

Torts Wypadki

Fall 2008



Torts I
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Fall 2008 Torts Wypadki

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DEFINITIONS/TERMS

Affirmative Defense

The way a defendant can win even if a prima facie case is proven by the plaintiff.

Examples: consent, acceptance

Cause of Action

A specific occurrence or event that allows for proper action to be taken

Examples: patent infringement, employment discrimination, and negligence.

Elements of Cause of Action

Set of items one must prove in case of Torts.

All elements must be proven, all are essential.

Misfeasance: active misconduct on part of Δ

Nonfeasance: passive inaction on part of Δ. Generally, people have no duty to act to help others.

There are 3 major exceptions -

SPECIAL RELATIONSHIP EXCEPTION: A duty may be present when there is connection between parties (parent & child, landowners & their invitees, shopkeepers & customers)

UNDERTAKING EXCEPTION: If you start to save a person, and the victim begins to rely on the Def.'s action, there can be a duty to act created.

CREATION OF PERIL EXCEPTION: If Def. negligently places the plaintiff in peril, the Def. has duty to take reasonable action to remove plaintiff from that peril.

Standards of Proof:

Beyond a reasonable doubt (criminal)

Clear and convincing (civil)

Preponderance of the evidence; greater than 50% (civil; torts)

Prima Facie Case: when plaintiff proves all elements of a cause of action.

Types of Torts

Lineal: direct connection to physical injury of person or property

Intentional: Requires an OVERT ACT, some form of INTENT, + CAUSATION.

Transferred Intent: When the Def. wants to injure an individual but hurts another - Will in most cases satisfy the intent requirement. Causation can be satisfied as long as the Def. was a subst. factor in causing the harm. - - Motive becomes irrelevant / "TI" can be used in trial to prove intent.

Examples: assault, battery, false imprisonment, outrage, trespass to land, trespass to chattels, conversions

Accident:

Negligence: When there is a breach of a duty of care that happens w. factual + proximate cause & creates damages.

Strict Liability: Fault is not an issue. The court does not decide what level of precaution is appropriate. Rather anyone engaged in the act is responsible for the full cost of the act, including accidents.

Oblique: not an injury to person, real property, or chattels (next semester)

Examples: fraud, nuisance, defamation

Damages

Nominal Damages: When the Def. Violates the plaintiff's rights w/o substantial loss or injury to the plaintiff, the court can award nominal damages (a small sum of money) to make the judgment a

matter of record. ///(no pain, or missed work, but still you can get monies (though lesser monies). In **negligence** you can not get nominal damages.

Compensatory Damages: Monetary sum = to the full loss or harm suffered by the Plaintiff. Can be awarded for physical harm, property damage, and emotional harm w/o physical injury in some cases(neg. inflict. of emo. dist.).

Punitive Damages: Damages to punish egregious acts. Monetary awards that are additional to compensatory damages. Not generally available in simple negligence cases. The can be awarded for products liability, misrepresentation, defamation, malicious prosecutions, and in some jurisdictions, recklessness.

Judgment Proof: Defendant does not have any money so even if Plaintiff did secure a judgment, it would be difficult to satisfy it.

REAL PROPERTY: something attached to the land that can not be moved

Culpability: the degree of one's blameworthiness in the commission of an offense. Except for strict liability crimes, the type and severity of punishment often follow the degree of culpability.

Intent: nature of conduct or a result thereof - a conscious object to engage in conduct of that nature or to cause such a result.

Substantial Certainty: nature of conduct or the attendant circumstances, Def. = aware that conduct is of that nature or that such circumstances exist; & if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result.

Reckless Actions: The risk is such that, considering the nature and intent of the Def.'s conduct and the circumstances known to Def., its disregard involves a gross deviation from the standard of conduct that a reasonable person would observe in the Def.'s situation.

Negligent Acts: of a nature and degree that the Def.'s failure to perceive it, considering the nature and intent of Def.'s conduct and the circumstances known to Def., involves a gross deviation from the standard of care that a reasonable person would observe in the Def.'s situation

Intentional Torts

Generally

Act

Volitional movement

Not reflex

Intent

Standard of intent differs from tort to tort

Substantial certainty sufficient for intent

Intent can be transferred person to person and tort to tort

Motive is irrelevant

No issue of incompetence - children as well as mentally ill, developmentally disabled, and demented can commit intentional torts

Example - **Garratt v. Dailey** - 5 year old pulled chair out from under older woman

Causation - Important in all torts. Considered in-depth under the heading of negligence (same concepts apply)

Actual

Proximate

[a] Assault

General

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

Elements

Act

Example: faking to hit someone, don't actually have to hit

Intent

can be intent to effect an assault
or intent to effect a battery

Causation: There is 'factual' + 'legal' causation.

Factual Causation: Did the plaintiff's loss come from Def.'s Act? -- "The BUT FOR TEST" =
Would the harm have happened if Def.s act had not happened?

Legal Causation: One is liable for things that are foreseeable. PROXIMATE CAUSE
functions as a legal limit on results of factual causation. Causation of an act alone does not make legal liability.

Apprehension (believing you will be hit or even touched)

Fear distinguished from apprehension, not the same as fear

Apparent ability sufficient-looks good enough to happen.

Examples: finger in pocket looking like a gun; pretending to hit someone but stopping before

Words alone are not sufficient

Must appear about to do something

But words can negate the effect of conduct

Example: saying, "This is just my finger in my pocket, but if it was a gun I'd shoot."

Immediacy - threat to assault later is not sufficient

has to happen right away

Example: saying, "I will beat you up later tonight" is not immediate, so not assault

[b] Battery

General

Statement: An intentional infliction of a harmful or offensive touching of a person

Examples: poking stranger's shoulder not battery, but grabbing someone inappropriately is

Elements

Act

Intent

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

Causation

Defendant need not actually contact the victim.

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 (e.g., a person's car while they are in it)

Harmful or Offensive

Judged by a reasonable-person standard

Issues

"Eggshell plaintiff" rule

Liable even if the victim suffers unusual damages due to a pre-existing vulnerability or medical condition

Example: tapping shoulder breaks arm

Another example: if you tap someone on the head and that person has a soft head shell and you cause damage, you are responsible

[c] False Imprisonment

General

Statement: The intentional confinement, experienced or harmful, of a person to a bounded area

Example: Locking someone in a car trunk

Elements

Act (or omission to act)

Keeping someone confined

OR Failure to release

Intent

Causation

Confinement

Sufficient methods of confinement

Physical barriers

Physical force

Threats of force (Ex. "You move & I'll shoot you")

Invalid assertion of legal authority (Ex. A fake cop arresting you)

Insufficient methods of confinement

Moral pressure

Future threats (Ex. "If you leave, I'll come tonight and hurt you")

Duration of confinement is irrelevant

Bounded area

Movement must be limited in all directions

Any reasonable and reasonably knowable means of escape negates this element (Ex. If your locked in a house, you need to check all the doors)

The bounded area cannot be the rest of the world

Awareness or harm

Person must be aware of confinement OR be harmed by it.

Ex. If someone is sleeping in their hotel and you weld the door shut, and while they are still sleeping someone fixes the door, and they wake up unharmed and unaware of what happened, it is not a tort

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 it, the confinement, this element is satisfied

Parvi v. City of Kingston: Police pick up drunk Parvi and drop him off at golf course outside of town. Even though Parvi could not recollect the confinement later, that does not mean that at the time of the confinement he did not know he was being confined. The police/city was found liable for false imprisonment.

[d] Outrage / IIED

General

Also known as "intentional infliction of emotional distress" or "IIED"

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

Elements

Act

Intent or recklessness

Note that recklessness counts as "intent" for outrage

Extreme and outrageous conduct

The standard here is high

Must be truly outrageous

Ex. Telling someone their family died and they did not

Causation

Severe emotional distress

Must be enough that plaintiff sought medical attention-for example obtaining a prescription.

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

[e] Trespass to land

General

Statement: An intentional physical invasion of a person's real property

counts if you invade someone's possessory interest (tenants may recover...but landlords may not have a possessory interest)

Elements

Act

Example: Includes failure to leave

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. Not knowing doesn't excuse! ...Did you intend it?

Example: Throwing a baseball too far

Causation**Physical invasion**

Person or object (example: walk on lawn or throw ball on lawn)

Does not include intangibles, like vibrations or odors. Smoke doesn't count.(these are actionable under "nuisance")

Real property

Surface

Subsurface, down to center of earth

Airspace to a reasonable distance-Here is your throwing a ball over is trespass example.

[f] Trespass to chattels

General

Statement: An intentional interference with plaintiff's chattel by physical contact or dispossession

This is "stuff"(not real property) and stuff attached to land.

Defendant need not act in bad faith or intend to interfere with rights of others

Chattel

Includes objects not attached to land (e.g. pets)

Not people

Not real property

Not intangible property, like intellectual property

Unless reduced to a tangible form (example: bonds)

Elements

Act**Intent**

The only intent needed is the intent to do the act that results in the physical invasion

Causation**Interference****With right of possession**

Physical contact

Dispossession(take it away from someone and act like you own it)

Interference with use

Chattel

Issues/Examples:

Distinguish from conversion - difference is remedy

*Different examples of chattels v. conversion:

Borrowing/stealing burberry coat (trespass to chattels) v. altering coat (conversion)

Neutering cat v. Neutering champion stud cat

Borrowing car for 20 minutes (trespass to chattels) v. Taking car for 1 year (conversion)

[g] Conversion

General

Statement: 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

"You break it, you buy it"

Defendant is liable for the entire market value of the chattel and not simply a small repair or rental cost (Trespass to chattels)

Example: Δ borrows coat from P and alters so no longer fits π. Another example would be taking a payload to a car. (must buy a new one).

Elements

Act

Intent

Interference

Chattel

Substantiality

so substantial, the act warrants a forced sale

Issues

Distinguishing conversion from trespass to chattels (see notes above)

In the remedy for conversion, Δ retains converted property after paying damages

Factors mitigating in favor of conversion

Length of time withheld

Amount and severity of damage

If chattel is "totaled"

Factors tending to negate conversion

Repairable damage

Temporary nature of deprivation

Intentional Tort Defenses

Consent

Scope: Must be within scope (within the boundaries of what you agreed)

Ex- can't hit someone with a bat when they told you to punch them with your fist

Types:

Express: In writing or oral

Implied in fact: assume one is ready

Example: jumping into a boxing ring with gloves on and acting like a boxer

Implied by law:

Example: unconscious from car accident in ER and need surgery, it is performed -- /or/ If you are taken to a hospital and bleeding/unconscious there is implied by law consent.

Defense of self

A person is entitled to use reasonable force (same level as what other person did to you) to prevent any reasonably believed threat of imminent battery or false imprisonment

Retaliation is NOT a defense

Defense of others

Similar to self defense

BUT in a majority of jurisdictions, a mistake in perceiving a threat, even if reasonable, will void the defense

Ex.-Keifer Sutherland defending someone that appeared to be harrassed on prank show...he was liable

Defense of property

A person is entitled to use reasonable force to protect land and chattels

Warning: there's more to this, so check local law before doing anything

Arrest

Police

Citizen

privilege is much more limited than for police

Private necessity

A person is privileged to invade the property rights of another to avoid injury to person or property, but must pay compensatory damages

Note: Necessity is a defense to property torts only: trespass and conversion

e.g.: if you use someone's car to save their life and bang the car up, you have to pay for the car's damages

Public necessity

Doing something to protect the public at large, no compensatory damages are owed.

Note: Necessity is a defense to property torts only: trespass and conversion

Recapture of Chattels

Where another's possession began lawfully (ex: conditional sale), one may use peaceful means to recover chattel

Force may be used to recapture a chattel only when in "hot pursuit" of one who has obtained possession wrongfully (ex: theft)

Discipline

A parent or teacher may use reasonable force in disciplining children, taking into account the age and sex of the child and the seriousness of the behavior. (barbri book)

Things that are NOT Defenses:

Deserve-"he deserved to be slapped."

Retaliation- going at a person with a butcher knife if all they did was push you

What must Δ do to win?

Prove one of the elements in π 's cause of action not there

OR prove affirmative defense

Negligence

Generally

Elements: six elements to establish prima facie case

Duty: legally recognized relationship between parties-Can only be sued by someone to whom you owe a duty.

Standard of Care: required level of expected conduct, measure of duty owed

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

Cause-in-fact(Actual Causation): π 's harm caused by Δ 's breach of duty. Did your act actually cause the damages?

Proximate Cause: no reason to relieve Δ of liability. Is there a close enough causation between your acts and the damages?

Damages: π suffered a cognizable injury. 3 types: 1)compensatory-ex: hospital bills; 2)punitive-punish defendants; 3)nominal-No compensatory damages but can get 1\$, or 5\$ for example. Not available in negligence cases-Need real damages.

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

One cause of action with several permutations, different than strict liability - proving a blame.

Defined- Conduct falling below the standard of care established by law for the protection of others against the unreasonable risk of harm. You did not want to hurt person but you did create a reasonable risk.

[1] Duty

General Duty of Care - A legally recognized relationship between the defendant and the plaintiff that obligates the defendant to act (or to refrain from acting) in a certain manner toward the plaintiff. - - You can only be sued by one whom you owe a duty. Generally analyzed as a question of law.

A general duty of care is owed to all **foreseeable** plaintiffs.

A judge's legal lever to limit liability in a way that is fair

Scope of the Duty - duty involves:

consideration of the scope or boundaries of the duty;

totality of the circumstances; and

must be reasonable under those circumstances. Circumstances include:

risk of harm involved and;

practicality of preventing the harm (If Δ 's actions are relatively easily corrected & the harm sought to be prevented is serious, it is fair to impose duty).

No affirmative duty to act

Nonfeasance: a failure to take positive steps to benefit others

Typically, no duty is found for these actions, but there are exceptions:

Assumption of duty by acting (start helping someone)

Once you undertake an attempt to rescue, the rescue has to be done reasonably

Exception: good samaritan statutes exempting medical professionals from liability for ordinary, but not gross, negligence in voluntarily acting to help someone

Peril caused by negligence - Defendant has a duty to assist someone in peril because of the defendant's negligence

Duty to Aid Another Harmed by Actor's Conduct

If person knows or has reason to know that by his conduct he has caused bodily harm to another to make him helpless and in danger of further harm, the person is under a duty to exercise reasonable care to prevent further harm.

South v. Amtrak - Plaintiff's view was obstructed while driving & collided with train. Court held that duty is owed to Plaintiff where Defendant knows or has reason to know his conduct, whether innocent or tortuous, has caused harm to another - **has affirmative duty to render assistance to prevent further harm.**

Common carriers, innkeepers, shopkeepers

Those who solicit and gather the public for their own profit owe a duty to aid patrons

Ex.-If someone has a heart attack at Target, Target needs to help...But, you need to be in or on their property

Failure to Act - Δ may be liable if he had control or custody over a person, situation, or premises and acted negligently.

Hegel v. Lansam - Parents of a 17 yr old girl alleged University allowed her to become associated with criminals & was negligent in keeping her from drugs & mischief. Court held school had no control or custody over the girl & no duty to protect individual students from personal choices.

Duty to control - generally a person has no obligation to control another person's conduct to prevent harm to a 3rd person, exceptions arise if there is a special relationship.

Tarasoff v. Regents of University of California- Psychologist who treated Poddar, and during the course of treatment Poddar threatened to kill Tatiana Tarasoff because she had put off Poddar's romantic advances, but the doctor decided not to confine Poddar or warn Tarasoff. Court held that doctor has a duty to warn a person if they know that their patient poses a legitimate risk to that person. This may extend to anybody who has a confidential or special relationship with the party, combined with knowledge of the need for control.

Rule: When a therapist determines or should determine, that his patient presents a serious danger of violence to another, he incurs an obligation to use reasonable care to protect the intended victim against such danger.

NOTE: Special relationship can be between either:

Actor and 3rd person which imposed duty upon actor to control 3rd person's conduct, OR

Actor and other person which gives other person a right of protection

NOT all professionals are held to the same standard when it comes to duty to warn. The further away a professional gets from being "able", as a result of professional training to assess the mental processes of a person, the less the liability.

Suppliers of Liquor

At common law, neither sellers of liquor nor social hosts were liable to those injured by those to whom they served alcohol. Courts viewed the inebriated driver, not the supplier of the liquor,

as the sole proximate cause of the harm.

Starting in the late 1970s, courts began to reconsider this common law view, and liability was imposed on commercial suppliers of liquor, as well as social hosts.

Courts have recognized social host liability to person injured by intoxicated guest's negligence in driving where 1) a social host knew or should have known that his guest was drunk and still gave/permitted the guest to drink, and 2) because of his intoxication, guest negligently operated a motor vehicle causing 3rd party's injury.

Licensed Vendors: Owe a duty to a 3rd person who is injured in a motor vehicle accident caused by negligence of a customer to whom the vendor sold a drink when he knew or should have known the customer was intoxicated (reasonableness standard)

Bar owners also have a duty to protect their patrons from harm caused by drunken clientele.

Duty to Protect

Generally, there is no obligation to protect another from harm. Exception is when the Δ has ceded their ability to protect themselves in certain circumstances, then the P must take reasonable steps to protect the Δ .

Business Duty to Protect – courts generally require a high degree of foreseeability such as prior incidents to establish a duty

Boyd v. Racine Currency Exchange - Δ was behind protected counter and refused to comply with robber's demands. Boyd's husband was shot and killed by robber. Court held that Δ does not have an obligation to comply because Δ would either have to give money or face civil penalty for failure to protect customer. Compliance would have put the teller in grave danger and would have encouraged robbers to use customers as hostages to get \$.

Specific Situations

Rescuers

A rescuer is a foreseeable plaintiff where the defendant negligently put the self or a third person in peril.

Also: If you hit a pedestrian and someone stops to help, and they (the rescuer) get hit, you are liable

"Danger invites rescue."

Unborn, unconceived children (differs by jurisdiction)

Wrongful birth

Parents of child sue doctors for failing to diagnose birth defects.

Must prove abortion would have occurred if defect was known.

"If you would've run the test correctly"

Provides financially strapped parents means to pay for lifelong care of a child.

Wrongful life

When child sues, "wish I had never been born" case.

Provides \$\$ for child's medical problems.

Dobson v. Dobson - Mother injures unborn from her negligence in car accident. Court held that Mother was not liable because it infringes on the rights of the mother and negligence would be pursued by unborn kids.

[2] Standard of care

General standard

Reasonable person: the care that would be exercised by a reasonable person under the same or similar circumstances (example: Looking in the rear-view mirror before backing up)

Failure to do so constitutes unreasonable conduct and is a breach of duty.

This is an objective standard.

Mental deficiencies not taken into account

Mental disability is deemed irrelevant

The reasonable person is deemed sane

Inexperience not taken into account -Example : Young Drivers

Heath v. Swift Wings - Airplane piloted by Fred Heath crashed killing all on board. Action brought by π's estate and owner of airplane against pilot's estate alleging negligence on his part. At trial, expert pilot testifies reasonable pilot would have used flaps to aid flight and would have landed in cornfield after difficulty. Rule: One who engages in a profession must exercise its requisite degree of skill of that profession with reasonable and ordinary care

Physical disabilities and limitations ARE taken into account

Example: If the reasonable person would have 2 limbs to do something and Defendant only has 1, they are not blamed for only having 1 limb

A jury may consider such things as a defendant's height, loss of limb, deafness, etc.

Standard of care will reflect the defendant's physical condition

The law does not command the deaf to hear and the blind to see.

Flexibility in the Reasonable Person Standard

Example: Reasonable person will be more careful when walking on an icy sidewalk and even more careful if walking on an icy sidewalk with a newborn baby.

Emergency

An emergency is "an event that requires a decision within an extremely short duration and that is sufficiently unusual so that the actor cannot draw on a ready body of personal experience or general community knowledge as to which choice of conduct is best."

Defendant is held to a standard of what a reasonable person would do under emergency circumstances

This does not absolve from negligence liability but a jury may consider if the mistake is one that a reasonable person would make in a similar situation.

Emergency doctrine unavailable where the defendant created the emergency situation.

There are contexts where defendants can be liable for failing to anticipate an emergency situation.

Fire in a business or drowning in a pool.

Physical Conditions

To some degree, intoxication can be viewed as a physical condition. However, because the reasonable person is viewed as sober, the voluntarily intoxicated defendant will be required to perform as well as a sober person, not as well as a reasonable person at that level of intoxication.

Characteristics of a Reasonable Person

Jury must compare the conduct of the Δ to that of a reasonable person in the

community.

Represents community norms

Ignorance is irrelevant, must rise to level of community one is in

The reasonable person is not a real person or any member of a jury.

The reasonable person is expected to be aware of well known hazards.

Example: fire, loaded firearms, etc.

The reasonable person is not infallible, should possess weaknesses of others in the

community

Can be held liable for not seeing that which should have reasonably been noticed

Example: Should know when tire is worn, it needs repair because could

potentially harm others if continue to drive on it

Cases involving reasonableness are very fact intensive and often involve the following:

Probability- Likelihood of harm occurring

Magnitude of the loss- Likely harm to happen

Burden of avoidance- Balance of avoiding the harm, interest to be sacrificed, costs associated with preventing the harm

Lubitz v. Wells- Dad left golf club in yard, son swung and hit friend in face.

Issue was whether it was reasonably foreseeable to dad that kids could use club and cause injury.

Court held that it was not foreseeable that a golf club was so intrinsically dangerous that leaving it in the yard would cause injury.

Blyth v. Birmingham Waterworks Co. - Water lines broke during harsh weather and flooded Plaintiff's house. Court held that the company was not negligent. A reasonable person could not have expected the weather to be so harsh.

Vaughn v. Menlove - Defendant built haystack near cottage, combusted and burned cottage. The issue was whether the defendant acted as a reasonable person by stacking a wet hay next to cottage. Court held that the defendant was negligent. It's not whether defendant knew hay would combust, rather, would a reasonable person have known. The conduct of a prudent man is the criterion for the jury in these cases. What care would a prudent man have taken? Did Menlove act honestly and bona fide to the best of his own judgment? If YES, he should not be responsible for not being very smart. - But the court said "NO" that he was warned and should have known what might happen; instead of fixing it he said "he would chance it" (established gross negligence).

Gulf Refining Co. v. Williams - Plaintiff buyer purchased from defendant sellers a drum of gasoline. The drum had been used for nine years and the threads in cap were broken, bent, and jagged. When the employee removed the cap from the drum, a spark produced by the condition of disrepair caused an explosion and severe injuries. Rule: An actor will be liable for all such harm as a reasonably prudent person would or should have anticipated as the natural and probable consequences of his act. Although the event was unlikely, the likelihood of some damage was of such appreciable weight that a reasonable person would be induced to take action to avoid it.

Specific standards

Superior Skills - held to same standard of care as reasonable person

Note: Reasonable person is required to use all the knowledge & skills she possesses (*Hill v. Sparks*)

Professionals - based on industry custom

General practitioner

Held to the knowledge, skill, and custom of practice among practitioners in the local

community. In other words, doctors in small towns are held to lower standard than doctors in big towns

Specialist

Held to the knowledge, skill, and custom of practice among members of the specialty across the nation.

Note: Doctors are NOT employees of the hospital. All other staff are.

Medical Malpractice

A physician is held to the professional standard of care when acting in their professional capacity.

Physician must possess and use the skill common to members of the profession but the standard only requires a minimum competence. other doctors in good standing.

Determining breach of duty arises from defendant's failure to act w/minimal competence exercised by

To establish medical malpractice plaintiff must show more than an unwanted result (ex: failure to cure)

Customary standard of members of the profession in good standing

As long as one of the accepted approaches is followed, a doc is protected from liability
(Even if a doc uses a different treatment, as long as it is respectable one it is ok)

Medical malpractice usually arises from negligent diagnosis or treatment.

Proof Issues in Medical Malpractice

π must show an unwanted result, and not a failure to cure. Cannot use res ipsa loquitur unless malpractice is so egregious that laypersons may determine breach themselves. Examples include "common knowledge" exceptions - leaving a foreign object (sponge) in someone, or amputating the wrong limb.

Expert witnesses: most likely Plaintiff will need an expert witness to help determine the standard of care and Δ s breach of duty. They do not have to practice the same kind of medicine only have familiarity with customs associated with Δ 's practice.

Custom may differ depending if you look at it from a national, state-wide or local practice. Must be of same or similar locality to that where Δ practices. This does not take into account the deficit rural doctors may be subject to due to lack of resources

Informed Consent

Liability arises from Doctor's failure to provide info & obtain Patient's informed consent

Battery: Wrongful touching without consent in Doctor/Patient relationship

Example: if π consents to surgery on left ear and Δ operates on right ear
P can recover without proof of actual harm

Negligence

Usually when undisclosed complication arises after treatment/procedure

Two rules for standard of care:

Physician's Rule: Professional standard of care set by medical custom

regarding informed consent

Patient's Rule: Physician is obligated to disclose all material risks

involved in a given procedure or treatment

π must show 3 elements:

a nondisclosure of a material fact by the Δ

had there been proper disclosure she would have

rejected the proposed treatment (cause-in-fact)

the undisclosed adverse consequences did occur

Subjective Test: Whether the risk is material to a particular Plaintiff

Objective Test: Whether the risk is material to a reasonable person

Exemptions: Nondisclosure of material risk is justified if due to emergency or when patient requests Dr. not inform her.

Therapeutic Privilege (some states)- a physician may justify non-disclosure upon proof that "complete and candid disclosure might have a detrimental effect on the physical and mental well being of the patient."

Extensions of Informed Consent: Some courts require disclosure of risks of forgoing a medical procedure or treatment.

Example: π consults Dr. Δ for medical Problem. Dr. Δ suggests to π that he should have prostate checked. Δ declines and a year later is diagnosed with incurable prostate cancer. π sues Dr. Δ for not informing him of the risks of refusing to undergo the proposed procedure

Sawyer v. St. Joseph Hospital - Alcoholic went in for treatment, dr prescribed 3x max daily dose of aversion drug, π severely disabled. Issue was whether Δ followed custom of profession. Rule: General practitioners are held to a local standard, if act against custom then negligent, so Δ here is liable

Campbell v. Pitt County Memorial Hospital- Breech baby delivered regularly instead of by c-section, baby gets cerebral palsy Issue is whether Δ followed custom of profession. Rule: Dr held to local standard, acted against custom here; but for nurse not reporting to supervising dr, supervising dr would've intervened and delivered baby by c-section

Moore v. Regents of Univ of CA - π had cancer, treated by Δ , Δ used π 's cells for research without telling π . Issue is whether Δ breached duty for failing to disclose financial facts material to patient's consent. Rule: Doctors must disclose personal interests in procedure when seeking patient's consent, so Δ liable here

Attorney Malpractice

Generally

The relationship between attorney and client establishes duty

The custom of the profession sets the standard: statewide custom seems appropriate per state bar exam; national standard for specialists;

Breach of duty is shown by attorney's failure to meet that standard of care.

Malpractice cannot follow merely because of an unfavorable result in litigation but when an attorney fails to act in a manner of skill or knowledge possessed by other attorneys in good standing.

Expert witnesses usually needed.

Could be a state, regional, or national standard depending on the area of law the lawyer practices.

Causation is also necessary and difficult to prove

π must prove that without the attorney's actions, she would have prevailed.

Example: Failing to file a claim before the statute of limitations runs.

Children

Held to standard of that of a child of like age, education, intelligence, and experience

Children under four generally do not have the capacity to be negligent

Contrast this with intentional torts, wherein one can sue a two year old.

Exception: The relevant adult standard of care applies for the activity when children engaged in an adult activity

Robinson v. Lindsay (snowmobile case)- 11 yr old gets hurt by 13 yr old's negligence while using a snowmobile. Court held that there was negligence because defendant was operating a powerful machine, an adult activity.

Direct Negligence by Parents

Negligent Supervision: If they know of a minor's tendencies

Negligent Entrustment: If they give the child a dangerous instrument w/o ability to handle it safely

Bailment(loaning someone something)**Bailor-lender**

Gratuitous bailment (for free)-let friend borrow car:

Must inform of known, dangerous defects in chattel

Bailment for hire (paid service)-Renting from Hertz

Must inform of known and reasonably discoverable defects in the chattel- can be observed w/o use

Bailee

Sole benefit of bailor, low standard

Liability will exist only where there is gross negligence.

Mutual benefit of bailor and bailee, ordinary care standard - "hotel case" with the lost

ring

Sole benefit of bailee, high standard of care

Liability will result from slight negligence.

Owners/occupiers of land**Infant trespassers**

"Attractive nuisance" doctrine

Duty to avoid foreseeable risk to children caused by artificial conditions, if:

A dangerous artificial condition the owner/occupier does or should know about

The owner/occupier knows or should know that children frequent the area

The condition is dangerous to children

Cost/benefit analysis: the expense of remedying condition is slight compared to magnitude of risk

Licensees

Persons who enter land with permission for their own benefit, rather than the benefit of the owner/occupier.

Licensees include friends and contractors coming on to the premises to make sales or repairs. (ex: door to door salesperson)

Duty to warn of or make safe any known, concealed dangerous condition (whether natural or artificial)

No duty to inspect

BARMORE v. ELMORE (SON STABBING CASE) - Issue is whether there were defendants, as landowners, negligent in failing to protect plaintiff from a dangerous condition upon their premises – namely their son who had a history of mental illness. Court held that defendants were not negligent because only duty owed to plaintiff by the defendants was to warn him of hidden dangers unknown to the plaintiff of which the defendants had knowledge. Defendants did not know or have reason to know of the possibility that son would commit a criminal act toward plaintiff that no contrary verdict could ever stand. Plaintiff had had previous contact with son w/out incident.

Rowland v. Christian - π asked to use Bathroom at Δ's, and π injured when faucet broke off sink. Issue is whether Δ was negligent in not warning π of broken handle? Δ was aware of condition and was reasonable that the handle could break and harm π. Court eliminated the distinctions between trespassers, licensees, and invitees in favor of a reasonable care standard owed in all situations. This was a departure from common law precedent.

Invitees

Persons entering land with permission for the owner/occupier's business or as members of the public on land open to the public

Two primary kinds of invitees:

Business Invitees: on the premises for the potential financial benefits of the land occupier (i.e. customers)

Public Invitees: on land held open to the public at large (i.e. churches, airports, museums)

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

Example: people that come to look in store of shopkeeper

"If it appears that a person had no intention of presently or in the future becoming a customer, he could not be held to be an invitee, as there would be no basis for any thought of mutual benefit."

CAMPBELL v. WEATHERS (CUSTOMER FALLING IN TRAPDOOR CASE) -

Plaintiff entered Defendant's place of business, and loitered w/out making any purchase. While walking down a dark hallway to use the business' toilet, he fell into an open trap door. Issues:(1)What is the relationship between the defendant and the plaintiff?(2)Was Plaintiff a trespasser, a licensee or an invitee? Court held that even though Plaintiff made no purchase, he nonetheless was to be considered a customer and therefore an invitee, since he was a long-standing regular customer, who had used the public toilet on numerous other occasions.

WHELAN v. VAN NATTA (GROCERY STORE STAIR WELL CASE) -

Plaintiff came into grocery store, made purchase, and then inquired about obtaining a box. Plaintiff was instructed by Defendant to go to the "backroom" to find some boxes. While in dark backroom, plaintiff fell into an unseen stair well. Plaintiff was not warned about existence of stairwell. Issue: "Did the status change from invitee to licensee after he made the purchase and went into the storage room to obtain the box?" Holding: Yes. Although Plaintiff was an invitee at the time of his purchase, he was a licensee at the time he went in to the backroom to get a box, and Defendant owed no duty to provide a safe place.

Trespassers - One who enters another's property without permission.

Undiscovered

No duty

Discovered/anticipated

Duty to warn or make safe concealed artificial conditions, known to the owner/occupier, involving risk of death or serious bodily injury

SHEEHAN v. ST. PAUL & DULUTH RY. CO. (FOOT STUCK IN RAILROAD

CASE) - Issue is what duty a railway company owes to a trespasser on its tracks, and how and when does the duty arise? Court held that a trespasser on the track, in a place not open to travel, is clearly distinguishable in the absence of this notice to the company. Since injury came wholly from the act of trespassing, the risk and all positive duty of care for his safety rests with the trespasser – no breach of positive duty involved. Duty not pre-existing but arises at the moment of discovery. Judgment for RR was affirmed.

Owner/Occupier's Duty to Those Outside the Land

Common law rule provides that a land possessor owes no duty to those outside the land for natural conditions on the land, even where the land possessor realizes that the condition creates a significant risk of serious harm. Where harm is occasioned by an artificial condition or the land possessor's activity, however, a duty is recognized.

Chart of Duty Owed	Condition	Activity
Unanticipated Trespasser	No Duty	Reasonable Care
Reasonably Anticipated Trespasser	Warn or make safe "known man-made death traps" (artificial conditions)	Reasonable Care
Licensees	Warn or make safe "known traps" (natural & artificial conditions)	Reasonable Care
Invitees	Same as licensees, plus duty to inspect (natural & artificial conditions)	Reasonable Care

Negligence per se

When applicable, statute's specific standard replaces the general negligence standard (i.e. the reasonable person standard)

Note: Sometimes the purpose of a statute is very ambiguous. Example: key-in-the-ignition statutes...who is the class of persons the statute was designed to protect? (Insurance Co., children, burden on police, accident victims?)

Test: class-of-persons/class-of-risk (Judge must determine)

The plaintiff is in the class of persons the statute was designed to protect

The harm suffered is among the risks that the statute was designed to protect against

Just because negligence per se established does not automatically mean P wins; still must show actual causation, proximate causation, and damages.

Defendant may also have a valid excuse which overcomes negligence per se (i.e. compliance with the statute would cause greater danger than its violation).

Osbourne v. McMaster - Osbourne's wife drank an unlabeled bottle of poison and died. State statute required all poison bottles to be labeled. The fact that the poison was not labeled established negligence per se.

Zeni v. Anderson - A nurse was hit by a car while she was walking on the street in the winter. There was excessive snow on the sidewalk and people often used the street to walk to work. There was also a statute that said people couldn't walk on the street if there was sidewalks. Court held that although negligence per se was established, that only makes for a rebuttable presumption of negligence. Since walking on the roadside was more reasonable than walking on the sidewalk in this case, Zeni has an excuse that overcomes negligence per se.

Stachniewicz v. Mar-Cam Corp. - Fight erupted in a bar between patrons sitting at a booth and other patrons at an adjacent table with the plaintiff. The brawl resulted in the plaintiff suffering injuries. The booth patrons had been drinknig in Defendant's establishment for about two and a half hours before the brawl commenced. A state regulation prohibited any licensee from permitting loud or disorderly conduct or profane language upon their premises. The OR Supreme Court ruled that the Defendant's violations of state regulation should be treated as negligence per se, reversing the lower court's decision. The court reasoned that the regulation was meant to prevent abuses associated with bars and they had the safety of bar patrons (such as the plaintiff) in mind in addition to the peace and tranquility of the community.

[3] Breach of duty

Generally

The defendant's failure to meet the standard of care owed to the plaintiff.

Careless, not providing the care owed to a person

Issue for jury or trier of fact

[a] Determination of Unreasonableness

All conduct creates some risk, negligence is not established by showing defendant engaged in risk creating conduct leading to injury.

Risk Calculus - whether $B < PL$

B = Burden of Avoidance-The value of the interest to be sacrificed;

requires consideration of things such as: costs associated with avoiding the harm, alternatives and their foreseeability, inconvenience to those involved and the extent to which society values the relevant activity

based on an objective standard; defendant's inability to afford an otherwise reasonable safety measure is irrelevant.

P = Probability-Probability measures how foreseeable the harm-causing event is;

L = Injury-The magnitude of the loss looks at the likely harm (not the actual harm)

what a reasonable person would foresee as the likely harm

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

The Role of Custom

Custom: A well-defined and a consistent way of performing a certain activity, often among a particular trade or industry.

Deviation from Custom

If a plaintiff can persuade a jury that there is an established custom in a certain area (putting shatter proof glass in a shower door) then the Δ's deviation from this is a breach of duty.

Compliance with Custom

Evidence of compliance with custom is admissible as evidence of lack of breach of duty.

The T.J. Hooper (tug boat radio)

Whether or not something was the industry custom does not in and of itself answer the question of whether the owners breached a standard of care by not supplying their tug boats with radios.

Just because it was not custom to carry radios does not mean it was not the standard of care to require them to carry radios.

Custom does not dictate standard of care! (but relevant in determining standard of care)

The court held that the tugs were unseaworthy (comparative to not reasonable in reasonable person standard) because they did not have receiving sets, even though such sets were not standard in the industry. (The court also said the barges were unseaworthy, but that wasn't important in regard to the custom question. Custom question involved whether radios on tugs were industry custom.)

Jury may find "customary negligence" on Δ 's part, determining that entire custom itself is unreasonable.

Custom is evidence for the jury to consider in its determination of breach of duty. Example: Where Δ driver tries to show excessive speed was consistent with the community norm

[b] Proof of Breach

π has burden to prove each element of a negligence by a preponderance of the evidence. If plaintiff fails at any one of these elements, the case is decided for the defendant.

Two key forms of Evidence

Direct: evidence that comes from personal knowledge or observation

Only issues are credibility and reliability, no need to draw inferences
rare in negligence cases

Circumstantial: proof that requires the drawing of an inference from other facts

most common form of evidence

plaintiff often relies on circumstantial evidence to persuade jury of unreasonable

conduct.

Slip and Fall Cases

π must show more than the fact that she fell and was injured to prove Δ 's breach. π must show that the condition on which she slipped existed long enough so that the Δ should have discovered and remedied it.

Example: unmelted v. melted icecream bar on grocery store floor.

Melted icecream bar allows one to reasonably infer that it was there long enough so that it should have been discovered and remedied - "Constructive Notice"

Some Courts permit π to make a case w/o proof of actual or constructive notice on part of Δ . π could prove a "mode of operation" liability by which π bases liability on methods Δ uses to run business- thus notice of specific danger is irrelevant

[c] Res Ipsa Loquitor

Res ipsa loquitor-thing speaks for itself

Objective: it permits a jury to infer that the plaintiff's injury was caused by the defendant's carelessness even when the P presents no evidence of particular acts or omissions on the part of the D that might constitute carelessness (common sense theory)

Special type of circumstantial evidence establishing defendant acted unreasonably without any other inferences needed

The very occurrence of an event may rebuttably establish negligence, if:

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

The instrumentalities of the accident were in defendant's sole control

Elements

The accident would normally not occur absent negligence: the injury must be of a kind that ordinarily does not result absent carelessness of D

The Δ had exclusive control over the cause of the injury

The π did not contribute to the cause of the injury, nor did a 3rd party.

Burden of Proof

The π has the burden of proving that the Δ breached a duty

The burden then switches to the Δ to prove that he/she/it acted reasonably

Byrne v. Boadle - Guy walking down sidewalk gets hit with barrel of flour. Owner of flour warehouse is found negligent under *res ipsa loquitur*.

Ybarra v. Spangard - Very limited applicability of Ybarra because could not show which Δ "exclusive control" of the instrumentality causing the injury. Man went to doctor for a routine surgery. After surgery arm stopped working. Many people operated on Plaintiff. Plaintiff could not identify who caused his injury. Because plaintiff was unconscious, we can't expect him to be able to know who injured him. Furthermore it is unlikely that the doctors or nurses will rat each other out. Therefore plaintiff can recover.

Hypo: if you had a choice between two clients, one slipped on an intact ice cream bar, the other slipped on a melted ice cream bar, which would you take?

The melted ice cream bar, shows there was time for owner to notice it and clean it up
Intact bar itself does not speak to anyone's negligence without more evidence

[4] Actual causation

Generally

Also called cause in fact

Plaintiff must show that it is more likely than not the defendant's conduct was a cause of plaintiff's injury

[a] But for test

The traditional, dominant test

But for defendant's conduct, plaintiff would not have been injured

For Δ to be held liable, π must establish by preponderance of the evidence that *but for* the Δ 's actions the π would not have been injured.

Daubert v. Merrell Dow Pharmaceuticals (Birth Defects)

Facts: Children brought suit claiming birth defects from drug taken to prevent morning sickness (Bendectin).

Issue: Evidentiary question- is expert scientific testimony admissible to prove that Bendectin caused π 's birth defects?

Statistical Evidence Test:

Is it reliable "scientific knowledge" i.e. tested, peer-reviewed, scientifically accepted?

Is it relevant?

Rule: Causation can be proved even when don't know how the damage occurred, if there is sufficiently compelling proof that the agent caused the damage somehow.

Holding: π did not meet statistical evidence test to prove drug caused birth defects

[b] Substantial factor test

Used to supplement the but for test when redundant multiple causes are present

If two people's or multiple actions were sufficient (substantial factor) to cause the injury, both or any actor whose conduct as a substantial factor in bringing about the injury can be held liable

Anderson v. Minneapolis RR

RR started a fire in one area and it eventually combined with another fire.

The new combined fire caused Anderson's house to burn down.

RR is liable and Anderson wins

Hill v. Edmonds

Facts: Woman collides with tractor left in middle of the road at night with its lights on

Rule: Where separate acts of negligence combine to produce directly a single injury each tortfeasor is responsible for the entire result, even though his act alone might not have caused it

- Some courts view this as an alternative to the but-for test for actual causation in multiple tortfeasor situations. (See Aldridge v. Goodyear.)

[c] Multiple Necessary Causes

When each of multiple careless acts is necessary to cause the injury, each is considered an actual cause of the injury

Example: Someone heaves bowling ball. Someone else lobs knife. The bowling ball that deflects the knife hits a pedestrian. The heaver and the lobber are both liable.

[d] Multiple Sufficient Causes

When each of multiple discrete careless acts committed by different multiple actions, by itself, cause the injury that resulted.

Example: Two companies dump equal amounts of toxic chemicals into the ground which seep into the soil and contaminate a residential well. The well has 1000 ppm of the chemical. The resident drinks the water and dies because a dosage of 300 ppm is enough to kill someone...both companies are liable. -- /or/ If you and your neighbor play w/ fireworks and start a fire that hurts your neighbor. The "But For" claim does not work cause' you can say "but for" this your burns would have still happened for my neighbor's actions would have caused you harm regardless. So judges made the JOINT CAUSES charge to help people get damages.

[e] Burden Shifting and Problems in Cause-In-Fact**Summers v. Tice**

Facts: Two hunters both negligently fired their guns, but plaintiff cannot establish which one fired at him. Multiple defendants acted, but only one caused injury

Rule: Where a small number of defendants are engaged in substantially simultaneous, culpable conduct imposing similar risks, the burden of proof shifted to defendants to negate his or her own negligence, ie make defendant prove that he was not the cause.

Holding: In this case, plaintiff won damages from both defendants because neither could negate negligence.

Market share liability

Theory of causation used by consumers who allege that they were injured by a product but cannot identify who made it. This is so that Plaintiffs that do not know exactly how they were injured are still able to recover damages.

Burden of proof is on the defendants to prove that they did not manufacture the product that caused the injury

If defendant cannot prove that it wasn't the cause of the injury, that manufacturer is liable for

its percentage share of the market at the time the injury took place. For example, if Defendant's product accounted for 10% of the market at the time of the incident, then damages are rewarded respective of the market they hold (10% of the damages).

Plaintiffs must join enough defendants to represent a substantial share of the market of manufacturers of the product at the time of the injury

Example: DES medication taken by pregnant mothers to prevent morning sickness (resulted in birth defects to babies). Asbestos manufacturers

Sindell v. Abbott Laboratories

Facts: Plaintiff's mother took diethylstilbestrol which caused cancer, but unclear which manufacturer of approximately 195 nationwide is specifically responsible

Rule: Each defendant liable for the proportion of the judgment represented by its share of the market unless it demonstrates that it could not have made the product which cause plaintiff's injuries

Under Sindell, Defendants are required to join together so that a substantial portion of the market is represented in the proceedings.

Medical Uncertainty Cases

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

Some courts make the loss of opportunity to survive the cause of action. Lost opportunity can be compensated and valued as an appropriate percentage of wrongful death claim

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

[5] Proximate causation

General: also called legal cause; when the cause is close enough to hold one liable; proximate causation is an issue of fact, therefore an issue for the jury - For example ~ if someone fell into a hole in your floor that was hidden by a rug. Definition: an event that set in motion the resulting injury AKA a cause that does not necessarily or immediately cause an event or injury (i.e. butterfly effect concept)

'Foreseeability test'

Definition: whether the Δ should have reasonably foreseen, as a risk of her conduct, the general consequences or type of harm suffered by the π .

The extent and the precise manner in which the harm occurs need not be foreseeable.

Elements:

(1) A reasonably foreseeable result or type of harm, and

(2) No superseding intervening force

A new, extraordinary or highly improbable force which joins with D's conduct to cause P's injury.

(1) Δ is liable IF there is a "direct line" between π 's injury and Δ 's conduct.

Δ is liable for the damages he causes that are foreseeable; he is NOT liable for remote, or unforeseeable damages. The injury must be a "natural and ordinary result" of Δ 's act. The act must be "adjacent" to the injury.

Ryan v. New York Central R.R. Co:

Facts: π 's home was destroyed by a fire that started in a railroad's wood

shed.

Rule: If damage is remote, π can't recover from Δ , so ct. ruled for Δ because the distance between the 2 structures was too great.

(2) Δ is liable IF the link between π 's injury and Δ 's conduct is a "reasonably foreseeable harm."

When Δ 's conduct is unintentional, the question is whether the wrong is "natural or probable."

Palsgraf v. Long Island R.R. Co.

Facts: Package of fireworks falls on tracks, explosion knocks over scale that injures π

Rule: No indication of what inside package, so injury not reasonably foreseeable

'Eggshell Plaintiff Rule' - the extent or severity of harm is always considered foreseeable

'Medical Professionals' - negligence is always considered foreseeable

"Wagon Mound No. 1"

Facts: Boat spilled oil in harbor. Oil later started on fire by actions of π 's workers.

Rule: Liability depends on the reasonable foreseeability of damage. Court ruled in favor of Δ stating that damage (oil catching fire) was not foreseeable.

"Wagon Mound No. 2"

Facts: Same as first case, but claim brought by owners of ship, not owners of wharf.

Rule: Liability depends on the reasonable foreseeability of damage. Court ruled in favor of π stating that Δ could have reasonably foreseen and prevented the oil from catching fire.

Proximate Causation – Handout

[1] Basic Tests

[a] Foreseeability Test

[i] the basic test of proximate causation

[ii] an imaginary trip back in time

[iii] What might go wrong here?

[b] Harm-Within-The-Risk Test

[i] think of this as a way of focusing and re-articulating the foreseeability test

[ii] a question of germaneness (connectedness/relevance)

[iii] Is this the kind of harm that made the defendant's action negligent?

[iv] Is the harm suffered the kind that makes us want to make the defendant's action actionable?

[c] Direct Test (largely discarded)

[i] Are there any intervening forces that are necessary to join with the defendant's conduct to cause the injury?

[ii] Precludes any intervening force

Note: Existing circumstances can combine with defendant's act, and yet the causation is still "direct." (The defendant acted on a "set stage.")

[iii] If some occurrence (act of God, person's action, animal's action) is a necessary link in the chain of causation between the defendant's act and the plaintiff's injury, then the case fails for want of proximate causation.

no longer the law, generally

[d] Rough-Sense-Of-Justice Test

[i] might explain many results

[ii] not a test that a court is likely to use explicitly, unless the other articulations fail to produce the desired result

[2] Objects of Foreseeability**[a] Unforeseeable Plaintiffs**

[i] General Rule: There is no proximate cause for unforeseeable plaintiffs.

[b] Unforeseeable Extent of Harm

General Rule: The extent of harm is not subject to the foreseeability limitation.

Personal Injury: eggshell-plaintiff rule. The defendant is liable even for an unforeseeable extent of harm.

Property Damage: some loosening of the rule. The foreseeability and harm-within-the-risk tests can be applied to the extent of harm for property damage so as to provide a proximate-cause limitation on liability (even if the causal connection is "direct.")

Ex.-If someone stores ming vases in the door of their car, you are liable for them if you drive into the door.

[c] Unforeseeable Manner of Harm

General Rule: If the harm suffered is of the foreseeable sort, an unforeseeable manner does not preclude recovery, unless the manner was extraordinary in retrospect.

Example: The defendant's negligent driving causes plaintiff's car to crash. Plaintiff is, at this point, okay, but walking to town, he is hit by a third car. This is not extraordinary. The original defendant is liable.

[d] Unforeseeable Type of Harm

No general rule: case by case.

Example: The defendant negligently leaves a loaded shotgun lying in the backyard with three-year-old children. One child moves the rifle so that it is leaning on a rock, and another kid falls backward onto one end of the shotgun so that the other end is propelled upward, causing it to strike a child in the head. Courts and commentators would differ.

It is not the TYPE of harm you would expect from a shotgun

[3] Issues of Intervening and Superseding Forces

[a] By definition, a "superseding" force is one that breaks the proximate-cause relation.

[b] Negligence is not normally superseded by someone else's negligence.

[c] Common Recurrent Situations**[i] Rescuers**

The defendant is always liable for the injuries to a person who reasonably attempts to rescue someone imperiled by the defendant's negligence. In Cardozo's words, "danger invites rescue." More plainly, rescuers are always foreseeable plaintiffs.

It is a separate act from the original event

[ii] Injuries Received in Treatment of Original Injury

Malpractice is generally foreseeable.

The defendant is usually liable for aggravation of an injury caused by subsequent treatment, medical malpractice, and ambulance accidents.

If, however, it goes too far - that is, the subsequent negligence is extraordinary - proximate cause may be lost.

Example: A drunk trauma surgeon vomits in a person's body cavity, causing sepsis. The negligent driver whose actions sent the patient to the hospital is not liable.

Vomit is the superseding cause

[iii] Intentional or Criminal Intervenor

Usually, criminals or intentional tortfeasors are superseding forces. But not always. Apply the harm-within-the-risk test.

Example: A negligent internet security firm forgets to install updated software. Malicious geek arsonists take over your computer and use it to set your house on fire. The security firm is liable.

[6] Damages

Compensatory Damages

Money given to make P whole again. Intended to represent the closest possible financial equivalent of the loss or harm suffered by P.

'These are the most common form of damages'

Sufficient kinds of compensatory damages

Personal injury - physical pain and suffering can be included

Property damage (tangible)

Severe emotional distress (for NIED only)

Not mere economic damages, harm to reputation, or other oblique injuries

But note that oblique injuries may create liability covered under the heading of oblique torts

Pecuniary injury - damages include compensation for the victim's medical expenses, lost wages or diminished earning capacity, and other economic expenses because of the injury.

Non-pecuniary injury - pain, suffering, and other variations of mental distress.

Punitive damages

Punishes defendant

Compensatory damages are a prerequisite

Conduct must be wonton, willful, reckless, or malicious

Respondeat Superior and Punitive Damages

Punitive damages may be levied against an employer or "other principal" because of an act by that party's agent if:

The principal or a managerial agent authorized the doing and the manner of the act, or

The agent was unfit and the principal or a managerial agent was reckless in employing or retaining him, or

The agent was employed in a managerial capacity and was acting in the scope of employment, or

The principal or a managerial agent of the principal ratified or approved the act.

Duty to Mitigate

Example: Seek medical attention if it is needed for your injuries-must take care of.

Collateral Source Rule

Damages are not reduced because plaintiff has collateral sources (insurance, charity, someone else paid their medical bills)

Nominal Damages are NOT AVAILABLE in "negligence claims"

Negligence Defenses

PLAINTIFF BEARS BURDEN OF ALL ELEMENTS OF A TORT CLAIM-If plaintiff fails on just one element, defense wins!!

Plaintiff's negligence

Contributory Negligence

Definition: Conduct on the part of the plaintiff which falls below the standard of conduct to which he should conform for his own protection; and which is a legally contributing cause cooperating with the negligence of the defendant in bringing about the plaintiff's harm.

Complete bar to recovery- if plaintiff contributes to negligence, no recovery

Most jurisdictions have rejected contributory negligence in favor of comparative

negligence

Comparative Negligence

Pure comparative negligence

Plaintiff's award is reduced by percentage of fault

Example: If P is responsible for 90% of the negligence that caused his injuries, he may still recover 10% of his damages.

Partial comparative negligence

Plaintiff's award is contingent upon defendant meeting a certain threshold

percentage of fault

Plaintiff's award is then reduced by percentage of fault

Assumption of Risk-"You assumed the risk."

Definition: A plaintiff who fully understands a risk of harm to himself or his things caused by the defendant's conduct or by the condition of the defendant's land or chattels, and who nevertheless voluntarily chooses to enter or remain, or to permit his things to enter or remain within the area of that risk, under circumstances that manifest his willingness to accept it, is not entitled to recover.

'Elements':

Knowledge of a Particular Risk: plaintiff must have actual and conscious knowledge of the particular risk.

Voluntariness: plaintiff must voluntarily expose herself or her property to the risk to assume the risk.

Assuming the risk: the defense of assumption of risk only applies to the particular risk which the plaintiff has knowingly and voluntarily assumed.

'Classifications of Assumption of Risk':

Express agreement

Not valid for certain defendants, including common carriers (like airlines)

Not valid for gross negligence or willful acts

Implied: Based on the circumstances, plaintiff impliedly assumed the risk

Strict Liability

Generally

Under special circumstances, liability may be imposed without a showing of negligence or other form of culpability. Liability is always there!

NO DUTY OR STANDARD OF CARE

Law doesn't care how careful you are.

Elements

1) Absolute responsibility for safety

Trespassing non-domestic animals, (ex. livestock, not dogs and cats)

Owned wild animals (ex. reptiles, birds, exotic pets), on property or escaped, to licensees and invitees (non-trespassers)

Domestic animals with known, uncommon, dangerous propensities (ex. biting dog)

Ultrahazardous / abnormally dangerous activities

Factors

Degree of danger

Risk of serious harm

Inability to render safe

Uncommonness of activity in area (ex. demolish a building in a downtown area)

Examples:

Blasting

Oil drilling

Fumigation

Crop dusting

Defective products

Defendant must be a "Commercial Supplier" of the product at issue

manufacturers, wholesalers, and retailers are "Commercial Suppliers"

Does not include casual sellers, (ex. garage sales)

2) Actual causation: Generally the same as for negligence 3) Proximate causation: Generally the same as for negligence 4) Damages: Generally the same as for negligence

Other Lineal Tort Issues

Standard of proofPreponderance of evidence: greater than 50%

For each element of cause of action or affirmative defense

DamagesCompensatory: awarded as compensation for harm for monetary and non-monetary losses

Special

General

Nominal: a symbolic award given when there is a legal injury but no substantial loss to be recovered for; there are no nominal damages granted in negligence claims

Punitive: awarded in cases where defendant has acted with malice, deceit, or recklessness; given in addition to actual damages - must first have compensatory damages

*Multiple Defendants

If two Δ 's injure π at same time, burden is shifted to Δ 's to prove which one did not harm π

*Duty

Where a statute imposes a duty on a person, regardless of reasonable person standard, he is negligent.