): creating a foreseeable risk and highly significant risk even when reasonable care exercised
        - i. Will not be applied when the harm may be reduced by reasonable care (*IN Harbor Belt*)
      - b. *Rylands* (Cairns): the activity is not one of common usage

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- i. §520d “if it is carried on by the great mass of mankind or by many people in the community.”
        - ii. Would suggest reciprocal risk
      2. Restatements:
        - a. 3<sup>rd</sup> Restatement applies *Rylands* prongs (RTT §20)
        - b. 2<sup>nd</sup> Restatement applies the *Rylands* factors + 2: §520
          - i. Inappropriateness of the activity to the place where it is carried out; and
          - ii. Extent to which its value to the community is outweighed by its dangerous attributes.
      - ii. Causation & Limitations:
        1. Harm W/in the Risk (Proximate Cause Std) (§519)
          - a. Blasting: concussion, vibration and flying debris
          - b. Exception for injury caused by unexpected:
            - i. Innocent, negligent or reckless conduct of a 3<sup>rd</sup> person - §522(a)
              1. Someone enters your property and recklessly unleashes a lion
            - ii. Action of an animal - §522(b)
              1. Mink responding to loud noise eats his kitten ☹
            - iii. Operation of a force of nature - §522(c)
          2. Abnormally sensitive activity exception (§524A)
            - a. Ex. π conducting blasting no strictly liable for the sensitive science experiments conducted next door being ruined.
        - iii. Defenses:
          1. Assumption of Risk – Yes (§523, §524(2))
          2. Contributory Negligence – No (§524(1))
          - iv. Need help on the economics of SL v. Negligence
      - b. Nuisance
        - i. An invasion of another’s interests in the use and enjoyment of land
        - ii. Cause of action for:
          1. Owner if goes to decreased value in the land
          2. Occupier if goes to decreased enjoyment in the land
        - iii. Vs. Trespass
          1. Can be intentional or unintentional
          2. Can be tangible or intangible
            - a. Trespass can be intangible (*Van Wyk*), but requires physical damages to property – not a requirement for nuisance
        - iv. Unintentional (*Vogel*)
          1. A negligent or strict liability activity leading to an invasion of another’s interests in the use and enjoyment of land (negligence and SL alone only cover damage to the property or harm to health).
          2. Defenses:
            - a. If predicated on Negligence:

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- i. Assumption of Risk / Consent
      - ii. Contributory Negligence
    - b. If predicated on Strict Liability
      - i. No defenses (other than assumption of risk)
  - v. Intentional
    - 1. May include negligent or strict liability activities for which the  $\Delta$  is substantially certain are nuisances.
    - 2. Actionable Only With/For:
      - a. Intent (§825)
        - i. Purposeful [causation of invasion of interests, not just invasion] or
        - ii. Substantially certain
      - b. Unreasonable (§826)
        - i. The social benefit of the activity is outweighed by the gravity of the nuisance
        - ii. But we won't find a nuisance actionable if it is a valuable activity for which awarding damages for every nuisance would prevent the activity from occurring.
    - 3. Exceptions
      - a. Natural Activities (*not* the following)
        - i. Geysers on your property
        - ii. Tree on property whose roots grow (*Michalson*)
      - b. Eye Sores
        - i. Traditionally not a case for nuisance, unless a spite fence / intentionally attempting to irritate neighbors
      - c. Blocked access to air and sunlight (*Fontainebleau Hotel*)
        - i. Otherwise too much litigation
        - ii. Can be left up to zoning boards
      - d. Live and Let Live
        - i. There are some nuisances that are so common to a particular area (i.e. city noises) for which we
    - 4. Defenses
      - a. Consent – telling the next door neighbor that they may use their land in a certain way, perhaps for a fee
      - b. Sensitive  $\pi$  – only responsible for acts that would be nuisances to a *normal* person (*Rogers*)
      - c. Coming to the nuisance (*Ensign*, §840D): not a slam dunk assumption of risk, but may be relevant
        - i. Must be an uncommon activity / nuisance.
    - 5. Damages
      - a. Temporary: Fair value of the annoyance for a certain amount of time
      - b. Permanent: reduction in land value given the nuisance
  - c. Vicarious Liability

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- i. Master is liable for the torts of a servant if committed within the scope of employment
- ii. Joint and several liability results
- iii. Servant v. Independent Contractor
  1. Employers are generally not liable for IC's torts (§409)
  2. Determinative Factors: R(2)A §228
    - a. Extent of principle's control ( ↓ IC )
    - b. Employee's occupation distinct from employer ( ↑ IC)
    - c. Local custom as to degree of control
    - d. Extent of skill ( ↑ skill, ↑ IC)
    - e. Who supplies the tools and jobsite (employer, ↑ S)
    - f. Duration of employment ( ↓ IC)
    - g. Compensation scheme (hourly – S, by project – IC)
    - h. Work part of regular business of employer (routine – S, once– IC)
    - i. Party's belief as to their position
    - j. Employer a business (S) or an individual (IC)
  3. Exceptions:
    - a. VL for IC when engaged in an abnormally dangerous activity or one for which there are special dangers to other that the employer knows or has reason to know about (§§ 427, 427A)
    - b. Non-Delegable Duty (see special relationships) (does not relieve contractor of liability, simply adds in employer)
      - i. Maintaining an escalator (*Colmenares*)
      - ii. Maintaining common areas (*Kline*)
      - iii. Keeping streets in repair (*Fletcher*)
      - iv. Maintaining flags at RR crosses (*Erie*)
      - v. Maintaining safe premises for invitees
  4. *Petrovich*: Allows  $\pi$  to get to the jury on two exceptions to the independent contractor rule, on which  $\pi$  detrimentally relied:
    - a. Apparent Authority: Made representations that the independent contractors were servants
      - i.  $\pi$  must prove that such a representation was one that caused detrimental reliance
    - b. Implied Authority: The employer exercises great control over the independent contractors.
      - i.  $\Pi$  must prove that control yielded detriment to care
- iv. Scope of Employment
  1. R(3)A §7.07(2) – An employee acts within the scope of employment when performing work assigned by the employer or engaging in a course of conduct subject to the employer's control.
  2. Additional Tests
    - a. Is the tort foreseeable to the employer? (*Bushey*)
    - b. Actuated in part by purpose to serve employer? (bouncer)
    - c. In response to frustration caused by work?

- d. Facilitated access to the premises where tort occurred?  
(*Bushey*)
      - e. An outgrowth of performance of the work
      - f. Small deviation from responsibilities?
    - 3. Usually *not* intentional torts (*Baker v. St. Francis Hosp.*)
  - v. An employer is also always liable for his or her or its *own* negligence
    - 1. Poor management of employees or independent contractors
    - 2. Inadequate screening of employees or ICs
    - 3. Also have a duty (if able) to control employees *not* acting within the scope of employment (§317)
  - vi. Policy Considerations:
    - 1. Employees less likely than employers to be solvent, leaving  $\pi$  insufficiently compensated
    - 2. Incentivizes the implementation of safety precautions / monitoring by employers
    - 3. Determining which person caused the tort might be impossible (*which* employee constructed the toaster that exploded)
    - 4. Risk becomes built into price, so that dangerous activities are not overly produced.
    - 5. Without VC, the requirement for proving that the employer was negligent in supervising the employee would be difficult. And *who* was responsible for supervising – Manager, Supervisor, CEO??
- X. Products Liability (§402A)
  - a. What it means to be defective
    - i. Manufacturing Defect (*Escola*)
      - 1. Was the product manufactured to specifications?
      - 2. Proof via circumstantial evidence (*Speller* & RTT:PL §3)
        - a. Would the harm ordinarily without a defect + are other causes ruled out.
        - b. For food products, is the foreign object something beyond the expectations of a consumer:
          - i. Clam Shell in Chowder: No
          - ii. Bathroom Tile in Muffin: Yes
    - ii. Design Defect
      - 1. *Campo* open & obvious rule:
        - a.  $\Delta$  not liable for designs whose risks are obvious
        - b. No longer in use
      - 2. Consumer Expectations Test (*Barker* – either standard)
        - a. “[D]angerous to an extent beyond that which would be contemplated by the ordinary consumer” §402A cmt. *i*
          - i. Wouldn’t expect your microwave to explode
      - 3. Risk/Utility Test (~Negligence) (*Volkswagen*) (RTT:PL §2(b)d)
        - a. Factors (*Barker*):
          - i. Gravity of danger posed by the challenged design
          - ii. Likelihood that such danger would occur

- iii. Mechanical feasibility of a safer alternative design
  - iv. Financial cost of an improved design
  - v. Adverse consequences to the product and to the consumer that would result from an alternative design
  - b. Burden of Proof
    - i. On the  $\pi$  in most states
    - ii. On the  $\Delta$  in California (*Barker*)
  - c. Foresight / Hindsight
    - i. Foresight (state of the art) a la negligence
    - ii. Hindsight includes unforeseeable risks
    - iii. Court may choose which of the two to use
  - 4. Product Use
    - a.  $\Delta$  liable for design defects that cause harm when  $\pi$  uses them for:
      - i. their intended use
      - ii. and/or *reasonably foreseeable* use (*Barker*)
        - 1. causes price of products to increase and requires others to pay for  $\pi$ 's unintended use of product
        - 2. preventing harms for unintended use may decrease efficacy of the product
  - 5. Defectively designed products with warnings (§402A cmt j)
    - a. "Where a warning is given, the seller may reasonably assume that it will be read and heeded; and a product bearing such a warning, which is safe for use if it is followed, is not in defective condition, nor is it unreasonably dangerous."
- iii. Failure to Warn
- 1. Duty to Warn (in general)
    - a. No duty to warn of an *obvious* risk (*Garrison v. Heublein*)
      - i. What is "obvious" is up for debate (vodka)
    - b. Generally based upon Hand test
      - i. How expensive is the warning in comparison to the associated risks that it prevents
    - c. Only "state of the art" risks –not hindsight (*Vasallo*)
      - i. Risks that were known or *should been known* to the manufacturer at time of production
      - ii. *Vasallo*  $\Delta$  had simply conducted insufficient experiments.
    - d. *Direct* warnings (§388) & Rx
      - i. Required for Rx in direct advertisements to patients

- ii. Fall under §388 exception to inform only “learned intermediary” of risks, but subject to exceptions if (*McDonald* – birth control)
      - 1. Heighted participation of patients in decision to use
      - 2. Limited participation of the physician
      - 3. Possibility that oral communication between physician and patient may be insufficient standing alone to fully apprise consumers of products’ dangers
      - 4. Substantial risks associated with products’ use
      - 5. Feasibility of direct warnings by the manufacturer to the user
    - iii. Pharmacists not “learned intermediaries” and do not have duty to warn about *prescription* drugs (*McKee*).
  - 2. Adequacy of Warnings
    - a. Compliance with regulatory agency requirements *not* a safe harbor for defendants
    - b. *McDonald* factors:
      - i. Probability of risks
      - ii. Plain language
      - iii. Conspicuousness
      - iv. Sufficiently detailed
        - 1. “stroke” v. Fatal blood clot
      - v. Magnitude and nature of hazard
    - c. Test is whether including such information would do more harm than good
      - i. Decreased attention of consumers to lengthy warnings
      - ii. Avoidance of harm
    - d. A clear and specific warning will normally be sufficient – “the manufacturer need not warn of every mishap or source of injury that the mind can imagine flowing from the product” (*Hood* quoting *Liesener*)
    - e. Warning need only be reasonable under the circumstances (*Hood* quoting *Levin*)
  - 3. Causation
    - a.  $\Pi$  would not have used the product (or not in a certain way) *with* the proper disclaimer (subjective)
    - b. Damages would not have occurred but-for  $\pi$ ’s use of the product (in a certain way)
- b. Limitations of Liability
  - i. Seller not Service Provider

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1. Physicians who sell their products are not liable, as they are primarily providing medical services (*Cafazzo*)
  2. Used equipment dealers (*Tillman*) exempted
  3. Pharmacists service providers for Rx drugs (*Murphy*)
    - a. Professional expertise?
    - b. Advice and counseling regarding drugs prescribed, side effects, etc.?
  - ii. Product must cause personal injury or harm to *other* property (*Casa Clara*) (but see warranty)
  - iii. Product substantially changed after being sold
  - iv. Seller must be in the *business* of selling *products*
    1. Not simply a neighbor selling his car
    2. Not a business that sells houses which *include* microwaves
  - v. Bystanders - §402A does not offer an opinion on whether bystanders (not product users) may maintain actions.
- c. Warranty v. Tort
- i. Economic Loss Rule draws the line between tort and warranty
    1. Tort actions limited to harms *beyond* economic damages
    2. Harm to product of which defective product is a constituent is an economic damage
  - ii. Statute of Limitations Begin
    1. Warranty: at date of sale
    2. Tort: when injury occurs or manifests
  - iii. Privity Limitations
    1. (Warranty) Initially strict – buyer and seller
      - a. Extensions of potential  $\pi$  in §2-318
    2. (Tort) – eliminated in *McPherson* for negligence
  - iv. Warranties Generally
    1. Seller warrants that its good are “fit for the ordinary purposes for which goods of that description are used” §2-314(2)(c).
      - a.  $\Pi$  must prove a breach of warranty
    2. Sellers may contract out of such warranties (§2-316), but such disclaimers must be conspicuous, and not unconscionable (which includes setting damage limits for personal injury, or limiting liability to parties in privity) (§2-719, *Henningsen*)
    3. Notification – UCC has required prompt notification of breach of warranty so that the seller may react accordingly, but *McCabe* says that it is sufficiently prompt to notify once  $\pi$  has retained counsel.
- d. Defenses
- i. Warranty:
    1. Not contributory negligence
    2. Not assumption of risk
    3. Yes to mitigation of damages:
      - a. Use of product was not ordinary
      - b. Purchased a product you *knew* to be dangerous

## TORTIOUSLY, 1249

- ii. Tort:
  - 1. Unreasonable assumption of risk
- XI. Damages
  - a. General Principles:
    - i. You must have suffered *physical* (not just economic) harm in order to collect economic damages
    - ii. Attorney's fees are not recoverable
    - iii. Compensatory damages are not taxable, but punitive damages are
  - b. Compensatory Damages
    - i. Must be proven by  $\pi$  with a PoE
    - ii. Live Victims
      - 1. Entitled to:
        - a. Economic Damages (projected into the future)
          - i. Medical Expenses
          - ii. Lost Earnings
          - iii. Property Damage
        - b. Non-Economic Damages / Lost Enjoyment of Life
          - i. Pain and Suffering / Emotional Damages
          - ii. May be 3 to 1 larger than economic damages
      - 2. Calculation?
        - a. How much would you have to be paid per hour to switch places with my client X life expectancy
      - 3. Comatose
        - a. Can they be said to have a lost enjoyment of life?
        - b. Do they really experience pain and suffering?
    - iii. Deceased
      - 1. Same basic principles as for live victims
        - a. Loss to Survivor:
          - i. Allows survivors to benefit based upon what kind of support the deceased would have provided had s/he stayed alive
          - ii. Requires dependency
        - b. Loss to Estate
          - i. Full lifetime earnings – full lifetime expenditures
      - 2. Emotional Damages:
        - a. None, as the decedent is dead
        - b. Leads to an incentive problem
      - 3. Consortium:
        - a. Lost enjoyment to spouses and *potentially* children from not having someone in their lives.
  - c. Punitive Damages
    - i. General Principles
      - 1. Tend to be available (though vary across states) for torts worse than negligence:
        - a. Intent to do harm
        - b. Reckless conduct

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- c. Gross negligence
    - d. Wanton conduct
    - e. Conscious disregard for the safety of others
  2. Why do they exist?
    - a. The cost to society may not be reflected in compensatory damages because you might not always get caught. Multiply by 1/% of time you get caught
    - b. Compensates for an under-compensatory damage problem
  3. Criticisms
    - a. Market based punishments should be enough
    - b. That's what criminal justice system is for
- ii. Individuals (*Kemezy*)
  1. Not much of a downside. Helps to abolish reprehensible activities for which compensatory damages won't stop
  2. Keeps people from taking the law into their own hands
- iii. Corporations (*Grimshaw*)
  1. Following learned hand seems to be insufficient to prevent against punitive damages
  2. Malice Standard for Punitive Damage
    - a. "[C]onduct which is intended by the defendant to cause injury to the plaintiff or conduct which is carried on by the defendant with a conscious disregard of the rights or safety of others."
  3. Managerial Agent (§909)
    - a. Manager must have signed off on / supervised the decision.
- iv. Factors in determining punitive damages:
  1. Degree of reprehensibility of conduct
  2. Defendant's wealth
  3. Compensatory damages
  4. Account which would serve as a deterrent