**Purposes:** Peaceful mans for redress of rights; Deter wrongful conduct; Encourage socially responsible behavior; Restore injured parties.

**History:** Originally based only on causation; Gradually moved to fault; Now almost all fault-based.

**INTENTIONAL TORTS:**

**PF Case:**

**1) Intent** – Acting with the purpose or knowledge with substantial certainty that an act will cause a particular consequence. Distinguish from motive (reason for acting).

* Subjective, not RPP
* Mistake of fact/identity and good faith irrelevant
* Some states say young children cannot form intent, others leave to FF
* Mutually exclusive of negligence
* Insane person may be capable of forming intent
* Transferred among victims and among the “big 5” – B, A, FI, TL, TC

**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:** Intentional act causing direct or indirect harmful or offensive bodily contact.

* Contact with thing closely connected to P’s body enough
* Enough that D set the injuring force in motion, e.g. bullet, trap, vicious dog
* RP standard of offensive (2RT declines to comment on special knowledge)
* Minority: Intent to touch is enough, even without intent to cause harm
* No actual injury required; don’t have to be conscious

**Assault:** Intentional act causing reasonable apprehension of imminent battery [unless defensive actions are taken].

* Distinguish apprehension (anticipation) from fear
* Threats of future actions not enough; telephone threats don’t count
* Conditional threats can be enough if they show intent and aren’t for the future
* Based on apparent present ability (words AND conduct/circumstances)
* No actual injury required, but must be aware; interest = mental tranquility
* RP standard (most courts hold liable for special knowledge)

**FI:** Intentional (to confine, not necessarily wrongfully), act causing direct restraint within a bounded area, with no consent or legal justification.

* No reasonable means of escape (known, safe, reasonably available for P); liable for injury during reasonable attempt to escape
* Moral suasion, denial of entry, future threats insufficient
* Withholding means of escape is sufficient, even without physical force or if original confinement voluntary or lawful
* Threat of imminent force/bodily harm to person sufficient; duress sufficient
* Conviction vitiates
* No actual injury required, but consciousness required (absent physical injury)

**IIED:** Intentional or reckless, extreme and outrageous conduct causing severe emotional distress. Law leave *some* room for jokes.

* RP standard for distress/outrage (absent other info); can include anger/chagrin
* No physical injury required; requires actual distress; maybe eggshell psyche?
* Common carriers/innkeepers have special duty *to patrons*; high std. for corpses
* Reckless (usually for bystanders) – callous disregard for the consequences: physical, temporal, and relational proximity; must be aware of P’s presence

**Trespass to Land:** Intentional unlawful entry onto land causinginterference with right of possession. (Physical invasion; wind, vibrations, smoke, etc. not enough – nuisance)

* Mistake of fact does not excuse
* Applies to anyone with immediate right of possession; rights apply upward and downward (reasonably); D does not have to personally invade (e.g. dog, flood)
* Exceeding permission counts as trespass

**Trespass to Chattels:** Intent (to do the act that creates interference) act causing interference with right of possession or control of chattel. (Present possessory interest.)

* 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.
* P: Chattels are less important than real property.

**Conversion:** Intention (to assert control or dominion) assertion of dominion or control over chattel (at time of harm) 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.

* Value at time and place of conversion; some modern expansion to intangibles
* Mistake and good faith irrelevant; also finders and borrowers can bring suit
* Interference must be severe – substantial depravation, inconsistent with opener’s rights, harm, expense, refusal to return, misdelivery, information as a commodity; otherwise maybe just an action for replevin

**PRIVILEGES TO IT:**

* Arise from circumstances; distinct from immunities, which arise from status
* Affirmative defenses; don’t defend against the tort, just liability for it; D has burden of proof
* P has burdens. No need for affirmative defense if elements not met.

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

* How a reasonable person would interpret behavior, submission to custom, etc. as manifestation of feelings; contact sports consent to usual rules/play
* 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: requires Dr. to disclose all potential risks particular P would want to know. Usually covered by negligence.
* Invalid if fraud (essential, not collateral, matter), duress (of immediate and serious harm), no capacity, criminal, exceeds scope

**Self-Defense:** Defending yourself against battery [or confinement?].

* Reasonable/proportionate force; no obligation to use method of least force
* Reasonable belief that force is necessary; reasonable mistakes allowed
* No retaliation; not warranted by provocation
* Maj: no duty to retreat except before serious or deadly force (unless in home)
* Not liable for accidental injury to third party

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

* Same rules as self-defense
* Split: 1) Majority: Intervener privileged only when party himself privileged – “step into shoes”; 2) reasonable mistake sufficient

**Defense of Property:** Intrusion not privileged, reasonable belief force is necessary, demand that intruder desist, only as much force reasonably necessary to protect prop.

* 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. Problem: Can’t distinguish between whether force is justified or not. No deadly force. Most courts require warning.
* P: Human life more valuable than chattels.

**Recovery of Chattels:** Reasonable force after request for return in fresh pursuit after actual tortious dispossession by the person the defense is being asserted against.

* Privilege to enter another’s land if the chattel didn’t get there by your fault.
* 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 necessity – to avert public disaster (complete privilege):
	+ By public official or entity: Standard of good-faith reasonable person; larger interests of society; no liability
	+ By private “champion of the public”: Must be right; liable for mistake
* Private necessity: privileged, but still required to pay compensatory damages

**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:** Right to discipline based on relationship.

* Parent/child, student/teacher, officer/subordinate
* Reasonable force under the circumstances (to discipline or maintain order)

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

**NEGLIGENCE:**

**PF Case:**

**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. Objective standard – RPP.

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

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

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

**Duty:** 2RT 485 gives 4 ways to establish duty:

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

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

**2) Adopted from a legislative regulation with no express provision (Criminal)**

* P: Legislature thought it was bad enough to make a statute prohibiting. Established fact pattern seen often. Wouldn’t be a stretch to make a tort. Easy to apply. May bind lower courts. More efficiency. Would take away trial by peers.
* Member of class, type of injury, appropriate to impose tort
	+ Consider huge liability disproportionate to injury, direct or indirect injury, obscurity of statute fails to properly put the public on notice of imposes liability without fault, feasible to apply, criminal v. civil punishment
* 3 effects:
	+ Negligence per se: Judge decides duty and breach (and excuse - unaware, tried to comply, emergency), jury decides causation and injury. (Majority.)
	+ Rebuttable presumption: Judge decides duty and breach, jury decides excuse (RPP or other excuses), causation, and injury.
	+ Mere evidence: Judge decides whether statute is appropriate to consider, jury may use as evidence in deciding all elements. (Very small minority.)

**3) Established by judicial decision (rule of law).**

* Court has made a rule articulating the standard of care.

**4) Applied to the facts of the case (RPP).**

* Consider: 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; (can use custom as mere evidence)

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

* Adult: Objective standard, not D’s own traits
* Emergency is considered as a circumstance. RP acts in self-preservation.
* Physical (but not mental or intoxication) disability taken into account
	+ P: A disabled person can reasonably expect certain accommodations from able-bodied persons. Physical disability is outwardly recognizable. Person should take precautions ns protect self.
	+ P: Mental: Make caregivers more responsible. Person can pay for living, should pay for the harm they cause. Often not recognizable.
* Those with special/expert skills are held to higher standard
* Children: Case-by-case (intelligence/maturity) unless engaged in adult activity

**Professional:** Skill or knowledge possessed by members of that profession (e.g. reasonable doctor). (Common carriers and innkeepers also held to higher standard.)

* Expert testimony; standard of same or similar community
* Higher standard if special certification (sometimes national standard)
* 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)
* Have to tell about exterior motivations (e.g. research on body part)

**Failure to Act:** Baseline – no duty to act. Eroded with exceptions:

* D has assumed duty; bound to use reasonable care and not leave P worse off; if detrimental reliance, bound to complete rescue; remember good Samaritan
* Liability for aggravation due to delay in acting (in some special relationships, e.g. child in store escalator when store created the peril, co-venturers)
* 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

**Emotional Distress:** Baseline – no liability. Eroded with exceptions:

* 1) Definite and objective physical injury, 2) natural consequence of emotional distress, 3) proximately caused by D’s negligence.
	+ $ limited to physical consequences, but impact rule (and z.o.d.) abrogated
* Bystander: 1) relationship to victim, 2) presence/perception, 3) severe mental distress
* No physical injury required for death telegrams and corpse mishandling

**Unborn Children:**

* Per se rule no recovery, but maj of states allow for wrongful death of fetus.
* 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.)
* Wrongful life: Brought by child (not allowed in most places).
* Recovery: Can get future medical expenses, but no mental suffering. Child never knew difference. Can only recover in birth or life suit, not both.
* P: Where do we cut off? Need definite rule. Birth is easy.

**Owners & Occupiers of Land:**

**1) Off property:**

* Natural conditions: no duty (except for trees)
* Artificial conditions: Duty to avoid unreasonable risk of harm. Must inspect and maintain structures.

**2) On property – 3 categories:**

* Invitee – on the premises with permission for the business of the landowner: must reasonably inspect and make premises reasonably safe (full RP standard).
	+ Includes frequent customer, even if not conducting business at time
	+ Can downgrade to licensee when you cease doing business for owner.
* Licensee – enters with permission for own business; no benefit to owner: duty not to willfully or wantonly injure, and to warn of known dangers unknown to him..
* Trespasser – on land in violation of the rights of owner, no foreseeability: no duty, with exceptions:
	+ Cannot willfully or wantonly injure
	+ Discovered trespasser: duty to warn of or make safe hidden dangers that threaten death or serious injury
	+ Frequent or tolerated: licensee duty
* 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 and flood liability. Eliminate distinction b/w invitee and licensee?Reasons 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:** Tradition approach no duty with 6 exceptions:

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
* 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

**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.

* P must show: 1) D had or should have had knowledge/notice of condition (or condition was continuous and foreseeable), 2) condition posed unreasonable risk of harm (duration of risk), 3) D didn’t exercise reasonable care to eliminate risk, and 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.

* Jury cannot consider res ipsa unless instructed. Then *may* use; don’t have to.
* P must show:
	+ D controlled risk.
	+ 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) – FF is allowed to infer negligence
	+ (Large Minority) – Rebuttable presumption
	+ (Small Minority) – Shifting of burden
* Minority: Can be used against multiple professional colleagues when injuring party unknown; conspiracy of silence. (But not usually against multiple Ds.)

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

**Causation in Fact:** “Without which nothing.” But/for test.

**Proof of Causation:**

* Must be probable, not just possible; breach more likely than not caused injury
* Lost chance: P must show there was a reduction in chances of survival. (Less than normal threshold to take to jury.) 3 approaches: Can only recover for damages from premature death, tradition causation requirements, if you lose 14% chance you can recover 14% damages. P: Want doctors to act competently.

**Concurrent Causes:** “Substantial factor” test.

* If each alone could have caused the harm, determine whether each was a substantial factor. (Throwing match into inferno.)
* If each is necessary, both are causes in fact and are liable for entire result.
* If multiple D’s are negligent and could have caused P’s injury, burden shifts to D to show that he did not. Otherwise joint and several liability. P: When between innocent P and culpable D, err on the side of P and let D figure it out.
* DES cases: Liable for proportion of judgment represented by market share, unless can prove not responsible.
	+ 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

**Legal/Proximate Cause:** “Restraining mechanism on CIF.” After CIF established, when should we cut off liability?

**3 approaches:**

**1) Arbitrary line drawing** – bright line rule; easy to apply, predictable

**2) Direct causation** – liable for all damages directly traceable to breach in unbroken sequence; no decision-making

**3) Foreseeability** (majority) – reasonable person standard; limited by FF

* Class of persons must be foreseeable (Palsgraf)
	+ Cardozo – Duty inquiry; foreseeable Ps and people in zone of danger
	+ Andrews – Duty to the “world at large”; should leave PC to jury to use common sense for when to cut off
* Type of injury must be foreseeable, though not the extent or exact manner
	+ Eggshell rule

**Intervening Causes:** When is an intervening force a superseding cause? Turns on whether the force is normal, foreseeable consequence of the situation.

* Superseding force: Unexpected, extraordinary, unforeseeable act.
* Criminal act usually superseding, though not necessarily (if foreseeable)
* 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: 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.
	+ P: The wrong to an imperiled victim is also a wrong to his rescuer.
* Social hosts: Duty because should have foreseen unreasonable risk of danger to others (most states decline to apply liability).
	+ 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.

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

**Damages:** Actual damages required (i.e. not just punitive or nominal). (See below.)

**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.

* P: When between innocent P and culpable D, err on the side of P and let D figure it out.
* 3 circumstances:
	+ In concert; consciously acting together
	+ Failed in common duty to P (based on relationship, e.g. master/servant)
	+ Indivisible harm (e.g. death)
* Effects of comparative fault on J&S:
	+ Illinois: Retain J&S; P is not at fault, D is culpable
	+ New Mexico: Several liability; Hold each D liable only for his portion of the damages; J&S not fair to D

**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.

* 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
* Mary-Carter agreements: Settle with one D and work together to help recover from other D. Pay first D back; controversial; majority don’t allow.
	+ 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 Δ 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 and Indemnity:** Assuming J&S:

* 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 is available when an single party is entirely liable for the harm D is charged with (derivative tortfeasor); it is for the whole amount.

**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: A and B are both liable if the injury is not apportionable.
* Successive tortfeasors (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 and the ones following it that stem from it.

**(AFFIRMATIVE) DEFENSES:** D has all the burdens.

**Plaintiff’s Conduct:**

**Contributory Negligence:** All or nothing. Any fault of P bars recovery. Exceptions:

* Intentional tort
* Last clear chance: If D had last clear chance to avoid, P can recover
* P: Contributory negligence allowed for predictability and jurisprudence, so maybe we should leave it up to legislature to change. However, each party should be responsible for their portion of the accident.

**Comparative Negligence:** Each party liable for their %: Three varieties:

1. Pure: P’s recovery is reduced by his % negligence. (46 states.)
2. Modified less than (49%) rule: Recovery as above, but only if P’s negligence is less than D’s.
3. Modified does not exceed (50%): Recover as above, but only if P’s negligence is not greater than D’s.

**Assumption of Risk:** P shifts risk to self (allocated). Complete bar to recovery.

* 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
* Implied: Voluntarily encounter risk, must have awareness of risk, and must have awareness of magnitude. (Some states combine with comp neg, esp sec.)
	+ 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.

* Old rule: never tolled; based on date of injury
* New (discovery) rule: based on when you did or should have with reasonable care discovered the injury; more flexible.
* Statutes of repose: Non-flexible. Absolute. Based on fixed timetable from injury. Usually longer.
* P: The new rule will be productive or results more nearly consonant with the demands of justice and the dictates of ethics and morality.

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

**Spousal:** Abrogated

* 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.).

* P: Insurance. What about child suing negligently driving mother for injuries just to get to insurance?

**Charity:** Generally being abrogated

* 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

**Lower Government:** No immunity for proprietary functions (e.g. city pool). Immunity for governmental functions (e.g. army). Usually delineated by statute.

**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.

**DAMAGES:** For intentional torts actual injury need not be shown. For negligence or strict liability damages are an essential element of the plaintiff’s case.

**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.

* Specific/special: basically damages that have a receipt (doctor bills, property damage, lost wages, etc.)
* General: pain and suffering, loss of consortium, mental anguish, permanent disability, loss of enjoyment of life, etc. (can be assumed)

**3) Punitive** – above and beyond other damages; to punish or deter; quasi-criminal in nature (usually in IT; only in egregious cases, i.e. malice).

* Undue compensation for P; some states pay into a related fund.
* Constitutional issue: wildly disproportionate damages not allowed under due process. Rule of thumb – double-digit bar. Actual average – about 1:1.
* P: Bad: Overcompensate P w/o usual safeguards of criminal procedures (proof beyond reasonable doubt, privilege against self-incrimination, and rule against double jeopardy). Good: A salutary method of discouraging evil motives; partial remedy for the refusal to allow attorney fees; diverts P’s desire for revenge to peaceful channels; incentive to bring petty cases of outrage and oppression into court that would otherwise not be given redress.

**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

**Economic:** Past/future medical expenses, past/future loss of earnings, permanent disability or disfigurement. Present value calculations.

**Non-economic:** Past/future physical pain, past/future mental anguish, loss of function/appearance, lost enjoyment of life, loss of consortium. No PV calculation.

**Limits:**

* Max recovery rule: Judge only adjusts when above or below the allowed recovery he calculates from evidentiary support. If “shocks the conscience.”
* Comparison to other cases not proper.
* Remittitur, additur (additur denied federal courts by SC).
* Collateral source rule: jury not told of collateral benefits.
* Duty to mitigate: requires reasonable conduct after injury
* Legislative caps.
	+ P: Keep malpractice insurance down and medical costs low. Protect doctors from career-ruining suits.

**Physical Harm to Property:** 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:** Most states have two statutes that provide for these causes. This changes the common law that tort action dies with person. Defenses are all those that could have been brought if decedent were alive.

**Wrongful Death:** Brought by beneficiaries (determined by statute).

* 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.

* 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:** Not one’s own negligence, but same liability as if it were.

* Often used to find a financially responsible defendant
* Does not exacerbate wrongdoer; both held liable
* Indemnity/contributory negligence available

**Respondeant Superior:** Employer bears the risk of employee’s harmful conduct.

* Has to be within scope of employment – slight deviation rule: frolic v. detour = liability v. nonliability. Violation of rule does not preclude liability.
* Generally not liable for commute. (But remember sick employee case.)
* Can still be liable if mixed purpose.
* P: Employer has control over the business, including the work of employees. Employer stands to profit from employee’s services. Should be liable.

**Independent Contractors:** Only hired for an end result, free from control and direction of employer. Often in a distinctly different business.

* Not vicariously liable
* Exceptions: non-delegable duties (e.g. keeping brakes working) – applies to particular risk that makes non-d, inherently dangerous activities, illegal activity
	+ P: Duty so important; no relief from liability, aso in best position to spread the costs of injury. Rebuttal: no control.

**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 without fault for those who engage in abnormally dangerous activities that by their nature can’t be made completely safe.

* Don’t want to deter productive activity. Consider social utility.
* Usually applies to enterprise, not employee
* Rylands split:
	+ Blackburn: Ultrahazardous activities - risk can never be fully eliminated
	+ Cains: Abnormally dangerous activity based on the location of the activity and its abnormal/non-natural use
* Animals: Usually determined by where animal kept. Liable if you know the animal is dangerous or it is not domesticated.
* P: Due to the character of the action or where it was taking place we impose SL no matter what level of care was taken to avoid damage, if damages is caused they are liable. Meant to persuade people to undertake such actions with utmost care and only in limited circumstances.

**2RT 520 Balancing Test:**

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

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

* Act of God that could not have been reasonably anticipated.
* Liable only for the consequences that make the activity SL.
* Fault of P. Contributory negligence not available. Trend toward comparative fault. AR available in some jurisdictions.
* Superseding cause (e.g. robber steals explosives).

**PRODUCTS LIABILITY:** Liability of manufacturer, seller, or supplier of product to all users of that product. (NOT meant to be insurers.) Still need causation and injury!

* Liable only for physical harm, but not harm to product itself (K remedy).
* In some states, can still bring traditional claims; others = statutorily barred.

**Theories of Liability:**

**1) Negligence:** Manufacturer or retailer’s failure to use reasonable care. Privity doesn’t matter. Only if product arrives substantially unchanged.

* P: Using Negligence theory of liability will require P to show that D is at fault, but P can’t always do this which is why SL is also needed. PL can prevent good products from getting on the market, but can also give incentive to D to make products that do reach the market safer for the public.

**2) Warranty:** express or implied. Problems: doesn’t apply to personal injury, no privity of contract.

**3) Strict liability (most jurisdictions):** Originally applied to food and cosmetics. Looks to product itself, not person. Liability for things consumer will not recognize. Problem with 2RT – didn’t distinguish between types of defects – difficult to apply.

**3RT:** Distinguishes between manufacturing, design, and warning defects:

**1) Manufacturing defect:** One particular product deviated from intended design.

* Strict liability
* Just have to show your product deviated from the design, not the conduct that led to the defect.
* P: Π shouldn’t have to prove tough burden and D is better able to shoulder the cost.
* 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.

**2) Design defect:** Failure in concept of the entire line of products; was there an alternative safer design?

* Basically negligence
* 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.
* Some courts use consumer expectation test.
* Risk utility at time of trial = SL.
* 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.

**3) Warning defect:** Foreseeable risk of harm could have been reduced or avoided by proper warning.

* Negligence standard
* Must be effective, though D entitled to presumption that P read
* Exception for open and obvious dangers.

**Defenses:**

**State of the Art:** What was known/knowable in the field at the time? Not for m.def.

**Comparative Negligence:** Available in most jurisdictions. Contributory not available.

**AOR:** Usually swallowed up in comparative, but some courts would bar the claim.

**Misuse:** Abnormal or unintended uses. But still liable for foreseeable misuse!

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

**Remote Retailer:** Outside the original production and marketing chain.

**Services:** Low-skill usually liable, high-skill usually not (e.g. pacemaker).

**NUISANCE:** Based on unreasonable activity affecting another’s use and enjoyment of his own property. All about balancing a person’s rights with the rights of others.

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

* Usually brought by public official on behalf of the public.
* Can be brought by private individual if interest is above and beyond that of the general public; affected in a different way.
* Compliance with zoning does not preclude.

**Private:** Unreasonable interference with another’s use and enjoyment of land.

* Claim between private citizens
* Cannot sue seller for conditions on your own land
* Usually cannot get damages based on lowered property value
* Must be substantial and unreasonable interference. Should we just look at utility, or should we balance utility with P’s interests?

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

* Injunction
* Make D pay to continue
* Make P pay to stop (think coming to the nuisance)
* Payment of past and future damages

**DEFAMATION:** Communication that damages P’s reputation or perceived self-worth. Dignitary tort. Can’t bring after you’re dead. Elements: 1) defamatory, 2) of and concerning P, 3) published, and 4) damages.

* Two step test for defamatory: 1) Judge decides whether communication if capable of being defamatory, 2) jury decides how the words were understood by a right-thinking audience.
* Pleading requirements: 1) Actual event: defamatory words, 2) publication: heard or seen by a 3rd party who could understand it, 3) inducement: extrinsic facts supporting defamatory meaning, 4) colloquium: words were about P, 5) innuendo: allegation of particular defamatory meaning, 6) actual damages: natural, immediate, and legal consequence of the words.
* Opinions that seem to imply the sayer knows facts are enough.
* Disclaimer does not necessarily preclude, thought it may (e.g. Hustler).
* Best remedy is self-help!

**Slander:** Originally oral statements. Now more blurry. Typically smaller audiences and momentary harm.

* 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:** No SL. 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.

**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
* Recognized by most courts
* Can occasionally have 1st Am. Issues, but new can’t appropriate entire act, e.g.

**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
* Laundry list of 27 claims under the act
* 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

**COURTS V. LEGISLATURE:**

**Uniformity:** The Legislatures better suited to create uniformity among the states. But, is uniformity in our best interest? States have different concerns. Idaho-agriculture/NY-bus. Although states could adopt only portions.

**Big Picture v. Fact Specific Decisions:**

* Courts are better able to handle nuances of the law that legislators may miss; incremental change can reduce unintended consequences; often have to fix problems with legislative enactments anyway.
* If the problem was started by the CL, the courts should fell free to repeal or change it. But, drastic changes made by high courts will leave a huge array of questions at the lower court levels and getting these answered by the high court could take years, when leg could solve problem.
* Courts become consumed with spec facts of case; while leg can take a more comprehensive view. Legislatures have advisors and special hearings with different incentives and valuable input of prospective application.

**Bias:** The legislature may have bias b/c of political pressures from outside sources.

**Historical Precedent:** It has been a certain way for so long, it may take leg intervention to make a change.

**Legislature:** Dram Shop Laws/DTPA/Doctor-Patient/Damages/Wrongful Death

**Policy Questions:** 1) Explain interest at stake; 2) Discuss the liability basis; 3) Policy Consideration for abrogating/not abrogating; 4) Conclusion.

**Negligence:** **1) PF case; 2) Duty (4 ways) to establish; 3) ways that apply here; 4) breach; 5) causation in fact; 6) legal causation; 7) damages; 8) defenses**

**1)** To make out a claim for negligence P bears the burdens of pleading, production, and persuasion in showing …

**3)** **a)** For P to recover under an **express legislative enactment** …

**b)** Court sometimes adopt a standard from a **non-express legislative provision** when … 3 different approaches to the effects of this … The majority is negligence per se …

**c)** A **rule of law** is … it has the benefits of … but the detriments of …

**d)** If duty is not established otherwise, a **reasonable person** standard is applied. This is an objective standard of what an ordinary, reasonably prudent person would have done in the same circumstances. It hinges on foreseeability of injury and balancing of factors including likelihood of harm, magnitude of harm, burden of making an activity safe, utility of activity, and availability of reasonable alternatives. Here …

**4)** Breach

**5)** Causation in fact is essentially a but/for test … Here …

**6)** Legal/proximate causation is a limiting device on cause in fact. It determines when, even after cause in fact has been established, liability should be cut off. There are three approaches to proximate cause … The majority view is foreseeability … Here …

**7)** P has the burden of showing actual damages. General damages (e.g. pain and suffering, mental anguish, etc.) alone will not be sufficient. Here …