Duty

Affirmative Duty

* Special Relationship
* Undertaking
* D Creates Harm
* Contracted Duty
* Emergency Doctrine

3rd Parties

* Social Hosts
* Commercial Hosts
* Rowland Factors
* Attractive Nuisance
* Negligent Entrustment
* Negligent Misrepresentation

Premises Liability

* Off Premises
* Trespassers
* Licensee
* Invitee
* Activities
* Artificial Conditions
* Natural Conditions
* Landlord Tenant

Statues

* Negligence Per Se
* Private Right of Action

Governmental Immunities

* Cops
* FTCA

Emotional Harm

* NIED
* Physical Impact
* Direct
* Bystander

Economic Harm

* Direct
* Bystander
* Loss of Consortium
* Wrongful Birth
* Wrongful Life
* Wrongful Death

Vicarious Liability

* Employee – Birkner’s
* IC – Apparent Agency
* Borrowed Servant
* Fellow Servant

SOC

Ordinary Care

Extraordinary Care

Hand

Reasonable Person

Custom

Breach SOC

Res Ipsa Loquitur

Negligence Per Se

Medical Malpractice

Informed Consent

* Med Mal – bad care
* Negligence – warning
* Battery – IT

Causation

Actual Cause

* But For
* J&S
* Multiple Ds
* Alternative Liability
* Market Share
* Industry Wide
* Environmental
* Loss of Chance

Proximate Cause

* Zone of Danger (Cardozo)
* Foreseeable Plaintiff (Andrews)
* Eggshell Rule
* Intervening
* Superseding

Damages

Personal Injury

* Medical Expenses
* Pain & Suffering
* Lost income

Property Damages

Single Judgment Rule

Collateral Source Rule

Loss of Chance

J&S

Defenses

Contributory Negligence

* Last Clear Chance
* Imputed

Comparative Negligence

Avoidable Consequences

Assumption of Risk

Preemption

Strict Liability

* Inherently Dangerous
* Explosives
* Wild Animals
* Statutorily Established
* Product Liability

Product Liability

Manufacturing Defect

Defenses:

* Did not leave factory like this
* Subsequent Remedial Repair

Design Defect

* Ordinary Consumer Expectations
* Reasonable Alt Design/Ortho

Defenses:

* Irreducibly Unsafe

Failure to Warn

Defenses:

* Sophisticated User

Negligence Comparison of Each

Intentional Torts

* Assault
* Battery
* False Imprisonment
* IIED

Defenses:

* Self-Defense
* Defending 3rd party
* Defense of Property
* Immunity

Defamation

* Libel
* Slander

Defenses:

* Absolute Privilege
* Conditional Privilege
* Consent

Privacy

Unreasonable Intrusion on Seclusion

Unreasonable Publicity to Private Life

False Light

Appropriation of Name

Economic Interests

Deceit

Interference with Contract Relations

Interference with Advantageous Relation

**Torts –Exam Taker – Professor Barbara Evans –Fall 2015**

# **Liability**

In general, someone is responsible for a tort, whether intentional or negligent. However, just because someone is responsible for the occurrence does not mean they are liable for damages caused by it.

Liability can be determined by multiple factors

## **Vicarious Liability**

Allows for plaintiffs hurt by some company’s employee while on the job to sue the company as well – ***respondeat superior*** (an employer is responsible for the actions of employees performed within the course of their employment.)

* Since employees generally don’t have much money, whereas the company does, this increases the chance of the plaintiff being able to recover if judgment is in their favor
  + **Indemnification**
    - Ask the person who was really in charge of the tort to pay you back if you’re found liable for something that THEY did
    - i.e. brake shop does shitty work, you get in an accident, victim can sue you and win, but you can then sue the brake shop and make them pay you back for your losses
    - Doesn’t mean they can pay it all, so you might still be screwed
* ***Birkner v. Salt Lake County*** (1989)
  + **Established three criteria for testing it**

### 1) Employee’s conduct must be of the general kind the employee is hired to perform

### 2) Employee’s conduct must occur substantially within the hours and ordinary spatial boundaries of the employment

### 3) Employee’s conduct must be motivated, at least in part, by the purpose of serving the employer’s interests

Birkner’s Rules

* What did they do?

Is it related to work?

* Why did they do it?

To further employer’s objectives?

* Where and When?

During work hours and venue?

* + - (note: some people don’t work in an office)
* ***Christensen v. Swenson*** – Defendant was a guard, technically on duty when she drove across the street to get lunch in uniform, crashed into Ps car; Court decided that the three criteria could reasonably be viewed as met so company can be held vicariously liable
* **Direct Negligence Liability**
  + In addition to suing for Vicarious Liability for the employer’s actions, might also sue the company directly for their own actions
  + Negligent Hiring, Retention, or Supervision
  + Employers held directly liable for hiring, retaining, or supervising employees who have committed a tort (usually violent) – ex hiring a bouncer with an assault history

What about when a worker isn’t necessarily considered an employee but rather is contracted for specific jobs and actually works for some other third-party company?

* **Independent Contractor (IC)**
  + Some workers are technically contractors, i.e. there for a specific job but don’t actually work for the company.
  + This can significantly affect the degree of liability that a business owes
  + Must determine if there is a master/servant relationship or not
  + **Apparent Agency** – Subjective theory

Way around the lack of vicarious liability for IC

Tortfeaser may actually be an IC, but was presented as an employee, which wasn’t clear to the victim

Exists only if all **three elements** are present

1) A representation by the purported principal

2) A reliance on that representation by a third party

3) A change in position by the third party in reliance on the representation

Requires the principal creates the appearance, not the other way around

***Roessler v. Novak*** *–* Hospital gave the impression that a radiologist, who was technically a contractor, was a hospital employee; P relied on that description to trust the hospital, caused a change in position based on the negligent reading by D

**Ostensible Agency**

“de facto” employee – way to test

Person isn’t technically an employee, but the situation is such that there really is no other way to describe them

Another way assign liability to a party that can pay (the actual employer)

Can be shown if:

Paid a salary instead of per job done

(maybe) Low–skilled work

Don’t own their own business or tools – work at Principal’s place of business and use their tools

Typically long term workers

**Borrowed Servant**

No employee or IC relationship, but one person borrows another for a quick job

In doing so, borrower takes on vicarious liability over the borrowed servant

Nurses are borrowed servants in an Operating Room; the surgeon has full control over them, so he takes on the liability, not the employer (hospital’s defense)

**Fellow Servants**

Employees cannot sue each other and hold the employer vicariously liable

Worker’s comp generally takes care of this anyways since most employees can’t sue their employers to begin with

**Institutional Liability**

Some states give specific industries higher liability due to the type of business conducted

Non–delegable duty to prevent further injury

Other way to handle it, make hospitals responsible for all actions within the hospital itself

**Inherently Dangerous**

Some things cannot be safe even if you take all due care

Hospitals don’t fall into this because the thought would be that with reasonable care, a dangerous procedure is possibly safe if done correctly

## **Limitations of Liability**

Courts don’t just let anyone sue, even when they may be victim of a tort

* Lack of Legislative Intent
  + ***Uhr v. East Greenbush Central SD*** – State law required schools to test students for scoliosis, D failed to test one year, P got scoliosis; P tried to sue, court rules that they do not have a **Private Right of Action.** Case is about whether there was a statutory duty or not.
    - ***Sheehy* Test** for **Private Right of Action**

1. Whether the plaintiff is a member of the class whose particular benefit the statute was enacted
2. Whether recognition of a private right of action would promote the legislative purpose
3. Whether creation of such a right would be consistent with the legislative scheme

* Public Policy
  + ***Strauss v. Belle Realty Co.*** – P has energy contract with D, as does the building in general; Power goes out, P leaves his room and falls in a dark common area; sues; Court says that as a matter of public policy, it would be wrong to extend right of action when P doesn’t have a contract with D over the common area
    - Public Policy arguments essentially say that allowing a right of action to a broad group would permit so many people to sue as to prevent companies from being willing to go into business
    - Also would fill court dockets with far too many cases
* Suing the Government
  + Courts often make it difficult to sue to the government or government entities
    - The standards for proving that a duty directly extended to an individual makes it difficult to bring about a private right of action
  + Historically, citizens couldn’t sue the national government for anything **(Sovereign Immunity)**; the FTCA opened that up a bit, but it’s still tough
  + The primary test is whether there is a **Private Right of Action**
  + ***Lauer v. City of New York*** – ME messed up on autopsy, results in police harassing father; Court holds that father can’t sue the ME because ME does not owe a duty directly to him. City code requires ME to report findings to the DA for public good, not meant to establish a duty to individuals
  + ***Riss v. City of New York*** – P was threatened by ex, asked police for help, they refused, ex threw acid in her face; Wants to sue police for failing to protect her; Court says she has no right of action against the police
    - **Sovereign Immunity** protects the police (as a gov’t entity) from legal liability
      * They “owe to a duty to all, therefore to no one” specifically
    - Court says it’s the legislature’s job to establish new tort claims, not the court
    - Uses ***Cuffy v. CoNY* test** to see when citizens CAN sue police:

1. An assumption by the municipality, through promises or action, of an affirmative duty to act on behalf of the party who was injured
2. Knowledge on the part of the municipality’s agents that inaction could lead to harm
3. Some form of direct contact between the municipality’s agents and the injured party, AND
4. That party’s justifiable reliance on the municipality’s undertaking.
   * **Federal Tort Claims Act** (see Preemption p32)
     + Legislature established new guidelines to determine if and when people could pursue private rights of action against government entities and employees
     + § 1346(b) – District Courts have exclusive jurisdiction in suits for money damages after 1/1/1945, injury or loss of property, or personal injury or death caused by negligence or wrongful acts or omission by a government employee while acting within scope of office or employment
     + § 2402 – Actions will be tried by court without a jury
     + § 2674 – US shall be liable in the same manner and extent as a private individual, but not liable for interest prior to judgment, or for punitive damages
     + § 2678 – Attorney fees cannot be more than 25% of judgment
     + § 2679(b) – If you sue the govt under FTCA, you give up right to sue the employee
     + § 2680 – Provisions are limited; can’t sue under FTCA for:
       - 2680(a) – Cannot sue for ministerial acts **performed properly**, or for discretionary acts whether proper or not
         * Has been changed by courts, see below
       - 2680(b) – Loss, miscarriage, or negligent transmission of postal mail
       - 2680(h) – Intentional torts
       - 2680(i) – Damages from fiscal operations of the treasury or monetary regulations
       - 2680(j) – Combatant activities by the military in times of war
       - 2680(k) – Any claim arising in a foreign country
     + **Analyzing 2680(a)**
       - **Ministerial Act**
         * “Conduct requiring adhering to a governing rule, with a compulsory result” – ***Lauer v. CoNY*** (p6)
         * Following the law, even if the law is stupid, should not subject an employee to tort liability
         * Ministerial acts may not be immunized, but they are not tortuous.
         * **Good faith effort** will satisfy, but if you totally fail to properly follow the statute, or fail to show a reasonable attempt to follow it, then you have negligently failed to perform that duty, and therefore are open to suit
       - **Discretionary Act**
         * The agent has discretion of what to do and gets to decide entirely on their own without statutes guiding the way
         * The courts are uncomfortable second-guessing the decisions of a government employee who doesn’t have anyone guiding him to figure out what’s the best option to take; It would be wrong to subject them to liability when they don’t have anything to go by
         * Courts have carved out exceptions however:

***Cope v. Scott*** – P’s car slipped on windy wet road in national park, sued claiming there weren’t enough signs warning of the danger and that Park Service neglected to repair the road with better traction

Court holds that discretionary functions are only exempt if they “are grounded and fraught with social, economic, or political goals”

Repairing roads has high economic concerns in deciding which roads to close and fix, and therefore is discretionary and protected

Placing signs is discretionary, but not fraught with those concerns

Essentially: “Big discretion” policy decisions that primarily involve a policy matter, trade-outs, interests to the greater good, made under budgetary constraints, etc, should be immune from suit. “Petty discretion” policy decisions do not involve any of the above and are not immune from suits.

## **Loss of Consortium**

Spouses/parents can sometimes sue for injury to their spouses/children under **Loss of Consortium** due to no longer being able to enjoy the familial benefits – namely sex

* Now, most courts grant LoC for emotional companionship basis
* Some states now extend the right from Parents to child, but not most
  + Very few extend the right back from Child to Parent
* Generally won’t succeed if the person actually injured doesn’t want to go along with the loss of consortium claim

## **Strict Liability**

The Defendant is entirely liable for the wrong, end of story.

* Generally used in Product Liability or other instances where P could not possibly have avoided being harmed
* P doesn’t have to prove D did anything negligent or wrong, the fact that they have been hurt is enough to satisfy judgment under strict liability (similar but not exactly *res ipsa loquitur*)
* Strict liability protects victims who couldn’t avoid the damage (w/o simply not using the products) and can also be used to protect bystanders
* For SL, Still need duty, causation, & injury, but no need for SoC or breach.
* Elements of strict liability (page 568): 1) Defendant has a status (regularly in business of selling product that caused injury); 2) defect that made product unreasonably dangerous; 3) proximate and actual causation; 4) harm.
* Examples:
  + Wild animals
    - Even if they are inherently dangerous, you have strict liability for having them
  + Escaped cattle
    - Old rule since ranching was so prevalent/Cattle can cause serious damage
  + Blasting/dynamite
    - While new regulations govern this action, previously anyone could use it
  + Fumigation
  + Cellar odors
* **Goals of Strict Liability**
  + Loss Spreading – theory that companies can pay for the damage and pass it on to all their customers, which “spreads out” the loss among several people, so no one get hits to hard
  + Loss Avoidance – (aka risk reduction) aims at imposing liability in a way that reduces the number and severity of accidents; law & eco view where actors will make cost-benefit analysis of their activities to behave efficiently (Hand formula)
    - *Note*: problems can arise w/ *over-deterrence* where the cost of the product becomes so high or even some products going off the market b/c of liability costs that consumers are forced to use “the second best” option, which turns out to be even more dangerous
  + Loss Allocation – objective is for the loss to be “internalized” by the liable company
  + Administrative efficiency – strict liability would produce administrative savings b/c of its simplified determination, which eliminates the need for proving fault
  + Predictability – Nice to have some consistency with these actions
* **Doctrinal Development**
  + ***Rylands v. Fletcher*** – D had water tank on his land, it fell and washed away P’s land; Court holds that D is fully responsible for anything on his property that affects D’s property, since there was nothing that P could’ve done to prevent it. Strict liability. Going to need to prove either direct or vicarious liability. Vicarious wont work and neither will direct, therefore, cant prove negligence.
  + ***Sullivan v. Dunham*** – D is cutting down tree with dynamite, wood flies and hits P’s car on highway killing him; Court rules that while D has a right to cut down the tree on his land, P’s right to safety is more important, so D is strictly liable, whether it is negligent or not

## **Products Liability**

Manufacturers have a non-delegable duty for consumer safety.

**Three Primary Claims:**

* Manufacturing Defect
* Design Defect
* Failure to Warn

|  |  |  |  |
| --- | --- | --- | --- |
| Must Prove: | **Manufacturing Defect** | **Design Defect** | **Failure to Warn** |
| **Negligence** Must prove all 4 elements of Negligence | -Breach of SoC for manufacturing due to failure of quality control, manuf process, or delivery | - Design process breached SoC  - What was wrong with the design process?  -Were unqualified people involved? Duty to have right people? | -What’s the standard warning for this type of product or risk?  -Did they use the right language? Style? Etc |
| **Strict Liability** | 1) Out of conformity with specifications  2) Defect Caused injury | 1) Product was unreasonably unsafe, either by OCE or RAD  2) Caused Injury | 1) Product doesn’t have a warning, or warning is insufficient  2) Presence of (sufficient) warning\* would have prevented injury  \*heeding presumption – even if P didn't read warning, courts treat as if they would have |

# ***McPherson v. Buick Motor Co*** – D sold car to dealer, who sold to P, car had a defective wheel from a third-party supplier that was never inspected, crashed and caused injury; Court held that Manufacturer knew someone other than the dealer would end up using the car, so

# “If the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger”.

# Under privity theory, plaintiff could only sue dealer. This is the case that modernized American law following the Industrial Revolution. Making a big realignment of law by saying even though plaintiff has no privity of contract w/ Buick, they could still sue them. Opened door to 20th century products liability.

# ***Escola v. Coca Cola Bottling Co. of Fresno*** – P hurt her hand when Coke bottle exploded, res ipsa suggests this shouldn’t happen because of testing standards at factory, so bottling company must be at fault

# “The consumer no longer has means or skill enough to investigate for himself the soundness of a product.”

# Justice Traynors concurrence established that plaintiff should no longer have to sue under negligence.

* **Manufacturing Defects**
  + Product fails to meet the design specs – something likely went wrong in production/packaging/shipping, etc
  + Generally applies to mass-produced items
  + ***2nd Restatement 402A*:**

(1) one who sells a product in a ***defective condition unreasonably dangerous*** to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is ***engaged in the business of selling*** such a product

(b) it is expected to and does ***reach the user or consumer without substantial change*** in the condition in which it is sold

(2) This rule applies even if the seller has exercised all possible care in the preparation and sale of his product (***strict liability***) and/or the consumer is not the direct buyer from the seller (***indirect seller***).

* + Generally can also sue for negligence, given that errors in manufacturing are assumed to be caused by someone screwing something up.
* **Design Defects**
  + Products were manufactured correctly, but the design of the item itself is flawed in a way that leads to possible injury
  + **Three Elements:**

1) Product was made as intended to be

2) But is not reasonably safe, and

3) Alternative design would have made the foreseeable risk reasonable

* + Two tests for Liability
    - **Ordinary Consumer Expectations**
      * Do consumers expect this sort of product to be safe? Or do they understand that there is some inherent danger?
      * Generally do not get to have expert witnesses testify about safety, since the primary point of the jury is to test what “ordinary consumers” would expect
      * ***Barker v. Lull Engineering*** – A product is defective in design if either: (1) the product has failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeably manner; or (2) the benefits of the challenged design do not outweigh the risk of danger, inherent in such design.
      * ***Soule v. GM*** – P’s car crashed, but the floorboard shot up and crushed her feet in addition to (“enhancing”) the regular crash injuries; Court rejects use of OCE, saying a case this complex falls outside the ordinary consumer’s knowledge
        + **Elements for OCE are:**

1) The product failed to perform as safely as an ordinary consumer would expect

2) The defect existed when the product left the manufacturer’s possession

3) The defect was a “legal cause” of the plaintiff’s enhanced injury

4) The product was used in a reasonably foreseeable manner

* + - **Reasonable Alternative Design (RAD)**
      * Is there another way to make the product that would be safer than what this manufacturer/designer chose?
      * If there is a reasonable design already on the market that shows that a certain product would’ve been safe had the manufacturer chosen to take that approach instead, they might be held liable for it
      * ***Camacho v. Honda*** – Motorcycle didn’t have leg-guards, so a side crash destroyed P’s legs; Argued that some other bikes had them, so Honda should have a duty to have them too; Court says to use ***Ortho Pharm. V. Heath*** factors to test if RAD was necessary, puts this to the jury since its factual question
      * **Factors to consider (*Ortho* Factors)**:
        + Product’s utility to the user and the public
        + Overall Safety (likelihood and severity of injury) of the product
        + Availability of safer substitutes
        + Manufacturer’s ability to make the product safer without impairing its usefulness or making it too expensive
        + User’s ability to avoid danger by appropriate care
        + User’s anticipated awareness of the danger and its avoidability (warnings, etc)
        + Feasibility of spreading loss by setting the price higher or carrying insurance

|  |  |
| --- | --- |
| 1. Ordinary Consumer Expectations Test: P needs to demonstrate that the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner  (Soule) Consumer Expectations Test = P needs to show:   1. Manufacturer's product failed to perf. as safely as an ordinary consumer would expect 2. The defect existed when the product left the manufacturer's possession 3. The defect was a "legal cause" of P's enhanced injury 4. The product was used in a reasonably foreseeable manner | Would a jury be able to figure out that this is unsafe? |
| 2. Risk Utility Test/R.A.D. (Reasonable Alt. Design): A design defect can also be shown if the jury finds that the risk of danger inherent in the design outweighs the benefits of such design.  (Banks) P must prove that a reasonable alt. design would have reduced the foreseeable risk of harm. Factors such as production cost, product longevity, maintenance, repair and esthetics, etc. should be considered  **(Ortho) Factors:** just need to balance the factors (don’t have to meet all):  1) The product's utility to the user and the public  2) The overall safety (likelihood and severity of injury) of the product  3) The availability of safer substitute  4) The manufacturer's ability to make the product safer without impairing its usefulness or making it too expensive  5) The user's ability to avoid danger by appropriate care  6) The user's anticipated awareness of the danger and its  avoidability (warnings, etc.)  7) The feasibility of spreading the loss by setting the price higher or  carrying insurance | Use for situations beyond ordinary's consumer knowledge |

* + - **Irreducibly Unsafe Product Theory** – if a product is irreducibly unsafe, a reasonable alternative design is not needed (because obviously the product cannot be made safer without eliminating its function) ex: knife
    - **Subsequent Remedial Repair** – when the manufacturer, on their own initiative, chooses to improve a product’s design, this change/improvement is not admissible in court to show that the product originally had a defect
      * Policy – this is to make sure we don’t create disincentives for manufacturers to make their products safer
    - **Medical Products** – See Medical Device Amendment
* **Failure To Warn**
  + If a manufacturer knows a product can be dangerous, but does not warn its consumers in a reasonable way, they can be held liable for any injuries that could have been prevented if the consumer had seen the warning ahead of time
  + Number of warnings and prominence of their placement can be considered (see below)
  + **“Heeding Presumption” Theory** – Courts generally hold that even if a P didn’t read an inadequate warning, had there been stronger warnings they WOULD HAVE read them. Allows people who didn’t read the warning to still bring suit.
  + ***State v. Karl*** – D pharma did not warn consumers of possible dangers of their drug under the assumption that the doctor would know to warn – “**Learned Intermediary Doctrine**” (only applies to drugs) – under which doctor is responsible for communicating these dangers; Court holds that since pharma now advertises directly to patients, they can no longer rely on doctors to communicate all dangers, they now have a responsibility.
    - * Mfr. Fulfills warning to consumers if they warn physician. Then, physician has duty to warn consumers. By warning physician, the consumer cannot sue mfr. under strict liability. But patients can sue mfr. about things not warned about or not a good enough warning. If no warning, physician is off the hook and consumer can bring strict liability suit against mfr.
  + **Sophisticated User Doctrine** – Relieves a manuf. of warning when the class of users are sufficiently knowledgeable that they already know or appreciate the danger
* **Defenses to Product Liability**
  + ***Vassallo v. Baxter Healthcare Corp.*** – D made a bad breast implant, but prior testing did not show it was a foreseeable danger; Court decides that D can only be held liable for failing to warn about dangers that it knew of AT THE TIME the warning labels were made (P still won for other aspects of the case)
    - **“State of the Art”** – attempted defense to FTW, similar to Customs for Duty
  + ***General Motors v. Sanchez*** – Guy mis-shifted into Park when he got out of his truck to open a ranch fence, truck’s bad transmission slipped into reverse and pinned him severing an artery killing him; Court rules that P’s negligence in not properly putting the truck in park and turning off the engine can be “comparatively responsible” and reduce damages.
    - * Whenever you see reasonable alternative design, no longer an argument of ordinary consumer expectations.
      * Punitive damages awarded. That means they were found grossly negligent bc you can only receive punitive damages from gross negligence.
  + ***Royer v. Catholic Medical Center*** – D Hospital installed defective prosthetic knee in P patient; P alleged that D was strictly liable because they essentially sold the defective product to P
    - Court rules that hospitals are service providers, that service being surgery and other operations. Providing a bad implant is incidental to the surgery so no liability
  + **Modifications/Tampering** with a product can relieve a manufacturer of liability
    - ***Hood v. Ryobi America Corp.*** – P removed the blade guards on a saw despite different warning labels not to, blades flew off at him, now wants to sue; Court holds that manufacturer do not have to have encyclopedic warnings
      * Standard for warning labels: Must be “reasonable under the circumstances”
    - ***Jones v. Ryobi*** – Ps employer removed safety guard from paper press, P got hurt; Court rules that in order to recover from the manufacturer, P must show that defect was there when it left the manufacturer
    - However, manufacturers may be still need to warn about dangers of tampering
      * ***Liriano v. Hobart Corp.*** – Store removed hand-guards for meat grinder, P got hand caught in it, couldn’t sue for MD or DD because product was substantially modified, but tries to sue for failure to warn about modifying
        + Court rules that manufacturers can be sued for failure to warn about dangers of modification, IF such modifications are reasonably foreseeable.
        + Significant difference in this case from Jones v. Ryobi is that Jones is a failure-to-warn case, not a design defect. **She said this is always on her final**.

**II. Negligence Torts**

# Failure of D to take reasonable care to protect a reasonable P

***Brown v. Kendall*** – Plaintiff and Defendant had dogs that were fighting, Defendant tried to break up the dogs with a stick, but accidentally hit the Plaintiff in the eye in the process of poking at them; Court ruled that defendant should be liable only if he were at fault or acting without “ordinary case and prudence”; Established Reasonable Person Standard

**Reasonable Person Standard**

If both use ordinary care

Defendant Wins because Defendant took all precautions

If Plaintiff Didn’t use Ordinary Care, but Defendant did

Defendant Wins because Plaintiff was contributory (If contrib. neg. jurisdiction)

If both did not use Ordinary Care

Defendant Wins because Plaintiff was contributory (If contrib. neg. jurisdiction)

If Plaintiff Did use Ordinary Care, but Defendant did not

Plaintiff Wins

Burdon of proof for proving defendant did not use ordinary care is on the Plaintiff, not the Defendant

## **Elements for Proving a Prima Facie Negligence Suit:**

### D had a legal ***duty*/*standard of care*** to protect P

### D ***breached*** that duty/standard of care

### D’s breach ***caused*** the injury (actual and proximate)

### P was ***injured***, there are legally compensable ***damages***

### All four elements must be proven.

## **Duty**

There is a general Duty of Care from all people to another to not create unreasonable risk of harm to one another. Such duty is limited by reasonableness, foreseeability, and some sort of relationship between the parties such that one would be expected to protect another.

### **When is there a Duty**

There is generally no duty to rescue or warn, unless there is some degree of a special relationship between the parties. Those special relationships are:

* Employer–Employee
* Carrier-Passenger
* Teacher-Student (But not Student-Teacher)
* Doctor-Patient
* Attorney-Client
* Innkeeper–Guest
* Landlord–Tenant
* Parent/Guardian–Child
  + Can’t hold a parent responsible for a child’s actions
  + But may be liable for the parent’s own tort: negligent supervision of the child, negligent entrustment of a gun to a child, etc.
* Common Social Understanding (i.e. out with friends drinking)
  + ***Farwell v. Keaton*** – D owes a standard of care to P because there are going out drinking together
    - Also because D started to render aid to P, expected to reasonably finish that aid
    - See also *Duty for Easy Care*
* Joint Venture Undertakings/Partnerships
* ***Rowland* Factors for Testing Duty** (from *Rowland v. Christian*)

1) The **foreseeability of harm** to the Plaintiff

2) The **degree of certainty** that the Plaintiff suffered injury

3) The **closeness of the connection** between the defendant’s conduct and the injury suffered

4) The **moral blame** attached to the defendant’s conduct

5) The **policy of preventing** future harm

6) The **extent of the burden to the defendant** and the **consequences to the community** of imposing a duty to exercise care with resulting liability for breach

7) And the **availability, cost, and prevalence of insurance** for the risk involved

### What Degree of Care is Owed?

General Duty of Reasonable Care

1) Imposed on all persons not to place others at foreseeable risk of harm through conduct

2) Adults → Reasonable person standard (objective)

3) Children → Child standard of care

* + Same age, experience, and intelligence

4) Physically disabled persons → reasonable person with same abilities

Three general degrees of care

1. **Ordinary Care**

* When there is a known risk, and some responsibility owed to others, you have a duty to warn or fix it
* Applies 99% of the time over extraordinary
* Applies to Licensees
  + ***Adams v. Bullock*** – Trolley Co. had taken reasonable care to prevent injuries by hanging wires low enough where people shouldn’t be able to touch it, there was no more they needed to do

1. **Extraordinary Care**

* When there is a known risk, and some responsibility owed to others, you have a duty to warn or fix it, but you also have a duty to actively seek out any unknown risks
* Is the exception, generally duty is just ordinary
* Applies to Invitees, Common Carrier passengers, Experts in the Field, etc
* ***Andrews v. United Airlines, Inc.*** – UA, as a common carrier of passengers, has a higher duty to do everything it can to prevent injuries
* However, ***Bethel v. NYCTA*** changed this, saying it’s still has to be reasonable care, might be higher but not absolute

**Common Carriers**

Carry the public from place to place, permitted monopoly in an economic space for efficiency

As matter of public policy, courts imposed the highest degree of extraordinary care to these agents, since the public relied on them so much at the time

When these began to pop up they were very technologically advanced, ordinary people don’t have the knowledge/expertise to know if they are safe or not

These fears in 1970 (Bethel) were on an ordinary level, society understood the technology

In many cases regulation is superior to tort or nation-wide insurance system

1. **No Care**

If there is no foreseeability of a risk of harm, then there is generally no duty to warn of an unforeseen risk

In some cases, regardless of the risk, you have no responsibility to warn or fix it

***Harper v. Herman*** – P was someone else’s guest on D’s boat, dove into shallow water without warning; Court held that D had no duty to warn because it wasn’t foreseeable that P would jump without asking

Generally applies to individuals with no right to be somewhere, like trespassers

**3. Specific Types of Duty**

**Duty for Easy Rescue**

Some states place an affirmative duty to act or warn so long as it can be done with little or no inconvenience to oneself

AKA Good Samaritan Rule – Vermont

**However, once you start helping, you voluntarily undertake the duty to finish rendering aid/not leave them worse off**

***Farwell v. Keaton*** – D started help P by getting ice and helping him fall asleep in the back of the car, but didn’t take him to a hospital which would’ve been easy. P died, D is held liable because he made the situation worse, not better

**Non-negligent Creation of Risk**

***Simonsen v. Thorin*** – court held that the D had an affirmative duty to use due care to remove a hazard he added to the road (pulled over car to help another crash) or to warn others of it, though he was not liable for creating the hazard

**Learned Hand’s Theory of Care** – Formula for merchants to test SOC, used in ***US v. Carroll Towing Co***:

Burdon (B) vs Probability of injury (P) \* Loss (L)

If burden (cost) to prevent injury is less than probability of an injury times the cost of such an injury, then the person has not met the SOC and is liable

If the burden (cost) is more, then they have met the standard

No need to prevent the injury at all…

Even if the injury occurs without you taking action, you are not liable and therefore don’t have to pay to prevent it b/c you won’t have to pay if you dont

**Emergency Doctrine** – ***Levey v. DeNardo*** – D rear-ended P because P stopped suddenly to avoid a car that jetted out in front of it, D not held liable because there was nothing she could do to prevent it in the emergency

“Individuals confronted with an emergency should not be held to the same standard of care as someone confronted with a foreseeable occurrence”

Due to the emergency and short time to react, it would be very difficult for a person to exercise the same precautions to prevent an accident

Should “exhibit only an honest exercise of judgment”

**Customs** - Industry standards can be used to determine standard of care

***Trimarco v. Klein*** – Landlord uses ordinary glass for showers, P falls into it and it shatters and causes injury, wouldn’t have if it were shatterproof

Industry Custom is to use shatter-proof glass

Does this mean it is the standard of care?

Yes, if the jury decides it is indeed custom

BPL can apply as well to determine cost effectiveness

**4 Part Test**

1) Must show the claimed custom is actually customary

2) Must show that custom was violated

3) Must show violation was proximate cause of the injury

4) Must show the custom is reasonable

**Negligence *per se*** – Something is negligent by statutory regulation

Requires that the violation was specifically what the statute was designed to prevent

Must be a member of the intended protected class:

Pedestrian laws are meant to protect pedestrians

Driving laws are meant to protect drivers

Defend by attempting to show that a statute is irrelevant in a given situation

Some require knowledge about the statute

***Martin v. Herzog*** – P violated a statute to have lights on in order to warn oncoming traffic, therefore it is negligent by violation of the statute

Also demonstrates **Contributory Negligence**, in which P’s negligence contributed to the occasion of D’s negligence, therefore D is no longer liable

Unlawful/negligence, Venn Diagram w/ slight overlap

The absence of the lantern could be considered by the jury, but doesn’t make him automatically contributorily negligent

Not following statute only shows standard of care element of negligence, doesn’t define negligence

Sometimes, the statute can be lawfully violated if following the statute would cause greater harm than not following

***Tedla v. Ellman*** *–*Ps are walking on wrong side of street because the other side has heavy traffic; If they were on the other side, they would’ve been in more danger

Statutes are not iron clad; a general rule of conduct does not fix a definite SOC

**Property Suits**

**Premise Liability** – Landowners may have higher SOC

Harms arising from conditions on property; harms caused by activities on property “active operations”; harms to people outside the property from things on the property; harms done by third parties on your property.

For premises liability, Plaintiff must be on your property.

Right of action

* 1. **Invitees** get extraordinary SOC

Any person who enters land with permission such that the land owner has an interest of material benefit in the visit

Owed a SOC for *both* known dangers and those that would be revealed by inspection

Business customers, repairmen, etc…

b. **Licensees** get ordinary SOC

Any person who enters land with permission

Owed SOC for *known* dangers

Dinner guests, bible study, friends

c. **Trespassers** get no SOC

Any person who enters land without permission

You have a duty of ordinary care to protect known trespassers **only**.

* + - Discovered T
      * + aNatural – no duty

Known artificial – duty to exercise ordinary care to warm of or make safe dangers that risk death or serious bodily harm

Active Operations – duty of reasonable care

When is T ‘discovered’?

Actually noticed presence

Reasonable person would conclude someone on property

* + - * + Anticipated T

Landowner knows or should know of trespassers who constantly cross a section of land

Treat as discovered T

If sign of ‘no trespassing’ back to undiscovered

***Carter v. Kinney*** – D holds open bible study, P comes but isn’t exactly invited directly, slips and falls; Court holds that P was just a Licensee, and therefore was only owed an ordinary duty of care for *known* dangers

**Old rule:** Only invitees and licensees could bring a suit if hurt on a premises

**Modern Trend:** Licensees should not be denied a right of action with lower SOC

***Heins v. Webster County*** – Man visits daughter at hospital, is applying for a job too, gets hurt; Court decides that Invitees and Licensees should be afforded equal care

**Attractive Nuisance Doctrine**

A landowner may be held liable for injuries to children trespassing on the land if the injury caused by a **hazardous object or artificial condition** on the land that is likely to attract children who are unable to appreciate the risk posed by the object or condition

**FIVE Conditions**

1) The place where the condition exists is one on which the possessor knows or has reason to know that children are likely to trespass

2) The condition is one of which the possessor knows or has reason to know and which he realizes or should realize will involve an unreasonable risk of death or serious bodily harm to such children

3) The children, because of their youth, do not discover the condition or realize the risk involved in inter-meddling with it or in coming within the area made dangerous by it

4) The utility to the possessor of maintaining the condition and the burden of eliminating the danger are slight as compared with the risk to children involved,

5) The possessor fails to exercise reasonable care to eliminate the danger or otherwise to protect the children

* + **Suits for Active Operations on the Land**
    - The actions caused the problem, not some condition of the land
  + **Duty to prevent dangerous people from hurting others on your property**

**Duty to Customers**

* + Almost anyone who legally enters a store while it is open becomes an invitee
    - Store is thought to receive some present or future benefit from your being there
  + ***Negri v. Stop and Shop*** – P slipped on baby food that D Store should had constructive notice was there
    - Constructive Notice – Store had been told there was stuff on the floor, and regular checks would have shown it was there
      * Supermarkets know things can fall, so should check aisle
        + Customers are invitees and therefore are owed an extraordinary SOC, since the store gets a benefit from having people making it look busy
    - Actual and constructive knowledge both deal with concrete incidents and business practice deals with potential risk
  + Notice – Actual or Constructive
    - **Actual Notice/Knowledge**
      * Best evidence for negligence if you can show that they definitively knew about the risk, such as other customers warning of a problem
    - **Constructive Notice/Knowledge**
      * Can apply to both ordinary and extraordinary care based on risk
      * Requires the defect to be visible and apparent, AND it must exist for a sufficient length of time prior to the accident to permit D’s employees to discover and remedy it
        + ***Gordon v. American Museum of Natural History*** – P slipped on a piece of wax paper from a food vender on museum steps, paper fell as he was taking a step; tried to claim museum had constructive notice because there might have been other paper in other areas on the steps; Court said no, there was no evidence museum could’ve known about that specific piece of paper at that moment – no constructive notice.

Introduces business practice rule.

* + - **Business Practices**– Injury foreseeable due to nature of business
      * Likely relieves liability due to assumption of risk
    - **Extraordinary care**
      * If known, deal with it
      * Should be doing reasonable inspections to find the UNKNOWN risk
  + What Degree of Duty do they owe?
    - ***Posecai v. Wal-Mart Stores, Inc.*** – Woman robbed in parking lot of Sam’s in bad neighborhood, but very few prior instances of crime in the parking lot, sues saying they owed her a duty to have security guards outside
      * Court rules that stores only hold a duty to protect equal to the foreseeability of crime occurring on the premise – **Balancing Test**
      * Other possible options they turned down:
        + **Specific Harm Rule** – Sam’s would have had to know that the specific person was under her specific car
        + **Prior Similar Incidents Test** – Sam’s would have to have evidence of previous similar crime in the nearby area such that they would expect it
        + **Totality of the Circumstances Test** – Evaluates aspects such as time, location, nature of crimes in the area, and other conditions
  + The Foreseeability Aspect
    - ***A.W. v. Lancaster County SD 0001*** – Teachers see suspicious guy in school, tell others but don’t really do all that much to stop him, molests young boy; Court rules that **foreseeability is a question of fact** to be determined by a jury
      * It’s case-specific and must be evaluated on the facts of each case
      * It’s really more a test of negligence than of duty

**Duty in Medicine – Med/Mal**

* + Requires a Physician/Patient relationship, or else no Med/Mal
  + Doctor/Patient Relationship
    - Regarded as contractual relationship in which the doctor agreed to provide a higher standard of care
    - Duty is a **professional standard of care**, not a reasonable one – set by industry
    - Doctor can end the relationship if patient is nonresponsive to doctor’s instructions
      * States have limitations on this to protect patients
    - Doctors owe a duty to patients to protect them and provide the best medical care available, including suggesting the correct course of action
      * **Duty of Informed Consent**
        + ***Matties v. Mastromonaco*** – Elderly P fell, doctor only told her about bed rest instead of surgery; bed rest failed and injured P more; sued for MedMal saying she did not have informed consent

Court rules that doctors have a duty to inform patients of all reasonable courses of action, even if they don’t agree with them

\*\*MAY SEE A SIMILAR FACT PATTERN ON EXAM!! WILL NEED TO EXAMINE IF THERE WAS MEDMAL, THEN INFORMED CONSENT\*\*

**Duty to Third Parties**

* + **Negligent Entrustment**
    - ***Vince v. Wilson*** – Grandmother buys car for grandson who she knows has no license and is a bad driver; GS causes accident hurting P who sues saying she should be liable for giving him the car, as well as the guy who sold her the car
      * Court agrees, saying the Restatement (Second) of Torts allows for liability to be extended to an individual who knowingly gives a “chattel” to someone they know is incompetent and might hurt someone with it
      * There is liability for injuries minors cause to themselves but not to 3rd parties
  + **Social Hosts**
    - ***Reynolds v. Hicks*** – Social hosts are not liable for injuries to a third party caused by a driving accident caused by drunk minor who drank at their party
      * Social hosts are not as capable of handling the responsibilities of monitoring a guest’s drinking; They are busy hosting the party and being social…
      * There is liability for injuries that minors cause to themselves, but not to third parties; Negligent Entrustment therefore doesn’t apply to social hosts
      * State Statute (WA) protects parents from third party liability if they give alcohol to minors, so therefore it is obvious that others would be protected as well
  + **Bystanders**
    - Duty depends on foreseeability of bystander experiencing harm
      * SEE DAMAGES SECTION FOR EMOTIONAL DISTRESS
  + **Duty to Warn (psych)**
    - Medical practitioners with knowledge of a person’s potential to harm others may have duty to warn those individuals
    - ***Tarasoft v. Regents of UC*** – Therapist knows patient wants to kill ex-gf, tells authorities but they release him, she’s instructed not to pursue further, he quickly kills ex-gf
      * Court rules she had a duty to warn the ex-gf; “medical privilege does not apply when the dangers to another are foreseeable” (see **Rowland Factors**)
      * Therapists can be held liable for failing to predict violent behavior if others in the professional standard would have
      * The police, however, have sovereign immunity, so they’re good
  + **Duty to Warn/Negligent Misrepresentation**
    - Have a duty to tell the truth if what you’re saying will cause others to rely on that information
    - **See Economic Harm (*KPMG* Case)**
    - ***Randi W. v. Muroc Joint Unified SD*** – D wrote Letter of Recommendation for teacher who had been fired for complaints of sexual harassment, but left that info out of overwhelmingly positive LOR; New school used LOR to hire him, he promptly molested P
      * Court rules that when they chose to include positive information in their LOR, they volunteered into a duty to disclose all relevant information
      * There was foreseeability that their failure to disclose could open up possibility for another student to be molested
      * The police, however, have sovereign immunity, so they’re good
    - **Restatement (Second) of Torts § 311**

(1) One who negligently gives *false information* to another is subject to liability for physical harm caused by action taken by the other *in reasonable reliance upon such information*, where such harm results

(a) to the other; or

(b) to such third parties as the actor should reasonably expect to be put in peril by the action taken

(2) Such negligence may consist of failure to exercise reasonable care

(a) in ascertaining the accuracy of the information, or

(b) in the manner in which it is communicated

* + **Duty to Prevent Economic Harm**
    - See Damages – Economic Harm section
  + **Wrongful Birth/Wrongful Life**
    - Courts may find doctors liable for failed contraception procedures
    - If the mother still gets pregnant despite seeking out a procedure to prevent it, they may have a right of action
    - ***Emerson v. Magendantz*** – P had tubes tied but still got pregnant, child with birth defects that will cost EVEN MORE to take care of; Sues doctor saying her negligence in the procedure caused pretty severe economic harm
      * Court rules that doctor has **Limited Liability** for certain aspects

1) Medical expenses for the failed operation

2) Medical expenses for the pregnancy/delivery

3) Medical expense for subsequent sterilization

4) Loss of current and future wages

5) SOMETIMES emotional distress

6) Loss of consortium

7) May award expenses of child with disability

8) However, **costs of child care** depends on healthy or not

This court (RI) determines that if child is healthy, then parents should be happy to have a child; if they decide not to put up for adoption, then they obviously want that happiness and should not recover for expenses from bringing up the child

Dissent took issue with this reasoning

* + - * + If the child is not healthy, then they should be compensated for the extreme costs of taking care of a disabled child; since this adds a large emotional toll on any parent, they should be compensated for emotional distress as well
    - Other theories of liability used in other states:
      * **Full recovery with benefits offsets** for the economic and emotional benefits of having a healthy child (See above for what types)
        + Allows for recovery of cost of child rearing but balances it against the benefits of being a parent
      * **Full recovery** without benefits offsets
        + If P sterilized to prevent child with disability and happens, then full recovery
    - **Wrongful Life**
      * The child might sue the parents for not terminating the pregnancy if they are born with foreseeable severely–debilitating injuries, but most jurisdictions refuse to grant a cause of action out of public policy

## **Breached Standard of Care**

When an entity with a recognized Standard of Care fails to reasonably perform that duty, they are considered in breach of their SOC. However, this element must be proven, and sometimes must be proven as intentional or unreasonable.

Breach element closely incorporates the Duty element when evaluated the Standard of Care to see IF it has been breached.

***Res ipsa loquitur* – “The thing speaks for itself”**

* Sometimes you can prove a standard of care was breached by the mere fact that something bad or wrong occurred
* Must prove that the bad thing actually happened
* Comes in handy if you can’t prove a breach based on **lack of proof or accessibility to proof**
  + Doesn’t mean you’ll automatically win, just means you can move forward with a case
* ***Byrne v. Boadle*** – P was hit by a barrel falling out of a window. Sued the person responsible for the barrel, but couldn’t prove he did something wrong to make it fall. A witness saw it fall, but also couldn’t see how it fell. Court ruled that the mere fact that barrels don’t fall on their own proves that something wrong must have occurred in order for it to fall. Since D was in full control over it, he is responsible for it.
* **Elements for evaluated res ipsa loquitur:**

1) The accident must be of a kind, which ordinarily does not occur in the absence of someone’s negligence

2) It must be caused by an agency or instrumentality within the exclusive control of the defendant

3) It must not have been due to any voluntary action or contribution on the part of the plaintiff

4) Other causes have been ruled out

* Three Versions:

**1. “Inference” version: Weakest version**

* + - RIL just lets P get to the jury, but P still has the burden of proof and D is under no burden to produce evidence (i.e., D can still win the case even if the D is silent)

**2. Middle Version**

* + - RIL lets P get to the jury and puts a burden of producing evidence on D.
    - D needs to provide at least some evidence that supports an alternative explanation of how the event occurred (i.e., D has to supply some evidence that supports the idea that D was not negligent)
    - Plaintiff survives dismissal and gets to the jury, defendant has a burden of producing evidence (not a burden of proof), and plaintiff still has that burden.

**3. Strongest Version**

* + - This flips burden of proof to defendant.
      * ***McDougald v. Perry*** – Spare tire flies off semi into Ps car, chain disappeared before trial preventing P from proving it was broken
        + Court rules that *res ipsa* applies despite being unable to prove that something bad happened; all that is required is evidence from which reasonable persons can say that, on the whole, it is more likely that there was negligence associated w/ the cause of the event than that there was not – 51%+
* **Medical Malpractice**

Due to the complexities of medicine, courts often establish rules of law specifically for medical cases. Doctors are held to different standards of care, and their actions can have consequences beyond merely their specific patient.

***Res Ipsa* in MedMal**

* + ***Ybarra v. Spangard*** – P has appendectomy, but comes out and neck hurts, never happened before
    - Court rules that *res ipsa* is met for suit because P was unconscious, thus doctor had exclusive control over her, and neck injuries don’t ordinarily result from appendectomies
    - Burden of proof falls on defendant, since plaintiff can’t possibly obtain factual information hidden from them
    - Give Ybarra res ipsa and the judge should flip the burden of proof. With the burden now on defendant, if the jury doesn’t fully know what to do they must find for plaintiff.
    - **Also establishes a duty of care to someone who is unconscious**
  + ***Sheely v. Memorial Hospital*** – P wants to use medical expert to prove res ipsa in a medmal case (episiotomy), Judge says no because it’s a slightly different field
    - Appeal Court says that since medical education has improved so much, the old rule requiring same field of medicine no longer applies
    - Medical experts of a particular operation should obviously be allowed to testify that such a routine procedure wouldn’t cause problems without negligence
    - Also gets rid of “same or similar locality” rule in which Dr had to be from same area
      * Travel is easier, education is the same, no more “conspiracy of silence” problem
  + ***Sides v. St. Anthony’s Medical Center*** – P underwent surgery, developed e. coli, wants to use *res ipsa* to prove doctor screwed up
    - Patient’s body is entirely under Dr’s control under general anesthesia, so it is his responsibility to protect her

**Informed Consent Tort**

* + ***See Duty in Medicine/IC section***
  + Don’t necessarily have to have something bad happen, if it was done against your consent
  + Battery Theory of informed consent:
    - Battery – nonconsensual touching that a reasonable person would think is objectionable
    - Medical Battery
      * Considered negligence
      * Taking out the wrong kidney in surgery, since you didn’t consent to them touching the wrong kidney, only the correct one
      * Having the wrong doctor operate that you didn’t consent to, etc
  + Negligence Theory of informed consent:
    - No touching element, i.e. can involve leaving a patient alone
    - Have to show the lack of treatment is bad treatment
    - Have to show that the informed consent is defective
    - Fills the gap in situations where there wasn’t an active wrongdoing on the part of the doctor
    - Insurance generally covers negligence medmal, so plaintiffs can get a bigger payday by claiming medmal in addition to other charges since insurance will pay for it
  + Unconscious patients can be assumed to have consented to reasonable medical care

**Ordinary Negligent Tort**

* + Doctors can commit other standard negligence during medical treatment that is not part of the treatment or physician/patient relationship
  + Generally sticks with standard Negligence rules

## **Causation**

Plaintiffs must be able to prove that defendant’s actions CAUSED or led to the injuries they are claiming was defendant’s fault. This can be difficult given uneven access to evidence, and requires courts to draw conclusions. Thus certain rules have been put in place to manage what conclusions can be drawn, and how closely they can been assumed to be connected

**Cause In Fact**

* Actual Cause – Evidence shows the action in question directly caused the alleged damages
* “But for” Test – the injuries would not have occurred *but for* D’s negligence
* there can be more than one actual cause (ex: chain of events x 🡪 y 🡪 z (if one hadn't happened, the last wouldn't have happened)
* there can be parallel cause (but for all of these things occurring at the same time/near to each other, this wouldn't have happened; if ebola patient hadn't gone to Dallas and if the nurse just didn't happen to have a tear in her suit then it wouldn't have spread)
* **Degree of Proof:** D’s negligence was probably (more likely than not) the cause of the injury. Establishing actual causation requires evidence to rule out (or at least discount) other possible causes. P has a burden to produce enough evidence to show that D’s negligence was more likely than not the cause of P’s injury (but P does not necessarily have to definitively rule out all other causes).
* Daubert Test: trial judges are charged with ensuring that expert testimony “both rests on a reliable foundation and is relevant to the task at hand"
* more flexible std.; looks at a broader range of scientific testimony
* 6 Factors:

1. Whether the theory can be/has been tested according to the scientific method
2. Whether the theory/technique has been subjected to peer review and publication
3. In the case of a particular scientific technique, the known or potential rate of error; and
4. Whether the theory is generally accepted.

* Court says: 3 factors bear on whether a P can satisfy the burden of proof of causation based only on the negligent act and inference:

1. Circumstantial evidence
2. Relative ability of the parties to obtain evidence about what happened
3. Whether the case is one in which there is reason to have different concerns about errors favoring P as opposed to D.

* ***Stubbs v. City of Rochester*** – City’s drinking supply contaminated by sewage, P contracts Typhoid Fever, claims contamination caused it; Offers evidence showing TF cases went up significantly during that time, expert witnesses say contamination can cause TF; D wants P to have to disprove other possible causes
  + Court refuses to force P to disprove other causes, says it would be impossible to disprove something that has unknown medical causes and non-definite methods of transmission
  + There was reasonable suspicion that the contaminated water was the cause, since so many more got sick in this area
* ***Zuchowicz v. U.S.*** – P was negligently told to take too much of an Rx drug way past the maximum safe dosage, diagnoses with PPH; offers expert testimony that the overdose was the cause of the PPH
  + Court allows the suit, saying it is up to a jury to decide if the preponderance of evidence suggests that the overdose caused the PPH
  + Court rules that to meet substantial factor test (**Connecticut ONLY**)
    - Defendant’s negligent act or omission was a *but for* cause of the injury
    - The negligence was causally linked to the harm, and
    - The defendant’s negligent act or omission was proximate to the resulting injury
* ***Matsuyama v. Birnbaum*** – Doctor negligently tells P he doesn’t have cancer and doesn’t do any of the routine checks, P gets cancer, could have obtained treatment early enough if he had known
  + Court recognizes “**Loss of Chance**” claim saying that D’s negligence caused him to lose a chance of prolonged life if he had sought treatment earlier
  + **Loss of Chance instructs juries to do five things:**

**1. Calculate total amount of damages allowable if the case weren’t a loss of chance case**

**2. Calculate patient’s chance of survival or cure immediately preceding**

**3. Calculate chance of survival or cure that patient had as a result of malpractice**

**4. Subtract the amount derived in Step 3 from the amount in Step 2**

**5. Multiple amount derived in Step 1 by the percentage calculated in Step 4 to derive the proportional damages award for Loss of Chance**

* + Must still find that it’s a *But for* cause in order to award damages
* **Joint and Several Liability**

**Joint Liability** establishes that when there are multiple defendants, all defendants found at fault are liable for the whole of the damages (although there are other aspects that reduce the overall amount). – If one fails, the others might have to make up for it

* + ***Summers v. Tice*** – Two defendants shoot P, nobody is sure who was responsible for which injury, court finds both liable
    - Court finds them Jointly Liable – “Each defendant is liable for the whole damage whether they are deemed to be acting in concert or independently”
    - However, under this new theory, the burden of proof for who caused the injury falls on the defendants to prove amongst themselves
    - Plaintiff can essentially pick which one will pay, it is up to that person to seek repayment by the other defendants held liable

**Several Liability** allows these defendants to split the damages amongst themselves proportionally according to percentage of fault (which is generally determined by the jury).

* + ***Hymowitz v. Eli Lilly & Co.*** – P, as well as nearly 500 others, contracted cervical cancer from a pregnancy drug. The drug was generic, so multiple manufacturers made it, making it difficult to establish what plaintiffs took which defendant’s product
    - Court finds all defendants Severally Liable – Only have to pay their portion.
      * Each D’s actions only caused a portion of the cases, so only have to pay a portion
    - In this case, court takes a **market-share approach**, in which each defendant is proportionally liable to each plaintiff based on the percentage of their market-share of the drug – See Comparative Negligence in Defenses (p32)
      * Local/narrow, state, or national/broad) - this case (NY) used national market share
      * Different states calculated in different ways though which caused inequities and injustice.
      * Example: Eli Lilly has 40% market share in NY, 20% market share nationally, & never sold in CA…. If NY uses a state market share but CA does national, pay too much (more than their “fair” portion) bc they will pay 40% in NY & 20% in CA. However, if NY uses a national market share but CA uses a state market share, they will pay too little (less than their “fair” share) bc they will pay 20% in NY & nothing in CA.
      * Some of the companies were now out of business, so some percentages of the claims were not paid since at this time, the ones that were still in operation did not have to make up for the missing portions
      * \*Fun fact: Market Share Liability was created by a 2L on Law Review.
    - EXAM QUESTION ALSWAYS ASKED: What are the ways the different states differ in their market share theory?
      * 1) Definition of the market. (National, Regional, Pharmacy)
      * 2) Exculpation? (Prove yourself innocent, you’re out of the class)
      * 3) Missing defendants (Several or jointly several liability w/ respect to missing defendant’s)

Most states have some version of Joint & Several Liability, although most have made modifications to deal with situations in which P is also partially at fault – ***See Defenses***

**Proximate Cause**

* **Legal Cause** – Evidence suggests the alleged damages occurred as a result of the **line of causation** following an alleged negligent act or omission
* While the damage in these cases was not an immediate result from the act, it still occurred BUT FOR (aka only because of) the original negligence – i.e. causally linked – continuance
* **2nd Restatement:** A negligent defendant, whose conduct creates or increases the risk of a particular harm and is a substantial factor in causing that harm, is not relieved from liability by the intervention of another person, except where harm is intentionally caused by a third person and is not within the scope of the risk created by a defendant’s conduct. In such a case, the third person has deliberately assumed control and all responsibility for the consequences of his act is shifted to him.
* ***Benn v. Thomas*** – P gets hurt in car crash, broken ankle and bruised chest; 6 days later dies of heart attack, estate claims the heart attack occurred because the crash exacerbated a preexisting heart problem, and would not have occurred “but for” the crash
  + Court establishes **“Eggshell Plaintiff” Rule**
    - “A tortfeasor whose act, superimposed upon a prior latent condition, results in an injury may be liable in damages for the full disability”
    - Even though this plaintiff was more easily susceptible to injury than a reasonable person, the court finds D is responsible for any damages resulting from the crash
    - Rule applies to both Causation and Damages aspects
    - No foreseeability aspect
* ***In re Polemis v. Withy***– P’s ship is borrowed by D to move benzene. D’s negligence allows benzene to release into cargo hold, then D’s agent kicks a board which falls and causes a spark, igniting the ship
  + Court holds that the board fall was proximate cause of explosion because they are so directly linked together – but for the board falling, no spark would have ignited
  + Foreseeability of explosion from a board fall is irrelevant – the action still caused the spark which set off explosion; the anticipated damage doesn’t define the actual damage
  + Eggshell ship.
* While many courts refuse to limit damages based on foreseeability of the proximately caused results, others require that the linked damages be reasonably foreseeable by a defendant before holding them liable for damages
* ***Overseas Tankship v. Mort’s Dock & The Wagon Mount*** – D’s ship leaks oil on water, P stops welding to prevent fires, eventually starts back up a few days later, oil on top of the water catches fire, destroys ship
  + This court ignores old rejections of foreseeability, deciding instead to hold that defendants should only be liable for proximate cause damages that they reasonably could have foreseen to cause by their actions – Not reasonable to think fire could catch on water
  + Overruled Polemis.
* **Causal Link Theory**
  + Even if D’s actions are the causal action for the damage, it has to have actually increased the chance for what happened
    - i.e. Speeding gets a car further down the road than not speeding would, and so a falling tree lands on it, when otherwise it would’ve fallen before the car got there
* **Intervening Cause**
  + An event that happens AFTER the D’s tort which causes additional harm to P
  + If this event was foreseeable, the original D IS liable for the additional injury.
    - Negligence of rescuers (ex. ambulance getting in wreck)
    - Medical Malpractice (must be connected to the injury)
    - Subsequent Accidents (original injury has to be substantial factor)
* **Superseding Cause**
  + Certain situations that occur after D’s supposed negligence can break the causation line
    - If the event is NOT foreseeable, the original is NOT liable for the additional injury
  + Generally, some other person’s unforeseeable interference can relieve D of liability
    - Criminal acts of 3rd parties; Acts of God; Intentional torts of 3rd parties
  + ***Doe v. Manheimer*** – P is meter-reader, gets raped in a bad neighborhood behind overgrown bushes on D’s property that nobody could see
    - Court holds that D’s negligent act of overgrown bushes could not have reasonably been foreseen to cause a rape; Rape is not in the reasonable scope of danger
    - **Proximate Cause:** an actual cause that is a substantial factor in the resulting harm
    - **Substantial Factor Test:** Whether the harm that occurred was of the same general nature as the foreseeable risk created by D’s negligence
    - The rapist was the superseding cause, not the bush; the bush didn’t CAUSE rape
* ***Palsgraf v. Long Island Railroad Co.*** – Dumbass carries box of fireworks on train, RR employee accidentally knocks the box out and explodes, causing scale to hit P further down
  + Court (Cardozo) holds the railroad (VL for employee) couldn’t possibly have foreseen knocking an unmarked box would cause it to explode causing a scale to fall 30+ ft away
  + Andrews in dissent rejects that view; says it’s an unbroken chain of events causing the scale to fall

## **Damages**

There must be some damage or injury or harm that results from the alleged negligence. This is generally physical, but sometimes can be mental, economic, emotional, property, etc

**Collateral Source Rule**: If injured victim has other sources (e.g. insurance) to help pay for losses, those sources are disregarded during the tort suit. Rationale: P who has been thrifty & purchased insurance should get the benefit of their prudent decision; tortfeasor should not benefit by paying a lower reward. [various tort reforms in states have changed this rule by statute so that such “double recovery” is not allowed]

|  |  |  |
| --- | --- | --- |
|  | **Negligence** | **Intentional** |
| **Emotional harm** | Negligent Infliction of Emotional Distress | Intentional Infliction of Emotional Distress |
| **Economic harm** | Negligent Misrepresentation | Intentional Misrepresentation (fraud) |

### **Emotional Harm**

* **Negligent Infliction of Emotional Distress (NIED)**
  + Sometimes an individual was not physically contacted, but the experience was enough to cause emotional injury, such as fear
  + Courts generally require some physical manifestation from the emotional harm, such as heart attacks or diagnosed mental illness
  + **Impact Rule** – Something must actually touch you in order to recover, even just dust
  + **Zone of Danger Rule** – Don’t have to have anything touch you, but must be close enough to be fearful of being hit
  + ***Falzone v. Busch*** – P watched husband get hit by car, car ALMOST hit her as it continued, suffered physical response from the fear of almost getting hit
    - “Where negligence causes fright so severe that substantial injury or sickness precipitates, it should be treated just as though the harm were caused by direct injury rather than by fright”
    - P wasn’t actually touched, but her “injuries” still resulted from D’s negligence
    - P was in the “**zone of danger**” in which she could reasonably feel in danger
    - Got rid of the New Jersey Impact Rule.
  + ***Metro-North Commuter Railroad Co. v. Buckley*** – P worked around asbestos, was constantly in contact with it, developed fear of getting asbestosis or meso but never got it, still constantly visited doctors out of fear
    - Court denied recovery because he never actually got the disease
    - Simple physical contact to a potentially dangerous substance with no symptoms or contracting of a disease did not meet the physical impact standards
    - Not enough physical contact with the asbestos reasonably lead to some sort of harm
    - Case gives rise to a private right of action, but some statutes do not give rise to private right of actions.
  + ***Gammon v. Osteopathic Hospital of Maine, Inc.*** – P’s father died, cremated at hospital, hospital accidently sends bag with human leg. P thinks it’s his dad’s leg
    - Court finds it’s reasonable to have severe ED from something so outrageous
    - No real proof, but presented as *res ipsa*, also not neg. *per se* because statute for proper biohazard disposal wasn’t made for emotional harm
    - Essentially a new type of NIED, since it borrows elements from IIED
* **Bystander Emotional Distress**
  + Most courts will allow bystanders to recover for emotional distress, but provide stricter standards to be met
  + ***Portee v. Jaffee*** – P mother watched son get stuck between elevator doors and was killed while she watched rescue attempt
    - Technically part of NIED, but bystanders have different requirements
    - Court uses **4-step approach** to evaluate bystander recovery

### **1.** Death or serious physical injury of another caused by Defendant’s negligence

### **2.** Marital or intimate familial relationship b/w Plaintiff and the injured party

### **3.** Observation of the death or injury at the scene of the accident

### **4.** Resulting severe emotional distress

* + - Evaluated the original ***Dillon v. Legg*** factors (but these are old, use the ones above):

1. Whether plaintiff was located near the scene of the accident as contrasted with one who was a distance away

2. Whether the shock resulted from a direct emotional impact upon the plaintiff from the sensory and contemporaneous observance of the accident, as contrasted with learning of the accident from others after its occurrence

3. Whether plaintiff and the victim were closely related, as contrasted with an absence of any relationship or the presence of only a distant relationship

* + ***Johnson v. Jamaica Hospital*** – P’s newborn was abducted from hospital due to their negligence, returned 4 months later. P sues for ED
    - Court denies recovery because the hospital cannot foresee the emotional injuries
    - “The foreseeability that such psychic injures would result from the injury to Kawana does not serve to establish a duty running from defendant to plaintiffs”
    - Parents were not in any zone of danger, and did not witness the event itself

**Economic Harm**

Damages can be monetary as well as physically damaging. There is generally a duty to prevent monetary when they are foreseeable, though certain situations put forth specific requirements

* + **Duty to Prevent Economic Harm – Negligent Misrepresentation**

Accountants have a duty to prevent harm from negligence in their economic reviews, but only under certain circumstances

* + - ***Nycal Corp. v. KPMG Peat Marwick, LLP*** (p299) – D accountant prepared a report for a company’s annual report. That company gave report to P, who used it to buy the company. Report was wrong and P lost a lot of $$; suing for economic harm
      * Court rules under **§ 552 of the 2nd Restatement**, D would only hold a duty to P if he knew that the report was being prepared in order to influence such a transaction
      * Court refuses to use other tests done in other states:
        + **Foreseeability Test**

Accountants would hold a duty to anyone who could foreseeably use the report, for any reason

Anybody can sue, general tort foreseeability test used.

* + - * + **Near–Privity Test**

Accountant would only hold to duty to people who he directly knew would use the report, and who the accountant somehow introduced the parties

Factors: 1) Defendant must know that the info was going to be used for a particular purpose, 2) needs to have some sort of link to plaintiff showing that they knew plaintiff was going to rely on info for that particular purpose, 3) need to know that specific plaintiff intended to rely.

Duty also exists to prevent economic harm from physical negligence, although it too is rather highly limited, and must accompany some other injury besides purely economic harm

* + - ***532 Madison Ave. Gourmet Foods v. Finlandia*** – South section of wall falls from D’s negligence. Crews have to shut down the street in order to fix it, preventing customers from getting to P’s store
      * Court ruled that economic loss alone without personal injury or property damage can not entitle a plaintiff relief. It would open a Pandora’s Box of litigation which could extend to unlimited liability
        + Statutes have eased this hard line to allow recovery for economic harm in certain cases, such as fisherman who lose business from oil spills

## **Defenses**

In order to fight claims of negligence, defendants have certain avenues to attempt to eliminate liability, or limit it as much as possible to reduce damages for which they are liable.

**Plaintiff’s Fault**

A common attempt of defense is to claim the resulting damages from a negligent act were in some way caused by the plaintiff’s own negligence

* + - **Contributory Negligence**
      * Claims the plaintiff’s negligence was so closely causal to the damages that the defendant should not have to pay anything at all
      * Courts originally used it as a complete bar to recovery – all-or-nothing – because the plaintiff’s negligence was viewed as the proximate cause rather than defendant’s act
      * Virtually all states that still have contributory negligence have shifted the burden of proof to the defendant who makes the claim
      * **Limitations on Contributory Negligence**
        + **Statutory Bars**
        + **Recklessness**

All courts have decided that contributory negligence is only a defense in cases OF negligence. Cannot use it in recklessness or intentional tort suits

* + - * + **Last Clear Chance Doctrine**

If a defendant had the last opportunity to stop it from happening despite P’s negligence, he can’t then blame the P for causing it.

Does NOT apply to comparative negligence, ONLY contributory

***Davies v. Mann*** – D ran into donkey that P left in the road, had an opportunity to stop before hitting it, so P can still recover for the value of the donkey

* + - * + **Refusal to Impute**

Can’t hold a parent responsible for a child’s actions

Examples include refusing to impute the negligence of a rental car driver to the rental car company plaintiff that sued the other negligent driver involved in the accident, refusing to impute the negligence of a driver to the passengers on the vehicles, and refusing to impute to the child a parent’s negligence in failing to protect the child.

* + - * + **The Jury’s role**

Courts have started allowing contributory neg. cases to go to juries under the awareness that they’ll often ignore full-bar rules and just decrease damages fairly

* + - * + **Avoidable Consequences (Duty to Mitigate)**

Courts generally refused to award damages for complications that could have been avoided by the exercise of due care after the accident

Like not following doctor’s orders

But most states have done away with this

* + - **Comparative Negligence *– See Causation – Joint & Several Liability* above**
      * “A negligent plaintiff’s recovery depends on how serious the plaintiff’s negligence was compared to the defendant’s”
      * The plaintiff’s negligence attributed to the damages, so their portion of the blame shouldn’t fall on the defendant
      * Three Principle versions used in different states:
        + **Pure Comparative Negligence**

P can recover whatever percentage is accounted to D’s fault

Ex. If P is 90% at fault, he can only recover 10% from D

* + - * + **Modified “Not As Great As” Comparative Negligence (50% cutoff)**

P can recover a percentage as long as D is more liable than P (</=49%)

If P is as or more liable than D, then no recovery

* + - * + **Modified “No Greater Than” Comparative Negligence (51% cutoff)**

P can recover a percentage as long as D is more than, or equally, liable to P

If P is equal or more liable than D, then no recovery

* + - * **Uniform Comparative Fault Act (UCFA) – p440 – Pure Comparative Neg**
        + Section 1 – Effect of Contributory Fault

(a) Any contributory fault diminishes damages proportionally

(b) Fault means any negligence or recklessness, breach, unreasonable assumption of risk (without consent), misuse of product, failure to mitigate. Must still have causal relationship

* + - * + Section 2 – Apportionment of Damages

(a) Jury (or court if no Jury) shall determine:

(1) Amount of total damages claimant would be entitled to

(2) Percentage of fault of each party, including claimant

(b) In determining percentage, Jury considers nature of conduct and extent of causal relationship

(c) Court shall determine award of damages to each claimant in accordance with amount and percentage findings

(d) Upon motion within a year after judgment, court shall determine if any of the parties cannot make their payments and reallocate any uncollectable amount proportionally among all other parties using their percentage of fault

* + - * + Section 3 – Setoff

(a) Claims and Counterclaims will not offset each other, unless both parties agree

(b) If Court finds one side can’t make those payments, it can order them to pay the court when they can and the court will pay off the rightful parties for them

No-Setoff Rule – each party pays the other parties what they owe them, not the net difference. ex: B owes A $4k. A owes B $10k. There’s $14k in med bills here. Rather than A’s insurance only having to pay out $6k (as the case with setoff rule), A’s insurance has to pay B’s $10k tab and B’s insurance has to pay A’s $4k tab.

* + - * + Section 4 – Right of Contribution (Like indemnification, but not full)

(a) Joint and Severally liable parties can indemnify each other based on each’s equitable share of the obligation, including claimant’s fault

(b) Contribution is available to those who settle only if (1) their liability is extinguished, and (2) the amount paid in settlement is reasonable

* + - * + Section 5 – Enforcement of Contribution

(a) If proportions are established, a party who pays more than its equitable share (because one party was insolvent), can seek indemnification for that amount

(b) If proportions not established, a party who pays more than its equitable share can seem indemnification in a separate action regardless of judgment against them

(c) If judgment has been rendered, action for indemnification must be commended within 1 year of final judgment. If no judgment, person seeking indemnification must have either

(1) discharged by payment the liability within the SOL and commented the action within 1 year after payment, or

(2) agreed while action was pending to discharge the common liability and make payment within 1 year after agreement

* + - * + Section 6 – Effect of Release

(a) A release, covenant not to sue, or similar agreement (i.e. a Settlement) discharges that person from all liability for contribution (don’t have to indemnify others)

However, releasing party’s claim against others is reduced but the amount of the released person’s equitable share (if they owe $20 but you settle for $10, the other parties don’t have to make up for the rest of the $10)

* + - * + Obligations of insolvent parties redistributed among others (including P)
        + UCFA tends to discourage settlements – settling with one defendant for less reduces the amount that can me re-apportioned to the other defendants
        + Reckless acts are still considered in determining Plaintiff’s fault. However, if the plaintiff caused the initial problem by doing something specifically prohibited by law, courts will likely not give them anything (like making a pipe bomb)
        + Set-off payments aren’t allowed for policy reasons to prevent insurance from not having to pay out whatever damages were appropriated

If the court order were to say C owed nothing to A because of set-offs, C’s insurance says it doesn’t have to give C anything, though C might have expenses

* + - **Effects of Settlements on Comparative Negligence**
      * **UCFA**
        + Discourages P from settling for less than a D owes, because they won’t be able to get that amount back from the other Ds
      * **Modified States like Iowa**
        + Whether P settles or not doesn’t matter, parties are only responsible for their share (are severally liable) if they are under 50% liable

If over 50%, then Joint and Several, and could be responsible for all

* + - * **Pro Tanto Jurisdiction like California or Texas**
        + Encourages Ds to settle early, P is ok either way
        + If D settles, the impact of the settlement reduces the remaining suit by the **amount** of the settlement, not the percentage of D’s fault

So on D’s to settle as quickly as possible to avoid having to take on the remaining liability from Ds who have already settled

* + - **Limitations on Comparative Negligence**
      * Still have to prove enough of a link of causation
        + ***Fritts v. McKinne*** – P was drunk, crashed into tree. D surgeon accidently nicked a neck artery in surgery several days later that shouldn’t have been so close to the skin; a few days later P bled out

Court says D can’t claim P was contributorily negligent for drunk driving forcing him into surgery; Surgery was several days later after alcohol had worn off

Says D might be able to use it to reduce damages for lost wages

Holds there are certain situations where patients conduct limits medmal recovery

Evidence of patient’s failure to reveal medical history, furnishing false information, not complying with orders, etc

* + - * Punitive awards are generally kept to whatever defendant was specifically responsible
        + i.e. they are not proportionally distributed

**Assumption of Risk**

In some circumstances, courts will refuse to grant damages to a plaintiff who knowingly chose to engage in a dangerous activity, and suffered an injury as a result. Assumption of risk defense: 1) obvious risk, 2) non-necessary risk, 3) limit to normal foreseeable risk.

* **Express Agreements**
  + Contracts that specifically waive the defendant of all liability, as agreed by the plaintiff
  + States vary on whether they will uphold the waiver of liability, but generally do not allow a plaintiff to sign away all his rights to due care
  + ***Hanks v. Powder Ridge Restaurant Corp.*** – P took kids to snowboard, D made him sign exculpatory contract waiving all liability including Negligence; Court won’t allow waiver on public policy, says its wrong to make P take all responsibility when D has full control.
  + ***Tunkl v. Regents of Univ. of Cali.*** – established 6 primary factors for testing if an exculpatory agreement violates public policy
    1. Concerns a business thought suitable for public recognition
    2. Performs a service of great importance to the public
    3. Holds service out to anyone in the public
    4. Holds decisive advantage of bargaining strength for the contract
    5. Does not provide some sort of insurance for an additional cost (**Adhesion Clause**)\*
       - Often the Most Important factor
    6. Places the other party under their control

If any of these factors are met, it likely violates public policy. But not all factors must be satisfied to win using Tunkl.

* **Implied Assumption of Risks**
  + Plaintiff knows the action is dangerous and likely to cause injury
  + Even though there is no waiver signed, the courts assume the individual was willing to waive liability by choosing to participate
  + ***Murphy v. Steeplechase Amusement Park*** – P got on a ride where the point is to fall. He fell. Shocking. Now he’s hurt and whiny about it. Court says he knew he would fall, can’t blame D for injuries when the risk is known and obvious
  + **Two types of Implied Assumption of Risk:**
* **Primary Implied Assumption of Risk**
  + Plaintiff impliedly assumes those risks that are inherent in a particular activity
  + Not a true affirmative defense, but helps defeat claim of prima facie case
* **Secondary Implied Assumption of Risk**
  + Plaintiff knowingly encounters a risk created by the defendant’s negligence
  + True affirmative defense because it’s claimed after prima facie negligence is presented
* **Effect of Assumption of Risk on Litigation**
  + Courts have evaluated whether taking on an assumption of risk should act as a complete bar of recovery, or apply proportionally like comparative negligence
  + ***Davenport v. Cotton Hope Plantation*** – P lived in condo, complained that light was out in stairwell but chose to use that stairwell anyways (there were others); Slipped and fell; Court held that taking on an assumption of risk does not bar recovery and should remain like comparative negligence, as long as P is less than 51% at fault. There was no express (written) agreement to waive the risk.

**Preemption (see FTCA p7)**

Sometimes, Congress will establish regulations for specific things like drugs and medical devices; courts must evaluate whether these federal statutes preempt lawsuits based on state regulations under the Supremacy Clause. Opposite of negligence-per-se, so did everything the statute requires, so how was SOC broken? Two main categories:

* **Express Preemption**
  + Purely a question of what the federal statute says: Does it preempt state tort lawsuits against the regulated entity?
  + Courts still have to evaluate the wording to determine exactly what aspects of federal statute preempts what aspects of the state statutes
  + **Savings Clause** – Specifically allows tort actions, but only IF a savings clause in written into the statute
  + ***Riegel v. Medtronic, Inc*** – Congress passed **Medical Device Act**, which preempts any state regulation higher than the FDA regulations; P’s catheter explodes in him (ew), sues under NY state tort law; Court rules that the express preemption prevents the state from establishing laws higher than the FDA, so P cannot sue on NY law
    - **Medical Device Amendment (1976)**
      * **Class I**
        + Includes elastic bandages and examination gloves
        + Lowest level of oversight: “General Controls” like labeling
      * **Class II**
        + Includes powered wheelchairs and surgical drapes
        + Medium level of oversight: “Special Controls” like performance standards and postmarket surveillance measures
      * **Class III**
        + Includes replacement heart valves and pacemakers
        + Highest level of oversight: “Premarket Approval” if the device presents a potentially unreasonable risk of illness or injury
        + Only class that has an express preemption clause
      * If a device is “**substantially equivalent**” to a previously-approved device, it may be grandfathered in through §510(k) without individual testing (only in class I & II)
      * If not, Class III product go through **Pre-Market Approval**, requiring a higher test from the FDA, so congress intended for there to be no state tort suit
      * Drug preemptions: a drug has no preemption and must prove no worse than a similar drug currently on the market. Generic drugs, however, are preempt.
* **Implied Preemption**
  + The statute does not say whether Congress intended to preempt state tort lawsuits, so Courts draw inferences about whether there was an intent or not. Can prevail under any of the three arguments below, do not need to meet all three.
    - **Conflict Preemption**
      * State torts may be preempted if it would be impossible to comply with both the federal statute and the requirements imposed by the state
    - **Field Preemption**
      * Federal scheme of regulation is so detailed and broad that it appears that Congress intended for the federal govt. to occupy the entire field, **leaving no room for the state courts** to set additional requirements via tort lawsuits
    - **Minimal v Optimal Regulations**
      * Some statutes set minimum “floor” safety requirements that still allow states to establish stricter requirements – NOT PREEMPTED
      * Some statutes also set “ceiling” safety requirements that specifically say that states cannot set safety requirements higher than this amount - PREEMPTED
  + ***Geier v. American Honda Motor Co.*** – DC required side airbags but Fed law didn’t; P was hurt in crash because 1987 Honda had no airbag; court rules that while there is no express preemption in statute, congress didn’t intend for tort actions from states, so cannot sue because federal law preempts DC law – for “**Standards**”. Question is did Congress mean to have just a floor, or a floor/ceiling? (Floor: states below floor must come up but states above are ok to stay. Floor/ceiling: a safety v safety and a safety v cost problem. Saying all states must be equal, so if below fed standard must come up and if above fed standard must come down.) Court ruled floor/ceiling.
  + ***Wyeth v. Levine*** – P hurt by injection of phenergan because of bad labeling; Even though FDA approved the label, court allows state suit to go forth on basis of failure to warn because Vermont states required more; Court held that intent of congress was NOT to preempt on labeling issues. No express preemption on drugs.
* **To analyze Statutes: GEIER CASE**

1) Look for express preemption clause

* + - “Standards” – State regulations and statutes are preempted (no state common law tort)
    - “Standards and requirements” – Torts ARE preempted (along w/regs & statutes)
    - Silent – No preemption

2) Look for a savings clause

* + - If yes, no preemption and state claim may continue

3) Even if there’s a savings clause, you still have to do the Implied Preemption analysis.

4) Look for Implied Preemption

* + - Conflict/Field/Minimal/Optimal

**II. Intentional Torts**

Intentional torts are incidents in which an actor knows his actions either will cause harm, or have a high likelihood of causing harm.

The primary aspect of these cases is *intent*, by which we mean the actor’s ***purpose*** in his actions.

**Four Primary Intentional Torts:**

1. Assault

2. Battery

3. False Imprisonment

4. Intentional Infliction of Emotional Distress (IIED)

* Causation is generally easy to show in intentional torts
  + Less of a burden of proof because of the intentional action
* **Assault**
  + **Elements of Assault**

**1) D intends to cause harmful or offensive contact (or to create apprehension of harmful or offensive contact)**

* + - * (Examples: Punching is harmful contact. Spitting would be offensive contact. Pointing a gun at someone would show intent to cause apprehension of harmful contact, even if you didn’t intend to fire it).
      * Even if you point a gun at someone and don’t really intend to fire it, that is apprehension and intent is still satisfied

**2) P is actually put into such apprehension, believing such contact will occur imminently.**

* + - * P’s apprehension is a subjective standard (not a reasonable person std; if P is easily scared, that doesn’t matter, all that matters is that P was put into apprehension)
      * The apprehension P suffers must be for himself and not a 3rd party (telling someone you are going to kill their mother is not assault)
  + **Doctrine of Transferred Intent**
    - If D intends to cause contact with one person but causes it with another, the intent element is proven
    - In assault, intent transfers: If you intended to scare or hit person A, but scare or hit person B, person B can make out the intent element
  + ***Picard v. Barry Pontiac-Buick*** – P took picture of D during car inspection, D got mad and hit camera possibly injuring P; P is claiming assault and battery with injuries; Court rules that Ds actions in sticking his finger in the camera clearly gave her apprehension of being in imminent bodily harm; her fear was reasonable so assault occurred
    - Secondary claim of battery was also met, since the camera acts as an extension of her own person, so hitting it amounted to hitting her, whether the intent was to injure her or not
  + **Other Aspects of Assault**
    - **Words can negate an assault**
      * Suppose Bill had said to Jack, “I have a knife and I sure would like to stab you. If the maids hadn’t already come around and cleaned up the office, I would stab you, but I hate to make a big mess for them to clean up.” His words indicate he doesn’t really intend to stab Jack.
    - **Conditional assault**
      * Defendant threatens Plaintiff, but offers not to harm Plaintiff if Plaintiff complies with a condition. (e.g., If you give me $10, I won’t stab you). Plaintiff is not required to comply with the condition; assault is still proven.
    - **Reality of threat**
      * D must have apparent, present ability to cause the harmful or offensive contact. However, if it *appears* D has the ability to cause the contact, even though *factually* D does not have the ability, we have an assault.
* **Battery**
  + **Elements of Battery**

**1) Intent**

* + - * The requisite intent for battery is identical to that required for assault: D must intend to cause harmful or offensive contact or intend to create apprehension of such contact.
      * Transferred intent applies.
      * Intent does not mean bad motive.
        + A doctor could commit battery by touching a patient, even though the doctor had good motives.
        + A person could commit battery by slapping someone on the back with friendly intent.
      * Note: Actual contact is needed to prove battery--contact is the second element of the tort (see below). However, the *intent element* of battery does not require that the Defendant intended for there to be actual contact.
        + For example, suppose I pointed a gun at you, not intending to fire it; I only intended to scare you. However, the gun did go off and you were wounded. You can make out both the intent element (since I *did* intend to put you in apprehension) and the touching element (since contact did occur), even though I did not intend to fire a bullet that would make contact with you.

**2) Harmful or Offensive Touching**

* + - * Touching or contact is an element of battery (in contrast to assault, where no actual contact is required).
      * The “touching” can be such things as:

**1)** direct touching of the victim’s body

**2)** touching of something connected to the victim (a hat the victim is wearing, or a box the victim is carrying, or a bicycle or other conveyance the victim is riding)

**3)** touching of a separate object that sets a chain of events in motion (e.g., pulling a chair out from under the victim as he sits down, such that the victim makes contact with the ground; putting poison in the victim’s food)

**4)** indirect touching (e.g., if I order somebody else to hit you, I’m liable to you for battery)

* + - * Note: unlike with assault, an unconscious victim can be battered. If you deliberately hit me while I am passed out, you’ve still battered me. Even though I was not put into apprehension of being hit (which is the second element of an assault), the fact is that I did actually get hit (which is the second element of battery). Also, the intent element of battery is made out, since you intended to make harmful contact with me.

**3) No Consent**

* + - * This is part of the Plaintiff’s prima facie case. I.e., consent is not a defense that the Defendant has to raise.
        + The Plaintiff has to show, as part of Plaintiff’s prima facie case, that the Plaintiff had not expressly or impliedly consented to the touching.
      * The standard is “What would a reasonable defendant have inferred from the plaintiff’s actions?”
        + E.g., suppose the Plaintiff, a mom, did not want to get a vaccination. However, she sort of stuck her arm out as she took her kid through the vaccination line, and the nurse vaccinated mom against her will. The question would be whether the nurse was reasonable to infer that the mom was offering her arm to receive a shot, which would imply consent.
      * Consent can be inferred from social custom.
        + E.g., it is widely accepted to tap people on the shoulder to get their attention or ask directions. If the Defendant tapped someone on the shoulder to get directions, there would be implied consent, unless the Plaintiff had clearly negated the usual social custom (e.g., by telling the Defendant not to do it or by moving away from the Defendant in a way that indicated a desire not to be touched).
  + ***Garratt v. Dailey*** – 5yo pulled chair out from under person about to sit down, person is suing for battery; Court rules that the 5yo is treated the same as a 55yo in Battery, but still must have an intent to cause harm. Intent can be satisfied with the KNOWLEDGE that his actions would cause harm
    - Without such knowledge, there was no battery
  + ***Wishnatsky v. Huey*** – P barged into boss’ office where he was having a meeting, D (district attorney) shut the door in his face, P is “a born-again Christian who is sensitive to evil spirits”
    - Court rules that as a matter of law, “rude and abrupt” conduct does not rise to the level of harmful or offensive touching, as an ordinary person wouldn’t have been so butthurt about it.
  + **Defenses to Battery**
    - **The problem of express consent that is procured by fraud or deception**.
      * If a Plaintiff consents to touching, there can still be a battery, if the consent was procured through deception or misrepresentation. However, law draws a distinction between two types of deception:
        + If the deception involves a **misrepresentation about the essence of the touching** (i.e., the type, extent, or bodily consequences of the touching), it will negate the Plaintiff’s consent. E.g., D told P, “Let me touch you, it won’t hurt and it will only take a second.” P consents. D then proceeds to touch P for over a minute in a way that causes severe pain. The D was deceptive about the very essence of the touching, and P’s consent is invalid. A battery has occurred.

“Fraud that led to the essence”

* + - * + If the deception involves a **misrepresentation about a collateral matter**, it will not negate the consent. E.g., D told P, “Let me touch you. It will hurt for about one minute, but I’ll give you $100.” P consents. The touching hurts for about one minute, just as predicted. However, at the end of it, D says, “Oops! I forgot my wallet. Sorry. I can’t pay you.” This would not negate the consent, and there would be no battery.
    - **The problem of express consent that is procured by duress.**
      * D tells P, “I’ll seriously hurt your kid unless you agree to let me kiss you.” The kid is right there, and D seemingly has the ability to carry out the threat. P consents to be kissed. This is a battery since the consent was procured under duress. (Note: Depending on the facts—e.g., if the kid was not present at the time, and if D’s threat was doubtful or lacked immediacy—this might not amount to duress).
      * If you trick me into accepting touching but you touch more than I wanted, I can sue for battery
    - **Consent under intoxication**
      * If both are intoxicated, then both are good
      * If only one is, then its unfair and consent may be invalid
* **False Imprisonment**
  + **Elements of False Imprisonment**

**1)** D has **intent** to restrain or confine P.

**2)** **Actual confinement** has occurred. P constrained in a limited physical area from which there is no reasonable or apparent means of escape.

**3)** P **did not consent** to the confinement

**4)** P is **aware of the confinement** (if no injury to P occurs) **OR** P is unaware of the confinement but is **actually injured** as a result of it.

* + - * Note: Jurisdictions vary on this “awareness” element. The Restatement 2nd requires awareness of the confinement, absent injury to the plaintiff.
  + ***Lopez v. Winchell’s Donut House –*** P was caught stealing money from company, asked to enter back room where they asked her about it but was never told she couldn’t leave; After she willingly left, she began to feel emotional distress and now suing for False Imprisonment
    - Court rules no FI occurred because she was not held against her will
    - There was no immediate risk of harm for not complying, only the possibility of losing her job in the future
  + **Restatement has 5 triggers for unlawful restraint:**

**1)** Actual or apparent physical barriers

**2)** Overpowering physical force, or by submission to physical force

**3)** Threats of powering force

**4)** Other duress

**5)** Asserted legal authority

* + **Consent**
    - If you agree to let yourself be locked in a confined space, you can’t sue the person that locked you in.
      * A lot of false imprisonment actions revolve around situations where a store detains a suspected shoplifter. An issue is whether they gave valid consent or not.
        + Store detective says you are suspected of shoplifting, asks you to come back to his office while he investigates evidence that might prove you innocent, requests to search your bag and pockets. If you agree, this will be treated as a valid consent. However, the consent would be invalid if the detective used force or threats of force.
        + **Merchant’s Rule**

Storeowner can approach a person who they think was shoplifting and ask them to stay *for a reasonable amount of time* and wait for police so that they don’t have a false imprisonment charge. If any force is used or time period is longer than usually an hour, it becomes false imprisonment.

Shoplifting – misdemeanor, so even if a cop sees you, they actually can’t arrest you

Many states have relaxed this and will let cops arrest for misdemeanors

* + - * + Store/others might detain them under **citizen’s arrest** – but better be able to prove they’re actually guilty or its False Imprisonment
  + **Awareness**
    - Time of awareness is dependent on the circumstances

a) If the individual is not injured during the false imprisonment, their claims are considered to begin when they first become aware that they are actually confined

b) If the individual IS injured during the false imprisonment, their claims are considered to begin at the moment the confinement began, whether they were aware of it or not

* + - Is used to appropriate damages proportionally to the amount of time under constraint
  + **Confinement**
    - Must actually be confined, not just believing that you’re confined
      * I.E. if the door isn’t actually locked but you think it is, you aren’t actually confined

**Intentional Infliction of Emotional Distress**

* + **Elements of IIED**

**1)** D must have **intent.**

* + - * a) subjective intent (i.e. D deliberately intended to cause distress, for example, the D wanted to give the P a good scare or wanted to embarrass and humiliate the P); or
      * b) D acted with substantial certainty that his/her actions would cause distress; or
      * c) D acted with a reckless disregard of the probable consequences of his/her behavior.

**2)** The D’s conduct is **extreme and outrageous.**

* + - * The D’s conduct goes way outside socially accepted behavior. Exception: The D’s conduct could be within socially accepted behavior if D knows that P has some special sensitivity that makes the behavior outrageous in the P’s particular circumstances.
      * For example, it is socially acceptable to invite someone to go with you to the PTA meeting at school, but if you knew that the P’s child had just passed away and that the P would be likely to suffer severe grief if reminded of the child’s school, your invitation might be outrageous, based on your special knowledge of the P’s situation.
      * **Sometimes, words alone can prove this tort, but they have to be really outrageous.**

**3)** The P’s **emotional distress must be *severe***

* + - * i.e., on the order of a nervous breakdown that requires treatment or medication to get over
      * Merely humiliating or embarrassing or scaring the Plaintiff a little bit is not enough.
        + However, if D knows that P is particularly sensitive and that a small fright could cause a total meltdown for the Plaintiff, then D could be held liable for an action that would not have caused severe distress in an ordinary person.
  + **Other aspects of this tort:** 
    - **Special relationships may be relevant.**
      * If D is a common carrier, landlord, innkeeper or hotel, public utility, or someone in a position of special trust, they can be held liable for insults of a highly offensive nature (even if the insult might not cause a total emotional meltdown in the plaintiff).
      * However, this is not extended to all business owners, e.g., department stores and shops probably would not be liable for insults absent proof of severe emotional distress.
    - **Liability to bystanders**
      * ***There is no transferred intent in this tort***. If D intends to cause severe emotional distress to Jack, but Britney, who is nearby, sees D’s conduct and becomes distressed, the intent would not transfer (as it does in assault and battery).
      * However, there is some liability to bystanders in the following situations. If D intends to cause severe emotional distress to a third party, a bystander P may be able to recover if:
        + a) plaintiff is a member of the third party’s immediate family and was present at the time of Defendant’s conduct, whether or not the plaintiff suffers any bodily harm as a result of the emotional shock; ***OR***
        + b) if the plaintiff is unrelated to the third party, but plaintiff is present at the time of D’s conduct, and plaintiff suffers bodily harm as a result of the emotional shock.
  + ***Womack v. Eldridge*** – D tricked P into having his picture taken so D’s employer (lawyer) could try to introduce reasonable doubt in a child-molestation case against another guy; P was forever connected to the case throughout litigation, causing emotional distress
    - Court establishes **4 elements** in testing IIED in Virginia

1) Conduct was intentional or reckless

2) Conduct was outrageous and intolerable against social standards

3) There was a causal connection b/w conduct and emotional distress

4) Emotional Distress was severe

* + - * Does NOT require bodily harm
* **Defenses to Intentional Torts**
  + Contributory and Comparative Negligence are NOT a defense to Intentional torts
  + **Immunity**
    - A tort exists, but no liability is assigned. The defendant may have committed a tort but, for various reasons, will not be held accountable for it.
    - **The four traditional immunities were:**
      * **Spousal**
        + Married people couldn’t sue each other.
        + It also had the practical objective of avoiding collusive suits such as suits where a couple conspires to defraud the couple’s insurer
        + The majority view today is that there is not spousal immunity. A married person can sue an abusive spouse who beats him or her, however
      * **Parent-child**
        + Traditionally, “unemancipated” minors (children who rely on their parents for their support) could not sue the parents.
        + Modern trend is to abolish this, especially for intentional torts by the parent.
      * **Governmental immunity**
        + **Sovereign Immunity**

FTCA partially waived this immunity (see FTCA p6)

At common law, municipal govt. only had immunity for governmental (policy-related) functions but could be sued for activities that were proprietary or commercial in nature (i.e., trash collection could be done by private parties).

* + - * **Charitable immunity**
        + Traditionally, charities could not be sued for torts they committed during the course of their charitable activities.
        + Charitable immunity is virtually gone at this point
  + **Privilege**
    - No tort is considered to have occurred; D’s otherwise tortious behavior is justified
    - **To analyze privileges, one needs to know:**

1) The various types of privileges that exist;

2) The scope of the various privileges--what are the rules that define whether a particular privilege can be invoked; and

3) Did the defendant stay within the scope of the privilege, such that the defendant is eligible to claim that his or her actions were privileged?

**1. Consent**

* + - * If it can be proven that the injured party fully consented to the actions against them, and that consent is deemed appropriate by the court, then the actors intentional actions are no longer viewed as unlawful

**2. Self–Defense**

* + - * If an actor is acting to protect themselves or others from harm or danger, courts will generally excuse liability in an intentional action
      * ***Courvoisier v. Raymond*** – D was defending shop against rioters when P (plainclothes police officer) came through the crowd, D shot him thinking he was a rioter/robber
        + Where a defendant in a civil action claims self-defense, he must satisfy he jury, not only that he acted honestly in using force, but that his dears were reasonable under the circumstances, and also as to the reasonableness of the means he made use of

I.E. if he can show he had a reasonable fear of personal harm, and that his actions were proportional to the harm being threatened, juries can find him innocent by self-defense

Standards are different in criminal trials, however

* + - * How much force can you use
        + When defending yourself, keep it proportional to the threat
        + If threatened with death or serious bodily harm, you probably can use lethal force
      * Escape Exception
        + If you can get away, you should get away instead of using deadly force
        + Stand Your Ground is criminal, not tort
      * Transfer of privilege
        + Privilege transfers to whoever you accidently hit; sue the aggressor, not the defender
      * When you’re wrong: if you had a legit concern, you might still get away with it

**3. Protecting Others**

* + - * Allowed even if the person is not a family member or acquaintance
      * Like self-defense privilege, proportional force allowed
      * Transferred intent
      * BUT if you make a mistake in intervening, you’re screwed.
        + Two people fighting, little person looks weak, you intervene and hurt the big guy, but the little guy was actually a criminal and big guy was cop, you’re liable.
        + If defender is mistaken, defender is liable (in most states)

**4. Protection of Property**

* + - * Some jurisdictions also allow defendants to claim a defense of protection of property or land, **provided that** his actions are reasonable under the circumstances
      * ***Katko v. Briney*** – D set up a trip-wire spring shotgun in his abandoned ranch house that had been targeted by looters; P broke into the house to steal cheap jars and got shot
        + Court rules that even though D has the right to defend his property, using such a dangerous means of protection (a loaded shotgun set to fire upon whoever enters) is not proportional to the risk at hand, and is ONLY ok when the risk involves violence or threat of death
      * The right to human life is more important than the right to protection of property
      * Cannot use lethal force
        + Even in Texas, Texas’s property laws only allow deadly force defense in criminal law, NOT tort law
      * If they’re in your house, its considered self defense
      * Fresh pursuit – must be actively chasing them
      * Must show verbal command wouldn’t be successful
      * Can threaten deadly force, but can’t use it (wait what?)

**5. Private Necessity**

* + - * In some situations, the court will allow an individual to temporarily violate another’s private use of property for personal safety, such as docking a ship on a private island in order to avoid an impending dangerous storm
      * However, the individual is still likely liable for any damages incurred
      * ***Vincent v. Lake Erie Transportation*** – D steamboat moored at P’s dock while unloading cargo when a massive storm hit; it was impossible to move the boat so P stayed and replaced bad lines and cables to hold it; during the storm the boat crashed against the dock and caused damage
        + Court rules that D is not liable for invasion of privacy due to Private Necessity, but that they ARE liable for the damages incurred
        + If boat had damaged the dock initially, they would not be liable; HOWEVER since they replaced bad lines during the storm, they are liable because affirmative measures were taken to continue securing the boat to the dock

D caused these damages at P’s expense in order to prevent damages to D

# **DEFAMATION TORTS**

Defamation involves a false statement of fact about plaintiff. The statement must be “published” (i.e., communicated to a third person), and it must cause reputational harm. Also, the defendant must be guilty of some type of fault.

|  |  |  |  |
| --- | --- | --- | --- |
| Libel | Libel Per Quod | Other Slander (Slander per quo) | Slander Per Se |
| Didn't Need to show Sp. Damages | The statement isn't really defamatory unless put together w/in context. Must show special damages! ex: Blue diamond | Must show special damages (We'll let ppl bad mouth each other unless it gets too bad/out of hand) | Didn't Need to Show Sp. Damages |

**Two Types of Defamation**

* **Libel**
  + Generally recognized as a defamatory statement made in writing
  + Was considered more likely to reach a broad range of people and have longer-lasting effects
    - As such, the requirements for proving damages are significantly lower
  + Modern courts generally include broadcasted defamation (TV and radio) as libel as well, since they too have a further reach than person-to-person spoken word, and can be saved and repeated
    - ***Matherson v. Marchello*** – Rock&Roll group says they fooled around with guys wife on a radio show; Also suggests he’s gay (in 1980); Court rules that this was clearly defamatory (suggesting the wife sleeps around defames her, suggesting he sleeps around with a man defames him); Court also rules that there is a greater capacity for harm given the far-flung audiences reached by broadcast media
    - Current question of if internet should be considered the same, but jurisdictions vary
  + “**Libel *per se***”
    - A written defamatory statement is defamatory on its face, so no need to prove “special damages”, only general damages to one’s reputation
* **Slander**
  + Generally recognized as a defamatory statements made verbally
  + Still considered bad, but since it’s generally between two individuals the potential for continuing harm is lower, so courts often require more damages to be shown
    - Courts require proof of “special damages” – i.e. economic loss, either by lost wages, not getting hired, losing customers etc – in addition to general damages to reputation
      * AKA “**slander *per quod***”
  + However, there are some types of slander considered so bad that they also have no requirement for proving special damages
    - ***“*Slander *per se”***

**1)** Falsely saying the plaintiff committed a **criminal act**

**2)** Falsely charging the plaintiff with **conduct detrimentally affecting his business**

* + - * Immoral business practices – cheating, misappropriating funds

**3)** Falsely saying the plaintiff has engaged in serious **sexual misconduct**

**4)** Falsely saying that the plaintiff has a “**loathsome disease**”

* + - * Something that would keep people from associating with you
    - ***Liberman v. Gelstein*** – Condo owner accused of bribing cops and threatening to kill someone, accused by members of the Condo’s tenant board
      * Court rules that while the first part IS slander *per se* since it accuses him of a crime, defendants enjoy a conditional privilege because they have a common interest in knowing anything bad about the condo owner, even if it happens to be false
        + Also P could not prove **malice** (“knowledge that the statement was false, or reckless disregard of whether it was false or not”)
        + It’s P’s duty to show that D did not have reason to believe this, but he didn’t even try to depose D’s supposed sources
        + Second element is not pursuable since its mere harassment at best

**Elements of Defamation**

**1) The defendant published a communication**

* + Publication means intentionally or negligently communicating the defamation to at least one person other than the plaintiff
  + Communication to one person is sufficient
  + Must be voluntary

**2) The nature of the communication was communication of a fact**

* + Expressing opinions does not constitute defamation, it must be a factual statement
    - A factual statement can be totally false, but if there’s no opinion it’s still a factual statement
  + Cannot “sanitize” a statement by adding “In my opinion, …” in front; if it is still a factual statement it is still actionable

**3) The communication concerned the plaintiff**

* + The person to whom the defamation is published has to be reasonably able to connect it with the plaintiff
    - Aka “identifiable”
  + Generally only living persons can sue, although some jurisdictions allow estates to pursue claims
  + “Legal persons” (corporations, partnerships, etc) can also sue for defamation
  + Individual members of small groups can sue, if it is reasonable that people would assume that every member of that group were being defamed, not just a generalized group of people

**4) The communication was false**

* + The plaintiff has to establish that the statement is substantially not true
    - Minor incorrect details to not entail defamation
      * If the main point is substantially true, defendant will likely win

**5) The communication was defamatory**

* + Restatement: The statement tends to harm the plaintiff’s reputation, so as to lower plaintiff in the estimation of the community, OR tends to deter third parties from associating with the plaintiff.
    - This involves a community standard, i.e., tends to lower the plaintiff in the minds of a considerable and respectable segment of the community.
  + ***Romaine v. Kallinger*** – Book was written about some lady’s murder; before she was killed she went to Ps house who was a friend; book suggests part of the reason she went there was to find out about junkie they both knew; P claims this statement is defamatory because she thinks it suggests that P was involved in criminal activity
    - Threshold is “whether the statement at issue is reasonably susceptible of a defamatory meaning:
      * If it is clearly defamatory on its face, the court can rule as a matter of law that defamation has occurred
        + “According to the fair and natural meaning which will be given if by reasonable persons of ordinary intelligence”
      * However, if the language is ambiguous, or could be interpreted either way by a reasonable person, then it should go to the jury as a question of fact
        + **“Libel *per quod*”**

If the language seems innocent, but when taken in context with previously known facts would be defamatory, then a statement can still be libelous

Requires proof of special damages, unlike normal libel

* + News Headlines and photo captions are to be read in context with the whole story, which might explain everything is innocent

**6) The person receiving the communication understood it to be about the plaintiff and to be defamatory**

* + The third party person must be able to understand what is said
    - i.e. if said in another language that they don’t understand, then not defamation
    - A deaf person who couldn’t even hear it would not create defamation
  + They must also know who it is talking about
    - If they think it’s about someone else, then not defamatory to you

**7) The defendant was guilty of “fault”**

* + Jurisdictions vary on what degree of fault is required, but generally negligence is the minimum standard, while some require malice
    - Accidental communication is not considered defamatory
    - **Negligent Defamation**
      * Requires standard negligence rules such as standard of care
        + Reasonably thinking a statement is true is a defense for negligent defamation
      * Generally only have to show negligence in actions against ordinary private citizens
    - **Malicious Defamation**
      * The false statement was made with
        + a) Knowledge of its falsity; or
        + b) Reckless disregard of whether it was true or false
      * Does not require “hostility” or “dislike”, just intent or recklessness
      * Must show Malice for high-level public officials and public figures
        + These people are considered likely to make statements often, so courts don’t really want to force them to always be on guard for anything they say

**8) The communication proximately caused harm to the plaintiff**

* + General Damages
    - Damages to one’s reputation or stance in the community
    - Often difficult to put a money value on, but can still recover
  + Special Damages
    - Proof of the economic loss is required, such as showing exactly what clients now refuse to work with you, or what specific jobs you lost specifically because of the defamation

**Defenses/Privileges to Defamation**

* **Absolute privilege**: No matter how false or defamatory the statement, D cannot be sued.
  + This privilege exists for statements made by one spouse to another spouse.
  + It applies to statements in judicial proceedings by judges, witnesses, and attorneys
  + The Speech and Debate clause of the Constitution protects members of congress in the course of legislative activities.
  + It protects federal officials, such as the Secretary of State, from defamation actions.
  + Most states give absolute privilege to high state officials like the governor.
* **Conditional privilege:**  When this applies, the plaintiff can sue the defendant only if malice is shown (known false or reckless disregard standard), even if the plaintiff is a private person. This applies to many types of defendants:
  + Lower state officials often enjoy this privilege
  + People writing letters of recommendation for job applicants
  + Persons reporting crimes to the police
  + Credit bureau reports
* **Consent is a defense** (i.e., the plaintiff consented to let the defamatory statement be made)

|  |  |
| --- | --- |
| Innocent Error | You don't want ppl to be able to sue here; it can be potentially damaging but it's not worth it. Protected by 1st amendment |
| Neg. Error (sloppy, lazy fact checking) | Most states use this in situations where malice std. is not constitutionally req. Depends on the person's status: ordinary private citizens who are not in the news are private figures.  D who makes a false statement reasonably thinking it was true, can still win. They just have to show that they took reasonable steps to ensure accuracy of statement. |
| Reckless (not checking when you had reason/suspicion); willful blindness | Reckless = D knew enough to suspect it was not true but didn't check "wilful blindness" |
| Malice (knew it was false and you had a reckless disregard to check); gen. flows from 1st Amendment considerations  P must prove:  a) knowledge of its falsity  b) reckless disregard of whether it was true or false | P who have to prove malice in order to have a defamation suit: public officials/figures (celebrities, politicians, teachers, local policemen, etc.)  **1. All-purpose public figures**: People who hold positions of  persuasive power and influence (e.g., sports stars, movie stars)  **2. Limited-purpose public figures**: A person who is not ordinarily  famous, but who has thrust himself into the news with respect to a particular issue. |
| Known Lie |  |

\*ordinary person can sue under any on the line but it's harder to prove malice, so gen. they will use one of the others. BUT if you are a public figure, you can only sue under malice.

\*\*Limited purpose public figure- a person who is not ordinarily famous, but who has thrust himself into the news w/ respect to a particular issue.

# **INVASION OF PRIVACY TORTS**

Involves torts in which D has not necessarily lied about P, but has shared information that can be just as harmful to P’s reputation. The torts system doesn’t really provide much protection, since once your privacy is violated it can’t be undone, and these cases are very hard to prove; but it seeks to help remedy

**Four Separate Causes of Action**

**1. Commercial Appropriation**

* + Restatement 2nd: “One who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy.”
  + Using someone’s image or voice (or imitation thereof) to promote a product or political candidate without their permission
    - e.g. getting somebody who sounds like Lauren Bacall to make ads that give the false impression that Lauren Bacall endorses the product.
  + Protects dignitary interests (e.g., a person’s peace of mind in not having his image appropriated), but it also protects the person’s property right to decide which persons, and on what terms, may use his/her image and likeness.
  + Once the person dies, his/her heirs may assert this cause of action, although it isn’t exactly clear how long this lasts after the person has died
  + This tort doesn’t usually run into constitutional/free speech problems
  + The original invasion of privacy tort, established first in NY by statute, now common law in other states

**2. Intrusion on Seclusion**

* + Restatement 2nd: “One who intentionally intrudes, physically or otherwise, upon the solitude of another, or his private affairs and concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.”
  + Intentional tort
  + No publication requirement; the mere fact of invasion is enough
  + ***Nader v. General Motors*** – P was outspoken critic of D’s car, so to discourage him from writing about it, D spied on him by tapping his phones, followed him close enough to see how much cash he took out at the bank, and hired prostitutes to try to entice him into committing a crime
    - Court rules that these actions went far and beyond reasonable gathering of information and clearly intruded on his “right to not having his affairs known to others”
    - Could also bring in IIED claim
  + ***Shulman v. Group W Publications*** – P was in car crash, D reporter flew with LifeFlight to report on the EMT nurse, filmed the whole scene and recorded everything, then broadcast the incident including questions to P and her incoherent responses; also broadcasted her vital signs
    - Court rules that this was an intrusion, and that freedom of the press does not protect D
      * “The press in its newsgathering activities enjoys no immunity or exemption from generally applicable laws”
        + Newsworthiness is not a bar to intrusion; they should find another, legal, way to get the information
    - **Two Primary Elements**

1) Intrusion into a private place, conversation, or matter

2) In a manner **highly offensive** to a reasonable person

**3. Public Disclosure of Private Facts (Unreasonable Publicity)**

* + Restatement 2nd: One who gives publicity to a matter concerning the private life of another is subject to liability for invasion of his privacy, if the matter publicized is of a kind which (a) would be highly offensive to a reasonable person, and (b) is not a matter of legitimate concern to the public.
    - Clause (b) makes it very hard/impossible for plaintiffs who are in the news to sue for publication of facts that are related to the news story, no matter how embarrassing
    - Protects people from publication of private information that is not newsworthy
  + Unreasonable publicity given to matters about a plaintiff that are true but private, in such a way that it violates common decencies (e.g., publishing the details of a person’s love life).
  + Does not require a false statement, or a commercial use or appropriation of the private information by the defendant, or a physical intrusion on the plaintiff’s seclusion.
    - * Involves publication of private matters which, when revealed, are highly offensive and not of legitimate concern to the public. (i.e. Identification of rape victims)
  + ***Haynes v. Alfred A. Knopf*** – D author writes a book about some lady’s life, in it the lady talks about P coming home drunk one night and walking in the bedroom with a drink in his hand; P sues claiming this was an invasion of his privacy
    - Court rules that it was not highly offensive to say he came in the bedroom drunk, since it doesn’t really talk about any details of his sex life or give details that would be particularly embarrassing
    - Also says these types of scholarly works should be protected by the First Amendment, or else writing Non-Fiction would be impossible
      * Also no need to change names, since this wouldn’t really protect anyone if friends and family could still figure out who it’s talking about

**4. False Light**

* + Restatement 2nd: One who gives publicity to a matter that places a person before the public in a false light is subject to liability to the other for invasion of his privacy, if (a) the false light in which the person was placed would be highly offensive to a reasonable person, and (b) the actor had knowledge of or acted in reckless disregard for the falsity of the published matter and the false light in which the other would be placed.
  + Publication of matters that are not defamatory but which place the victim in a false light in a way that would be highly offensive to a reasonable person.
    - Distinction from regular defamation: This can include matters that are not bad enough to constitute outright defamation. Example: publishing an article claiming that a person’s children are going hungry following the death of one’s spouse. Even though being poor is not defamatory, this could be very objectionable.
    - P sometimes can sue for both defamation and false light invasion of privacy as alternative theories of a case, although only one recovery can be collected from D.
    - Constitutional issues: This tort raises some of the same constitutional/freedom of speech issues discussed earlier with respect to defamation. E.g., if the false-light disclosure concerns a matter of public interest that is newsworthy, it will be hard for plaintiff to win. However, there is not yet a Gertz-like different standard for private parties who suffer this tort. As you see in the Restatement, a “known falsehood or reckless disregard” standard (i.e., a public-figure-like fault standard) must be proved by all types of plaintiffs.
  + ***Cantrell v. Forest City Publishing Co.*** – P’s husband died in bridge collapse, D reporter and newspaper did a piece on them, then returned 5 months later for a follow up but the wife wasn’t home; D wrote the story anyways and talked about how horrible their home was and how she looked terrible although she wasn’t even there (i.e. lied)
    - Court rules that he can be held liable for casting her in a false light if he acted in malice (knew it was false or was reckless in figuring out if it was or not)

**IV. HARMS TO ECONOMIC INTERESTS**

Generally considered intentional torts that lead to economic damages

Four types of Harm to Economic Interests torts:

* **1. Deceit**
  + **Five Basic Elements**

**1)** D made a **misrepresentation of an existing fact**

* + - * Fact must have existed at the time the deceitful statement was made
      * Making a statement you think is true but later turns out to be false is NOT deceit
      * Mere broken promises are not deceitful unless you KNOW the promise could not be kept or had no intentions of doing so

**2)** The **fact was material**

* + - * The fact must be a substantial element of the statement such that the transaction would not have occurred without the fraud

**3)** Intent requirement: D **intended to induce reliance** from P (or from an entire class of people, of which P is a member)

* + - * The deceitful statement must be directed at P, not just overheard

**4)** Scienter (intent/knowledge of wrongdoing. State of mind) requirement: D **knew the statement was false or had reckless disregard for its truth or falsity**

* + - * Three-Part Standard: Defendant made the statement

1) Knowing it was false,

2) Without belief in its truth, or

3) Reckless disregard for whether it was true or false

* + - * An honest belief in a statement’s truthfulness prevents deceit
      * D’s state of mind must be inferred by the court as to whether a reasonable person would have justifiably believed the statement were true

**5)** Detrimental reliance by P – **P relied on the false statement** and was harmed thereby

* + - * P’s reliance needs to be reasonable
      * Courts have generally eliminated the “*caveat emptor* – buyer beware” approach
  + Many courts have limited misrepresentation claims to commercial and transactional context and economic harm
    - i.e. Can’t sue for Deceit or negligent misrepresentation for someone lying to you about STDs causing you to get sick
  + **Fraud by Silence**
    - D can commit misrepresentation by intentionally withholding information
    - “If there is a duty to disclose a fact, failure to disclose the fact is treated in the law as equivalent to representation of the non-existence of the fact” – *Ollerman* court

1) **Special Duty/Fiduciary Duty** – If P and D are in a special relationship, D may have an affirmative duty to disclose material facts; failure to do so would be deceit

2) **Concealed Defects** – D may commit fraud by concealing defects in a piece of property being sold, even if there is no special relationship

3) **Partial Disclosure** – Making a partial disclosure can create a duty to make a full disclosure (think **Duty to Render Aid**)

4) **Misrepresenting the Law** – Modern trend says there is no deceit in giving a false opinion statement of the law (“I interpret it as saying…), but there is fraud if it’s a statement of fact about the law (The law says…), IF the person knows the information is false, or if there is a special relationship

* + - ***Ollerman v. O’Rourke Co., Inc*** – D sold house to P but didn’t tell P that there was a water-well underneath that destroyed property value; P claimed this is intentional misrepresentation by omission; D claims they had no duty due to *caveat emptor*
      * Court rules that the well was material to the issue and D knew or should have known that P would rely on him to disclose all material facts that P could not have known
      * Established **4 part test for duty to disclose**

1) The condition is “latent” and not readily observable by the purchaser;

2) The purchaser acts upon the reasonable assumption that the condition does (or does not) exist;

3) The vendor has special knowledge or means of knowledge not available to the purchaser; and

4) The existence of the condition is material to the transaction, that is, it influences whether the transaction is concluded at all or at the same price

* + **Defenses**
    - Contributory Negligence is no defense whatsoever to intentional misrepresentation
    - Comparative Negligence is *sometimes* used, however, against negligent misrepresentation
      * There are public policy arguments against this, since it could encourage better behavior
  + **Damages**
    - The measure of damages can vary, depending on facts of the case and D’s degree of culpability.
      * “Out-of-Pocket” Damages
        + P recovers the amount he lost by doing the transaction—e.g., P gets his money back.
        + AKA Restitution Damages
      * “Benefit of Bargain” Damages
        + P gets the benefits he would have gained from the transaction, had the transaction been the way the D represented it to be
        + AKA Expectancy Damages
    - Courts generally do not allow for punitive damages unless the conduct “evinced a high degree of moral turpitude and demonstrated such wanton dishonesty as to imply a criminal indifference to civil obligations”

**2. Negligent Misrepresentation**

* + Basically the non-intentional version of deceit (See above)
  + Three Basic Elements

**1)** Defendant, **in performance of his/her trade or profession**

**2)** **Negligently provided erroneous information**

**3)** Which is **used by the plaintiff** to the plaintiffs detriment

* + Privity of contract is not required, but there must be foreseeability that P would rely on D’s advice or statement
  + However, as a matter of public policy, courts are fearful to expand this liability when:

1) The injury is too remote from the negligence

2) The injury is too wholly out of proportion to the culpability of the negligent tortfeasor

3) In retrospect it appears too highly extraordinary that the negligence should have brought about the harm

4) Allowance of recovery would place too unreasonable a burden on the negligent tortfeasor

5) Allowance of recovery would be too likely to open the way for fraudulent claims; or

6) Allowance of recovery would enter a field that has no sensible or just stopping point

* + Requires a duty of due care, however, and some courts have been hesitant to assign one
    - However, most courts now do impose SOME duty, but the level varies
      * “Wrongful Adoption” - Adoption agencies often have an affirmative duty to disclose information to enable informed decisions on adopting a child

**3. Interference with Contractual Relations**

* + Three Basic Elements

1) Plaintiff had an **existing contract** with a third party

2) **Defendant knew** this

3) Defendant **intentionally interfered** with that contract

* + ***Imperial Ice Co. v. Rossier*** – D2 convinced D1 to violate his non-compete clause and restart selling ice in an area that he had agreed not to compete in, in order for them to gain an economic advantage for themselves
    - Court rules that their interference in the non-compete aspect of the contract was done to further their own economic advantage at the plaintiff’s expense, which is not justified
    - Contractual stability is of greater importance than competitive freedom
    - If the contract being breached would otherwise cause harm if enforced, they may be free from liability, but this was not that case
  + ***Lumley v. Wagner***…
  + If D’s motives for inducing breach are legitimate and justified, the court may allow this as a privilege to the interference liability
    - Some courts evaluate the different motives and use the “dominant” one to determine true motive
      * Plaintiff has the burden to prove the desire for harm was the dominant motive
  + The interference can be found in making performance impossible or more difficult, too
  + A consultant is allowed to advice his clients to breach a contract without liability

**4. Interference with Advantageous Relations**

* + Similar to Interference with Contractual Relations, but involves relations that are **non-contractual, but which offered a prospective benefit to the plaintiff**
    - i.e. interfering with the drafting of a will that would benefit P
  + Very rare and tough to prove
  + Some courts view interfering with contracts that are terminable at will as IAR
    - Enforceable contracts are and should be more protected than those that have yet to be entered