**Sub:** **Admin**

* **Corrective Justice Leg vs. Court**
* **Deterrence Efficiency/Floodgates**
* **Redress Grievances Fraud/Proof**
* **Compensation Innovation/Economic**
* **Loss Distribution (Ins.?) Predictability**
* **Fault**

**INTENTIONAL TORTS:**

**1) Intent (Subjective)** – desire or knowledge to a substantial certainty that an act will cause in invasion.

* Mistake = Shoot dog
* Child = Pulling out aunt’s chair
* Insane = Hitting with lazyboy leg
* **Transferred** B, A, FI, TL, TC = Throwing stick case.

**2) Act** – Volitional, voluntary (affirmative) act

**3) Cause** – Act legally caused the invasion

**4) Invasion of legally protected interest** – Unique to each IT; liable for ALL injury

**Battery:** Harmful or Offensive Contact.

* Reasonably connected = Black dinner case
* Special knowledge = Unsolicited hug.
* Normal interaction exception = school teacher fire drill.

**Assault:** reasonable apprehension + imminent + battery

* RA = Ability to accomplish = fix clock case
* RA = aware
* Temporally short = garbage mob

**FI:** direct restraint + definite area + without consent or legal justification.

* Escape = reasonable (aware + no injury) = Tel Aviv ship case.
* Moral suasion, denial of entry, future threats insufficient
* Withdrawal of exit = Tel Aviv Ship case
* Present awareness, not future recollection = hit by car after getting left in field

**IIED:** Intentional or reckless + extreme and outrageous conduct + severe emotional distress. GARBAGE COLLECTOR CASE.

* Conduct = atrocious in society in sterile enviro, except special knowledge = stutter case
* No include jokes, insults, annoyance, etc.
* Distress = beyond what reasonable person could endure. Words not enough
* **Bystander (Reckless)**: IIED + knowledge of bystander + 3 proximity (physical + temporal + relational) or actual injury. = father beaten, daughter in window

**Trespass to Land:** unlawful entry onto land. (Physical invasion; wind, vibrations, smoke, etc. = nuisance)

* Reasonably above/below = shotgun shooting case

**Trespass to Chattels:** interference with right of possession or control of chattel.

* **Actual damage required** – impairment of condition, quality, or value; deprivation of use for a substantial time; dispossession; bodily harm to possessor or legally protected interest; intermeddling = brief touch or harm.
* Girl riding dog case
* No nominal damages.

**Conversion:** dominion or control over chattel causing such interference with another’s right of control that forced sale/payment of full value is warranted. Converted to own use or seriously deprived owner of dominion.

* Damages = FMV at time of conversion
* Mistake and good faith irrelevant; also finders and borrowers can bring suit
* Interference must be severe – substantial depravation, inconsistent with opener’s rights, destruction or alteration, expense, refusal to return, misdelivery // return of goods does not bar action // full value is not automatic, factors!

**PRIVILEGES TO IT: (D’s BOP)**

**Consent:** D reasonably believes that P has expressly or impliedly consented to D’s actions.

* RP would believe consent was given = vaccination case
* **Medical emergency**: 1) unable to give consent, 2) serious risk of bodily harm if delayed, 3) reasonable person would consent, 4) no reason to believe otherwise here (implied as a matter of law); limited privilege to extend surgery within initial area
* Informed consent: Dr. to disclose all potential risks particular P would want to know. Usually covered by negligence. Failure = battery = wrong ear case
* **Exceeding consent** = Football player case
* **Misrepresentation** = mother giving birth case
* **Criminal activity**

**Self-Defense:** reasonable belief of B/FI + reasonable force

* Reasonable/proportionate force; no obligation to use method of least force
* Mistake = okay
* Retaliation 🡪 battery
* **Deadly Force:** Maj: retreat to the wall unless in home; Min/R2T: no retreat
* **No liability for 3rd party injury**

**Defense of Others:** Defending another against battery.

* **Mistake:** Maj (R2T 76) – okay as long as reasonable mistake; Min: step into shoes

**Defense of Property:** reasonable force to defend land/chattel from meddling.

* Force commensurate to property protected; no deadly force
* Can’t put intruder out into more danger; e.g. drunk person on highway
* Traps: Disfavored. Only allowed to use as much force as owner would be allowed to if he were there. No force if invasion is peaceful. Most courts require warning. Deadly force can be used to prevent the commission of a felony. = Springloaded shotgun case.

**Recovery of Chattels:** Reasonable force after request for return in fresh pursuit after actual tortious dispossession. Reasonable force if resisted. Negates *trespass to land*

* Fresh pursuit = prompt discovery + persistent pursuit
* Request Exception = dangerous/futile = stealing washing machine case.
* Shopkeeper’s privilege: Merchant can detain reasonably suspected shoplifter, when in or in the immediate vicinity of the store, with reasonable force for a reasonable time in order to investigate.

**Necessity:** Harming another’s property in order to protect life or health; threatened injury substantially more serious than harm.

* Public – benefit outweigh cost/ avert public disaster = Chicago fire case
  + **Public Party:** Standard of good-faith reasonable person; larger interests of society; no liability.
  + **Private Party:** Must be right; **liable for mistake**.
* Private necessity: partially shield to prevent greater injury = boat/dock case

**Authority of Law:** Duly commanded or authorized by law.

* Police officers: May arrest without warrant on reasonable grounds for belief of felony (some stats allow misdemeanor) and person
* Private citizens: Must know felony committed, FI if wrong
* Breach of peace: Both can arrest in fresh pursuit if committed in their presence

**Discipline:** parents/military can exercise reasonable force and restraint.

**Justification:** Catch-all for when other privileges don’t fit.

**NEGLIGENCE: - D’s conduct poses unreasonable risk and P harmed**

1. **Duty of reasonable care** – Obligation recognized by law, requiring the actor to conform to a certain standard of conduct, for the protection of others against unreasonable risks.
   1. Civil Statute = child labor, pure foods act, etc. + excuse
   2. Crim Statute = P Member of Class + type of injury + excuse = pedophile case
   3. Rule of Law = stop, look, and listen railroad case.
   4. RPP =

**2) Breach** – Failure to conform to the required standard.

**3) Causation** – A reasonably close causal connection between the conduct and the resulting injury. 1. Causation in fact and 2. “proximate” or legal causation.

**4) Damages** – Actual loss or damage resulting to the interests of another.

**I. Duty:** Obligation requiring the actor to conform to a certain standard of conduct, for the protection of others, against unreasonable risks.

**1) Expressly provided for legislatively. (Civil)**

* P member of class intended to protect, type of injury meant to be prevented

**2) Adopted from regulation (criminal) = Child molestation case**

* P member of class intended to protect, type of injury meant to be prevented
* **Negligence per se (Maj):** Judge decides duty and breach (and excuse - unaware, tried to comply, emergency), jury decides causation and injury.
* **Rebuttable presumption (Min)**: Judge decides duty and breach, jury decides excuse (RPP or other excuses\*), causation, and injury.
* **Mere evidence (Min)**: Judge decides whether statute is appropriate to consider, jury may use as evidence in deciding all elements.
* **\*Excuses may include**- incapacity, lack of knowledge, inability to comply, emergency, or compliance poses greater risk than violation

**3) Rule of Law = court made rule = stop, look, and listen train case.**

**4) Applied to the facts of the case (RPP) Fishing Bobber**

* **Factors:**: 1) \*Foreseeability of injury (general nature of harm) (Cardozo – anyone in foreseeable zone of danger; Andrews – anyone injured as proximate result of D’s conduct), 2) utility of the conduct, 3) likelihood of injury, 4) magnitude of injury, 5) availability of alternatives, 6) costs of preventing harm
* **Hand formula**: B v. PL

**Degrees of Care: slight** (failure to use great care), **ordinary** (failure to use reasonable care), **gross** (failure to use slight care), **Willful, wanton and reckless conduct** (deliberate and conscious disregard for a known high degree of probability of harm to another), **aggravated neg** (actor is required to adopt to changing circumstances)

**Reasonable Person:** In the same or similar circumstances. (Remember the bobber.)

* **Knowledge:** common knowledge/hazardous condition = tire blowout case
* **Precaution:** take precautions to prevent accident = turntable lock vs. biz. of life grabbing steering wheel.
* **Custom:** Evidence for establishing duty = broken shower glass case.
* **Emergency:** sudden + unexpected + unforeseen + D did not instigate = cab driver case.
* **Physical Disability:** Taken into account = blind person case.
* **Mental disability:** Not taken into account unless Sudden + Unexpected
* **Children**: Case-by-case (intelligence/maturity) unless engaged in adult activity

**Professional:** Skill or knowledge possessed by members of that profession = pilot case

* Attorney: Professional + best judgment + reasonable care; mere error/unsettled law = insurance malpractice case.
* Doc: doc + action + standard through expert test, unless obvious + harm + (locality?) = old lady with screw in ankle case.
* **Informed consent**: 1) was not informed of material risk, 2) if had been informed, would not have consented (2 ways: reasonable patient standard (majority) or \*particular patient standard (Joyce)), 3) the unknown adverse consequences did in fact occur. **Exception**: If telling them would cause dire consequences (e.g. heart attack) = vaginal surgery case

**Failure to Act:** No duty

* **Assumed Duty:** bound to use reasonable care and not leave P worse off; if detrimental reliance, bound to complete rescue; remember good Samaritan
* **Special Relationship:** Control instrumentality + knowledge = finger stuck in escalator case.
* **Special Knowledge:** actual/constructive knowledge + reasonably safe = child molestation case or psychotherapist case.
* Occupiers of land. D created the risk
* Duty to control instrumentality of harm when D has special relation to P that requires him to protect him (parent/child, teacher/student, etc.) or special relationship (and/or special knowledge) to control third party’s actions

**Negligence + Emotional Distress:** Baseline – no liability. **exceptions**:

* 1) Definite and objective physical injury, 2) natural consequence of emotional distress, 3) proximately caused by D’s negligence. = flying car case.
  + $ limited to physical consequences, but impact rule (and z.o.d.) abrogated
* **Bystander**: 1) relationship to victim, 2) contemporaneously aware, 3) severe mental distress [beyond disinterested person; not abnormal] 🡪 Actual injury = child ran over while driver backing out case.
* Death Telegram/Corpse = no physical injury

**Unborn Children:**

* Maj. of states allow for **wrongful death** of fetus. = 2 still borns after accident.
* **Wrongful birth:** Brought by parents who failed to have abortion after doctor negligently failed to warn them of birth defects. Must show mother would have had abortion. (Allowed more often than wrongful life.) Dmg: Med bills
* **Wrongful life:** not born but for docs neg. (not allowed in most places) = rubella kid case.
* **Recovery**: Can get future medical expenses, but no mental suffering. Child never knew difference. Can only recover in birth or life suit, not both.

**Owners & Occupiers of Land:**

**1) Off property:** No Duty; Factors urban/rural; profession of owner; # of outsiders

* Natural conditions: no duty (except for trees) = tree in road case
* Artificial conditions: Duty to avoid unreasonable risk of harm. Must inspect and maintain structures. = baseball field case.

**2) On property – 3 categories:**

* **Invitee (RPP)**: on the premises with permission for the business of the landowner: must reasonably inspect and make premises reasonably safe. = bathroom trap door case.
  + Includes frequent customer, even if not conducting business at time
  + Can downgrade to licensee when you cease doing business for owner.
* **Licensee (Hidden Danger):** enters with permission for own business/social guest; duty not to willfully or wantonly injure, and to warn of known dangers unknown to him. = crazy son in closet case.
  + **Obvious Dangers:** No duty to warn if obvious.
* **Trespasser (Willful/Wanton)**: on land in violation of the rights of owner = guy walking on railroad track case.
  + **Discovered/Frequent/Tolerated Trespassers:**  Duty to warn of non-obvious hidden dangers
  + Discovered trespasser: duty to warn of or make safe hidden dangers that threaten death or serious injury- **reasonable care**
  + Frequent or tolerated: licensee duty

**Minority View =** RPP for all entrants = severed tendon on faucet in house case.

* P: Reasons to keep: CL distinction provides workable approach to problems; the duty chosen by the court will require a case by case analysis of each situation to reject: O&O should owe a general duty of reasonable care for all persons regardless of their status; human life or limb doesn’t become less worthy of protection due to classification; within a matter of seconds a person can change categories; categories are also easy way for D to win as a matter of law.

**3) Lessor/Lessee: Majority View - No Duty, unless**: = icy steps case.

1. Undisclosed dangerous condition known to lessor and not lessee.
2. Conditions dangerous to those outside the premises
3. Premises leased for admission of the public
4. Parts of land retained in lessor’s control which lessee is entitled to use
5. Lessor contracts to repair
6. Negligence by lessor in making repairs

**Minority:** RPP to tenant = falling off balcony case.

* Trend toward abrogation; finding implied warranty of habitability or finding exculpatory clauses void as against public policy.

**Attractive Nuisance:** Higher standard of care for a danger that attracts **children**. Foreseeable trespass. Duty of ordinary care to prevent foreseeable risk of harm.

**Privileged Persons:** No owner consent needed. Many approaches, but commonly:

* Benefit of owner (mailmen, garbage men, etc): invitees
* Police and firemen: licensees

**II. Breach/Proof of Negligence:**

**Direct Evidence:** Unequivocal - eyewitness, video, etc.

**Circumstantial Evidence:** Circumstances or facts from which the elements of the case can be reasonably inferred.

* 1) **Constructive Notice** = fresh banana peel case
* 2) condition **posed unreasonable risk** of harm = grape display case.
* 3) D didn’t exercise **reasonable care to eliminate risk** = rotten banana peel
* 4) D’s failure to use such care proximately caused injuries.

**Res Ipsa Loquiter:** “The thing speaks for itself.” The accident itself creates an inference of negligence.

* P must show: bag of flower; 130 pound spare tire, hotel chair out window cases.
  + D has right to **control risk risk**/instrumentality
  + The thing usually **wouldn’t occur w/o negligence**.
  + Not act of P or 3rd party (sometimes required).
  + D had superior knowledge (sometimes required).
* **3 effects**:
  + (Majority) – Fact Finder is allowed to infer negligence, **inference**
  + (Large Minority) – Rebuttable presumption
  + (Small Minority) – Shifting of burden to the D
* **Minority**: Can be used against multiple professional colleagues when injuring party unknown; conspiracy of silence. (But not usually against multiple Ds.) - (Dr. mess up while under)

**Automobile Guest Statutes:** Require willful, wanton, reckless.

**III(a). Causation in Fact:** But/for or substantial factor test.

**But for:**

* **Unpreventable injury ≠** but for = speeding train case.
* **More likely than not 🡪 injury =** hotel guest with bad cut on head case.
* **Greatly increase risk = but for cause** = light out on stairwell in train station.
* **Lost Chance (MIN)**: reduction in chances of survival. 3 approaches: Can only recover for damages from premature death, tradition causation requirements, if you lose 14% chance you can recover 14% damages. = cancer patient case.
  + **$ =** (% negligent)(% reduction of chance)(time lost)(Annual Income/Additional Expense).

**Substantial Factor:** 2 but for factors.

* **Each alone sufficient:** if each alone could cause, then liability = leaving tractor in road case + forest fire case.
* **Can’t tell who did it:** Burden shift to D = shotgun accident where 2 shoot at same time.
* **Market Share Theory** (DES cases): Liable for proportion of judgment represented by market share, unless can prove not responsible. Must have substantial portion of market.= DES granddaughter case.
  + P: Damages even out to proportion of injury caused by each company. Problem when blameless corporations cannot prove that they didn’t innocence.
  + P: Enterprise liability – all Ds create a risk of harm to П, all liable because the industry, by lobbying and creating standards, controls the risk
  + **$** = (Judgment)(% Mrkt Represented)(% of D’s share of Represented Mrkt)

**III(b). Legal/Proximate Cause:** “Restraining mechanism on CIF.”

1. **Arbitrary line drawing**: bright line rule; easy to apply, predictable
   1. Unforeseen Consequence:too remote for liability to stick = NY Fire Case.
   2. Intervening/Superseding Forces
   3. Public Policy (fairness, knowledge, insurance, deterrence): Alcohol at party case; 3rd generation DES.

**2) Direct causation**: liable for all damages in but for sequence = explosion in cargo area. Andrew’s Duty to the World/Natural consequences.

**3) Foreseeability**: (1) Class of person must be foreseeable = Cardozo z.o.d.; (2) type of harm that made conduct unreasonable to begin with (foreseeable harm). Paslgraph/Wagon Mound

**Intervening Causes:** normal, foreseeable consequence of the situation. = molten metal/barrier case.

**Superseding force:** Unexpected, extraordinary, **unforeseeable** act.

* Criminal act usually superseding, though not necessarily (if foreseeable) = firebug case.
* Exacerbated mental conditions question for jury. Med mal usually foreseeable.
* **Dependent forces** (e.g. subsequent accident due to original negligence, immediate reactions) usually foreseeable. Subsequent malpractice not superseding.
* **Rescuer Doctrine (Danger invites rescue)**: 1) D was negligent to person rescued, placing them in **apparent** **peril**, 2) peril was **imminent**, 3) **RPP** would have concluded **peril existed**, 4) rescuer **acted with reasonable care**. = Suzuki Case.
* **Firefighter Rule**: Professional cannot recover for D’s negligence.
* **Social hosts**: Duty because should have foreseen unreasonable risk of danger to others (most states decline to apply liability). Opposite of **Dram Shop**
  + P: Large party may be beyond host’s control, person pouring own drinks, too many murky cases, ease of application with bright line, people only consider driver, not host, at fault.
* **Inherently Dangerous Activities**: liability traces further (ricochet bullet)
* **Subsequent Injury**:Not a superceding cause if (1) original injury was broken limb or disease and (2) first injury made more susceptible.

**Shifting Responsibility:** Cuts off liability. Usually no 3rd party duty to intervene to prevent risk. Prime counterexample: parents finding dynamite caps.

**IV. Damages:** Actual damages required

**Liability of Joint Tortfeasors**

**Joint and Several Liability:** Each D liable for the whole harm. P can recover in any proportion from any D and then they can sort it out amongst themselves.

* **3 circumstances:**
  + In concert; consciously acting together = car racing case.
  + Failed in common duty to P (based on relationship, e.g. master/servant)
  + Indivisible harm (e.g. death)

**Satisfaction and Release:** P can only get one full recovery. Full judgment executed precludes future recovery. Can still sue other D if full judgment not executed. = **Multiple Judgments =** collected judgment against NY in auto accident before other case closed

* **Release:**
  + Old rule: Release of one tortfeasor is release of all; you give up your legal right to a claim
  + New rule: Covenant not to sue; contract with a particular D not to sue them; preserves right against other Ds; can no longer recover proportion of judgment attributable to that party = lady fell and signed 2.5K waiver.
* **Mary-Carter agreements**: Settle with one D and work together to help recover from other D. Pay first D back; controversial; majority/Tex don’t allow. = Med mal. case where one doc payed for the other side.
  + P (majority): Unfair to the non-settling party; misleads the jury; skews the trial process; they encourage litigation; promotes unethical collusion among nominal adversaries; creates likelihood that a less culpable D will be hit with the full judgment.
  + P (minority): As long as the agreement is not “hidden” and the jury sees all evidence, these agreements allow the D’s to control their own cases and they can settle as they choose, court can adjust for bias.

**Contribution (<100%):** D1 can recover from D2 any payment of his portion of the damages, even if P doesn’t sue D2. (But settlement precludes contribution.) Applies after payment.

**Indemnity (100%):** is available when a single party is entirely liable for the harm D is charged with (derivative tortfeasor); it is for the whole amount. **Look for**: employer/employee, manufacturer/retailer, owner of land/ negligent constructor = Ford car defect case.

**Apportionment of Damages:** Two separate injury-causing torts are not joint and several. If the second damages do not flow from the first tort, the jury should apportion the damages. Burden is on P to bring enough information for apportionment, else P can’t recover.

* Concurrent tortfeasors (**Indivisible harm?)**: A and B are both liable if the injury is not apportionable.
* Successive (**unrelated accidents**): Second tortfeasor liable for whole injury where damages cannot be apportioned.
* Successive (**related accidents/chain of events**): Only liable for the injury you caused (aggravated) and the ones following it that stem from it. = accident 1 year after original car accident case.

**(AFFIRMATIVE) DEFENSES:** D BOP.

**Contributory Negligence:**. P’s negligence completely bars recovery. = speeding on a horse at night case.

* **Exceptions**: Intentional torts, wanton, willful or reckless,
* **Last clear chance:** If D had last clear chance to avoid, P can recover = buggy killed ass case.

**Comparative Negligence:** P’s recovery reduced by P’s negligence. = Drunk + speeder accident case.

1. **Pure**: P’s recovery is reduced by his % negligence. (46 states.)
2. **50% Rule (No Greater):** Recovery only if P’s neg. is not greater than D’s.
3. **49% Rule (Less than):**  Recovery only if P’s negligence is not as great as D’s

**Assumption of Risk:** P’s actions shifts risk to self**.**

* **Express**: Must be overt, though not in writing. Matter of K. Policy exceptions:
  + Intentional or reckless
  + Grossly unequal bargaining power
  + Public interest/necessary public activity = fitness club case.
* **Implied**: **Voluntarily** encounter risk, must have awareness of **risk**, and must have awareness of **magnitude**. = fell through whole in outhouse.
  + **Primary** (inherent; no duty to P; no neg) v. **secondary** (duty to P; neg)
  + **Pure/strict** (P is reasonable) v. **qualified** (P is unreasonable/negligent)

**Statutes of Limitations:** Limit on period for recovery. Tolling for infancy/mental defect

* **Old Accrual**: never tolled; based on date of injury
* **Discovery Accrual**: (1) when P discovered injury or (2) should have reasonably discovered the injury = failed pregnancy procedure case.

**Statutes of repose**: Maximum time to bring a claim, regardless of tolling of SOL.

**Immunities:** Defenses based on status or relationship.

**Spousal:** Abrogated = husband suing wife after tractor accident case.

* P: Encouraged couples to collude on insurance claims because husband won’t have to indemnify insurance company for wife’s injuries; disturbance of peace of marriage, woman chattel of husband, other remedies through criminal and divorce law

**Parent/child:** Partially abrogated to reasonable parent standard. Usually only allowed for acts only a parent is responsible for (e.g. discipline, not driving, etc.).

* Will never apply to intentional torts

**Charity:** Generally being abrogated // may sue up to insurance policy limit = Guy fell in charity hospital case.

* P: Charities had immunity because of two policy issues: **1)** when people gave $ to charities they didn’t expect it to go to lawsuit, and **2)** it was deemed an implied waiver when people accepted these services. But, people can’t waive their right if unconscious. Charities now operate like big business and can buy insurance. Want to encourage due care.

**Employers:** Usually workers comp statutes preclude tort liability

**State/Local Government:** No immunity for proprietary functions (e.g. city pool). Immunity for governmental functions (e.g. police).

* **Duty to All = Duty to None:** No liability for government functions unless gov. assumes the duty/party reasonably relies = 9-11 home invasion mistake case.

**Public Officials:** For discretionary (higher policy, decision-making) functions, but not ministerial (mechanical day-to-day; just following orders) functions.

**Federal government:** Sovereign immunity, but FTCA waives for discretionary functions, most intentional torts/defamation, combatant military activities

* **Discretionary functions:** Requires an element of choice = drunk at fair case.

**DAMAGES:** For IT = no actual injury. For Neg./SL = actual injury

**Types of monetary damages:** (Injunction is also a possible judgment.)

**1) Nominal** – small sums of money to vindicate rights (only for IT)

**2) Compensatory/Actual** – intended to represent closest financial equivalent of loss or harm suffered; to make P whole again.

* **Economic (Special) PV calc.**: medical expenses, property damage, lost wages, loss of future earning wages
* **Non-economic (General):** General: pain and suffering, loss of consortium, mental anguish, permanent disability, loss of enjoyment of life, reduced life expectancy (minority/ hard to measure)
* **Max. Recovery Rule:** Unreasonable jury verdict can be reduced by judge to maximum. = defective heater case.
* **Addittitur/Remititur:** Judge can adjust +/- based on evidence = car accident case awarding 22M and 100K.
* **Collateral Sources:** evidence not available unless disproving element of P’s claim. = UAMS hospital agreement (50% fee down) case.
* **Loss of Consortium:** recovery for relational interest.
* **Duty to Mitigate Damage:** P must act reasonably to avoid permanent injury = knee injury and no surgery case.

**3) Punitive** –to punish or deter; quasi-criminal in nature (IT - only in egregious cases)

* **No Right to Damages =** Undue compensation for P; some states pay into a related fund. = ex-husband mailing nude pictures case.
* **10:1 Raito:** A wildly disproportionate damages not allowed. Look at reprehensibility and other cases. = 145:1 case.

**Underlying Themes:** 1) purpose is to restore P to pre-injury status,2) only tool is $, 3) all damages must be in one lump sum, 4) judicial review is limited to awards that “shock the conscience”, 5) punitive damages focus on behavior of D, not on P

**Physical Harm to Property = FMV/Dif. in value:** Usually reasonable market value at time and place of injury. Full market value, difference in value before and after, or value of use of which P has been deprived. Can recover consequential damages.

**SURVIVAL AND WRONGUFL DEATH:**

**Wrongful Death:** Brought by beneficiaries (determined by statute). No ben. = no claim

* From death going forward.
* **Can recover:** loss of earnings, loss of society and companionship, other economic losses, funeral expenses (sometimes part of survival), punitive damages (in about half the states).
* Awards go directly to beneficiaries.

**Survival:** Brought by estate. Cause of action for PI survives the death of P and D

* From injury until death.
* **Can recover**: conscious pain and suffering, loss of earnings, medical expenses and physical disability, loss of property
* Damages are decedents; the go to the estate

**VICARIOUS LIABILITY = Control + Financial Benefit**

* **Indemnity/contributory negligence available**

**Respondeant Superior:** Employer bears the risk of employee’s harmful conduct done while within the scope of employment.

* **Going & Coming Rule:** No liability for commute unless employee’s actions unless employer forseably endagers**. Not foreseeable = starting + unusual.** = employee car accident after pesticide spray.
* **Slight Deviation Rule:** employer is liable for sufficiently related detours, but not for pursuit of personal business in frolic. = accident while delivering tickets.
  + **Factors:** employee’s intent; circumstance, duration, scope of employment, reasonably expected, degree of autonomy.

**Independent Contractors:** Only hired for an end result, free from control and direction of employer. Generally, no liability = newpaper boy brawl.

* **Non-Delegable Duties:** Liability for when work poses serious risk of harm = brake failure because of mechanic case.
* Condition of granting franchise
* Condemning agent to protect a severed parcel from damage
* GC to construct building safely
* Unreasonable risk to others
* Landowner to maintain land in reasonably safe condition
* Compliance with safety law.

**Joint Enterprise:** Joint business venture. All liable. Elements:

* Agreement among members of group
* Common purpose of group
* Community or pecuniary interest in purpose
* Equal right of control

**STRICT LIABILITY:** Liability w/o fault when abnormally dangerous activities

* **Prima Facie Case:**

1. Activity (Animals or Abnormally Dangerous Activity)
2. Causation (actual and proximate)
3. Damages to P’s person or property

* **Animals**: (Domestic) knowledge of propensity to cause harm. (Wild) stict liability. **Exception**: trespassers usually cannot recover under SL.
* **Blackburn Rule:** Liability based on nature of activity. = damn over mines case.
* **Cairn Rule:** Ultrahazardous/Abnormally Dangerous Conditions:

1. Condition/activity imposes severe risk of harm

2. It cannot be made reasonable safe

3. Condition or activity is uncommon in the community

4. Risk outweighs utility

**R2T § 520 Balancing Test for abnormally dangerous activities:** = stray bullet case.

1. Existence of high degree of risk of harm
2. Likelihood that harm will be great
3. Inability to eliminate risk by reasonable care
4. Extent to which activity is not of common usage
5. Inappropriateness in place where carried on
6. Extent to which public value is outweighed by danger

**Defenses:** Legal cause doesn’t get traced as far.

* **Prox. Cause:** Injury did not lie w/in activity’s extraordinary risk = mink case
* **P Invited Injury:** P invited the injury = horse in meadow case.
* **Act of God:** can’t reasonably anticipated = huge rainfall 🡪 dam overflow case.

**PRODUCTS LIABILITY:** manufacturer, seller, or supplier of product to all users

* **Prima Facie Case:**
  + Was there a seller or distributor?
  + Was there a defect? (Man.; Design; Warning)
  + Was user foreseeable?
  + Causation
  + Harm

**Theories of Liability:**

**1) Negligence:** place life and limb in danger if neg. man. + foreseeable user. = broken wooden tire case.

* **Probable Danger:** Knowledge of danger must be probable, not merely possible

**Defenses to Negligence in PL**- not a product, AoR, Open and obvious, Comparative Negligence, State of the Art, Compliance with regulations, not cause of the injury

**2) Express Warranty (Strict):** delivers product + lacking represented qualities + absence not readily detectible. = broken windshield case.

**3). Implied Warranty: Merchantability –** reasonably conform to buyer’s expectation (fit for ordinary purpose) **Fitness of Purpose –** Seller knows buyer’s purpose + buyer reasonably relies on seller’s expertise.

**Defense** will always be disclaimer = steering mechanism failure case (no disclaimer w/ adhesion K).

**5) Intentional:** Like any intentional tort. Purposefully made bad.

**6) TXDPA:** consumer protection against false, misleading, deceptive practice and breach of warranty

* **Consumer:** Individual + Biz <25M
* **Seek/Acquire:** look to buy/take ownership or benefit from item
* **Purchase/Lease:** free goods excluded and actual purchaser is irrelevant.
* **Good/Service:** normal definition.

**5) Strict liability:** in business of selling + no change in condition = wood shopsmith

**Prima Facie Case**

1. D must be a merchant seller
2. Product is defective (unreasonably dangerous)
3. Foreseeable User
4. Causation (CIF/Prox)
5. Harm

**1) Manufacturing defect (Strict):** departure from intended design.

P: **Rationale for strict liability for product defects:** Defects often not obvious to the user. Manufacturer can better prevent defects and better bear the cost of injury. Incentive to develop safer products. Difficult burden for P. Manufacturer gets profits, so should bear risks.

* P: **Impact of strict liability:** Cost of the liability is passed on to consumers. Manufacturer is more careful; timely release of needed products to the market is held up. Reduces incentive to manufacture new products.
* **Defenses**- A0R, Misuse, Wear and tear, Alterations after leaving D’s control = *two-ton water truck case*

**2) Design defect (Neg):** product creates an unreasonable risk of danger due to fault design = vinyl pool case; forklift case.

* **Element:-** 1) foreseeable risk of harm posed by product + (2) could have been reduced or avoided + (3) existence of an alt. design + (4) omission made product unsafe
* **Risk-Utility Analysis**: 1) Usefulness of the product, 2) safety aspects of the product, 3) safer alternatives 4) state of the art (not known at time of manufacture – no duty), 5) costs to alleviate the problem, 6) user’s ability to avoid danger w/ due care, 7) user’s anticipated awareness of danger, 8) feasibility of spreading the loss by setting the price or carrying insurance by manufacturer.
* **Consumer Expectation Test (Minority):** Consumers expect product to be reasonably safe.
* P: **Reasons for adopting negligence theory as opposed to strict liability:** P should discover design defects b/c they are deliberate, documented decisions on the part of manufacturer. Incentive b/c negligence standard rewards careful manufacturer and penalizes careless manufacturer. P should be required to pass a higher threshold of fault b/c an entire product line is in jeopardy.
* **Defenses**- State of Art, product was modified by P, Unavoidably unsafe (look for high social utility such as drugs), AoR, unforeseen misuse

**3) Warning defect (Neg):** Foreseeable risk of harm could have been reduced or avoided by proper warning. DOES NOT SHIELD FROM DESIGN DEFECT!

* **Elements:** foreseeable risk of harm + could have been avoided + omission of warning = asbestos case.
* **Adequacy of Warning:** attention + explain danger + how to avoid.

**Defenses:**

**Learned Intermediary:** E.g. doctor – must only tell him, not patient of side effects.

**Occasional Seller:** One-off sale is not enough.

**Comparative Neg.:** = kid not wearing seatbelt ejected, but door had bad latch.

**Unforeseen Misuse:** no liability for unforeseen abnormal misuse = ran over by tractor

**AoR:** (Maj): evaluate under comparative negligence; (Min) complete bar.

**State of the Art:** No liability if defect is not known or knowable.

**Secondary Supplier:** Used not liable = defective used car case.

**Predominant Purpose:** no liability for service, unless product was predominant service = pacemaker case.

**NUISANCE**

**Elements**- (1) **Act** (2) **Causation** (3) **Substantial interference** (4) **unreasonable interference**

**Public:** Unreasonable interference with a right common to the general public.

* **Duration + Substantial interference + statute**
* **Difference in Kind:** Private P must suffer harm of a different kind = fishers or toxic land purchaser

**Private:** Non-trespassory interference with another’s use and enjoyment of land. Future threats treated as menace (explosives/vicious dogs R2T 281)

* **Pre-Existing Condition:** Can’t sue seller for conditions on purchased land = toxic land case.
* **Balancing Utility and Harm (Maj):**  Liability = Harm > Societal Utility = expanding city case. =3M pounds of poop/day
* **Serious Harm & Feasible Payment (R2T 862b)(Min):**  damages if harm P’s harm is serious + payments feasible.
* **Must Exceed Mere Annoyance:** Unreasonable/Unlawful interference + injury or great annoyance OR unreasonable interference. = Winn-Dixie Store case.

**Recovery Options:** Coming to the nuisance can sometimes preclude. Risk/utility

* Injunction – Potential indemnification for move = expanding city case.
* Make D pay
* Make P pay to stop (think coming to the nuisance)
* Payment of past and future damages

**Defenses**: Coming to the Nuisance: P went to the nuisance (like consent) …

**DEFAMATION:** Communication that damages P’s reputation (respect, goodwill or confidence - outward) or perceived self-worth (inward). Can’t bring after you’re dead**.**

**Old Rule:** 1) false statement, 2) published, 3) *hold P out to hatred, contempt, ridicule, OR 4) causes shun/avoidance*.

**New Rule Prima Facie Elements**: 1) false statement, 2) published, 3)of and concerning P, 4) damages.

* **Two step test for defamatory**: 1) Ambiguous meaning – Judge decides whether communication if capable of being defamatory, 2) jury decides how the words were understood by a right-thinking audience. = Florida Bar judge case.

**Slander:** Originally oral statements- transitory gestures

Requires showing of pecuniary damages, **unless slander per se**: imputations of major crime, loathsome disease, affects business or trade, serious sexual misconduct (woman’s unchastity).

**Libel:** Originally for written words. Now typically more widespread audiences & longer lasting harm. Same potential harm as written words.

* No requirement of special damages; damages presumed
* Group libel: have to be part of small, recognizable group; more salient the comment the more likely to recover.

**Constitutional Limitations:** First Amendment

**1) Public official/public concern (also public figures):** **Requires Times malice** (actual knowledge of falsity or reckless disregard for the truth). No presumed or punitive damages; must show actual damages. (Seems to effectively require that P prove falsity.)

* P: Privilege of fair comment. Public figures put themselves the public eye; negative comment comes with the job.

**2) Private person/public concern:** States can apply negligence up to the Times standard. Can presume damages. Punitive damages only with Times malice.

* P: Interest in 1st Amendment is much less when P is a private citizen. Did not choose to be in the public eye. More vulnerable to injury.

**3) Private person/private concern:** Common law standard. Can get presumed and punitive damages without Times malice.

**Defenses:**

* Absolute privileges: executive, legislature, judicial, public officials (in scope of job/related to case); absolute = always privileged under the circumstances
* Qualified privileges: Self-interest, other’s interest, common interest, press, fair reporting, means of publication, fair comment, sanity commissions; qualified = can lose under circumstances if you abuse (e.g excessive publication or malice)
* Substantial truth is an affirmative defense. P doesn’t have to show falsity for claim to be good, but showing truth will block.
* Consent or Truth

**PRIVACY:** Interference with the right to be left alone. 4 Categories:

**Appropriation of P’s name or likeness:**

1. Used P’s name or likeness
2. Sought to take advantage of P’s reputation or standing, or any value attached to P’s name or likeness (removed in CO by *Dickerson*).
3. Was for D’s own purpose or benefit, commercial or otherwise.
4. Damages (usually commercial value of name or likeness)
5. Causation

* Can occasionally have 1st Am. Issues if it is a public concern

**Unreasonable intrusion upon the seclusion of another:**

1. Intrusion into a private place, conversation, or matter
2. Highly offensive to a reasonable person

* Doesn’t have to be completely secluded, depends on identity of intruder and nature of intrusion; just have a **reasonable expectation** of privacy from the particular intrusion.

**Public disclosure of private facts:**

1. Publicity
2. Private facts
3. Highly offensive to reasonable person
4. Absent legitimate public concern

* First Amendment issues. (Looks like you can only bring if private matter.)
* Some courts don’t recognize. Breach of confidence is often alternative.

**Placing another in false light:** Negligently or intentionally publishing false facts harmful to P. **2RT requires Times malice**.

* Different than defamation. Worried about privacy, not reputation.
* Some states just use defamation for both.
* Common law malice (personal ill-will or wanton, reckless disregard for P’s rights) for punitive damages.
* First Amendment concerns. (For public figures and/or public issues.)

**Exceptions:**

* First Amendment – “newsworthiness”; matter of legitimate public concern; subject, not person; content, not motive, governs; IIED still subject to 1st Am.
* Information that is already public

**TX DTPA:**

* Designed to address problems with tort and contract law. Makes it easier for consumers to sue.
* Encourages settlement. Business get out cheaper, consumers get out quicker.
* Concerns: explosion of litigation, business not making enough money
* **Benefits**: broad applicability, basically no-fault liability, lowest causation standard (basically direct causation), economic and general damages, lowest standard for punitive damages (“knowingly”), can get attorney’s fees, liberally construed and applied
* In effect waiver is almost impossible (very rare)
* Only consumers can bring. VERY broad definition of consumer
* Applies to goods (including real estate) and services
* P must send 60 day pre-suit notice. Not accepting reasonable settlement severely limits damages at trial.
* Attorney’s fees if P wins or to D if frivolous suit.
* Usually only for economic damages

**Policy:**

1. Prevention of self help
2. Retribution against wrongdoers
3. Deterrence of wrongdoers
4. Compensation for the victims of wrong doers
5. Vindicate individual rights
6. Shaping society- future impact
7. Administering policy- how will it effect the legal system if the rule is adopted
8. Non-interference