

# Torts Wypadki

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### Torts II

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### TABLE OF CONTENTS:

2	Immunities and the Firefighter's Rule; Federal Torts Claims Act
4	Special Issues in Rights of Action; Wrongful Death, Survival Action, Loss of Consortium
8	Intentional Torts
21	Nuisance; Strict Liability; Products Liability
35	Oblique Torts
44	Practical Perspectives; Theoretical Perspectives; Alt. to Torts

# Immunities and the Firefighter's Rule; Federal Torts Claims Act

## Firefighter's Rule

1. **Firefighter's Rule** (Firemen's Rule): firefighters can't bring suit for injuries sustained fighting negligent fires; compensation of such professionals already reflects the ordinary risks of negligently created fires inherent in their job, but arsonists can be sued by firefighters.
  - in essence - a form of assumption of risk.
  - the rule also addresses concern that victims would be deterred from seeking assistance if liability to firefighters was imposed on negligent behavior which created the emergency.
  - historic use - assumption of risk - preclude works recovery for injuries on the job and that the modern trend to absorb assumption of risk into comparative fault argues for not precluding some recovery culpable D's. Evolved out of the idea that an employee shouldn't be able to sue their employer and a servant shouldn't be able to sue their master.

## Immunities

1. **Charitable Immunity**: historically immune from tort liability; immunity was justified as a means to protect the work charities do/ funds should not be diverted from the cause; the restatement and many states have abolished charitable immunity because of liability insurance and business-like operation of large charities
  1. *Schultz v. Roman Catholic Archdiocese of Newark*: priest abused boy
    1. Charitable Immunity Statute: Says that a beneficiary of the works of the charity cannot sue the charity, but a stranger to the charity can.
    2. ISSUE: Whether the Charitable Immunity Act bars a claim by a beneficiary of a charitable institution based on the charity's alleged negligence in hiring?
    3. Finding an exception to charitable immunity here is in disfavor as a matter of public policy
    4. The Legislature should consider the scope of the law again and its intended application
    5. HOLDING: Under the Act, the charity is not liable for negligence. The court called on the legislature to modify the law
    6. Doesn't include the person who was negligent. He could still be sued.
1. **Spousal Immunity**: historically could not sue each other; many said suits would damage marital harmony; most states have eliminated spousal immunity and those who retain it have limitations on it; immunity is not applied against property or economic torts. Some say that they could use this and sue each other to recover from the insurance company if they were in an accident.
2. **Parent-Child Immunity**: precludes tort actions btw parents and non-adult children; parent-child immunity still exists in some form in many jurisdictions; never been held to bar property or economic torts, but does preclude intentional torts; some states have completely abolished it

but most states have only partially abrogated it; there is a reluctance to have judicial review over acceptable parenting

3. **Governmental Immunity:** Federal government has specifically retained immunity for certain enumerated intentional torts, (IE: assault, battery, false imprisonment, false arrest, malicious prosecution, libel, slander, misrepresentation, deceit, and interference w/ contract rights) except in the case of acts or omissions of investigative or law enforcement officers resulting in claims of assault, battery, false imprisonment, false arrest, abuse of process or malicious prosecution.
  - Under common law, immunities were complete and prevent tort suits against the gov't; immunity for discretionary functions but not ministerial acts.
  - The federal government is also immune from claims based on strict liability.
1.
  1. *Downs v. US:* FBI Agents (liability for actions of FBI agents resulting in the death of innocent victims of an airplane hijacking)
    1. Issue 1: Is the action a discretionary function?
      1. If the standard here was for him to "exercise judgment", a host of other cases were wrongly decided
      2. Immunized discretion includes determinations made by executives or administrators in establishing plans, specifications, or schedules of operations. Where there is room for policy judgment and decision there is discretion.
      3. 28 U.S.C. § 2680(a) immunizes gov't employees formulating policy; FBI agents were not involved in formulating policy; the hijacking policy had already been formulated
    2. Issue 2: Did the trial court err in finding O'Connor was not negligent?
      1. Yes, there was a better alternative; he should have continued the waiting game; he violated FBI policy and disregarded guidelines which resulted in deaths
      2. The extent to which "an actor will be excused for errors in judgment under (emergency) circumstances is qualified by training and experience he may have, or be expected to have, in coping with the danger or emergency with which he is confronted."
  2. Discretionary functions: policy-making decision
  3. Ministerial acts: gov't conduct which implements or executes policy decisions

## **Federal Torts Claims Act**

- Federal Torts Claims Act gives federal courts jurisdiction to hear actions for injury or loss of property, or personal injury or death caused by negligence or wrongful act or omission of any employee of the Gov't while acting w/in the scope of his office or employment, under circumstances where the US, if a private person, would be liable to the claimant in accordance w/ the law of the place where the act or omission occurred(Downs).
- Limited waiver of sovereign immunity
- Must file administrative claim first
- Agency has 6 months to decide; if denied, P may sue in Fed. D. Ct.
- Tort liability judged with reference to state law
- If under st. law, a private actor would have a duty

- Conduct must have been done by fed. employee within the scope of employment
- Exceptions: based on type of conduct or cause of action
  - Cannot sue when gov't is doing gov't things (discretionary duty)
  - No strict liability – must prove negligence

# Special Issues in Rights of Action; Wrongful Death, Survival Action, Loss of Consortium

## Contents

- 1 Special Issues in Rights of Action
  - 1.1 Implied Rights of Action
  - 1.2 Bivens Action
  - 1.3 Section 1983 actions
  - 1.4 Wrongful Death, Survival Action, & Loss of Consortium

## Special Issues in Rights of Action

### Implied Rights of Action

*Tex. & Pac. Ry. Co. v. Rigsby*

- Rigsby was employed by the RR as a switchman - he was engaged in taking some "bad order" cars to the shops to be repaired. Rigsby rode the top of one of the cars - in order to set the brakes and as he was descending from the car, he fell as a defect in one of the handholds or grab-irons that formed the rungs of the ladder, sustaining personal injuries.
- Assumption of risk is a defense; no need to put that in unless there is a possibility for a cause of action (implied cause of action)
- Strict liability
- Courts decide to see an implied right of action; statute leaves it open
- A disregard of the command of a statute is a wrongful act, and where it results in damage to one of the class for whose especially benefit the statute was enacted, the right to recover for damages from the party in default is implied.
- ISSUE: Whether the defective condition of the ladder was due to D's negligence is immaterial, since the statute imposes an absolute and unqualified duty to maintain the appliance in secure condition.
- The employee's knowledge of the defect does not bar his suit!
- HOLDING: Strict liability – they were required to keep the appliance in a safe condition

*J.I. Case Co. v. Borak*

- Borak owned shares of stock in J.I. Case. Case's managers sought to merge Case w/another company ATC. The merger could not happen unless a certain percentage of Case's shareholders approved it. Case's managers sent a proxy solicitation to shareholders, Borak alleged the solicitation contained false statements and if not for the false statements the shareholders would not have agreed to the merge and the merge negatively affected the value of Case's stock.
- D sued to block the merger because of false statements; managers solicited proxies so they could vote amongst the shareholders.
- ISSUE: Whether Section 14(a) of the federal securities exchange act of 1934, creates a private right of action on behalf of those who suffer losses by virtue of conduct that violates it.
- Makes it “unlawful for any person...to solicit or to permit the use of his name to solicit any proxy or consent or authorization in respect of any security...in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors”
  - The SEC implicitly allowed private right of action on behalf of those who suffered losses by virtue of conduct taht violated it.
  - No specific reference to private right of action
  - “protection of investors” implies availability of judicial relief where necessary
- Ct identified a 4 part test designed to determine whether to infer a private right of action from a statute
  - Is the plaintiff one of the class for whose benefit the statute was enacted(Rigsby)?
  - Is there any indication of legislative intent explicit or implicit to create such a remedy or deny such a remedy?
  - Is it consistent with the purpose of the legislature to imply such a remedy?
  - Is the cause of action one traditionally relegated by State Law?

*Cannon v. University of Chicago* (CB 364):

- The question of the existence of a private right of action is basically one of statutory construction.
- “When Congress intends private litigants to have a cause of action to support their statutory rights, the far better course is for it to specify as much when it creates those rights.

*Touche Ross & Co. v. Redington* (CB 364-65):

- The source of the Ps' rights must be found, if at all, in the substantive provisions of the 1943 Act which they seek to enforce, not in the jurisdictional provision.
- Court emphasized that generalized references to the “remedial purposes” of the 1934 Act will not justify reading a provision “more broadly than its language and the statutory scheme reasonably permit.”

## ***Bivens* Action**

*Bivens v. Six Unknown Agents of Federal Bureau of Narcotics*:

- 4th amendment provides that the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. That money damages are applicable, even though not specifically stated in the Constitution.

- ISSUE: Whether violation of that command by a federal agent acting under color of his authority gives rise to a cause of action for damages consequent upon his unconstitutional conduct.
- It is well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.
- The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.
- HOLDING: It does. Having concluded that his complaint states a cause of action under 4th Amend., court holds that he is entitled to recover money damages for any injuries he has suffered as a result of the agents' violation of the 4th Amend.
- If something is implied by the Constitution, the Court does not have to wait until Congress says something
- The Constitution trumps all!

### Section 1983 actions

1. 42 U.S.C. § 1983
2. Allows a federal claim for someone acting under color of state law
  1. Against state police in federal court and in some cases, against private individuals who are acting like state authorities
3. Implied rights of action under other Amendments (IE: 5th and 8th Amendments)

### Wrongful Death, Survival Action, & Loss of Consortium

#### Wrongful Death Action

- *Wrongful death*: pain and suffering suffered by persons closely connected to victim
- P is suing for loss suffered due to the tortuously inflicted death of a close relative
- Spouse, parents, and children are usually permitted to bring the action
- Initially only could receive pecuniary losses
  - Now can recover lost support and other benefits
- *Proof Problems*
  - P must prove w/some degree of certainty the losses suffered from the tortuous act
  - Must establish relevant time period for support, focus on the value of the support that would have been provided as well as value of lost services
  - Ps need to provide factual support for claim of damages not pure speculation
- *Defenses*
  - P's own fault (parent not supervising child) affects her recovery
  - The deceased's own fault affects the wrongful death heir's recovery

#### Survival Actions

- *Survival action*: pain and suffering suffered by victim brought by the decedent's estate (It is what they would have been able to bring had they survived).
- Like wrongful death actions, created by statute
- A survival action is the continuation of the decedent's action against the tortfeasor
  - Continues pre-existing claim
  - Action is brought by the administrator, executor, or personal rep of decedent's estate

- The rep can recover any damages the decedent would have if lived
- Also, any defenses that could have been raised against the decedent could be raised by the rep
- Where D's conduct leads to instantaneous death of P, there is no survival action available to P's estate
- Does not need to cause death for a survival action
- Pre-death injuries are the basis for the claim
- Survival action typically allows estate to recover decedents' medical expenses, lost wages, and sometimes pain and suffering
- Post-death are recoverable in wrongful death actions
- There is no survival action for instantaneous death

### **Loss of Consortium**

- Loss of consortium is a claim from someone who is related to (closely connected to) the direct victim of tortious conduct where the victim doesn't die to recover the lost value of the services the victim provided
- Economic loss as well as intangibles such as companionship, comfort, and sexual services. Is not an automatic recover Must prove loss.
- Statutes broaden what and who can recover
- All states now allow for spousal loss of consortium
- Victim is still alive
- Conduct of the initially injured party may affect recovery
  - What about loss of parental consortium?
  - Recent movement to expand it to parents and children
- In some courts it only applies where you can show pecuniary (money) losses.

### **5 doctrines where you don't have to be physically injured:**

- Wrongful death
- NIED
- IIED
- Assault
- False imprisonment

*Externalities*: costs to conduct bore by people outside of that conduct (i.e. RR causing harm from conduct to people outside the railyard)

*Internalize*: cost absorbed by party causing the harm i.e. oil company moving petroleum in large single-hull tankers to save money because old spill is less expensive than double-hull vessels; costs compensated by oil company for oil spill

*Nelson v. Dolan* : wrongful death action

- noted that no recovery for mental suffering or bereavement or as a solace on account of such death
- a cause of action for an injury to a personal estate survives the death of the person entitled to the same
- Wrongful Death Action

- The damages recoverable, the disposition of the avails obtained, and the measure of recovery in a wrongful death action are all fixed by statute.
- The ct. recently reaffirmed that damages on account of mental suffering or bereavement or as a solace to the next of kin on account of the death are not recoverable.
- General Rule: Where a statute has been judicially construed and that construction has not evoked an amendment, it will be presumed that the Legislature has acquiesced in the ct's determination of its intent.
- Decedent Nelson's Damages: Statute plainly limits a recovery to the loss suffered by a decedent's next of kin. It provides no basis upon which to recover a decedent's own damages.
- Survival Action: there's no action for instantaneous death.
- Estate Action: Whether the decedent's estate may recover for mental anguish a decedent consciously suffers by the apprehension and fear of impending death prior to sustaining fatal injury.
  - Court has long permitted a decedent's estate to recover for the conscious physical pain and suffering the decedent endured after a negligently inflicted injury resulting in death.
  - Also has long recognized postinjury mental anguish as an element of damages recoverable in personal injury actions.

# Intentional Torts

## Contents

- 1 Intentional Torts
  - 1.1 Generally
  - 1.2 Assault
    - 1.2.1 Elements
    - 1.2.2 Cases
  - 1.3 Battery
    - 1.3.1 Elements
    - 1.3.2 Cases
  - 1.4 False Imprisonment
    - 1.4.1 Elements
    - 1.4.2 Cases
  - 1.5 Outrage (IIED)
    - 1.5.1 Elements
    - 1.5.2 Cases
  - 1.6 Trespass to land
    - 1.6.1 Elements
    - 1.6.2 Statute of Limitations
    - 1.6.3 Cases
  - 1.7 Trespass to chattels
    - 1.7.1 Elements
    - 1.7.2 Necessity (Distinguished from self-defense)
    - 1.7.3 Cases



- 1.8 Conversion
  - 1.8.1 Elements
  - 1.8.2 Cases
- 1.9 Defenses

## Intentional Torts

### Generally

(1) Act

- Volitional movement
- Not reflex

(2) *Intent*: desire the result or knows to a substantial certainty that it will occur.

- The conception of intent differs from tort to tort under the heading of "intentional torts"
- Substantial certainty or desire counts as intent and is subjective.
- *Transferred intent*: applied to 5 intentional torts: (1) Battery, (2) Assault, (3) False Imprisonment, (4) Trespass to Chattel, and (5) Trespass to land. Does not transfer to Conversion.
  - Person to person
  - Tort to tort
- Motive is irrelevant, and is distinguished from intent.
  - (Note that whether evidence of motive can be used at trial to establish intent or another element is a question for evidence law.)

(3) *No issue of incompetence*

- Children as well as the mentally ill, developmentally disabled, and demented can commit intentional torts

(4) *Causation*

- Actual
- Proximate
  - (Causation is considered in more depth under the heading of negligence, but the same concepts apply)

(5) *The Mistake Doctrine*: if a defendant intends to do acts which would constitute a tort, it is no defense that the defendant mistakes, even reasonably, the identity of the property or person he acts upon or believes incorrectly there is a privilege.

### Assault

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

### Elements

(1) Act

(2) Intent

- Can be intent to effect an assault
- The defendant must desire or be substantially certain that her action will cause the apprehension of immediate harmful or offensive contact.
  - Or intent to effect a battery

(3) Causation

(4) Reasonable Apprehension of immediate harmful or offensive contact

- Fear distinguished from apprehension--need not produce fear in the victim.
- Apprehension--it is about to happen, and is imminent
- Apparent ability sufficient
- Words alone are not sufficient
  - But words can negate the effect of conduct

(5) Immediacy

## Cases

*Beach*: unloaded gun

- That the pointing of a gun, in an angry and threatening manner, at a person three or four rods distant, who was ignorant whether the gun was loaded or not, was an assault, though it should appear that the gun was not loaded, and that it made no difference whether the gun was snapped or not.
- Court held it was an assault even though he didn't know if the gun was loaded.
- Action is compensable

*Brooker*: D threatened telephone operator over phone

- An assault is an immediate apprehension of offensive or harmful contact.
- Immediacy
  - In this case, it was not immediate, but future.
  - This threat only promises a future injury and usually gives ample opportunity to provide against it, while an assault must be resisted on the instant
- Apprehension/Fear
  - There must be just and reasonable ground for the fear; hence a vain or idle threat is not sufficient
  - The D's threat was not of such nature or made under such circumstances as to put a person of ordinary reason and firmness in fear of bodily hurt
  - There has been reluctance on the law to give a cause of action for mere words.
  - Words never constitute an assault is a time honored maxim because they can be misunderstood, thoughtlessly spoken
  - Fear is not sufficient to establish apprehension and it is not necessary to establish apprehension.

*Vetter*: crazy guy in vehicle next to her

- Assault: an intentional threat or attempt, coupled with apparent ability, to do bodily harm to another, resulting in immediate apprehension of bodily harm. No bodily contact is necessary.
- There was evidence of a threat
- words can constitute an assault if together with other acts or circumstances, they put the other in reasonable apprehension of imminent harmful or offensive contact with his person
- here, there was fear but there was not apprehension because there was no move towards the vehicle that causes her to feel she was going to be imminently harmed.

*Wishnatsky*: ND case (Office fight. Sued for battery saying Huey closed the door on him pushing him out of the office)

- In order that a contact be offensive to a reasonable sense of personal dignity, it must be one which would offend the ordinary person and as such one not unduly sensitive as to his personal dignity.
- It must, therefore, be a contact which is unwarranted by the social usages prevalent at the time and place at which it is inflicted.
- Rude and abrupt conduct did not rise to the level of battery
- The attorney's conduct would not be offensive to a reasonable sense of personal dignity

## **Battery**

An intentional infliction of a harmful or offensive touching of a person.

Does not require intent to harm, only necessary D intend to cause either harmful or offensive contact

## **Elements**

(1) Act

(2) Intent

- Can be intent to effect a battery
  - or intent to effect an assault

(3) Causation-the defendant's voluntary action must be the direct or indirect legal cause of the harmful or offensive contact.

(4) Touching

- Can be direct or indirect (e.g., setting something in motion, laying a trap)
  - Touching of a person includes anything connected to the person

(5) Harmful or Offensive

- Judged by a reasonable-person standard
- The offensive contact need not even physically touch the body.
- There is no requirement that the victim be conscious of either the contact or its harmful or offensive nature at the time of the intrusion.

(6) Issues

- "Eggshell plaintiff" rule
  - Ex: Vosburg v. Putney-where a school boy playfully but without privilege slightly kicks a classmate without intending harm, he is responsible for the unexpected serious illness which resulted.
  - Ex: Where a physician performs a medical procedure without the patient's consent.

## Cases

*Koffman* (football coach tackling innocent football player)

- Gross negligence: that degree of negligence which shows indifference to others as constitutes an utter disregard of prudence amounting to a complete neglect of the safety of another.
  - Must shock fair minded people
  - Because reasonable persons could disagree on this issue, a jury issue was presented, and the trial court erred in holding that, as a matter of law, the second amended motion for judgment was inadequate to state a claim for gross negligence.
- Assault: consists of an act intended to cause either harmful or offensive contact with another person or apprehension of such contact, and that creates in that other person's mind a reasonable apprehension of an imminent battery
- Battery: an unwanted touching which is neither consented to, excused, or justified
  - No assault because there was no apprehension of fear, but there is a battery
  - The trial court erred in holding the Koffmans' second amended motion for judgment was insufficient as a matter of law to establish a claim for battery

*Haeussler* (neighborly confrontation over dog)

- when using self defense, you must not use more force than the ordinary person and what is reasonably necessary to protect yourself
- RULE: One who is in an altercation with another has the right to use such force as is necessary to protect himself from bodily injury.
  - The question of the amount of force justifiable under the circumstances of a particular case is one for the trier of fact.

*Katko* (spring gun)

- property owners are not permitted to use excessive force, including force calculated to cause death or great bodily harm, to protect their property except to prevent the commission of felonies of violence and where human life is in danger
- The instructions explained that breaking and entering is not a felony of violence
- ISSUE: Whether an owner may protect personal property in an unoccupied boarded-up farm house against trespassers and thieves by a spring gun capable of inflicting death or serious injury.
- RULE: The possessor of land may not arrange his premises intentionally so as to cause death or serious bodily harm to a trespasser.
  - The possessor may of course take some steps to repel a trespasser.
  - If he is present, he may use force to do so.

- If the trespasser threatens harm to property only, the possessor would not be privileged to use deadly force, he may not arrange his premises so that such force will be inflicted by mechanical means.

*Jones* (took bite plate)- sexist case

- D owned a nursing home. P worked for them. P was told that her teeth were bad and that she needed an upper plate. D's volunteered to loan her \$200 for the dental expenses. Shortly after getting the plate, she quit working for the Ds. They argued about the loan. Mr. F seized P and Mrs. F grabbed her face and extracted her upper plate.
- Jury found that Ds committed assault and battery.
- Ct lowered punitive damages from \$2,500 each D to \$1,000 each.

## **False Imprisonment**

The intentional confinement, experienced or harmful, of a person to a bounded area. Unlawfully acts to intentionally cause confinement or restraint of the victim within a bounded area.

- Accidental confinement is not included and must be addressed under negligence or strict liability.
- The victim must be aware of the confinement at the time of the restraint.
- Psychological, physical, and economic injury occasioned by the imprisonment.

## **Elements**

(1) Act (or omission)

- Failure to release

(2) Intent--can be transferred.

(3) Causation

(4) Confinement

- Sufficient methods of confinement
  - Physical barriers
  - Physical force
  - Threats of force
    - can be directed at the victim, her family, companions, or property
    - the restraint that results from not abandoning her property constitutes imprisonment.
    - Ex. victim detained on a yacht surrounded by water without access to rowboat.
  - Invalid assertion of legal authority
- Insufficient methods of confinement
  - Moral pressure
  - Future threats
- Duration of confinement is irrelevant-but obviously, the amount of compensation received will be a factor.

(5) Bounded area

- Movement must be limited in all directions
- Any reasonable and reasonably knowable means of escape negates this element
- The bounded area cannot be the rest of the world, but can be an entire state.

(6) Awareness of harm

- If plaintiff is unharmed, but is aware of the confinement, this element is satisfied
- Likewise, if plaintiff is unaware of the confinement, but is harmed by the confinement, this element is satisfied

(7) Omissions

- False imprisonment can also result from a defendant's omission when the defendant had a legal duty to act.

Improper Assertion of Legal Authority(False Arrest)

- Unlawfully restraining a victim is a form of false imprisonment.
  - The actor making the arrest must be privileged, i.e. police officer, private citizens of cause.
  - Confinement that is privileged is not unlawful.
  - False imprisonment requires that the victim be conscious of the confinement at the time of imprisonment.

## Cases

*Fojtik* : (forced into alcohol treatment) - other sexist case

- Elements of false imprisonment:
  - willful detention by D,
  - without consent of the detainee, and
    - consent is invalid when the action is illegal (IE: Dueling hypo with Erin Burr and Alexander Hamilton)
  - without authority of law. A detention may be accomplished by violence, by threats, or by any other means that restrain a person from moving from one place to another.
- To what extent must Ps insist on their freedom and have it denied them before they can recover for FI?
  - None of the factors that are considered in evaluating whether treats are sufficient to overcome the P's free will, i.e., the relative size, age, experience, sex, and physical demeanor of the participants, weight in F's favor
  - F was not a young, inexperienced woman, not physically restrained
- The fact that Charter permitted F to leave on passes undermines his claim for FI rather than supporting it.

*Grant*: (THE SHOPKEEPERS PRIVILEGE)

- There is an issue of material fact concerning whether Grant was detained, and whether he consented to stay in the store
- D claimed shopkeepers privilege
- The shopkeeper’s privilege provides that a person who reasonably believes another person has stolen, or is attempting to steal property, is privileged to detain that person in a reasonable manner and for a reasonable time to investigate the ownership of the property.
  - Three components:
    - A reasonable belief a person has stolen or is attempting to steal
    - Detention for a reasonable time
    - Detention in a reasonable manner
- The test of liability is based on the reasonableness of the store’s action under the circumstances!
- Stop-N-Go did not negate any element of Grant’s FI claim as a matter of law, and Grant raised genuine issues of material fact on each element. SJ on this claim was improper.

*Thurman:* (stolen lawnmower case)

- Under the doctrine of qualified immunity, government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known
- ISSUE: Whether Miller deprived Thurman of a federal constitutional right.
  - Whether a seizure occurred?
    - The S. Ct. held that a seizure occurs when a gov’t actor “by means of physical force or show of authority, has in some way restrained the liberty of a citizen.”
    - A seizure “requires an intentional acquisition of physical control.”
  - There were 2 seizures here
    - When Miller grabbed Thurman outside of his garage
    - When Miller caught Thurman after pursuing him in the van and on foot
- 3 factors that determine whether force was reasonable
  - “the severity of the crime”
  - “whether the suspect poses an immediate threat to the safety of the officer or others”
  - “whether he is actively resisting arrest or attempting to evade arrest by flight”
- HOLDING: SJ based on qualified immunity is inappropriate. A reasonable jury could find that Miller’s seizure of Thurman was unreasonable in the circumstances. A reasonable jury could conclude that Miller’s conduct created a high probability of serious harm and was unjustified by any offsetting potential benefit to the public.

## **Outrage (IIED)**

The intentional or reckless infliction, by extreme and outrageous conduct, of severe emotional distress

### **Elements**

(1) Act

(2) Intent or recklessness

- Note that recklessness counts as "intent" for outrage
  - Extreme and outrageous conduct-is behavior which is "beyond all possible bounds of decency and to be regarded as atrocious, and utterly intolerable in a civilized community."
- The standard here is high -- must be truly outrageous

(3) Causation (4) Severe emotional distress

- For recovery under IIED, the plaintiff must prove that the defendant intended to cause severe emotional distress or acted with reckless disregard as to whether the victim would suffer severe distress.
- Although characterized as an "intentional" tort, recklessness, in addition to intent, generally suffices for liability.
- Must be enough that plaintiff sought medical attention
  - Requires proof both that the defendant intended or recklessly imposed the risk of severe mental distress and that the victim actually suffered severe mental distress.
- Most states no longer require that the victim suffer physical manifestations of the mental distress.

(5) Issues

- The "eggshell plaintiff" doctrine does not apply to allow unusually sensitive plaintiffs to recover for act that would not cause severe emotional distress in persons generally
- However, if the defendant knows about the unusual sensitivity, a cause of action will lie
- Outrage is also known as "intentional infliction of emotional distress" or "IIED"
- Innkeepers, common carriers, and other public utilities (such as a telegraph company) are liable for intentional gross insults which cause patrons to suffer mental distress.

**Cases**

*Wilson:* (Age discrimination)

- plaintiff was entitled to both back pay and front pay upon determination that employer's conduct in demoting and humiliating plaintiff resulted in constructive discharge
- outrageous conduct has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.... (has to be extreme outrageousness and sever emotional distress).
  - Generally, the case is one in which a recitation of the facts to an average member of the community would lead him to exclaim, "Outrageous."

*Dillon*

- holding that the plaintiff could recover for serious emotional distress for witnessing the accident, even if she was only in "close proximity" to the accident and not within the "zone of danger"
- It seems obvious that the shock of a mother at danger or harm to her child may be both a real and serious injury
- Whether D owes P a duty of due care, cts will take into account such factors as



- Whether P was located near the scene of the accident as contrasted with one who was a distance away from it
- Whether the shock resulted from a direct emotional impact upon P from the sensory and contemporaneous observance of the accident, as contrasted with learning of the accident from others after its occurrence
- Whether P and the victim were closely related, as contrasted with a absence of any relationship or the presence of only a distance relationship
- These factors will indicate the degree of the D's foreseeability

## Trespass to land

An intentional physical invasion of a person's real property. Can be the earth, other material beneath the surface, and "the air space above it."

### Elements

(1) Act

(2) Intent

- The only intent needed is the intent to do the act that results in the physical invasion
- Not knowing that the land belongs to another person does not negate the intent element

Causation

(3) Physical invasion

- Person or object
- Does not include intangibles, e.g., vibrations or odors

(4) Real Property

- Surface
- Subsurface
- Airspace to a reasonable distance

### Statute of Limitations

- Permanent trespass
  - unabatable trespass, the limitations period begins to run when the trespass is first committed.
- Temporary trespass
  - abatable trespass, the limitations period begins anew with each day that D has failed to remedy the trespass.

### Cases

*Burns Philip Food v. Cavalea Contl.*

- ISSUE: Whether Illinois conditions damages on the landowner's notice to the trespasser.
- HOLDING: Judgment vacated and case remanded for two purposes: to limit damages for unjust enrichment to the five-year period preceding the suit, and to calculate and award damages that Cavalea sustained from the trespass.

*Kopka v. Bell Tel. Co.*

- ISSUE: What is the liability of a trespasser for personal injuries suffered by the possessor of land as an indirect result of the trespass?
- A trespass results from an innocent mistake and, in that sense, is not deliberate or willful, does not relieve the trespasser of liability thereof or for any of the results thereof.
- One who authorizes or directs another to commit an act which constitutes a trespass to another's land is himself liable as a trespasser to the same extent as if the trespass were committed directly by himself, and this is true even though the authority or direction be given to one who is an independent contractor.
- One who trespasses upon the land of another incurs the risk of becoming liable for any harm which is caused to the possessor of the land by any conduct of the trespasser during the continuance of his trespass no matter how otherwise innocent such conduct may be.

## **Trespass to chattels**

An intentional interference with the right of possession of personal property.

D's acts must damage the chattel, deprive the possessor of its use for a substantial period of time, or totally dispossess the chattel from the victim.

### **Elements**

(1) Act

(2) Intent--can be transferred

(3) Causation

(4) Interference

(5) With right of possession

- Physical contact
- Dispossession
- Interference with use

(6) Chattel

- something tangible that you own, livestock, computer
- Not people
- Not real property
- Not intangible property
  - Unless reduced to a tangible form (e.g., negotiable bearer bond)

## (7) Issues

- Distinguish from conversion
  - Conversion exists only when the damage or other interference with the personal property is sufficiently serious to justify a forced sale to the defendant. The defendant is liable for the entire market value of the chattel and not simply a smaller repair or rental cost.

Bad Faith not Required--killing a dog thinking it was a wolf.

- See notes below

## **Necessity (Distinguished from self-defense)**

2 kinds of necessity

(1) Private necessity - Incomplete defense where you owe compensation for the damage you cause (no punitive damages or injunction)

- Exists when individual appropriates or injures a private prop interest to protect a private interest valued greater than the injured prop
- Individual has the privilege to interfere w/prop right of another to avoid greater harm but must compensate P for interference

(2) Public necessity - Complete defense where you do not owe compensation for damage you cause if you are trying to defend the public from something

## **Cases**

*Vincent v. Lake Erie Trans Co.*

- Steamship Reynolds, owned by D, was discharging her cargo moored to P's dock in Duluth. During unloading a storm developed. Reynolds signaled for a tug, but none could be obtained. During the storm the boat damaged the dock at the amount of \$500.
- Here those in charge of the vessel deliberately and by their direct efforts held her in such a position that the damage to the dock result, and, having preserved the ship at the expense of the dock, it seems to us that her owners are responsible to the dock owners to the extent of the injury inflicted.
- The defendant has a partial privilege to protect its private property from serious harm.
- The defendant will be subject to liability to anyone who is injured.
- That by holding the boat in a position against the dock, having thus preserved the ship at the expense of the dock, then the owner of the boat is liable for damage.

## **Conversion**

An intentional exercise of dominion or control over a chattel which so substantially interferes with the plaintiff's rights as to require defendant to be forced to purchase it at full value.

## Elements

(1) Act

(2) Intent

(3) Interference

(4) Chattel

(5) Substantiality

- So substantial, the act warrants a forced sale

(6) Issues

- Distinguishing conversion from trespass to chattels
  - Factors mitigating in favor of conversion
    - Length of time withheld
    - Amount and severity of damage
    - "Totaled"
  - Factors tending to negate conversion
    - Repairable damage
    - Temporary nature of deprivation
- In the remedy for conversion, after paying damages, the defendant retains the converted property
- Purchasing stolen property, even if the purchaser was acting in good faith and not aware the seller did not have title, constitutes conversion by both the seller and innocent buyer. Both the seller's and the buyer's acts seriously interfere with the ownership of the rightful owner.

## Cases

*Moore v. Regents of UCLA*

- Moore theorizes that he continued to own his cells following their removal from his body, at least for the purpose of directing their use, and that he never consented to their use in potentially lucrative medical research
- "To establish a conversion, plaintiff must establish an actual interference with his ownership or right of possession ....
- Where plaintiff neither has title to the property alleged to have been converted, nor possession thereof, he cannot maintain an action for conversion.
- Since Moore clearly did not expect to retain possession of his cells following their removal, to sue for their conversion he must have retained an ownership interest in them.
- First consider – Whether the tort of conversion clearly give Moore a cause of action under existing law. The court does not believe it does.
- Next consider – Whether it is advisable to extend the tort to this context.

## Defenses

- *Consent*: If the asserted victim gives permission, what would otherwise be tortious is instead privileged.
- *Self-Defense*: Reasonable force can be used where one reasonably believes that such force is necessary to protect oneself from immediate harm
- *Defense of Others*: a person can use reasonable force to protect a 3rd person from immediate unlawful physical harm
- *Defense and Recovery of Property*: An individual is privileged to use reasonable force to prevent a tort against her real or personal property. BUT a reasonable mistake will not excuse force that is directed at an innocent party.

# Nuisance; Strict Liability; Products Liability

## Contents

- 1 Nuisance
  - 1.1 Cases
- 2 Strict Liability
- 3 Products Liability
  - 3.1 Cases

## Nuisance

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### Nuisance

- Nuisance arises from an allegation of injury to person or property
- Injury need not be physical and can include injury to rights or property enjoyment

2 distinct categories

#### (1) Public Nuisance

- D's conduct may create an actionable public nuisance where it either interferes w/public right or convenience, or public health or safety
- Complainant need not have a prop or use interest in any prop affected by D's conduct

#### (2) Private Nuisance

- May constitute a private nuisance when it interferes w/another's current possessory or beneficial interest in use or quiet enjoyment of land
- Complainant seeks to protect his own, current interest in undisturbed enjoyment of or benefit from prop
- P need not own prop – but need only be lawful occupant or holder of one or more other use rights

Actor's conduct may incur liability both public and private nuisance

- Essential element of actionable nuisance is persons having suffered harm or are threatened w/injuries that they ought not have to bear
- Threaten to cause incalculable damage to general public

Nuisance and Trespass Distinguished

- Claim in trespass
  - Seeks damages for physical intrusion onto prop (pollution or contamination of P's prop by a substance, article, or object) – where intrusion is permanent or if not at least serious or persistent – suit in trespass
    - Interference w/P's current possessory interest in prop
- Claims of Nuisance
  - D's conduct creates conditions of noise, lights, odor or vibration that interferes w/P's quiet enjoyment of property
  - Vexing and an interference w/P's enjoyment or exploitation of prop are not generally considered to dispossess P of all or part of current possessory interest thus considered private nuisances
- Nuisance and Trespass distinguished on basis of the duration of the interference
  - Fleeting or temporary interference w/P's right to enjoy prop might be categorized as nuisance while invasion of prop if chronic could be trespass
- Distinction between "continuing" and "permanent"
  - Continuing could be abated at any time like smokestack
  - Permanent is an interference or intrusion that has no ready means of elimination like mercury contamination of a marshland
  - Primary significance between the two
    - where nuisance or trespass is permanent, P must bring cause of action and must seek all damages in one suit
    - Where nuisance or trespass is continuing the continuing nature of the wrong permits P to bring successive actions as damages accrue until abatement takes place
  - "Permanent" referred to as indefinite" and court held permanent damages should be recoverable when a nuisance results in contamination of prop for indefinite period of time

### **Private Nuisance**

(1) Elements

#### ***(a) Unreasonable Interference***

- An unreasonable interference with the use or enjoyment of the owner or possessor's prop interest
- Unreasonable intrusion on land of prop owner – very loud music, toxic contamination, etc. will constitute nuisance if unreasonably interferes w/occupant's capacity to use or quietly enjoy prop
- Distinction between use and enjoyment – prevent use or interfere w/enjoyment

- At common law - "smoke, offensive odors, noise or vibration" that "materially interfere" with possessor's "ordinary comfort" may constitute a nuisance

**(b) Current Possessory Interest**

- Private nuisance claim can only be brought by one w/a current possessory or beneficial interest in property
- A possessory interest in land exists in a person who has physical relation to land which gives certain degree of physical control over the land and intent to exercise control to exclude other members of society in general from occupation of the land

**(c) Intentional or Unintentional Conduct**

- Restatement Section 822 - establishes liability in private nuisance for:
  - An invasion of another's interest in private use and enjoyment of land where invasion is:
    - (1) Intentional and unreasonable; or
    - (2) Unintentional and otherwise actionable under rules controlling liability for negligent or reckless conduct or abnormally dangerous conditions or activities
- Restatement Section 825 provides:
  - An invasion is "intentional" if the actor:
    - (a) Acts for purpose of causing it or
    - (b) Knows it is resulting or substantially certain to result from it
  - For conduct to be intentional D does not have to act for purpose of causing invasion or harm but knows it is substantially certain to result
- Liability in nuisance is predicated upon unreasonable injury rather than on unreasonable conduct
  - Claim of intentional private nuisance does not req evidence that D acted w/o due care under the circumstances

**(2) Nature of the Interest Interfered With**

- Particular use and sensitivities of persons using prop are important factors in evaluating if Ds conduct constitutes an unreasonable interference that rises to the level of a nuisance
  - Ex. sulphurous smell on the p premises of a nursery school playground
  - Factors – type of neighborhood, proximity to structure, frequency of use, and nature of resulting harm
- A landowner who has contaminated a prop and then sold it to another may remain liable “for continuation of the nuisance” after transfer
- Interference must be real and substantial

**Public Nuisance**

**(1) Generally**

- An unreasonable interference w/a right common to the general public
- Circumstances that might give rise to D's activity creating an unreasonable interference w/a public right include:

- (1) Whether the conduct involves a substantial interference w/public health, public safety, public peace, public comfort or public convenience,
- (2) Whether conduct is of a continuing nature or has produced a permanent/long-last effect and to actor's knowledge has a substantial detrimental effect on the public right

## (2) Proper Complainants

- Who may bring suit in public nuisance? – depends whether for damages or equitable relief (injunction or abatement)
- Public Nuisance Suit
  - Suit for damages may be brought by public official or agency, or private individual or business that has suffered harm of different from that suffered by other members of the public
  - "Special injury" rule
    - For private party showing injury "different in kind" from that suffered by the public generally
  - Suit for equitable relief Ps may be:
    - (1) Public body or agency bring suit on behalf of public;
    - (2) Private party suffered "special injury";
    - (3) Class representatives of a class action; or
    - (4) One w/standing to bring a citizen suit under state/federal law.
- Who has standing in these public nuisance cases? – Gov can always be a P

## (3) Special Injury Rule

- Individual may sue another in public nuisance where he proves there is a substantial interference w/a right common to the public and has suffered special harm that is different from harm(s) burdening public at large
  - Ex. P owns fishery w/contract to stock the lake that became polluted – suffered economic loss and the community at large lost right to fish and enjoy lake, etc.
- If public nuisance was proved, Ps would be able to recover for
  - (1) Loss in rental value of prop;
  - (2) Compensation for physical injuries (usually held to be "special injuries"); and
  - (3) upon showing independent personal injury, damages for emotional distress

## (4) Environmental Harm

## (5) Economic Loss

## (6) Prospective Nuisance

- A court may grant an injunction or order of abatement to stop risk of future harm where risk is substantial and harm is imminent

## Cases

- *Sturgis v. Bridgman*, 11 Ch.D. 852 (1879):



- Confectioner has been using home for his business for over 20 years. In the kitchen of the house are two large mortars used to pound meat. The physician lives across the street and he recently built a consultation room on the side of his house. The noise of the mortars caused him inconvenience.
- The smith in this case supposed might protect himself by taking sufficient cartilage to ensure what he does from any time is not an annoyance to his neighbor
- *Penland v. Redwood Sanitary Sewer Serv. Dist.*, 965 P.2d 433 (Or. Ct. App. 1998)
  - Five factors
    - Location of the claimed nuisance
    - Character of the neighborhood
    - Nature of the thing complained of
    - Frequency of the intrusion
    - Effect upon the P's enjoyment of life, health, and property
  - Whether a condition constitutes a nuisance depends on its effect on "an ordinarily reasonable person, a normal person of ordinary habits and sensibilities."
  - The composting operation is a nuisance
  - The odor did in fact substantially and unreasonably interfere with Ps' use and enjoyment of their property
  - It does not follow that an injunction should issue as a matter of course. The court may refuse an injunction in certain cases where the hardship caused to the D by the injunction would greatly outweigh the benefit resulting to the P. The injunction does not issue as a matter of absolute or unqualified right but is subject to the sound discretion of the court.
  - The hardship to the District from the issuance of an injunction does not "greatly outweigh" the benefit to the Ps. There is no question that relocating the composting operation will be expensive.
- *Boomer v. Atlantic Cement Co.*, 257 N.E.2d 870 (NY 1970): (D operates large cement plant near Albany.)
  - Two Questions
    - Whether the court should resolve the litigation between the parties as equitably as seems possible; or
    - Whether, seeking promotion of the general public welfare, it should channel private litigation into broad public objectives
  - It seems that the court resolves this case equitably because they did not grant an injunction but only temporary damages and permanent damages

## Strict Liability

Strict Liability = liability without fault

- a person will be held liable in damages for injury or loss even if he exercised all possible care to prevent it
- a recognized subset of conduct for which, should injury or damage occur, the actor will be responsible in damages without regard to due care or fault

## 2 categories of strict liability

- Strict liability for damage or injury caused by animals owned or possessed by D
- Strict liability for abnormally dangerous activities ranging from blasting operations to aerial pesticide spraying - that pose unavoidable risk of substantial harm to others even where the actor has exercised the utmost care

Two reasons to have it:

- Judge Posner says...wants the actor to consider the possibility of making accident-reducing activity changes.
- Prof Fletcher says...rationale focuses on the non-reciprocal nature of the risks to which D's conduct exposes P.

## Negligence vs. Strict Liability

- Duty –vs. X (SL Qualifier - wild animals)
- Standard of care – vs. X (SL Qualifier)
- Breach – vs. X (SL Qualifier)
- Cause-in-fact (actual cause) - yes
- Proximate cause - yes
- Damages – yes
  - Intent not needed in either SL or negligence

## Defenses

- Assumed the risk or comparative fault
- In SL, you cannot have comparative fault, but there is still a defense
  - The person who harbors the wild animal may have a defense—all depends on the incident and the jurisdiction

## (1) Animals (owned or possessed by D)

- *Livestock*:
  - Possessor of trespassing livestock liable unless:
    - The harm is not a foreseeable one
    - The trespass by animals being “driven”/herded along the highway is confined to abutting land
    - State common law or statute requires the complaining landowner to have erected a fence
  - Dogs & cats are exempt (b/c they are “difficult to restrain & are unlikely to do any substantial harm by their intrusion”)
  - A separate provision is made for animals that demonstrate a dangerous propensity not characteristic for the species (ie, horse that developed a habit of attacking persons whom wander into a pasture)
- *Domestic Animals* = “customarily recognized as devoted to the svc of mankind”
  - Liable only where the possessor knew or should have known of the animal's vicious disposition “and no measure of care in its keeping will excuse him”

- In many Jurisdiction's, dog bite statutes supersedes the CL & creates the exclusive remedy for dog bite victims
- *Wild Animals:*
  - Possessor is liable even though the utmost care was exercised
  - The keeper of a wild animal "is req'd to know the dangerous properties normal to the class to which it belongs"
  - Some Jurisdiction's, have manifest a reluctance to extend Strict Liability this far unless directed to do so by the Legislature & opt instead for a negligence std
- *Defenses*
  - P's contributory negligence should not bar a claim in some jurisdictions
  - However - P's assumption of risk is a defense (minority)
  - Comparative fault in some Jurisdiction's (minority)
- Restatement of Torts § 515
  - A P is not barred from recovery by his failure to exercise reasonable care to observe the propinquity of a wild animal or an abnormally dangerous domestic animal or to avoid harm to his person, land, or chattels threatened by it
  - A P is barred from recovery by intentionally and unreasonably subjecting himself to the risk that a wild animal or abnormally dangerous domestic animal will do harm to his person, land, or chattels

*Issacs v. Monkeytown, U.S.A.*

- Dad lifted P up to feed monkeys and was injured in the arm because he was lifted too high
- strict liability not used in this 1st impression case, instead negligence std at trial
- appellate ct reversed & held majority rule of strict liability std for wild animals
- 2 views
  - Strict or absolute liability doctrine under which negligence or fault on the part of the owner or keeper of an animal *Ferae naturae* is irrelevant
  - Minority view that liability should depend upon negligence, i.e., a breach of the duty of care reasonably called for taking into account the nature and specie of animal involved

**(2) Ultrahazardous activities (abnormally dangerous)**

Abnormally dangerous = The activity creates a foreseeable & highly significant risk of physical harm even when reasonable care is exercised by all actors; and the activity is not one of common usage

- Danger unavoidable even with the exercise of due care
  - Requirement of an activity under D's control
  - Type of hazard contemplated
    - Pose an unavoidable risk of substantial harm to others even where the actor has exercised the utmost care
    - D's conduct must be characterized as "abnormally dangerous"
    - P can prove liability w/out having to prove D's culpable conduct
    - P must show:
      - The risk of an abnormally great harm should D's safety efforts fail
      - The virtual impossibility of D's elimination of the risk of harm even with the utmost care

- A resultant harm to P, or P's prop, caused by the very hazards the risk of which led to describing D's conduct as "abnormally dangerous" in the 1st instance
- no intent by D req'd
- in many cases of explosives injuries, locational appropriateness should have no bearing & liability should be truly strict
- ***Six factors in determining if an activity is "abnormally dangerous"***
  - Existence of a high degree of risk of some harm to the person, land, or chattels of others
  - Likelihood that the harm that results from it will be great
  - Inability to eliminate the risk by the exercise of reasonable care
  - Extent to which the activity is not a matter of common usage
  - Inappropriateness of the activity in the place where it is carried on, and
  - Extent to which its value to the community is outweighed by its dangerous attributes
- Defenses
  - Only the Ps assumption of the risk is a Defense to a SL action based on an abnormally dangerous activity

*Rylands v. Fletcher* : Reservoir built on the mine case in England

- American courts adopted to form this non-negligence doctrine of Strict Liability
- the person who, for his own purposes, brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril; and if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape.
- If by the operation of nature, that accumulation of water had passed off into the land of the P, the P could not have complained that that result had taken place.
- **Rule:** The D will be liable when he damages another by a thing or activity unduly dangerous and inappropriate to the place where it is maintained, in the light of the character of that place and its surroundings

*Klein v. Pyrodene Corp. (1991)*: Fireworks case where P was injured. Court held strictly liable; products liability claim was dismissed.

- Detonating fireworks displays constitutes an abnormally dangerous activity warranting strict liability. Public policy also supports this conclusion. Furthermore, RCW 70.77.285 mandates the payment of all damages caused by fireworks displays, regardless of whether those damages were due to the pyrotechnicians' negligence. This establishes the standard of strict liability for pyrotechnicians.

## Products Liability

- Definiton - refers broadly to the decisional and statutory law permitting money damages from manufacturers and sellers of defective products that injure persons or property

4 Principal Doctrines Underlining PL Suits

(1) negligence

(2) breach of one or more warranties

(3) liability w/o fault – strict products liability

(4) misrepresentation

#### **Prima Facie Case - Elements to prove in PL suit**

- D is subject to liability to P in products liability if:
  - P has suffered an injury;
  - D sold a product;
  - D is a commercial seller of such products;
  - At the time it was sold by D, the product was in a defective condition; and
  - The defect functioned as an actual and proximate cause of P's injury.

Comparing PL elements to negligence

- Injury and causation elements (1) and (3) are parallel to negligence
- Duty and breach elements are absent – in their place there are 3 new elements in PL
  - (2) sale of product, (3) by a seller, (4) in a defective condition

*Defining Terms Injury*

- Whether the owner of a product can invoke products liability law to cover for a defect that causes damage to, or the destruction of, the product itself.
  - General Rule: The owner cannot and is instead left to the protections he was able to obtain in the contract of sale via express or implied warranties. “Economic Loss Rule”
- Tangible property damage caused by a product defect to property other than the product itself is ordinarily actionable in products liability.

Product

- Services even when provided commercially are not products.
- As an item comes more closely to taking the form of real property, it is unlikely to qualify as a product.
- Human body parts, tissues, blood products, and cells are usually not considered products.
- Live animals sold as pets or livestock are frequently not considered products.
- Textual material, such as encyclopedias, guides, or books, are generally not considered products.
- Intangibles, such as electricity and x-rays, reside at the margin.
- Used products are not normally subject to strict products liability.
- Some jurisdictions deem a type of item to be a “product” but nevertheless have made a deliberate decision to exempt the product from the reach of product liability laws (i.e. prescription drugs and vaccines)

Seller

- Retailers
- Manufacturers
- Distributors

- Some jurisdictions require only that the P be w/in a class of persons foreseeably put at risk by the defective product.
- A person or entity who sells a product does not qualify as a seller unless she is in the business of selling or marketing such products.
- Courts will look at the underlying reality of the transaction, and ask whether the D has placed the product in the stream of commerce.
- If the courts deem the D to be engaged primarily in a service, rather than a sale, they will not treat the D as a seller of the product
- The seller and manufacturer of the component part will be liable. However, the component manufacturer may be able to demonstrate that there was nothing intrinsically defective in its product and that the problem was simply that the larger product did not function optimally with that component.

### **Design Defect - 2 tests**

(1) Consumer expectations test: a product is defective in design if aspects of its design render it more dangerous than an ordinary consumer would expect it to be

- The concept of a flaw or a defect can be given content by comparing the actual product to a prototype in the mind of the ordinary consumer

(2) Risk-utility test: a product is defectively designed if the risks of its design outweigh its utility

- Whether the utility of the design- better visibility, easier maneuverability, etc.- outweighs the heightened risk of bodily harm the design poses as compared to cars with more substantial front ends.

### **Nature of Product Defects**

(1) Manufacturing Defect (mismanufacture):

- The product diverges from the manufacturer's own specifications for the product

(2) Design Defect (defective design for safe use):

- There is a flaw in the plan or specifications for a whole line of products. The flaw may be small or technical, or may go to the essence of the product.

(3) Failure to Warn or Instruct (failure to give adequate warnings or instructions for safe use):

- When safety requires that the product be sold with a warning, but the product is sold without the warning

### **Prescription Drugs**

- A Plaintiff-friendly approach:
  - A P alleging injuries caused by use of a prescription drug
  - Sold by the seller with adequate warnings of health risks
    - That are posed by the drug's use, and
    - Of which the seller knew or should have known at the time of the sale,

- May not invoke either the consumer expectations test or the risk-utility test

## Cases

### Products Liability; Manufacturer and Seller Liability

*Escola v. Coca Cola*: coke bottle broke in hand

- Majority applied Res Ipsa Loquitur
  - Under the general rules, it must appear that bottles of carbonated liquid are not ordinarily be defective w/o negligence by the bottling company.
  - All the requirements necessary to entitle P to rely on RIL to supply an inference of negligence are present.
- Concurrence – Traynor
  - A manufacturer incurs an absolute liability when an article that he has placed on the market, knowing that it is to be used without inspection, proves to have a defect that causes injury to human beings.
- Just call it strict liability for defective products; that’s what it is; don’t contort the other doctrines b/c it’s too confusing

*Greenman v. Yuba Power Products*: wood hit him in head

- Civil Code § 1768: In the absence of express or implied agreement of the parties, acceptance of the goods by the buyer shall not discharge the seller from liability in damages or other legal remedy for breach of any promise or warranty in the contract to sell or the sale. But, if, after acceptance of the goods, the buyer fails to give notice to the seller of the breach of any promise or warranty within a reasonable time after the buyer knows, or ought to know of such breach, the seller shall not be liable therefor.
- Even if P did not give timely notice of breach of warranty to the manufacturer, his cause of action based on the representations contained in the brochure was not barred.
- Manufacturer is strictly liable if P proves that the Shopsmith caused his injury.
- Traynor's decision - jury should conclude that the manufacturer negligently put the machine together because of the screws used
  - Also, manufacturers should be held strictly liable

*Cronin v. J.E.B. Olson Corp.*

- P was driving a delivery truck and was passing a pick-up, the impact caused the safety clasps to break causing the baked goods trays to hit and injure P
- Although the seller should not be responsible for all injuries involving the use of its products, it should be liable for all injuries proximately caused by any of its products which are adjudged “defective.”
- Whether the injured P seeking recovery upon the theory of strict liability in tort must establish, among other facts, not only that the product contained defects which proximately caused his injuries but also that such defect condition made the product unreasonably dangerous to the user or consumer.
  - No, he need not do so.
- Restatement § 402A (CB 832)

## Defects

*Gower v. Savage Arms*: gun went off

- claimed various defects
  - warning defect - he didn't get the booklet with the gun (manufacturer did supply one when it left factory)
    - supplier has duty to warn and pass along the safety booklet when someone buys a gun
  - unloading defect
    - since P was not unloading on discharge, then his claim is insufficient
  - detent defect
    - If you have a knob that you turn, you feel the sensation that drops or clicks into a certain place, this is a detent defect if it doesn't set into a certain place

*Cepeda v. Cumberland Eng'g Co.*: Design defect

- Distinction between ordinary manufacturing defects and defects of design
- Consider whether a balanced consideration of the following factors did not preclude liability as a matter of law
  - The usefulness and desirability of the product – its utility to the user and to the public as a whole
  - The safety aspects of the product – the likelihood that it will cause injury, and the probable seriousness of the injury
  - The availability of a substitute product which would meet the same need and not be as unsafe
  - The manufacturer's ability to eliminate the unsafe character of the product w/o impairing its usefulness or making it too expensive to maintain its utility
  - The user's ability to avoid danger by the exercise of care in the use of the product
  - The user's anticipated awareness of the dangers inherent in the product and their avoidability, b/c of general public knowledge of the obvious condition of the product, or of the existence of suitable warnings or instructions
  - The feasibility, on the part of the manufacturer, of spreading the loss by setting the price of the product or carrying liability insurance

## Prescription Drugs

*Sindell v. Abbott Drugs*: mother took drug when pregnant, caused problems

- General Rule: The imposition of liability depends upon a showing by the P that his or her injuries were caused by the act of the D or by an instrumentality under the D's control.
  - There are exceptions to this rule
    - Summers v. Tice theory: places the burden of proof of causation upon tortious Ds in certain circumstances
    - Ds acted in concert to cause injury to P
    - theory of enterprise liability or industry-wide liability
- Court concludes that these doctrines may not be applied to hold Ds liable under the allegations of this complain, but it proposed and adopts a 4th basis grounded upon an extension of Summers.



- Under the court's rule, each manufacturer's liability for an injury would be approximately equivalent to the damages caused by the DES it manufactured.

*Freeman v. Hoffman La-Roche*: P seeks damages for injuries she sustained following her use of the drug Accutane for chronic acne

### **Failure to Warn or Instruct**

*Anderson v. Owens-Corning Fiberglas Corp*

- P inhaled asbestos when he was around a ship yard; P was injured by exposure and claims negligence, breach of warranty, strict liability, and punitive damages
- Exclusion of state-of-the-art evidence, when the basis of liability is a failure to warn, would make a manufacturer the virtual insurer of its product's safe use, a result that is not consonant with established principles underlying strict liability.
- The manufacturer is liable if it failed to give warning of dangers that were known to the scientific community at the time of manufacture or distribution
- A defendant in a strict products liability action based upon alleged failure to warn of a risk of harm may present evidence of the state of the art

### **Proving Actual Causation in Failure to Warn**

*Motus v. Pfizer, Inc.*: bad opinion, Zolofit suicide case

- California follows the learned intermediary doctrine which states that in the case of prescription drugs, the duty to warn "runs to the physician, not to the patient."
  - A manufacturer discharges its duty to warn if it provides adequate warnings to the physician about any known or reasonably known dangerous side effects, regardless of whether the warning reaches patient
- an overpromotion theory is one way that a P in a failure-to-warn case can overcome the manufacturer's argument either
  - that it provided adequate warnings OR
  - that the doctor's decision to prescribe a drug despite his awareness of its dangers was an intervening cause sufficient to vitiate the manufacturer's liability

### **Worker's Compensation**

- Not torts, a statutory scheme that is an alternative to torts
- History: employees had a hard time suing their employers when there was injuries in the work place
- Workers are more likely to get compensation from workmen's comp because you don't have to prove negligence
  - But workers cannot get punitive damages and their recovery is more limited than what it would be for damages under torts
- Various circumstances can bar your recovery for worker's comp, depending on jurisdiction but the following are things that are looked at
  - Horseplay
  - Recreational activities such as an employer sponsor softball game
  - Commuting to and from work
  - Personal activities on business trips

### 3 kinds of risks

- Occupational - Always rises out of employment and will be covered; directly related to job at hand
- Personal - never rises out of employment and will never be recovered
- Neutral - gray area, sometimes accidents are covered and sometimes they are not (depends on type of risk) from least to most likely to be compensated
  - Proximate cause - foreseeability
  - Peculiar risk - risk has to be peculiar to the employment
  - Increased risk - so long as the kind of injury you suffered is one where your job puts you in increased risk then you are covered
  - Actual risk - as long as the risk is one that actually accompanies employment and will be compensated
  - Positional risk - if an injury would not have occurred but for a fact you were in a certain place because of your job, then it's covered

### Difference between worker's comp and torts

- Causation: for worker's comp, causation is replaced with the concept arising out of the course of employment
- Benefits: instead of being based upon how much P has suffered or lost, it's based around the idea of P's lost earning capacity

### 4 elements you must prove for worker's comp

- Must be a personal injury
- That results from an accident
- That occurs during the course of employment
- And arises out of employment

### Benefits from workman's comp

- medical care paid for
- disability - temporary partial/total, permanent partial/total, death
- precludes tort suits - intentional wrongs, fraudulent concealment, dual capacity, 3rd party D's or P's

# Oblique Torts

## Contents

- 1 Oblique Torts
  - 1.1 Fraud
  - 1.2 Intentional Interference
  - 1.3 Breach of Fiduciary Duty
  - 1.4 Defamation

- 1.5 Constitutional Limitations on Punitive Damages
- 1.6 Invasion of Privacy
- 1.7 Seduction
- 1.8 Criminal Conversation
- 1.9 Alienation of Affection
- 1.10 Misuse of legal process
- 2 Matrix for Intrusion of Privacy Torts

## Oblique Torts

### Fraud

Fraudulent Misrepresentation – provides recovery for pure economic loss, unassociated with other injury

5 elements:

(1) Material Misrepresentation

- Even a technically accurate statement can constitute a misrepresentation if it is intended to
- Doesn't need to be verbal – physically disguising a defect can suffice
- NOT mere opinion unless opinions by an expert to a non-expert
- Materiality – If either a reasonable person would attach importance to it in determining his action in the relevant transaction, OR the maker of the statement either knows or should know the other person is likely to regard it as important.
  - Past or present material fact

(2) D acted with requisite scienter

- D has to know that the misrepresentation was false or acted w/ reckless disregard as to its falsity

(3) Intent to induce reliance

- Joke is not actionable

(4) Misrep caused justifiable reliance (causation)

- Sometimes limited by unforeseeable losses

Justifiable – detrimental – reliance

- NOT justified if the misrepresentation is immaterial or is mere opinion
- Case specific – look to the qualities and characteristics of the particular P, and her circumstances

(5) Pecuniary damages

- “Benefit of the bargain” – expectation damages; PD if malice is proven

*Pinnacle Peak Developers v. TRW Investment Corp.* – Alleged fraud = oral agreement “not to worry about the off-site improvements” & the express K which said “you can exercise the option ‘if and only if’ you complete “off-site improvements.”

1. HOLDING: Evidence of a prior oral statement was inadmissible under the parol evidence rule despite allegations of promissory fraud because:
  1. There was a clear contradiction between the written agreement and alleged oral representation
  2. Parties were experienced
  3. Parties were represented by counsel
  4. It involved a relatively substantial and sophisticated real estate transaction
  5. The written option agreement was a “formal contract”

*Committee on Children’s Television, Inc. v. General Foods Corp.* –  $\Delta$ ’s advertising of certain sugared breakfast cereals was fraudulent, misleading, and deceptive.

1. Unfair Competition/Consumer Protection COA: Didn’t need to plead the exact language of every deceptive statement; description of  $\Delta$ ’s scheme to mislead customers was sufficient.
  1. POLICY: Impractical for  $\pi$ ’s to compile every advertisement, which change constantly
  2. The organizational  $\pi$ ’s had standing because the statutes permitted a complaint by any person on behalf of the general public.
2. Fraud COA: Individual  $\pi$ ’s could prove damages
  1. *Comparative Negligence* doesn’t have an impact on fraud.
  2. Organizational  $\pi$ ’s could not prove the damages element = no standing
3. Breach of Fiduciary Duty COA: doctrine not for fighting fraud

## **Intentional Interference**

### ***Intentional interference with Contract:***

- Allows recovery when the D intentionally interferes with a valid contract between other parties
- Damages in such cases can be awarded for:
  - Economic losses
  - Mental distress
  - Punitive Damages if malice is proven
- Justification or Exceptions
  - For an interference with non-terminable at will contracts, but they are quite limited.
    - Ex. There is no liability if the D interfered with a Contract that was illegal or against public policy

### ***Intentional Interference with Prospective Economic Relations***

- Allows recovery when D intentionally and unjustifiably disrupts the Victim's economic expectations not embodied in an actual contract
- Damages can include an action for lost business
- Justification of Exceptions
  - Same as above
  - Also fair competition is a justification

### ***Elements of both Interferences***

(1) *A valid K or economic expectancy between the P and 3rd Party*

- Requires proof of valid Contract
- Mere hope for customers or economic profit is insufficient

(2) *Knowledge of the valid K or economic expectancy by D*

- D must know facts from which she should have concluded that a valid contract existed

(3) *Intent by D to interfere with the K or economic expectancy*

- The interference must be intentional

(4) *Interference caused by the D (causation)*

- The D must have actually caused the interference

(5) *Damages to P*

- P must have suffered damages

### ***Justifications for Interference***

- There are 4 sets of circumstances that justify both interference
  - Statements of truthful information or honest advice within the scope of the request
  - Interference by a person responsible for the welfare of another while acting to protect that person's welfare
  - Interference with a contract which is illegal or violates public policy
  - Interference by someone when protecting his or her own legally protected interests in good faith and by appropriate means

### ***Sallywags***

- Restaurant owned by P who leased property to F
- F managed business as P's employee, but F started talking with D who convinced F to take over the business and they would help him get started
- F terminated his relationship with P
- Court deemed it an interference of F's K with P

### **Breach of Fiduciary Duty**

- Elements of Breach of Fiduciary Duty
  - The existence of a fiduciary relationship
    - Trustee/beneficiary
    - Attorney/client

- Directors/officers to corp
- Agent/principal
- Partner/partner
- Joint venturer/joint venture
- Its breach
- Damage proximately caused by that breach

*April v. KTTV*

- ISSUE: Whether P has pleaded a cause of action for breach of fiduciary duty of a joint venture
- Joint venture: an undertaking by 2 or more persons jointly to carry out a single business enterprise for profit
- The elements necessary for its creation are
  - Joint interest in a common business
  - With an understanding to share profits and losses
  - A right to joint control
- A joint venture continues until the purpose for which it was formed has been accomplished or it is expressly extinguished
- HOLDING: Yes, 1st amended complaint sufficiently alleged facts sufficient to support a cause of action for breach of fiduciary duty of a joint venture. The issue needs to be determined at trial.

## **Defamation**

### **Four Elements**

- (1) Defamatory Statement
- (2) Of and Concerning the P
- (3) Publication of Defamatory statement
- (4) Damage to Ps Reputation

### **Defamatory Statement**

- P must persuade jury statement at issue is defamatory
- Under CL statement must hold P up to scorn, ridicule, or contempt or Rest – is defame if tends to harm the reputation of another as to lower him in estimation of community or deter 3rd persons from associating or dealing w/him
- Defam statement is one that harms the reputation by injury a person's general character or causing personal disgrace
- Reasonable person std giving language its fair and natural meaning rejecting extreme interps

#### (1) Defamatory to Whom?

- It is not necessary P show most ppl would have interpreted the statement in a defame fashion – enough P shows a substantial and respectable minority would comprehend defame nature of the communication

(2) Statement Not Facially Defamatory – Inducement and Innuendo

- Sometimes defamatory impact can only be understood by the addition of extrinsic info where P needs to plead extra facts to make the statement defamatory (inducement) or to explain the defame impact (innuendo) if not obvious

**Of and Concerning the P**

- P must show defamatory communication was understood as referring to her
- If P can show this it is irrelevant D did not intend to refer to P

(1) Group Defamation

- Defam communications discrediting behavior to unnamed members of a group
- In a small group each of the ppl could bring defamation action if reasonable reader could believe if referred to any 1 individual of that group

(2) Corporate Ps

- Corps and business entities where communications defames their business character (ex. trustworthiness) or deters 3rd parties from dealing w/them

**Publication and Republication**

- P must establish the defame communication was published
- Actually means to simply reach a single 3rd party other than defamation P

**Damages**

- Ps reputation injury may be presumed permitting P to recover compensation w/o any proof beyond defame nature of communication
- General damages – provide comp for emotional trauma and harm suffered by Ps who rep was ruined
- Whether P has to prove special damages depends on whether defame communication is considered libel or slander

(1) The Libel/Slander Distinction

- Slander is an oral utterance (by sound)
- Libel is a more permanent expression like a writing, photo, or statue (by sight)

(2) Slander and Slander *Per Se*

- P generally must meet burden of pleading and proving special damages
- Special “slander per se” – sometimes proved due to extreme reputational injury to P w/o proof of special damages
  - Four traditional slander per se categories permit presumed reputational damages absent special damage
    - (1) slanderous communications directly call into question Ps competence to perform her job

- (2) Statements claiming P has a current and bad disease like syphilis
- (3) Allegations of serious criminal misbehavior
- (4) Sexual misconduct regardless of gender

(3) Libel and Libel *Per Quod*

- Any libel P may recover general (presumed) damages
- Libel per se (libel on its face) from libel per quod (libel that req extrinsic evidence such as inducement or innuendo)
- For libel per quod – P must show special damages unless falls into per se categories

**Common Law Defenses**

- Most important CL defense - truth

(1) Consent of P

(2) Substantial Truth

- Defam cause of action intended to permit Ps to vindicate rep harm caused by false communications about P
- If communication was true, no basis for defamation action
- D does not establish truth by showing literal truth of communication, but needs to show the truth of the underlying allegation, not just accuracy of it
- While D had to show accuracy and truth of the statement in issue – did not have to show the literal truth of every aspect – substantial truth is the test
  - Ex. where D reports P killed 12 ppl when actually killed 11 vs. where D reports P killed 12 ppl and actually robbed 11 ppl, unlikely substantial truth could be found in the latter

(3) Absolute Privileges

- Absolute privileges under which D could escape liability even if knew the statement was false or published to hurt P's rep
  - Gov proceedings involving judicial, leg, and exec communications
  - Also, comments made outside courtroom similarly privileged if closely related to the litigation, however, attorney's comments about a case to the media would likely not
  - Communications by one spouse to another and tv broadcasts of a candidate's response to another

(4) Qualified (conditional) Privileges

- Based on social utility of protection communications made in connection w/speaker's moral, legal, or social obligations
  - Ex. to not self-incriminate, 3rd party – prospective employer asks about a former employee, employer has qualified privilege to provide info
- 3rd party must need the info and be able to act on it, and must be relevant

**Constitutional Restraints**

(1) STATUS OF Plaintiff



- **Public Officials** – those who are positioned to affect policy (e.g. police, not teacher)
  - *Actual Malice\** – Public official must show that the Δ either knew that the statement was false or recklessly disregarded whether the communication was false by clear and convincing evidence
  - Requires more than Δ's failure to investigate or unreasonable conduct
- **Public Figures** – All-Purpose/widely known (e.g. Bill Gates; NOT socialite, soviet spy, whistle blower, prominent attorney)
  - Limited – voluntarily injects themselves or is drawn into a particular controversy with a limited range of ideas
  - Must have actual malice but with \*lower standard of proof\*
  - They assume the risk of some reputational harm by involving themselves in issues of importance
- **Private Persons** – depends on the Subject Matter; private or public ↓

(2) SUBJECT MATTER – public or private concern

- **Private Concern** – can recover more readily than public because actual injury is more evident; Actual Malice not needed to recover (PD if private π & private subject matter)
- **Public Concern** – Actual Malice needed to recover presumed damages or PD

## Constitutional Limitations on Punitive Damages

*State Farm v. Campbell*

- HOLDING: Few awards exceeding single-digit ratio between PD and compensatory damages will satisfy due process
  - Ratios are not binding, they are instructive
- RULE: 3 guideposts for review PD
  - (1) Degree of reprehensibility of the defendant's misconduct
  - (2) Disparity between the actual/potential harm suffered and PD
  - (3) Difference between the PD award and the civil penalties authorized in comparable cases

## Invasion of Privacy

Four torts for invasion of privacy

### 1. **Intrusion** (upon seclusion)

- One who intentionally intrudes, physically or otherwise, upon solitude or seclusion of another or his private affairs or concerns, subject to liability to the other for invasion of privacy, if intrusion would be slightly offensive to a reasonable person
- Tort addresses acts of intrusion w/a V's zone of privacy
  - Ex. placing a mic in a matrimonial mattress (no req for info to be obtained or communication only if intrusion itself constitutes the interference)
- *Shulman v. Group W Productions, Inc.* (On Scene Emergency Response Documentary)

### 2. **Publicity** (Appropriation of name or picture and right of publicity)

- One who appropriates to his own use or benefit the name or likeness of another is subject to liability to other for invasion of his privacy
  - Ex. unauthorized endorsement of a product, but not to journals or books about a person
  - Also, not tortious to put pic of someone on a magazine and write an article about them
  - Polydoros v. Twentieth Century Fox Film Corp. (Sandlot case)

### 3. **False light** (place P in false light before the public)

- Elements must be established by P include D's
  - (1) publicizing - communicate false facts to substantial number of ppl (greater req than defamation)
  - (2) false facts - includes but not limited to defamatory statements actionable under defamation, seriously damaging to rep that a reasonable person would object to, and
  - (3) in addition, acted with *NYT* malice (knowledge of falsity or reckless disregard toward the truth)
- Overlaps with defamation, easier to evade the special damages reqs for slander etc, by labeling action false light claim

### 4. **Disclosure** (public disclosure of private facts)

- Elements
  - (1) publicity of - D communicate private facts to a significant group of ppl
  - (2) private facts
  - (3) highly offensive to a reasonable person which are
  - (4) not of a legitimate public interest (tort not actionable when revelation of private facts is of legit public interest)
- The disclosure of private fact privacy tort is unlike defamation, b/c makes communication of true facts subject to liability
  - invasion of protected privacy is a valid basis for liability even where info disclosed is accurate

## **Seduction**

- Elements
  - (1) Enticement, Persuasion, or Promise of Marriage
  - (2) Female must be chaste at time of seduction
  - (3) Sexual intercourse as a result of the enticement

## **Criminal Conversation**

- Elements
  - (1) An actual marriage to which P is a party
  - (2) D had sexual intercourse w/ P's spouse
- Originally this cause of action was only for husbands suing for someone having sexual intercourse with their wife. Gradually made so that wife could as well.
- Ex. Thomas v. Siddiqui
  - Abolished Tort of Criminal Conversation in MO

## **Alienation of Affection**

- Elements
  - (1) D engaged in wrongful conduct
  - (2) P lost the affection or consortium of his/her spouse
  - (3) Causal connection between D's conduct and P's loss

## **Misuse of legal process**

1. Abuse of process - RULE: the intentional misuse of either a civil or criminal legal process for an ulterior purpose resulting in damage to the  $\pi$ 
  1. Depositions, subpoenas, and property attachments
  2. The use can be wrongful regardless of who ultimately wins the litigation
  3.  $\Pi$  has the difficult onus of proving an ulterior purpose

## **Malicious Prosecution - Criminal or Civil**

Elements:

### **(1) Institution or continuation of a proceeding**

- D must be responsible or at least supportive
- e.g. Asking another to bring or maintain the suit
- false testimony is not enough, although it can be used as evidence that the D had an improper purpose

### **(2) Termination of the proceeding in favor of the “prosecutor”**

- Original case must be completed
- ISSUE: dropping the proceeding just prior to an anticipated finding for the “prosecuted”

(3) **Absence of probable cause** – P must prove that there was no reasonable basis for the prosecutor to believe the prosecuted was guilty

(4) **Improper purpose of the accuser** – only critical when the accuser has not acted reasonably in presuming the accused guilty or liable

(5) **Damages suffered by the accused** – Economic consequences, Emotional distress, Reputational injury, Punitive damages if malice is proven

- Hard to Win\* = b/c you must have a judgment for the accused on the merits
  - BUT SEE: if a meritless suit is brought, a D is going to want to settle
- POLICY: do not want to deter people from seeking legal redress with the fear that if they lost their case in court, they would have to compensate the vindicated D's for their expenses
  - Reluctant to address excessive litigation by imposing new litigation as a remedy
- *Scheicher v. Western State Bank of Devils Lake* – P picked up a hitchhiker. Hitchhiker gave  $\pi$  \$300 check. P called to see if check was valid. Bank said it was. Police somehow got involved.
  - HOLDING: Bank is not liable for malicious prosecution because there was no evidence that the bank initiated criminal fraud investigation regarding  $\pi$ 's alleged fraud.

- Scheicher didn't sue the police because they have immunity.
- Immunity of Public Officials – Prosecutors, judges, other public officials; does not preclude malicious prosecution claims against others who fabricate evidence with the intent to stimulate wrongful prosecutions
- Bank didn't have a duty to tell police π called

## Matrix for Intrusion of Privacy Torts

- Intrusion
  - To how many people does it have to be published? N/A
  - Statement is true or false? N/A
  - Must it be highly offensive? Yes
  - Intent requirement? NEED
- Disclosure of private facts
  - To how many people must it make? Public (significant number)
  - True or False statements? True
  - Highly offensive? Yes
  - Intent? NEED
- False Light
  - How many people? Public
  - True or false statements? False
  - Highly offensive? Yes
  - Intent? Need actual malice
- Defamation
  - To how many people? 1
  - True/False? False
  - Highly offensive? No
  - Intent? Complicated
- Outrage (IIED)
  - How many people? N/A
  - True/False? N/A
  - Highly offensive? Yes + (must be extreme and outrageous)
  - Intent? Yes
- Right of publicity (appropriation)
  - How many people? Used commercially
  - True/False? Either
  - Highly offensive? Yes
  - Intent? None

## Practical Perspectives; Theoretical Perspectives; Alt. to Torts

### Contents

- 1 Practical Perspectives

- 2 Theoretical Perspectives
- 3 Alternatives to Torts
  - 3.1 Worker's Compensation

## Practical Perspectives

1. View of a personal-injury lawyer
2. View of a public-interest lawyer
3. View of a corporate-defense lawyer
4. Settlement dynamics

## Theoretical Perspectives

1. Basic theoretical concepts of jurisprudence
  - Jurisprudence - Means the process and system of court adjudication, but can also mean legal philosophy.
  - Natural Law - the theory that law is inherent in nature. Before humans came along there was law.
  - Analytical Jurisprudence - talking about the philosophy of what law is
    - Legal Realism (Oliver Wendell Holmes Jr.) - laws are made by humans and they are subject to weaknesses and frailties
  - Normative Jurisprudence - what law ought to be.
1. Law-and-economics analysis
2. Sociological perspectives
3. Feminist critique
4. Critical race theory

## Alternatives to Torts

### Worker's Compensation

- historically tort law made it difficult for employees to recover from their employers for injuries suffered in the work place. In addition, they had to show that they didn't assume the risk or contribute to the negligence. States have now enacted workers' comp regimes that make it easier for workers to recover.
- Can now recover regardless of whether the employer was negligent.
- **Causation:** has to occur during the course of employment.
- **Benefits:** workers' comp benefits include payment of medical bills for the injury and disability benefits, which are usually calculated as a fraction of lost wages.
- **Funding:** employers can either pay premiums into a workers' comp insurance fund or they can choose to self-insure.
- **Workers' Comp Trade-Off:** involves a trade-off for workers and employers
  - **For Workers:** allows recovery regardless of employer negligence. Since you don't have to prove negligence, you can recover for non-negligent injuries that the tort system

would never provide. Disadvantage: recovery is limited to 2/3 of lost wages. Also, permanent disabilities are subject to maximum benefit caps.

- **For employers:** limits their liability, shielding them from large recoveries in lawsuits. They must pay regular premiums to the state's workers comp fund. Disadvantage is that even where employees suffer zero injuries, the company will still be required to pay minimum premiums.

**Requirements for Obtaining Benefits (Elements)** A claim for workers' comp is subject to a 4-prong test. For an employee to obtain benefits, there must be:

- (1) Personal injury
- (2) Resulting from an accident
- (3) That occurs during the course of employment
- (4) And arises out of employment

**Personal injury:** while most injuries are compensable, the "personal injury" requirement becomes an issue when the injury involved includes a component of mental illness.

- *Physical-physical:* where both the cause and the effect are physical, the harm will be considered a personal injury
- *Physical-Mental:* Where the cause is physical and the effect is physical and mental, most states will consider the condition to be an injury.
- *Mental-Physical:* if the cause is mental, and the effect is physical, most courts will consider the physical injury to be a compensable injury
- *Mental-Mental:* Where both the cause and the effect are mental, and there is no accompanying physical cause or effect, the injury requirement is not usually met.

**Resulting from an accident:** "Accident" may be defined as a sudden, unexpected occurrence that happens in a particular place at a particular time. Some places use this to exclude conditions that develop over a long period of time (ex. asbestos-linked cancer).

**Course of employment:** an injury must arise during the course of employment

- *Recreational activities:* employer sponsored recreational activities may or may not be covered
  - The "reasonable expectancy" test: if the employee was expected to be involved in the recreational activity, then the activity is covered
  - Subjective/Objective components must be met: for the activity to be covered, it must be the case that reasonable employees would believe that they were expected to participate in the activity (objective) and that the employee in this case actually thought participation was expected (subjective)
  - Facts relevant to finding of "reasonable expectancy" include:
    - Encouragement or pressure from the employer
    - Involvement by the employer in the activity
    - Benefit to the employer (e.g., "team-building")
- *Horseplay:* Any horseplay activities in the workplace are usually covered.
  - The "aggressor defense": while bystanders injured by horseplay are almost always covered, the employer may show that the person injured in the horseplay was a

perpetrator of the conduct. A perpetrator can be considered to have temporarily "abandoned employment," making the conduct ineligible for workers' comp coverage because this would mean it didn't arise "during the course of employment."

- Bystander: some courts decline to recognize a difference between participants and bystander, finding that if the horseplay is a natural byproduct of a stressful work environment, all workers are covered.
- *Commuting and Travel*
  - The "coming-and-going" rule: injuries sustained while commuting are not covered. The "coming-and-going" rule holds that injuries sustained while coming and going from work do not arise during the course of employment. Coverage begins when the worker enters the employer's property.
  - Exceptions: Not applicable in several circumstances:
    - Necessary passages and noncontiguous spaces: if employees must travel a certain stretch of land in order to get to work, the employee may be awarded comp for accidents occurring in that land. An exceptional danger posed by travelling that space will increase the likelihood of coverage.
    - Special hazards near employer property: while jurisdictions vary, courts may award comp for injuries caused because employees are exposed to hazardous conditions on public spaces near the employer's property.
    - Returning to work: When an employee must make a special trip from home during off-duty hours (ex. coming back to lock the door), injuries sustained in transit are usually covered.
    - Travel on employer-owned conveyances: if the employer provides buses or other vehicles for commuting employees, injuries are usually covered.
    - Vehicle required at work: if the employee drives a vehicle to work because the vehicle is required during working hours to carry out certain work-related tasks, the commute is usually covered.
  - Travel for work: if employee travels for work, comp is always available for injuries sustained during the performance of work-related tasks. Increasingly, courts are awarding comp for injuries sustained while dressing, eating, and bathing during the time in which the worker stays in hotel accommodations (since they are essential for related travel).
    - **Note:** activities undertaken on business trips that are exclusively personal are not covered.

**Arising Out of Employment:** this deals with causation. Whether or not certain injury must be compensated depends on the category or risk it falls under

- *Types of risk:* there are 3 categories of risk. The majority fall into occupational or personal
  - Occupational Risks (aka employment risks). Are those that are directly related to the job at hand. (Ex. machine breaks and employer gets hurt). These are ALWAYS compensable.
  - Personal Risks: succumbing to a heart attack caused by arteriosclerosis while at work would not be covered, b/c the risk of suffering such a heart attack, caused by poor nutrition, lack of exercise and genetic propensity, has nothing to do with work. These are NEVER compensable.
  - Neutral Risks: those that aren't clearly occupational or personal. Only one that requires further analysis:

- Proximate-cause doctrine: (borrowed from tort law). To satisfy this, the worker must prove there is an unbroken chain of causation, w/out intervening causes, which links an employer action to a foreseeable harm for the worker.
- Peculiar-risk doctrine: the risk must be "peculiar" to the workplace and not present for members of the general public. Most courts have abandoned this doctrine.
- Increased-risk doctrine: demands only that the risk must be greater than that borne by members of the general public. B/c people that have to prove during their job would have a hard time meeting this test, statutes commonly specify that injuries sustained while travelling in the course of employment will be covered.
- Actual-risk doctrine: As long as the risk is one that actually accompanies employment, the resultant injury will be compensated regardless of whether workers have a higher chance for being injured in this particular way than the general public does.
- Positional-risk doctrine: Any injury which would not have been sustained but for the fact that the employee was in a certain place at a certain time because of his employment is covered.

**Arising-Out-of-Employment and Course-of-Employment considered together:** Some courts hold that a strong case for arising-out-of-employment will offset a weak showing for the course-of-employment requirement.

#### *Typology of Benefits*

- 2 basic types of benefits: the provision of medical and rehabilitation care, and the payment of cash to compensate for lost-earnings capacity.
- Medical and Rehabilitation Care Benefits - will typically pay for all medical care. However, if they appear to never be able to go pay to pre-injury health, they will stop benefits so person can receive disability benefits
- Will usually be given cash to compensate. Benefits may be disbursed under 5 statuses:
  1. Temporary Partial Disability - workers who temporarily suffer reduced earnings may be paid a fraction of their lost wages.
  2. Temporary Total Disability - where worker can't work at all for a limited time, payments will be equal to some percentage of wages.
  3. Permanent Partial Disability - a worker who can work, but has a permanent condition that will reduce earnings capacity, may receive permanent partial disability payments. Come in 2 varieties:
    1. Scheduled - using a scheduled-benefit scheme, disabled workers receive a set amount of money for their lost limb or injury, without regard to their actual reduction in earnings capacity.
    2. Unscheduled - Some injuries are not compensated according to a schedule or chart, but are calculated according to the circumstances of the individual case.
  4. Permanent Total Disability - applies to workers who will never be able to work again, even in a partial capacity. Usually based on lost earnings capacity
  5. Death - when a worker is killed through a work-related accident, workers' comp may provide death benefits to the dependents of the worker.

#### *Exclusivity/Preclusion*



- General rule - workers' comp is intended to be the exclusive means of recover for a worker against the employer, so it precludes the possibility pf tort suits against employers.
- Exceptions:
  1. Intentional Wrongs - if the employer intentionally injured the employee, then a tort suit may go forward
    1. Genuine intentional wrongs - if the injury is thre result of a genuine intentional wrong, there is no tort immunity. In some courts, if the employer created a condition in which the employer knew or should have known that there was a substantial certainty that injury would result, then the wrong is considered intentional.
    2. Reckless or wanton acts - in some courts, reckless or wanton beh by an employer is not covered by workers' comp, so tort suit may go forward.
    3. Fraudulent concealment - Where a company doctor discovers an employees ill, but doesn't inform the employee, a theory of fraudulent concealment may allow a suit for the worsening of the condition caused by delay in treatment
  2. Dual Capacity - in some states, an employee may sue if she is injured when the employer acts in a non-employer capacity.
  3. 3rd party Ds - employees may be able to sue parties other than the employer (contractors, other employees, etc.).
    1. 3rd party Ps - just as workers are barred from bringing suit, their spouse or children are also.
  4. Federal Causes of action - if employee is authorized to sue under a federal statute, the suit may go forward.
- Preclusion w/out recovery - in some jurisdictions, it is possible for a tort suit to be precluded even when workers' comp is not awarded. This is b/c the tort-preclusion works separately from the scheme that determines whether comp will be awarded. Thus, an injury arising out of and in the course of employment will trigger the preclusive aspect of a workers' comp statute. If the injury is unaccompanied by an industrial liability, it will not be compensable by disability benefits.

### **The Occupational Safety and Health Act (OSHA)**

- Was created to regulate workplace safety and health. It prohibits dangerous conditions in general in the workplace and regulates in detail what employers in specific industries must do to safeguard workers from various hazards.
- OSHA creates an *ex ante* regime for dealing with injuries in the workplace. This means that is works *before* the injury, seeking to prevent injuries for happening. This contrasts workers' comp, which are *ex post* regimes, meaning that they come into play after the injury or disease has occurred.
- OSHA does not provide for a private right of action. Instead, actions under OSHA must be brought by the secretary of labor and the OSHA administration. While workers can complain to OSHA about violations, employees cannot themselves sue their employer.
- OSHA applies to all employers in a business affecting interstate commerce. Government agencies and various industries with specific, alternative regulatory schemes are not covered under OSHA. States may opt out of OSHA and create their own approved alternative.

*General-Duty Clause*

- Section 5(a) of OSHA is the general duty clause. It states, "Each employer shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees."
- To take action against an employer under the general duty clause, OSHA must show that the hazard was both preventable and recognized.

#### *Recognized*

- The "recognized" requirement is similar to an intent requirement. The hazard is considered "recognized if it meets either subjective or objective tests.
  - Objectively recognized - A hazard that is recognized by the industry as a whole will be considered recognized. Thus, employers that are ignorant of workplace hazards may be liable for them if such hazards are generally known to professionals in the industry.
  - Subjectively recognized - A hazard that is recognized by the employer can establish employer liability even if the industry is generally ignorant of such a danger.
  - Accidents not recognized - because the statute discusses hazards that are "likely" to cause injury, an accident is not required before an employer will incur the duty to correct the hazard. However, the occurrence of an accident may make the hazard recognized if the hazard was previously undiscovered.

#### *Feasibly Preventable*

- Although the statute does not use the word "preventable," the law has been interpreted to permit industrial practices that produce hazards that are not feasibly preventable.
  - Feasible - Remedial measures may be unfeasible because of terrific cost or technological unsoundness.
  - Effective - to make the hazard preventable, the proposed safeguard must be demonstrably effective.

#### *Specific Standards are a Defense*

- If there is a specific OSHA standard on point for a particular situation, the employer may assume that meeting that specific standard will also satisfy the general-duty clause. If charged with a general-duty violation, an employer may raise this argument as a defense.
  - Exception: Standard Known to be Deficient - if the employer, however, knew that the specific OSHA standard was not stringent enough to prevent a recognized hazard, the defense will fail.

#### *Promulgation of Standards*

- The OSHA law grants the secretary of labor the power to promulgate rules, called "standards," setting specific requirements for workplace safety and health. There are 3 ways these rules may have been enacted:
  1. "Interim Standards" Under 6(a) - For 2 years after the enactment of OSHA, the secretary of labor adopted rules that were a matter of national consensus. This allowed for rapid adoption of rules. Since then, any new rules or changes to existing ones must be promulgated through 6(b) or 6(c).
  2. "New Standards" Under 6(b)

1. Procedural Requirements - 6(b) sets forth a complex process that must be undertaken to adopt a new standard. This process requires a period of public review and mandates public hearings with regard to objections.
2. Substantive Requirements - Sets substantive limits on rulemaking.
  1. Significant risk/ section 3(8)/The Benzene Case - in order to promulgate new rules under 6(b), the secretary must meet the burden of proving that there is a significant risk of a material health impairment for which the proposed standard is reasonably necessary and appropriate.
  2. Feasibility analysis/ section 6(b)(5)/The Cotton-Dust Case - W/ regard to rules dealing w/ toxic materials or harmful physical agents, the secretary must promulgate the rules which most assures "to the extent feasible...that no employee will suffer material impairment of health." In the Cotton-Dust Case, the Supreme Court rejected the argument that OSHA should show that the new standards are justified by a cost-benefit analysis. Instead, the proposed standard must be technologically and economically feasible. **Note:** the feasibility analysis only applies to "health" regulation, and not to "safety" regulation.
    1. Technologically feasible - the method of eliminating the hazard must be technologically possible; that is, a merely hypothetical solution does not meet the feasibility requirement.
    2. Economically feasible - to be economically feasible, a solution must not be so expensive that it would force most of the industry into bankruptcy. On the other hand, the elimination of a hazard might still be feasible even if it is prohibitively expensive to some firms.
3. "Emergency Temporary Standards" Under 6(c)
  1. Procedural Requirement - a new rule promulgated under 6(c) is effective immediately upon its publication in the Federal Register. The rule is effective for only 6 months, after which it must be replaced by a 6(b) permanent rule.
  2. Substantive Requirements - section 6(c) rules must meet a 2-prong substantive test. The secretary may only promulgate a rule he/she finds is necessary to protect workers from a "grave danger" created by new hazards of toxic or harmful substances. The grave-danger prong has been interpreted to require a finding of certainty of impending harm, but to require "more than some possibility."

#### *Enforcement*

- Inspections of work sites by OSHA officials may be triggered by accidents at the work place, by employee complaints, or as part of a program of random inspections. While employers may require a warrant for the inspection, there is no requirement for OSHA officials to show probable cause to obtain a warrant.
- Upon the recommendation of an inspector, an OSHA official may calculate fines, prescribe abatement for hazardous condition, and issue a citation.
- The employer may contest the fine and abatement w/ a timely filing to the Occupational Safety and Health Review Commission (OSHRC). After hearing from the employer and OSHA, and administrative law judge renders judgment.
- Either the employer or OSHA may appeal an adverse ruling to the U.S. Court of Appeals for the applicable circuit.
- While OSHA rules are promulgated and enforced by the secretary through the OSHA administration, the act does have implications for individual employees.

- No private right of action - Remember that OSHA does not create a private right of action.
- Employee Complaints - Employees can complain to OSHA, either individually or through their union, and request that OSHA make inspections and/or initiate legal action.

Protection from retaliation against employees - Section 11(c) of OSHA prohibits employers from firing or otherwise retaliating against employees for actions taken in regard to workplace safety and health issues, including

1. Complaining to OSHA
  2. Refusing to perform work that the employee reasonably believes, in good faith, to present the danger of death or serious injury.
  3. Taking other actions w/ regard to health and safety on the job.
- Like all other provisions of OSHA, 11(c) does not create a private right of action. Therefore, employees who are the victims of alleged retaliation can request OSHA to take action on their behalf, but cannot sue under OSHA.

#### *The Employee-Misconduct Defense*

- Where the dangerous condition giving rise to the violation was created by employees and was not reasonably preventable by the employer, the employer may assert the employee-misconduct defense.
- To assert the employee-misconduct defense, the employer must meet a 4-part test (Jensen Construction Co.)
  - The employer has attempted to discover unknown violations
  - These rules have been adequately communicated to workers
  - The employer has attempted to discover unknown violations
  - The employer has corrected violations when they have been discovered
- While the 4-part test focuses more on the employer's overall safety program, courts also scrutinize the violation itself. Thus, courts also look to whether the violation at issue was isolated, caused by an employee, unknown to the employer, and contrary to the employer's instructions and uniformly enforced workplace rules.

#### **No-fault insurance regimes**