Torts I
Fall 2014
Wypadki

(including regular wypadki and condensed casebook)

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Torts I, Eric E. Johnson
Fall 2014
University of North Dakota School of Law

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1. 01.01 Neglience in General

Tort claim in general

In any tort claim, (P) has the burden of proof to establish all the elements, and if the (P) established all the elements (P) made out a prima facie case.

(D) can win a case in 3 ways:

1. The (P) failure to establish the prima facie case by preponderance of evidence
2. Rebuttal defense, the (D) offer evidence to disprove just one element of (P)'s prima facie case.
3. Affirmative defense or assumption of risk, the (D) actually stipulate the (P)'s prima facie case, but offer evidence such as self-defense, consent, or insanity to defeat the (P)'s case.

Tie-breaker:

1. If the question is whether the (P) established a prima facie case, then any tie will go to the (D).
2. If the question is whether the (D) etablished an affirmative defense, then any tie will go to the (P).

Negligence: Prima Facie Elements

Generally - (D) may be held liable for his unintentional conduct to (P) for negligence if it can be determined that the (D) owed a duty to the (P), the (D) breached that duty, and the (P) suffered damages which were the actual and proximate cause by (D)'s breach.

Elements: Five elements to establish prima facie case

1. Duty: A duty is an obligation imposed by law requiring one party to conform to a particular standard of conduct toward another. Duty is a question of law meaning the judge will decide whether the duty owed to (P)

- The duty must be reasonable under the circumstances.
- A general duty of care id owed to all foreseeable (P)
- Rescuers - If the (D) negligently put himself or the third person in a peril. "Danger invites rescue"
- No affirmative duty to act - people do not have a duty to help or rescue or help someone. There are 3 exceptions:
  - 1) common carries to passengers, innkeepers to guests, shopkeepers to customers, landlord to tenants, schools to student, employer to employee, jailer to prisoner, daycare provider, to children or adults being cared for, possessor of public land open to the public, to members of the public lawfully present, and those who solicit and gather public for their own profit OWE a duty to aid.
  - 2) Anyone created a hazardous environment, he has the duty to help.
  - 3) medical professional are exempt from liability for ordinary, but not gross negligence acting to, help someone.
- If no duty, there is no liability

2. Breach of Duty: failure to meet the standard of care. Were you in fact careless?

- **Reasonable Person:** the care that would be exercised under the circumstance.

- **Objective test** - 1) Mental deficiencies and inexperience not taken into account. 2) Physical disabilities and limitations are taken into account.
- **Professionals** - Professionals will not be compared to a reasonable person standard, they will be compared to that professional standard of care.
  - General Practioner: A general practioner's knowledge, skills, and custom will be compared to other general practioner's in that "Community."
  - Specialist: will be compared to the other specialists across the "Nation."
- **Children**: will not apply the "reasonable person" standard. Age (under 4 do not have the capacity to be negligent), education, intelligence, and experience are taken to account. There is an exception: if a child will be engaged in an adult activities, like shooting gun, or in one case playing golf.
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3. Cause-in-fact(Actual Causation): Plaintiff's harm caused by Defendant's breach of duty. The cause-and-effect relationship between the (D) carelessness and the (P)'s damages or injury. In another word, (D)'s conduct = (P)'s injury or damages. Did your act actually cause the damages? ("But-For Test," Substantial Factor Test). "But for the (D)'s conduct, the (P) would not have been injured."

4. Proximate Cause: no reason to relieve Defendant of liability. Is there a close enough causation between your acts and the damages? (Foreseeability Test, Eggshell Plaintiff Rule, Strict Liability).

5. Existence of an Injury or damages: bodily injury to (P) himself or damages (P)'s property. Need real damages.

- Plaintiff must establish each of the following elements by a preponderance of the evidence (>50%, 50.00001%)

Georgetown v. Wheeler - Negligence case was established A mal-practice case. The (D) who is a "specialist" breach his duties to detect the problem. The (P) was found "comparative negligence" because the (P) failed to followup with the doctor's advice.

- 1) The (D) as a "specialist" doctor owed a duty of care to (P), and 2) (D) breached his duty because he did not properly diagnosed the (P)'s health problems since the specialist standard of care is compared to other specialists across the nation, and 3) (D)'s breach was the actual cause of the (P)'s injury because "But for" the (D)'s breach to properly diagnose the (P)'s problem, the (P) would not have been injured, and 4) the (D)'s breach of duty of care was the proximare cause because it was forseeable that the extent of the (P)'s injury was caused by the (D)'s breach of duty, and 5) the (P) suffered bodily injury.
- Comparative Negligence: is a defense for (D). when the (P)'s own negligence partly contributed to (P)'s injury. Therefore, the (D) is not liable for the full amount of the (P)'s damages.

Cases for Duty Element

1. **Weirum v. RKO** – Negligence case was established
   - Radio station contest killed motorist
   - Negligent driving of listeners was deemed foreseeable
   - If one's actions creates an undue risk of harm, then liable for any actions taken by third parties resulting from that risk of harm
2. **Kubert v. Colonna** - No Negligence. No duty
   - Remote texter (D), who was not aware that her friend was texting while driving, had no duty toward the (P) because of the injuries that (D)'s friend caused it.
3. **Boyd v. Racine CurrencyExchange -**No negligence case becaue (D) as a shopowner had no duty to protect its customer.

- Bank robber shoots customer
- Invitee status (high SOC) does not apply b/c the incident didn't occur b/c of a condition of the place, but b/c of something that occurred at the place
- Duty didn't include complying w/ robber's demands

4. **Yania v. Bigan** – No negligence. No duty to rescue
- persuaded to jump into water-filled trench, then drowns
- (D) wasn't liable for failing to rescue, even though (D) conduct led to harm.

5. **Theobald v. Dolcimascola** – No negligence, No affirmative duty to rescue
- teenager plays w/ gun in presence of friends (Russian roulette)
- No duty to rescue if Δs are merely bystanders/observers to decedent's dangerous actions
- Distinction b/t moral and legal obligation
- (Exception: if Δs had placed friend in peril and he was injured due to that peril, then they'd be liable)

6. **South v. Amtrak** – Negligence case was etablished
- engineer refused to assist injured motorist
- Duty to aid is owed to π where Δ knows or has reason to know that own conduct has caused harm to another
- Must exercise reasonable care to prevent further harm

7. **Tarasoff v. U.C. Regents -** Negligence case because the doctor (D) was aware of his patient mental stage.
- doctors were aware of possible killing that eventually occurred
- Was w/in psychologist's authority to do something to prevent the harm; obligation to use reasonable care to protect potential victim from harm
- When the avoidance of foreseeable harm requires Δ to control the conduct of another (or to warn of such danger), common law imposes liability (but only if Δ bears a special relationship to the dangerous person or potential victim – satisfied in this case: doctor/patient)

Cases for Breach of Duty Element

1. **Rogers v. Retrum** – No negligence because (P)'s injury was not a result within an unreasonable risk created by (D)
- teacher gives student a failing grade; friend crashes car
- There was a duty – a student car accident is foreseeable risk to school's open campus policy
- No breach of duty – school was not unreasonable; superseding cause

2. **Vaughan v. Menlove** – Negligence case was established because a reasonable person knows that stacking wet hays next to (P)'s cottage will cause fire.
- Δ liable b/c held to objective standard of reasonableness
- Duty to deal w/ property so not to damage property of others
- Must use care a prudent person would take under the circumstances,
- A person's subjective considerations are immaterial

3. **Breunig v. American Family Insurance** - The negligence cae was established because the (D)'s mental disability, instanty, will not be taken into account because the mental abberations were no constant, and the (D) had prior knowlege of her condition. Therefore, (D) breached her duty to exercise the reasonable person standard of care under the circumstance to avoid the accident.

4. **Gorris v. Scott –** Negligence per se was not satified because the statute was not designed to cover the harm to (P)'s animals
- sheep overboard
- Can't use particular statute b/c it was enacted for a different purpose (to prevent transmission of disease, not to prevent animals from drowning)
- Can't show breach of duty

5. **Martin v. Herzog -** Negligence per se case was not satisfied because the (P)'s own violation of the statute barred them to recover in a contributory negligence jurisdiction.

6. **The T.J. Hooper** –Negligence case was established because the whole industry custom was "unreasonable"
- tugboats didn't have radios, no knowledge of weather
- The law should not be bound by what is customary; customs don't prove reasonableness

7. **U.S. v. Carroll Towing Co.** – Negligence case was established by applying the BPL analysis because the burden to avoid the harm by having an attendant on the barge was less than loss the (P) suffered.
   - unattended barge broke away and caused damage
   - Calculus of negligence (Hand Test)– Loss vs. benefit (utility of keeping condition vs. costs of preventing harm)
8. **Byrne v. Boadle -** Negligence case was established by applying the Res ipsa loquitur doctrine. Flour barrel falls from shop window on top of the (P) and injured him.
9. **Flower v. Seaton** - The (P) established the negligence case by applying the Res Ipsa Loquitor doctrine because (P) daughter's injury does not normally occur in nursery schools if the children are properly supervised.
10. **Campbell v. Weathers** - Negligence case was established because the (P), as an invitee though (P) did not purchased anything, was injured at the (D)'s business, and the (D) failed to notify the (P) of the trap.

Cases for Actual Causation Element

Ybarra v. Spangard – π was unconsciously injured, any doctor/nurse could've been responsible
– Several instrumentalities; all in a position to know who was solely responsible
– Res ipsa loquitur can be applied to create group liability b/c all those involved are potentially liable for the wrongful actions

Byrne v. Boadle – flour barrel falls from shop window
– Res ipsa loquitur
– More than just the happening of an accident is required for π to prove Δs breach of duty
- The harm-causing event has to be tied to Δ, and the event must be one that generally doesn't occur absent negligence
– Nature of accident proved breach of reasonable care
– Burden of proof shifted to Δ to prove that duty wasn't breached

Beswick v. CareStat – ambulance was inappropriately dispatched
– Loss of a chance to survive (there may have been a chance of survival if ambulance would've arrived on time/earlier)
– Reliance interest being protected – rescuers generate an expectation among individuals who turn to them
– A person who undertakes to render services to another which are recognized as necessary for the protection of the other person is subject to liability for physical harm resulting from failure to exercise reasonable care to perform undertaking if failure to exercise such care increases risk of harm

Anderson v. Cryovac – water contamination leads to illness and death of city residents

Kingston v. Chicago and Northwestern Railway – fires unite
– Multiple sufficient causes – when there are multiple causes, where each factor is of sufficient magnitude to cause the injury but neither is a sole 'but for' cause, all parties are liable

Summers v. Tice – quail hunters

– When at multiple actors are equally negligent/act independently of each other to cause injury to π and π is unable to establish which Δ caused the specific injury (not due to π lack of diligence), then there's a presumption that both are responsible until

one can show that the other is solely responsible (Δs have burden to prove) – both Δs are jointly and severally liable

– π had the obligation to establish that both Δs had breached a duty of care
- π is then compensated due to Δs behavioral (not casual) responsibility for the accident
– 'But for' test doesn't apply b/c there's a 50% chance either Δ caused the injury
- Has to be 'more likely than not' that each Δ is a 'but for' cause for preponderance of the evidence – in this case, there's not – hunters can say that it's 'just as likely' not 'more than likely'

Palsgraf v. Long Island RR – package fell while loading moving train, exploded, object hits π

– πs injury not a foreseeable risk, so no breach of duty b/c only a duty to guard against foreseeable risks

– π must prove that conduct was a wrong to the π, not anyone else

– There are different conceptions of tort law
- Cardozo: Tort law is about remedying wrongs b/t particular individuals in a certain relationship w/ each other (wrongdoers owe duties of repair to persons that they wrong and only those persons –π isn't owed a duty; negligence isn't actionable unless it involves the invasion of a legally protected interest, the violation of a right (specifically a violation of πs right); π must've suffered a wrong at the hands of π, not enough that π committed a general/societal wrong
- Andrews: Tort law is valuable b/c it regulates risks and compensates accident victims; case should be analyzed by proximate cause, duty is irrelevant

Ryan v. New York Central RR – train caused spark and set shed on fire which then burned house
– Natural and ordinary doctrine – "one leap" away consequences should be looked for, not necessarily all injuries that could ever occur
– Δ not liable b/c more than one leap away
– Damages weren't immediate, they were too remote (π can't recover)

Hulsey v. Elsinore Parachute Center –

Hiett v. Lake Barcroft Community Association –

Sawyer v. St. Joseph's Hospital –

Campbell v. Pitt County Memorial Hospital – baby born w/ condition due to hospital's choice of delivery
– Doctor held to local standard and acted against custom

01.02 The Duty Element

***Subpart A: The Duty*Element - is the question of law not jury**

1. **Did the (D) create foreseeable risk of harm to the (P)?**
2. **"Foreseebility of the risk" is the primary consideration in establishing the duty of element**

3. **You(D) have a duty to be careful to all foreseeable Plaintiff(s) and to Foreseeable Rescuer(s)**
4. **Plaintiff has the burden of Proof to show that defendant's negligence created foreseeable risks of harm to persons in her position**

-

- **General duty - A general duty of care is owed to all foreseeable plaintiffs**
- **Specific Situations**

-
-

- **Rescuers - A rescuer is a foreseeable plaintiff where the defendant negligently put the self or a third person in peril. "Danger invites rescue**

Basics

1. If the harm was a foreseeable result – act is negligent
2. Was the Defendant negligent at all – unreasonably risked harming someone or some thing
3. Whether harm to a particular Defendant (class) was a foreseeable result of negligence
1. All-risks-considered whether the Plaintiff was negligent
2. Nature of the relation between Defendant's negligence and what actually happened to Plaintiff

Following Cases are about the DUTY element:

1. **Weirum v. RKO** - Radio show contest. Negligence case was established because it was foreseeable that (D)'s contest would the (D)'s listener to race and drive negligently and cause harm to (P)

- The remote (P) sued the (D) because (P)'s husband was killed by the (D)'s listener. (D) conducted a contest where listener had to find a mobile DJ. (D)'s listener attempted to follow and negligently forced another car off road and killed (P)'s husband.
- 1) Duty: The (D) is owed the duty because it was foreseeable that by conducting the contest, the (D)'s listeners would race and drive negligently and disregard the demands of the highway safety to arrive first at the announced location to collect the prize, and 2) the (D)'s breached its duty because it such contest deemed to unreasonable because the gravity and likelihood of the danger outweigh the utility of the conduct. 3) The (D)'s contest was the actual cause of the (P)'s injury because "But for" the (D)'s contest the listener would not have raced and drove negligently. 4) The (D)'s contest was the proximate cause because the extent of the (P)'s injury and the (D)'s conduct was foreseeable. 5) the (P)'s husband was killed.
- **If one's affirmative act creates an undue risk of harm, is he liable for any actions taken by third parties resulting from that risk of harm?**
- Yes. Station created unreasonable risk of harm and intervening act of 3rd party was irrelevant because this was foreseeable.
- **McCollum v. CBS** - In contrast to *Weirum v. RKO,* No negilgence because the duty element was not satisfied.
- The (P)'s son killed himself with a gun after listening to Ozzy Osbourne song, "Suicide Solution." The court held that the accident was not foreseeable because artists cannot limit and restrict their creativity and speech which may adversely effect an individual emotionally.

2. **Kubert v. Colonna** - No negligence because the (D), a remote textor, was not aware her friend is texting while driving.

- The court held, if the sender of a text knows or should have known the recipient of the text would view the text while driving and thus be distracted, then the sender is liable if an accident caused by texting.

- 1) No duty to (P) because the (D) was unaware that her friend was texting while driving, therefore, it was not foreseeable that the (D)'s text could injure the (P) , 2) Since the (D) had no duty, she did breached her duty, 3) Actual cause is satisfied because but for the (D)'s text the driver would not caused the accident and the (P)'s injury would not have happened. 4) Proximate cause is not satisfied because it is not foreseeable that (D)'s text would cause the injury to (P). 5) (P) suffered injury.

3. **Boyd v. Racine** - No negligence because the (D), a shop owner had no duty toward its customer.

0. BAD case to illustrate the duty element. [in fact the (D) as a owner of the business who solicit and gather public for its own benefit owed a duty to aid the (P)'s husband.]

- (P)'s husband was killed in (D)'s shop by an armed robber.

4. **Yania v. Bigan** - No negligence because the (D) had no affirmative duty to rescue (P)

- 1) No duty to rescue his friend because the (P) voluntary placed himself in the way of danger, and the mere fact that (D) saw (P) in a position of peril, the law imposed no legal duty upon (D) to rescue the (P). 2) Since the (D) had no duty, (D) did not breach his duty. 3) Actual causation is satisfied because but for the (D)’s asking for help, the (P) would have not been injured. 4) Proximate causation is satisfied because it was foreseeable when the (D) asked the (P) to aid him in starting the jump at (D)’s home, an injury could occur, 5) the (P) was drowned.

5. **Theobald v. Dolcimascola** - No negligence because (D) had no affirmative duty to rescue (P)

- (D)s were invited to (P) house, and (D)s witnessed the (P)'s son killed himself playing Russian Roulette.

6. **South v. Amtrak** - Negligence because the (D) had an affirmative duty to rescue the (P) in a situation that the peril was created by (D)'s conduct.

- When the (D) knows or should have known that his conduct, innocent or tortious, caused the (P) harm, the (D) has affirmative duty to render assistance to prevent further harm.
- 1) The (D) had an affirmative duty to help the (P) when (D)'s conduct caused the (P)'s harm, and 2) (D) breached his duty when he refuse to help (P), 3) actual causation is satisfied because but for the (D)'s breach of duty to help the (P), the (P)'s injury would not occurred, 4) the proximate causation is satisfied because it was foreseeable the (D)'s refusal to help the (P) would cause the injury, 5) the plaintiff suffered bodily injury.

7. **Tarasoff v. Regents of U.C -** Negligence case because (D) as a doctor had to excercise a reasonable person standard of care under the circumstance to warn the (P) that the (D)'s patient was planning to kill him.

- (D) was a psychiatrists, a specialist, had a pantient that informed the (D) he plans to kill the (P)'s daughter.
- (D) warned the authorities, but the court found that was enough because the law impose a duty on the therapist (D) to excercise a reasonable degree of knowledge and skill to detect and determine if the patient poses serious danger of violence to others, and when the (D) determined that, the (D) bears a duty to excercise reasonable care under the circumstance to protect the foreseeable victim of that danger.

Affirmative Duties(A Defendant has no affirmative duty to act unless: 1. You assume the duty by acting (Exception: Good Samaritan statutes exempting medical professionals from liability for ordinary, but not gross, negligence in voluntarily acting to help someone) 2. Put Plaintiff in peril, and/ or 3. A common carrier (those who solicit and gather the public for their own profit owe a duty to aid patrons)

There is no general affirmative duty to act (Nonfeasance)

- Misfeasance/Feasance – If a person is by circumstances placed in a position where if he did not use ordinary care and skill in his own conduct, he would cause danger of injury to another person or property, a duty arises to use ordinary care and skill to avoid such danger. – Active Misconduct or Risk Creating Omission = Duty
- Nonfeasance – when the defendant has failed to aid plaintiff through beneficial intervention. - - Liability for nonfeasance is largely limited to those circumstances in which some special relationship can be established. – Passive Inaction = No Duty (usually). In some instances(exceptions), however, courts will impose liability for nonfeasance.

- **Example (Nonfeasance):** *Osterlind v. Hill* - Defendant canoe renter had no duty to rescue his drunk lessee from drowning. (No special relationship found).
-
  - *Theobald v. Dolcimascola* - Defendant friends/party guests are under no duty to prevent the son from playing russian roulette.
- Exceptions:
-
  - Assumption of duty by acting (start helping someone)
  -
    - Once you undertake an attempt to rescue, the rescue has to be done reasonably (have a duty).
    -
    - **Reliance**: courts have found a duty where the defendant caused the plaintiff to rely on promised aid.
    - Exception: good samaritan statutes exempting medical professionals from liability for ordinary, but not gross, negligence in voluntarily acting to help someone
  - Peril caused by Defendant's conduct - Defendant has a duty to assist someone in peril because of the defendant's actions (especially negligent actions)
  -
    - Duty to Aid Another Harmed by Actor's Conduct
    - If person knows or has reason to know that by his conduct he has caused bodily harm to another to make him helpless and in danger of further harm, the person is under a duty to exercise reasonable care to prevent further harm.
    - ***Example: South v. Amtrak*** **-** Plaintiff's view was obstructed while driving & collided with train. Court held that duty is owed to Plaintiff where Defendant knows or has reason to know his conduct, whether innocent or tortuous, has caused harm to another - has affirmative duty to render assistance to prevent further harm.
    - Not all jurisdictions are so strict, but the trend is moving that way. Previously, only negligent actions created a duty to aid.
  - Common carriers, innkeepers, shopkeepers (duty is justified by *special relationships* between the parties)
  -
    - Those who solicit and gather the public for their own profit owe a duty to aid patrons
    -
    - Ex.-If someone has a heart attack at Target, Target needs to help...But, you need to be in or on their property
    - *Example: Boyd v. Racine Currency Exchange* - Patron in bank was shot by robber after teller refused to give the robber money. Court held the duty did not include complying with the robbers demands.
  - Public Duty Doctrine: a government actor performing improperly is not usually liable to individuals harmed by the misperformance, because any duty owed is limited to the public at large rather than to any specific individual.

- Police Duty: Police departments are typically not liable for failing to protect individual citizens. (Reasoning = Limited Resources). Most courts have limited a finding of duty to situations where the defendant police undertook to act and created reliance, enlisted the aid of the plaintiff, or increased the risk of harm to the plaintiff.
- Duty to Inform of Threats to Another
-
  - **Tarasoff** - parents of slain college student sued campus police, two doctors, and University for not warning daughter about a patient's desire to harm her.
  - one person owed no duty to control conduct of another nor to warn those endangered by such conduct. However, the exception is when defendant stands in some special relationship to either the person whose conduct needs to be controlled or in a relationship to the foreseeable victim of that conduct. In this case, defendant therapists relationship to plaintiff daughter **or** the killer suffices to establish a duty of care.
  -
  - Restatement 2d Torts: duty of care may arise from either
  -
  - Special relation…btwn actor & 3rd person which imposes a duty upon the actor to control 3rd person's conduct
  - Special relation…btwn actor and the other which gives to the other a right of protection

2. 01.03 The Breach Element

Subpart B: The Breach Element- issue for the jury or the judge to resolve it.

- Breach element can be established by:

1. **Objective Standard:**
1. **Reasonable person standard**
   - Roger v. Retrum - (P) did not establish the breach (P)'s injury did not reasult from an unreasonable risk.
   - Vaughan v. Menlove - Plaintiff established the breach element because of the reasonable person standard of care
2. **Mental Disability will not taken to account.**
   - Breunig v. American Family Insurance - (D)'s mental disability was not taken to account, therefore (P) established the breach element.
2. **Professional standard of care like for mal practice cases**
3. **Bailmont**
4. **Owner or occupier**
   - If it is a condition on the land, use: Trespass, licensee, and Invitee
   - If it is an activity on the land, use: Reasonable person standard of care
5. **Negligence Per se** - violation of a statute or regulation caused the (P)'s injury, and there are two steps that must be met:
0. Class of person - did the statute was designed to protect this class of person?
1. Class of risk - did the statute was designed to protect this risk?
   - Gorris v. Scott - (P) did did not establish the breach element because the statute was not designed to prevent the harm to (P)'s animal
   - Martin v. Hezog - (P) did not establish the breach element because (P)'s was contributory negligence by violating the statute, therefore, the (P) is barred to recovery.
6. **BLP Analysis -** If B < PL, the breach element is satisfied.

   - U.S. v. Carroll Towing
7. **Custom -** custom is not dispositive because the whole custom may be "Unreasonable"
   - TJ Hooper -
8. **Res Ipsa Liqutor -** things speak for itself

   - Brune v. Boadle

Circumstantial evidence in a slip and fall case: old dirty banana peel (it has been on the ground a while and the train platform operator should have picked it up but failed to do so in a reasonable amount of time)

The risk causing activity of the defendant must be unreasonable.

Did the (D) act within a standard of reasonable care?

1. **General Standard -** Reasonable person standard is an objective standard. Ordinary people are subjective.
   - The care that would be exercised by a reasonable person under circumstances. Looking in the rear-view mirror before backing up
   - **Objective Standard:**
   - Mental deficiencies and inexperience will not taken into account
   - If the (D) had a superiour knowledge or skill then the (P) can those to argue for the breach element.
   - physical disabilities and limitations will be taken to account.
   - Acting in a good faith or tried the best is not an objective standard.
2. **Specific Standard:**

- **Professionals** - lawyers, doctors, nurses will not be compared to a reasonable standard test. Those professional will be compared to the reasonable care standard in that particular profession. There are two exceptions to general practitioner v. specialist
- General Practitioner's knowledge, skill, and custom of practice will be compared to other general practitioners in the "Local" community.
- Specialist's knowledge, skill, and custom of practice will be compared to other specialists across the "nation"
- **Children**: The children will not be compared to a "reasonable person" standard.
- Factors to consider are child's age, education, intelligence and experience
- Children under 4 generally do not have the capacity to be negligent
- The only exception to children standard is when a child is engaged in an adult activity, therefore, the child will be compared to adult standard of care for the activity.
-
- There was a case when a child fired a shut gun did not, the court did not apply the adult, or reasonable person standard of care, and the court applied the "child" standard of care
- There was another case the court find a 11-year child playing golf was engaged in adult activity.
- **Bailment -**caretaker of a chattel
- **Bailo**r - Lender
- Gratuitous bailment - Must inform of known, dangerous defects in chattel
- Bailment for hire - Must inform of known and reasonably discoverable defects in the chattel
- **Bailee**- Borrower
- Sole benefit of bailor - Low standard
- **Ex. The bailor asks his neighbor, the bailee, to take in the bailor's mail while the Bailor is gone on vacation, the bailee is only liable for being grossly negligence.**
- Mutual benefit of bailor and bailee - Ordinary care standard
- Sole benefit of bailee - High standard of care
- **Ex. The Bailor loans a lawnmower to the Bailee, for the sole benfit of the bailee. The bailee is liable if the bailee is slightly negligent with the lawnmower**
- **Owner/Occupier of Land:**
- **Conditions:**
- Trespassers -
- Undiscovered - No Duty
- Discovered or anticipated - Duty to warn or make safe concealed artificial conditions, known to the owner/occupier, involving risk of death or serious bodily injury.
- The remedy can: obviate the condition or create an effective warning such as posted signs
- Discovered Child Trespassers - "attractive nuisance doctrine" duty to avoid foreseeable risk to children caused by artificial condition, if:
- The owner or the occupier knows or should have known about the dangerous artificial condition
- The owner or the occupier knows or should have known that children come the area frequently
- The artificial condition is dangerous to children
- The remedy can be: remediate a dangerous artificial condition on the land capable of causing death or serious bodily injury, so long as the conition can be remied without imposing an unreasonable burden on the occupier/owner.
- Cost/ benefit analysis: the expense of remedying the artificial condition is slight compared to magnitude of risk, then the owner will be held liable.
- Licensees - persons who enter the land with permission for their own benefit, rather than the benefit of the owner/occupier, including friends, visitor, and contractors coming on the premise to make sales or repairs.
- The owner or the occupier has a duty to warn or make safe of any known, concealed dangerous condition whether it is natural or artificial
- The owner or the occupier has no duty to inspect the premise
- Invitees - Persons entering the land with permission from the owner/occupier's business or as a member of public on the land that is open to public.
- In some jurisdiction, public employees like firefighter, mail carrires to be invitee even in private homes, as long as they are privileged to be there.
- Invitees are owed the highest duty by the landowner/occupier.

- Duty to adequately warn or render safe concealed hazards plus to make a diligent effort to inspect for unknown dangers.

o **Activity:**

- Everybody - Reasonable person standard of care

o **Statutory Standard -** Negligence Per Se

o When applicable, statute's specific standard replaces the general negligence, reasonable person standard

o The violation of the statute must caused the injury

o The test is: class of person/class of risk

- The (P) is in the class of person the statute was designed to protect
- The harm suffered is among the risk that the statute was designed to protect against.

o **Negligence *Per Se* used by (P)** - when a (P) uses per se for prove the breach element, the (P) uses a violation of a statute or regulation to prove the breach element. Using a violation of a statute, negligence per se, is a free pass to prove the breach element. Even there is a violation of the statute by the (D), it does not grantee the (P) has satisfied the breach element. There is a two steps process the (P) must show: 1) (P) must show that he is in the class of person the statute was designed to protect, and 2) (P)'s harm is among the risk the statute was designed to protect. If the (P) satisfied both of the steps, then the (P) does not need to make argument about the reasonable person standard.

- If the (P) cannot satisfy the negligence per se, for example, (P) can satisfy only one step for the negligence per se requirements, it does not mean the (P) cannot establish the breach element. It means the (P) cannot use the violation of the statute, and (P) must use the reasonable person standard.

o **Negligence Per Se used by (D)** - It is a defense for the (D). When a (P) violated a statute or regulation, and (P)'s is party or completely is the blame for his own injury.

o

- Ex: if the (D) caused the accident, but (P)'s over the speed limit was partly a fault of his own injury, then the (D) can use the statute or regulation that (P)'s excess speed contributed to his injury.
- Negligence per se can be use for contributory/comparative negligence.
- Negligence Per Se for Contributory Negligence - It is used in minority of jurisdictions, and contributory negligence is (D) friendly. Under this view, if the (P)'s own negligence for not complying with the statute contributed even slightly to his own injury, then (D) is not liable at all.
- Negligence Per Se for Comparative Negligence - it is used in majority of jurisdictions, and comparative negligence is (P) friendly. Under this view, if the (P)'s own negligence for not complying with the statute partly contributed to his own injury, then (P) will not recover the full amount for his injury.
- **Excuse for Complying with a Statute or Regulation** - Courts may excuse failure to comply with a statute or regulation only if the person who failed to comply 1) used the reasonable care, 2) acted in a good faith, and 3) complying with the statute would be more dangerous than violating the statute under the circumstances.
- **Complying with Statutes or Regulation as a Defense** - The question is, since (P) can use the violation of the statute to establish the breach element under the negligence-per-se, can the (D) used complying with a statute to show that there was no breach?
- (D) may use the complying with the statute or regulation as a defense, but (D) must also show the reasonable person standard of care. In another word, only complying with statutes or regulations as a defense is not a complete argument, and the (D) must be able to show the reasonable person standard of care under the circumstances.

3. **Special case -** Res Ipsa Loquitor: Things speak for itself.

o the very occurrence of an event may rebuttably establish negligence if:

o The accident is of the type that would not normally occur absent negligence

o The instrumentalities of the accident were in the (D)'s sole control.

4. **Custom or Standard Practices -** Custom cannot usurp the reasonable person standard of care under the circumstances because the whole custom may turn out to be unreasonable.
5. **BPL Analysis or Hand Formula** - it is known as the "cost-benefit" analysis, and it is has been embraced by law-and economic scholars. A party breached its duty of care when the **B**urden to take precaution to avoid the harm is less than the total amount of risk which is **P**robability of the kind of accident times the gravity of **L**oss occurred

- If B < PL, then the breach element is satisfied because the (D)'s burden is lower than the total amount of risk to avoid the harm.
- If B ≥ PL, then the breach element is not established because the (D)'s burden is equal or higher than the total amount of risk to avoid the harm.
- **P** x **L** = the total amount of risk.
- **B** and **L** must be in the same unit.
- **B =** Burden, and it is measured in dollars or other unit in comparison like Euros, Pound. How much money the (D) must spend to avoid the loss.
- **L =** Loss, and it is measured in dollars or other unit in comparison like Euros, Pound. How much the (P) stand to lose if the preventable accident comes to pass.
- **P =** Probability and is measured between 0...1. Probability is measured as fraction, the likelihood that the preventable accident comes to pass.

6. **Res Ipsa Loquitor** - Things speak for itself

- (P) prevail when there is a lack of specific evidence showing a breach of the duty of care.
- There are two requirements: 1) the accident was likely negligence, and 2) the likely the conduct of the (D).
- More than just the happening of an accident is required for (P) to prove (D)'s breach of duty
- The harm-causing event has to be tied to (D), and the event must be one that generally doesn't occur absent negligence
- Nature of accident proved breach of reasonable care
- If the (P) convinces the court that the Res Ipsa Loquitor sould be allowed, jurisdictions have two different views:
- In some, jury is permitted but not required to draw inferences that the (D) breached the duty of care.
- In some other, the burden shit to (D) who can rebut the presumption of breach with specific evidence.

Characteristics of a Reasonable Person

- Jury must compare the conduct of the Defendant to that of a reasonable person under the circumstances.
- Represents community norms
- Ignorance is irrelevant, must rise to level of community one is in
- The reasonable person is expected to be aware of well known hazards.
-
- Example: fire, loaded firearms, etc.
- The reasonable person is not infallible, should possess weaknesses of others in the community
- Can be held liable for not seeing that which should have reasonably been noticed
-
- Example: Should know when tire is worn, it needs repair because could potentially harm others if continue to drive on it

Cases For Breach Element

1. **Rogers v. Retrum** - No negligence because the (D) did not breach his duty because the (P)'s injury did not result from an unreasonable risk.
    - The school had a open campus policy, and the (P) and his friend left school. (P)'s friend was driving over the speed limit when he got into an accident.
    - 1) (D) had the duty toward the (P) becuase of the school-student relationship, 2) (D) did not breach because th (P)'s injury was not a result within an unreasonable risk createdd by (D), 3) The actual causation is satisfied because but for the open campus policy, the (P) would not be injured. 4) The proximate cause is not satified in this case because the extent of the harm the (P) suffered due to accident was forseeable by (D)'s permission to leave the campus. 5) (P) suffered bodily injury.
2. **Vaughn v. Menlove** - Negligence case because the (D) breached a reasonable person would not stack wet hay near the (P)'s home.
    - The (D) is liable for the "rick" fire that burned down his neighbor's house when the reasonable person knows not to stack hay like he did, despite the defendant's action being according to his best judgment.

- The standard for negligence is to look whether one has acted as would a reasonably prudent person would have acted under the similar circumstances.
- weakness or inexperience will not be taken into account because those are subjective standard.

3. **Breunig v. American Family Insurance -** Negligence case because the (D)'s mental deficiencies will not taken into account.
   - (D) has knowledge of her mental condition, and she drove her car into (P)'s car and injured her.
   - Insanity is not a defense in tort case except for intentional torts.
4. **Gorris v. Scott -** No negligence case was established because the statute did not protect the animals from being washed overboard, the purpose of the statute was to protect the animals against spreading diseases.
   - The statute: Animals to be placed in separate pins to prevent the spread of disease.
   - First Q: did the statute protected the (P)'s animals? Yes
   - Second Q: Did the statute was designed to protect such injury to (P)'s animal? No
   - Therefore, No negligence per se.
   - Though the the (P) cannot use the negligence per se (the statute) to satisfy the breach element, the (P) may be able to establish the breach of duty element under the reasonable person standard of care.
5. **Martin v. Herzog** - The negligence case was established but the (P)s are liable for their own injury
   - (P)s was driving a buggy without using lights, and (P)'s husband was killed
   - there was a statute to protect travelers on the roads at night, and by violating the statute (P) is blamed for her husband's death.
   - This case is about contributory negligence which is used in minority of jurisdictions. Under contributory negligence view, if the (P)'s own negligence contributed even slightly to the (P)'s injury, the (D) is not liable at all. Contributory negligence is (D) friendly
   - In contrast, comparative negligence which is (P) friendly, which is used in the majority of jurisdictions. Under comparative negligence view, if the (P)'s own negligence contributed to his own injury (P) cannot recover the full amount of the injury.
   - Both contributory and comparative negligence are used as a defense by the (D).
6. **The T.J Hooper** - The negligence case was established though the (D) complied with the custom because the whole industry's custom was not reasonable under the circumstances.
   - (P)'s barges was towed by (D)'s tugboat, and the (P)'s barges were lost in a storm because (D)'s tugboat was not equipped with a radio.
   - Though the custom admiralty law did not require for (D) to install radio, but the court found if the (D) had radio installed in his tugboat, the (D) would have voided the storm because the radio would have announced the storm was in its way.
   - Another concept can be applied to this case that is the Hand formula analysis which is the (D) had breached its duty of care, when the burden (B) of installing the radio is less than (PL) the probability and the magnitude of the loss. Therefore, breach of duty is found If B <PL. The burden to installing the radio on the boat was lower than total risk of harm.
7. **U.S. v. Carrol Towing -** the (P) established the breach element by applying the BPL analysis because the burden to having an attendant aboard the barge was less than the total amount of the risk.
   - There was no custom or general rule to have an attendant on the barge. Therefore, the whole custom was unreasonable.
   - The court applied the BPL analysis to determine if the (D) is liable to damages.
   - Beside applying the BPL analysis, a reasonable person under the circumstances would have an attendant on the board because a reasonable person knows or should have known if the barge break free from the pier, the damages or the injury to (P)'s goods was greater than paying an attendant.
8. **Bryne v. Boadle** - the (P) established the negligence case by applying the Res Ipsa Loquitor doctrine because the the barrel of flour would not have dropped on top of the (P) for no reason if the owner of the flour warehouse (D) acted reasonably.

9. **Flower v. Seaton** - The (P) established the negligence case by applying the Res Ipsa Loquitor doctrine because (P) daughter's injury does not normally occur in nursery schools if the children are properly supervised.
   - (P)' daughter, a minor, was delivered healthy to the (D) business, a nursery school.
   - When the (P) picked the child up the (P) noticed she had crossed eye.
10. **Campbell v. Weathers** - Negligence case was established because the (P), as an invitee though (P) did not purchased anything, was injured at the (D)'s business, and the (D) failed to notify the (P) of the trap.
    - (P) had been the (D)'s customer for a number of years.
    - (D) never told the (P) the toilet was not for the public use.
11. **Rowland v. Christan -** Negligence case was established because the (D) breached her duty of care as the occupier of the land, where the (D) was aware of the defective faucet in her bathroom and failed to inform the (P), a licensee.
    - (P) was the (D)'s guest, and the (P) suffered injury from a defective facuet at the (D)'s bathroom, and the court found that (D) had a duty to warn the (P) about the dangerous condition.

Emergency

- An emergency is "an event that requires a decision within an extremely short duration and that is sufficiently unusual so that the actor cannot draw on a ready body of personal experience or general community knowledge as to which choice of conduct is best."
- Defendant is held to a standard of what a reasonable person would do under emergency circumstances
- This does not absolve from negligence liability but a jury may consider if the mistake is one that a reasonable person would make in a similar situation.
- Emergency doctrine unavailable where the defendant created the emergency situation.
- There are contexts where defendants can be liable for failing to anticipate an emergency situation.
-
  - Fire in a business or drowning in a pool.

Infirm Adults

- Physical infirmities are visible, measurable and verifiable and are taken into account in judging the reasonableness of behavior.
- Mental infirmities are not visible and hard to measure, therefore, defendant are responsible and liable for their torts.
-
  - See - **Breunig v. American Family Insurance Co.** (no exception to objective standard of care for a mental deficiency)
  -
    - π's truck struck by Defendant's car when Defendant was driving wrong way on hwy. Psychiatrist's testimony revealed Defendant believed God was steering the car.
    -
    - **Should an insane individual be held liable for negligence for actions occurring as a result of the sudden onset of a mental disorder?**
    -
    - Yes. Insanity is not a defense. If an individual had forewarning of the onset of a sudden mental disability then that individual can be held liable for his/her actions.
    -
    - However, when a mental disorder interferes with an individual's ability to understand and appreciate the duty to follow a standard of care or interferes with one's physical ability to do so, it may be enough to avoid liability from negligence. A person cannot be held responsible for an accident which she was incapable of avoiding.

3. Negligence Per Se(**are specific standard of care that is borrowed usually from statute or regulation, which sets the standard of care).**

- Negligence Per Se / Statutory Standard of Care
  - Statutory standard (negligence per se)
  -
    - When applicable, statute's specific standard replaces the general negligence standard
    - Test: class-of-persons/class-of-risk
    -
      - The plaintiff is in the class of persons the statute was designed to protect
      - The harm suffered is among the risks that the statute was designed to protect against
- Requirements for Statutory Standard to Apply -- "Class of persons, class of risk" test
-
  - Plaintiff must fall within the protected class.
  - Statute must protect against this kind of harm.
- **Example:** *Gorris v. Scott* - There was a statute that stated, " Animals to be placed in separate pins to prevent the spread of dieses." Defendant puts all of Plaintiff's animals in 1 pin. Then Plaintiffs animal washes away. Plaintff claims that defendant violated the statue therefore breached defendants duty of care. Plaintff lost and defendant wins. The object of the statute was not to prevent the animals from being washed overboard, but to protect them against spreading dieses.
- **Example:** *Martin v. Herzog* - the lamp on the buggy requirement applied to the plaintiff, and the requirement is to prevent traffic accidents, so the jury needed an instruction that the buggy driver's ommission is negligence per se
-
  - remeber this is just showing the breach of duty--the other elements of the negligence tort must be satisfied--P might not have been barred from recovery under contributory negligence because the jury does not find the lack of the lamp was a proximate cause.
- If statute applies there is negligence per se
-
  - but NOT necessarily liability since there might be no damages
- Violation of some statutes may be excused if:
-
  - Where compliance would caused more danger than violation.
  - Where compliance would be beyond defendant's control.
- Regulations are a big area to look to for negligence per se violations

4. The Role of Custom or Standard Practices

Custom Application

- Relevant because it reflects the thoughts of a large number of people.
- Dispositive because a large number of people could be wrong.
- It does not have to be universal to be considered a custom, it can be specific to a certain area, industry, group etc.
- A reason for admitting evidence of compliance with custom is to inform jury that if it finds a party negligent, it is actually finding that entire community or industry that follows that custom as negligent.
- Regardless of whether custom evidence is put in front of the jury, they will often have an idea of customs in their minds anyways.
- Custom is evidence for the jury to consider in its determination of breach of duty

Custom Rationale

- Evidence of non-compliance or compliance with custom is not only relevant but dispositive
- Compliance tends to prove reasonableness
- Non-compliance tends to prove negligence
- Evidence of industry custom as well as non-compliance aids in educating jurors of current custom and serves as a coordinating function.

5. Negligence Calculus

Learned Hand Calculus

- Liability depends upon whether Burden (B) is less than Loss (L) multiplied by Probability (P).
- P and L measure cost of taking risky action.
- B, measures the cost of reducing or avoiding the risk of harm.
- B is the cost (burden) of taking precautions, and P is the probability of loss (L). L is the gravity of loss. The product of P x L must be a greater amount than B to create a duty of due care for the defendant.

U.S. v. Carroll Towing- Learned Hand's BPL Formula; Unmanned barge sank. Court held that if the probability & gravity of loss is greater than the burden, then negligence. Defendant was liable because burden was less than the high probability multiplied by high potential loss

Economic View of Negligence Calculus

- Plaintiff generally tried to prove that there was a particular precaution that the defendent should have taken, and if the precaution should have been taken, plaintiff would not have been harmed.
- The economic theory of negligence will be used by parties that engage in risky actions to determine whether or not the risk is worth taking.

The Untaken Precaution

- A precaution that the defendant should have taken and chose not to. Had the defendant taken that precaution, the plaintiff would not have been harmed.

Modern View of Hand Formula

- There is not much use of hand formula today when it comes to real-world negligence. In reality, it is not always possible to assign numbers to components.
- However, hand formula has a lot of use when it comes to design defects in products liability because numbers can be pinned down.
- Note: that in analyzing hand formula problem, remember that numerical value can definitely be assigned to a human life. Examples: EPA values human life at $6.1M; DOT values human life at $3M.

Example

- **T.J. Hooper** - Whether or not something was the industry custom does not in and or itself answer the question of whether the owners breached a standard of care by not supplying their tug boats with radios. Just because it was not custom to carry radios does not mean it was not the standard of care to require them to carry radios. Custom does not dictate standard of care! (but relevant in determining standard of care). The court held that the tugs were unseaworthy (comparative to not reasonable in reasonable person standard) because they did not have receiving sets, even though such sets were not standard in the industry. (The court also said the barges were unseaworthy, but that wasn't important in regard to the custom question. Custom question involved whether radios on tugs were industry custom.)

6. Res Ipsa Loquitor(likely Defendant breached the duty of care. and likley Defendant undertook the careless conduct).

- **Res ipsa loquitor**-thing speaks for itself
- **Objective**: it permits a jury to infer that the plaintiff's injury was caused by the defendant's carelessness even when the P presents no evidence of particular acts or omissions on the part of the D that might constitute carelessness(common sense theory)
- Special type of circumstantial evidence establishing defendant acted unreasonably without any other inferences needed
- The very occurrence of an event may rebuttably establish negligence, if:
-
  - The accident is of the type that would not normally occur absent negligence
  - The instrumentalities of the accident were in defendant's sole control

Elements

- The accident would normally not occur absent negligence: the injury must be of a kind that ordinarily does not result absent carelessness of D
- The Defendant had exclusive control over the cause of the injury
- The Plaintiff did not contribute to the cause of the injury, nor did a 3rd party.

- **Example:** *Byrne v. Boadle* - Defendant's barrel rolled out from their warehouse and hit Plaintiff on the head. A barrel cannot roll out of a warehouse without the defendant being negligence and without Defendant breaching its' duty to be careful. This is a good example of the thing speaking for itself**.**

7. Land Owners and Occupiers

Trespassers(adult tresspasers and Children Tresspasers). (a trespsaser is one who comes onto the land without permission or privilege).

-
  - Undiscovered/ Unanticipated = a landowner owes No duty to an undiscovered trespasser. He has no duty to inspect in order to ascertain whether persons are coming onto his property.
  - Discovered/anticipated = Duty to warn or make safe concealed artificial conditions(man-made death traps), known to the owner/occupier, involving risk of death or serious bodily injury
  - I**nfant trespassers**
  -
    - "Attractive nuisance" doctrine
    -
    - Duty to avoid foreseeable risk to children caused by artificial conditions, if:
    -
    - There is a dangerous artifical condition present on the land of whcih the owner is or should be aware of;
    - The owner/occupier knows or should know that children frequent the area
    - The condition is likely to cause injury or is dangerous, becasue of child's inability to appreciate the risk and;
    - Cost/benefit analysis: the expense of remedying condition is slight compared to magnitude of risk.
- **Licensees**(is one who enters on the land with the landowner's permission, express or implied. (Licensees include friends, contractors coming on to the rpemises to makr sales or repairs and etc).

-
  - Duty to warn of or make safe any known, concealed dangerous condition (whether natural or artificial) that a licensee is unlikely to discover.
- **Invitees (** are people who are allowed to come on ladn to conduct business related to the owner/occupiers business, or who are members of the public on the land that is held open to the general public, such as parks, museums, churchs, airports, etc).

- Same duty as to licensees, plus a duty to inspect and render safe concealed dangers

Traditional categorization of duty based on the type of entrant

Type of entrant------------------Condition--------------------Activity

Unknown, unauth. trespasser------no duty------------------------reasonable care

anticipated, known trespasser----known, manmade death traps----reasonable care

Licensee---------------------Known, concealed dangerous traps----reasonable care

Invitee----------------------known traps & duty to inspect------reasonable care

4 categories further defined:

9.04 Land Possessor Duty to Those Outside the Land

- Parallel to a large degree those regarding the duty owed to those entering the land
  -

- Land possessor owes no duty to those outside the land for natural conditions on the land
- Where the harm is by an artificial condition or the land possessor's activity : duty owed
- No-Duty-for-natural-conditions rule: land owners has to exercise care that trees on the property do not pose unreasonable risks to those on outside lands

9.05 Landlord - Tenant Relations

- Liability imposed for
  -
    - Defects in common areas
    - Undisclosed dangerous conditions to the lesser
    - Negligent repairs
    - Lesser's covenant to repair
    - Condition dangerous to persons outside leased premises
- Liability extends to those who are foreseeable on the property

TRESPASSERS	**Conditions (on the land)**	**Activities (on the land)**
Unanticipated trespassers	No duty	Reasonable person
Anticipated tresspassers	Warn or remediate (mandmade deathtraps)	Reasonable person
licensees	Warn or remediate (traps)	Reasonable person
invitees	Warn or remediate +duty to inspect	Reasonable person

8. 01.04 The Actual-Causation Element

Subpart C: The Actual-Causation Element = is the question for trier of facts

- **The requirement for Actual causation is simply that there must be a strict, logical, cause-and-effect relationship between the (D)'s conduct and the (P)'s injury.**
- **Other labels for Actual causation:** 1) Causation-in-fact, 2) Factual causation, 3) direct causation.
- **"But For Test"** - But for the (D)'s breach of duty of care, the (P)'s injury would have not occurred.
  - **Ex:** (P) is a passenger on a bus. The bus driver was driving while texting and as a result got into a car accident and (P) gets hurt. "But for" the bus driver texting while driving, would the injury to (P) have occurred?
    - Answer to the above question is Yes –> No to Causation → No to Liability
    - Answer to the above question is No → Yes to Causation → Yes to Liability
- **Loss of Chance Situation -** when there is a loss of chance sitatuion like in "CareStat" for actual causation, there are two ways to decide:
  - If the injury is "the loss of chance to survive," then the question is to decide is whether the loosing "a chance" counts as a personal injury
  - If the injury is the "death," then the question is where one can say that causing a decreased probability of survival is the same az causing death.
- **Multiple necessary causes -** When each of multiple careless acts is a necessary condition for an injury, each is deemed an actual cause of that injury.
  - Where there are mutiple necessary causes meaning more than one action had to occur in order for the (P) to be injured.
  - The combination of both of the acts caused the (P)'s injury, and each of the acts on its own would have not injured the (P)
  - **Ex:** Someone heaves bowling ball. Someone else lobs knife. The bowling ball that deflects the knife hits a pedestrian. The heaver and the lobber are both liable
  - Ask the "but-for" question: Is it a 'but-for' cause? **Answer: Each are "but for" causes for the Pedestrian injury.**
- **Multiple (D)s in the Multiple Necessary Causes -** Where two or more (D)s that have been negligent, but uncertainty exists as to which (D) caused (P)'s injury. The "but for" analysis, won't work because (P) would be unable to prove by prponderence of evidece which one of the (D) caused the (P)'s injury. Therefore, the burden of prove shifts to each (D) to prove that he did not cause the (P)'s injury.
- **Mutiple Sufficient Causes** - "Twin fires doctrine" (D1) negligently sets a fire in one side of the town, and the (D2) negligently sets a fire on the other side of the town. The fire merged and along the way destroyed the (P)'s house. Thus, to protect the (P), the court would allow the actual causation to be satisfied where the "but-for" test is not satisfied because neither (D1) nor (D2) met the "but for" test.
  - But for the act of (D1), would the (P) would have been uninjured? No, the (D2)'s fire would have injured the (P)

- But for the act of (D2), would the (P) would have been uninjured? No, the (D1)'s fire would have injured the (P)

Substantial Factor Test (where several causes commingle and bring about an injury and any one alone would have been sufficient to cause the injury- it is sufficient if defendant's conduct was a "substantial factor" in causing the injury).

-
-
- A cause can be a substantial factor without satisfying the "but for" test.
- **Example:** Two fires meet and burn a farm. Either fire alone would have done the damage without the other. Under the "but for" test, neither was the "cause" since, looking at either fire alone, the loss would have ouccrred without it. Rather than reach this reuslt, the courts consider as causes all those things that were a "substantial factor" in causing the injury.
- **Example:** Two chemical companies both dump roughly equal (50/50) amounts of toxic chemicals into the ground which seep through the soil and contaminate a nearby residential well. The well water has 1000 ppm of the chemical. The resident drinks the water and dies. A dossage of 300 ppm is enough to inure and kill someone. Under the "but for" test, neither since, looking at either dump alone, the loss would hav occured without it. Rather than reach this reuslt courts consider as causes all those things that were a "substantial factor" in causing the injury. So both liable in essesnce.

Medical Uncertainty Cases

- Alternative theory of causation that allows plaintiff to permit recovery for malpractice even when they cannot prove the malpractice more than likely caused death (e.g. negligence causing only 14% less likelihood of survival when patient had less than a 50% chance of surviving prior to the act/omission)

See Herskovits - π argued that misdiagnosis cut chances of survival by 14%.

- The estate can show probable reduction in statistical chance for survival but cannot show and/or prove that with timely diagnosis and treatment, decedent probably would have lived to normal life expectancy.
- **Is there an actionable claim for failure to timely diagnose a life threatening condition when there is very little evidence that even if it were diagnosed earlier that the decedent would still live?**
-
  - Court held that negligent misdiagnosis was a substantial factor leading to π's death.
  - If reduce a 49% chance of survival to 1% --> probably should be found liable for your negligence. On the other hand, if you reduce the chance of survival from 49% to 48% or 2% to 1%, we may not want to hold the defendant liable or quite as liable.
- Some courts make the loss of opportunity to survive the cause of action. Lost opportunity can be compensated and valued as an appropriate percentage of wrongful death claim

Example: Beswick v. CareStat - 911-dispatcher and private ambulance company increased the risk of Mr. Beswick to survive his heart attack (16 minutes slower than city ambulance)

Cases for Actual Causation:

1. **Beswick v. Carestat -** Loss of chance situation. The (P) failed to establish the negligence case because the (P) failed to establish the actual causation. The (P)'s expert testified that the (P)'s husband had 34% chance of survival, and thereforre, (P) failed to prove the actual causation by preponderance of evidence.
   - Though the "but for" could have applied in this case, the (P)'s husband had only 34% chance of survival, therefore, no negligence.
2. **Jarvis v. J.I. Case Co** - Actual causation was met because (P) was injured by mutiple necessary cause by multiple (D)s, and the court held that there can be several causes in fact which combine, result in an injury, and become the actual cause.
3. **Kingston v. Chicago & Northwestern Railway** - Twin fire example or mutiple sufficient cause, (P) was be able to establish the actual causation despit of "but-for" test would not be established because (P)' property would have been destroyed from one of those fires set by (D)s.

4. **Summer v. Tice** - Multiple (D)s and in this case each (D) is an actual cause. (D1) and (D2) both negligently fire shotguns in (P)'s direction. P is hit by 1 pellet, but (P) cannot tell which gun fired the shot. Under the shifting of alternative cause apporach, (D1) and (D2) will have to prove that the pellet was not theirs. If unable to do this, both (D1) and (D2) are liable

01.05 The Proximate-Causation Element

Subpart D: The Proximate-Causation Element

9. Proximate Causation(the defendant is liable for all harmful results that are the normal incidents of and wihtin the increased risk caused by defendant's act.... This is determined by: foreesablity test(often used), harm within the risk, and direct test(not often used).

Test for Proximate Causation

1. Foreseeability Test(often used): (If a paritucular harmful result was at all foreseeable from defendant's negligent conduct then defendant's negligent conduct is foreseeable even though there were intervening forces; HOWEVER, even if the reuslt is foreseeable, the defendant is relieved/barred from liability if there aresuperseding intervening force.)

Foreseeablity test requires: (1). a reaonsonably foreseeable result or type of harm and (2).NO SUPERSEDING INTERVENING FORCE.

Intervening forces: (is a new force which joins with the defendant's conduct to cause the plaintiff's injury. Intevening force can be human, animal, mechanical, or natural, such as a wind shift. It is considered intervening because it has occurred sequentially in time after the defendant's conduct).

Example: D is driving her sports car down a busy street at a high rate of speed when a P steps out into crosswalk in front of her. D has no time to stop, so she swerves to one side. **Her car hits a parked truck** and **bounces to the other side of the street**, **where it hits another parker vehicle**, propelling it into the street and breaking P's leg. D is liable despite the unusual way in which she caused the injury to the P . **All those other causes could be foresseble intervening forces, which caused P injury.**

Superseding intervening force: (Highly improbable and extraordinary interening forces are generally found superseding and preclude defendant from liability. The superseding force is one that serves to break the causal connection between defendant's intial negligent act and the ulitmate injury, and itself becomes a direct immediate cause of the injury).

Example: D negligently blocks a road, forcing P to take an alternative road. Another driver negligently collides with P on this road, injuring him. Even though D is an actual (but for) cause of P's injury, the other driver's conduct is an unforeseeable intervening force becasue D's negeligence did not increase the risk of its occurrence. Thus, the other driver is a superseding force that cuts off D's liability for his original negligent act.

Eggshell Plaintiff Rule: (while foreseeability of consequences is generally reuqired to find liability courts make an exception and do not require that the typ of personal injury suffered by a victim be foresseable. Courts have consistently held that the defendant takes the plaintiff as he finds him.

Example: A tortiously bump B in the head, and that such a bump would ordinarliy only cause a minor injury. B, however, has an eggshell-like head and the bump results in a castrophic brain injury. A's bad luck at bumping the one individual vunerabl enough to suffer serious inuryor death does not protect A from liability).

2. Harm-Within-The-Risk-Test

- this can be thought of as a way of clarifying the foreseeability test
- Did the defendant's negligence increase the risk that the same general type of harm that the plaintiff suffered would occur?
- Ex: A defendant negligently parks his car next to a fire hydrant. Suppose now that the plaintiff, driving by the hydrant where the defendant parked, skids on the road and collides with the defendant's parked car.
-
  - Is the risk of the injury the plaintiff suffered one of the risks that makes the defendant negligent for blocking access to the fire hydrant?
  -
    - NO - because the act of parking by the hydrant instead of a dozen feet further down the street does not increase the risk of the harm materialized. A motorist passing by that spot is no more likely to skid into a car parked negligently than into a car parked a legal distance away from the hydrant.

3. Direct Causation Test (not often used): (No intervening forces or causes from the defendant's conduct to the injury. Defendant's negeligent conduct must be direct cause to Plaintiff's injury. SO If any new intervening force such as human, mechanical, or natural joins the defendant's action to cause the injury, then the defendant is not deemed to be the direct cause of Plaintiff's injury).

10. 01.06 The Damages Element

Subpart E: The Damages Element

11. Existence of Damages

- **Compensatory are the most common form of damages**
- Money given to make P whole again. Intended to represent the closest possible financial equivalent of the loss or harm suffered by P.

Sufficient kinds of compensatory damages

- Personal injury - physical pain and suffering can be included
- Property damage (tangible)
- Severe emotional distress (for NIED only)
- Not mere economic damages, harm to reputation, or other oblique injuries
-
  - But economic damages that flow from Personal or property damages are allowed (lost wages if disabled)
  - But note that oblique injuries may create liability covered under the heading of oblique torts
- Pecuniary injury - damages include compensation for the victim's medical expenses, lost wages or diminished earning capacity, and other economic expenses because of the injury.
- Non-pecuniary injury - pain, suffering, and other variations of mental distress.

12. 01.07 Affirmative Defenses to Negligence

Negligence: Defenses

Plaintiff's Negligence (Contributory and Comparative)
Note: PLAINTIFF BEARS THE BURDEN TO PROVE ALL 5 ELEMENTS of a NEGLIGENCE CLAIM - If plaintiff fails on just one element, defense wins!! HOWEVER, if Plaintiff does prove all 5 elements of her prima facie negligence claim, Defendant can still **win** if defendant can successfully assert an affirmative defense.

1. ***Contributory Negligence (Minority Jurisdictions)***
1. Definition: Conduct on the part of the plaintiff which falls below the standard of conduct to which he should conform for his own protection; and which is a legally contributing cause cooperating with the negligence of the defendant in bringing about the plaintiff's harm.
2. Complete bar to recovery- if plaintiff contributes to negligence, no recovery
3. Example **:** A fails to put on her seatbelt while driving and is negligently hit by B's car. A's negligence in not wearing a seatbelt is not contributory negligence, since the failure to wear a seatbelt did not legally contribute to the accident which induced A's harm. This is so, even if the plaintiff suffers a greater injury as a result of not wearing the seatbelt.
2. ***Comparative Negligence(Majority Jurisdicitions)***
1. Defintion: reduces the Plaintiff's redovery by the percentage she is deemed responsible for causing her own injury.
2. **Pure comparative negligence**
1. Definitions: Plaintiffs can recover some percentage from liable defendants regardless of the extent of their own negligence.
2. Example: If Plantiff is 60% responsible for an accident with defendant, Plaintiff can still recover 40 percent of the damages.
3. **Modified/Partial comparative negligence**
    1. Definition: Plaintiffs are allowed a partial recovery just as in pure comparative negligence, until the Plaintiff reaches a certain level of culpability for her own accident.
    2. Two types of Partial/ Modified Comparative Negligence depending on the jurisdiction:(1) A plaintiff is barred from recovery only when she is **more**

negligent (**greater than 50% at fault)** than the defendant(s).

For Example,

if Plaintiff is 50% responsible for the accident, she can still recover 50% of her damages from the liable defendantys. (2) A Plaintiff is barred from recovery when she is **equal to or more negligent (greater tahn or equal to 50%)**
than defendant(s).

For example:

If plaintiff is 50% at fault she would be barred from recovery.

3. Assumption of Risk(Implied and Express)

1. Definition: A plaintiff who fully understands a risk of harm to himself or his things caused by the defendant's conduct or by the condition of the defendant's land or chattels, and who nevertheless voluntarily chooses to enter or remain, or to permit his things to enter or remain within the area of that risk, under circumstances that manifest his willingness to accept it, it not entitled to recover.
2. ***Elements***
1. Knowledge of a Particular Risk: plaintiff must have actual and/or conscious knowledge of the particular risk.
2. Voluntary: plaintiff must voluntarily expose herself or her property to the risk to assume the risk.
3. Assuming the risk: the defense of assumption of risk only applies to the particular risk which the plaintiff has knowingly and voluntarily assumed.

3. ***Classifications of Assumption of Risk***
1. Express agreement
1. Not valid for certain defendants, including common carriers, and hospitals (e.g. airlines)
1. **Example:** *Tunkl v. Regents of Univ. of Cal.* - hospital cannot require waiver because it is an essential service; this goes against public policy.
2. Not valid for gross negligence or willful acts
3. Signing a release form is generally an acknowledgement of the risk rather than a contract.
1. This is really good evidence that you have expressly assumed the risk; you still need to know what you signed.
2. **Example:** *Hulsey v. Elsinore Parachute Center* - it is hard to believe that the parachuter did not know that parachuting was dangerous and waiving liability when his initials appeared next to bold words saying as much.
2. Implied: Based on the circumstances, plaintiff impliedly assumed the risk
1. **Example:** *Murphy v. Steeplechase* - Plaintiff was injured on a amusement park ride. Court barred recovery for injuries because plaintiff assumed the risk. The court stated that the risk of being injured was part of the thrill and plaintiff knew being thrown off was the likely outcome of participating.

02.01 Liability Relating to Health Care

Health Care Liability

Three ways to sue health care providers:

- Professional negligence
- Medical battery
- Informed consent

1. Medical Malpractice/Professional Negligence

- A "regular" or "general" malpractice case against a physician involves professional negligence (prof. neg.also governs conduct of attorneys and accountants):
- Elements of negligence BUT WITH PROFESSIONALS
-
  - Duty
  - Breach – standard of care (**Professional Standards: G<u>eneral practitioner</u>(The knowledge, skill, and custom of practice among practitioners in the local community or if too small another general practitioner of similar size to this local community) *<u>Specialist</u>* (The knowledge, skill, and custom of practice among memebrs of the specialty across the nation).**
  - Actual Causation
  - Proximate causation
  - Damages
  -
    - Damages are necessary for negligence (but not medical battery)
    - Consent issue is irrelevant here if it causes harm

2. Medical Battery

- Medical battery
-
  - Intentional tort
  - Elements of battery
  -
    - Act

- Intent
- Causation (The result giving rise to liability must have been legally caused by the Defendant's act. **THIS IS NOT** ACTUAL **CAUSATION NOR PROXIMATE CAUSATION. BATTERY DOES NOT FOCUS ON THOSE ELEMENTS HERE**)
- Touching
- Harmful or offensive

- **Example:** Undergoing an operation on the left ear, but doctor decides to operate on right ear and the right ear is made better.
-
  - Lack of damages does not invalidate an intentional tort action. However, there is no negligence because there are no damages.
-
  - Consent is irrelevant.
    - Damages are not necessary to make out a case for battery. Thus, the patient who is not injured, and is in fact better off because of the touching, still has a case.
    - Note: A "harmful" touching for purposes of battery is not necessarily one that causes harm
    -
      - it is a touching that is unwanted
    - Consent for emergency treatment is implied by law for public policy reasons.

3. Informed Consent

Informed Consent Actions

- Policy premise: Patients should get enough information ahead of time to make an intelligent, reasoned decision about care.
- Typical facts for suit: A complication of treatment arises about which the patient was not apprised ahead of time.
- May also be applied to:
-
  - Lack of disclosure about treatment alternatives
  - Lack of disclosure of risks of forgoing treatment
- Requirements:
-
  - **1. A risk should have been disclosed.**
  - **2. The risk was not disclosed.**
  - **3. The patient would have made a different decision about treatment if the risk had been disclosed.**
  - **4. The patient was injured as a result.**

Key Points:

- Damages are necessary to make out a case. The patient who is not told of a risk, but suffers no physical injury, has no cause of action
- Actual causation is a barrier to many suits. **The patient must show that but for the lack of disclosure about risk, the patient would have refused treatment.**
- The standard of care is an important point of contention. Some courts use the "physician rule", others a "patient rule"

Example: Heart Bypass Surgery

- A patient with severe blockage in coronary arteries undergoes a triple bypass operation. The Surgeon never discloses that there is a rare risk of chest wound infection. The patient suffers a chest wound infection, resulting in considerable injury. Even if the patient had been told about the risk, the patient would have undergone the surgery.
- Result: no action for informed consent.
- Why? Actual causation is lacking. The patient would have had the surgery anyway [not "but for" causation].

Standard of Care:

- **Physician Rule:'**
  - Question: Is it the custom among physicians to disclose the risk?
  - Custom sets the standard as in regular professional negligence actions
  - Criticized as paternalistic: (1) Should the physician decide what you know or think about? (2) Patients made not be able to decide what they need to know.
- **Patient Rule:**
  - Question: Is the undisclosed risk or alternative course of treatment material information a reasonable patient would want to know?
  - A risk is material if it would affect a patient's decision about the treatment
  - Two approaches for materiality
    - Objective: would a reasonable patient have cared about the risk?
    - Subjective: Would that particular patient in front of the doctor care about the risk?
  - Growth of recognition of doctrine in late 1960s and 1970s
  - No liability for failure to disclose risk where in certain situations when justified
    - Emergency
    - Patent requests non-disclosure
- **Therapeutic privilege:**
  - Justifies non-disclosure where disclosure would have detrimental effect on the patients physical or psychological well being
  - The therapeutic privilege is only recognized in some jurisdictions
  - Substantially undermined significance of the patient rule

4. ERISA pre-emption(HOWEVER, EVEN THOUGH WE WENT OVER THIS IN CLASS IT IS NOT A MAIN FOCUS AS THE OTHERS LISTED ABOVE. THIS MAY BE USED FOR THOSE WHO MAY SPOT ADDITIONAL ISSUES(FOR BONUS) THAT OTHERS MAY NOT SEE).

- Employee Retirement Income Security Act (1974)-- Federal Law
-
  - Covers any private sector voluntary employee benefit plan
  - Section 502 allows recovery of wrongfully denied benefits
  -
    - Does not allow for recovery of consequential damages
  - Section 514 preempts all state laws that relate to benefit plans.
- **Example:** *Corcoran v. United Healthcare* - parents of unborn child who dies because the insurer did not authorize hospitalization of the mother cannot recover for wrongful death because of ERISA preemption.

13. 03.01 Intentional Torts

INTENTIONAL TORTS

Intent

Generally

- **Volition** & **Consciousness of likely consequences**: D **desires** the consequences of his acts OR is **substantially certain** his acts will cause the elements of the tort to occur.
-
  - **Bohrman v. Main Yankee Atomic Power Co.**: *Holding* several students could claim damages for battery b/c the nuclear plant they were touring was allegedly "substantially certain" the students would be exposed to excessive doses of radiation.

Special Considerations

- **Transferred intent doctrine**: If Δ intends any of the 5 intentional torts, but her acts, instead or in addition, result in any of the other 5, Δ is liable even though she didn't intend the others. (not only does the intent to commit 1 tort satisfy intent req for the other, but the intent to commit a tort against one V can transfer to any other V)
-
  - **Applies to:** battery, assault, false imprisonment, trespass to chattel/land.
  - Not necessary Δ know or have reason even to suspect that the other is in the vicinity of the 3rd person.
  - Intent transfers when battery is intended on 1 person & accomplished on another [burglar/neighbor], when assault intended & battery accomplished [burglar/neighbor] & when false imprisonment intended & accomplished [burglar/guest].
- **Mistake doctrine:** If D intends to do acts which would constitute a tort, it is no defense that D mistakes, even reasonably, the identity of the property or person he acts upon or believes incorrectly there is a privilege.

NOTES FROM DLB:

- [a] Intentional torts have to be done on purpose (D desires or knows to a substantial certainty the outcome will occur). Reasonable person standard is evidentiary but not dispositive.
- [b] desire is subjective, but is sometimes measured objectively (firing a loaded gun directly at someone, for instance).
- [c] substantial certainty is when D pretty much knows that their actions will satisfy the tort requirements, like intentionally blowing up a stagecoach, even if you didn't know Bob was on it, you intentionally injured Bob. Different from reckless conduct.
- [d] transferred intent applies to battery, assault, false imprisonment, trespass to chattel, and trespass to land. This means that if you intend to commit one of these torts but instead end up committing another, you are liable for the actual tort (even tho it wasn't the original intent). This can also transfer between victims (intended to hurt A but hurt B instead). Restatements accept transferred intent only between assault and battery. Also transfer of victims for false imprisonment.
- [e] mistake doctrine. If the tort is intentional then mistaken identity is no defense as long as D has not wrongfully induced the mistake. Self-defense is still a valid protection. Effectively imposes strict liability on D's who make mistakes.
- [f] infancy and insanity are not defenses, however intent is subjective as discussed above, so an infant or mentally diminished person may not be able to have the requisite intent. Intent to prove serious harm is not required, just an understanding of/desire to cause what will happen when the action is taken.

Battery

Elements of Battery

1. Act by defendant

2. Intent (On the part of defendant to bring about harmful or offensive contact to Plaintiff's person).

3. Causation (defendant is liable not only for indirect contact but also direct contact).

Ex.(this is an example of indreict touching): Defendant intending to set a trap, dug a hole in teh road upon which Plaintiff was going to walk. Plaintiff fell in. Causation exisit here.
4. Touching (Indirect, as mentioned in the example above, Indirect can also be setting something in motion as mentioned above or direct touching)
5. Harmful or Offensive Contact (Contact is harmful if it causes actual injury, pain, or disfigurement. Contact is offensive if it would be considered offensive by a reasonable person).
Ex. A taps B on the shoulder. This would not be considered as harmful nor offensive becasue a reasonable person in B's person should not consider A's conduct as Offensive nor harmful.
HOWEVER::: EXCEPTION

-
  - *Exception:* when D knows P is unusually sensitive
- **Without privilege**: Must not be consented to; in everyday life, consent is implied (bumping into someone on bus)
- *Eggshell P*: D liable for all harm that results if only a minor battery was intended
-
  - "A D takes his V as he finds him"
- V does not have to be aware of contact; i.e. unconscious
- includes contact of things set in motion, including particulates:
-
  - *See* Leichtman v. WLW Jacor -- blowing smoke in someone's face is a battery
  - *See* Bohrmann v. Yankee Maine Power -- causing radioacive particles to contact touring students is a battery.

NOTES FROM DLB:

- [a] intentional harmful or offensive contact with the victim's person. Physical and psychological.
- [b] intent required but not intent to harm, just intent to cause the contact. Once the intent is accomplished, D is responsible for harm even if none was intended.
- [c] Harmful or offensive contact. As long as society defines the contact as harmful or offensive, P is liable even if D isn't aware of the contact (D kisses P while she is sleeping without consent or privilege). This can go to a grey area when P is oversensitive, the touching is not considered offensive societally and D is unaware. If D is aware then it depends on the circumstances and precedent is ambiguous at best.
- [d] Causation - D must do the action voluntarily, but does not need to actually contact the victim (ie throwing a rock).
- [e] as a policy it's pretty easy to defend battery, but the downside is that the opportunity to sue, while preventing further violence, may not really be the desired outcome.

Assault

- An *intentional* creation of an immediate *apprehension of a harmful or offensive touching*

Elements

1. Act
2. Intent
3. Causation
4. Apprehension
5. Immediacy

1. Act

- Imminent Harmful or Offensive Contact
-
  - Words alone are not enough.
- Source of Contact
-
  - It is not necessary that D be the perceived source of the threatened harmful or offensive contact.
  - Ex: telling someone a stick is a snake
- *Conditional Assault:* Assault made conditional on Π noncompliance w/ an unlawful demand still assault, even if Π confident no assault will actually occur if Plaintiff complies w/ request

2. Intent

- Can be intent to effect an assault or intent to effect a battery
- D must desire or be substantially certain that her action will cause the apprehension of immediate harmful or offensive contact.
-
  - Accidental creation of apprehension= not assault but may be NIED

3. Causation

- Apparent ability sufficient

4.Apprehension

- V must perceive that harmful or offensive contact is about to happen to him
-
  - Plaintiff must not be asleep, attacked from behind.
- Apprehension of imminent contact need not strike fear in V
-
  - Apprehension simply acknowledges Π awareness that imminent harmful or offensive conduct will occur unless Π takes effective evasive action (*expectation* of harm, rather than being *in fear*)
  - Π superior strength or evasive techniques do not immunize Δ from liability, provided Π apprehends imminent contact would occur in absence of evasive action
  - Apprehension is more of a sense of expectation, rather than being in fear.
- Words alone are not sufficient, but words can negate the effect of conduct

5. Imminent Harmful or Offensive Touching

- If too "forward looking": Insufficient to satisfy immediacy req.

Case Law

- **I de S et ux. v. W de S**: Allowed H (W had no legal standing) for recover from Δ who wielded an axe at Π's W. Even though W not physically touched, attack caused her harm (fear of imminent physical injury)
-
  - this is a case from 1348 -- the mental damage has long been recognized as an injury.

NOTES FROM DLB:

- [a] this is about comping purely psychological injury. Tends to be construed very narrowly.
- [b] assault occurs when D's acts intentionally cause the victim's reasonable apprehension of immediate harmful or offensive contact. No requirement of reasonable. Different from criminal definition in that crim = attempted battery, where tort = apprehension (no apprehension with attempted battery = no assault).
-
  - [1] Intent same as discussed before. Transferred intent applies. Accidental creation of the apprehension would more likely be NIED.
  - [2] apprehension means the victim must be aware of the attempted touching (ie not asleep or looking the other way) and must believe D is capable of the act (ie an unloaded gun that D claims is loaded).
  - [3] the harmful or offensive contact must be imminent - future threats or threats without any action to back it up don't count.
  - [4] reasonable apprehension means generally that if I point a pencil at you and push the eraser and you are scared you will be shot, it probably isn't assault (but the restatements might make it so). However, if I knew you had a deadly fear of pencils and decorated your office with them, that could count.
  - [5] fear v. apprehension - the imminent contact doesn't need to make the victim afraid, just means that the victim is aware that the touching will occur unless they take evasive action (or something else intervenes like bodyguards). IE being spit at would not make me afraid but it IS offensive and I WOULD want to get out of the way.
  - [6] conditional assault = where D makes a threat of an unlawful nature so that if the victim chooses it they will avoid harm (ie give me your wallet or I'll kill you…while brandishing a knife). That is still assault. If a delay is built in or another condition (I'd kill you if there weren't a cop standing right here) there is no assault.
  - [7] source of contact does not need to be D directly, if they create the apprehension through other means assault can still happen (ie rigging a trap to scare someone).
- [c] Justifications:

-
  - [1] Moral justifications are that it is wrong to do this to someone. The apprehension requirement can make it under-inclusive from a standpoint of how the criminal law works. Over-inclusive morally, I mean really, being aware of potentially being touched offensively?
  - [2] this allows the distress to be comped and the imminent part gives a bright line…"future" threats may fall under IIED.
  - [3] can deter retaliation - if you know you can sue for the assault you are less likely to escalate the situation to battery. Also keeps that to self-defense, which is an acceptable sort of thing in this society.

False Imprisonment

1.Unconsented **act** or omission with **intent** to***Intent to confine established by:**

- Force or the immediate threat of force against P, P's family, or P's property
  - Implied threat sufficient
- Witholding property
- Omissions *where there is a duty to act*
  - A takes B out on boat & A promises to return upon B's request. A refuses to return to land. A has a legal duty (contractually) to act.

2. Confine or restrain π

- Physical barriers, physical force, threats of force, failure to release, invalid assertion of legal authority (false arrest)
- Economic or moral pressure and future threats not enough
  - Use of threats of economic retaliation or termination of employment to coerce Π to remain don't constitute FI
- Time irrelevant, *however*, amt of compensation reflects length
- **π must know of the confinement**
  - Restatement modifies; would find liability even when Π not aware of confinement but is injured.
- Types of lawful confinement
  - Restraint of shoplifters BUT must be:
    - rsbl belief theft occurred
    - detention in rsbl manner
    - for a rsbl period of time
  - Contractual Obligations (pilot must keep you on a plane before take-off)
  - Child discipline

3. To a bounded area

- Freedom of movement limited in all directions, not FI if P free to proceed in any direction, even if P prevented from going in direction P prefers
- **No reasonable means of escape known to π**
  - Not rsbl if requires Π to be heroic, endure excessive embarrassment or discomfort, or if Π unaware of means of escape
- Can be large

NOTES FROM DLB:

- [a] where D acts to unlawfully and intentionally cause confinement or restraint of the victim within a bounded area. Accidental confinement = negligence or strict liability. Victim must usually be aware of it.
- [b] the victim must be confined in an area bounded in all directions. Not being able to go the direction you want to (but being able to go in any other direction) is NOT imprisonment. The bounded area can be

as large as a city or it can be a moving vehicle. REASONABLE means of escape precludes liability. Unaware/heroic measures, etc = not reasonable.

- [c] victim must be confined or restrained, maybe by 1) physical barriers, 2) force or immediate threat of force 3) omission where D has a legal duty to act or 4) improper assertion of legal authority.
-
  - [1] physical barriers: must surround v in all directions so that no reasonable means of escape exists.
  - [2] Force: May be directed at v, v's family, companions, or property. Future threats or threats against employment, etc don't count.
  - [3] Omissions: If you don't do something you said you would do, like "I'll unlock the door whenever you want" then if the other criteria are met this is too. P must establish that D had a duty to act.
  - [4] Improper assertion: aka false arrest. V must submit to it for it to count. this is met if D is not privileged under the circumstances to make the arrest. Different privileges for police v. private citizens.
- [d] Contract w/ malicious prosecution & abuse of process: privileged confinement is not unlawful. If it is a lawful arrest liability here is precluded. However the lawful arrest if motivated by bad faith and meeting other criteria may be malicious prosecution. Improper use of documents like subpoenas may be abuse of process (other requirements here too)
- [e] V must be conscious of the confinement at the time it occurs. Restatements would negate this requirement if harm occurs.
- [f] No minimum time. BUT compensation sill reflect the length of the detention.
- [g] Transferred intent applies here
- [h] policy issues include potential issues with the awareness requirement and what kinds of restraints are unlawful.

Outrage (Intentional Infliction of Emotional Distress)

1. Act of extreme and outrageous conduct;

- Transcends all bounds of decency in society (must be truly outrageous)
-
  - Mere rudeness or callous offensiveness insufficient
- Vulnerability of V & relationship of Δ to V can be critical
-
  - Cruelty toward young child or very ill patient more likely perceived as outrageous than comparable conducted directed towards healthy adult
  - Presence of superior-subordinate relationship taken into acct

2. Intent or recklessness: disregard for high probability that emotional distress will occur;

- P must prove that the D intended to cause severe emotional distress or acted with reckless disregard as to whether the victim would suffer severe distress.
-
  - **Recklessness will suffice -- this is the only intentional tort without intent absolutely required**
- Severe Mental Distress
-
  - mild distress will not suffice.

3. Causation; and

- Bystander: when Δ harms 3rd party and π suffered emotional distress, may recover either by prima facie case for IIED or:
-
  - (i) P present when injury occurred,
  - (ii) P close relative of injured person and
  - (iii) Δ knew (i) and (ii)

4. Severe emotional distress

- Some Jurisdictions require Plaintiff to seek non-psyciatric medical attention
-
  - This is a way to cut off spurious claims
- More outrageous conduct, the easier to prove damages

Exception for Innkeepers, Common Carriers, and Other Public Utilities

- Innkeepers, common carriers, and other public utilites are liable for intentional gross insults which cause patrons to suffer mental distress.
- The requirement that the D **ACT** in an extreme and outrageous manner to impose liabilty for intentional infliction of emotional distress is waived.
- The P must be a patron of the D.

NOTES FROM DLB:

- [a] this is newer and less rigidly defined which can be a good thing…until the 1st amendment comes into play
- [b] This started as a way to recover for mental distress that accompanied a severe physical injury. Usually a case of "outrageous behavior." Common carriers with insulting behavior was an exception to the physical injury requirement. Gradually increased to no injury required and then not even just to victim.
- [c] IIED = d's extreme and outrageous conduct intentionally or recklessly causes v severe mental distress.
-
  - [1] extreme and outrageous conduct = behavior which is "beyond all bounds of decency and to be regarded as atrocious, and utterly intolerable in civilized community." No objective standard but mere rudeness/callousness is not enough. definitely situational; knowledge of a weakness (like an unreasoning fear of flamingoes) and exploiting that usually counts too.
  -
    - [a] IIED hasn't been widely extended to sexual harassment and racial epithets because they do not usually meet the "extreme and outrageous" standard. Same for isolated attempts at seduction and racial slurs, unless there is an established pattern of behavior.
    - [b] Public individuals have limited IIED rights when the conduct is a parody, not claimed/purported to be the truth, and would not be taken as truthful by a reasonable reader. Called the New York Times standard. No indication that the courts are going to limit the recovery rights for private individuals.
  - [2] Intent or recklessness: Recklessness counts for this where it won't for most other intentional torts. Endorsed by the restatement. Means a deliberate disregard of a high degree of probability that severe mental distress will result, even if that is not the intention.
  - [3] Originally physical manifestations (like a heart attack or miscarriage) were required to prove severe mental distress (to prevent fraudulent claims) but not so much any more. Evolution away recognizes that the outrageousness of D's behavior can interpret the distress, and tummy issues are easily faked. .Most states do require some sort of proof of the distress also
- [d] IIED doesn't usually have transferred intent. This recognizes that there wasn't really a transfer, by the behavior, D intended to allow some harm to come to the 3P. Usually also requires P to be 1) close relative, 2) present at the scene of the incident when it happened and 3) D knows the 3P is present. Restatement is less restrictive, allows non-relatives to recover if present and suffer mental damage. Not widely accepted. These are not generally insured so allowing bystander recovery wouldn't have a large insurance impact. There are arguments both ways.
- [e] Common carriers are liable for gross intentional insults which cause severe mental distress. "Extreme and outrageous" requirement waived. P must be a patron of D (but no purchase requirement, just have to be an invitee). Intended to reflect the higher duty of care these D's have, but it is questionable in the modern light so courts usually will enforce the existing classifications but not extend them.
- [f] policy issues - too vague (uncertainty as to when it applies), where more specific torts could be created to take its place. It is, however limited by the high bar of "extreme and outrageous" behavior and addresses mental anguish where other torts might not.

Trespass to Chattels

definition: the intentional interference with the right of possession of personal property.

- D act must intentionally damage the chattel, deprive the possessor of its use for a substantial period of time, or totally dispossess the chattel from V.

1. Act that interferes with π's right of possession in a chattel;

- Intermeddling: directly damaging chattel (denting car)

- Dispossession: deprive π of right of possession
-
  - More than trivial or momentary interference

2. Intent;

- Does not require that the D act in bad faith or intend to interfere with the rights of others.
-
  - Sufficient that the actor intends to damage or possess a chattel which in fact is properly possessed by another.
- Mistake and good faith are not defenses (i.e. that you took someone elses umbrella b/c you thought it was your own- no defense)
- Transferred Intent applies.
-
  - Intent for battery, assult, trespass to land, or false imprisonment can be substituted to satisfy the requisite intent for trespass to chattel.

3. Causation; and

4. Damages

- Actual required
-
  - Usually measured as the cost to repair the chattel
  -
    - Plaintiff has the chattel returned to her along with the money for repairs = make her whole

Transferred Intent Application

- If A intends to hit B w/ rocks & misses, but hits B's or C's car, A liable for damage under trespass to chattel.
- Even if car totaled (a very big rock ala roadrunner-coyote?), NO CONVERSION b/c car's destruction not intentional & transferred intent n/a to conversion.

NOTES FROM DLB:

- [a] these can overlap (a conversion is usually also a trespass) but not always. Both involve wrongful possession of the chattel; conversion exists only when the damage or other interference is sufficiently serious to justify a forced sale to D.
- [b] TRESPASS TO CHATTEL - the intentional interference with the right of possession of personal property. D must intentionally damage, deprive the possessor of its use for a substantial period, or totally dispossess the chattel from the victim.
-
  - [1] bad faith not required. As long as the damage, etc, is intentional, mistake is no excuse.
  - [2] Actual damage, substantial deprivation, or dispossession required. A trivial interference is not a tort (unlike trespass to land) . Momentary dispossession - unless at a critical moment - doesn't count. Stealing, even if only for a bit, counts as D is challenging P's right to ownership.
  - [3] transferred intent applies.

Conversion

Definition: an intentional exercise of dominion and control over a chattel which so seriously interferes with the right of another to control it that the actor may justly be requires to pay the other the full value of the chattel.

1. Act that interferes with π's right of possession in a chattel;•Only tangible personal property and intangibles that have been reduced to physical form (deed, promissory note)

2. Interference is so serious that warrants requiring Δ to pay chattels full value;

- Theft, wrongful transfer, wrongful detention, substantially changing, severely damaging or misusing
- The longer the withholding and more extensive the use, likely to be conversion (less serious interference is Trespass to Chattels)

3. Intent; and

- Purchasing stolen prop, even if B was acting in good faith & not aware S didn't have title= conversion by both S & innocent B.

4. Causation

Special Issues:

- **Moore v. Regents of U of Cali**: P didn't retain sufficient interest in excised cells to state a cause of action for conversion. Refused to extend tort primarily b/c of policy issues (strong interest in socially useful scientific research). Blood shield laws prohibit the treatment of blood and blood derivatives as "products" (instead considered services) for the purposes of strict liability & implied warranty claims.
- Sentimental value in Chattels
-
  - Sometimes courts will award the cost of repair for sentimental chattel even if it outweights the FMV.

NOTES FROM DLB:

- [c] CONVERSION: an intentional exercise of dominion and control over a chattel which so seriously interferes with the right of another to control it that the actor may justly be required to pay the other the full value of the chattel. Generally limited to tangible property unless the intangible property has distinct scientific, literary, or artistic value. 6 factors:
-
  - [1] the extent and duration on the exercise of dominion or control
  - [2] the intent to assert a right in fact consistent with O's right of control
  - [3] the actor's good faith
  - [4] the extent and duration on the interference with the other's right of control
  - [5] the harm done to the chattel
  - [6] the inconvenience and expense caused

Trespass to Land

Definition: an actionable invasion of an interest in exclusive possession of land.

1. Physical invasion of π's real property;

- Person or object (throwing a ball is sufficient)
- Intangibles (odor, vibrations) are nuisance or strict liability if ultrahazardous
- Real property is land, air above, land below

2. Intent; and

- Intent to do the act that results in trespass is sufficient
-
  - do not have to intend to trespass
- Mistake of fact is not a defense
-
  - Mistaken belief of permission to enter is not a defense

3. Causation

- Causal intervention of natural conditions (wind, rain), in initiating or exacerbating the trespass will not absolve Δ liability.
- Def. is liable for damages incindental to the trespass
  -
    - This is almost like strict liability
- Nominal damages available where no physical injury to property or person occurred
-
  - can be useful for asserting a rightful claim to the property -- judgment says you are the landowner

NOTES FROM DLB:

- [a] an actionable invasion of an interest in exclusive possession of land. Protects the surface, subsurface, and airspace. "Possession" means anyone with a current OR reversionary interest (like a landlord). Trespass = invasion of property interests/exclusive right of possession; nuisance = interference with use and enjoyment of that right.

- [b] INTENT = the desire to cause the consequences of the act, or that the believe the consequences are substantially certain to result from it." Mistake is no excuse, and D doesn't have to intend the trespass specifically as long as they intended the act that caused the trespass.

DEFENSES

Self Defense

Scope: Reasonable force can be used.

- Must sincerely believe the force is necessary for protection.
    - Belief need not be correct.
- Force must be in response to immeditae threat
    - pre-emptive strike not justified
    - retaliation not justified.
- Can only use deadly force if deadly force is threated.
    - Ex- can't shoot someone who throws a punch at you.
- Most Courts: Reject duty to retreat prior to use of non-deadly force.

NOTES FROM DLM:

- [a] reasonable force can be used where one reasonably believes that such force is necessary to protect oneself from immediate harm. Sincere but unreasonable actions are not privileged.
- [b] the threat must be immediate. A pre-emptive strike is not justified under common law. There is some argument about allowing a preemptive strike for harm threatened during the "immediate occasion" ie abusive relationships and prison cells, where the intended victim cannot get away and the actor has unlimited access. Retaliation is also not allowed.
- [c] The victim's response must be reasonable. You cannot kill someone for kicking you in the shins. The victim must believe that the force is necessary to avoid an attack, even if the belief is wrong, and that self defense is necessary. Lethal force is only reasonable if the victim believes that death would result from the attack. Threatening, however, may be reasonable even when the action would not.
- [d] Obligation to retreat from less-than-deadly force = NONE. From deadly force = none if you have the right to be present or to proceed (majority). Minority = retreat, except from your dwelling (unless the assailant also lives there), or a retreat cannot be safely or reasonably accomplished.

Defense of Others

Reasonable force can be used to protect a 3rd person from imminent unlawful physical harm.

- 3rd party can only use force that victim could have used to defend himself.

Majority Rule: Reasonable force can be used to protect victim whenever intervenor reasonably believes the victim is entitled to self defense.

Minority--**Limited Privilege Rule**: Use of force in defense of a 3rd person exists only when the person being defended was privileged to use force.

- Intervenor must stand in the shoes of the person being protected.
- Act at your own peril

NOTES FROM DLM:

- [a] a person can use reasonable force to protect a 3P from immediate unlawful physical harm. No limit on who can do the protecting.
- [b] Some courts limit the privilege of defense to when the person in need of defense would have been able to use that privilege.
- [c] some courts toss out the above and say there is a privilege to use reasonable force to protect 3P whenever the actor reasonably believes that a 3P is entitled to use self-defense.

- [d] Policy considerations - a good Samaritan acting in good faith shouldn't be punished…but…there is the problem of stranger intervention targeting the wrong person.

Defense and Recovery of Property

Defense of Property

- Reasonable force can be used to protect land and chattels
- Reasonable mistake does not excuse force directed at innocent parties.
- Deadly force is never reasonable.
- Even slight force is unreasonable if it is excessive.
- Mechanical devices are never justifiable.
- Ex) *Kato v. Briney* - Spring loaded gun.

Defense of Home

- Deadly force not justified unless intruder threatens occupant's safety.
- Ex) Felony

Recovery of Property

- Can use reasonable force to recover property when in "hot pursuit" of the wrongdoer.

NOTES FROM DLM:

- [a] there is a privilege to use reasonable force to prevent a tort against real or personal property. No excuse for reasonable mistakes.
- [b] lethal force is never reasonable. "Reasonable" is in context to the offense - if a verbal warning will suffice, then hitting with a shovel is unreasonable.
- [c] force used mistakenly against a privileged party is not excused, unless the victim causes the actor to believe that the intrusion is unprivileged.
- [d] Defense of habitation - deadly force/serious bodily harm not justified unless the intruder threatens the occupants' safety either by committing or intending to commit a dangerous felony on the property. Also you can't eject a non-threatening trespasser when doing so would cause harm.
- [e] defensive mechanical devices are strongly discouraged by the courts. It is not privileged unless such force would be justified if the owner of the device were inflicting the harm. Deterrents to enter land, like barbed-wire fences, are generally held to not be intended to inflict serious harm, and they are visible (not traps) so they are OK.
- [f] recovery of personal property - reasonable force when in " hot pursuit." Act at your own peril - mistake doctrine does not apply. Merchant's privilege allows retention for reasonable periods to investigate possible theft, this does usually include a reasonable mistake clause.

Consent

Types of Consent

1. **Express** Can be written / oral / gestures
2. **Implied in fact** under the circumstances conduct conveys consent

Ex) jumping into a boxing ring - consent to getting hit is implied.

- Measured by objective manifestations of consent by Victim
- Negated if Tortfeasor subjectively knows that those manifestations are not giving consent

1 **Implied by law** consent to medical treatment by medical professionals if unconscious.

- Implied by law can be negated - Ex) bracelet that expresses objective to treatement for religious reasons.
- Medical procedure without express or implied consent = battery

Consent Invalid if Induced by:

- Fraud
- Physical Threat
- Economic Pressure

Lacks Capacity to Consent if:

- Child
- Insane
- Mentally retarded
- Under the influence of drugs

ScopeTypically a question of fact for the jury

- Did a 13 year old consent to being tackled violently by his football coach or to being tackled by players of like age and skill?

NOTES FROM DLM:

- [a] if a victim gives permission the tort becomes privileged. Can be express or implied.
- [b] EXPRESS AND IMPLIED CONSENT. This is a valid defense when objectively manifested - the victim's secret but unexpressed lack of consent cannot be relied upon. However if D knows of the unexpressed desire that invalidates the defense. Express consent can be words or pictorial gestures. Implied consent is when, under the circumstances, the conduct of the individual reasonably implies consent. Also implied by community custom.
- [c] CONSENT BY LAW - legislatures dictating when consent for something is given - usually unconscious person consenting to medical treatment. Can be negated by wearing a medical alert bracelet to that effect.
- [d] INVALIDATING MANIFESTATIONS OF CONSENT
- [1] INCAPACITY - an individual can be held to lack capacity to consent, ie a child cannot consent to surgery. Insanity or retardation = lack of capacity. Drug ingestion (incl. alcohol) can incapacitate and negate. BUT if the incapacity is not known or cannot reasonably be known, that does not negate the consent in most cases.
- [2] ACTION BEYOND SCOPE OF CONSENT - If you agree to being punched in the stomach and they beat you all over, that is beyond the scope of your consent so they are liable. In the medical field, procedures beyond consent except where immediately necessary to save the patient's life are usually liable as battery, but not always. Should be careful and play it safe!
- [3] FRAUD negates consent (ie lying about the nature of the tort) but fraud about say the name brand of an item does not because it is collateral. Medical consent is usually treated as negligence, and then the standard is if a reasonable physician would have informed.
- [4] DURESS - consent under physical threat is invalid. Economic pressure does not negate. Situational duress can also negate - A is trapped and B demands something before letting A out.
- [5] ILLEGALITY - a person cannot consent to a criminal act (majority rule). Minority says they can consent as far as the tort liability unless the criminal law is specifically designed to protect members of the victim's class.

Condensed Casebook for Torts I Fall 2014

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1. Basic Concepts

To start into the subject of tort law, it's helpful to get some context for what you will be studying: what torts is, where it comes from, and how it fits into the general scheme of law and the law-school curriculum.

What is Torts?

Torts is traditionally one of the core, basic, required courses in law school. The subject of torts is civil lawsuits in which one person alleges that another person perpetrated some harm. Personal injury, medical malpractice, and defamation are all subjects of torts.

The subject matter of torts is broad and fundamental. If you wrote out a list of 10 things someone could sue over, most of them would probably be torts. Breach of contract is a matter for your contracts course. Questions of who owns what are questions for your property course. And many modern claims, such as copyright infringement or antitrust violation, are based in specific federal statutes. But otherwise, most of the traditional, frequently invoked claims that can serve as a basis for a lawsuit can be categorized as torts. Someone punches you? That's a tort – it's called *battery*. A careless driver loses control and drives over your lovingly hewn shrubbery? That's a tort – it's called *negligence*. An enraged neighbor intentionally drives over your shrubbery? That's the tort of *trespass to land*. The neighbor does it over and over? Well, depending on how lovingly hewn the shrubbery was, that could be the tort of *intentional infliction of emotional distress*. Other torts include *slander*, *invasion of privacy, products liability,* and *fraud*.

The word "tort" dates back to Middle English, where it meant a *wrong* or *injury*. The word, with its meaning, came to Middle English, by way of Old French, from the medieval Latin "tortum." That word was produced as the past participle of "torquere," which means *to twist*. Etymologically, the word "tort" is related to "torque," "tortuous," and "torture."

How Torts Fits In

Let's take a look at law school as a whole and see where torts fits in. Typically, law schools have at least these six courses in the first year: Torts, Contracts, Property, Civil Procedure, Criminal Law, and a course in basic lawyering skills, which goes by different names at different schools.

Torts is a doctrinal course teaching substantive private law. Explaining what that means will help you see how Torts relates to and is distinguished from your other courses.

Doctrine vs. Skills

Roughly speaking, there are two sets of subject matter taught in law school – skills and doctrine. Sometimes both are taught in the same course, but often a course tends to be either a skills course or a doctrinal course. Generally, 1Ls will have one introductory course to teach you how to do the things a lawyer does. This may be called "Legal Methods," "Lawyering Skills," "Legal Reasoning and Argument," or something similar. You are taught how to do legal research, how to write a brief, and maybe how to present an oral argument in court. Advanced skills coursework may include trial techniques, negotiation techniques, drafting for business transactions, estate planning, and more. In contrast with skills courses, courses that teach the law itself are called doctrinal courses. Torts is a doctrinal course. Although a torts course might include some relevant skills training, the primary mission is to teach you what tort law is.

Substantive vs. Procedural

Doctrinal subject matter can be divided into two camps: procedural and substantive. Procedural law is law that governs the function of legal institutions. Most first-year law students take a course called Civil Procedure in which they learn the law that governs civil lawsuits. This includes how to start a lawsuit by serving a summons and a copy of the complaint on the defendant, which court to file the lawsuit in, and other essentials. Other procedural courses include Evidence, which largely concerns when you can say "Objection!" at trial, and Federal Courts, which covers some fascinating questions about the power of the federal courts in relation to Congress, the president, and the states. Substantive law, by contrast, directly governs what people can and cannot do, or to whom they will be liable if they do certain things. In many schools, a course called "Criminal Law" is about half procedural law (such as what constitutes probable cause) and half substantive law (such as the difference between murder and manslaughter). Torts is a body of substantive law. Contracts and Property are substantive courses as well.

Private Law vs. Public Law

Law can also be divided into "private law" and "public law."

"Public law" refers to direct regulation by the government of individual conduct. If you run afoul of public law, then you are in trouble with the government. Substantive criminal law fits within this category, as does constitutional law, immigration law, environmental regulation, zoning ordinances, and the motor vehicle code.

"Private law," on the other hand, refers to substantive law that gives one private party a claim on which to sue another private party. Torts is this kind of law. If you commit a tort, you are not in trouble with the government, but you might get sued by some private person. Another way to refer to private law is "the law of obligations," meaning that it is the law that recognizes obligations between private parties that are enforceable in court.

It is of course possible for the same action to create liability under both private and public law. Many actions that constitute a tort will also constitute a crime. If you intentionally kill someone, that's actionable in tort as wrongful death, and it is prosecutable under criminal law as murder.

Technically speaking, the government could – if they really wanted to – sue you as a private party in tort. But that almost never happens. If the government comes after you, they have more potent means in the public law than they have under private law. If you break into a secret Air Force installation, for instance, the federal government is not going to noodle around with a tort suit for trespass. The U.S. Attorney will go to a grand jury and cook up an indictment with some heavy federal criminal statutes. Getting sued would seem dreamy by comparison.

The Elemental Concepts of Private Law

In most law schools there are three foundational first-year doctrinal courses that each revolve around an elemental concept in private law. Those courses are Torts, Contracts, and Property. Each of these represents an essential idea that can give one person a claim against another person in court. If one person injures another, that's actionable under **tort** law. If one person breaches a binding promise to another, that's actionable under **contract** law. If two people both claim to own the same thing, a court can resolve the dispute using **property** law.

These concepts are not just important as themes for first-year courses. They are fundamental ideas that that animate law as a whole, and thus the concepts from them will reappear over and over again throughout law school.

Take misappropriation of trade secrets, for instance. If an employee takes a secret recipe from a baker and sells it to a competitor, that is actionable under trade secret law. Trade secret law is usually thought of as a separate body of law, not as a species of torts, contracts, or property. But at a fundamental conceptual level, when we ask why we have trade secret law, we find ourselves using the basic theories of tort, contract, and property to explain it. For instance, you could say trade secret misappropriation should be actionable because it constitutes a harm suffered by the originator of the secret. That's a *tort* way of thinking about it. Or, you could say the misappropriation should be actionable because it represents a broken promise made by the misappropriator to safeguard the secret. That's a *contract* way of thinking about it. Or you could say that the misappropriation is wrong because the trade secret was owned by the originating party and thus the misappropriator had no right to transfer or dispose of it. That's a *property* way of thinking about it.

You can think of torts, contracts, and property as the great common-law triumvirate in the first-year curriculum.

There is a fourth elemental concept, although it does not get its own course in the core curriculum. That fourth concept can be called **unjust enrichment**. The same concept also goes by labels such as "quantum meruit," and "restitution." The idea here is that a court should transfer some wealth from one person to another because the other person deserves it more. This is a very broad idea, but it usually is only applied in rare situations where no other theory would reach a just result. For instance, when an unconscious person – incapable of assenting to a contract – receives emergency treatment in a hospital, a theory of unjust enrichment gives the hospital a legal right to get paid. You might cover this doctrine in your contracts course.

So, that's about it – four fundamental theories of the common law: tort, contract, property, and unjust enrichment. Most of the private law is built out of these four elements. So keep in mind that torts has a conceptual importance well beyond this single course. You can expect tort theories to come up in courses concerning constitutional law, intellectual property, civil rights, federal courts, securities regulation, and many others.

Where Tort Law Comes From

States vs. the Federal Government

In the United States, for reasons having to do with federalism and the dictates of the U.S. Constitution, tort law is almost entirely a creature of state law. Contracts, property, and unjust enrichment are, similarly, matters of state law.

This has a very important implication for this course: You are going to learn a generalized conception of tort law, not the law of any particular state. There are many different versions of tort law in the United States – including each state, plus the District of Columbia and various territories. Happily, tort law is mostly the same everywhere. But, unfortunately, you never know for sure what a particular doctrine of tort law is in any given jurisdiction until you check it out. And what may be a minor difference in the grand scheme of things could make all the difference in a particular lawsuit.

For you, as a law student, this is both annoying and liberating. It is annoying for obvious reasons: You could learn tort law extremely well, but yet not be able to answer any particularized question about it with certainty. It is liberating for the same reason – you are off the hook from knowing with certainty how the law will apply to any given situation. (This can make it a lot easier to dodge legal questions posed to you by members of your extended family when you are home for the holidays.)

By the way, when it is time for you to take the bar exam, you will find that most state bars require you to know the generalized conception of tort law, rather than your state's particular law. When it comes to torts, you could even get a multiple-choice question on the bar exam marked wrong by answering it accurately based on your state's idiosyncratic law.

Every once in a while, federal law has a say in a torts lawsuit, but such circumstances are rare. One example, covered in the part of this book on healthcare liability, is how the federal Employee Retirement Income Security Act – better known as "ERISA" – preempts tort lawsuits against health insurers. Two other examples, subjects for Volume Two, concern the Federal Tort Claims Act and constitutional due-process limitations on punitive damages.

Common Law vs. Civil Law

In American elementary schools, maybe even in middle schools and high schools, it is common to teach that the three branches of government – the legislative, the executive, and the judicial – each have three separate, distinct jobs: The legislative branch makes the law; the executive branch enforces the law; and the judicial branch interprets the law. Unfortunately, this is wrong. It is not just slightly inaccurate – it is fundamentally wrong. Most of the private, substantive law that is on the books in the United States has been created by the courts, not legislatures. This kind of court-created law is called the "common law."

For the most part, what you will study in torts, contracts, and property are doctrines of common law. In creating, fine-tuning, and revising these doctrines, the courts are not being "judicially activist." Under the common-law system, it is the job of the courts to do this. This is the way it has been for centuries.

The tort of battery, for instance, allows one person to sue another for a harmful or offensive touching. If someone kicks you, that's a battery. Battery is actionable as a tort not because a legislature passed a statute, but because long ago, a court said it was. And later courts followed that court. If you want to find the "law of battery," you will have to look in the reported opinions of the courts – not in the enactments of the legislature. This makes looking up the law complicated. And this is a large part of what people pay lawyers for: Reading through lots of cases to figure out what the law is on any given matter.

You could criticize the common-law method as abstruse, wasteful, arcane, and undemocratic. And these criticisms would not be groundless. Regardless, as a general matter, this is how the law works in the "common-law countries," a group which includes the United States, the United Kingdom, Canada, Jamaica, Ireland, Tanzania, Australia, and New Zealand, among others. Looking at this list of common-law countries, you probably will not be surprised to learn that the common-law way of doing things derives ultimately from England.

There is another way of creating a system of private law that is much closer to the government/law model you may have learned in elementary school – that is, where the legislature makes the law and the courts interpret the law. In this other way of doing things, the legislature passes statutes that govern private legal causes of action. This method is sometimes called a "code system," since the essential doctrines are arranged in the form of a written code – an organized set of laws. This system is also called a "civil-law system." Countries that follow such a system are often referred to as "civil-law countries." Examples include France, Mexico, Germany, Japan, Guatemala, Switzerland, Thailand, China, Brazil, and many others. The phrase "civil law" can be confusing, because in the United States, the word "civil" is often used in contradistinction to "criminal." For instance your "Civil Procedure" course will cover the procedural law of "civil" lawsuits – meaning litigation that is not criminal litigation. In this sense, a tort lawsuit is a civil lawsuit, even though torts is a common-law subject. But to say that a country is a civil-law jurisdiction is to say that it follows a code system, in which the legislature creates the law of private obligations.

France is an archetypal civil-law jurisdiction. In France, the law that allows one person to sue another comes from the Napoleonic Code. The French civil-law heritage actually gives rise to two important exceptions to the common-law nature of torts in the United States and Canada. One state and one province have a code-based "law of obligations" rather than a common-law of torts. Those two jurisdictions are, naturally, Louisiana and Quebec. Owing to their French colonial history, each has a legal system that is a descendant of the Napoleonic Code.

While the code system has advantages, many of which are immediately apparent – including organization and accessibility – you will find that the common law has a wealth of subtly attractive features. In fact, both the common-law and civil-law systems have much to admire, which is perhaps why many countries – including Botswana, South Korea, Cameroon, Kuwait, and Norway – have adopted a mix of the two.

The Place of Statutes

Even in a common-law jurisdiction, the legislature has a role to play in shaping tort law. While, for the most part, legislatures do not create tort law, they can if they want to. And when a legislature passes a statute on a point of tort law, it trumps any contrary judge-made common law.

For instance, the courts decided long ago that killing another person is not actionable as a tort. If this sounds ridiculous to you, you are in good company. Legislatures have found it ridiculous too. That's why state legislatures everywhere have passed statutes that create a "wrongful death" cause of action and allow "survivorship" claims.

So, some aspects of tort law are statutory in origin. Nonetheless, tort law is, overwhelmingly, a body of judge-made common law. This means that most of what you will study in a course on torts are cases in which judges have announced and sharpened common-law doctrines.

The Structure of a Tort Case

To proceed methodically through tort law, we will follow what you might call the internal structure of a tort. Understanding this structure requires separating out the roles of the plaintiff and defendant, and then distilling causes of action, elements, and affirmative defenses.

The Parties

A **plaintiff** is someone who sues. A **defendant** is a person whom the plaintiff sues. In the torts context, this typically means that the plaintiff got hurt and the defendant is the one who is alleged to be responsible.

Causes of Action, Elements, Affirmative Defenses, and Burdens of Proof

A **cause of action**, also called a "claim," is a basis upon which a plaintiff can sue. Torts has several causes of action. Some examples are battery, negligence, false imprisonment, fraud, and assault. In order to have a meritorious lawsuit, a plaintiff will need to properly allege at least one cause of action. Plaintiffs can, and frequently do, sue on multiple causes of action in the same lawsuit.

Each cause of action can be broken down into a number of **elements**. For instance, the cause of action for battery can be divided into the following four elements: (1) an action, that is (2) intentional, and which results in a (3) harmful or offensive (4) touching of the plaintiff. It is the plaintiff's **burden of proof** to establish each of these elements. The plaintiff must establish all of the elements of the cause of action in order to win. It is not enough for the plaintiff to establish one or even most of the elements. The plaintiff must establish every single one in order to win.

If the plaintiff establishes each of these elements, then the plaintiff is said to have made out a **prima facie case**. "Prima facie" is Latin for "first face." If a plaintiff has established a prima facie case, then the plaintiff has presumptively won.

You can understand the requirement that a plaintiff establish every single element just by thinking about it. Suppose you tap a stranger on the shoulder and ask her what time it is – after which she promptly sues you for battery. She can prove you undertook an (1) action, which was (2) intentional, and which resulted in (4) a touching. But the lawsuit must fail because there is nothing *harmful or offensive* about tapping someone on the shoulder. Because that element has not been established, the prima facie case for battery has not been made out. If you change the facts to replace the tap on the shoulder with a shove, then you have something harmful or offensive. And in that case there would then be a prima facie case for battery.

What does the defendant need to do to win a tort lawsuit? Absolutely nothing. At trial, the defendant can just sit back and see how things go, and if the plaintiff comes up short, failing to establish every element, then the defendant will win.

Now, even if the plaintiff establishes all the elements, and therefore has a prima facie case, the defendant still has two more ways to win. First, the defendant can undermine the plaintiff's prima facie case by putting on additional evidence to refute the proof offered by the plaintiff on at least one of the elements of the cause of action. This is called a **rebuttal defense**. If the defendant can disprove just one element, the defendant wins on that cause of action.

There is a second way for the defendant to win as well: an **affirmative defense**. If the defendant can establish an affirmative defense, then the defendant can actually stipulate to the plaintiff's entire case and yet still win. An affirmative defense defeats the entirety of the plaintiff's successful prima facie case.

Different tort causes of action have different defenses. For the tort of battery, two principle defenses are consent and self-defense. Let's say you punch someone in the face. That's a battery. But suppose you punch the person in the face in the context of a boxing match. In that case, you can establish the affirmative defense of consent. Consent is a complete defense to battery. Alternatively, if the punch in the face was in the context of defending yourself against someone physically attacking you, then you can establish the affirmative defense of self-defense.

It's a little strange how this works: If you punch someone in the context of a boxing match, you have committed a battery. That means that a prima facie case can be established against you. It does not mean the plaintiff will win when all is said and done, but it does mean the burden is on you, as the defendant, to establish that the punch was consented to in order to avoid liability. That's not to say that this will be difficult: Just provide credible testimony that the plaintiff stepped into a boxing ring and took a fighting stance while wearing boxing gloves – that will suffice to show implied consent.

The general standard of proof in a torts lawsuit is **preponderance of the evidence**. This means that it counts as "proof" to show that something is more likely than not. If a jury, after hearing conflicting evidence, determines it was 50.000000000000001% likely that a defendant acted with consent when punching someone, then that counts as proof. The preponderance standard works for whomever has the burden of proof in a torts case on a given issue. That is, the preponderance standard is the standard by which plaintiff must prove every element of a cause of action, and it is the standard applied to defendants seeking to establish an affirmative defense.

One way of thinking about the burden of proof and the preponderance standard together is that it constitutes a tie-breaker. If the question is whether a prima facie case has been established for a given cause of action, then the burden is on the plaintiff – that means that any tie will go to the defendant. If the issue is whether an affirmative defense is established, the burden is the defendant's – so a tie on that issue will go the plaintiff. (Just remember, a defendant is not required to prove an affirmative defense to win. If the plaintiff fails to prove any element of a given cause of action, then the defendant wins without doing anything.)

The preponderance standard can be compared to the well-known standard for criminal prosecutions: proof beyond a reasonable doubt. The reasonable-doubt standard in criminal law is a high bar. By comparison, the preponderance of the evidence standard in a tort suit is easy to meet. Suppose, after a trial, a jury collectively thought, "We aren't very sure about it, but we think it's slightly more likely than not that the defendant intentionally killed the victim." That's enough for a wrongful-death verdict, but it would lead to an acquittal for a murder charge.

One more note about causes of actions and affirmative defenses: Remember that it is possible for a plaintiff to allege more than one cause of action in a lawsuit. In fact, it's typical. Similarly, a defendant may raise multiple affirmative defenses. A single altercation between two people could give rise to claims for battery, negligence, false imprisonment, fraud, defamation, and more. Each of those claims could give rise to multiple affirmative defenses, and all would ordinarily be dealt with in the same lawsuit.

Why allege more than one cause of action? Well, some causes of action entitle a plaintiff to more in monetary damages than others. Some are easier to prove than others. Bottom line, however, to get some relief, a plaintiff needs only to prevail with one cause of action. Similarly, for any given cause of action, a defendant can raise multiple affirmative defenses. But the defendant needs only to prove one affirmative defense to prevail with regard to any given cause of action.

2. An Overview of Tort Law

Now that you understand the fundamentals of causes of action, elements, and affirmative defenses, we can start to sketch an overview of the subject of tort law.

Before delving into the details of particular tort causes of action, it is extremely helpful to take the time to learn the broad outlines of the entire subject matter. Why? Having a framework of any subject makes it easier for you understand and absorb

details. Moreover, when it comes to torts, you will find that there are many points of connection among disparate aspects of the subject matter. For instance, an aspect of negligence doctrine – called res ipsa loquitor – is similar in important ways to the cause of action for strict liability. If you take the time at the outset to study the overview, you will be able to understand these linkages much more readily when they come up later on.

As a common-law subject, torts has no official organization scheme. It exists as a disconnected mass of judicial opinions spanning a multitude of jurisdictions. The opinions are put into reporter volumes in chronological order – not grouped by topic. In fact, you would have a hard time grouping cases by topic if you tried, because any given case often deals with multiple topics.

Yet to tackle the subject of torts methodically, it is necessary to adopt some organizational scheme. There is some unavoidable artificiality in doing this, but imposing some form of order is needed to make the subject comprehensible to the uninitiated.

The most straightforward way to organize the study of torts seems to be to group together causes of action, and then explore one cause of action at a time, running through the elements and relevant defenses for each. That is how this book is organized. Unfortunately, some topics do not fit into this structure, since they are relevant to all or many tort causes of action. Such topics include immunities, remedies, special issues regarding who can sue, and generically applicable affirmative defenses. Such topics will be treated separately (and they will appear in Volume Two).

To take a first cut at dividing up all the tort causes of action for study, we'll separate them into two large piles, to which we will give the labels "lineal" and "oblique."

The Lineal Torts – Direct Harm to Persons or Physical Property

What we are calling the lineal torts are the ones that involve some kind of direct injury to a person's body or physical property. (And rarely, the harm can be to a person's mental well-being.) In this category of lineal torts, the harm to person or property is a direct one. Bar brawls, car crashes, and exploding soda-pop bottles are all examples.

Lineal-tort causes of action can be divided into two categories: those that will accrue from accidents, and those that only apply to intentional actions.

Causes of Action for Accidents

Negligence

The most general cause of action that is available for accidents is negligence. Motor-vehicle accidents, slip-and-falls, and most kinds of medical malpractice are negligence cases. There are five elements to the cause of action for negligence.

> (In plain English:)
>
> A plaintiff can win a negligence case by showing that (1) the defendant had an obligation to be careful, (2) the defendant wasn't careful, and that carelessness was (3) an actual cause and (4) a not-too-indirect and not-too-far-fetched cause of (5) a bodily injury or damage to physical property.

Those are the elements of negligence. But those are not the words courts actually use to talk about negligence. We will have to translate our plain English into legal terms of art – "legalese," if you want to call it that.

> (Restated in legal terms of art:)
>
> A plaintiff can establish **a prima facie case for negligence** by showing: (1) the defendant owed the plaintiff a duty of due care, (2) the defendant breached that duty, and that breach was (3) an actual cause and (4) a proximate cause of (5) an injury to the plaintiff's person or physical property.

The **duty of care** concept simply means that, under the circumstances, the defendant had an obligation to be careful. A defendant is said to owe a duty of care (i.e., have an obligation to be careful) with regard to all "foreseeable" plaintiffs. This means that if you should have known you could hurt someone by being careless, then you had an obligation to be careful.

The **breach** element is established if the defendant was not, in fact, being careful.

The element of **actual causation** means that there is a logical cause-and-effect relationship between the defendant's carelessness and the plaintiff's injury. That is to say, if the defendant had actually been careful, then the plaintiff never would

have gotten hurt. Generally speaking, if the plaintiff would have gotten hurt anyway, then the element of actual causation is not met.

The element of **proximate causation** means that the cause-and-effect relationship between the defendant's conduct and the plaintiff's injury cannot be too bizarre. If newlyweds driving back from their wedding reception are paying more attention to one another than the road, and because of this, their car rear-ends yours, you can sue the driver, and maybe the distracting passenger, but you cannot sue the matchmaker who got the two lovebirds together. Why not? A court would say that the matchmaker's actions were not a "proximate cause" of the collision.

The **injury** element requires that the plaintiff actually got hurt. You cannot sue someone in negligence just because you are mad at them for *almost* getting you killed. If you come away without a scratch, then there is no negligence case.

There are three affirmative defenses that are particularly relevant to negligence. The first two are **comparative negligence** and **contributory negligence**. These are really two different versions of the same idea – relieving the defendant from liability when the plaintiff's own negligence contributed to the plaintiff's injury. This kind of defense may either be complete, absolving the defendant of all liability, or partial, allowing the defendant to pay no more than some percentage of the total damages. An additional affirmative defense is **assumption of the risk**, based on the idea that where the plaintiff knowingly and voluntarily assumed the risk of something bad happening, the defendant should not be liable.

Strict Liability

The cause of action for strict liability, like negligence, is also available for a plaintiff who has suffered a bodily injury or property damage because of an accident. But while negligence is available broadly for just about any kind of accident, strict liability is available only in a few limited circumstances in which the law imposes an **absolute responsibility for safety**. Those circumstances are:

- wild animals
- trespassing livestock
- domestic animals with known vicious propensities
- defective products
- ultrahazardous activities

The elements for strict liability are the same as those for negligence with one powerful exception: The duty-of-care and breach-of-duty elements are removed. This means that if the cause of an injury falls into one of the five categories for strict liability, then it doesn't matter how careful a defendant was being.

> A plaintiff can establish **a prima facie case for strict liability** by showing: (1) the defendant's conduct falls into one of the categories for which there is an absolute responsibility for safety, and the defendant's conduct was the (2) actual cause and (3) proximate cause of (4) an injury to the plaintiff's person or physical property.

The key question in strict liability is when it may be invoked; that is: How do we define the categories giving rise to absolute responsibility for safety?

Ultrahazardous activities trigger the absolute responsibility for safety. That much is clear. But there is considerable room for argument as to what qualifies as ultrahazardous. Some examples of activities the courts have said qualify as ultrahazardous are fireworks, blasting, crop dusting, fumigation, oil drilling, and just about anything nuclear. On the other hand, jurisdictions are split on whether transporting gasoline by tanker truck qualifies.

With regard to defective products liability, the key question is what counts as a defect. The law recognizes three kinds of defects: a **manufacturing defect**, whereby some product failed to be made to specification; a **design defect**, where the product was designed in such a way that it was unreasonably dangerous; and a **warning defect**, in which the lack of a clear warning causes an otherwise safe product to be dangerous. An interesting aspect of strict products liability is that anyone in the distribution chain can be held liable, from the retailer, to the distributor, to the manufacturer.

We will save elaborations, complications, and exceptions for later, but for now it may give some readers piece of mind to know that selling items at a garage sale does not make you a retailer for purposes of strict products liability.

Intentional Torts

The next broad category is that of intentional torts. You will see that where the defendant acted with intent in harming the plaintiff, the law allows many more options for recovery.

There are seven traditional intentional torts. Four are personal, three are property-related. The intentional personal torts are battery, assault, false imprisonment, and outrage (also known as intentional inflication of emotional distress, or "IIED"). The intentional property torts are trespass to land, trespass to chattels, and conversion. For these torts, we will sum up each in a sentence, saving a formal breakdown into elements for later.

Battery

The tort of battery requires an intentional infliction of a harmful or offensive touching of a person.

The touching does not need to be direct. Touching someone's clothing, or even an object the person is holding, can qualify. Setting in motion some process that eventually results in a touching qualifies as well. Setting up a bucket of water to pour on someone's head when they walk into a room weeks later will count as a touching. The touching also does not need to be on the outside of the body. Giving someone a beverage adulterated with a disgusting substance or a narcotic would count as a touching.

The intent requirement is more relaxed than you might think, as well. Knowing with substantial certainty that a person would be harmfully or offensively touched, for instance, suffices for the purposes of battery. Intent is also satisfied where the defendant intended only a near miss.

The most important aspect of battery, when compared to negligence and strict liability, is that there is no injury requirement. Spitting on someone, for instance, rarely causes an injury. But it will constitute a battery. In a case without an injury, it might not be possible to win any appreciable monetary award, but a claim can nonetheless be made and vindicated. And since some harmless touchings are quite reprehensible (e.g., spitting), a large award of punitive damages might well be justified.

Battery covers an enormous range of conduct, from the inappropriate to the catastrophic. Pulling hair is a battery. So is a bombing.

The affirmative defense of consent is extremely important to battery. Consent can be expressed in words or implied by the circumstances or a past course of interaction. The defense of consent is what keeps contact sports out of the courtroom.

Assault

The tort of assault is similar to battery, but it does not require a touching. Assault is defined as **the intentional creation of an immediate apprehension of a harmful or offensive touching**. In other words, making someone think they are about be the recipient of a battery constitutes an assault. Like battery, assault does not require an injury as part of the prima facie case.

Also like battery, the intent requirement is nonspecific. Intending to hit someone, but actually missing, qualifies as intent for the purpose of establishing battery.

False Imprisonment

The tort of false imprisonment is established by proof of **intentional confinement – experienced or harmful – of a person to a bounded area**. Kidnapping counts as false imprisonment. But a very brief period of locking someone in a room is false imprisonment as well. An actionable confinement can be accomplished by physical force, threat of physical force, or improper claim of legal authority. For instance, overzealous store security guards can accrue liability for false imprisonment by making improper assertions of legal authority in detaining persons suspected of shoplifting.

No harm needs to be done, nor any injury inflicted, for a claim of false imprisonment.

A key affirmative defense is **consent**, which, for instance, keeps airlines from incurring liability for making passengers wait for the ding before getting out of their seats. Another key affirmative defense is the **lawful arrest privilege**, which allows the police and sometimes citizens to effect the arrest of a criminal suspect.

Outrage (or Intentional Inflection of Emotional Distress)

The tort of outrage is commonly called intentional infliction of emotional distress, a name unwieldy enough that it is usually shortened to "IIED." Liability for the tort is triggered by **the intentional or reckless infliction, by extreme and outrageous conduct, of severe emotional distress**.

The key to remember with outrage is that merely insulting or treating someone badly will not suffice. The conduct has to be *extreme and outrageous*. Teasing and name-calling does not qualify. Falsely telling someone that a loved one is dead, however, certainly would. Sometimes an outrage claim can be successfully pursued in employment situations where a worker's boss engaged in a prolonged campaign of harassment.

Also important, the emotional distress experienced by the plaintiff must be *severe*. Making someone cry is not enough. Reducing someone to uncontrolled screaming or prolonged hysterical sobbing, however, would likely qualify as severe. Over the longer term, severity could be established by proving recurring night sweats, heart palpitations, panic attacks, or the wearing down of teeth through chronic grinding.

Trespass to Land

The intentional tort of trespass to land requires **an intentional physical invasion of a person's real property**. Real property is land along with anything built on or affixed to the land, as well as the subsurface below and the airspace above to a reasonable distance.

Failing to remove something from the plaintiff's land that the defendant is obligated to remove also counts as trespass to land.

To have a valid claim for trespass to land, no injury is necessary. Touching a physical portion of the land is not even necessary. A disgruntled homeowner could theoretically sue neighborhood kids for playing a game of catch in which a ball is thrown over a corner of the homeowner's lot. Of course, in such a case, no compensatory damages would be awarded, since there is no harm needing compensation. Punitive damages would be unavailable as well, since the kids' behavior would not warrant it. In such a case a court would likely award only nominal damages of $1. So, such a case would, as a practical matter, be pointless to pursue. But the fact that bringing such a claim is possible serves to illustrate the incredible sweep of the tort of trespass to land.

Also important for trespass to land is how the intent requirement is construed. The defendant does not need to have the specific intent to trespass. If the defendant intends only to walk upon a public right-of-way, but nonetheless strays onto private property, the intent of putting one foot in front the other is sufficient intent to establish the cause of action.

Of course, consent is a defense, as it is to intentional torts generally. So when the neighborhood kids come trick-or-treating, they will have a defense of implied consent.

Trespass to Chattels

Chattels are items of tangible property that do not qualify as real property. Motor vehicles, paper clips, jewelry, horses, and helium balloons are all chattels. An action for trespass to chattels will lie when there is **an intentional interference with plaintiff's chattel by use, intermeddling, or dispossession**.

The requirement for trespass to chattels is stricter than for trespass to land. Merely touching or waving a limb over real property counts as trespass to land. But for trespass to chattels, a mere touch will not qualify, nor will merely picking the item up. There has to be something more – not damage, but something that amounts to an interference with the plaintiff's rights in the chattel. Stealing the item, damaging it, or destroying it would be more than enough.

Conversion

The intentional tort of conversion is an alternative cause of action for chattels. A conversion is effected by **an intentional exercise of dominion or control over a chattel that so substantially interferes with the plaintiff's rights as to require the defendant to be forced to purchase it**.

If the plaintiff wants to pursue conversion, the plaintiff will need to make a heighted showing compared to trespass to chattels, proving that the defendant so substantially interfered with the chattel that a forced sale is warranted.

The main difference between trespass to chattels and conversion is the remedy. For conversion, the court will order the defendant to pay the plaintiff for the value of the chattel before the defendant interfered with it. It is an example of what is called a "forced sale." Afterwards, the plaintiff must deliver the chattel to the defendant – or whatever is left of it.

If the plaintiff wants to keep the chattel, regardless of its condition, then the plaintiff should pursue an action for trespass to chattels. The monetary recovery might be lower, but the plaintiff does not have to part company with the object.

The Oblique Torts – Economic or Dignitary Harm

The other major group of tort causes of action applies where the harm is not a direct one to person or property. The harm may by financial, or it may be to one's sense of dignity or reputation. We will only discuss these very briefly, just enough to demonstrate the range of situations in which tort law provides a mode of redress for oblique harms.

Many oblique torts concern a purely financial loss.

The tort of **fraud** allows a cause of action in certain circumstances we would call, in the ordinary vernacular, "getting ripped off." A fraud claim requires that the defendant made a misrepresentation to the plaintiff, that the plaintiff relied on it, and that this ended up making the plaintiff worse off. A typical situation is where the defendant lies in order to get the plaintiff to purchase worthless goods or put money into a shady investment.

The tort of **intentional economic interference** allows a plaintiff to sue when someone does something to prevent the plaintiff from closing a business deal or getting the benefits of a valid contract. In the prototypical case, the defendant is an intermeddler, who for some reason, possibly out of spite, wants to make someone flounder in their career or line of business. The most important thing to understand about the intentional economic interference tort is that it cannot be brought against a party to a contract for failing to live up to the terms of a deal. The action available in such a situation is one for breach of contract. The intentional economic interference tort can only be brought against third parties who have no business involving themselves in the matter.

Other oblique torts are more concerned the plaintiff's sense of dignity and integrity.

The tort of **defamation** can be brought against a person who communicates false, reputation-harming statements about the plaintiff. Defamation in writing is called **libel**, while the defamation that is spoken is **slander**. Libel is easier to allege. For slander, a plaintiff will only be able to make out a prima facie case under certain circumstances, such as if the false statement is about certain sensitive topics or if the plaintiff can prove a direct financial loss resulting from the statement. The largest limitation on defamation comes in the form of the **First Amendment**, which can make it nearly impossible for public officials and public figures to sue their critics in most circumstances.

There are multiple torts that fit under the banner of **invasion of privacy**. One, **false light**, is similar to defamation in that it allows a cause of action for certain false statements, but it does not require the kind of harm to reputation that defamation requires. The tort of **intrusion upon seclusion** allows lawsuits against peeping toms and others engaged in eavesdropping, surveillance, or various other sorts of creepiness. Meanwhile, the cause of action for **public disclosure** allows suits against people who communicate embarrassing, private information about the plaintiff to the public at large. And finally, the tort cause of action called the **right of publicity** creates liability for certain commercial uses of a person name, voice, or likeness. It is principally useful to celebrities suing makers of unauthorized merchandise – like t-shirts, stickers, and coffee mugs – as well as for anyone whose name is unwittingly used in an advertisement. Consent is a defense – one, in fact, that you will find buried in the terms of service for Facebook and Google.

There yet more common-law tort causes of action, some of them quite exotic. Examples are some relics of a different age that allow lawsuits to be brought by cuckolds and jilted bridegrooms. These may be more interesting for their historical value than anything else.

Other torts – many with considerable present-day relevance – are statutory in origin. These include claims against government officials for civil rights violations.

The Whole Torts Landscape Considered Together

As you can see, there are a variety of torts, each with its own tangle of convoluted doctrine prescribing when persons are entitled to redress. Ultimately, the range of tort claims and defenses reflects society's ideas about what counts as hurtful and wrong and what we owe to one another as citizens of the same complicated, crowded society. Our views on these subjects, of course, are complicated, so it is probably inevitable that tort law is complex as well. But as a student, take heart, because as complicated as it might be, tort law takes its current form from having been hammered over the lumps and bumps of human concern – and that is a subject that you, just by living on this planet, have already become intimately familiar with.

3. Introduction to Negligence

Introduction

The center-stage cause of action in torts is negligence. In terms of its economic impact and social importance, negligence predominates.

In its briefest form, the doctrine of negligence holds that if you are to blame, through your carelessness, for an injury to the person or property of another, you will be liable for the damage.

Attorneys who practice "personal injury law" are, for the most part, working with the negligence cause of action. Bus-stop ads and billboards offering legal representation for "ACCIDENTS" are mostly aimed at negligence claims. On the other side of the coin, defending against negligence suits is a major preoccupation of insurance companies.

The Central Idea: Shifting the Burden of Loss

Negligence is all about who should bear the burden of the loss that results from an injury-producing incident. It takes as a given that something bad has happened. Often it is something tragic. Negligence tries to make the best out of a bad situation by allowing the burden of the loss to be shifted from one party to another where appropriate.

Fundamentally, the negligence cause of action is about compensation. It is not about punishment. It is possible to get punitive damages as an added remedy in a negligence lawsuit, but doing so requires proving more than negligence. In particular it requires showing that the defendant's conduct was reckless, wanton or willful. Negligence itself about trying to allow a less blameworthy party to shift the burden of misfortune to a more blameworthy party.

There are many stories of runaway jury verdicts in negligence cases that give plaintiffs a huge windfall of cash. Some of these stories are apocryphal. Most omit important context that would make the verdict seem less shocking. Jackpot verdicts happen, but they are outliers, and even those are usually cut down to size on a post-trial motion or appeal.

Real-life jury verdicts that run to the millions of dollars often include large punitive damage components, meaning more than negligence was at work. If a huge verdict is handed down merely on the basis of negligence alone, and thus comprises only what are called "compensatory damages," then it is usually because the plaintiff will suffer lifelong chronic pain, has permanent injuries that will make normal life impossible, or will be unable to pursue what had been a very lucrative career. Or it might be a combination of these factors. For example, a multi-million-dollar verdict consisting of only compensatory damages could well be possible – and might even be expected – for a young Wall Street financial whiz whose brilliant career was cut short by a massive brain injury that has left her in constant, severe pain and unable to eat, drink, or use the toilet without assistance. In other words, a person with a huge compensatory damages verdict is probably someone you wouldn't want to switch places with.

The Elements and Defenses for Negligence

The law of negligence is both complicated and simple. Negligence is simple in terms of its central idea. That idea is that a party injured in an accident should be able to recover the loss from whoever is at fault for causing the accident. The core notion is one of *responsibility*.

A good way to think about the law of negligence is that that it is a formalized system for assigning blame. The elements of the prima facie case for negligence, and the defenses that are allowed, form a highly structured way for the courts to "think" about issues of responsibility and blame, and thereby hold a party accountable. This is where negligence law gets complicated. Exactly what does it mean to say that someone is "to blame" for an injury?

Try to imagine that you are shipwrecked on a remote island with a large group of castaways. None are lawyers or judges. There are no books and no internet. You are appointed as a judge in this cleaved-off society. A dispute comes before you, and you are asked to determine whether someone is to blame for an accident. "Blame" is a broad and vague word. How could you subdivide the question for analysis? In other words, what things would have to be true for you to confidently say that a given person to be "to blame" for the injuries of another? Essentially, these were questions that have been put to the common law over the past centuries. And the answer the common law has come up with is the modern cause of action for negligence. The prime facie elements and affirmative defenses of negligence reflect a way of dividing up the blame question into many subsidiary issues.

Here are the elements of a **prima facie case for negligence**:

(1) The defendant owed a **duty of care** to the plaintiff. (That is, the defendant had a reason to be careful.)

(2) The defendant's conduct constituted a **breach** of that duty of care. (In other words, the defendant was *not* careful.)

(3) The defendant's conduct was an **actual cause** of the plaintiff's injury. (Without the defendant's conduct, there would not have been an injury.)

(4) The defendant's conduct was a **proximate cause** of the plaintiff's injury. (This concept is complicated, but it means something like the plaintiff's injury isn't so indirectly connected to the defendant's actions that it isn't fair to hold the defendant responsible.)

(5) There was an **injury** to the plaintiff's person or property. (An injury "to the person" here generally means the person's body, and "property" means something tangible.)

This way of dividing up the question of blame in the case of accidents is not a logical necessity. Other people could have come up with other systems. In fact, it's not hard to argue that other systems would be better. Regardless, this is the system we have.

This is a good point at which to pause and note that some other people writing about torts – such as lawyers, commentators, or judges – might tell you that the negligence cause of action only has four elements. Others might say the number is six. Accountings of the elements vary. But if you look closely at the content of what other sources say, you will find that it is, in essence, the same as the five elements laid out above.

Plausibly, a court could say that the negligence cause of action consists of just *two* elements: (1) a breach of a duty of care owed to the plaintiff, (2) an injury that was caused thereby. While this formulation looks different – since it is two elements instead of five – look closely and you will see that it is actually the same thing, just with various parts lumped together.

You may be tempted to ask about the "official" list of elements of the cause of action for negligence. Well, there is no official list. As a common-law subject, negligence is the product of many, many different courts, all reading each other's work, but with no one really in charge. Add to that the fact that the doctrine evolves over time. The bottom line is that in learning torts, you will have to pay attention to concepts more than labels.

Now, going back to the list of the five elements above, you might think, right off the bat, that the concept of "duty of care" seems strange and unnecessary. Once we get into it, however, you will see that this element helps to filter out a lot of cases where it would seem unfair for the plaintiff to be able to recover.

In particular, the duty-of-care concept helps filter out many cases where the plaintiff's injury seems too indirectly connected with the defendant's conduct. That the duty-of-care element would do this is strange, since the proximate-cause element also helps filter out cases where there is an indirect connection between the plaintiff's injury and the defendant's conduct.

The fact is, the elements of negligence contain considerable room for overlap. In fact, the conceptual overlap between the duty of care element and the proximate causation element is at the heart of what is likely the most famous torts case of all time: *Palsgraf v. Long Island Railroad*. We will get to that in a later chapter.

An alternative to the prima facie elements would be for every case to be decided on its own, with a judge listening to both sides and simply determining what is fair. And that is a very plausible way things could be done. But it's an anathema to the common law. The project of the common law is to build a body of doctrine that helps to ensure that like cases will be decide alike, no matter who the judge is and who the parties are. By setting out a formal system, rather than depending on intuition and a rough sense of justice, then the courts can avoid arbitrary decisions, achieving a "rule of law" rather than a "rule of persons." That's the idea, anyway. Throughout your study of torts, you can constantly ask yourself whether the negligence law, through its structure of elements, is achieving that goal. At times you may find that the determination with regard to any individual element in any given case seems to be decided arbitrarily – not according to any system, but just according to the judge's "rough sense of justice." In fact, one way of defining the proximate causation element, as we will see in the *Palsgraf* case, is that it is a placeholder for "a rough sense of justice."

At the end of the day, the use of individual elements within the prima facie case for negligence reflects the common law's incomplete project of striving to avoid arbitrariness. The elements give us a helpful structure to organize our thinking about negligence.

Alongside the prima facie elements of the negligence case are the principle defenses to negligence, which include:

Comparative negligence – With the defense of comparative negligence, if the plaintiff's injury is at least partly attributable to the plaintiff's own negligence, then the defendant will not be liable to the plaintiff for the full amount of the plaintiff's damages. If the plaintiff's relative fault is very large in comparison to the defendant, then, depending on the jurisdiction, the plaintiff may be barred from any recovery whatsoever.

Contributory negligence – The defense of contributory negligence is a more defendant-friendly version of comparative negligence. It is used in a minority of jurisdictions in lieu of comparative negligence. Under contributory negligence, if the plaintiff's own negligence contributed even slightly to the injuries sued upon, the plaintiff is completely barred from any recovery.

Assumption of the risk – Despite the existence of a prima facie case for negligence, the plaintiff will not be able to recover if the plaintiff willingly assumed the potential burden that something bad might happen. Such an assumption of the risk can implied by the circumstances or expressed in words, written or oral.

In addition to these defenses, there are generic defenses available – defenses that are available in all torts cases. These include the statute of limitations, which causes you to lose your claim if you wait too long to file. There are also some unique defenses that are only applicable to certain kinds of defendants, such as charities and governmental entities. But we will wait to study those until after we have explored the elements of negligence and the general defenses.

4. An Example of a Negligence Case

In the following case, you will be able to see how tort law works within a structure made of causes of action, elements, and affirmative defenses. The case does a great job, as well, of showing the different roles of the judge and the jury. It also shows the common-law method at work – past decisions being applied as precedent to help decide a new case presenting different facts.

Georgetown v. Wheeler

5. When and to Whom is a Duty of Care Owed

Introduction

The first element that must be established by a plaintiff in proving a negligence case is that the defendant owed the plaintiff a duty of care. If the defendant did not owe the plaintiff a duty of care, then even if the defendant was careless and caused injury to the plaintiff, there will be no recovery in negligence.

Suppose someone asks you for one of your kidneys, explaining that otherwise they will die. In terms of negligence doctrine, you do not owe this person a duty to hand over a kidney. And even if the person dies as a result of not getting one of your kidneys, there is no prima facie case against you for negligence. You can probably intuit that there is not a good cause of action here, but it is instructive to consider the explicit reason. Check off the elements: There is an injury. There is causation. Those are not lacking. What *is* lacking is the duty of care.

Now, suppose you are carelessly operating a rocket-powered tricycle and, thanks to your lack of care, you careen out of control, hitting and injuring a pedestrian who was walking on a sidewalk. You owed the pedestrian a duty of care, and you breached that duty. And that breach caused an injury. Thus, the pedestrian will be able to establish a prima facie case for negligence. All the elements are in place.

In this chapter, the key question is when and to whom is a duty of care owed. In other words: Is there a duty? The question of what is required by a duty of care – in other words, just how careful do you have to be – is a question for the next chapter, in which we will talk about *breach of duty*.

Whether or not there is a duty of care is generally considered a *question of law*, meaning it is a matter for the judge to decide. Thus, the doctrine of duty of care can be used to prevent a jury from hearing a case that might otherwise result in a substantial award of damages.

The Essential Concept: Foreseeability

The essential concept in defining the duty of care in negligence is *foreseeability*. A defendant is said to owe a duty of care to all foreseeable plaintiffs for all foreseeable harm.

Case: *Weirum v. RKO*

In this case there is carelessness, injury, actual and proximate causation. The only open question is whether a duty of care is owed.

Doctrinal Wiggle Room

One way to think about the elements of a negligence case is that they are the law's way of providing an analytical structure that will pare down the universe of possible negligence matters into a subset of cases where awarding compensation is in tune with our basic intuitions of fairness. But when you try to construct simply stated rules that will both correspond with a sense of justice and work in any context, you run into the inevitable need for wiggle room. In tort law, the elements of duty of care and proximate causation do the most to provide that wiggle room, with duty of care being primarily the domain of judge, and proximate causation being generally the province of the jury.

The duty of care can be defined as an obligation for people to exercise reasonable care to avoid foreseeable harm to others. It is a frustratingly fuzzy definition. So, if you feel like you are having a hard time understanding the concept of duty, do not worry. It probably just means that you are reading closely and thinking deeply. The duty-of-care standard is vague out of necessity.

The definition of the duty of care is probably less important than the way it is employed by courts. Justice Mosk describes the role of the duty of care with considerable candor when he says, "It is the court's 'expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection.'"

Duty of Care in Entertainment Industry Cases

Weirum v. RKO is frequently cited in negligence cases where the entertainment media is blamed for death or injury. In other cases, however, plaintiffs have not tended to fare as well as the Weirum family. For example, in *McCollum v. CBS, Inc.,* 202 Cal.App.3d 989 (1988), a 19-year-old killed himself with a gun after listening to the Ozzy Osbourne song, "Suicide Solution." The song includes the lyrics "Suicide is the only way out" and "Get the gun and try it. Shoot, shoot, shoot … " The California Court of Appeals rejected the plaintiffs' attempt to use *Weirum v. RKO* to show a duty of care. While acknowledging *Weirum*'s broad language, the court found the case to be of limited applicability, concluding that while the accident in *Weirum* was foreseeable, the Osbourne fan's suicide was not.

The court also noted the separation in time involved in recorded music versus live radio: "Osbourne's music and lyrics had been recorded and produced years before. There was not a 'real time' urging of listeners to act in a particular manner. There was no dynamic interaction with, or live importuning of, particular listeners." Emphasizing the policy implications of their decision, the court added, "[I]t is simply not acceptable to a free and democratic society to impose a duty upon performing artists to limit and restrict their creativity in order to avoid the dissemination of ideas in artistic speech which may adversely affect emotionally troubled individuals. Such a burden would quickly have the effect of reducing and limiting artistic expression to only the broadest standard of taste and acceptance and the lowest level of offense, provocation and controversy."

Case: *Kubert v. Colonna*

This case explores the duty of care in the context of texting while driving, a leading-edge area in negligence law.

The Duty of Care and Criminal Acts

One thorny question regarding the duty of care is whether a duty of care will be present in the circumstance in which a person is pressured to accede to the demands of a criminal in order to prevent harm to an innocent person. Few courts have considered this question, but a majority have concluded that there is no duty.

Case: *Boyd v. Racine Currency Exchange*

The following case consider whether there is a duty to accede to criminal demands. While you read, ask yourself whether you find the court's use of precedent persuasive.

Affirmative Duties

It is well accepted that the general duty of care requires would-be defendants to refrain from actions that unreasonably subject foreseeable plaintiffs to a risk of harm. There is, however, no general duty to affirmatively engage in actions to prevent harm to plaintiffs.

Stated more plainly, you only have to try to not hurt people. You do not have to try to help them.

The distinction is sometimes said be on between "nonfeasance" on the one hand and "malfeasance" (a/k/a "misfeasance") on the other. In this terminology, nonfeasance is doing nothing, while malfeasance or misfeasance is doing something harmful. Ordinarily, no legal duty is implicated in cases of nonfeasance – where the would-be defendant just stands by and watches harmful events unfold. This is true even, for instance, if there is an easy opportunity to step in and prevent massive loss of life or suffering. On the other the hand, any activity that is engaged in must be engaged in in a reasonably careful manner. Thus, malfeasance implicates the duty of care.

There are some important exceptions, which are discussed below. These include circumstances where there is a pre-existing special relationship between the plaintiff and defendant, and where the defendant's own conduct created put the plaintiff in peril.

The General Rule: No Affirmative Duty to Help

The overarching rule is that the law does not require persons to be good Samaritans and step up to help people in distress. This rule is often hard for students to accept. The next two cases demonstrate that even cruel indifference to another's suffering does not make for a cause of action.

Case: *Yania v. Bigan*

This case is a vivid example of the no-affirmative-duty to act rule.

Case: *Theobald v. Dolcimascola*

This case is a more contemporary example – but no less vivid – of the general rule of that there is no affirmative duty to act.

The Exception of Defendant-Created Peril

A generally recognized exception to the no-affirmative-duty rule is the situation in which the defendant's own negligence conduct created the plaintiff's peril. If the defendant has left a banana peel in the road, and the plaintiff slips on it and falls, the defendant has a duty of care to help the plaintiff out of the roadway before a truck comes along and strikes the plaintiff. If the plaintiff is hurt badly enough, the defendant also has an affirmative duty to call emergency services, etc.

Note that this exception applies when it is the defendant's negligence that has produced the perilous situation. If the defendant's innocent conduct somehow creates the peril, traditional doctrine holds that no affirmative duty is incurred.

Case: *South v. Amtrak*

This case shows how one jurisdiction decided to broaden the defendant-created peril rule to include not just those situations occasioned by the defendant's negligence, but also those situations that were created by the defendant's innocent conduct.

"Good Samaritan" Laws

Many people, when they first hear about the common law's lack of a duty to rescue, ask, "What about Good Samaritan laws?"

All states have so-called "Good Samaritan" laws on the books – but they don't work the way most people think. Instead of requiring people to come to one another's rescue, these laws mostly function to provide a liability shield for the "clumsy rescuer," who munificently decide to come to a person's aid, but then ends up doing more harm than good. The idea of these statutes is to waylay the fears of someone who, at the scene of an accident, thinks, "Gosh, I know CPR, but if I try to help out, I might end up getting sued."

Referring to the biblical parable that gives Good Samaritan laws their name, Dean William L. Prosser wrote, "[T]he Good Samaritan who tries to help may find himself mulcted in damages, while the priest and the Levite who pass by on the other side go on their cheerful way rejoicing."

An example is *Swenson v. Waseca Mutual Insurance Co.*, 653 N.W.2d 794 (Minn. Ct. App. 2002). In that case, a group of friends were snowmobiling when one of them, 13-year-old Kelly Swenson, suffered what appeared to be a dislocated knee. The

friends tried to flag down a passing motorist for help. A woman named Lillian Tiegs was nice enough to stop. After trying unsuccessfully to call 911 on her cell phone, Tiegs offered to take Swenson to the hospital. When Tiegs tried to make a U-turn on the highway to go the direction Swenson needed, a speeding tractor-trailer rig struck Tiegs's vehicle and killed Swenson. Swenson's family sued Tiegs, alleging she was negligent in making the turn. Tiegs's insurance company was able to use the state's Good Samaritan law as a liability shield.

Good Samaritan laws vary state by state in coverage. Typically, the laws provide immunity from ordinary negligence, but not from gross negligence or recklessness. Who is protected by the laws varies as well. Some laws extend immunity to any well-meaning stranger. Some only apply to persons with training or persons who are licensed professionals, such as nurses, EMTs, and physicians.

On balance, scholars think Good Samaritan laws do little to actually encourage people to render help. Professor Dov Waisman, however, argues that Good Samaritan laws are justified in at least some situations on the basis of fairness. See Waisman, *Negligence, Responsibility, and the Clumsy Samaritan: Is There a Fairness Rationale for the Good Samaritan Immunity*?, 29 GA. ST. U. L. REV. 609 (2013).

Although in the ordinary case, Good Samaritan laws do not require people to render aid, there are four states that have laws that impose some kind of a duty to stop and render aid. Maybe these statutes would be better called "Compelled Samaritan laws." Minnesota, Rhode Island, and Vermont make it an offense to fail to render reasonable assistance at the scene of an emergency to someone who is exposed to or has suffered grave physical harm if it is possible to safely do so. In Minnesota and Rhode Island, such failure to render aid is a low-level misdemeanor; in Vermont it carries a maximum $100 fine. See Minn. Stat. § 604A.01, R.I. Gen. Laws § 11-56-1, & 12 Vt. Stat. § 519. Wisconsin has a narrower duty that attaches when someone is the victim of a crime. See Wis. Stat. § 940.34.

The Exception for Special Relationships

Despite the general no-affirmative-duty rule, there is an affirmative duty to render aid or take other affirmative actions in situations involving certain pre-existing relationships. Examples of duties owed on account of special relationships are:

- common carriers, to passengers
- innkeepers, to guests
- landlords, to tenants
- stores, to customers
- possessors of land open to the public, to members of the public lawfully present
- schools, to students
- employers, to employees
- jailers, to prisoner
- day-care providers, to the children or adults being cared for

So, for instance, if a hotel fire breaks out for reasons having nothing to do with negligence on the part of the hotel, the hoteliers are nonetheless under a duty to help patrons to safety. Similarly, if a customer in a store has a heart attack and falls to the floor, the storekeepers have an obligation to dial 911, clear a space, etc.

The Exception for Assumption of Duty

Another exception to the no-affirmative-duty rule is when a defendant assumes the duty. A motorist is driving along the highway when comes upon the scene of a car crash. In this instance, he is under no duty to stop. This is true even if no other help has yet arrived. But if the motorist does stop to render aid, then he has assumed a duty. This means that the driver is liable for any additional harm caused by his failure to take whatever affirmative steps are reasonable under the circumstances. Certainly such a duty would include calling 911, assuming there is cell phone service. Moreover, once the motorist has stopped, the he cannot "unassume" the duty by getting back in his car and driving away. Of course, once emergency responders have arrived, he could leave, since reasonable care would not require him to stick around.

One rationale the courts have articulated for the assumption-of-duty rule is that once a bystander voluntarily intercedes to render aid, this makes it less likely that other people will do so. So if a would-be rescuer comes to the aid of someone, but then acts carelessly or fails to follow through, the plaintiff will be left in a worse position than if the defendant had never stopped in the first place.

The *Tarasoff* Exception

One particular exception to the no-affirmative-duty rule is unique enough that it is largely associated with the case that announced it: *Tarasoff v. UC Regents*. The case held that a psychotherapist has a duty to warn third persons of potential dangers that have been revealed in the course of psychotherapy. Thus, if a patient tells a therapist about difficult-to-control urges to do harm to a third person, then a duty running from the therapist to the third party may be triggered. This rule is distinguished from the special-relationship exception discussed above. Under the special-relationship rule, the psychotherapist has affirmative duties to a patient. The *Tarasoff* rule, by contrast, creates an affirmative duty on the part of the psychotherapist to a person with whom the psychotherapist has no relationship at all.

Case: *Tarasoff v. UC Regents*

The following case led a seachange in the law of liability for psychotherapists. And like *Boyd,* it is a good case to ask whether you find the court's use of precedent persuasive.

Tarasoff v. Regents of the University of California

6. Breach of the Duty of Care

Determining Breach, in General

The next element in the negligence case is breach of the duty of care. Very roughly, this gets at the question of whether the defendant was "being careless." In this sense, the breach element is really at the heart of negligence cause of action.

Terminology Note: Negligence vs. Negligence

This is a good point at which to pause to note some potentially confusing issues regarding terminology.

The term "negligence" is used for two different concepts. One use of the word "negligence" is to denote a legal cause of action, a basis upon which one person can sue another. This is the sense in which we have been using the word up to now. The other use of the word "negligence" is as a synonym for "carelessness." And in this sense, "negligence" is sometimes used to refer to the breach of the duty of care. In this vein, a person might say "the defendant was negligent" or "the defendant's actions constituted negligence" as a way of saying that "the defendant breached his or her duty of care." Of course it seems circular to speak of "negligence" as being just one of the several elements of "negligence." But the apparent circularity is resolved when you understand the separate senses in which the word may be used.

More often than not the noun "negligence" refers to the cause of action, while the adjective "negligent" refers to the breach element. But you cannot count on the noun/adjective distinction to tell the concepts apart, because they often go the other way as well. To be literate in reading cases, briefs, and other documents, you will need to learn to look past the word to the concept it represents. It may sound confusing now, but if you keep reading, this is something that will, in time, come to you naturally, without conscious thought.

The Essential Question: Was the Risk Unreasonable?

To speak in very broad terms, the breach question essentially comes down to the question of whether the risk was *reasonable*. Certainly there is much more the law has to say about the matter – and this chapter will cover that. But in terms of the basic idea, breach is defined by what can reasonably be expected of people living in civil society who do not wish to cause harm.

An example will help show reasonableness in action.

> *Example: Banana Peels and Lasers* – Suppose a woman slips and falls on a banana peel in the produce aisle of the grocery store, causing her to suffer a broken wrist. Suppose also that the banana peel had only been there for a couple of minutes before the woman slipped. Can the woman establish a prima facie case for negligence? No, she cannot. But why not? It is certainly true that the grocery store could have prevented the accident if it had really wanted to. The store could have installed a sophisticated laser-tripwire alarm system to detect the presence of any foreign object on the floor. Or the grocery store could have hired a large number of employees to act as sentries, guarding every aisle to provide constant monitoring of all floors for hazards. Those things would have prevented the accident. But it is not *reasonable* to expect stores to do these sorts of things. The law only requires people to be reasonably careful, not triple-extra-super-duper careful.

Distinguishing Breach from the Other Elements

Remember that each element in the negligence cause of action is essential to presenting a prima facie case. If a plaintiff can prove that a defendant owed the plaintiff a duty of care and undertook an action that actually and proximately caused an injury to the plaintiff's person or property, there can still be no recovery if there is no breach.

Consider again the banana case. Notice that in that case, absolutely every other element of the negligence case is there. There is a duty of care: That is easy, because stores owe their customers a duty of care. There is also actual causation: But for the banana peel being in the aisle, there would be no injury. Proximate causation is satisfied as well: There is a very direct connection between the presence of the banana peel and the broken wrist, and a slip-and-fall is a foreseeable consequence of an abandoned banana peel in a walkway. The existence-of-damages element is satisfied also: There is a broken wrist. What is missing is the breach element. It is the breach element – and it alone – that prevents the unlucky shopper from recovering from the grocery store.

Case: *Rogers v. Retrum*

The following case is an example of a situation in which all the elements of a negligence cause of action are present except for breach of the duty of care. The court takes pains to explain why it all comes down to breach, and because of this, the case provides an excellent introduction to the breach element.

One thing to note about the terminology in the case: What the court calls "legal cause" is a lumping together of what this casebook treats as two separate elements: actual causation and proximate causation. Moreover, instead of using the term "actual causation," the case uses the terms "but-for causation" and "causation-in-fact."

Rogers v. Retrum

The Reasonable Person Standard of Care

Basics

It is amazing how much of the law comes down to the word "reasonable." Just from watching television or reading books, you are probably already familiar with the concept of "reasonable doubt" in criminal law. But you will find that much of the law in contracts, property, and torts – not to mention antitrust, family law, disability law, and many other fields – also ultimately funnels down to a question of whether something is *reasonable*. Certainly not all legal questions turn on reasonability. But many do. And, as you will see in this chapter, the breach element of negligence is one of those.

If a defendant owes a plaintiff a duty of care, then the default standard of care is what the reasonable person would do under the same circumstances. If the defendant is less careful then the reasonable person would be, then the duty of care has been breached.

So, for example, if the defendant in a negligence case is alleged to have caused an accident by texting and driving 10 miles an hour over the speed limit while applying makeup, then the breach-of-duty question is, would the reasonable person have done that while driving along that freeway at that time under those circumstances? If not, then the duty of care has been breached.

A classic statement invoking the reasonable person as the way of determining whether the duty of care has been breached comes from Baron Alderson in *Blyth v Birmingham Waterworks Co.*, 11 Ex. Ch. 781 (1856):

> "Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. The defendants might be liable for negligence, if, unintentionally, they omitted to do that which a prudent and reasonable person would have done, or did that which a person taking reasonable care would not have done."

(Note that in this quote, the first time Baron Alderson uses the word "negligence," it is in the sense of *breach of the duty of care*; the second instance of the word refers to the cause of action as a whole.)

The reasonable person is a mental construct that is used as a benchmark for analysis. As such, "reasonable person" is a term of art in tort law.

It is important that you understand that the reasonable person is not a real person. She or he does actually exist. When you are in your Torts classroom, look around. No one you see is the reasonable person. You can search the whole world and

never find the reasonable person. Thus, at the trial of a negligence case, you can never put "a reasonable person" on the stand as an expert witness and ask what that person would have done. If such a thing could be done, it would create the most sought after expert witness in America. Imagine the plaintiff's attorney asking, "Reasonable Person, would you have been driving along the freeway at 85 miles per hour while applying lipstick and texting?" Personal injury litigation would be a whole lot simpler if you could do that, but you cannot.

The reasonable person is not merely a person who is reasonable. In the real world, reasonable people are occasionally careless. But the reasonable person of negligence law is always careful – 24 hours a day, every day of her or his hypothetical life.

It follows that the breach-of-duty question in a negligence case is not answered by asking whether the defendant is a reasonable person. The defendant is not the hypothetical reasonable person, and, since the defendant is a real person, the defendant could never aspire to be the reasonable person. The relevant question is whether the defendant was behaving as the reasonable person would have behaved at the moment of the occurrence being sued over. So a defendant might be a very careful driver – one who has driven for 40 years without ever having caused an accident or been ticketed for a moving violation. But that is irrelevant to the breach-of-duty question. All that matters is whether the defendant's conduct met the reasonable person standard at the critical moment when the calamity started to unfold.

You may think that it is not fair to expect everyone to behave as the reasonable person at all times. Most people would agree with that. And negligence law does not imply that everyone should behave as the reasonable person at all times. The issue in negligence law is, *given that someone has suffered a injury or property damage,* is it more fair for the plaintiff to bear the burden of the loss, or is more fair for the defendant to bear the burden. The answer from negligence law is that it is more fair for the burden to fall on the defendant if the defendant's level of care fell below that of the hypothetical reasonable person.

An Objective Standard

The reasonable person standard is an objective one. It requires evaluating the situation as if viewing it from above. By contrast, a subjective standard would go to what a person's own thoughts were. If the reasonable person standard was a subjective standard, you could successfully defend a negligence lawsuit by convincing the jury that you genuinely thought you were being reasonable, that you were "trying your best." Yet under the objective reasonable person standard, doing your best isn't good enough, if it isn't as good as the reasonable person would have done in the situation.

Case: *Vaughn v. Menlove*

This case is the classic example illustrating the reasonable person standard and its objective nature.

Vaughan v. Menlove

Accounting for Differences Among People

Basics

For the most part, the reasonable person standard does not make allowances for differences among defendants. That goes with the territory of an objective standard.

The point made is made in an expressive way by Oliver Wendell Holmes, Jr. in *The Common Law:*

> "[W]hen men live in society, a certain average of conduct, a sacrifice of individual peculiarities going beyond a certain point, is necessary to the general welfare. If, for instance, a man is born hasty and awkward, is always having accidents and hurting himself or his neighbors, no doubt his congenital defects will be allowed for in the courts of Heaven, but his slips are no less troublesome to his neighbors than if they sprang from guilty neglect. His neighbors accordingly require him, at his proper peril, to come up to their standard, and the courts which they establish decline to take his personal equation into account."

The general rule notwithstanding, there are some circumstances under which the reasonable person standard is adjusted to the particular characteristics of the defendant, including for physical limitations, childhood, and superior skills and knowledge.

Mental and Physical Capacity and Disability

In general, the courts will take the physical characteristics of the defendant into account in applying the reasonable person standard, but not mental or cognitive limitations or disabilities. So, for example, if a defendant has impaired vision, impaired

hearing, amputated limbs, or does not have the ability to walk, then these differences are tailored into the reasonable person standard. If a blind person runs into someone, causing an injury, the question is what a reasonable blind person would do under those circumstances. On the other hand, adjustments are generally not made for mental or cognitive differences. The hypothetical reasonable person is considered sane and cognitively normal. So if a person with Alzheimer's dementia were to become disoriented and knock someone over in a restaurant, the reasonable person standard would ask whether someone without Alzheimer's disease would have knocked someone over under the same circumstances.

The rule of adjusting the standard for persons with physical differences, but not for persons with mental/cognitive limitations has been sharply criticized, and some jurisdictions have retreated from the rule in its full harshness.

Case: *Breunig v. American Family Insurance Co.*

Here, Wisconsin's high court confronts the question of whether the reasonable person standard should take into account a driver's sudden bout of insanity.

Breunig v. American Family Insurance Co.

Experience and Level of Skill

As the *Vaughn v. Menlove* case illustrates, differences in experience and knowledge are not taken into account in favor of the person accused of negligence. So, for instance, someone who has just learned to drive a car will be held to the same standard as the average, experienced driver.

On the other hand, if a person has superior skills or knowledge, then those ratchet up the standard of care. So if a champion NASCAR driver crashes into the plaintiff's car, the plaintiff is free to argue that the racecar driver should have used those race-honed superior skills to swerve, break, or otherwise avoid the crash.

Here are some examples to help you keep straight what we have learned so far:

> *Example: The Unknown Dangers of Haystacks* – Go back to the case of *Vaughn v. Menlove,* but suppose it evolved in an alternative universe where the propensity of piles of damp hay to catch fire was unknown in the community. In such a case, Menlove would win – his actions would not have breached the duty of care because the reasonable person in that community would not have known of the danger.
>
> *Example: The Leading Edge of Haystack Design* – Let's tweak the facts of *Vaughn v. Menlove* once more. We are still in our alternative universe the dangers of wet haystacks is generally unknown. But suppose the evidence at trial uncovered the fact that Menlove subscribed to publications such as *The Journal of Hayrick Research* and also that he frequently attended academic conferences on haystack design. Suppose as well that pretrial discovery uncovers the fact that through his reading and conference-going, Menlove in fact knew that leading-edge research had determined that stacks of wet hay will tend to catch fire. Now Menlove will lose. But in this case, Menlove loses not because of the reasonable-person standard, but in spite of it. Once he has the superior knowledge about the danger and how to avoid it, Menlove must use it to avoid the harm, or else he is liable for it.

Children

An exception to the reasonable person standard is made for children. The rule, as stated in *Hardsaw v. Courtney,* 665 N.E.2d 603, 606-07 (Ind. Ct. App. 1996), is:

> "The standard of care expected of a child is measured by that degree of care which would ordinarily be exercised by a child of like age, knowledge, judgment and experience under like conditions and circumstances."

Notice that the standard is not only lowered for children and calibrated by age, but allowances are also made for differences in knowledge, judgment, and experience. So this standard is quite unlike the stalwart and unyielding objective standard for adults. The standard for children leans away from a purely objective standard, so much so that it arguably becomes quite subjective. In fact, one could say that the reasonable person standard is not just adjusted for children, but that it is thrown out entirely. Note that in the statement of doctrine from the Indiana court, there is no use of the word "reasonable" at all.

There is an important exception to the child standard of care, and that is when the activity that the child is engaged in is an adult activity. This is often applied to when a child is operating a motor vehicle, such as a car, motorboat, airplane, or snowmobile. But it has been applied in other contexts as well, including golf. In *Neumann v. Shlansky,* 58 Misc. 2d 128 (N.Y. County Ct. 1968), an 11-year-old golfer teeing off drove a ball into the plaintiff's knee. The court wrote:

"As applied to the instant case, one of the critical elements in the opinion of the court is the risk involved when a dangerous missile is hit by a golfer. Just as a motor vehicle or other power-driven vehicle is dangerous, so is a golf ball hit with a club. Driving a car, an airplane or powerboat has been referred to as adult activity even though actively engaged in by infants. Likewise, golf can easily be determined to be an adult activity engaged in by infants. Both involve dangerous instruments. No matter what the age of a driver of a car or a driver of a golf ball, if he fails to exercise due care serious injury may result."

In many of these cases, the courts have rejected the argument that because children frequently engage in the activity, it should not be considered an adult activity. These courts tend to look at the level of danger associated with the activity, rather than its adultness.

Other courts take a different view, however, and will allow a lowering of the standard of care for children even when the activity is inherently dangerous, so long as it is often engaged in by children. In *Purtle v. Shelton,* 474 SW 2d 123 (Ark. 1971), the adult standard was held not to be applicable to a 17-year-old engaged in deer hunting. The defendant, in a deer stand, shot at what he thought was a deer. In fact, the defendant shot in the vicinity of his 16-year-old friend. The bullet broke into shrapnel, hitting the friend in both eyes. The court said:

"We are unable to find any authority holding that a minor should be held to an adult standard of care merely because he engages in a dangerous activity. There is always the parallel requirement that the activity be one that is normally engaged in only by adults.˜ We have no doubt that deer hunting is a dangerous sport. We cannot say, however, either on the basis of the record before us or on the basis of common knowledge, that deer hunting is an activity normally engaged in by adults only. To the contrary, all the indications are the other way.˜ We know, from common knowledge, that youngsters only six or eight years old frequently use .22 caliber rifles and other lethal firearms to hunt rabbits, birds, and other small game. We cannot conscientiously declare, without proof and on the basis of mere judicial notice, that only adults normally go deer hunting."

Gender

Traditionally, the objective standard for negligence was known as the "reasonable man" standard. Courts and commentators have now shifted to speaking of the "reasonable person." But the question remains as to whether the standard – by whatever name it is called – retains a male bias. Professor Leslie Bender of Syracuse University puts it this way in *A Lawyer's Primer on Feminist Theory and Tort,* 38 J. LEGAL EDUC. 3 (1988):

"Does concerning a "reasonable man" to a "reasonable person" in an attempt to eradicate the term's sexism actually exorcise the sexism or instead embed it?˜ This "resolution" of the standard's sexism ignores several important feminist insights. The original phrase "reasonable man" failed in its claim to represent an abstract, universal person. Even if such a creature could be imagined, the "reasonable man" standard was postulated by men, who, because they were the only people who wrote and argued the law, philosophy, and politics at that time, only theoried about themselves. When the standard was written into judicial opinions, treaties, and casebooks, it was written about and by men. The case law and treatises explaining the standard are full of examples explaining how the "reasonable man" is the "man on the Clapham Omnibus" or "the man who takes the magazines at home and in the evening pushes the lawn mower in his shirt sleeves." When the authors of such works said "reasonable man," they meant "male," "man" in a gendered sense."

Professor Bender suggests the possibility of a different and higher standard of care – a "reasonable neighbor" standard, in which people are expected to treat one another at least as well as we would social acquaintances. She also asks what would happen if we understood "standard of care" to mean "standard of caring." In her view, "the feminine voice can design a tort system that encourages behavior that is caring about others' safety and responsive to others' needs or hurts, and that attends to human contexts and consequences."

Negligence Per Se

Basics

Usually the standard of care is a matter for the parties to argue about through the mental construct of the fictional reasonable person. But the plaintiff can argue to the court that the case should instead be submitted to the jury with a specific standard of care that is borrowed from a statute or regulation. The doctrine governing this is called **negligence per se**.

Example: Flatbed with Rebar – Suppose a statute says that (1) that a driver who has a cargo load protruding beyond the rear bumper of a vehicle must attach a red flag to the protrusion to warn drivers behind the vehicle, and (2) regardless of the flag, the load must not protrude more than four feet. The defendant, driving a 10-foot flatbed truck, is carrying a load of 16-foot-long rebar, such that the load protrudes six feet beyond the rear bumper. The defendant does not attach any flag. The plaintiff is driving behind the defendant when the defendant stops suddenly. The plaintiff's vehicle collides with the defendant's truck. As the plaintiff's car crumples into the truck's bumper assembly, the protruding rebar pierces the windshield and injures the plaintiff. The plaintiff would likely be able to use the statute to set the standard of care, obviating the need for argument about whether the defendant's actions were reasonable.

Negligence per se doctrine can be very helpful to plaintiffs because it can function as a free pass on the element of breach of the duty of care. If the evidence shows that the defendant failed to comply with the statute or regulation, and if the negligence per se doctrine applies, then there will be no need to make an elaborate argument to the jury about the conduct being unreasonable.

"Per se" is Latin meaning "by itself" or "in itself." But translating this phrase does not help much. The phrase "negligence per se" is a term of art. There are many situations in which you could describe something as being "negligence, in itself." *Negligence per se*, however, refers specifically to the use of a statute or regulation to set the standard of care in a negligence case.

What Makes a Statute or Regulation Amenable

Not every statute or regulation can be used by a plaintiff as a replacement for the generic reasonable-person standard of care. The analysis for whether a statute or regulation can be used as a per-se standard can be summed up as **the class-of-risk/class-of-persons test**. Two questions must be asked:

- Does the injury or accident being sued on represent the kind of risk that the statute or regulation was designed to address?
- Is the plaintiff within the class of persons that the statute or regulation was designed to protect?

If the answers to both questions are yes, then the statute or regulation can be used. This test helps to filter out some cases where the negligence-per-se doctrine would lead to some unfair or bizarre results.

Example: Young Smoker – Suppose a statute prohibits persons under the age of 18 from using tobacco. The defendant, a 17-year-old, is smoking a cigarette in bed when he falls asleep. The smoldering cigarette starts a fire, which burns down a neighbor's apartment. To determine whether the tobacco-age-limit statute can be used to set the standard of care, first ask the class-of-risks question: Was the statute meant to protect against risks of structure fires? The answer would seem to be no. The statute was meant to protect young persons from the health hazards associated with inhaling tobacco smoke or placing tobacco in contact with the epithelial tissues of the mouth. So negligence per se will not apply here.

Example: Young-looking Smoker – Suppose a statute requires sellers of tobacco product to require any person appearing to be under the age of 35 to produce a state-issued identification card or driver's license to prove that he or she is 18 years of age or older. The plaintiff is and appears to in his early 20s. The plaintiff gets cancer caused by the use of tobacco products and sues the store that sold the products. The plaintiff produces evidence that he has never had a state-issued identification card or driver's license, and thus would not have been able to produce the required identification at the sales counter. Can the statute be used to set the standard of care? The class-of-risks part of the test would seem to be satisfied. The risks intended to be addressed by the statute are the health risks of using tobacco. But a problem is revealed with the class-of-persons part of the test. We ask: Is the plaintiff within the class of persons meant to be protected by the statute? The answer would seem to be no. The statute appears to be aimed at protecting persons under the age of 18 – not adults without ID. So the statute could not be used to set the standard of care in this lawsuit.

It is important to understand what the class-of-risk/class-of-persons test does not require: It does not require that the statute or regulation was enacted with the *intent* that it be used in negligence lawsuits. It is almost always the case that such statutes and regulations were enacted with no thought about whether or not they could be used in torts lawsuits. Usually, such statutes are for the purpose of allowing criminal prosecutions or for some form of administrative enforcement (such as by government regulatory agencies who conduct inspections, assess fines, revoke licenses, etc.). It may be that the enacting body never dreamed that the provisions it promulgated would be used in private tort lawsuits. Generally speaking, that lack of

legislative or regulatory intent is irrelevant. Whether or not the statute or regulation can be commandeered under negligence-per-se doctrine depends instead on the class-of-risks/class-of-persons test.

Case: *Gorris v. Scott*

The following is a seminal case on negligence per se, applying the class-of-risk/class-of-persons test in classical fashion.

Gorris v. Scott

Negligence Per Se and Contributory/Comparative Negligence

When the plaintiff's own negligence contributes the injury that the plaintiff is suing over, the defendant can use that fact to establish an affirmative defense – called contributory negligence or comparative negligence, depending on the jurisdiction. This is discussed in more detail in a later chapter. For now, note only that negligence per se can be used by plaintiffs in a prima facie case and by defendants to establish contributory/comparative negligence.

Consider the example of the rear-end collision with the truck loaded with rebar. Suppose the plaintiff's car was following the defendant's truck on the freeway at 80 miles per hour. Suppose also that the posted speed limit on this stretch of freeway is 65 miles per hour. If the plaintiff's speed was partly at fault for the plaintiff's injuries, then the defendant can use the violation of the statute to establish the plaintiff's negligence for a contributory or comparative negligence defense.

Negligence Per Se and Causation

When negligence per se is being used, it is important to keep in mind that for the prima facie case to work as a whole, the violation of the statute must have caused the injury the plaintiff is suing over. Again, let's go back to the example of the flatbed loaded with rebar. Suppose evidence at trial shows that before the accident, the plaintiff had seen the truck from the side, and had mentally noted how far the rebar extended beyond the bumper. If that is the case, then violation of the portion of the statute that requires a red flag does not help the plaintiff's case, because it is clear that the red flag would not have made a difference in preventing the accident. The only thing the red flag could have done was make the plaintiff aware of the protuberance – but the plaintiff was already aware, so the violation of the statute cannot be viewed as a cause of the accident.

It should be noted that the necessity of this causal link between breach and injury applies in all negligence cases – whether the reasonable person standard of care is used or the doctrine of negligence per se. But for some reason the causation analysis is more intuitive when the reasonable person standard is used than with negligence per se, where it seems to present a habitual pitfall.

Case: *Martin v. Herzog*

The following case is from the New York Court of Appeals, which, despite the name, is actually the highest state court – equivalent to the "supreme" court in most jurisdictions. This case is written by the most famous New York Court of Appeals judge of all time: Benjamin N. Cardozo.

Martin v. Herzog

Excuse for Complying with a Statute or Regulation

The courts will sometimes excuse failure to comply with a statute or regulation. Recognized excuses can include situations in which complying with the statute or regulation would be more dangerous than violating it, inability to comply with the statute or regulation despite an honest attempt to do so, and emergency circumstances – so long as the emergency itself was not the defendant's own fault.

> *Example: Southbound Swerver* – Suppose a statute requires motorists to not travel on the wrong side of the road. A motorist is traveling southbound on a road when a group of children suddenly dart out into traffic. To avoid hitting them, the motorist swerves across the double yellow line and sideswipes a northbound vehicle. The southbound motorist is excused from complying with the statute, and thus negligence per se doctrine cannot be used to establish breach of the duty of care.

Keep in mind that even where a person is excused from complying with a statute, there is still the duty of reasonable care. So the southbound swerver must still exercise care reasonable under the circumstances when crossing the double-yellow line.

Complying with Statutes or Regulations as a Defense

Since violating a statute or regulation can count as a breach of the duty of care under negligence-per-se doctrine, the question naturally arises whether complying with a relevant statute or regulation will suffice to show that the relevant standard of care

was met. In other words, since statutes can be used by plaintiffs to establish breach, can compliance with statutes be used by defendants to show a lack of breach?

The general rule is that defendants can introduce compliance with a statute or regulation to the jury as evidence that the relevant standard of care was met. However, compliance with a statute or regulation is not dispositive. A plaintiff is free to argue that the reasonable person standard of care required doing more than the statute or regulation itself required.

> *Example: Retail Railing* – Suppose a statute requires that railings in retail stores be of a certain height. The defendant's railing meets the standard. Nonetheless, the plaintiff falls over the railing, with the theory of negligence being that the railing was not high enough to reasonably prevent falls. Can the defendant use compliance with the statute to defeat the negligence claim? Not necessarily. The defendant can present the statute to the jury and argue that the fact that the railing was as a high as required by statute indicates that reasonable care was taken. But the plaintiff can argue that the railing height was not reasonable regardless. Suppose evidence at trial showed that several similar accidents had happened at the store in the past. One can imagine that the jury would be persuaded to find the railing height unreasonably low despite the fact that it was as high as the statute required.

So, for defendants, compliance with a statute or regulation forms an incomplete argument. For plaintiffs, however, violation of a statute or regulation, if it passes the negligence-per-se requirements, functions to end all argument and tally up a win for the plaintiff on the breach element of the negligence case.

The Role of Custom or Standard Practices

Golfers yell "Fore!" before teeing off. Lumberjacks yell, "Timber!" Waiters serving fajitas say, "The plate is very hot." Adults insist that little kids hold hands in a parking lot. What is the relevance of such habitual ways of doing things on the standard of care in a negligence case?

Judges and people writing on torts call such conduct "custom." (Although in the business world, "standard practice" may be the more common term.) The rule with regard to custom is that it can be relevant evidence for the jury on the standard of care, but custom is not dispositive to the issue. In fact, no matter how firmly established custom is, custom itself is not the standard of care. The standard is what it always is: what the reasonable person would do under the circumstances.

Custom can be relevant and helpful to the jury in many ways. Showing that a practice is customary tends to show that it is a practicable and well-known means of reducing risk. An established custom can also be reflective of the amalgamated judgment of a large community. These showings can go a long way in making an argument about what the reasonable person would have done.

An important exception to the rule that custom is not dispositive is professional-malpractice negligence – that is negligence in the practice of medicine, dentistry, law, etc. In the professional-malpractice context, the prevailing custom in the professional community is dispositive. That is, the custom actually sets the standard of care, replacing reasonable-person analysis. Professional malpractice is discussed in a later chapter on healthcare liability. Just remember that outside the context of negligence committed by a professional in the course of professional practice, custom cannot usurp the reasonable-person standard of care.

Case: *The T.J. Hooper*

The following case is the classic exposition on the use of custom in tort law. Ironically, the case does not technically concern *torts*, but rather *admiralty law*, the common law of obligations arising at sea. Admiralty law covers a lot of topics – such as sunken treasure – that are not covered by tort. But when it comes to liability for accidents at sea, admiralty law and torts are largely consonant.

The T.J. Hooper

The Negligence Calculus

Introduction

An alternative way of thinking about negligence has emerged from the law-and-economics movement: the negligence calculus, also called the "Hand Formula." The idea is that a person is obliged to undertake a precaution when the benefits outweigh the costs. The particular way this is spelled out in the Hand Formula is that a defendant has breached its duty of care if it fails to take a precaution when the burden of doing so is less than the probability of the harm multiplied by the magnitude of the harm.

Following the case, we will spell this out in a formal way with defined variables and a mathematically expressed inequality.

Case: *U.S. v. Carroll Towing*

The Hand Formula comes to us from an opinion filed 14 years after *the T.J. Hooper*. Yet this case was also authored by Judge Learned Hand and also happens to concern a tugboat.

United States v. Carroll Towing

The BPL Formula's Place in Torts

Based on the *Carroll Towing* opinion, it does not appear that Judge Hand intended to wholly redefine negligence using algebra. Instead, it looks like he meant to use algebra as a way of illustrating the negligence concept of what is reasonable. Yet however modestly Judge Hand might have intended it, his algebraic way of thinking about breach of the duty of care has been embraced by law-and-economics scholars as holding the key to describing liability in a way that promotes economic efficiency.

The key figure in the promotion of the Hand Formula was Professor Richard A. Posner of the University of Chicago. In a 1972 article, Professor Posner – now a judge on the Seventh Circuit – saluted *Carroll Towing* as providing the path to understanding negligence in terms of a cost-benefit analysis. Posner rejected the view that negligence is about compensation or morals. Instead, he argued that it is about economics.

> "It is time to take a fresh look at the social function of liability for negligent acts. The essential clue, I believe, is provided by Judge Learned Hand's famous formulation of the negligence standard – one of the few attempts to give content to the deceptively simple concept of ordinary care. [I]t never purported to be original but was an attempt to make explicit the standard that the courts had long applied. … Hand was adumbrating, perhaps unwittingly, an economic meaning of negligence. Discounting (multiplying) the cost of an accident if it occurs by the probability of occurrence yields a measure of the economic benefit to be anticipated rom incurring the costs necessary to prevent the accident."

Richard A. Posner, *A Theory of Negligence,* 1 J. LEGAL STUD. 29, 32 (1972). The idea of reconceptualizing negligence in economic terms, so that it will serve economic goals, has been highly influential in scholarly circles. The impact in the courts has been considerably smaller. While there are sporadic examples of courts expressly engaging in the negligence calculus – including opinions authored by Judge Posner – the formula has not been widely embraced by the bench. Insofar as the idea has had influence, it has been followed by controversy.

How the BPL Formula Works

In *U.S. v. Carroll Towing*, the BPL formula assigns variables as follows: **B is the burden, P is the probability that something will go wrong, and L is the total loss that would result**.

When multiplied together, **P and L represent the total amount of risk**. It follows from this that just because the L is big, it is not necessarily the case that the total level of risk is big. A relatively large harm, when coupled with a miniscule probability, might represent a relatively small risk overall. The variable P can be thought of as "discounting" L.

What you might call the "negligence condition" exists when the following inequality is true:

$B < PL$

If we incorporate that formula into an algorithm, we would have this:

Regarding a certain precaution:
If B < PL,
and if the certain precaution is not taken,
then the duty of care is breached.

If the PL is greater than B, there is a breach of the duty of care. If the B is greater than the PL, then there is there is no breach. What happens if B = PL? This essentially reflects a tie between the plaintiff and defendant on the breach-of-duty question. Since the fundaments of civil procedure mandate that the plaintiff has the burden of proof, such a tie would, in essence, go to the defendant, since it is a failure to prove breach. Thus, B = PL means there is no breach of the duty of care.

Some important things to keep in mind:

The L in the formula reflects the total amount of loss suffered – not the loss suffered by the defendant. This is where BPL analysis can be distinguished from what most people think of as "cost-benefit analysis." When a business manager weighs the costs and the benefits of undertaking some initiative, the manager is looking at the costs and the benefits to the firm. That is not how the BPL formula is meant to work. The BPL formula is meant to take into account the entire loss suffered anywhere.

The P in the formula is a number ranging from 0 to 1. If there is no chance that the harm could come to pass, then P is 0. If it is certain that the harm would come to fruition absent the precaution, then P is 1. If there is a 50% probability – alternately stated as odds of 1 to 1, or a chance of 1 in 2 – then the P is 0.5.

> *Example: Dangling Danger* – Suppose a company will be using a crane to move a large generator assembly to the top of a tall building. If the crane or cabling fails, then the equipment package will fall, crushing a single-story restaurant below. The move will be done when the restaurant is closed and vacated, so there will be no danger to people. If the restaurant were to be destroyed, it would represent a loss to its proprietors of $600,000. The kind of crane involved, making this kind of maneuver, has a failure rate of 1 in 10,000. Using a second crane to lift the load at the same time would eliminate this risk, but it would cost an additional $12,000 to hire. If no second crane is used, and the load falls, destroying the restaurant, then according to BPL analysis, was there a breach of the duty of care? In this case, L = $600,000 and B = $12,000. To get P, we divide 1 by 10,000, so P = 0.0001. P multiplied by L is $60. Since the B of $12,000 is not less than the PL of $60, it is not a breach of the duty of care to forgo the precaution.

In order to make the analysis work, you need to do it on a precaution-by-precaution basis. In the example just given, there are probably many things that the construction company could do to avoid danger to the restaurant. It could disassemble the package and move it in smaller bundles. It could redesign the new building so that it didn't require a generator assembly on top. It could build a temporary protective shell around the restaurant to protect it in the case of a crane failure. There is no need to put all these into the BPL formula at once, because they all represent different decisions. BPL analysis works on one decision at a time – providing an answer as to whether it is a breach of the duty of care to do or omit to do *a certain something.*

Also, to make the analysis work, the B and the L must be expressed in the same units. For instance, if B and L are both expressed in present-value dollars, the proper comparison can be made. If the B were in dollars and the L in euros, you would have to convert one into the other. The time value of money can be a complicating factor as well. If the B is expressed in present dollars – which would make sense, since money would have to be spent on the precaution now – the L must be expressed in present dollars as well. This may require some translation, because if the harm would be suffered 10 years from now, then whatever the loss would represent in dollars at that time must be translated into a figure stated in present dollars. This can be accomplished by "discounting" the future funds to present value. If the harm would not necessarily take place at a certain time in the future, but may take place at any time over the next 25 years, say, perhaps with the magnitude of the loss varying over time, then the calculation becomes very complex – something probably better suited for an accountant rather than a lawyer. The point is that BPL analysis is about comparing numerical values, and that necessarily means they must be expressed in equivalent units.

If compensation for different currencies and the time value of money is a difficult problem, an even bigger challenge lurks where the loss is not originally stated in terms of money at all, but is stated in terms of lives potentially cut short. If the burden is expressed in terms of dollars, but the danger is one of loss of life, then to do the analysis you must put a dollar-value on human life. Distasteful as it may seem, if you are going to use BPL analysis in a situation where human life is on the line, there is no way around this need to monetize death.

As it turns out, the torts system is quite accustomed to putting a dollar value on human life in the case of wrongful death claims. This thorny damages question – how much money will fairly compensate a plaintiff for the loss of a loved one – is a subject for a later chapter.

Putting a dollar value on human life is also a regular part of the job for government regulators trying to decide questions such as how much money should be spent on motor vehicle safety measures or environmental remediation. The U.S. Department of Transportation has used a value of $6 million per human life to justify new vehicle standards, such as more crush-resistant roofs on cars. In 2008, the U.S. Environmental Protection Agency valued a single human at $7.22 million in making decisions about limits on air pollution. In 2010, the EPA used a value of $9.1 million per life in proposing new, tighter standards. Another way of valuing human life is by the year. A common figure used by insurers to decide whether life-saving medical treatment should be provided is $50,000 per year of "quality" life. Another estimate came up with $129,000 per quality year per person. (*See* Binyamin Appelbaum, "As U.S. Agencies Put More Value on a Life, Businesses Fret," N.Y. TIMES, Feb. 16, 2011; Kathleen Kingsbury, "The Value of a Human Life: $129,000," TIME, Tuesday, May 20, 2008.)

Res Ipsa Loquitor

The Usual Necessity of Specific Evidence of Breach

Ordinarily, a negligence plaintiff must have "a specific theory of negligence" to take to the jury, which is to say the plaintiff must prove a breach of the duty of care with specific evidence as to what happened, allowing the jury to conclude that such conduct was in breach of the duty of care.

For instance, if the evidence shows that plaintiff fell in the defendant's store and was thus injured, no prima facie case for negligence has been made out, because there is nothing in evidence that would provide a fair inference that any breach of the duty of care occurred. Perhaps the plaintiff fell because he slipped on something just dropped by a fellow customer. Perhaps the plaintiff fell because he was tripped by another customer. Perhaps the plaintiff tripped over his own feet. If, however, the plaintiff has testimony from a store clerk that were the plaintiff fell there was a pool of water on the floor because of an unrepaired roof leak, then there is specific evidence that shows conduct that constitutes a breach of the duty of due care.

The Place for Res Ipsa Loquitor

While specific evidence of a breach of the duty of care is the norm in negligence law and is generally required, sometimes there is a lack of evidence as to how an accident happened. Yet, because of the circumstances, it may be obvious that there was negligence. In such a case, the doctrine of res ipsa loquitor allows a plaintiff to prevail in spite of a lack of specific evidence showing a breach of the duty of care.

Case: *Byrne v. Boadle*

A pedestrian walks along the sidewalk next to a multistory building where a flour warehouse occupies an upper floor. A barrel of flour suddenly drops on top of the plaintiff. Was there negligence? Well, you might say that a falling barrel of flour pretty much speaks for itself. And that is exactly what Chief Baron Pollock said: "The thing speaks for itself." Only Pollock said it in Latin: "Res ipsa loquitor."

Byrne v. Boadle

The Requirements for Res Ipsa Loquitor

The two requirements for res ipsa loquitor are that the antecedent to the accident was (1) **likely negligence** (that is, likely a breach of the duty of care), and (2) **likely the conduct of the defendant**. If you think about it, these must be requirements. If it is not likely negligence and not likely the defendant who caused the accident, then it cannot be said that the defendant likely breached the duty of care.

Note that some courts are stricter. Instead of requiring the plaintiff merely to show that it was likely the defendant's conduct at issue, some courts require proof that that the instrumentality of harm was in the defendant's "exclusive control." Such a view is not the prevailing modern one.

The Effect of Res Ipsa Loquitor

If the plaintiff successfully convinces the court that res ipsa loquitor should be allowed in the case, then this usually means one of two things, depending on the jurisdiction. In some jurisdictions, the effect of res ipsa loquitor is that the jury is permitted – but not required – to draw an inference that the defendant breached the duty of care. Other jurisdictions hold that the effect of res ipsa loquitor is to establish the breach element of the negligence case in the plaintiff's favor, switching the burden to the defendant, who can then rebut the presumption of breach with specific evidence.

This burden-shifting function of res ipsa loquitor is potentially important where specific facts are difficult for the plaintiff to discover. Such was likely the case with *Byrne v. Boadle*. In modern American litigation, however, civil procedure rules allow very wide-ranging discovery. So with the kind of depositions and document requests that are allowed today, it might be quite easy to discover exactly what happened. When such discovery does not work to shed light on the matter, however – perhaps because of uncooperative or unavailable witnesses – then the burden-shifting function of res ipsa loquitor remains important as a way of making it the defendant's problem to find out what was going on at the defendant's place of business or arena of operation that caused the emergence of the means that did the plaintiff harm.

Recurrent Situations for Res Ipsa Loquitor

Certain situations come up again and again as candidates for res ipsa loquitor.

One such recurrent situation involves gravity-driven injuries – like the falling barrel of Byrne. There probably are no more upper-floor barrel warehouses in crowded pedestrian areas these days, but there are still many accidents where gravity is the moving force. A falling light fixture in a sports arena, for instance, is a good candidate for res ipsa loquitor: Lights don't usually fall absent negligence (so the first prong of "likely negligence" is met), and it is probable that the operator of the sports arena was the negligent party ("likely the conduct of the defendant").

Airplane crashes have been a frequent source for the invocation of res ipsa loquitor. For example, in *Widmyer v. Southeast Skyways, Inc.,* 584 P.2d 1 (Alaska 1978), the Supreme Court of Alaska held that "air crashes do not normally occur absent negligence, even in inclement weather." The court based its reasoning on the strong general track record of safety in aviation in the late 1970s. And of course, since then, aviation has only gotten safer.

Packaged food is another wellspring of res ipsa loquitor cases. In particular, an almost unbelievable number of mid-20th-century cases involve glass bottles of Coca-Cola soft drinks. In *Payne v. Rome Coca-Cola Bottling Co.,* 10 Ga.App. 762, (Ga.App. 1912), the court allowed res ipsa loquitor to be used by a customer whose sight was destroyed when an exploding bottle propelled glass fragments through his eye. The *Payne* court summed up res ipsa loquitor about as well as anyone before or since when it said:

> "Bottles filled with a harmless and refreshing beverage do not ordinarily explode. When they do, an inference of negligence somewhere and in somebody may arise."

A sampling of other cases: *Zentz v. Coca Cola Bottling Co. of Fresno,* 39 Cal.2d 436 (Cal. 1952) (restaurant worker severely cut by exploding bottle allowed to use res ipsa loquitor); *Groves v. Florida Coca-Cola Bottling Co,* 40 So.2d 128 (Fla. 1949) (waitress injured by exploding bottle allowed to use res ipsa loquitor); *Honea v. Coca Cola Bottling Co.,* 143 Tex. 272 (Tex. 1944) (15-year-old boy who suffered a severe wrist injury from exploding bottle when moving a case of Coca-Cola allowed to argue res ipsa loquitor); *Escola v. Coca Cola Bottling Co. of Fresno,* 24 Cal.2d 453 (Cal. 1944) (waitress injured by exploding bottle allowed to use res ipsa loquitor); *Starke Coca-Cola Bottling Co. v. Carrington,* 159 Fla. 718 (Fla. 1947) (vending machine customer injured by exploding bottle allowed to use res ipsa loquitor).

Another recurrent arena for res ipsa loquitor involves nursery schools and nursing homes –facilities where the very young or very old are cared for. What very young children and the infirmed elderly can have in common that sets the stage for res ipsa loquitor is an inability to speak for themselves, so as to explain how they got the injury they suffered. When such persons are hurt without any witnesses other than the defendants, the situation is ripe for a cover up: If the defendants lie and destroy evidence, it may be impossible to make a specific showing of the negligent conduct.

Case: *Fowler v. Seaton*

While most cases in this book take the form of judicial opinions, the reading for this case is the opening statement delivered to the jury by the plaintiff's attorney. The case illustrates the potential for res ipsa loquitor in a child-care setting.

Fowler v. Seaton

The Similarity of Res Ipsa Loquitor to Strict Liability

The application of res ipsa loquitor in negligence bears considerable practical similarity to the cause of action for strict liability. As discussed in the tort-law overview of Chapter 2, strict liability is a cause of action that, like negligence, is available for personal injuries and property damage suffered as a result of accidents. In terms of doctrine, strict liability is the same as negligence with one very large difference: The elements of duty of care and breach of the duty of care in the negligence cause of action are replaced in strict liability by a single element of "absolute duty of safety," which requires the plaintiff to show that the situation in which the harm arose falls into one of five categories: ultrahazardous activities, defective products, wild animals, trespassing livestock, and domestic animals with known vicious propensities. If so, there is no need to show that the defendant was careless; so long as an injury and causation can be shown, the defendant is on the hook for the damages.

How res ipsa loquitor and strict liability are similar is that in either instance, the plaintiff is relieved of having to show that it was defendant's carelessness that led to the injury. With res ipsa loquitor, the plaintiff is given a presumption in lieu of having to present evidence on breach of the duty of care. With strict liability, the element of breach of duty of care is not part of the prima facie case. Either way, the defendant becomes absolutely responsible should something go wrong. You will also notice overlap in the situations in which res ipsa loquitor and strict liability are imposed. The exploding Coca-Cola bottle cases, for instance, were brought as negligence claims making use of res ispa loquitor. Today, thanks to the evolution of tort law, those same cases could be brought as claims for strict liability, since exploding pop bottles would constitute defective products. (Happily, of course, pop bottles rarely explode these days thanks to advances in plastics and glass.)

Special Rules for Land Owners and Occupiers

An idiosyncratic aspect of the common law regards the standard of care expected of owners or occupiers of real property. When it comes to the liability for conditions of land and buildings, there are special rules that dictate the standard of care.

These special rules only apply when the injury arises from a *condition* of *real property*.

The phrase "real property" means land and anything built on the land along with all fixtures. In property law, a "fixture" is something attached to the real property. So an installed ceiling lamp is a fixture, and thus part of the real property, while a floor lamp that can be unplugged and repositioned is "chattel" – meaning property that is not real property.

The special rules apply to land owners *and occupiers* because one does not have to "own" the property outright to be liable for conditions on the property. Someone who is in possession of the property – a lessee, for example, can be liable in the same way as an owner.

The special rules apply only to *conditions* on the property. Note that *activities* on the property, as opposed to conditions, are not covered by the special rules. If an injury results because of something the land owner/occupier is doing on the land, then the standard of care is that of the reasonable person. But if the injury results from a condition of the property – such as a rotted stair case or a knife-like edge on handhold – then the special rules are engaged.

The key to how the special rules work is that they require a different standard of care depending on the classification of the plaintiff – i.e., the person who enters the land.

The rules differ from jurisdiction to jurisdiction, so any restatement of them will be highly imperfect. But what follows is a fairly standard conception of the traditional rules, ordered from the lowest duty to the highest.

Undiscovered/Unanticipated Trespassers

A person is a trespasser if the person intentionally enters upon the land and is without permission (whether implied or express) or some other privilege to do so. And if the land owner/occupier is not aware of the trespassers' presence on the land, and would otherwise not anticipate it, then the trespasser is and undiscovered/unanticipated one. Such a person is owed **no duty**. That is to say, there is no way the undiscovered/unanticipated trespasser can recover against a land owner/occupier in a negligence action for an injury sustained because of a condition of the real property.

Discovered/Anticipated Trespassers

A discovered/anticipated trespasser is a trespasser – someone intentionally entering upon the land without privilege – who the land owner/occupier either knows or expects to be on the land. If a land owner knows that people habitually cut across the property as a shortcut between two public places, then such people would be anticipated trespassers. Even if the owner/occupier has not witnessed trespassers in the past, if there is evidence on the property that a reasonable person would understand as indicating trespassers – such as a beaten path – then the owner/occupier will be considered to have constructive notice of the trespassers.

Discovered/anticipated trespassers are owed a duty. In some courts, the duty is one of reasonable care. A more traditional approach is there is **a duty to warn of or make safe any concealed artificial conditions which are capable of causing death or serious bodily injury**. This is lower than the reasonable-care standard three key ways: (1) only concealed or hidden dangers – "traps" the courts sometimes say – trigger the duty; (2) the duty only applies to artificial conditions, not natural conditions; (3) the dangers must be very serious ones, such as those risking life or limb. A good example is an abandoned mine shaft: it's hidden, not a natural feature, and is potentially lethal. To obviate such liability the owner/occupier can either remedy the condition or create an effective warning – such as with posted signs.

Discovered/Anticipated Child Trespassers

An extra duty is placed on an owner/occupier in certain circumstances when the known (or knowable) trespassers are children. This rule is often called **attractive nuisance doctrine**, although as we will see that name is misleading.

Where a land owner/occupier knows or should be aware of child trespassers, that owner/occupier has **a duty to remediate a dangerous artificial condition on the land capable of causing death or serious bodily injury, so long as the condition can be remedied without imposing an unreasonable burden on the owner/occupier**.

The most important difference with regard to anticipated child trespassers as opposed to their adult counterparts is that the danger need not be concealed to trigger the duty. Another important difference is that prominent warning signs do not offer

an easy way out of liability. These differences reflect that fact that children lack good judgment and are often drawn to obviously dangerous things rather than being revulsed by them.

The special treatment of children got its start in cases where children trespassed onto railroad land, attracted to the idea of playing on the rail turntable. A seminal case was *Keffe v. Milwaukee & St. Paul Railway Co.,* 21 Minn. 207 (Minn. 1875). A 7-year-old boy riding the turntable in this way got his leg caught, crushing it and necessitating an amputation. The court reasoned as follows:

> "[T]he defendant knew that the turn-table, when left unfastened, was easily revolved; that, when left unfastened, it was very attractive, and when put in motion by them, dangerous, to young children: and knew also that many children were in the habit of going upon it to play. The defendant therefore knew that by leaving this turn-table unfastened and unguarded, it was not merely inviting young children to come upon the turn-table, but was holding out an allurement, which, acting upon the natural instincts by which such children are controlled, drew them by those instincts into a hidden danger; and having thus knowingly allured them into a place of danger, without their fault, (for it cannot blame them for not resisting the temptation it has set before them,) it was bound to use care to protect them from the danger into which they were thus led, and from which they could not be expected to protect themselves."

For this reason the doctrine was often referred to as the "turntable doctrine." A broader label, apparently traceable to the *Keffe* case, is the "attractive nuisance doctrine." The doctrine reflects a special protectiveness courts often exhibit toward children. But not all courts. The doctrine was rejected in Michigan in *Ryan v. Towar,* 128 Mich. 463 (Mich. 1901), a case in which an 8-year-old girl was caught in a water wheel on an abandoned industrial site. When she began screaming, her older sister came to her aid and was injured as well. Justice Frank Hooker wrote for the Supreme Court of Michigan:

> "There is no more lawless class than children, and none more annoyingly resent an attempt to prevent their trespasses. The average citizen has learned that the surest way to be overrun by children is to give them to understand that their presence is distasteful.˜ The remedy which the law affords for the trifling trespasses of children is inadequate. No one ever thinks of suing them, and to attempt to remove a crowd of boys from private premises by gently laying on of hands, and using no more force than necessary to put them off, would be a roaring farce, with all honors to the juveniles. For a corporation with an empty treasury, and overwhelmed with debt, to be required to be to the expense of preventing children from going across its lots to school, lest it be said that it invited and licensed them to do so, is to our minds an unreasonable proposition."

Originally, attractive nuisance doctrine required – as its name suggests – that the child be induced to trespass through attraction to the dangerous condition itself, in order for the land owner/occupier's duty to be triggered. This is no longer generally the case. Although courts often still call the doctrine "attractive nuisance," the danger need not attract the child in order for the land owner/occupier to have a duty. For instance Michigan – which these days recognizes attractive nuisance doctrine – has no requirement that the condition lure the children onto the land. The court in *Pippin v Atallah,* 245 Mich App 136 (Mich. App. 2001) explains, "The term 'attractive nuisance' is a misnomer (or historical leftover) because it is not necessary, in order to maintain such an action, that the hazardous condition be the reason that the children came onto the property."

Licensees

The category of licensee is the default category of nontrespassers. Someone who is not trespassing is a licensee unless for some reason they qualify as an invitee (discussed below). In general, people on private property with the consent of the owner/occupier are licensees. Licensees include visitors to private homes, such as friends and family. Ironically (and confusingly), people who come into your home by way of a formal party invitation are not invitees; they are licensees.

With regard to conditions on real property, an owner/occupier owes to licensees **a duty to warn of or try reasonably to make safe concealed hazards that are known to the owner/occupier**. This is different from the duty to discovered/anticipated trespassers in that to trigger a duty, the danger need not be artificial, nor does it need to constitute a threat of serious bodily injury or death.

Invitees

Invitees are people who are allowed to come on land to conduct business related to the owner/occupier's business, or who are members of the public on land that is held open to the general public. Customers at the mall, visitors in a hospital, fans at a concert, and sunbathers in a park are all invitees. Some jurisdictions also consider public employees such as police officers, firefighters, and mail carriers to be invitees, even when in private homes, so long as they are privileged to be there.

Invitees are owed the highest duty by land owners/occupiers.

When it comes to conditions of real property, invitees are owed **a duty to adequately warn of or render safe concealed hazards *plus* to make a diligent effort to inspect for unknown dangers.**

The key difference between licensees and invitees is that with invitees, there is a requirement to affirmatively go out and look for conditions that may be a hazard for the unwary. This makes sense if you consider that invitees are generally persons from whom the owner/occupier stands to make money. In cases where there is no money to be made, such as with public spaces like parks, there is at least a subtle cue that the space is one where visitors can feel entitled to be there, as opposed to a private locale where they should feel as if they are guests who are obliged to be a little more circumspect.

Case: *Campbell v. Weathers*

The following case makes use of the special rules for negligence of land owners/occupiers and explores the boundaries of the definition of "invitee."

Campbell v. Weathers

Case: *Rowland v. Christian*

Not all jurisdictions follow the special rules for owner/occupier negligence for conditions of real property. In this case, California's high court expresses considerable contempt for the traditional rules and decides to discard them in favor of the flexible and portable reasonable-person standard.

Rowland v. Christian

Statute: California Civil Code § 847

California Civil Code § 847

7. Actual Causation

Introduction

The chapter does double duty. Actual causation is not just an element of negligence, it is an issue in torts generally, including with strict liability, battery, trespass to land, etc. So you will learn the concepts here, in the context of negligence, but keep in mind that they are generally applicable throughout the landscape of tort law. (Your introductory course in criminal law may cover actual causation as well. The essential concept there is the same, although the ramifications can be quite distinct.)

You may find that actual causation is the simplest element to understand. And, in many cases, it is also the easiest to prove at trial. In other cases, however, showing actual causation can be the most perplexing challenge the plaintiff will face.

The requirement of actual causation is simply that there must be a cause-and-effect relationship between the defendant's conduct and the plaintiff's injury. The concept of breaching a duty of care is an almost endless jurisprudential puzzle. It requires real wrangling. Actual causation, by contrast, is almost self-explanatory. As we will see in this chapter, however, there are a few complications – some of them quite surprising – that bear some scrutiny. Nonetheless, the relative simplicity of the concept means that there is considerably less to say about it.

When actual causation presents a live issue in a case, it is usually a factual matter rather than a legal one. That is, the issue is usually something to be resolved with evidence, witnesses, and logical thinking. The first case in this chapter, *Beswick v. CareStat,* presents a fascinating vehicle for thinking about issues of proving actual causation by a preponderance of the evidence.

Next are some complications, considered under the label of "multiplicity issues," that come about when there are multiple parties that could be said to be responsible, yet who could slip out of liability because of some seemingly paradoxical results that come from strict application of the actual-causation requirement.

The But-For Test

Here is 95% of the law of actual causation: If the injury would not have occurred but for the defendant's breach of the duty of care, then actual causation is satisfied; if not, then not. That is called the "but for" test. You simply ask, "But for the defendant's breach of the duty of care, would the injury have occurred?"

Now, you can ask same the question without using the words "but for." (E.g., "Absent the defendant's accused conduct, would the injury have occurred anyway?") But the words used by all the courts and all the learned treatises are "but for." Law, in general, is filled with long phrases, big words, counterintuitive terms, and numerical code provisions – not to mention a heavy helping of Latin. So it may come as something of a surprise that the lynchpin of actual causation comes down to a test named with two words of three letters each that mean exactly what they sound like they mean: "but for." Moreover, the term is universal. Everyone calls it the "but for" test, even a law-school-dean-turned-justice writing for a unanimous U.S. Supreme Court. *See Fox v. Vice,* __ U.S. __, 131 S.Ct. 2205, 2215 (2011) (Justice Kagan, discussing the "but-for test" in the context of civil rights claims under 42 U.S.C. § 1988).

Actual Causation vs. Proximate Causation

There are two distinct concepts within the umbrella of "causation" in torts. One is actual causation, the subject of this chapter. The other is proximate causation, the subject of the next. Since actual causation and proximate causation are conceptually distinct, this book treats them as separate elements. But many writers will lump them together as "causation." Thus, distinguishing the concepts from one another is the first step in understanding either one.

Actual causation is a matter of strict, logical, cause-and-effect relationships. Proximate causation – where proximate means "close" – is a judgment call about how direct or attenuated the cause-and-effect relationship is, and whether it is close enough for liability.

This example will help you see the difference. Suppose you drive a car carelessly and run over your neighbor's mailbox. Your neighbor, sitting on her front porch, has seen the whole thing. Bursting out of the car, you put your hands on your hips and say, with indignity, "My mother and father caused this to happen." Your neighbor screws up her eyebrows. "What on earth are you talking about?" she says. You answer, "My mother and father got together and they, you know, caused me to exist. So they caused this to happen to your mailbox. I'm so sorry."

In such a case it would be absolutely undeniably true that, as a strict matter of the logic of cause-and-effect, you mother and father caused the accident. But, of course, offering this as some kind of explanation for what happened to the mailbox is completely silly. The tension here is the difference between actual causation and proximate causation. It is true that your mother and father caused the accident in the sense of *actual causation.* But your mother and father did not cause the accident in the sense of *proximate causation.*

In everyday, non-legal English, when we use the word "caused," we are talking about some combination of actual causation and proximate causation. Most of the time, there is no need to separate out the concepts. But when it comes to legal analysis in torts, we need to specify exactly what we are talking about because, as you will see, the two concepts implicate entirely different sets of concerns.

Some Notes on the Terminology of Causation

The first stumbling block in learning actual causation is the vocabulary used to talk about it. Ironically, while the test for actual causation is easy, and while it is represented by a pithy, descriptive label with consistent usage, the same cannot be said for the terminology used to talk about actual causation itself, or that of its neighboring prima facie element, proximate causation. Be on guard. The labels are myriad, confusing, and used inconsistently by lawyers and judges alike.

Actual Causation's Other Labels: Causation-in-Fact, Factual Causation, and More

What we are calling "actual causation" in this book goes by different names.

It is not enough to tell you that we will use the term "actual causation" in this book, and leave it at that. You have to learn the other terms, and how they are potentially confusing, so that you will be able to read and understand cases, briefs, and other legal documents no matter whom they are written by.

So the first thing to know is that the element we are calling "actual causation" is also called "causation-in-fact," and sometimes "factual causation" or "direct causation." The term "causation-in-fact" actually appears to be the most commonly used term, with "actual causation," being the second most common.

We are using "actual causation" in this book, even though it comes in second place in frequency, because it is the most apt and least confusing term of those in common use. The potential problem with calling the requirement "causation-in-fact" or "factual causation" is that it makes it sound like it is not a legal concept, but is instead just something for the jury to decide based only on factual evidence. That perception would be mistaken, however. Actual causation is a judge-rendered legal doctrine, and the law of actual causation is applied, clarified, and evolved by judges and appellate courts. So "factual causation" is actually quite "legal."

No doubt the commonality of the term "causation-in-fact" owes to the fact that, in practice, that the actual causation element of the plaintiff's case often presents only fact issues for the jury and leaves no questions that need to be decided by the judge. But that is not because actual causation is not legal, is it is only because the legal doctrine on actual causation is crystal clear in nearly all cases. That is to say, in the garden variety negligence case, all open questions with regard to actual causation will turn on how facts are interpreted and how the factfinder perceives the credibility of witnesses. The parties will not typically present the judge with conflicting interpretations of the law of actual causation, but will agree to use standard jury instructions on actual causation.

While we are on the subject of the tendency to call actual causation "factual causation," we should note that proximate causation is sometimes called "legal causation." The reasons for this are corollary to the prevalence of "factual causation" and "causation-in-fact" for actual causation. If you put the terms together, calling actual causation "factual causation" and proximate causation "legal causation," it sounds as if they are the factual and legal sides to a unified question of "causation." But that's not accurate. Actual causation and proximate causation are two conceptually separate requirements of the prima facie case for negligence, both of which involve the application of law to facts. Both implicate legal questions and both implicate factual issues. So, to avoid headscratchers like talking about the "law of causation-in-fact" or the "facts needed to show legal causation," we will stick to the terms "actual causation" and "proximate causation."

Now, there is another label for actual causation that is more confusing than any of the others by an order of magnitude. Sometimes, reported opinions will use the label "proximate causation" to refer to actual causation. Courts frequently say that the plaintiff cannot prove that something is the "proximate cause" of something else, when what they are talking about is failure to show actual causation. You will find an example in the *Beswick* case immediately below. Courts probably do this because they are lumping the concepts of actual causation and proximate causation together, but then instead of calling the amalgam "causation," they refer to it as "proximate causation." In such cases, you can mentally translate the phrase as "causation, which includes a requirement that the causation be proximate."

These complications over terminology seem like needless headaches. You might think that a better casebook would have gone through all the cases and used bracketed insertions to make all the terms consistent. Unfortunately, that would be doing students a serious disservice. In the real world, the terminology is all over the place. So you might as well learn your way around it now.

For good or for bad, these sorts of lexicological tangles are part and parcel of our common law system. Using any of these terms – including "proximate causation" – to discuss actual causation cannot be called "wrong." These usages lead to confusion, yes, but they are not actually incorrect. Because court opinions are built by using various other court opinions as precedent, the body of common law exists as a web of interconnected nodes unorganized by any centralized authority. Some courts see one element of causation where other courts see two. Among the courts, different names spring up, and differences persist both out of a kind of linguistic drift and because of stubborn disagreement about which terms are best.

Such problems could be avoided if courts were limited to interpreting a carefully crafted set of abstract statements of law organized in the form of a comprehensive code. In fact, that very structure is what is employed in civil law jurisdictions, such as Louisiana, Quebec, and France. That code-based way of organizing and thinking about legal rights and obligations is also part of American law in certain fields. For instance, in Civil Procedure – a mostly code-based class – you will not have to worry about some courts calling a 12(b)(6) motion a "B(6)(12) motion." The vocabulary is highly consistent. But in the common-law system, shifting, slippery vocabulary is an inexorable part of the deal. One thing you must learn in torts and other common-law subjects is how to ride the synonymical tide so that you can see beyond labels to concepts.

Think "A" Not "The"

The most important conceptual aspect of the law of causation for you to understand is that an injury can have more than one actual cause. Do not think in terms of whether some action is "the cause" of an injury, instead ask whether the action is "a cause." This applies both to actual causation and proximate causation.

There is a tendency – perhaps endemic to human cognition – to want to find *the* factor or *the* person who is to blame. This is reflected in the question, "Who *really* is to blame?" (That phrase, in quotes, gets 299,000 hits on Google.) Clearly many people think this way when considering issues of responsibility. Tort law, however, does not. In reality, there are a nearly limitless number of causes for every event. And every event may have a nearly limitless number of effects. Tort law recognizes this, and thus actual causation doctrine only requires that there be a logical, actual cause-and-effect relationship between the alleged breach of the duty of care and the plaintiff's injury. If more than one breach of the duty of care was an actual cause of the plaintiff's injury, then the plaintiff can separately establish the element of actual causation as to each and every such breach, including against an unlimited number of defendants.

> *Example: Leadfoot to Liver Lobe* – A leadfoot driver shoots through a suburban intersection at 90 miles per hour. She hits a driver making a left turn who is texting instead of looking ahead. The vectors of the colliding masses of automobile wreckage converge to eject a spray of debris at a gasoline tanker parked nearby. The tank is structurally weak because of improper welds – welds that would have been fixed except that they were missed by a safety inspector. The welds burst and the spilling mass of gasoline erupts into flames near the plaintiff. While not seriously hurt, the plaintiff is nonetheless whisked to the hospital for observation where he is x-rayed. The radiologist misreads the film and counsels an unnecessary surgery. During that surgery, an unwashed scalpel, supplied by the hospital, is handed to an unobservant surgeon by an unobservant nurse, either of whom, with a glance, would have seen that it was covered with blood – before it got anywhere near the patient's skin. Upon incision, the dirty scalpel transmits a flotilla of microbial pathogens to the plaintiff, which a case of sepsis that eventually results in the plaintiff losing the left lobe of his liver. Who actually caused the accident? We apply the but-for test, and we mush conclude that the harm befalling the plaintiff would not have occurred but for the negligent conduct of the leadfoot, the texter, the welder, the inspector, the radiologist, the hospital, the nurse, and the surgeon. Each one represents a but-for cause. Every single one can be held liable. The plaintiff can sue one, some, or all. It's entirely the plaintiff's choice.

Proof and Preponderance

Like all elements of the prima facie case, the element of actual causation must be proved by a preponderance of the evidence. That is, it must be shown that it was more likely than not that the injury would not have occurred but for the defendant's breach of the duty of care. Where actual causation is an issue in a case, it is meeting this burden through the presentation of evidence to the jury that often poses the biggest challenge to the plaintiff.

Case: *Beswick v. CareStat*

The following case provides a rich set of facts to consider issues of actual causation. Note that the court in this case uses the phrase "proximate causation" to denote its discussion of actual causation questions. (See "Some Notes on the Terminology of Actual Causation," above.)

Beswick v. CareStat

Note on Loss of a Chance and Some Questions to Ponder

There are difficult philosophical questions brewing in *Beswick*.

The plaintiff's expert says that had Ralph Beswick gotten to the hospital without the CareStat-instigated delay, then he would have had a 34 percent chance of surviving. In other words, the odds are that Beswick would have died even if he had received the emergency services blocked by the defendants. So, bearing that in mind, did the defendants' actions kill Beswick? Or is it even possible to say?

Here we have what is called a "loss of a chance" situation, a recurrent problem in a great variety of torts lawsuits, especially those involving expert testimony that offers statistical probabilities.

There are two ways of conceiving of the loss-of-a-chance problem – as a question of causation, or as a question of whether or not there is an injury sufficient for a prima facie case. The distinction between these two modes of thought begins with understanding what, exactly, is the injury being sued upon.

If the injury is *the loss of a chance to survive*, then we encounter the difficult question of whether losing a "a chance" counts as a personal injury.

If, however, the injury being sued upon is *death*, then we have the difficult causation question of whether one can say that causing a decreased probability of survival is the same as causing death.

The loss-of-a-chance question is dealt with in a deeper way in the case of *Herskovits v. Group Health,* which appears later on in Chapter 9 as part of a discussion of the injury requirement of the prima facie case for negligence. *Herskovits* presents both ways of conceiving of the problem – as a question of causation, and as a question of the existence of an injury.

For now, however, in the case of *Beswick*, the injury being sued on is Beswick's death. That means we are confronted with the causation question.

Note on "Substantial Factor"

In seeking a way to resolve the thorny loss-of-a-chance causation questions presented in this case, the *Beswick* court follows the lead of Pennsylvania state courts in looking to the "substantial factor" requirement of the Restatement Second of Torts. The court quotes from Comment (a) of § 433B, "[T]he plaintiff is required to produce evidence that the conduct of the defendant has been a substantial factor in bringing about the harm he has suffered."

It is not clear, however, that engaging in a "substantial factor" inquiry does much to help. In fact, it is hard even to know what the "substantial factor test" is supposed to be. A team of torts scholars has noted that the substantial factor test is surrounded by ambiguity and uncertainty. They write, "[T]he test gives no clear guidance to the factfinder about how one should approach the causal problem. It also permits courts to engage in fuzzy-headed thinking about what sort of causal requirement should be imposed on plaintiffs, especially in cases that present complications in the availability of causal evidence." Joseph Sanders, William C. Powers, Jr., Michael D. Green, *The Insubstantiality of the "Substantial Factor" Test for Causation,* 73 MO. L. REV. 399, 430 (2008).

Multiplicity Issues

In any given case, trying to untangle the facts to determine but-for causation can be difficult. Conceptually, however, the but-for test itself is simple. And, as we discussed earlier, the but-for test is most of actual causation doctrine. When we do have to venture beyond the but-for test, actual causation doctrine gets considerably more complex.

The situations in which actual causation doctrine moves beyond the but-for test all have to do with concurrent negligent conduct by multiple actors – what we are calling in this book "multiplicity" issues. As you will see, once multiple negligent actors enter the mix, it is possible to create scenarios where the strict application of the but-for test will allow some or all of them to escape liability, even in situations where that seems at odds with our intuitions of fairness.

The multiplicity exceptions to the but-for test all apply when the but-for test *is not* satisfied – that is, when a defendant's negligent action cannot be shown by a preponderance of the evidence to be a but-for cause of the plaintiff's injury. In other words, the exceptions to the but-for test are for holding defendants liable even when the conduct of those defendants was not a but-for cause of the plaintiff's injury. Stated still another way, the multiplicity exceptions to the but-for test help plaintiffs, not defendants. (To be entirely candid, this is not universally true. Some highly complex cases involving things like environmental damage have employed but-for exceptions against plaintiffs, but those cases are rare, involve exotic facts, tend to be idiosyncratic, and are arguably erroneously decided. We won't be covering them here.)

Also, keep in mind that just because there are multiple actors in a case, it does not follow that we need to look at exceptions to the but-for doctrine. In the vast majority of situations in the real world that involve multiple negligent defendants, the but-for test will indicate that each one of them is an actual cause of the plaintiff's injury.

Multiple Necessary Causes

In situations where there are multiple necessary causes – more than one action that had to occur in order for the plaintiff to be injured – then there is no need to look for an exception to but-for causation, because all such action satisfy the but-for test.

Let's go back to the basic rule: If a plaintiff would not have suffered the complained-of injury but for the negligent conduct of the defendant, then actual causation is satisfied. Stated in this positive form, the but-for rule has no exceptions. That is, it is true with no caveats that if a defendant is a but-for cause of the plaintiff's injury, then actual causation is satisfied.

Everything else in actual causation law is directed at expanding the range of defendants who will be deemed an actual cause of the plaintiff's injuries. That is, in rare circumstances, the law sometimes will allow the actual causation requirement to be

satisfied against a defendant who cannot, because of strict logic or a lack of proof, be found to be a but-for cause of the plaintiff's injury. Those situations are exemplified in the cases found further below in this chapter: *Kingston v. Chicago & Northwestern Railway, Summers v. Tice,* and *Sindell v. Abbott Labs.*

But first, let's cement our understanding of how the but-for test works with multiple parties. Any and all defendants whose conduct is a but-for cause of the sued-upon injury has the actual-causation element satisfied against them. No such defendant can point to any other defendant and say, "That defendant is *really* to blame, so I should not be held liable." (You might want to re-review the *Leadfoot to Liver Lobe* example above.)

When we study damages later on, we will find out that it may be possible for one of multiple defendants to escape responsibility for a portion of the damages. Whether this is possible depends on the jurisdiction and the circumstances. Sometimes, one of many responsible defendants can, at plaintiff's election, be made to pay all the damages (joint and several liability), other times less culpable defendants can shrug off a part of the financial hit (such as through apportionment, indemnity, or contribution). But none of this changes the analysis with regard to the actual-causation element: But-for causation satisfies the element actual causation.

The situation where there is more than one but-for cause is sometimes called **multiple necessary causes**. We can state a rule for this situation as follows: **Where multiple causes are necessary to produce the harm, then each such cause is an actual cause.** Now, you can regard this as a rule. It's reliably accurate. But, in reality, calling it a "rule" is unnecessary. The only good that comes of stating this as a rule is to dispel an instinctual misapprehension that, in the ordinary case, there is only one true cause of a plaintiff's harm. All you need to do is apply the but-for test: If the defendant is a but-for cause, then the actual-causation element is met. Other defendants are simply irrelevant to the actual causation question.

Case: *Jarvis v. J.I. Case Co.*

The following case illustrates how any defendant who is a but-for cause is helpless to escape the actual causation element. Note that the court – continuing our cavalcade of motley terminology – uses the terms "legal cause" and "cause in fact" to refer to actual causation.

Jarvis v. J.I. Case Co.

Multiple Sufficient Causes

Here we come to the first kind of case in which actual causation can be established against a defendant despite the fact that the plaintiff would have suffered the injury even if the defendant had not acted negligently – that is, even where the defendant is not a but-for cause. The occasion is where there are **multiple sufficient causes**, that is where there was more than one negligent act – i.e., breach of the duty of care – that would have caused the harm.

The doctrine is best explained with an example that drove the doctrine's development: twin fires. In fact, multiple-sufficient-cause doctrine might well be called the "twin-fires doctrine," since it is so closely associated with this particular circumstance: Defendant A negligently sets a fire that spreads through the countryside. Not far away, Defendant B negligently sets a fire that spreads through the countryside. Soon, the A fire and the B fire merge. The merged fire proceeds along a path that leads to the plaintiff's property, burning it down. Neither defendant represents a but-for cause of plaintiff's injuries. Why not? Ask the but-for question. Would the plaintiff have been uninjured but for the actions of A? No – the plaintiff would have been injured anyway, since the fire set by B was sufficient to cause a conflagration to move across the countryside to plaintiff's property. That is, if A had been careful and not set any fire, the plaintiff's house still would have burned down. So A is not a but-for cause of the plaintiff's injuries. The exact same can be said of B. If B had been non-negligent and never set the fire, the plaintiff's property still would have burned, since A's ignition of the countryside was sufficient to burn the path to the plaintiff.

If but-for causation were the only way to establish the element of actual causation against a defendant, then in a twin-fires case, the plaintiff would lose. Courts found this result unpalatable: The only reason the plaintiff winds up empty handed is that there was *more* carelessness. So the courts fashioned doctrine that allows actual causation to be satisfied even where the but-for test is not. We can state a rule for these situations like this: **Where each of multiple discrete events, not committed by the same actor, would have been sufficient each in itself to cause the harm, then each act is deemed an actual cause, despite not being a but-for cause.**

Our twin-fire example had two negligent actors, each contributing a sufficient cause. But in its purest form, the doctrine does not require multiple negligent actors. One cause could have been set in motion nonnegligently – for instance, by someone who caused the fire despite exercising all due care, or even by natural causes. Not all courts would go so far – as the *Kingston* case indicates, below. Nonetheless, the application of the doctrine focuses on whomever the plaintiff has sued. If that

defendant's actions were sufficient to cause the plaintiff's injury, then actual causation can be deemed satisfied despite the fact that the defendant's actions are not a but-for cause.

Case: *Kingston v. Chicago & Northwestern Railway*

The following is a classic twin-fires case that illustrates the doctrine.

Kingston v. Chicago & Northwestern Railway

Twin-Fires Cases and the "Substantial Factor Test" in the Multiplicity Context

The "substantial factor" inquiry – which we discussed in relation to the *Beswick* case – often comes up when courts confront situations – like that in *Kingston v. Chicago & Northwestern Railway* – where there are multiple sufficient causes for a single injury. The idea is that if there are multiple sufficient causes, then to count as an actual cause, the conduct need not be a but-for cause, but must at least be a "substantial factor" in causing the plaintiff's injury.

Although courts frequently refer to this as a "test," it does not tend to function like one. Professor David A. Fischer has written, "The test offers no real guidance for determining when a factor is substantial or even a 'factor.' Courts and juries must rely on intuition to decide the issue." See Fischer, *Insufficient Causes,* 94 KY. L.J. 277, 280-81 (2005).

At any rate, courts have now gone on to use the "substantial factor" inquiry far beyond situations involving multiple sufficient causes. Fisher notes, "Over the years, courts used the substantial factor test to do an increasing variety of things it was never intended to do and for which it is not appropriate. As a result, the test now creates unnecessary confusion in the law and has outlived its usefulness." *Id.* at 277 (footnote omitted).

About the best that can be said about the "substantial factor" requirement is that it seems to function as a placeholder for a given court's intuitive sense of fairness – one that, while defying crisp logical specification, provides a path to a more comfortable result.

The *Summers v. Tice* Doctrine

Another situation in which the courts will permit actual causation to be satisfied despite the failure of the but-for test is the situation in *Summers v. Tice*: Multiple actors do something negligent, and while only one of them logically could be responsible for the plaintiff's injury, because of the circumstances, it is impossible to tell which one is. In such a case, the *Summers v. Tice* doctrine allows the plaintiff a presumption that each of the multiple actors is an actual cause; thus the burden of proof is shifted, leaving it to the defendants to disprove causation – if they can – on an individual basis.

This doctrine has been called "double fault and alternative liability" by treatise writers Prosser & Keeton, and "alternative causes and the shifted burden of proof" by the Dan B. Dobbs treatise. But in this casebook, we will simply call it "*Summers v. Tice* doctrine," which is probably the most common shorthand, referring as it does to the bizarre case that gave the doctrine its birth.

Case: *Summers v. Tice*

The seminal case on *Summers v. Tice* doctrine is also its most vivid exemplar.

Summers v. Tice

8. Proximate Causation

Introduction

This chapter – like the one on actual causation – will do double duty. Proximate causation is not only an element of negligence, it is a requirement for torts generally, including, for example, the intentional torts of battery, trespass to land, and trespass to chattels, as well as strict liability. For now, we will be talking about proximate causation in the context of negligence. But when you move on to considering other tort causes of action, the same doctrine of proximate causation will apply. (And, once again, you may find that your criminal law course covers proximate causation as well. The concept, at root, is the same for torts and crimes, although the implications diverge.)

To meet the requirement of proximate causation, the plaintiff must show that the causal chain from the defendant's breach of duty to the injury suffered was not too attenuated or indirect. The point of proximate causation is that it places some outer bound on the scope of a defendant's liability for any given tortious act.

Generally, the touchstone is some version of foreseeability. If the plaintiff's injury is foreseeable at the time of the time of the defendant's duty-breaching conduct, then proximate causation is usually satisfied – although the details of the doctrine get considerably more complex.

The Place of Proximate Causation

Actual causation is a matter of strict, logical, cause-and-effect relationships. The element of *proximate causation*, on the other hand, is a judgment call about how long or attenuated the cause-and-effect relationship is. "Proximate" means "close." The label gets at the question of how close the breach of duty and injury are. The breach and injury need not be close in space or close in time – they could take place many miles and many days apart. But the breach and injury must be somehow close along the chain of causation that links one to the other.

The element of proximate causation is an outgrowth of the common-sense meaning of the word "cause." As we saw in the last chapter, there is a bewilderingly large number of events that are actual causes of an injury.

Suppose a pedestrian is injured when struck by a car. The car was being driven by a minister who was headed up a lonely stretch of mountain road to officiate at a small wedding ceremony. The bride and groom met a couple years ago when the groom was taken to the hospital after being injured by a negligently maintained lighting fixture, which dropped on him from the ceiling of a department store. The bride-to-be was the groom-to-be's treating physician, and after they met, they fell in love.

Now, can we say the department store's negligence caused the car accident? A good response might be: "Yes, but only if you are being silly about it." In terms of strict cause-and-effect, there is no question that the department store's negligence caused the accident. So the element of actual causation is met. But it still seems ridiculous to say that the department store "caused" the accident. That's where proximate causation comes in. In the language of tort, we would say that the department store's negligence was not a proximate cause of the automobile accident.

One way, then, of defining proximate causation is that it is a certain lack of silliness in saying that one thing is the "cause" of another. Proximate causation is one aspect of what we mean in everyday language when we talk about one thing being the cause of another thing. Actual causation is the other. The point of separating them out for legal analysis is so that we can speak of the concepts more carefully and thoroughly, which should ultimately allow us to get at a more fair result.

The Label for Proximate Causation

Just as actual causation goes by many names (see "Some Notes About the Terminology of Causation" in the previous chapter), proximate causation is also cursed by having multiple labels. It is worth spending a little bit of time on the terminology question to avoid confusion later on.

Proximate cause is sometimes called "legal cause" and sometimes "scope of liability." The different labels have developed largely because many commentators believe "proximate causation" is a confusing misnomer.

Some critics of the label say that "proximate causation" is misleading because geographical proximity of the incident and injury is not required under the doctrine. Neither is proximity in time. Point taken. But "proximate" is apropos if you think not in terms of a physical closeness but instead in terms of a kind of metaphysical closeness – that is, closeness along the chain of causation that links the incident to the injury.

Others criticize the label "proximate causation" because, they say, the doctrine has nothing to do with causation. That, however, depends on how you define "causation." It is true if you define "causation" as actual causation, the strict logical relationship between cause and effect. But proximate causation does fill out part of the meaning of the word "cause" as it is used in everyday speech. When we say "cause" there is ordinarily both a proximate and an actual sense in which we are talking. We mean that there is a relatively direct cause-and-effect relationship. If the word "cause" in everyday speech did not include a kernel of the proximate causation concept, then it would not be absurd to say the Norman invasion of England "caused" you to be late to class.

Ultimately, whether it's a good label or not, you should think of "proximate causation" as a term of art. And like many other legal terms of art, you must learn the concept behind it without trying to derive its meaning from its constituent words.

Let's look at the other labels that are used for the proximate causation concept.

"Legal causation" is one. The "legal causation" label was championed by the authors of the Second Restatement of Torts. The term gets at the idea that the doctrine is an artificial limitation on the natural causal chain – a limitation that is construed to exist *by law*. The downside of "legal causation" as a label that it sounds like it is the "legal side" of "factual causation." And

that is not the case at all. The term "legal causation" also makes it sound like the doctrine is in the hands of the judge, as a "legal question," rather than in the hands of the jury, as a "factual issue." In fact, generally the opposite is true. Proximate causation is frequently taken to be mostly a "factual" issue for resolution by the jury.

"Scope of liability" is another label. This label has been championed by the authors of the Third Restatement of Torts. As a term of art, "scope of liability" avoids the problems people have with "proximate causation" and "legal causation." A problem, however, is that "scope of liability" does not sound like a term of art. Indeed, "scope of liability" is commonly used in a non-term-of-art sense to generically indicate the extent of liability. For instance, a lawyer might accurately say, as a way of talking about the statute of limitations, "Injuries that were suffered 10 years ago are outside the company's scope of liability." Such a statement has nothing to do with the proximate-causation concept. One might also talk about the "scope of liability" for patent infringement – and that would have nothing to do with the proximate-causation concept or even tort law. At the end of the day, however, the biggest problem with "scope of liability" is that it simply has not caught on, the efforts of the Restatement authors notwithstanding. When you see "scope of liability," be aware that the term may or may not be a synonym for proximate causation.

Having considered these different labels, the bottom line for you as a budding lawyer is that you need to be cognizant that when a court or commentator is talking about the concept of proximate causation, those words might not appear in the text.

Perhaps even more frustrating, you must be aware of the opposite problem: Courts often use the words "proximate causation" to refer to actual causation. This happens because court will sometimes say "proximate causation" to mean causation in general – with the actual and proximate varieties lumped together. And in many of these instances, the court will go on to speak exclusively of problems of actual causation. This leads to some confusing statements, such as, "To prove proximate cause a plaintiff must show that the result would not have occurred 'but for' defendant's action." *Mazda Motor Corp. v. Lindahl,* 706 A.2d 526, 532 (Del. 1998).

These complications can be extremely frustrating to new law students. But keep reading and thinking actively. You will soon become adroit enough with the concepts that you can see through to what the court is talking about no matter what labels are being thrown around.

The Relationship Between Proximate Causation and Duty of Care

Viewing all of the elements of a prima facie case for negligence together, you will find considerable practical and conceptual overlap between the duty-of-care element and the proximate causation element. Both proximate causation and duty of care function to circumscribe in a somewhat arbitrary way the range of situations where a plaintiff can recover from a defendant. In accomplishing this, both elements largely revolve around the idea of foreseeability. So why have both elements in the cause of action of negligence? What distinguishes the two?

These are excellent questions. Conceivably the elements of duty of care and proximate causation could be combined, or one absorbed into the other. But for whatever historical reasons there might be, negligence law developed the way it did, and we have the two elements.

Regardless of whether it is ideal to have duty of care and proximate cause separated, it is possible to articulate some helpful distinctions between the elements as they exist in modern negligence law.

First, the elements of duty of care and proximate causation can be distinguished in that they look at the injury-producing incident from different perspectives. The duty of care element gets at the question, "When must you be careful?" Proximate causation asks the question, "Assuming you weren't careful, just how much are you going to be on the hook for?"

This difference in perspective has driven the development of one element or the other when novel questions have arisen. For instance, the question in *Tarasoff v. University of California,* of whether a psychotherapist should be held liable for failing to warn third parties of a patient's dangerous propensities, was a question that was answered by evolving duty-of-care doctrine.

There is also a distinction between the duty-of-care element and the proximate-causation element in how and to what extent they are the province of the judge or the jury. It is sometimes said that duty of care is a question of law to be decided by a judge, while proximate causation is an issue of fact to be decided by the jury. This is fair as a broad generalization, but it is not categorically true. Both elements comprise judge-made legal doctrine that requires judicial interpretation, and both elements require fact evidence to prove. Nonetheless, as a functional matter in many cases, the duty-of-care element is a way for judges to limit the scope of negligence liability, while proximate causation gives juries a way to do the same.

Ultimately, the most important difference between the duty-of-care element and the proximate-causation element is that the duty-of-care element is unique to the negligence cause of action, while proximate causation is generally an element of all torts.

This difference is probably the most convincing reason for keeping the two elements doctrinally separate. The element of proximate causation is needed for the other tort causes of action to prevent silly results. Suppose a protester throws paint on a wall – actionable as trespass to land. The image of a paint-splattered wall on the evening news causes a woman to realize she should repaint her barn. While on her way to the paint store, she gets into an accident, injuring a motorcyclist. Proximate causation prevents the motorcyclist from successfully suing the protester. Without proximate causation, the protestor would be liable. Duty of care cannot be a barrier to the suit, because there is no duty-of-care element in a cause of action for trespass to land.

Meanwhile, we need the duty-of-care element to stop unwanted negligence suits. Suppose a burglar breaks into a store at night and is injured when hit on the head by a negligently secured lighting fixture. Proximate causation will not prevent this suit. The causal relation is unattenuated. But the duty-of-care element is a showstopper for the burglar plaintiff, because burglars are not owed a duty of care. In truth, the duty-of-care element is more important than just stopping unwanted negligence suits. The duty-of-care concept is the very essence of the negligence cause of action. The duty concept, and the inquiry of whether the defendant's duty was breached, is what distinguishes negligence from strict liability and the intentional torts. Strict liability has no element of breach of duty whatsoever, being limited in extent by the tightly circumscribed situations in which it is applicable. And the intentional torts are limited by the intent concept rather than duty.

Thus, while duty of care and proximate causation have a great deal of overlap, neither can be done away with without completely restructuring our entire system of tort doctrine from the ground up.

Case: *Palsgraf v. Long Island Railroad*

As discussed, there are some situations that present a duty-of-care issue, yet do not involve any question of proximate causation. Other situations do the opposite. Many cases, however, implicate both. The following case implicates both concepts, and in so doing, it provides a vehicle for discussing each and their relation to one another. It is such a good vehicle for considering these issues that it has become the most famous case in American tort law. It may even be the most famous case in the entire American common-law canon. In it, Judge Benjamin N. Cardozo and Judge William Shankland Andrews provide two very different views of the place of proximate causation.

Palsgraf v. Long Island Railroad

Various Tests for Proximate Causation

Trying to pin down blackletter rules for proximate causation is a frustrating task, because there is tremendous variability in how courts approach proximate causation. Various tests have been articulated, but it is not easy to say when a certain test applies. The different formulations are applied in a haphazard fashion in different cases – frequently even within the same jurisdiction. Thus, it is not always possible to say that a given state follows a certain test in a certain kind of case. Nonetheless, it is worth reviewing the different tests, because doing so will give you a feel for the different ways courts articulate their analysis of proximate causation questions.

The Direct Test and Intervening Causes

An older test for proximate causation, now largely disused, is the **direct test**. Despite its obsolescence, the direct test is helpful to know, because the concepts and terms it introduces help define more modern tests.

Today, the touchstone for proximate causation is foreseeability. The direct test, however, is not concerned with foreseeability at all. With the direct test, you ask whether the accused act led directly to the injury without there being an "intervening cause" between the two. An **intervening cause** is some additional force or conduct that is necessary in order to complete the chain of causation between the breaching conduct and the injury. The intervening cause could be the actions of a third party, or it could be some natural event. A good way to conceptualize the direct test is to start at the harm, and then work backward to see if there are any forces that served as a more immediate cause of the harm than the defendant's conduct.

> *Example: Cash from Above I* – Suppose an elderly man is proceeding down a sidewalk in the city. On a balcony above, an obnoxious rich woman decides to start throwing $20 bills into the air. The flutter of gently descending cash causes a mad rush on the street, and the man is trampled. He sues the profligate boor on the balcony who touched off the stampede. Were the woman's actions a proximate cause of the man's injuries? Under the direct test, the answer is no. The man will be unable to show proximate causation under the direct test because the money-grabbers represent an intervening cause.

> *Example: Cash from Above II* – Same facts as in the previous paragraph, except that this time, no one else was on the street, and instead of being trampled, the man was injured when he slipped on slick piles of banknotes that had

accumulated on the sidewalk. Is proximate causation satisfied under the direct test? Yes. There is no intervening cause between the negligent action and the injury, so the direct test for proximate causation is satisfied.

The leading example of the direct test is *In re Polemis & Furness Withy & Company Ltd.*, 3 K.B. 560 (Court of Appeal of England 1921). The freighter *Polemis* was being unloaded in the port of Casablanca. A worker dropped a wooden plank into the ship's hold. The friction of the plank striking inside the hold caused a spark that ignited a cloud of accumulated fuel vapor. The ensuing fire completely destroyed the *Polemis*. In the case, it was stipulated as unforeseeable that a falling plank of wood could cause a fire. But there was no question that dropping the plank was a negligent act – i.e., a breach of the duty of care. After all, it was easily foreseeable that the falling plank could have struck and damaged something below by mechanical force. The court analyzed whether the dropping of the plank was a proximate cause of the unforeseeable fire. The *Polemis* court used the direct test. Under the direct test, proximate causation was satisfied. Lord Justice Bankes wrote: "The fire appears to me to have been directly caused by the falling of the plank. Under these circumstances I consider that it is immaterial that the causing of the spark by the falling of the plank could not have been reasonably anticipated."

Suppose that, instead of the facts unfolding as they did in the case, the plank fell so as to awkwardly wedge itself across a walkway in the hold. Now, suppose that another worker came along, tripped over the plank, and dropped a lantern which ignited a fire. Under those facts, the direct test would not be satisfied.

There is a philosophical problem with the direct test that is hard to ignore: Every cause and effect relationship in real-world experience can be said, at some level, to involve intervening causes. Maybe on the *Polemis* it was the wafting of the fuel vapor through the air and the travel of air molecules around the plank that allowed it to hit at the perfect angle to make the spark. Clearly, for the direct test to work, many such would-be intervening causes must be ignored. Selecting what counts as an intervening cause thus requires some artificial characterization. One way to state the direct test so that it does not rely on the troublesome concept of intervening causes, is to use the concept of a "set stage." The formulation works like this: If it can be said that the defendant was acting on a "set stage" – where everything was lined up and waiting for the defendant's conduct to touch off the sequence of events that led to the plaintiff's injury – then proximate causation is established under the direct test.

But keep in mind, the direct test is mostly obsolete at this point.

Foreseeability and Harm-Within-the-Risk

Today, foreseeability is the touchstone for proximate causation analysis. To apply the **foreseeability test**, you take an imaginary trip back in time to the point at which the defendant is about to breach the duty of care. You then look forward and ask, "What might go wrong here?"

In the foreseeability view of proximate causation, intervening causes are not a problem. Consider the *Cash From Above I* example. Is it foreseeable that throwing cash off a balcony could cause a stampede? Yes, it is. Therefore, the foreseeability test for proximate causation is satisfied.

Perhaps the leading case on using foreseeability to determine proximate causation is *Overseas Tankship (U.K.) Ltd. v. Morts Dock & Engineering Co,* [1961] A.C. 388 (Privy Counsel 1961) – a case which is better known as "*Wagon Mound No. 1*." This case famously rejected the direct-causation test of *Polemis.* In *Wagon Mound No. 1,* the steam ship *Wagon Mound* was docked in the Port of Sydney, Australia. Owned by Caltex – a venture of what is today Chevron – the *Wagon Mound* was discharging its cargo of gasoline and taking on oil to use as fuel for its engines. During this operation, the *Wagon Mound* spilled a large amount of fuel oil into the water. Caltex made no attempt to disperse the oil, and the *Wagon Mound* soon unberthed and went on its way. Within a few hours, the *Wagon Mound*'s oil had spread over a substantial portion of the bay and had become thickly concentrated near the property of Morts Dock, a ship-repairing business that was doing welding that day on the *Corrimal.* Some bits of molten metal from the welding operation fell into the water and ignited some cotton waste that was floating on top of the oil. (Sydney is one of the main ports for Australia's cotton exports.) The burning cotton waste in turn ignited the oil. The ensuing fire burned a large portion of Morts Dock and the *Corrimal.*

The court made the finding that "the defendant did not know and could not reasonably be expected to have known that [fuel oil] was capable of being set afire when spread on water." While this seems unbelievable, the court took pains to note that this finding was based on "a wealth of evidence" including testimony of one Professor Hunter, "a distinguished scientist."

The court discussed *Polemis* extensively and rejected its direct-test view of proximate causation, positing instead that foreseeability is key. Viscount Simonds wrote for the court, "[T]he essential factor in determining liability is whether the damage is of such a kind as the reasonable man should have foreseen~. It is a departure from this sovereign principle if liability is made to depend solely on the damage being the 'direct' or 'natural' consequence of the precedent act. Who knows

or can be assumed to know all the processes of nature? But if it would be wrong that a man should be held liable for damage unpredictable by a reasonable man because it was 'direct' or 'natural', equally it would be wrong that he should escape liability, however 'indirect' the damage, if he foresaw or could reasonably foresee the intervening events which led to its being done~. Thus foreseeability becomes the effective test."

Since it was held unforeseeable that spilling a large quantity of fuel oil could lead to a destructive fire, Caltex won for want of proximate causation.

Another, related test that can be applied is the **harm-within-the-risk test**. Here, proximate cause is a question of germaneness: Is the kind of harm suffered by the plaintiff the kind that made the defendant's action negligent in the first place? The harm-within-the-risk test can be thought of as a way of focusing and re-articulating the foreseeability test.

The *Polemis* case illustrates how the foreseeability test and the harm-within-the-risk test can reach a different result than the direct test. The fire aboard the *Polemis* was not foreseeable. Likewise, an inferno is not the kind of harm that makes it risky to drop a wooden plank into a cargo hold. Thus, in the *Polemis* case, the plaintiff could show proximate causation under the direct test, but would not have been able to under the foreseeability test or the harm-within-the-risk test. Under the *Polemis* facts, the direct test is more generous for plaintiffs than the foreseeability test or the harm-within-the-risk test.

The *Cash From Above I* example shows that, under different facts, the opposite may be true – the foreseeability test and harm-within-the-risk test can be more generous for plaintiffs than the direct test. It is foreseeable that throwing money into the air will cause a stampede, and the risk of stampede is what makes such boorish behavior risky. Thus the foreseeability test is satisfied. The direct test is not satisfied, however, since the people rushing in represent intervening causes.

As you can see, the foreseeability test and the harm-within-the-risk test are both quite different from the direct test. But, you may be wondering, is there any practical difference between the foreseeability test and harm-within-the-risk test? That is, will the two tests ever produce different results? The answer is yes, although rarely.

Most of the time, the foreseeability test and the harm-within-the-risk test will yield the same results. A worker spills a bucket of soapy water onto a public sidewalk. A pedestrian comes along and slips, suffering a broken wrist. Is it foreseeable that a person would slip on a puddle of soapy water? Yes. Is slipping the kind of harm that makes it dangerous to spill soapy water? Yes.

To illustrate the potential difference between the foreseeability test considered alone and its harm-within-the-risk elaboration, let's take the facts from *Berry v. Sugar Notch Borough,* 191 Pa. 345 (Pa. 1899). The facts of this case arise on a violently windy day. A trolley was speeding down the street, when, suddenly, a large chestnut tree fell on it. The plaintiff, who was on the trolley, was injured. The tree – probably already weak with disease –fell when it did on account of the wind. The trolley, meanwhile, was under the tree when it fell because of the speed the trolley was travelling. The case does not say exactly how fast the trolley was travelling, except that it was considerably in excess of the modest speed limit of eight miles per hour. And while this rate of speed does not shock the conscience from a 21st Century perspective, we can stipulate that it was negligent fast for a trolley in the late 1800s. The question is whether the trolley's speeding was a proximate cause of the injury suffered by the plaintiff. Now, it is clear that the speeding did not cause the tree to fall. The tree was going to fall when it did, regardless of what the trolley was doing. On the other hand, there is no question that if the trolley had been going at a slower, safer speed, it would not have been hit by the tree. After all, if the trolley had been going slower, it would not have gotten to the place where the tree fell at the time it fell.

In trying to decide the issue of proximate causation here, we see that we get different results depending on whether we use the foreseeability test or the harm-within-the-risk test.

For the foreseeability test, we ask the foreseeability question: Was the harm foreseeable? In this case, we must ask whether it was foreseeable that a tree would fall on the trolley if it drove too fast. This is a hard question to answer. In some sense it is foreseeable. Certainly it is *imaginable*. Trees do fall in windstorms. So the foreseeability test appears to be passed, although in way that feels unsatisfying.

Now let's ask the harm-within question: Is the possibility of getting hit by a falling tree the sort of thing that makes it risky to drive a trolley too fast? Certainly not.

So in the *Sugar Notch* case, the foreseeability test provides a halting yes or is equivocal. The harm-within-the-risk test, however, provides a clear answer of no.

Objects of Foreseeability

The foreseeability concept does a lot to illuminate what is meant with the doctrine of proximate causation. But foreseeability needs some additional elaboration. In particular, we need to scrutinize exactly what is being focused on in the foreseeability inquiry. Is proximate causation wanting if the plaintiff is unforeseeable? Or what if it is the type, manner, or extent of harm that is unforeseeable?

Unforeseeable Plaintiffs

The general rule is that if the plaintiff is unforeseeable, then proximate causation will not be satisfied. That is, if it was unforeseeable that the plaintiff could have been injured by the accused conduct, then the defendant wins because proximate causation fails.

Unforeseeable Type of Harm

Now, let us assume we have a foreseeable plaintiff – meaning a plaintiff who could be foreseeably harmed by the defendant's conduct, but let's suppose that the *type* of harm suffered is a surprise. Does the unforeseeability of the type of harm cause a failure of proximate causation? Probably the best that can be said about this is that there is really no general rule; instead, courts look at this on a case-by-case basis.

> *Example: Bonked by a Shotgun* – Suppose the defendant negligently leaves an old rifle, loaded and with the safety off, lying in the backyard of her house with a group of three-year-old children. When one kid plays with it, banging it against a rock, the wooden stock comes apart and drives splinters deep into another child's hand, causing nerve damage. Some harm in such a scenario is foreseeable – in particular, a gunshot wound. But nerve damage caused by splinters? That is not foreseeable. So, is there proximate causation? Courts would differ.

Unforeseeable Manner of Harm

Let's now assume that we have a foreseeable plaintiff, injured by a foreseeable type of harm, but the manner of the harm is somehow surprising and unforeseeable. The general rule in such cases is that an unforeseeable manner of harm does not preclude recovery on the basis of proximate causation. There is, however, some give in the doctrine. If the manner of harm is truly extraordinary then the proximate causation limitation might be engaged.

> *Example: The Lucky/Unlucky Motorist* – The defendant's negligent driving causes the plaintiff's car to skid off the road. Luckily, the plaintiff is fine. But the car is stuck in the mud. Although the car is undamaged, the plaintiff cannot drive it out and will need to seek help. Walking to a nearby town to get help, the plaintiff is struck by a car driven by a third person. In a suit by the plaintiff against the driver who rode the plaintiff's car off the road, is proximate causation satisfied? The plaintiff was clearly foreseeable, since driving a car negligently exposes nearby motorists and pedestrians to danger. The type of harm – getting struck by a car – is perfectly foreseeable. The manner of harm, however, is unforeseeable. Who would have guessed that the plaintiff would be hurt not by the defendant's car, but by someone else's car? Yet a court could find proximate causation to be established. Since the plaintiff and the type of harm were foreseeable, and since the manner of harm was not truly extraordinary, proximate cause may be satisfied.

Unforeseeable Extent of Harm

What if it is the extent of the harm that is unforeseeable? Suppose someone in the cafeteria, horsing around, throws a small bottled water to a friend. A bystander is struck and killed. Did the thrower proximately cause the bystander's death? The general rule is that an unforeseeable extent of harm will not cause a failure of proximate causation. Alternatively stated, under the eyes of the law, the extent of the harm, no matter how great, is considered to be foreseeable – even if it really is not. This doctrine is called the **eggshell-plaintiff rule**, named for a hypothetical plaintiff who has a skull as thin as an eggshell, for whom a slight rap on the head could cause massive brain damage. This doctrine is quite strictly applied in personal injury cases. With property damage, however, there is some loosening of the rule, so that foreseeability and harm-within-the-risk tests might be applied to provide a proximate-cause limitation on liability – even in cases where the causal connection is tight.

Superseding Causes

Since the direct test of proximate causation is no longer the prevailing law, intervening causes are generally not a problem. However, a remnant of the direct test remains in the doctrine regarding "superseding causes." By definition, a **superseding cause** is an intervening cause that breaks the proximate-cause relationship. The term is conclusory – a court does not determine whether or not something is a superseding cause in order to find out whether it breaks the proximate-cause

connection. Rather, a court decides whether or not an intervening cause breaks the proximate-cause relationship, and, if it does, then it is dubbed a superseding cause.

The doctrine of superseding cause comes up when, after the defendant has undertaken some negligent conduct, something else comes along that gives the court or jury the sense that the something else is *the cause* of the plaintiff's injury. Technically, as we discussed with regard to actual causation, there is no such thing as "the" cause. Every event has a virtually infinite number of causes, so no single one can be "the" cause. Nonetheless, the doctrine of superseding cause is invoked when circumstances exist such that it just seems wrong to leave the defendant holding the bag.

A classic example comes from the facts of *Loftus v. Dehail,* 133 Cal. 214 (Cal. 1901). In that case, Isaac and Alice Dehail owned a lot in a busy section of Los Angeles. A house had been standing on the lot, but the Dehails had it demolished, leaving an open cellar. The Dehails left the lot in this condition, making no effort to fence off the open pit. Seven-year-old Bessie May Loftus was injured when she fell in. The court held that the Dehails' failure to fence in the pit was not "the" proximate cause. Why? It turns out Bessie was pushed. The superseding cause in this instance was Bessie's four-year-old brother who, "in a fit of temper," tipped her into the pit. "His act was the proximate cause of the injury," the court concluded. (It should be noted that while *Loftus* is a good example of the concept, the *Loftus* case itself almost certainly could come out differently today.)

Jurisdictions differ with regard to what kinds of actions can rise to the level of a superseding cause. There are some general observations that can be made, however. First, negligence is not normally superseded by someone else's negligence. Suppose a careless driver, who has passenger in the car, loses control on a mountain road and skids to a stop such that the car is teetering over the edge of a cliff. A careless trucker, driving too fast, fishtails around the bend and nicks the car, causing it to tip off the cliff. The passenger is injured by the fall. The carelessness the driver of the car will be deemed a proximate cause of the injury, notwithstanding the intervening force of the fishtailing truck.

A particular recurring situation is where injuries are made worse by medical malpractice committed in the course of the treatment of the original injury. The rule on this is quite clear: Medical malpractice is always considered foreseeable. In other words, incompetent medical treatment will not be considered a superseding force. Suppose a careless restaurant worker burned a patron while flambéing cherries tableside for a dessert dish. If the injuries had been treated competently, the patron would have recovered entirely in a couple weeks. Unfortunately the patient received substandard burn care, which led to an infection that necessitated an amputation. The restaurant's carelessness in this case will be considered a proximate cause of the amputation injury. The same applies to ambulance accidents.

On the other hand, criminal interveners are usually superseding causes. If a sociopath breaks into the hospital and puts poison in an IV, the inept flambéer will not be liable for the poisoning. Note that there is an important exception to the rule that criminal intervenors are superseding causes: If an intervening criminal act was foreseeable, or if the defendant otherwise had a duty to protect the plaintiff from a criminal act, then the criminal act will not be considered a superseding cause. If a negligently installed door lock on an apartment in high-crime area allows an assailant to enter a plaintiff's apartment, the criminal act is not considered a superseding cause, and the landlord's negligence will be held a proximate cause of the plaintiff's injury.

Case: *Ryan v. New York Central Railroad*

The following case provides an additional venue to think about proximate causation issues. It is also a fascinating vehicle for thinking about the interaction of law and industrial progress.

9. Existence of an Injury

In General

The existence of an injury is an element of the prima facie case for negligence. Even if a defendant had a duty and breached a duty, there is no negligence claim unless there is some compensable harm. Another way of stating the same idea is that "damages" is an essential element of the prima facie case for negligence.

Not all causes of action require an injury or damages. For instance, the intentional tort of trespass to land has no such requirement. If someone trespasses on your land, you can sue them whether or not they caused you any sort of loss. So, if someone trespasses by walking on your land, and then walks off, having not disturbed even a stalk of grass, you can win a lawsuit against them. In such a lawsuit, you would be entitled to "nominative damages" – meaning damages in name only –

commonly a single dollar. So why would anyone pursue such a lawsuit? Except under rare circumstances, there's no point. Yet, if they want to, they can.

Negligence is not like that. There must be damages in order to form a prima facie case. And the damages must be of a certain kind. Generally speaking, they must be compensatory damages occasioned by physical damage "to person or property," meaning to a person's body or a person's tangible property.

In the context of damages, "compensatory" means damages that compensate someone for an actual loss. It is not possible, for instance, to sue someone for negligence just out of a desire to punish them for being careless. Punitive damages will not suffice to make out a prima facie case for negligence. (Assuming you have compensatory damages, and thus can make out a prima facie case for negligence, you can then argue for punitive damages as a way of increasing the amount of the award – but that's a subject for later in this book.)

The requirement that the damages be for physical injury to the person or property excludes many possible claims. Notably, mental anguish, by itself, is not the kind of injury that is sufficient to establish a negligence case. Also, purely economic damages will not suffice. So, if someone's carelessness causes you to not get a job, then, without more, there is no negligence case. Now, if you lose your job because you are in the hospital, and if you are in the hospital thanks to a car accident for which you can establish all the elements of negligence, then you can recover for both the lost job as well as the hospital bills. But without the physical injury that sends you to the hospital, you have no case in negligence.

The doctrine regarding the existence of a compensable injury in the negligence case is sometimes put under the heading of whether there is a duty of care – that is, the first prima facie element of negligence we dealt with in this book. Whether courts look at it as a question of duty or as a separate element of the negligence case, the point is that without proving harm – and harm of the right kind – the plaintiff has not put forth a complete claim.

It should be emphasized that, as a practical matter, almost no one would want to pursue a lawsuit unless there is the prospect of substantial damages. Lawsuits are expensive, after all. The amount of damages, however, is a subject for a later chapter. For now, the question is whether there is an injury sufficient to establish a prima facie case.

Bear in mind that most of the time the existence of a compensable injury is a slamdunk in a negligence case. If it's not, then the only remaining questions are usually factual, not a legal. For instance, a plaintiff in an automobile accident case might allege a "soft tissue injury" – one in which no bones were broken. How to prove such an injury can be a thorny problem for plaintiffs' attorneys in the trial court. But such situations do not present any tricky matters of legal doctrine. This chapter concerns the relatively rare situations in which there is a legal question on the matter of the existence of an injury.

Ahead, we will first look at so-called "loss of a chance" situations, in which there is room to argue whether an injury actually exists. Then we will look briefly at cases of pure economic harm and cases of pure emotional harm.

Loss-of-a-Chance Situations

The following case looks at a situation in which the injury inquiry turns into something of a philosophical question – where the injury, if there is one, is a change in the odds.

Case: *Herskovits v. Group Health*

The following case looks at an unusual, but occasionally recurring, situation in which the existence of an injury becomes a philosophically challenging question, one that is not answerable merely by uncovering facts.

Herskovits v. Group Health

The Thorny Question of Calibrating Damages in *Herskovits,* and Some More Questions to Ponder

Assuming there should be recovery, what should be the measure of damages? Justice Dore's opinion is ambiguous on this point.

We will discuss the question of the measurement of compensatory damages in general later in the book. But the *Herskovits* case presents a unique question about calibrating damages, so it's worth pondering for a moment how it might be done.

Perhaps the simplest thing that a court could do is to award the Herskovits estate damages in the same way as would be done for a "normal" wrongful death case. So if Mr. Herskovits had been killed by a negligently dropped anvil, for instance, and if the damages in that case were $1 million, then the damages in this case would be $1 million as well. Let's call this the *unreduced approach.*

Justice Dore's opinion, however, seems to invite some reduction in the amount of damages, although his opinion is ambiguous on how this would be accomplished.

Let's consider some alternatives of how damages could be reduced.

One approach – let's call this the *percentage-difference approach* – would be to start with the number that would be the compensatory damages for death in a "normal" case. Let's again assume that is $1 million. Based on expert testimony, Mr. Herskovits's chance of survival would have been 39% with a timely diagnosis, 25% without. So we could say that since the best-case scenario was 39%, then the baseline figure for damages should be 39% of $1 million, or $390,000. Given the negligent delay in diagnosis, the chance of survival dropped to 25%, which is equivalent to $250,000. The difference between the baseline case and the negligence case is $140,000. (Notice that this is the same as subtracting 25% from 39%, which gives 14%, and then multiplying this by $1 million.) So, under this approach, the measure of damages would be $140,000.

Another approach would be to ask the hypothetical question, of how much would someone be willing to pay for the increased chance of survival. In this approach, we don't worry at all about the $1 million baseline figure. Let's call this the *what-would-you-pay approach*. We know that the negligence scenario left Mr. Herskovits with a 25% chance of survival. Had he been diagnosed earlier, he would have had a 39% of survival. From Mr. Herskovits's perspective, if he could somehow magically pay for the removal of the negligence, his chances of surviving would increase 56%. (That is, 39% is 56% higher than 25%.) So the question is, how much would a person pay for a 56% increased chance of surviving cancer?

Another approach – we can call this the *unguided approach* – would be to just tell the jury that they can reduce damages as they find appropriate.

The trial court could dictate an approach in the form of jury instructions. Or, in the absence of specific instructions, the attorneys could argue these approaches to the jury.

Pure Economic Loss

In general, pure economic loss – that is, unaccompanied by any physical damage to the plaintiff's person or property – will not suffice as an injury to create a prima facie case for negligence.

> *Example: A Tale of Two Factories* – A couple of billionaire balloon enthusiasts negligently allow their balloon to become entangled in electric power lines, causing a massive power outage to two factories. One factory makes popsicles. The other factory makes lugnuts. Both factories lose money because of the loss of productivity during the blackout, but only the popsicle factory suffers physical damage – namely the melting of its inventory of popsicles. In this case, the popsicle factory can recover, but the lugnut factory cannot. There are also workers, at both factories, who lose out on wages while the factories are closed during the blackout. The losses suffered by these workers are purely economic, and so they cannot recover.

Despite the general rule, which is very robust, there are occasional situations in which the courts have allowed recovery for pure economic loss.

One somewhat ad hoc approach that has been used in a few jurisdictions to allow negligence plaintiffs to recover for pure economic loss is an idea of **particular foreseeability**. In *People Express Airlines, Inc. v. Consolidated Rail Corp.,* 495 A.2d 107 (N.J. 1985), the defendant railroad negligently caused a fire that forced the evacuation of an airport terminal, resulting in a slew of cancelled flights. The court allowed the airline to recover from the railroad for the financial loss suffered on account of the cancelled flights because the airline, as a plaintiff, was "particularly foreseeable." The same court rejected claims from everyone else – including travelers who lost business deals. Even though such losses were foreseeable, they were not, in the view of the court, *particularly foreseeable*.

Another situation in which courts have allowed negligence claims for pure economic loss is against **accountants**. An accountancy's client can sue for a negligent audit, for example, even though the only losses are economic. Moreover, third parties who relied on information provided by accountants are sometimes able to recover under a negligence theory. This type of suit can arise when a non-client makes an investment decision based on the client's negligently audited books. The extent to which such non-clients can recover for pure economic loss from differs by jurisdiction and circumstance.

Finally, **attorneys** can be sued for negligence – professional malpractice, that is – when clients suffer purely economic losses. In addition, third parties can also sometimes recover from an attorney, despite the lack of a client relationship. A common situation for such recovery is in the context of a negligently handled will. If it is clear that a person was intended as a beneficiary, and would, but for the attorney's negligence, have received a bequest, the intended beneficiary is often able to recover from the attorney. Without allowing non-clients a cause of action in situations like this, attorneys drafting wills could

effectively have total immunity from malpractice, since it will virtually always be the case that the client will be deceased when the malpractice is uncovered. Outside of the will context, it is rare that non-clients can recover against attorneys. You will learn much more about attorney liability for professional malpractice in a separate Professional Responsibility course.

Mental Anguish and Emotional Distress

The general rule is that emotional or mental distress will not suffice as an injury for purposes of pleading a prima facie case for negligence. There are myriad exceptions, however. Much of the development of doctrine of allowing claims for pure emotional distress involve parents seeking compensation for emotional distress related to the death or grievous bodily injury of a child. Pregnancy and childbirth are recurrent contexts as well. Much of the impetus for the development of doctrine in this area likely has to do with the fact that the death of a child – for reasons to be explored later – will ordinarily give rise to little or nothing in damages under the common law of torts.

At the outset, it is important to keep in mind that mental suffering is generally recoverable if it is occasioned by a physical injury. The loss of a limb, for instance, may cause compensable emotional harm. That much is clear. Our question here is to what extent can a mental/emotional harm itself provide the injury that is required for a prima facie case for negligence.

Historically, the courts loosened the requirement of a physical injury in cases of severe emotional distress to allow cases where, despite the lack of a physical injury, there was at least a physical *impact* associated with the event that gave rise to the emotional distress. Requiring an impact, however, led to results such as the one in *Micthell v. Rochester Railway Co.,* 45 N.E 354 (N.Y. 1896), where a woman was denied recovery – for lack of an impact – where a team of runaway horses almost trampled her, though never touched her, and the stress of the event resulted in the her having a miscarriage.

Later courts became willing to allow a claim for emotional distress if was accompanied by some physical manifestation of the stress. And some courts broadened the impact exception to embrace situations where there was some risk of impact to the plaintiff, or where the plaintiff was within the "zone of danger" of an incident. Either of these rules, of course, would have aided the plaintiff in *Mitchell.*

Today, many cases support what can be thought of as an independent tort of **negligently inflicted emotional distress** – sometimes abbreviated "NIED." Particularly influential in this regard was the case of *Dillon v. Legg,* 68 Cal. 2d 728 (Cal. 1968), which allowed recovery to a person not within the zone of danger. In that case, Margery M. Dillon witnessed her daughter Erin be fatally struck by an automobile negligently driven by the defendant. Erin, who was five, had started out ahead of her mother, legally crossing a road, when hit. The *Dillon* court set out three factors to be considered:

> "(1) Whether plaintiff was located near the scene of the accident as contrasted with one who was a distance away from it. (2) Whether the shock resulted from a direct emotional impact upon 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."

Under *Dillon,* these were only factors to be considered – that is, they were guidelines for assessing whether the plaintiff's emotional trauma would be considered legally "foreseeable." Many states followed California's lead, recognizing some form of NIED in the mold of *Dillon,* often with various tweaks.

Meanwhile, two decades later, in the case of *Thing v. La Chusa,* 48 Cal.3d 644 (Cal. 1989), the California Supreme Court narrowed the scope of the NIED action it had pioneered by recasting its own *Dillon* guidelines into hard rules:

> "[A] plaintiff may recover damages for emotional distress caused by observing the negligently inflicted injury of a third person if, but only if, said plaintiff: (1) is closely related to the injury victim; (2) is present at the scene of the injury-producing event at the time it occurs and is then aware that it is causing injury to the victim; and (3) as a result suffers serious emotional distress – a reaction beyond that which would be anticipated in a disinterested witness and which is not an abnormal response to the circumstances."

Here are the facts of *Thing v. La Chusa,* as recited by the court:

> "On December 8, 1980, John Thing, a minor, was injured when struck by an automobile operated by defendant James V. La Chusa. His mother, plaintiff Maria Thing, was nearby, but neither saw nor heard the accident. She became aware of the injury to her son when told by a daughter that John had been struck by a car. She rushed to the scene where she saw her bloody and unconscious child, who she believed was dead, lying in the roadway. Maria sued defendants, alleging that she suffered great emotional disturbance, shock,

> and injury to her nervous system as a result of these events, and that the injury to John and emotional distress she suffered were proximately caused by defendants' negligence."

In *Thing,* the California Supreme Court denied recovery on the basis of the test it articulated:

> "The undisputed facts establish that plaintiff was not present at the scene of the accident in which her son was injured. She did not observe defendant's conduct and was not aware that her son was being injured. She could not, therefore, establish a right to recover for the emotional distress she suffered when she subsequently learned of the accident and observed its consequences. The order granting summary judgment was proper."

Today, there is great variation across jurisdictions as to whether tort law allows any claim at all for pure emotional harm or for NIED. Even in jurisdictions were claims are allowed, the differences among courts are considerable.

10. Affirmative Defenses to Negligence

In General

There are three ways for a defendant to win a negligence case. First, and easiest, the defendant can just stand by as the plaintiff fails to put on evidence to prove each of the prima facie elements. If that happens at trial, the defendant can successfully move for a directed verdict – thereby winning the case without putting on a single witness or, theoretically, even without asking a single question of any of the plaintiff's witnesses. Assuming the plaintiff puts on a prima facie case, proving each element by a preponderance of the evidence, the second way for a defendant to win is to make out a rebuttal defense. A rebuttal defense is established by offering evidence to rebut the plaintiff's evidence for one or more of the prima facie elements established by the plaintiff. The third and final way for a defendant to win is to prove an affirmative defense. Even if a plaintiff makes out a prima facie case, and even if the defendant has no rebuttal evidence whatsoever, the defendant can still obtain victory by proving an affirmative defense. As we will see, an affirmative defense could win a complete victory for the defendant, or sometimes an affirmative defense will effect a partial victory, shielding the defendant from some portion of the damages.

When it comes to affirmative defenses, the burden of proof is on the defendant. That is why it is called an "affirmative" defense – proving it up is the affirmative obligation of the defendant. In comparison, the first two ways for defendants to win – pointing out the failure of proof on the prima facie case or rebutting an element – can be thought of as "negative" defenses. There, the defense is premised on what the plaintiff lacks. With an affirmative defense, the defendant has to burden of putting all the needed evidence in front of the factfinder.

The standard of proof for an affirmative defense is the same as for the plaintiff's prima facie case – preponderance of the evidence. And, like a cause of action, an affirmative defense may be broken down into elements. Where an affirmative defense is structured as a series of elements, the defendant will have to prove each one of the elements by a preponderance of the evidence.

Keep in mind that an affirmative defense trumps the plaintiff's prima facie case. Even if a plaintiff went far beyond its burden of proving every element by a mere preponderance of the evidence – suppose, for instance that a plaintiff proved every element to a 100% certainty – it only takes an affirmative defense with each element proved by a mere preponderance of the evidence to block the plaintiff's recovery.

There are three main affirmative defenses that are particular for negligence claims: contributory negligence, contributory negligence, and assumption of the risk. They are the subject of this chapter.

The first two affirmative defenses – contributory negligence and comparative negligence – work by pointing the finger back at the plaintiff and blaming the plaintiff's injury on the plaintiff's own negligence. Contributory negligence and comparative negligence are alternatives to one another. Most jurisdictions have the defense of comparative negligence. The few that do not have the contributory negligence defense.

The defense of assumption of the risk is just what it sounds like: The plaintiff agreed to shoulder the risk that something would go wrong, so when it does, the plaintiff cannot come to the defendant for compensation.

Plaintiff's Negligence

If the plaintiff's own negligence worked to bring about the harm the plaintiff complains about, then the defendant can use the plaintiff's negligence as a defense. Depending on the jurisdiction, the defense will either be of the contributory-negligence type or the comparative-negligence type. Within either type, there are a myriad of possible differences between jurisdictions.

All of tort law is subject to differences from one jurisdiction to another. But there is probably no more important and fundamental set of differences in common-law doctrine than those having to do with the affirmative defense premised on the plaintiff's negligence. If you were a personal-injury attorney or an insurance-defense attorney moving to a new state, the first thing you would want to learn is how the law regards the plaintiff's negligence as a defense.

The first and most important distinction is whether the jurisdiction recognizes the comparative negligence defense or the contributory negligence defense. Contributory negligence is the older doctrine, and it is more defendant friendly. Comparative negligence – also called "comparative fault" – is the newer doctrine, and it is more plaintiff friendly. Under contributory negligence, if the plaintiff was a little bit negligent, then the plaintiff loses. Under comparative negligence, the plaintiff's negligence is not necessarily a bar to recovery, but it will at least serve to reduce the total amount of the award.

Contributory Negligence

The doctrine of contributory negligence holds that if the defendant can prove that the plaintiff's own negligence contributed to the injury that the plaintiff complains of, then the defendant is not liable. To be more exact, proving a case for contributory negligence involves proving that the plaintiff's conduct fell below the standard of care a person is expected adhere to for one's own good, and that such conduct was an actual and proximate cause of the injury that the plaintiff is suing on.

To break the defense of contributory negligence into elements, we can start with the elements of negligence. To review, those are: owing a duty, breaching the duty, actual causation, proximate causation, and the existence of an injury. For purposes of contributory negligence, we can throw a couple of those elements out. It generally goes without saying that a person owes a duty to one's self, so there is no need to have the existence of duty as an element. Similarly, there is no point in discussing the existence of an injury, since the occasion for asserting the defense will never come up unless there is an injury. So we can break contributory negligence down into three elements: (1) breach of the duty of care, (2) actual causation, and (3) proximate causation. In practice, issues of contributory negligence generally revolve around the breach element.

Contributory negligence was once available as a defense everywhere. Now it exists only in five American jurisdictions – Maryland, the District of Columbia, Virginia, North Carolina, and Alabama. Curiously, you'll note, all of those jurisdictions are contiguous except Alabama. And interestingly enough, the state of Tennessee – which connects Alabama to Virginia and North Carolina – is the most recent convert from contributory negligence to comparative fault. Tennessee broke the contiguous swath when it switched in 1992.

The reason for the decline in contributory negligence is that it is perceived as being too harsh on plaintiffs. With the defense of contributory negligence, a plaintiff who is found to have been even slightly negligent will be completely barred from any recovery, even against a defendant who was colossally negligent. Imagine that it's late at night on a stretch of two-lane highway. The driver of a car momentarily takes his eyes off the road while adjusting his car's air conditioning vents, and at that moment is hit head on by an overloaded truck with no lights whose driver was simultaneously under the heavy influence of alcohol, cocaine, and heroin, and – at the moment of the collision – was attempting to learn juggling by watching an instructional video on a laptop set on the dashboard and practicing the moves with a set of steak knives. The collision causes the driver of the car to be grievously injured and permanently disabled, while the truck driver walks away without a scratch. What is the result in a contributory negligence jurisdiction? No recovery for the plaintiff.

Comparative Negligence

At the time of this writing, 46 states have overturned the common-law doctrine of contributory negligence in favor of some form of comparative negligence. About a dozen have done so as the result of a court decision, with the remainder having introduced comparative negligence by way of a statutory reform.

Comparative negligence – also commonly called "comparative fault" because it has applications in tort law beyond negligence claims – is a partial defense. It allows a defendant to escape some portion of the damages under certain circumstances on account of the plaintiff's negligence. Generally the jury is required to determine the relative fault between the parties in the form of percentages. The reduction in damages is then done by multiplying the total damages by the relevant percentage. So

if a jury finds that the plaintiff is 1% at fault, that the defendant is 99% at fault, and that the plaintiff suffered $100,000 in damages, then the plaintiff's recovery will be reduced by $1,000, meaning that the defendant will be liable for $99,000.

That is a simple example, but comparative negligence gets much more complicated. The complications arise from the many variables allow the doctrine to be very different from one jurisdiction to the next. As a result, there are myriad versions of comparative negligence.

The first and most important variable is whether there is a threshold quantum of the plaintiff's negligence beyond which the defendant has a complete, rather than partial, defense. The version called **pure comparative negligence** has no threshold. This approach is followed in 12 states. Whatever percentage the plaintiff is negligent, that is the percentage by which the plaintiff's recovery is reduced. For instance, if the plaintiff is determined to be 99% negligent, then the recovery is reduced by 99%, and the plaintiff can only recover 1% of the compensatory damages from the defendant. In such a case, the plaintiff is, in the judgment of the factfinder, almost entirely to blame for her or his own injury, yet a small amount of recovery is still possible.

The perception among some courts and lawmakers that it would be unfair to allow recovery in such a situation – where the plaintiff is mostly to blame – has led to a form of the doctrine known as **modified comparative negligence** (also known as "partial comparative negligence.") In this form, if the plaintiff/defendant distribution of negligence meets or exceeds some threshold, then the plaintiff is entirely barred from any recovery. In essence, there is a reversion to contributory negligence. How this threshold works differs greatly among jurisdictions.

In some jurisdictions the plaintiff is allowed recovery – subject to reduction – so long as the plaintiff's fault is *not more than* the defendant's fault. Other jurisdictions say that the plaintiff is allowed recovery – subject to reduction – so long as the plaintiff's fault is *less than* the defendant's fault. Notice that either way, the threshold is 50%. The difference is what happens in the event of a tie, where the jury determines that both the plaintiff and the defendant are each equally at fault, assigning 50% of the responsibility to each.

The more popular version of modified comparative negligence is the more plaintiff-friendly one – the one in which the plaintiff can still recover if fault is apportioned 50/50. By one count, 22 states use this version. The more defendant-friendly rule – where equal fault means the plaintiff is denied all recovery – is the choice of 11 states.

So we have two main versions of modified comparative negligence, distinguished by what happens in the event that the plaintiff and the defendant are equally at fault. What are these alternative versions called? Putting labels on the rules is a potential source of extreme confusion. Some sources use the label "50% rule" to refer to the rule where defendant wins a complete victory in the event of tie. Indubitably it makes sense to call this the "50% rule," since the plaintiff is barred from recovering if adjudged 50% at fault. But other sources use the label "50% rule" to denote the rule that allows a plaintiff recovery in the event of a tie. This too makes perfect sense, since under the rule the plaintiff can be up to 50% at fault without being barred.

Unfortunately, it is very hard to know what someone is talking about when they use the phrase "50% rule" (or, for that matter, "49% rule," or "51% rule"). You might distinguish them by calling one the "50% bar rule" and the other the "50% allowed rule." The safest way to distinguish the two, however, may be to call them the plaintiff-wins-the-tie rule and the defendant-wins-the-tie rule. It's inelegant, but unambiguous.

None of this would matter much if ties were rare. But they are not. If you ask a jury to assign proportional blame between two negligent parties, the easiest and most obvious answer will often be to say that they are both equally at fault. So what happens in the event of a tie may amount to a huge difference in the overall effect of tort law in a given jurisdiction.

Even once the labels are straightened out, there is still a problem grouping states together in this way. One of the 22 states counted in the plaintiff-wins-in-tie rule was Michigan. But in Michigan, under Michigan Compiled Laws § 600.2959, a plaintiff who more to blame than the defendant is not really barred from all damages, just noneconomic damages. That means that such a plaintiff could recover a percentage of medical bills and lost wages, but would be barred from pain-and-suffering damages.

But wait. There are yet more complications. Up to this point, we have spoken only of situations in which there is one defendant. What if there are multiple defendants? Is the negligence threshold applied by comparing the plaintiff to each individual defendant, or to all defendants considered collectively? You will not be surprised to find out that jurisdictions differ. Most states consider defendants collectively – employing the threshold by comparing the plaintiff's percentage of the blame to the percentage of all the defendant's considered collectively. A few states apply the threshold on a defendant-by-defendant basis.

Statutes: Comparative Negligence

The following statutes show some of the variety of implementations of the comparative negligence defense.

Kentucky Revised Statues Title XXXVI, Chapter 411

Minnesota Statutes Chapter 604, Section 01

Maine Revised Statutes Title 14, §1

Assumption of the Risk

The affirmative defense of assumption of the risk provides that defendants can avoid liability where plaintiffs have voluntarily taken the chance that they might get hurt. One way to think about assumption of the risk is in relation to the prima facie elements of a negligence claim. Where plaintiffs assume the risk, they relieve defendants of their duty of due care.

Implied vs. Express Assumption of the Risk

The label "assumption of the risk" is applied by courts to many different situations, and it may differentially engage different requirements and limitations. There are two broad categories, however, that form an important division: implied and express. Implied assumption of the risk comes about when plaintiffs, by their conduct or actions, show that they have assumed the risk. Express assumption of the risk results from an explicit agreement in words – written or oral – assuming the risk.

The Elements of Assumption of the Risk

Assumption of the risk – whether of the implied or express type – can be broken down into two elements: (1) The plaintiff must **know and appreciate** the risk, including its nature and severity. (2) The plaintiff must take on the risk in an entirely **voluntary** way.

These requirements are quite strict.

Knowledge – To show knowledge it is generally not enough for the defendant to show that the plaintiff should have known about the risk. There generally must be proof that the plaintiff actually knows about the risk. And it is not just knowledge that is required, but real understanding and appreciation. In other words, plaintiffs have to really know what they are getting into. To put it in more formal terms, the standard is a *subjective* one – looking at what the person actually understood, rather than an objective one, which would look at what the person should have understood given the circumstances.

Contrast the doctrine of assumption of the risk with the objective reasonable person standard in the prima face case for negligence. The reasonable person standard, being objective, will not bend to a defendant's lack of understanding or awareness. So, it is readily possible for an inattentive or hapless person to blunder into negligence liability. In fact, the more inattentive you are, the most likely negligence liability becomes. By contrast, the more witless you are, the harder it is to assume the risk. A plaintiff, who, because of a lack of experience or intelligence is incapable of understanding the risk, cannot assume it.

There are limits to the subjectivity of assumption of the risk. In the sports context, there is less tolerance for claims of ignorance. Plaintiffs hit by foul balls as spectators at baseball games tend to be held to a more objective standard. The same goes for participants in sports activities.

Voluntariness – The standard for voluntariness is quite strict as well. There must be a genuine choice if a plaintiff is to be held to having assumed the risk. If it is the case that the plaintiff was compelled by circumstance and had no reasonable choice other than to confront the risk, then it does not count as voluntary for purposes of assumption-of-the-risk doctrine. Similarly, if a plaintiff's only choice to avoid the risk is to forego a legal right – such as enjoying one's own property – then the there is no voluntariness. In the celebrated case of *Marshall v. Ranne,* 511 S.W.2d 255 (Tex. 1974), a plaintiff who was attacked and bitten by his neighbor's boar was held not to have assumed the risk by walking out of his own house.

Relationship with Contributory and Comparative Negligence

There is considerable practical and conceptual overlap between the defense of assumption of the risk and defenses of contributory or comparative negligence. But assumption of the risk is conceptually distinguishable in that a plaintiff that assumes the risk might be acting reasonably. By definition, in a contributory/comparative negligence situation, the plaintiff is

not acting reasonably. On the other hand, plaintiffs might be quite reasonable in assuming the risk if they have determined that rewards outweigh the downside of the potential for injury.

Since the move from contributory negligence to the flexible system of comparative fault, many courts have held that the assumption of the risk doctrine is absorbed to some extent into comparative fault doctrine. In particular, the trend has been to abrogate the defense of implied assumption the risk. Express assumption of the risk, however, resists being rolled into comparative fault.

Case: *Murphy v. Steeplechase Amusement Co.*

The following case is an example of implied assumption of the risk.

Murphy v. Steeplechase Amusement Co.

Case: *Hulsey v. Elsinore Parachute Center*

The following case explores express assumption of the risk and considers under what circumstances a release will be enforceable.

Hulsey v. Elsinore Parachute Center

Case: *Hiett v. Lake Barcroft Community Association*

The following case shows the flexibility of the public policy doctrine to invalidate waivers.

Hiett v. Lake Barcroft Community Association

Public Policy Exceptions to Express Agreements to Assume Risk

As is apparent in both *Hulsey v. Elsinore Parachute Center* and *Hiett v. LABARCA*, courts impose a public policy limitation to agreements to waive negligence liability.

Where the defendant is providing some kind of service that is essential to a normal, modern life, and where there is unequal bargaining power between the plaintiff and the defendant, the public policy exception is likely to bar the defendant from using exculpatory releases to avoid liability for negligence. Certain traditional categories for the public-policy exception are hospitals, physicians, dentists, public utilities, professional bailiees (e.g., parking lots), and common carriers (e.g., airlines). It is not hard to imagine that if such releases were allowed for hospitals and physicians, it would be impossible to receive medical treatment without having to release claims for negligence. Indeed, the UCLA Medical Center actually tried this, conditioning their treatment on a patient's waiver of any future claim for negligence. Patients had to sign a document called "Conditions of Admission," which included the following:

> Release: The hospital is a nonprofit, charitable institution. In consideration of the hospital and allied services to be rendered and the rates charged therefor, the patient or his legal representative agrees to and hereby releases The Regents of the University of California, and the hospital from any and all liability for the negligent or wrongful acts or omissions of its employees, if the hospital has used due care in selecting its employees.

This was tested in *Tunkl v. Regents of University of California*, 60 Cal.2d 92 (Cal. 1963). Justice Trobriner wrote for the court:

> While obviously no public policy opposes private, voluntary transactions in which one party, for a consideration, agrees to shoulder a risk which the law would otherwise have placed upon the other party, the above circumstances pose a different situation. In this situation the releasing party does not really acquiesce voluntarily in the contractual shifting of the risk, nor can we be reasonably certain that he receives an adequate consideration for the transfer. Since the service is one which each member of the public, presently or potentially, may find essential to him, he faces, despite his economic inability to do so, the prospect of a compulsory assumption of the risk of another's negligence. The public policy of this state has been, in substance, to posit the risk of negligence upon the actor; in instances in which this policy has been abandoned, it has generally been to allow or require that the risk shift to another party better or equally able to bear it, not to shift the risk to the weak bargainer.

Tunkl has been followed just about everywhere. Otherwise, one imagines that every hospital would follow UCLA's lead.

Theoretically, if a grocery store or hotel tried to make patrons agree to such a release, such releases would be invalidated as well. Grocery stores and hotels are essential services in modern life.

By contrast, skydiving is about as nonessential as a service could be. Courts in many states have thus refused to find a public policy exception to waivers for parachuting services.

A good example of a case that would seem to be on the bubble is a fitness center. Fitness advocates and physicians like to talk about regular exercise as being "essential." But Maryland's high court held that going to the gym was nonessential, and so no there was no public-policy exception for an express waiver signed by customer. *See Seigneur v. National Fitness Institute, Inc.,* 752 A.2d 631 (Md. 2000). Another case that would seem be in the gray zone is a ski resort. In Vermont, a general exculpatory agreement used by a ski resort was found to be invalid. *See Dalury v. S-K-I, Ltd.,* 164 Vt. 329 (Vt. 1995).

Another category of defendants traditionally barred from using agreements to avoid negligence liability are manufacturers of products. Products liability – a complicated area – is a subject for Volume Two of this casebook. But for now it is enough to know that manufacturers and retailers cannot escape liability from property damage and personal injury caused by defective products.

11. Common Law Liability in the Healthcare Context

In General

The healthcare setting is a fertile one for torts. So many things can go wrong in the course of diagnoses, drug treatments, and surgeries. Of course, automobiles and roadways provide many opportunities for accidents as well, but hospitals and physicians tend to have one thing that the average driver does not – deep pockets. The confluence of injuries to fuel complaints and money to pay judgments thus makes healthcare a uniquely important setting for tort law.

At this point, you have learned the basics of negligence law, and thus you know most of what is relevant to lawsuits against physicians and hospitals. But there are a few important things to add. This chapter covers some additional common-law doctrine that applies to healthcare torts. The next chapter concerns the effect of a federal statute, ERISA, which often blocks plaintiffs from suing health-insurers and HMOs in tort.

There are three aspects of the common-law torts in the healthcare context that are covered in this chapter.

First, in a medical malpractice action for negligence, the standard of care is different. As we saw – in particular with *The T.J. Hooper* – the custom or standard practice of an industry is not dispositive when it comes to determining the standard of care. That is to say, the standard practice of an entire industry can be found unreasonable and thus held to fall below the standard of care to which defendants are held in negligence actions. That is not the case, however, with medical malpractice. Medical custom – what physicians generally call the "standard practice" or "standard of care" – is the benchmark for determining breach of duty in the context of medical malpractice negligence claims. This means that what is called "standard of care" in medical jargon ends up dictating what we refer to as the "standard of care" in legal jargon.

Second, the intentional tort of battery – to be dealt with in a more general way in the second volume of this casebook – has a unique role in the medical setting. The healthcare version of battery, called **medical battery**, provides a way for patients to sue physicians who treat them beyond the scope of the patient's consent. Consistent with battery doctrine, and in distinction to negligence, a medical battery action has no requirement of showing damages or an injury.

Third, there is a kind of claim that is unique to healthcare: the action for **informed consent**. The informed consent action is generally available where a patient was not apprised of an important risk necessary to make an informed decision about treatment, and the patient then suffers the negative consequence associated with the undisclosed risk.

The Standard of Care for Healthcare Professionals in Negligence Actions

Basics

Most cases falling under the label "medical malpractice" are negligence cases. Examples of medical malpractice negligence actions would include suits arising from an internist who prescribes a drug contraindicated by something in the patient's history or a radiologist who fails to see a tumor that other radiologists would have seen.

There is a key difference between negligence law generally and negligence law as applied to physicians: the standard of care. Physicians are considered *professionals*, and for professionals, the standard of care is not that of a reasonable person, but is

instead **the knowledge and skill of the minimally competent member of that professional community**. Another way of putting this is that custom becomes dispositive in cases of professional negligence. Is it the prevailing custom for neurosurgeons to order an MRI scan before undertaking a scheduled brain surgery? If so, then failing to do is a breach of the duty of care. If not, then there is no breach – even if the plaintiff can demonstrate that a practice of doing so would be prudent.

This way of setting the standard of care works both for and against physicians. On the one hand, hewing to custom keeps a physician insulated from malpractice judgments – even where the hypothetical reasonable physician might be more cautious. On the other hand, deviating from custom – even when doing so would seem reasonable – exposes the physician to liability.

This standard for professional negligence is objective, and it is calibrated in accordance with the community of professionals in the defendant's practice. If the defendant is a general dentist, then the standard is the minimally qualified member of the relevant community of general dentists. If the defendant is a cardiologist, then the standard is the minimally qualified member of the relevant community of cardiologists. By saying the standard is objective, we mean that it is the same standard for all members of the professional community. That is, the standard of care is not adjusted in favor of professionals who have lower levels of experience, skill, or knowledge. Thus, it does not matter whether a physician is just out of medical school or has been in practice for 30 years. Also, the standard of practice will evolve over time. What starts as an obscure technique may gain enough acceptance to become standard practice. Thus, negligence law puts the onus on physicians and other healthcare professionals to stay up to date.

One thing to bear in mind: The objective standard of care for professionals applies only when they are accused of negligence in the course of their professional practice. If an orthopedist drives her car into your mailbox, the standard applied will be that of the hypothetical reasonable person and not that of the knowledge and skill of the minimally competent orthopedist.

The Role of Expert Testimony

The fact that the professional standard of care is defined with objective reference to the professional community means that it is almost always the case that expert testimony will be needed to establish the standard of care. In practice, this makes medical negligence actions expensive to litigate. It also changes the role of the jury. Instead of jurors asking themselves what is reasonable, jurors are generally left to choose between the competing views of the plaintiff's expert and the defendant's expert. Thus, a medical negligence case can often come down to whether the plaintiff's expert or the defendant's seems more knowledgeable and credible.

Expert testimony is not always necessary. Some cases can be prosecuted based on common knowledge. If a surgeon mistakenly cuts off the wrong limb or removes the wrong kidney, no expert testimony is necessary to show that the standard of care has been breached. Another example is leaving foreign objects inside a patient, such as surgical sponges. In fact, a sponge left inside the body cavity is a leading example of the doctrine of *res ipsa loquitor* in action. One way to think about cases such as these is that they really are not medical malpractice cases at all, since medical knowledge and skill are not at issue. Most medical malpractice cases, however, involve a question of professional judgment. In such cases, the question of whether the physician used appropriate professional judgment is that case will require the testimony of a medical expert.

How the Professional Community is Defined

Since the standard of care is defined by the professional community, a key question concerns how to define the "community." The analysis of what constitutes the relevant community involves issues of both specialty and geography.

Exactly what skills and knowledge a physician is expected to have depends on whether or not the physician has a specialty, and, if so, what that specialty is. Physicians who are general practitioners are held to a different and lower standard than specialists. If a general practitioner prescribes an aerosol inhaler for asthma, the standard is different and lower than a pulmonologist who writes the prescription. For the general practitioner, the standard of care is set by the knowledge and skill level of a minimally competent general practitioner. For the pulmonologist, it is what is the knowledge and skill level of a pulmonologist. By the way, holding one's self out to the public as a specialist is generally what counts for being held to the higher standard of knowledge and skill of a specialist.

Geography may be relevant as well. Historically, professional communities were conceived of as being local. If the question of negligence concerns a physician practicing in Ridgefield, population 20,000, then the standard of care is set by the customs, skills, and level of knowledge of Ridgefield physicians. So the question of whether a physician in a particular town was negligent required getting experts from that city to testify as to the standard practice in that town. Such a requirement, as you might imagine, works greatly to the benefit of defendant physicians in small cities and towns. First, it allows small-town medical care to be held to a lower standard than in the big cities. And the lower the standard, the easier it is for physicians to

escape liability. But there is another, sharper advantage for physicians in smaller locales when the standard of care is defined locally. Professionals in small locals are often unwilling to testify against one another. Without an expert to testify as to the standard of care in the community, the lawsuit may be stopped in its tracks. Because of the recurrent problem of a lack of willing experts, the trend is away from defining professional communities in this way. The more favored alternatives are to use a national standard, or to use a nonparticularized local standard – that is, define the standard with reference to a *similar* city or town. The similar-communities standard means that experts for small towns and cities can be found across the country if necessary.

A typical way for courts to define professional communities is to use a similar-geographical-place standard for general practitioners and to use a national standard for members of a medical specialty. Thus, a cardiothoracic surgeon practicing in a city of a few thousand people will be held to the same standard as cardiothoracic surgeons in a megalopolis of millions.

Professional Negligence Outside the Healthcare Setting

The professional standard of negligence that applies to medical doctors and dentists applies to non-healthcare professionals as well, such as accountants, architects, engineers, veterinarians, and attorneys. That is to say that these professionals, when sued for negligence in the course of their professional practice, are held to a standard of care that is dictated by the custom or standard of practice that prevails in the relevant community of professionals – what the reasonable person would do is irrelevant. (Attorney malpractice is, of course, an important area of the law for budding lawyers to be familiar with. But we will leave an in-depth treatment of the topic for your professional responsibility course.)

Whether or not something counts as a "profession" can be a tricky question. In general, a profession for the purpose of assigning a standard of care in negligence is one that consists primarily of intellectual labor and that requires higher education.

Plumbers, electricians, and carpenters, for instance, are not considered professionals in the negligence context – even though their work requires a great deal of knowledge. Meanwhile, surgeons are considered professionals, even though their work might be considered primarily manual as opposed to intellectual.

Medical Battery

Medical battery is an intentional tort cause of action that can be alleged against a physician or other healthcare provider who performs a course of treatment without the patient's consent.

What we are calling "medical battery" is not really a separate tort; instead it is really just a particular factual context for the tort of battery. The intentional torts, including battery, are covered later in this casebook. So, assuming you are proceeding through this casebook in order, and you have not studied battery yet, you will need the basics of the doctrine to be able to understand actions for medical battery.

The intentional tort of battery requires that the defendant inflict a harmful or offensive touching on the plaintiff's body. Consent is an affirmative defense. To break it down into elements, battery – including medical battery – requires: (1) an act; (2) intent; (3) actual and proximate causation; (4) a physical touching of the plaintiff's body; and (5) harmfulness or offensiveness. The fifth element and the affirmative defense of consent are key to preventing the tort of battery from getting out of control. People touch each other's bodies all the time, rarely accruing claims for battery. The reason why most touches do not create liability is that nearly all touches are either not harmful or offensive, or else they are consented to.

Now that you understand the basics of battery, you can see some key differences between the negligence cause of action and the battery cause of action. Unlike a prima facie case for negligence, a claim for battery does not require an injury. That makes a battery claim, at least in that sense, easier to allege. But there is a tradeoff. Unlike negligence, which works for accidents, a claim for battery requires intent. That makes a battery claim harder to allege.

In a later chapter on that covers battery in general, we will explore more of what it means for a touching to be "harmful or offensive." In the medical context, however, this is not a difficult requirement for plaintiffs to meet. Cutting into someone or introducing a medical instrument into a bodily orifice certainly counts as harmful or offensive.

The key issue for medical battery is generally whether there was consent. Physicians touch patients all the time, and almost always, that touching is in accordance with the patient's consent. To be valid, consent does not have to be in writing. It does not even need to expressed orally. Consent can be implied. When a patient opens up his mouth to say "ahh," permission to insert a tongue depressor into the patients' mouth is implied.

There is one important and constantly recurring circumstance in which physicians touch patients without any consent whatsoever: the emergency room. When an unconscious patient is brought into an emergency room, the consent to touching the patient is said to be "implied by law." This means that even though there is no actual consent, the law will pretend that

there is consent for public-policy reasons. After all, if every unconscious patient given emergency treatment was able to win a lawsuit for battery, there would be a steep decline in emergency services.

Now that you have a firmer grasp of when medical battery claims will not arise, you can more readily discern the relatively rare circumstances in which they will arise. In particular, a common scenario that creates liability for medical battery is when a physician goes further with a touching than the patient consented to.

Case: *Mohr v. Williams*

The following case is the classic example of how a medical battery results when a physician goes beyond the patient's scope of consent.

Mohr v. Williams

Informed Consent

An informed-consent action alleges that a patient was harmed by a physician's failure to disclose risks associated with medical treatment.

Informed-consent actions are something of a battery-negligence hybrid. That is, they have some things in common with the intentional tort of battery, and some things in common with the tort of negligence. As a matter of pleading, informed-consent actions might be brought as either an intentional tort or as negligence. Indeed, whether an informed-consent action is pled as an intentional tort or negligence may have important ramifications for what deadline applies for purposes of the statute of limitations (which typically is longer for negligence). Whether an informed-consent action is brought as an intentional tort or a negligence claim may also be important for determining whether a judgment would be covered by insurance (generally insurance covers negligence but not battery). But as a conceptual matter, it is probably best to think of informed-consent actions as a breed of their own.

In general, an informed-consent action requires the following to be proved:

1. A risk should have been disclosed.
2. The risk was not disclosed.
3. The patient would have made a different decision about treatment if the risk had been disclosed.
4. The patient was injured as a result.

Let's look at an example of an easy prima facie case.

> *Example: Spinal Injection* – Suppose a man went to his physician with a complaint of moderate back pain. The physician suggested injecting a new drug directly into the spinal canal. The trials of this drug, used in this way, indicated a one-in-10 chance that permanent partial paralysis would result. The physician did not, however, disclose this risk. If the physician had disclosed the risk, the patient never would have agreed to the procedure – especially since the back pain was not severe. But, being ignorant of the risk, the patient was consented to the procedure. Unfortunately, the patient suffered paralysis as a result. Is there a good claim for informed consent? Yes. The patient will prevail in an informed-consent action. Why? There was a risk that should have been disclosed, the risk was not disclosed, the patient would have made a different decision if the risk had been disclosed, and the patient was injured. All the elements are met.

Let's discuss the requirements of an informed-consent action in a bit more detail:

1. The risk should have been disclosed. – The risk must be of the type that should have been disclosed in order for the patient to make an informed decision about the course of treatment. There are two schools of thought on how to decide if the risk was of the type that should have been disclosed. One is to judge it by the standard of the reasonable physician. If the reasonable physician would have disclosed the risk, then this element of the informed-consent action has been fulfilled. This approach is sometimes called the **physician rule**. The other school of thought that the risk should be disclosed if it would be "material" to the reasonable patient. The word "material" here is related to the word "matter." A material risk is one that would *matter* to the patient's decision. This approach is sometimes called the **patient rule**.

2. The risk was not disclosed. The physician must omit to disclose the risk at issue. This requirement is generally a question of factual evidence to be submitted to the jury. In order to have evidence of the disclosure of risks readily available, it is

common for physicians to ask patients who are about to undergo surgery or other invasive procedures to sign documents acknowledging that the risks have been explained to them.

3. The patient would have made a different decision about treatment if the risk had been disclosed. If, despite the risk, the patient would have gone ahead with the course of treatment anyway, then there is no claim. This requirement is essentially an actual causation requirement. If the patient would have had the treatment anyway, then it is not possible to say that *but for* the failure of the physician to disclose the risk, the patient would not have suffered the injury. There are two different approaches to this causation requirement. Some courts use a "subjective" standard, asking whether the particular plaintiff who is bringing the suit would have made a different decision. Other courts use an "objective" standard, asking whether the hypothetical reasonable patient would have made a different decision in awareness of the risk. The objective standard represents a slight departure from straightforward but-for causation.

4. The patient was thereby injured. In general, the patient must have suffered a bad outcome that counts as an injury. It is clear that an injury is required when the informed-consent action is brought as a form of negligence. In the absence of an injury, it may be possible to allege a claim of informed-consent as a battery action.

16. Introduction to Intentional Torts

The Context of the Intentional Torts Within Tort Law

Up to this point in the book, we have been looking at law that primarily concerns itself with accidents – negligence and strict liability. In the face of such causes of action, it is no defense for the defendant to say, "But I didn't mean to do it." The law can hold a person responsible for loss even without intent.

But when intent can be shown – when the defendant did "mean to do it" – the law opens up a slew of additional ways for a plaintiff to sue, lowering the barriers to recovery.

One thing that negligence and strict liability actions have in common is that they require as part of the prima facie case that the plaintiff show an injury – physical damage to the plaintiff's person or property. The intentional torts provide a powerful point of contrast in this regard: None of the intentional torts require proof of physical injury or damage. So, for example, intentionally spitting on someone qualifies as the tort of battery – it doesn't matter if there is no injury.

There is a sense in which we can think of the defendant's intent as an alternative to the existence of damages. For the most part, tort law seems to take the stance that unless you've been hurt, or unless the defendant acted with bad intent, you should not bring your grievance to court.

There are seven traditional intentional torts. They are: battery, assault, false imprisonment, intentional infliction of emotional distress, trespass to land, trespass to chattels, and conversion. The first four are personal torts – that is, they directly involve the plaintiff's person. The last three are torts against property.

For accidents, there is really just one big cause of action – negligence. The other causes of action – strict liability, products liability, and informed consent – can be categorized a modifications of negligence – all of them created in the 20th Century, built off of the same chassis. Even not counting negligence's offshoots, the cause of action for negligence takes care of the vast majority of claims arising from accidents.

By contrast, there is no general tort of "intentigence." Instead, we have the seven intentional torts – many of them ancient, and each of them well-formed before the 20th Century arrived.

Painting with a broad brush, several comparisons can be made: While negligence is broad and flexible, the intentional torts are narrow and rigid. Correspondingly, while the doctrine of negligence is complex, and its contours are fuzzy, intentional torts doctrine is comparatively simple, with harder edges.

Take, for instance, the elements of the cause of action for battery. They are: (1) an action, that is (2) intentional, and which results in a (3) harmful or offensive (4) touching of the plaintiff. Those elements are mostly self-explanatory. There are a few clarifications that will have to be made. Does hitting someone with a thrown object count as a "touching"? (It does.) But such questions are relatively straightforward, and they have relatively straightforward

answers. By contrast, the first element of the negligence cause of action is that "the defendant owed the plaintiff a duty of due care." That is not self-explanatory at all. Understanding what it means requires a lot of work.

Within the realm of intentional torts, there are, of course, hard cases on the margins. And novel facts can pose challenges. But, by and large, the intentional torts are generally about applying well-formed rules, not balancing factors or making policy choices.

A Quick Overview of the Intentional Torts

Let's take a fast look at the basics of the seven intentional torts.

First up are the four personal intentional torts – battery, assault, false imprisonment, and intentional infliction of emotional distress.

The most basic of these is **battery**. Battery is the intentional touching of the plaintiff in a harmful or offensive way. The concept of "touching" is quite broad. It would include, for instance, poisoning the plaintiff's meal. In keeping with the theme of the intentional torts, no actual harm need be done. For instance, a sturdy plaintiff might not be harmed at all by a punch thrown by a very weak defendant. Regardless, a punch is "harmful or offensive" even if no harm results.

Next is **assault**. Assault is the intentional creation of an immediate apprehension of a harmful or offensive touching. That is, an assault is the apprehension of an oncoming battery. Throwing a punch and missing would qualify.

The third intentional tort is **false imprisonment**, which is the intentional confinement of the plaintiff to a bounded area by force, threat of force, or improper assertion of legal authority. Locking the plaintiff in the cellar would count. So would brandishing a firearm and saying, "Move and I shoot." False imprisonment is a civil cause of action that is analogous to – though not completely overlapping with – the crime of kidnapping.

The last personal intentional tort is **intentional infliction of emotional distress**, often abbreviated "IIED," and sometimes known by its shorter and pithier name, *outrage*. This tort results when the defendant intentionally engages in outrageous conduct that causes the plaintiff severe mental distress. The key is that the action has to be *truly outrageous*. Telling someone that their close family member is dead – when that's not true – would likely qualify. Teasing or hurling insults at someone, however, is usually is not enough. Also, the mental distress the plaintiff suffers must be *severe*. Physical symptoms – such as teeth grinding, heart attack – are not necessary, but where they occur, they are helpful in showing the required severity.

The remaining three intentional torts are trespass to land, trespass to chattels, and conversion – all involving invasions of rights over tangible property.

The tort of **trespass to land** is the intentional tort that applies to invasions of interests in real property, which includes land and things attached to the land, such as buildings, improvements, trees, and fixtures. An action for trespass to land requires an intentional act to invade someone's real property. Traipsing across someone else's land – or even putting a foot on it – satisfies the elements. The invasion can be momentary and does not need to do any damage to be actionable.

The remaining two intentional torts are for invasions of interests in chattels. Chattels are the moveable kind of property, and they include any item of tangible property that is not real property. Cars, computers, clothing, and animals are all examples of chattels.

The tort of **trespass to chattels** requires an intentional action that substantially interferes with a plaintiff's chattel. What counts as "interfering" is a little tricky. The law here is stricter than it is with trespass to land. With trespass to land, merely putting a foot on the plaintiff's land creates liability. The analogous is not true for trespass to chattels. Merely running up and touching the plaintiff's chattels does not count. Making a substantial use of the plaintiff's chattels counts as interference, however, as does depriving the plaintiff of the opportunity to use them. Damage, where it occurs, always counts as interference.

The last intentional tort is **conversion**. An alternative to trespass to chattels, the tort of conversion is an intentional interference with the plaintiff's chattel that is so severe that it warrants a forced sale of the chattel to the defendant. Conversion is essentially trespass to chattels, but with a heightened threshold that triggers a more powerful remedy. An example: If a defendant steals the plaintiff's car, puts a cinder block on the gas pedal, and causes it to drive itself off a cliff, the plaintiff can sue for conversion. A successful suit for conversion means that plaintiff gets the market value of the car before it was taken, and the defendant gets to keep the smoldering wreck at the bottom of the canyon.

The Place of Damages in the Intentional Torts

As already emphasized, it is a general feature of the intentional torts that each is possible to plead and prove without a showing of damages. Nonetheless, the concept of damages does have an important place in intentional torts.

At the outset, we need to note that there is often little point in bringing a lawsuit unless it is for damages. Suffice it to say that if a lawsuit were brought every time there was technical liability under intentional tort doctrine, the civil justice system would collapse. Therefore, in the real world, intentional tort cases will often include claims for compensatory damages.

Also, for many intentional torts, proving damages may be the quickest path to proving a prima facie case. For a battery claim, proving a physical injury makes it unnecessary to debate the issue as to whether the touching counts as "harmful or offensive." In an action for trespass to chattels, proving that the plaintiff's actions damaged to the chattel means the "substantial interference" requirement is fulfilled – no need to argue about it.

But what about situations in which the plaintiff never does prove entitlement to compensatory damages? What does the plaintiff get for prevailing in such a lawsuit? In such situations, courts will award **nominal damages**. "Nominal" here means "in name only."

Nominal damages are usually one dollar, or a similar amount. Why would anyone bother to file a lawsuit to get nominal damages of $1? Well, they almost never do. But there are a few reasons that a plaintiff might be motivated to pursue an intentional tort claim without damages. For one, an award of nominal damages might be useful as a means of establishing a legal right. A judgment in a trespass to land case, even without damages, can be used as the basis for an injunction against the neighbor. At that point, further trespassing could be deterred by the threat of contempt sanctions. The same award of nominal damages might also be used as a way to get a judgment that the plaintiff holds legal title to the land in question.

The most lucrative function of nominal damages, however, is as a hook upon which to hang an award of punitive damages. Take again the case of a defendant spitting on the plaintiff – but let's embellish it. Suppose the defendant is a spoiled A-list movie star who spits on a waiter at a restaurant. The waiter could sue for battery and get nominal damages of $1, and then convince a jury to award punitive damages in an amount sufficient to deter the defendant from such conduct in the future. Such an amount, for a rich celebrity, might be quite a lot of money.

Putting all practicality aside, a victory in court and $1 in nominal damages might, if nothing else, give a wronged plaintiff a feeling of satisfaction. And suing out of a sense of indignity happens more often than you might imagine.

The Place of Actual and Proximate Causation in Intentional Torts

Assuming you studied negligence previously, you may wonder, when you look at the seven intentional torts, where are the requirements of actual causation and proximate causation? The traditional listings of the elements of the intentional torts do not include actual or proximate cause. They are there, but in the intentional tort context, their place is somewhat buried.

Take the intentional tort of battery – *an action, that is intentional, and which results in a harmful or offensive touching of the plaintiff.* The concept of causation is in the linkage between the action and the touching, where it is represented by the word "which results in." But the legal analysis of this linkage is not done by focusing on but-for causation. Instead, the focus of the analysis is on matching up the defendant's intent with the touching – something that will become more clear when we get into the doctrine in more detail, below.

Putting aside the causation-like concepts buried within the elements of the intentional torts, there is always a strong role for actual causation and proximate causation to play in intentional torts cases *if the plaintiff alleges damages*. If a defendant takes an aluminum baseball bat to the plaintiff's car, the plaintiff will not be able to get damages based on every dent and scratch that is to be found anywhere on the car. The plaintiff is only entitled to compensatory damages for the damage actually and proximately caused by the defendant's tortious conduct.

Intent and its Various Iterations

Now that we have a sketch of the intentional torts and understand their relation to negligence and other torts, it is helpful to look a little more closely at the concept of intent itself.

In general, "intent" means that the plaintiff either acts with the purpose or goal of bringing about a certain consequence, or at least does so with **substantial certainty** that the consequence will occur. The substantial certainty idea expands the concept of intent beyond a focus on the defendant's goals. Take a hypothetical defendant who says, "I didn't really want to shoot the plaintiff. What I *wanted* to do was shoot the jukebox that the plaintiff was standing in front of. So, yeah, I pretty much knew the plaintiff was going to get shot. But that wasn't my goal." In such a situation the defendant's testimony establishes the requisite intent, since the defendant acted with substantial certainty.

Beyond the fundamentals, the concept of intent begins to diverge among the various intentional torts. We said that intent means that the plaintiff acted purposely or with substantial certainty of producing *a certain consequence*. What "consequence" must be intended depends on the tort. With battery, for instance, the defendant generally must intend to commit a battery. But for trespass to land, the defendant does not need to intend a trespass at all – the defendant only needs to intend the action that causes the trespass. So intent to walk a certain path – even if undertaken in the earnest attempt to stay off the defendant's property – will satisfy the intent requirement of trespass to land so long as that path in fact goes over the plaintiff's property. That is, the intent to put one foot in front of another is intent enough, even if it was a genuine mistake to cross the property line.

Moreover, there is one intentional tort – intentional infliction with emotional distress – that, despite the word "intentional" in the name, generally requires only proof that the defendant acted with *recklessness*. (This may be one reason many people prefer the name "outrage" for the tort.)

A doctrine that introduces considerable flexibility into the intent requirement of the intentional torts is the concept of **transferred intent**. Where it applies, the doctrine of transferred intent allows the sort of intent required by the tort for a particular plaintiff to be satisfied by the intent that is required of a different intentional tort or that was directed to a different person. For instance, if a defendant intends to hit Ashanti with a baseball, but misses and hits Bart, the tortious intent to inflict a battery on Ashanti is said to be "transferred" to Bart, so that Bart can make out a winning case for battery. Under the traditional view, intent can transfer among any of the torts of battery, assault, false imprisonment, trespass to land, and trespass to chattels. Thus, acting with the purpose of trespassing on land could count as the requisite intent for a battery. Many courts today, however, apply transferred intent much more narrowly.

The bottom line is that you cannot guess at what intent means based on your common understanding of the word "intent." You will need to carefully apply the rules of the doctrine.

The last thing to point out is that intent is an issue for the jury. You may have wondered at some point, how can you truly know what another person *intended*? In a metaphysical sense, perhaps there is no way to know for sure. But a jury doesn't engage in metaphysics. A jury is entitled to decide, based on the preponderance of the evidence, whether the defendant acted with the requisite intent. The defendant might testify under oath that she or he did not intend the tortious action. But the jury can choose to disbelieve the defendant and decide, looking reasonably at the circumstances, that the defendant did act with intent. That might not count as "proof" for a philosopher, but it counts as proof in a courtroom.

17. Battery and Assault

Introduction

In this chapter we will explore the torts of assault and battery, two claims that are often found together. Each one is almost as ancient as tort law itself.

Battery

Battery may be the most basic tort of all. Battery is intentionally touching someone in a harmful or offensive way. Along with the torts of trespass to land and trespass to chattels, battery traces its history in English law as far back as tort law goes, to an action called the writ of trespass *vi et armis* – a transgression against the plaintiff's person or property by force and violence.

Today, battery does not require violence. But in keeping with its sibling torts of trespass to land and trespass to chattels, the tort of battery could just as well be called trespass to the body. For that is its essence – a physical intrusion by one person on another's flesh. Such a trespass could be spitting, grabbing, kicking, caressing, or stabing. The essence of the tort is that it's the plaintiff's body, and an incursion on it is actionable.

The Elements of Battery

Here is a blackletter statement of the elements of the tort of battery:

> A plaintiff can establish **a prima facie case for battery** by showing: (1) the defendant undertook an act, (2) with intent, effecting a (3) harmful or offensive (4) touching of the plaintiff.

Let's take the elements in turn.

Battery: The Act

First, there must be an **act** of the defendant. This is a simple requirement that is almost always very easy to meet. All it requires is that the defendant engage in some volitional action. This requirement will not exclude many cases, but it will cause a battery claim to fail where the touching of the plaintiff is caused by some motor reflex or unconscious movement on the part of the defendant. So a sleepwalker could escape liability this way, as could a jumpy person's limbs that flail in reaction to a noise. The act requirement also excludes cases where the plaintiff's complaint is that the defendant failed to act to prevent a touching, as opposed to complaining about a defendant's positive act. Standing by and watching someone get hit by an object, even when a slight exertion would have prevented it, does not meet the act requirement. However, persuading someone to stand in a certain spot where they will suffer a harmful or offensive touching would count.

Battery: Intent

Next, is **intent**. The intent requirement for battery obeys the general idea of intentional torts, discussed in Chapter 16, that acting either with purpose or with substantial certainty will suffice to qualify as intent. Also as is generally the case, intent is a jury issue and its determination depends on what the jury believes.

So, what is it that the defendant must intend? The required object of intent is a battery. That is, the defendant must intended to inflict a harmful or offensive touching. So this means that merely intending to move one's limbs is not enough to meet the intent requirement. Intending to pitch a baseball dangerously near an unaware bystander does not count as intent for battery. It might be correctly characterized as negligence, and if the bystander is harmed, the thrower might be liable via a negligence claim. But the intent for battery is not satisfied.

Remember, too, that the doctrine of **transferred intent** expands the scope of intent so that a defendant who intends to commit a battery on Arthur, but who misses and commits a battery instead on Beatrice, has acted with requisite intent for a claim by Beatrice. In addition to transferring intent among persons, the doctrine permits transfers of intent between assault and battery, and the most traditional view allows transfer among any of the torts

of battery, assault, false imprisonment, trespass to land, and trespass to chattels. So, if a defendant intends not to punch the plaintiff, but only to create the immediate apprehension of a punch, and if the defendant misjudges the angles and actually punches the plaintiff, there is sufficient intent to suffice for a battery claim. Intent can transfer both person to person and tort to tort at the same time. Throwing a hatchet with the aim of making a near-miss of Anne will suffice for intent to commit a battery against Burl if the hatchet ends up grazing Burl.

Battery: Harmfulness or Offensiveness

People get touched by others all the time. One person may tap another on the shoulder to ask for the time. Persons in a crowd will bump into one another. An acquaintance may give a hug. What keeps these touches from being actionable as batteries is the requirement of harmfulness or offensiveness. Along with the affirmative defense of consent, the requirement that a touching be harmful or offensive is what keeps millions of battery claims from arising every hour.

A touching that causes actual harm is harmful – and there is no need to take the analysis any further. But a touching need not inflict harm to be actionable. People have the right to not be "messed with." Any touching of a person in a way that is not socially sanctioned under the circumstances and that a person would reasonably find objectionable is a battery. This expansive scope of battery is what is meant by the use of the word "offensive" in common statements of the blackletter doctrine. There is no requirement that the plaintiff be "offended" in the sense of being affronted. A touching is "offensive" in this sense if intrudes upon a person's reasonable sense of dignity.

Societal convention plays a large role here. Tapping a stranger on the shoulder to ask the time is not battery because it's generally understood that this is how members of society interact with one another even when they are strangers. But tapping someone repeatedly on the shoulder to ask the time over and over again would be battery because, to put it in vernacular, "That's weird."

What counts as harmful or offensive may even differ geographically. In Boston, strangers brush into each other on sidewalks all the time. In Los Angeles – provided they are out of their cars and walking around at all – pedestrians don't touch. In Manhattan, people unhesitatingly pack into elevators in such a way that people are touching substantially. But in the rural Midwest, people will wait for the next elevator rather than get cozy. Even in Manhattan, if you sidle up and stand so that you are touching the next person on an elevator with no other people on it, you have transcended social convention and likely committed a battery.

Regardless of whether some touchings – like the tap on the shoulder – are socially acceptable as a general matter, once a person has let another know, whether by words or conduct, that such touches are unwelcome, then persisting with the touch despite the evident unwelcomeness constitutes a battery.

Battery: The Touching

The prototypical case of battery would involve a defendant who punches the plaintiff in the face. That certainly is a touching. But you should think about "touching" broadly. The touching can be indirect. Sneakily removing someone's chair as they go to sit down, causing them to fall to the floor, can effect an actionable "touching." So can causing someone to imbibe a foul or toxic substance that adulterates a drink.

Case: *Leichtman v. WLW Jacor*

This case confronts the question of what constitutes a touching in the contentious context of talk radio.

Leichtman v. WLW Jacor

Battery: Damages

Battery does not require damages for a prima facie case. A successful claim for battery without any proof of harm physical harm will entitle the plaintiff to nominal damages. Bodily injury sustained as a result of the battery will support a claim for compensatory damages. And in addition, it is generally the case that plaintiffs can recover compensatory damages that do not have a physical basis.

Case: *Fisher v. Carrousel Motor Hotel*

This case explores the availability of damages for a battery that has no physical injury component.

Fisher v. Carrousel Motor Hotel, Inc.

Assault

A claim of assault will lie where the defendant intentionally creates for the plaintiff an immediate apprehension of a battery. It's a strange tort. The need for its existence is not immediately obvious. The average person goes through life accumulating many opportunities to sue over battery – most of those cases involve an assault that was committed en route to the battery. It would seem to be fairly rare in the real world that facts give rise to a claim for assault but not for battery.

So why provide a cause of action for assault at all? The reason is probably that the cause of action for assault protects a very core notion of civil society – that we should all be free from the perception of an imminent attack.

Case: *I de S et Ux v. W de S*

This case is credited with being the first to recognize the action of assault.

I de S et Ux v. W de S

The Elements of Assault

Here is a blackletter statement of assault doctrine as it exists today:

> A plaintiff can establish **a prima facie case for assault** by showing: (1) the defendant undertook an act, (2) with intent, effecting (3) the immediate apprehension of (4) a harmful or offensive (5) touching of the plaintiff.

Let's take the elements in turn.

Assault: Intent

To meet the requisite intent for assault, the defendant must intend to create the apprehension in the plaintiff that is the essence of the tort.

Transferred intent provides an alternative way to meet the intent requirement. Intent can transfer from person-to-person and from tort-to-tort.

Person-to-person transference of intent takes place when the defendant intends to create an immediate apprehension in Xavier, but in fact causes an immediate apprehension in Yelena. In such a case, Yelena has met the intent requirement of the prima facie case.

Tort-to-tort transference of intent takes place between battery and assault. Suppose the defendant intends to strike the plaintiff in the back – thus intending to commit a battery but not an assault. This intent suffices for the intent element of an assault claim. If the plaintiff turns around just before the defendant strikes, and is then able to move out of the way, the plaintiff has a good cause of action for assault against the defendant.

As explained previously, transferred intent can also work two ways at once. If the defendant intends to commit a battery by throwing a beer bottle at Jill, but throws wide left so that Kai has to duck out of the way, the defendant has exhibited the requisite intent for Kai's claim against the defendant for assault.

Note that under the older, traditional view of transferred intent, transference is allowed among any of the torts of assault, battery, false imprisonment, trespass to land, and trespass to chattels.

Assault: Immediate Apprehension

Assault requires that the plaintiff experience an immediate apprehension of a battery. Apprehension is distinguished from fear, which is not required for the tort. A child, rendered weak and surly from having missed an afternoon nap, might swat at a mixed-martial arts champion and miss. No fear results. But if the MMA fighter wanted –

against the better advice of publicists – to pursue an assault claim against the child, the claim would be on firm legal footing.

The apprehension must be of an imminent battery. Threats of harm that might occur in the future – even in the near future – will not support an apprehension claim. Having the plaintiff anticipate a battery the next day or even in the next minute or two is not enough. The apprehension must be in the moment.

It does not matter, by the way, if the threatened battery could not come to fruition. Pointing an unloaded gun at a person – so long as the person believes the gun to be loaded – counts as an assault.

Traditionally, there must be some physical act or movement to effect an assault. It might be raising a stick for a swing, or even reaching into a pocket. Sometimes courts say that "words alone cannot constitute an assault." Most courts, however, when pressed, would agree that surrounding circumstances could make for a situation in which an assault would lie for words alone. A plaintiff already held at gunpoint by a third party, for instance, would likely have a good claim for assault against the interloping defendant who yells, "Fire!"

Authorities acknowledge that words can have the effect of alleviating the potential for an apprehension. Suppose the defendant says, "I don't have any bullets, which is a shame," Then the defendant pulls out a pistol and says, "Because if I did, I would shoot you down right now." There is no assault in such a situation.

Assault: Harmful or Offensive Touching

The requirement for a harmful or offensive touching is the same as it is for battery. The apprehended touch could be violent, disgusting, amorous, or all of those things. It might be slight or severe. What matters legally is only that it is harmful or offensive.

18. False Imprisonment

Introduction

The tort of false imprisonment gives plaintiffs a claim to assert when they are held against their will. It is tempting to think of false imprisonment as an ancient relic, a tort with only very rare applicability. The examples that come to the mind's eye are pirates and highwaymen, working in remote places far from the arm of the law. Yet the tort if false imprisonment has a surprising number of applications in venues of everyday modern life – including department stores and parking garages.

At the outset it is helpful to note that you should not try to make sense of the tort by its name. "False imprisonment" is a double misnomer. First, there is no requirement that the plaintiff be put in prison. Instead, all that is necessary is confinement, which might be accomplished without any walls or physical restraints. Compelling a plaintiff at knifepoint to not move is sufficient confinement for false imprisonment. Second, in so far as people understand the word "false" to mean "not true," then that is a misnomer as well, because a prima facie case requires true confinement. In the false imprisonment context, think of "false" as meaning wrongful or illegitimate.

The Elements of False Imprisonment

Here is the blackletter statement of false imprisonment:

> A plaintiff can establish **a prima facie case of false imprisonment** by showing the defendant (1) intentionally (2) confined the plaintiff, and that the plaintiff (3) was aware of the confinement.

Let's take the elements in turn.

False Imprisonment: Intent

The intent required for false imprisonment is the intent to confine. The defendant need not have bad intentions, nor must the defendant intend that the confinement be illegal, tortious, or even improper. Working with the best of

intentions and a conviction of being on the right side of the law is perfectly compatible with the requisite intent to confine.

As with the other intentional torts, false imprisonment observes party-to-party transferred intent. If Amy intends to confine Bella, but winds up confining Constance, then Amy has the requisite intent for Constance's prima facie case against Amy for false imprisonment.

Remember, too, that some courts allow tort-to-tort transferred intent among any of assault, battery, false imprisonment, trespass to land, and trespass to chattels.

False Imprisonment: Meaning of Confinement

To be confined for the purpose of false imprisonment, the plaintiff must be restricted to some **closed, bounded area for some appreciable amount of time**.

Confining a person to a room certainly counts, but so does confining a person to a particular city or state. The area need not be strictly delineated. A subway mugger who orders a plaintiff not to run away on threat of being shot effects an actionable confinement regardless of whether the mugging takes place in an enclosed subway car, on a platform, or in the ticketing area. The plaintiff in such circumstances is confined to the space in which she or he is standing, and thus the confinement is actionable.

Even though the area of confinement can be large or small, it must be complete. Freedom of movement must be bounded in all directions. A mere roadblock will not count. Suppose a plaintiff, out for a walk in the city, meets a gang of thugs who use threats to keep the plaintiff from walking on the public sidewalk on Elm Street between 10th Street and 11th Street. If the plaintiff can freely walk on Maple Street or Oak Street to traverse the town, then there is no false imprisonment.

A plaintiff cannot use the action to claim to be wrongly kept out of some particular place. That is to say, the confinement of false imprisonment does not work in reverse. If a plaintiff is not allowed into a certain restaurant or club, there is no false imprisonment. The area of confinement cannot be "the rest of the world."

In cases where the confinement is achieved by means of physical barriers, courts often say that there must be "no reasonable means of escape." Suppose the defendant locks the door to the room the plaintiff is in. Is there some other reasonable way out? If the sliding-glass door to the patio is open, and if the patio opens onto a golf course, that's a reasonable means of escape, and no false imprisonment claim will lie. But if the only means of escape is to jump from a second-story balcony or to crawl through HVAC ducting, then the means of escape is not reasonable, and the plaintiff has a good claim for false imprisonment.

There is no minimum amount of time for a valid confinement. Typically, courts will say that the confinement need only be for an "appreciable time." A confinement of one minute, for example, would be much more than enough.

The duration of the confinement may become a live issue in the context of an affirmative defense of consent. For instance, amusement park patrons have consented to a confinement when the board a dark ride and pull down the lap bar. But a confinement for how long? If the ride stops, must the park release the lap bars immediately and let everyone go? Or can they take some time to re-start the ride before they must release patrons? That question, which may be a close one, is a question about the scope of the consent, and it may take a jury to answer.

False Imprisonment: Method of Confinement

In a false imprisonment case, the confinement can be accomplished by a number of means. The most straightforward is by **physical barriers**, such as with walls or fences. But false imprisonment can also be accomplished by **force or imminent threat of force**. Threatening a plaintiff at gunpoint is an obvious example. However, the threat need not be against the plaintiff. It could be directed at a third person. Authorities sometimes say the third person must be a family member or someone who is immediately present, but one imagines if pressed, courts would permit a false imprisonment cause of action beyond this scope if the threat were serious and credible.

What is clear is that the threat must be *imminent*. Telling a person to stay put – or else suffer injury the next day – would not be considered confinement within the meaning of the tort. The fact that the false imprisonment tort does

not allow recovery in such a situation seems to imply that, in the view of the law, a would-be plaintiff should go and seek police involvement before the threat matures.

The barriers, force, or threat need not be directed at persons, but can also be aimed at the plaintiff's property. A plaintiff who is "free" to walk away by surrendering chattels is not free at all under the eyes of false-imprisonment law. For instance, a drunk and belligerent party host accomplishes a valid confinement by refusing to return the plaintiff's coat when the plaintiff is ready to leave the party.

Another recognized method of confinement is **improper assertion of legal authority**. Flashing a fake police badge and informing a plaintiff that she or he is under arrest is an obvious example. But improper assertion of legal authority could be made by a real peace officer with a real badge. Suits against individual police officers for false imprisonment are rare for a variety of reasons. Individuals are often judgment proof, plaintiffs are often not credible witnesses, and state statutes may shield law enforcement officers from suit. But as far as common-law tort doctrine goes, a cause of action will lie.

A common context for improper legal assertions concerns security officers in retail stores, who may falsely tell suspected shoplifters that they are under a legal obligation to stay on the premises and answer questions, or that they must wait for the police to arrive. Often, store security has no legal basis upon which to make such a claim (although in some jurisdictions recognizing a "shopkeeper's privilege," they might).

Omissions can effect a confinement count as well as overt acts. If the defendant is under an existing obligation to act, then the omission to release the plaintiff can be false imprisonment. For example, lawfully confined inmates must be released when their sentences are up, and a jailer who omits to unlock the door to the cell becomes liable for false imprisonment. An amusement park patron pulling down a locking lapbar on a roller coaster has consented to a confinement. But where the ride operator refuses to release the lapbar when the ride is over, there is liability for false imprisonment.

False Imprisonment: Awareness

In addition to intent and confinement, the balance of authority adds the requirement that the plaintiff must be aware of the confinement.

Because of the awareness requirement, an unconscious person locked in a room cannot, upon waking up to an open door, make out a case for false imprisonment. Many have noted that the awareness requirement in the false imprisonment tort is consonant with tort's emphasis on an individual's sense of autonomy.

Authorities commonly state without elaboration that if the prisoner is harmed by the confinement, then awareness is not required. It is hard, however, to imagine a situation in which a plaintiff is harmed by a confinement of which she or he is unaware and where the confinement itself is the essence of the harm, as opposed to a battery.

False Imprisonment: Scope of Privilege or Consent

One of the most contested issues in false imprisonment suits is likely to be privilege or consent. Jailers who confine their inmates have a legal privilege to do so. And riders on common carrier transport have consented to a confinement. But at what point does privilege or consent run out?

Case: *Sousanis v. Northwest Airlines*

This case presents false imprisonment in a thoroughly modern context: an airplane on the tarmac that's going nowhere.

Sousanis v. Northwest Airlines

19. Intentional Infliction of Emotional Distress

Introduction

The tort of intentional infliction of emotional distress is the most recent of the intentional torts. Arriving on the scene in the late 1800s, the tort won general acceptance the last half of the 1900s. It often goes by the abbreviation "IIED" and many other names as well, the pithiest of which is "outrage." Other, longer names are "intentional infliction of emotional harm," "intentional infliction of mental distress," and "intentional infliction of mental shock."

IIED is relatively scarce on court dockets. In the real world, people are largely civil to one another. When they are not, their insulting behavior rarely rises to the level required for liability under IIED. As we will see, IIED claims require unusual facts and extreme behavior. Where it does occur, IIED is often found in the employment context. Some people seem to perceive a license to inflict misery on their co-workers.

The Elements of IIED

Here is the blackletter formulation for intentional infliction of emotional distress:

> A plaintiff can establish **a prima facie case for intentional infliction of emotional distress** by showing: the defendant (1)§intentionally or recklessly, (2) by extreme and outrageous conduct (3) inflicted severe emotional distress on the plaintiff.

IIED: Intent

As has proved the case with so many other torts terms, intentional infliction of emotional distress is a misnomer. The intent element of the prima facie case is satisfied when the defendant either intended the plaintiff's severe emotional distress, or acted in deliberate disregard of a high probability of causing the plaintiff to suffer severe emotional distress (*i.e.,* recklessness). Thus, despite its traditional classification as an intentional personal tort, and despite the "intentional" in its name, IIED does not require that the defendant act intentionally. Recklessness suffices.

The doctrine of transferred intent generally does not apply to the outrage tort. So, if the defendant tries to inflict a battery on the plaintiff, but misses, causing instead an immediate apprehension of a battery, then transferred intent fulfills the intent requirement for an assault case. But if the defendant tries a battery and misses only to cause the plaintiff emotional distress, the intent element of IIED is left unmet.

It should be noted that some courts have held that a plaintiff can successfully sue a defendant for IIED where the defendant inflicts intentional bodily harm on the plaintiff's immediate family member in the plaintiff's presence. This sort of fact scenario is probably not best thought of as transferred intent however, but as an instance of recklessness fulfilling the intent requirement. That is, in such a situation, the defendant acted in deliberate disregard of the likelihood that the plaintiff would be made to suffer severe emotional distress.

IIED: Extremeness and Outrageousness

While the intent element may be comparatively easy to meet in an IIED claim, the requirement of extreme and outrageous conduct is a high bar. Being rude or insulting – even startlingly rude and grossly insulting – is not nearly enough to qualify as extreme and outrageous conduct.

A typical statement is that the conduct "must transcend all bounds of decency and be regarded as atrocious and utterly intolerable in a civilized community." *Graham v. Guilderland Central School District*, 256 A.D.2d 863, 863–64 (N.Y. App. Div. 1998).

One vivid example of outrageousness comes from *Nickerson v. Hodges,* 84 So. 37 (La. 1920), in which the plaintiff, based on family rumors and consultation with a fortune teller, earnestly believed that a pot of gold was buried on her property. Neighbors, who knew of the plaintiff's history of mental illness, filled a pot with rocks and dirt, put a lid on it, and buried it on the plaintiff's land where she could find it. Buried with the pot was a note instructing the

plaintiff to take the lid off the pot for the first time it in front of a large crowd. She did. The court reports that "the results were quite serious indeed, and the mental suffering and humiliation must have been quite unbearable, to say nothing of the disappointment and conviction, which she carried to her grave some two years later, that she had been robbed." Despite the death of the plaintiff before trial, her estate succeeded in its claim for intentional infliction of emotional distress against the neighbors.

Other examples of IIED include killing a pet animal in the pet owner's presence (*LaPorte v. Associated Independents, Inc.* 163 So.2d 267 (Fla. 1964)) and burning a cross in the yard of an African-American person (*Johnson v. Smith*, 878 F.Supp. 1150 (N.D. Ill. 1995)).

Notwithstanding these examples, IIED claims do not have to involve grim spectacle. In *Kroger Co. v. Willgruber,* 920 S.W.2d 61 (Ky. 1996), the court recognized an outrage claim where the complaint alleged that an employee, fired for a refusal to violate ethical rules, was then sent to chase an nonexistent job in another state.

While mere insults and incivility are generally not outrageous enough for IIED, there are two situations in which invective alone can be enough to sustain a claim.

First is where there is a pattern of insults or demeaning behavior over time. Given enough time, simple boorishness can eventually accumulate to tortious proportions. Patterns of repeated verbal abuse often happen in a context where the plaintiff is economically compelled to endure the mistreatment rather than leave – the employer/employee context being a common one.

Second, courts have traditionally allowed even single instances of gross insult to be actionable where the defendant is an innkeeper or common carrier. Allowance of such claims harkens to an ancient ethic that demands travellers – far from home and dependent on the assistance of strangers – are to be treated especially well.

There is often theme of inequality between the plaintiff and defendant in outrage cases. Professor Dan B. Dobbs identifies four markers that tend to support a finding of outrageousness: (1) abusing one's position over or power with respect to the plaintiff, (2) taking advantage of a plaintiff whom the defendant knows to be particularly vulnerable, (3) repeating offensive conduct in a situation where the plaintiff is not, as a practical matter, free to leave, and (4) perpetrating or threatening violence against a person or property in which the plaintiff is known to have a particular interest.

IIED: Severe Emotional Distress

Another high threshold for outrage claims is the requirement that the plaintiff must have suffered severe emotional distress. Suffice it to say that merely being upset or even reduced to tears is not enough. The key word is "severe." Formerly, plaintiffs were subjected to a general requirement that they prove some physical symptom of the distress – heart problems, stomach ulcers, teeth worn from grinding, or some other corporeal manifestation of torment. In fact, some jurisdictions still require a physical symptom, but the majority of courts leave it up to the jury to determine whether or not the distress is severe. Medical testimony is optional. Of course, where physical ailments can be proved, the plaintiff's case benefits.

The extremeness and outrageousness of the conduct tends to go hand-in-hand with the severity of the emotional distress. A strong showing of outrageousness aids the showing of severity.

Contrast IIED's requirement of severe emotional distress with assault's requirement of an apprehension of harmful or offensive contact. A particularly stalwart plaintiff, unphased by an apparently impending finger poke, is not barred from an assault claim on account of unflappability. But an emotionally tough plaintiff, one who lets the defendant's taunts and slings roll of her or his back, *is* barred from claiming IIED on account of not suffering severe distress.

Case: *Wilson v. Monarch Paper*

The following case looks at IIED in the employer/employee context, combined with an allegation of age discrimination.

Wilson v. Monarch Paper

20. Trespass to Land

Introduction

Trespass to land is one of the most ancient torts – and one of the most basic. It sits at the root of our capitalist economy. While we might be able to imagine a world without the torts of assault or intentional infliction of emotional distress, it is hard to imagine American society without a private right to take others to court for coming and going as they please on your land.

Just because trespass to land is old and just because respect for private property is thoroughly ingrained in our culture, do not make the mistake of thinking trespass to land has little relevance to modern practice. Unauthorized incursions on land happen all the time. And trespass to land is a powerful tort, working against seemingly blameless defendants in ways that would make negligence doctrine blanch.

Consent is, of course, a defense. Many if not most trespass to land cases involve a consent defense and a question of whether the consent was exceeded.

The Elements of Trespass to Land

The pleading requirements for the tort of trespass to land can be summed up as follows:

> A plaintiff can establish **a prima facie case for trespass to land** by showing: the defendant (1) intentionally (2) caused an intrusion, either by entry onto or failure to leave or remove from, (3) plaintiff's real property.

Trespass to Land: Plaintiff's Real Property

Instead of taking the elements in order, here we must start with the last – what constitutes plaintiff's real property. Understanding this is necessary to understanding anything else about the tort.

To begin with, it is important to understand that the plaintiff does not need to be the owner of the land in question. The plaintiff needs only be the possessor of the land. A couple renting a house can sue for trespass to land, even though they are only renting the land and do not own it. In fact, the landlord of leased property might not have standing to sue for trespass – at least where there is no damage to the landlord's interest.

Moreover, you need to think of the word "land" broadly. What we are talking about here is not soil, but *realty*, or real property. Real property is the land and everything affixed to it, including improvements, buildings, and all fixtures. Because real property can be divided vertically as well as horizontally, an individual apartment on an upper story can be "land" for the purposes of trespass to land. Imagine a multi-story warehouse converted into full-floor loft apartments: Jackie is the tenant-lessee of the third-floor loft, and Dominga is the tenant of the fourth-floor loft. If Jackie adventures into the fourth-floor loft without Dominga's permission, Jackie has committed a trespass, even though her GPS coordinates have never taken her outside the latitudes and longitudes of her own apartment.

You might think that real property that is not divided up vertically (by virtue of multi-story buildings) would be bounded only horizontally. That is not so. The property interest in a plot of land extends down into the subsurface of the Earth and upward into the sky. So, an undivided square lot would define real property having the shape of an inverted four-sided pyramid, with the point at the center of the Earth and the outward sloping sides extending into the heavens. That means that some good-hearted kids playing a game of catch with a baseball, who throw their ball over a corner of the lot of a cranky neighbor, are liable to the neighbor for trespass to land.

Trespass to Land: Intent

The intent required for trespass to land is the basic kind for the intentional torts – acting with purpose or with substantial certainty of bringing about some consequence. However that consequence – subject of the intent – is quite different from other intentional torts. The intent for trespass to land need only to be to cause the movement that intrudes on the plaintiff's land. That is to say, there does not need to be an intent to *trespass*, just an intent to effect the action that constitutes the trespass.

Suppose the defendant intends to place a small wire-and-plastic marking flag in the defendant's own ground. But the piece of ground into which the defendant plants the flag is, unbeknownst to the defendant, on the plaintiff's property. That is a trespass. It does not matter that the defendant was mistaken. Further, it does not matter if the defendant is non-negligent in entering the plaintiff's land. The defendant could have consulted all the documents in the county hall of records and used state-of-the-art GPS to map out a route. If the defendant purposely sets an object on land that happens to belong to the plaintiff (or even waives an arm, leg, or object above it), then the defendant has committed trespass to land.

Even under this expansive view of intent, not every entry will actionable. If the defendant stumbles and falls onto the plaintiff's land, or if the defendant is pushed by someone else, then the defendant is not liable.

Under the older, more traditional view of transferred intent, trespass to land is eligible for the application of transferred intent doctrine among the torts of battery, assault, false imprisonment, and trespass to chattels.

Trespass to Land: Entry

An actionable entry on land may be made by the defendant personally. Alternatively, the defendant can be liable by inducing a third person to enter or by causing an object to enter.

According to some authorities, entry can be accomplished even by minute particles. In *Martin v. Reynolds Metals Co.*, 342 P.2d 790 (Or. 1959), a farmer sued over an aluminum plant whose fluoride particulate emissions caused his land to be unfit for raising cattle. The court upheld the cause of action, writing:

> If, then, we must look to the character of the instrumentality which is used in making an intrusion upon another's land we prefer to emphasize the object's energy or force rather than its size. Viewed in this way we may define trespass as any intrusion which invades the possessor's protected interest in exclusive possession, whether that intrusion is by visible or invisible pieces of matter or by energy which can be measured only by the mathematical language of the physicist.

An "entry" does not need to be a transit of the border of the plaintiff's property. Suppose the defendant is on the plaintiff's property with the plaintiff's permission. There is no trespass to land at this point. However, the defendant could accomplish a trespass by interacting with the land or fixtures in a way that is beyond the scope of that permission. Sneaking into a party host's off-limits bathroom to rummage through the medicine cabinet is an example. Or even in the great room, where the defendant is authorized to be, a trespass could be accomplished by jumping on to a table and swinging from the chandelier.

Trespass to Land: Failure to Leave or Remove

The trespass need not be an affirmative act. It can be an omission as well. A guest who refuses to leave when asked commits a trespass by remaining. And a friend who has parked an RV in the driveway commits a trespass if, once the welcome is worn out, she or he does not return to drive the RV away.

Trespass to Land: Damages and Scope of Recovery

If the trespasser does no damage, the plaintiff can still recover nominal damages. If the trespasser does cause damage – personal injury, property damage, or even mental distress – the plaintiff can recover compensatory damages on that basis.

The scope of recoverable damages in a trespass to land case can be breathtaking. Any damages caused by the trespasser – even if highly unpredictable and even if the trespasser was exercising due care – can be recovered. This is quite extraordinary when compared to the negligence cause of action. In negligence, the requirement of a breach of the duty of care and the application of proximate causation doctrine would foreclose many damages claims that are perfectly good in a trespass to land case. Suppose an innocent trespasser – with a reasonable belief she or he is not trespassing – consistently undertakes every reasonable precaution while on the plaintiff's land, but nonetheless causes some damage in an utterly unforeseeable manner. The trespass to land tort can be used to make the defendant liable for the full extent of the damage.

An example is *Cleveland Park Club v. Perry*, 165 A.2d 485 (D.C. App. 1960), in which a nine-year-old, frolicking in the club's pool, raised a metal drain cover and inserted a tennis ball. When he came back to get his ball, it had vanished. It turns out the ball was sucked into the pool's drain, where it lodged in a critical place. The pool had to be closed down for extensive repairs. The club sued for the cost of the repairs. The court noted that under negligence, a child's age would be a mitigating factor, since a minor's age adjusts the standard of care in the child's favor. But no such ameliorative was available here: "[S]ince recovery under [trespass to land] is based on force and resultant damage regardless of the intent to injure, a child of the most tender years is absolutely liable to the full extent of the injuries inflicted."

Reading: *Trespass by Airplane*

Trespass to land is a doctrine that is both powerful and inflexible. With roots going back many centuries, it anticipated little about our modern world. This law review article from long ago shows how legal doctrine can be put under pressure by unanticipated new technologies – in this case, the airplane. Published in 1919, this article came out 16 years after the first Wright Brothers flight and just after the November 1918 armistice that ended World War I.

Trespass by Airplane

Case: *Boring v. Google*

Having gotten some historical context with the legal quandaries presented by the new-fangled aeroplane, we now go back to the future, where roaming dot-com camera cars come up against private property rights.

Boring v. Google Inc.

21. Trespass to Chattels and Conversion

Introduction

The common law has long treated chattels differently from land. Probably owing to its fundamental role in the historical English class structure, the common law treats land with far more solicitude. The distinction carries over to the trespass torts. Where trespass to land is a strikingly powerful tort, trespass to chattels is more circumscribed. For instance, while merely touching someone's real property is actionable as trespass to land, merely touching someone's movable property is not enough even for a nominal damages claim.

Trespass to chattels requires something that rises to an "interference" in order to be actionable. This is not a high bar, but it is nothing like the come-all-plaintiffs stance of trespass to land.

Alongside trespass to chattels is its big sibling, the tort of conversion. Conversion is essentially the same as trespass to chattels, but with two differences – it applies only to much more substantial invasions of the property interest, and it provides a potentially more potent remedy, that of the forced sale.

As with the other intentional torts, don't be fooled by the ancientness of trespass to chattels and conversion. These are torts with surprising relevance to the contemporary world. As we'll see in this chapter, they have been invoked in the thoroughly modern contexts of biomedical research and internet communications.

The Elements of Trespass to Chattels

Here is the blackletter formulation of trespass to chattels:

> A plaintiff can establish **a prima facie case for trespass to chattels** by showing: the defendant (1) intentionally (2) interfered with the (3) plaintiff's right of possession in a chattel.

Trespass to Chattels: Plaintiff's Right of Possession in Chattel

There is no requirement that the plaintiff be the owner of the chattel – merely that the plaintiff have a current right of possession. Thus, a defendant who takes a baseball bat to the plaintiff's leased car is not protected from liability by the fact that the plaintiff does not hold the car's title.

Trespass to Chattels: Intent

The intent requirement for trespass to chattels is similar to that for trespass to land. The defendant need only intend to act upon the chattel. There is no need that the defendant intend to harm the chattel or intend to interfere with the plaintiff's possession of it. Nor is the defendant excused by way of an honest mistake made despite all due care having been taken. So, if the defendants, innocently believing they are milking their own cow, mistakenly milk the plaintiff's cow, then the defendants are liable for trespass to chattels for the value of the milk. If the cow is injured despite defendants' best efforts to treat it properly, the defendants are on the hook for that damage as well.

Under the traditional doctrine of transferred intent, trespass to chattels is eligible for the application of transferred intent doctrine with the torts of battery, assault, false imprisonment, and trespass to land.

Trespass to Chattels: Interference

Here is where trespass to chattels differs starkly from trespass to land. Merely touching a chattel does not create liability. Yet actual damage is not necessary either. For liability to arise, the defendant must "interfere" with the plaintiff's possession. What does that mean? Interference can be established by any of the following: (1) actual damage to the chattel, (2) actual dispossession of the chattel, (3) loss of use of the chattel for some appreciable amount of time, (4) harm to the plaintiff, or harm to something or someone in whom the plaintiff had a legal interest, on account of the defendant's action.

The first thing to observe is that, in contrast to battery, assault, false imprisonment, and trespass to land, it is not possible to get nominal damages for an action that is truly trivial in nature.

Suppose a busybody is upset that a motorcyclist has parked their bike over a crosswalk. The busybody moves the motorcycle a few feet away so that it is out of the crosswalk. This is not trespass to chattels.

Now, suppose instead that a defendant takes a motorcycle, parked in front of a diner, and drives it a couple of miles away to visit a nail salon, returning it a couple of hours later. This clearly counts as a dispossession, and, as such, it clearly creates liability for trespass to chattels.

The Elements of Conversion

The blackletter formulation of conversion is as follows:

> A plaintiff can establish **a prima facie case for conversion** by showing: the defendant (1) intentionally (2) interfered with (3) the plaintiff's right of possession in a chattel (4) in so substantial a manner as to warrant the remedy of a forced sale.

Conversion: Intent

The intent requirement for conversion works like that for trespass to land and trespass to chattels. Conversion requires only that the defendant intend the actions that constitute conversion: interference with the plaintiff's right of possession in a chattel in so substantial a manner as to warrant the remedy of a forced sale. There is no requirement of bad motive, nor is there a requirement that the defendant intend to effect a conversion.

An example that is used in the Restatement concerns an auctioneer who takes a fine-art painting from a third party, honestly and reasonably believing that the third party is the true owner of the painting. If the auctioneer sells the painting, as instructed by the third party (the intended act), the auctioneer is liable for conversion to the painting's actual owner.

As loose as the intent element may be, it is still there. If a person does not intentionally exercise dominion over the property, then there is no conversion. Suppose a museum is given artifacts on loan, and the museum negligently

loses them. There may be a good negligence case here, but there is no conversion, because the intent element is unsatisfied.

Conversion: Interference and Substantiality to Warrant Remedy

For an interference with a chattel to qualify as a conversion, the defendant must exercise dominion over the chattel in a way that is so substantial that it warrants the remedy of the forced sale. There is no way to precisely delineate the threshold – it's a matter of degree.

With trespass to chattels, we used a borrowed motorcycle to illustrate a dispossession that creates liability for trespass to chattels: The defendant borrows a motorcycle for a couple of hours to run an errand a couple of miles away and then returns the bike to where it was originally parked. This is a trespass to chattels. Yet it is not conversion. Why not? The defendant has not exercised dominion over the chattel so seriously as to force the defendant to purchase the motorcycle. If we change the hypothetical so that, instead of going to the nail salon, the defendant drives the motorcycle from Milwaukee to South Dakota, then the dispossession unquestionably qualifies as a conversion.

Conversion: The Forced Sale Remedy

The sine qua non of the conversion action is the forced sale remedy. If someone takes a joyride in your car and wraps it around a tree, you can get the forced sale. That means the joyrider owes you for the fair market value of the car at the time it was taken, and the joyrider then takes title to the wrecked car.

Pursuing a conversion is a choice. No plaintiff can be forced into it. That is, conversion cannot be used to require an unwilling plaintiff to sell her or his goods. For this reason, the terminology of "forced sale" is confusing. It would probably be better if the concept were called "forced purchase." Suppose you want your roommate's signed first edition of *Harry Potter and the Sorcerer's Stone*, but your roommate won't sell. You cannot game the conversion tort so that you wind up getting what you want. If the plaintiff wants to get the chattel back – and wants the court to order its return instead of merely awarding damages under a forced sale theory – the plaintiff can chose to sue for trespass to chattels. Alternatively, the plaintiff can chose to sue for conversion yet elect the trespass-to-chattels remedy of compensatory damages for the dispossession. (Also, using something called a writ of replevin, your roommate can get the book on an expedited basis without the necessity of going through a trial.)

So, remember that conversion doesn't really force a sale; it forces a purchase – when the plaintiff so chooses.

Conversion: Intangibles and Capturing Increased Value

Conversion has some other superpowers that the tort of trespass to chattels does not have. For one, conversion can be used with many intangible assets that are tied to tangible artifacts, such as stock certificates. And conversion can be used by the plaintiff to capture the benefit of increased market values.

Suppose the defendant steals certificates for 100 shares of stock on Monday, when they are worth $100,000. On Tuesday, the price of the stock skyrockets, and the shares are worth $200,000. At that point, the plaintiff can use conversion to get a judgment of $200,000. Now suppose the plaintiff waits to sue, and on Wednesday morning, the value of the stock plummets to $50,000, at which point the defendant sells the shares for a loss. The plaintiff can still use conversion to get a judgment of $200,000. In this way, conversion can be used like a ratchet to capture increases in value without a possibility of slippage to a lower value.

Case: *Moore v. U.C. Regents*

This case explores the outer bounds of conversion doctrine.

Moore v. Regents of University of California

22. Defenses to Intentional Torts

Introduction

The elements of the causes of action for the intentional torts are only half the story. The intentional torts would be incomprehensible without their accompanying defenses. It's hard to understate the importance of the defense of consent: Every shutting of elevator doors would be actionable false imprisonment, every kiss of newlyweds would be actionable battery, and every haunted house at Halloween would generate an avalanche of actionable assaulta.

Beyond the commonness of consent, there are more exotic defenses: self-defense, defense of others, and the necessity defenses. All of these are crucial to understanding the full tapestry of intentional tort liability.

Consent

Consent is the most important defense to intentional torts, and it is ubiquitous. Consent can turn a trespass to land into a party, or turn a battery into life-saving medical care.

What is seemingly strange about consent is that, at least in the traditional common-law formulation, it is a defense. That means that it is the defendant's burden of proof to show consent. So, technically, a person who sends out party invitations could sue everyone who came to the party for trespass, and that perfidious party host would succeed in making out a prima facie case against each one. The burden would fall on the party guests to prove in court that they were on the plaintiff's land with the plaintiff's consent. This may seem absurd. Yet consider the alternative: Asking the plaintiff to prove a lack of consent as a prima facie element – means asking the plaintiff to prove a negative. That is something most courts are unwilling to do.

Let's take a slightly more realistic example than the vexatiously litigious party host. Suppose that a contractor demolishes the attached garage of someone's house. Because consent is a defense, it is not the homeowner's burden to prove that the contractor did not have permission. Instead, the contractor will need to offer proof that there was consent. Intuitively, it does not seem too much to ask that the contractor be able to produce a preponderance of evidence of consent – such as a document signed by the homeowner.

Notwithstanding the problems of proving a negative, the courts in many states hold that for intentional torts other than trespass to land, lack of consent is a prima facie element. While this does require the plaintiff to prove a negative, the plaintiff may accomplish this as an initial matter by testifying that there was no consent. Then it is up to the defendant to impeach or rebut that testimony. Yet putting the burden on the plaintiff for lack of consent is not without effect. In a close case, where the factfinder perceives the evidence to be a toss up, the tie will go in favor of the party without the burden of proof. So in an jurisdiction where a battery claim requires proof of a lack of consent, a tie on the consent issue means that the defendant wins.

The fact that trespass to land is the one tort for which courts seem unwilling to shift the burden to the plaintiff shows once again the abiding importance with which the law treats private ownership of land. It may seem strange, but in jurisdictions that make lack of consent a prima facie element for other intentional torts, an installer of residential sprinkler systems might have a greater need for recordkeeping on consent issues than does a physician doing surgery.

To delve further into the issue of consent, it is helpful to break it up into chunks. Courts have categorized consent as coming in two forms – express and implied.

Express Consent

Express consent is consent that is *expressed* by the plaintiff. This does not require anything formal. Express consent can be communicated orally, in writing, or even in gestures. Legally, any of these is just as good as the other. Waving someone into a room is just as good a consent to trespass to land as is delivering a signed writing that gives someone permission to enter. The reason a would-be defendant might insist on a more formal expression of consent would be to have more credible evidence at trial. A jury will readily believe a neighbor who testifies as to having seen a "come on over" gesture. But the same jury would be rightfully skeptical of a demolition firm claiming

it was given oral consent to bulldoze a garage. Neighbors can stay neighborly. But the demolition firm is well advised to get signed, written permission before biting into its first bucketload of sheetrock.

Implied Consent

Implied consent is consent that, instead of being expressed, is *implied*. Circumstances, custom, context, and culture can all create implications of consent.

The validity of implied consent to intentional torts is crucial to how our society works. A restaurant patron takes a napkin out of a dispenser and uses it. This is a prima facie case of trespass to chattels. But the consent for patrons to take napkins out of dispensers is implied.

The standard for consent is ***objective***. The question is whether the objectively reasonable person, standing in the shoes of the defendant, would have reasonably believed that the plaintiff consented. This is why consent can be implied by the circumstances even when the plaintiff never intended it.

The availability of the implied consent defense is typified by the classic of *O'Brien v. Cunard Steam-Ship Co.*, 28 N.E. 266 (Mass. 1891). In the case, Ms. O'Brien – apparently an Irish immigrant on her way to Boston – sued the operator of an ocean liner for battery on account of having been given a vaccination for smallpox. The steamship line was in the practice of giving vaccinations at the time because American immigration procedures required a certificate of inoculation issued by the ship's medical officer for all immigrants – otherwise immigrants were sent to quarantine. The evidence in the case showed that Ms. O'Brien stood in a line of people about to receive vaccinations and that, when her time came, she held up her arm and said nothing to the physician about a wish to not be vaccinated. According to the court:

> [T]he surgeon's conduct must be considered in connection with the surrounding circumstances. If the plaintiff's behavior was such as to indicate consent on her part, he was justified in his act, whatever her unexpressed feelings may have been.

28 N.E. at 266. At first blush, the lawsuit may seem absurd, but the case mentions that O'Brien also tried to sue in negligence – which would seem to indicate that she became seriously ill from the vaccination. Her negligence suit failed, however, because the court found no evidence the vaccination had been performed without due care. Unable to show negligence, the doctrine of implied consent prevented O'Brien from using a battery claim to get damages.

In addition to arising out of the circumstances, implied consent can arise by community custom. When neighborhood kids walk up to a house and ring the doorbell to sell cookies for a fundraiser, consent is implied by community custom. If a homeowner wants to avoid the implication of consent, then the homeowner can post a no-soliciting sign.

Case: *Florida Publishing Co. v. Fletcher*

Cookie sellers and signs work fine on an average day in suburbia. But not all situations are so easily resolved. Here we have the first of two cases pitting the news media, wanting to get the story, against the private property owners, wanting to be left alone.

In this first case, the issue is whether camera-wielding journalists have implied consent to enter private property after a disaster in order to capture vivid images of fresh tragedy.

Florida Publishing Co. v. Fletcher

Note on Media Trespass and Implied Consent

Implied consent for media trespass has had not had broad acceptance in other courts.

In *Anderson v. WROC-TV*, 109 Misc.2d 904 (N.Y. App. 1981.), an animal welfare official used a search warrant to enter a house where there was suspected animal mistreatment. The official called up multiple television stations, inviting them to come along on the search. The owner, who was at the house, objected to the entry of the news crews, but they entered with the official regardless, filming the house's interior. The footage was then used on air.

Not persuaded by *Florida Publishing*'s implied consent theory, Justice David O. Boehm's opinion in *Anderson v. WROC-TV* held: "The gathering of news and the means by which it is obtained does not authorize, whether under the First Amendment or otherwise, the right to enter into a private home by an implied invitation arising out of a self-created custom and practice." *Id.* at 907.

In view of the media defendant's urgings that the First Amendment should protect them, the case noted an irony:

> "In a case where the factual circumstances were ironically reversed, it appears the First Amendment suffered a strange sea-change. The defendants there, without permission, entered into a studio of the Columbia Broadcasting System in an attempt to exercise their right of free speech by publicizing what they claimed was unfair and unequal treatment of homosexuals in television news broadcasts. CBS was not deterred by the First Amendment from bringing charges against them of criminal trespass and they were duly convicted."

Id. at 908 (citing to *People v. Segal*, 78 Misc.2d 944 (N.Y. City Crim. Ct. 1974)).

The court in *Berger v. Hanlon,* 129 F.3d 505 (9th Cir. 1997) also parted ways with *Florida Publishing*. In the *Berger* case, federal agents from the U.S. Fish and Wildlife Service entered into a written contract CNN and Turner Broadcasting for cooperation in the production of television shows *Earth Matters* and *Network Earth*. The government obtained a search warrant based on the suspicion that rancher Paul Berger was poisoning eagles that were a threat to his livestock. According to the court, the network crews wanted footage and the federal government wanted publicity. Agents entered the property, with no disclosure to Berger or his wife that the lead agent was wearing a microphone or that the cameras that were visible were owned by the media. The television crews shot eight hours of footage and used both the footage and the audio recordings on television. As for the federal investigation, it yielded only a misdemeanor conviction against Berger for violation of 7 U.S.C. § 136j(a)(2)(G) – using a pesticide in a manner inconsistent with its labeling.

In the subsequent civil suit, the Ninth Circuit held that the Bergers had stated a claim of trespass against the broadcasters. And interestingly, the court found the media so entwined with the federal government that the court upheld a constitutional tort claim against the media defendants as well as the agents.

Consent Implied By Law

In addition to being implied *in fact* – that is, by circumstances or custom – consent can also be implied by law. When unconscious patients arrive in the emergency room, they have not consented to medical treatment. How could they, being unconscious? Consent in such a situation is implied by law for public policy reasons.

In some jurisdictions, during hunting season, consent for hunters to enter private property to hunt is implied by law. To defeat the implication, the onus is on property owners to post no trespassing signs.

The distinction between consent implied by law and consent implied in fact can be a little blurry. One might say that the fire-ravaged home of *Florida Publishing* is analogous to the unconscious ER patient in that in neither case could there be any consent in fact. At least on a theoretical level, the difference between implied-in-fact and implied-by-law consent is that implied-in-fact consent is manifested, if not by the plaintiff, at least by people within the plaintiff's community. The court, through implied-in-fact consent doctrine, merely recognizes that existing implication. By contrast, implied-by-law consent doesn't exist "out there" in the real world, but the court construes it – that is, acts as if it exists – because the court has decided that doing so is for the best.

Consent Obtained By Invalid Means

If consent is obtained by fraud, duress, or a mistake induced by the defendant, than the consent will not be valid.

Exceeding the Scope of Consent

Often there is no question that there is consent. Instead, the issue is the scope of that consent. Scope of consent problems involve difficult line-drawing problems.

Case: *Koffman v. Garnett*

This case looks the scope-of-consent issue in the context of contact sports.

Koffman v. Garnett

Self-Defense and Defense of Others and of Property

Tort law guarantees citizens a civil way of settling disputes and getting justice, and as such, it expects that people will not resort to the use of force against one another, infringements on their rights notwithstanding. However, the law recognizes there are some circumstances under which people cannot be expected to wait to try to vindicate their rights in court. Those circumstances give rise to the defenses of self-defense, defense of others, and defense of property.

Self-defense entitles a person to use reasonable force, as apparently necessary, to prevent an imminent and unconsented-to harmful or offensive touching, or confinement. In other words, you can defend yourself where there is an immediate threat of battery or false imprisonment.

Self-defense is quite limited. The threat must be *imminent*. In other words, the defendant has an immediate choice of self-defense or suffering the battery or false imprisonment. If there is time to call the police, or if the threat has not fully materialized, then imminence is lacking, and self-defense will not shield the defendant from tort liability.

Only *reasonable force* is permissible. That is, the degree of force must not be more than the force that appears necessary to thwart the threat. Deadly force may only be used where the defendant is faced with an extremely serious threat – such as death, rape, sodomy, loss of limb, loss of sight, etc. – and where nothing short of deadly force will stop the imminent attack.

Jurisdictions differ on whether the defendant has a *duty to retreat*. Many jurisdictions will not allow self-defense to negate tort liability where the defendant could have safely retreated to avoid the threat. Some jurisdictions allow a defendant to stand her or his ground and use force. In general, jurisdictions apply the same rule in torts as they do for criminal cases.

Defense of others works nearly identically to self-defense, with one important exception. The exception comes up where the defendant makes a reasonable mistake about whether there is really a threat to the third party. In most jurisdictions, if the defendant mistakenly believes that the third person is threatened, when that person is not actually threatened, then the defendant cannot use defense of others to avoid tort liability.

Suppose three friends are filming a video on a public street, shooting a scene of a mugging. A man pushes down savagely "beats" an actress appearing to be elderly woman. A passer-by stops his car, jumps out, and grabs the actor playing the thug and pushes him away from the woman. In most jurisdictions, the passer-by – no matter how reasonable his subjective belief that a battery was occurring – would be liable to the actor for battery.

In fact, this exactly what happened when actor Andy Samberg – before being hired on *Saturday Night Live* – was filming a mugging scene with his friends on Olympic Blvd in Los Angeles. The passer-by who stopped to intervene was actor Kiefer Sutherland. Famous for playing tough-guy-who-doesn't-play-by-the-rule counterterrorism agent Jack Bauer on *24*, Sutherland leapt to the woman's defense. Luckily, Samberg and his friends quickly explained to Sutherland that they were making a movie. In most jurisdictions, Sutherland would be liable for battery. In a minority of jurisdictions, Sutherland's reasonable mistake would not have prevented his ability to use defense of others as a complete defense to a suit for battery. But in all jurisdictions, struggling comedic actors know to milk such a situation for publicity value rather than using it as the basis of a tort suit.

Defense of property allows the reasonable use of force to defend both land and chattels against trespass. Generally, property owners must make a verbal demand on the trespasser to stop. After that, however, property owners may use as much force as is necessary to prevent the trespass, short of deadly force.

Whether deadly force may be used for the protection of property is a controversial issue. Most jurisdictions do not allow deadly force to be used against a trespasser merely on account of defending a property interest. (Although if there is a threat to a person, then deadly force may be permissible as self-defense or defense of others.) If the

property is a dwelling, and the trespasser is engaging in a breaking-and-entering felony, then many or most courts would allow deadly force if necessary – that is, if the intruder could not be evicted more safely.

Necessity

The defense of necessity is similar to self-defense or defense of others, except that it does not require the plaintiff to have been an aggressor. The defense of necessity allows a defendant, in emergency circumstances, to escape tort liability for committing an intentional tort against an innocent person.

As a practical matter, necessity is a defense that applies only to torts against property – that is, trespass to land, trespass to chattels, and conversion. Theoretically, however, necessity could apply to the personal torts. A battery effected by shoving an uncooperative person out of the way in order to trip a fire alarm, one imagines, would be justified on account of a necessity defense.

There are two brands of necessity.

Public necessity is when the tort is committed in order to protect the public as a whole from some danger. The defense of public necessity is a total defense, voiding all liability.

Private necessity is when the tort is committed to help one or a few people. Private necessity works the same as public necessity, except that private necessity is only a partial defense: The defendant who successfully interposes a defense of private necessity is still liable for compensatory damage for any actual harm suffered. So if a person commits a trespass to chattels by absconding with someone's cell phone to call for emergency help, then the phone snatcher is liable to the phone's owner for damage to the phone. If the phone owner has not suffered any actual loss, however, property-owner has no claim.

So, what good is the defense of private necessity if the trespasser is still liable for the cost of any damage done? For one thing, it means that the trespasser cannot be held liable for punitive damages. But it also means that the property-owner does have the right to self-help measures that would defeat the trespasser.