

# Torts Wypadki Spring 2010



**Torts II**  
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# Spring 2010 Torts Wypadki

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## **THE FEDERAL GOVERNMENT AS NEGLIGENCE DEFENDANT**

### **Federal Torts Claims Act**

#### **Overview**

- Sovereign immunity prevents suits against the Federal Government
- The Federal Torts Claim act is a limited waiver of sovereign immunity.
- Law has both substantive and procedural components

#### **Procedure**

- Plaintiffs must first file an administrative claim with the appropriate agency
- Agency then has six months to allow or deny claim
- Upon denial, a plaintiff may sue in federal district court

#### **Substance**

- The court applies the relevant state law.
- If, under State law, a private actor would have a duty in negligence, then the U.S. has a duty for negligence
- The tortious action must have been committed by a federal employee acting within the scope of his or her employment.
  - Contractors' generally cannot create federal liability.

- Many exceptions are provided that override state law
  - Examples
    - Cannot sue under these causes of action:
      - Assault
      - Battery
      - False imprisonment, false arrest
      - Defamation
      - Misrepresentation, deceit
      - Interference with contract rights
      - Actions using strict liability
    - Combatant actions of the military
    - Claims arising in a foreign country
    - Prison inmates cannot sue for emotional injury absent unless related to a physical injury

## INTENTIONAL TORTS

### Intent

#### Generally

- **Volition & Consciousness of likely consequences:** D **desires** the consequences of his acts OR is **substantially certain** his acts will cause the elements of the tort to occur.
  - **Garratt v. Daily:** *Remanded* to trial ct issue of whether 5 y/o Δ was substantially certain II V would fall while attempting to sit on a chair Δ had moved.
  - **Bohrman v. Main Yankee Atomic Power Co.:** *Holding* several students could claim damages for battery b/c the nuclear plant they were touring was allegedly “substantially certain” the students would be exposed to excessive doses of radiation.

#### Special Considerations

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

- **Insanity and Infancy are not defenses**

NOTES FROM DLM:

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

## Battery

### 1. Harmful or Offensive Contact;

- Reasonable person standard
  - *Exception:* when D knows P is unusually sensitive
- **Without privilege:** Must not be consented to; in everyday life, consent is implied (bumping into someone on bus)
- *Egg shell P:* D liable for all harm that results if only a minor battery was intended
  - "A D takes his V as he finds him"
- V does not have to be aware of contact; i.e. unconscious

### 2. To $\pi$ 's person;

- $\Pi$ 's body or "*anything which is attached to it & practically identified w/ it*" (purse, car)

### 3. Intent; and

- Once  $\Delta$  has engaged in even a mere technical battery against  $\Pi$ , the risk of unforeseen harm arising from battery is borne by  $\Delta$  → consequently:  $\Delta$  can be liable for greater damages than may be intended.

- **Vosburg v. Putney**: Where boy playfully but w/o privilege slightly kicks a classmate w/o intending harm, he is responsible for the unexpected serious illness which resulted (unconsented horseplay resulted in V being impaled on a meat hook)

#### 4. Causation

- Direct (hitting  $\pi$ ) or Indirect (setting in motion) contact

#### NOTES FROM DLM:

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

### Assault

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

#### Elements

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

#### 1. Act

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

#### 2. Intent

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

### 3. Causation

- Apparent ability sufficient

### 4. Apprehension

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

### 5. Imminent Harmful or Offensive Touching

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

### Case Law

- **I de S et ux. v. W de S**: Allowed H (W had no legal standing) for recover from  $\Delta$  who wielded an axe at  $\Pi$ 's W. Even though W not physically touched, attack caused her harm (fear of imminent physical injury)
- **Castro v. Local 1199**: threatening an emp while slamming a table was "*forward looking*" & was therefore insufficiently immediate to constitute assault

### NOTES FROM DLM:

- [a] this is about comping purely psychological injury. Tends to be construed very narrowly.
- [b] assault occurs when D's acts intentionally cause the victim's reasonable apprehension of immediate harmful or offensive contact. No requirement of reasonable. Different from criminal definition in that crim = attempted battery, where tort = apprehension (no apprehension with attempted battery = no assault).
  - [1] Intent same as discussed before. Transferred intent applies. Accidental creation of the apprehension would more likely be NIED.
  - [2] apprehension means the victim must be aware of the attempted touching (ie not asleep or looking the other way) and must believe D is capable of the act (ie an unloaded gun that D claims is loaded).
  - [3] the harmful or offensive contact must be imminent - future threats or threats without any action to back it up don't count.

- [4] reasonable apprehension means generally that if I point a pencil at you and push the eraser and you are scared you will be shot, it probably isn't assault (but the restatements might make it so). However, if I knew you had a deadly fear of pencils and decorated your office with them, that could count.
- [5] fear v. apprehension - the imminent contact doesn't need to make the victim afraid, just means that the victim is aware that the touching will occur unless they take evasive action (or something else intervenes like bodyguards). IE being spit at would not make me afraid but it IS offensive and I WOULD want to get out of the way.
- [6] conditional assault = where D makes a threat of an unlawful nature so that if the victim chooses it they will avoid harm (ie give me your wallet or I'll kill you...while brandishing a knife). That is still assault. If a delay is built in or another condition (I'd kill you if there weren't a cop standing right here) there is no assault.
- [7] source of contact does not need to be D directly, if they create the apprehension through other means assault can still happen (ie rigging a trap to scare someone).
- [c] Justifications:
  - [1] Moral justifications are that it is wrong to do this to someone. The apprehension requirement can make it under-inclusive from a standpoint of how the criminal law works. Over-inclusive morally, I mean really, being aware of potentially being touched offensively?
  - [2] this allows the distress to be comped and the imminent part gives a bright line..."future" threats may fall under IIED.
  - [3] can deter retaliation - if you know you can sue for the assault you are less likely to escalate the situation to battery. Also keeps that to self-defense, which is an acceptable sort of thing in this society.

## False Imprisonment

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

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

2. Confine or restrain  $\pi$

- Physical barriers, physical force, threats of force, failure to release, invalid assertion of legal authority (false arrest)
- Economic or moral pressure and future threats not enough
  - Use of threats of economic retaliation or termination of employment to coerce  $\pi$  to remain don't constitute FI
- Time irrelevant, *however*, amt of compensation reflects length
- **$\pi$  must know of the confinement**
  - Restatement modifies; would find liability even when  $\pi$  not aware of confinement but is injured.
- Types of lawful confinement



- Restraint of shoplifters BUT must be:
  - rsbl belief theft occurred
  - detention in rsbl manner
  - for a rsbl period of time
- Contractual Obligations (pilot must keep you on a plane before take-off)
- Child discipline

### 3. To a bounded area

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

Note: **Contrast w/ Malicious Prosecution & Abuse of Process**

- FI compensates for unlawful confinement; confinement that is priv not unlawful
- When arrest is privileged & conforms to all legal reqs to justify, FI liability precluded
- Malicious prosecution: arrest pursuant to lawful procedures motivated by bad faith
- Abuse of process: improper use of certain compulsory processes (subpoenas) despite conforming to legal reqs

NOTES FROM DLM:

- [a] where D acts to unlawfully and intentionally cause confinement or restraint of the victim within a bounded area. Accidental confinement = negligence or strict liability. Victim must usually be aware of it.
- [b] the victim must be confined in an area bounded in all directions. Not being able to go the direction you want to (but being able to go in any other direction) is NOT imprisonment. The bounded area can be as large as a city or it can be a moving vehicle. REASONABLE means of escape precludes liability. Unaware/heroic measures, etc = not reasonable.
- [c] victim must be confined or restrained, maybe by 1) physical barriers, 2) force or immediate threat of force 3) omission where D has a legal duty to act or 4) improper assertion of legal authority.
  - [1] physical barriers: must surround v in all directions so that no reasonable means of escape exists.
  - [2] Force: May be directed at v, v's family, companions, or property. Future threats or threats against employment, etc don't count.
  - [3] Omissions: If you don't do something you said you would do, like "I'll unlock the door whenever you want" then if the other criteria are met this is too. P must establish that D had a duty to act.
  - [4] Improper assertion: aka false arrest. V must submit to it for it to count. this is met if D is not privileged under the circumstances to make the arrest. Different privileges for police v. private citizens.
- [d] Contract w/ malicious prosecution & abuse of process: privileged confinement is not unlawful. If it is a lawful arrest liability here is precluded. However the lawful arrest if

motivated by bad faith and meeting other criteria may be malicious prosecution. Improper use of documents like subpoenas may be abuse of process (other requirements here too)

- [e] V must be conscious of the confinement at the time it occurs. Restatements would negate this requirement if harm occurs.
- [f] No minimum time. BUT compensation still reflect the length of the detention.
- [g] Transferred intent applies here
- [h] policy issues include potential issues with the awareness requirement and what kinds of restraints are unlawful.

## **Outrage (Intentional Infliction of Emotional Distress)**

### **1. Act of extreme and outrageous conduct;**

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

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

- P must prove that the D intended to cause severe emotional distress or acted with reckless disregard as to whether the victim would suffer severe distress.
- Severe Mental Distress
  - - mild distress will not suffice.

### **3. Causation; and**

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

### **4. Damages**

- Actual: severe emotional distress, nominal damages/proof of physical injury not required
- More outrageous conduct, the easier to prove damages

### **Note: Sexual Harassment & Racial Epithets: Cts hesitate extending IIED to these**

- Isolated proposition or attempts at seduction traditionally not actionable, nor liability extended solely b/c of racial slurs
- Ct more likely to impose liability where a pattern of harassment is constant & ongoing
- Most situations where liability imposed for racial or sexual harassment: combination of speech & conduct.

- **Jones v. Clinton**: Δ briefly exposed himself while propositioning a state emp. Conduct was sufficiently brief & w/o coercion so as not to be extreme & outrageous

**Exception for Innkeepers, Common Carriers, and Other Public Utilities**

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

NOTES FROM DLM:

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

allowing bystander recovery wouldn't have a large insurance impact. There are arguments both ways.

- [e] Common carriers are liable for gross intentional insults which cause severe mental distress. "Extreme and outrageous" requirement waived. P must be a patron of D (but no purchase requirement, just have to be an invitee). Intended to reflect the higher duty of care these D's have, but it is questionable in the modern light so courts usually will enforce the existing classifications but not extend them.
- [f] policy issues - too vague (uncertainty as to when it applies), where more specific torts could be created to take its place. It is, however limited by the high bar of "extreme and outrageous" behavior and addresses mental anguish where other torts might not.

## Trespass to Chattels

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

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

1. Act that interferes with  $\pi$ 's right of possession in a chattel;

- Intermeddling: directly damaging chattel (denting car)
- Dispossession: deprive  $\pi$  of right of possession
  - More than trivial or momentary interference

2. Intent;

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

3. Causation; and

4. Damages

- Actual required

### Transferred Intent Application

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

NOTES FROM DLM:

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

## Conversion

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

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

**2. Interference is so serious that warrants requiring  $\Delta$  to pay chattels full value;**

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

**3. Intent; and**

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

**4. Causation**

**Special Issues:**

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

NOTES FROM DLM:

- [c] CONVERSION: an intentional exercise of dominion and control over a chattel which so seriously interferes with the right of another to control it that the actor may justly be required to

pay the other the full value of the chattel. Generally limited to tangible property unless the intangible property has distinct scientific, literary, or artistic value. 6 factors:

- [1] the extent and duration on the exercise of dominion or control
- [2] the intent to assert a right in fact consistent with O's right of control
- [3] the actor's good faith
- [4] the extent and duration on the interference with the other's right of control
- [5] the harm done to the chattel
- [6] the inconvenience and expense caused

## Trespass to Land

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

### 1. Physical invasion of $\pi$ 's real property;

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

### 2. Intent; and

- Intent to enter land sufficient
- Mistake is not a defense

### 3. Causation

- Causal intervention of natural conditions (wind, rain), in initiating or exacerbating the trespass will not absolve  $\Delta$  liability.

NOTES FROM DLM:

- [a] an actionable invasion of an interest in exclusive possession of land. Protects the surface, subsurface, and airspace. "Possession" means anyone with a current OR reversionary interest (like a landlord). Trespass = invasion of property interests/exclusive right of possession; nuisance = interference with use and enjoyment of that right.
- [b] INTENT = the desire to cause the consequences of the act, or that they believe the consequences are substantially certain to result from it." Mistake is no excuse, and D doesn't have to intend the trespass specifically as long as they intended the act that caused the trespass.

## REMEDIES- DAMAGES

**definition:** the money awarded to the person injured by the tort of another.

- 3 kinds:
  - Nominal Damages
    - a symbolic award given to the P when liability for a tort is established but no actual harm occurred or is proven with sufficient certainty.
  - Compensatory Damages

- damages awarded to a person as compensation, indemnity, or restitution for harm sustained by him.
- Punitive Damages
  - awarded entirely to the plaintiff when a tort is committed with malice.

### **Property Damages**

- based upon conception of value
- permanent deprivation of the property results in the market value being used
- if real property is damaged but not destroyed, courts generally compensate the victim for the diminished market value of the property
- where malice is established, punitive damages can also be awarded

### **Personal Injury**

- Can be compensated for:
  - Medical expenses
  - Lost wages or impaired earning capacity
  - Other incidental economic consequences caused by the injury
  - Pain and suffering

### **Medical Expenses**

- An injured  $\Pi$  can be awarded all reasonable medical expenses caused by the tortfeasor
- $\Pi$  can also recover anticipated medical expenses caused by the  $\Delta$
- Can pose difficult issues concerning  $V$ 's future need for medical care and anticipated cost of such care
- ordinarily the  $\Pi$  must introduce expert medical testimony to support these claims

### **Lost Wages of Diminished Earning Capacity**

- $V$  can recover for past and future lost wages or diminished earning capacity
- $\Pi$  can be entitled to be compensated for wages or lost business earnings during the period the injury has impacted, and in the future is anticipated to impact, negatively on those earnings (alternatively,  $\Pi$  may seek recovery for past and future impaired earning capacity)
- Under this approach,  $\Delta$  cannot reduce his liability by arguing the  $\Pi$  would have, for example, chosen to have lived on another family member's income rather than pursuing his own career
- Impaired earning capacity requires proof of the victim's specific ability, skills, and aptitude for a career path prior to injury

### **Incidental Economic Consequences**

- Also recoverable; travel expenses to seek medical treatment as well as expenses incurred for housekeeping services because of the victim's incapacity

### **Reduction to "Present Value"**

- Generally damages for medical and other expenses are awarded in a lump sum

- Ex.) an award for future lost earnings is intended to cover the next 20 years, the actual award must be reduced to take into account that \$ is being transferred to V in advance
- Reflects that V is being compensated for losses he has not yet incurred

### **Pain and Suffering**

- Only that which is proximately caused by the tortfeasor
- If patient is unconscious they usually cannot recover for this because they are not aware of their loss
- No obvious monetary equivalent, monetary recovery can never fully compensate for such intangible injuries

### **The Collateral Source Rule Punitive Damages Other Remedies Enforcing Judgments**

#### NOTES FROM DLM: OVERVIEW

- Damages = the money awarded to the person injured by the tort of another. Types are nominal, compensatory and punitive.
  - Nominal = symbolic (often \$1) to show liability was established but no harm occurred/is proven sufficiently. Basically serves as judicial recognition of the wrong (can be helpful for boundaries in trespass cases). Torts that require damages to be actionable never have nominal damages.
  - Compensatory = compensation, indemnity or restitution for harm. Can be awarded for pecuniary and non-pecuniary losses. Property = diminished market value, replacement value, or rental value. Pecuniary = medical expenses, lost wages, diminished earning capacity, and other economic expenses. Non-pecuniary = pain, suffering, mental distress.
  - Punitive = punish and deter particularly egregious conduct. Discretionary and for an act with malice. Usually go to P, but some states get a cut.
  - There has been some statutory modification (ie malpractice damages).

#### PROPERTY DAMAGES

- Interference with property is compensable and based on a theory of value. Permanent deprivation/ destruction = market value @ the time of the tort, occasionally real value. If damaged but not destroyed = loss of market value, sometimes cost of reasonable repairs instead. Sentimental value of the property can factor into which is chosen. Prevented from using = loss of use or rental value (or rental value of substitute property even if it exceeds rental value of own property). Discomfort and annoyances are also compensable. If D is aware of the sentimental value sometimes mental distress damages are awarded too. No sentimental value = no distress damages, but if there is malice perhaps punitive.

#### PERSONAL INJURY

- V can be comped for medical expenses, lost wages/earning capacity, other economic losses, and pain/suffering
- [a] medical expenses - all reasonable expenses caused by the tortfeasor, such as payments for doctors, hospitals, nursing care, PT, abd testing. Also anticipated medical care which can be difficult to prove - usually expert witnesses are needed/used.



- [b] Lost wages/earning capacity - pretty much what it says. Actual losses, lost raises. OR past and future impaired earning capacity (instead of trying to prove lost income). Measures v's lost potential to earn income, not dependant upon proof that that income WOULD have been earned. Usually industry standard is used to value v's time (even if V would value it higher). Requires proof of a specific ability/skills/aptitude for the career path prior to the injury. Education can prove very persuasive. For infants/youths, it is a guess at best. The estimates for all include the life expectancy of V prior to the injury.
- [c] things like travel expenses, housekeeping services, etc.
- [d] Reduction to "present value" - this takes into account that P is getting the money in advance, so interest rates can reduce this (court is assuming P will invest wisely). On the flip side, inflation can reduce the lump sum. BUT they are not subject to income tax.
- [e] Pain and suffering - includes comp for loss of enjoyment of activities as well as mental distress over an injury and any disfigurement. Also for reduction in life expectancy or concern over illnesses they may now be subject to. If V is unconscious he cannot recover - V is not aware of the deprivation, therefore cannot suffer from it. Jury values this on a per diem basis then multiply by a # of days BUT you can't have a "golden rule" judgment (how much would you require to change places with P?). The issue here is that there is no obvious monetary equivalent. As such there is not usually reduction of present value. Not compensating this would ignore a very real aspect of the tort, and provides deterrence. However \$ can never truly comp for these things. Complicated by the fact that this is what usually covers the attorney's fees.

#### MITIGATION/DOCTRINE OF AVOIDABLE CONSEQUENCES

- Injured v's have a responsibility to act to reasonably to limit or "mitigate" the losses incurred. Things like going to the doctor to get stitches, etc. If V doesn't do that, D is not liable for incremental losses that could have been prevented. This is different from comparative/contributory negligence, where P contributes to the tort in the first place somehow.

## NON-DAMAGES REMEDIES

### Restitutionary Remedies

- **LEGAL**
  - Replevin – you can get this before trial – allows you to get possession of a chattel that has been seized by the Δ (you just need a hearing and you can get the chattel back before trial)
  - Ejectment – for restoring possession of land (similar to replevin)
  - Quasi-Contract – award of money; based on the value of an unjustly obtained benefit (ex. you harvest your neighbor's grain before the storm comes – he could get compensation for providing that benefit; if you are injured and worked on in the ER – concept of quasi-contract allows them to be paid for working on you)
- **EQUITABLE**
  - Constructive Trust – "trust" is a concept of property ownership where the property is owned in "trust" for someone or something else's benefit; "constructive" means something fake (construing something to be a trust);

- Requirements: Δ must acquire title to some property, have to show that the Δ keeping the property would result in unjust enrichment (in some courts), must be no adequate remedy at law
- Advantages (over quasi-contract) – if you can trace the property you can get the benefit of enhanced value of that property; you can become a secured creditor of the property (owns money and has security interest in a particular thing so that they are sure to get the money back – ex.) bank can get back your house if you do not pay mortgage; car loans, etc.
- 
- **Equitable Defenses**
  - Unclean hands – if your yourself are being unfair
  - Laches – wishy washy fairness
  - Transfer of legal title to a bonafide purchaser – did not know it was purchased through stolen means (no notice)
- 
- **Equitable Lien**
  - Lean placed on Δs property to secure payment to the Π
  - Different from a constructive trust in that you only have a security interest up to the amount of your claim (not enhanced value); (ex. selling stock and using proceeds to build an addition on your house)
  - Must be misappropriation of the Πs property
  - Traceable
  - Unjust enrichment in some courts
  - No equitable remedy at law
- 
- **Injunctions** – an order from the court that has somebody do or refrain from doing something
  - Injunctions are equitable (not legal)
  - Classic example – someone is going to demolish a building; if you represent a historical society who wants it to be preserved you can get a court ordered injunction to get them to NOT tear down the building

## ENFORCING JUDGMENTS

- damages are awarded but how are they enforced?
- If someone does not have enough money to pay a debt, there are various ways to enforce it
  - - Seize assets
    - Judgment creditors
    - Federal marshal seize something to scare them into giving you the money (Example from Prof: *II was owed \$2000 from an airline; fed marshal went to LAX, seized a 757 plane ad they cut her a check fast*)

# DEFENSES

## Self Defense

**Scope:** Reasonable force can be used.

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

NOTES FROM DLM:

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

## Defense of Others

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

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

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

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

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

NOTES FROM DLM:

- [a] a person can use reasonable force to protect a 3P from immediate unlawful physical harm. No limit on who can do the protecting.
- [b] Some courts limit the privilege of defense to when the person in need of defense would have been able to use that privilege.
- [c] some courts toss out the above and say there is a privilege to use reasonable force to protect 3P whenever the actor reasonably believes that a 3P is entitled to use self-defense.
- [d] Policy considerations - a good Samaritan acting in good faith shouldn't be punished...but...there is the problem of stranger intervention targeting the wrong person.

## **Defense and Recovery of Property**

### **Defense of Property**

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

### **Defense of Home**

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

### **Recovery of Property**

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

NOTES FROM DLM:

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

- [f] recovery of personal property - reasonable force when in “hot pursuit.” Act at your own peril - mistake doctrine does not apply. Merchant’s privilege allows retention for reasonable periods to investigate possible theft, this does usually include a reasonable mistake clause.

## Necessity

Allows the Defendant to interfere with property interests of an innocent party in order to avoid greater injury.

**Public Necessity** - Injuring private property interest to protect the community.

- Complete defense
- No compensatory damages are owed

**Private Necessity** - Person injures private property to protect a private interest valued greater than the injured property.

- Incomplete defense
- Defendant must compensate Plaintiff
  - Ex) D ties his boat up to P's dock to get out of a storm and save his life. Any damage done to P's dock must be compensated by D.

NOTES FROM DLM:

- [a] designed to protect those who act in a greater-good sort of situation
- [b] Private necessity - you can interfere with the property right of another to avoid a greater personal loss or harm, but have to pay damages.
- [c] public necessity - you can interfere or take someone’s property to avoid more substantial public harm. No liability. Some courts are going against this tho.
- [d] Intentional injury and killing - there is no clear authority but this book argues that if one life is to be sacrificed to save multitudes then it probably should be deemed OK.

## Consent

Types of Consent

1. **Express** Can be written / oral / gestures
  2. **Implied in fact** under the circumstances conduct conveys consent **Ex)** jumping into a boxing ring - consent to getting hit is implied.
  3. **Implied by law** consent to medical treatment by medical professionals if unconscious.
- Implied by law can be negated - Ex) bracelet that expresses objective to treatment for religious reasons.
  - Medical procedure without express or implied consent = battery

**Consent Invalid if Induced by:**

- Fraud
- Physical Threat
- Economic Pressure

**Lacks Capacity to Consent if:**

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

NOTES FROM DLM:

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

## **DEALING WITH ACCIDENTS (OUTSIDE OF EX-POST NEGLIGENCE)**

### **Strict Liability for Animals**

- Generally
  - Under special circumstances, liability may be imposed without a showing of negligence or other form of culpability

- Elements
  - Absolute responsibility for safety
  - Trespassing animals
    - 2d Restatment §504 - strict liability for the possessor of trespassing livestock unless (1) the harm is not a foreseeable one; (2) the trespass by animals being "driven" along the highway is confined to abutting land; or (3) state common law or statute requires the complaining land owner to have erected a fence.
      - Owner of land abutting highway would have to prove negligence; if animals strayed further onto some other owners land, then that owner can recover under strict liability.
  - Wild animals on property, to licensees and invitees
  - Domestic animals with known, uncommon, dangerous propensities
    - Cats, stallions, mules, steers, horses, heifers, bees and parrots are commonly held as domestic animals.
  - Ultrahazardous / abnormally dangerous activities
    - Factors
      - Degree of danger
        - Risk of serious harm
        - Inability to render safe
      - Uncommonness of activity in 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
      - Not casual sellers
- Actual causation
  - Generally the same as for negligence
- Proximate causation
  - Generally the same as for negligence
- Damages
  - Generally the same as for negligence

NOTES FROM DLM:

- [a] livestock - in some states liability without fault, because the animal will cause damage of some sort. Not for cats and dogs because they are much less likely to cause harm. Strict liability for the livestock unless
  - (1) the harm is not a foreseeable one
  - (2) the trespass of herded animals is confined to abutting land or (3) there is a precedent/law requiring the complainer to have a fence. Also for animals that are unusually dangerous. Recovery restricted to damage caused to property and harm to persons.

- [b] domestic animals - strictly liable only where possessor knew or should have known of the animal's vicious disposition. Even if the animal never harmed anyone before, aggressive behavior would put the owner on notice.
- [c] Wild animals - usually strict liability for owners or keepers of wild animals, for dangerous propensities that are characteristics of wild animals of that particular class. Knowing what that is, is the requirement of the owner. Some jurisdictions opt for a negligence standard unless otherwise directed by the Legislature. There are various definitions of "wild" animals, so check the jurisdiction.
- [d] defenses - because of the nature of the animal, P's contributory negligence doesn't matter. However, P's assumption of the risk (in a free and voluntary choice) does. Some jurisdictions apply comparative fault especially for the damages.

## Strict Liability for Ultrahazardous Activities

**Restatement §520: Factors that will aid in determination of whether a particular activity is ultrahazardous:**

1. Degree of risk of harm to person or prop
2. Magnitude of that harm
3. Inevitability of some risk irrespective of precautionary measures that might be taken:  
Manufacture of bombs in city may involve a risk of blowing up in spite of everything bomb manufacturer may rsbly be expected to do: subject to SL.
4. Ordinary (or conversely, unusual) nature of the activity in the community in which it is found
5. Activity's value to the community in comparison to the risk fo harm created by its presence.

NOTES FROM DLM:

- [a] if P can characterize D's conduct was abnormally dangerous, then P can prove liability without having to prove D acted intentionally, recklessly, or negligently. This is VERY limited. P's burden to show "abnormally dangerous" is (1) the risk of an abnormally great harm should D's safety efforts fail, (2) the virtual impossibility of D's elimination of the risk even with the utmost care, and (3) a resultant harm to P or P's property caused by those hazards. No intent for the result is required, sometimes it is just a matter of degree. This requires an extreme hazard, not just discomfort. Also P does not need a proprietary interest to be at stake.
- [b] the restatements - sec 519-20 handle abnormally dangerous activities. Has the same liability but 5 factors for determining: (1) degree of risk of harm (2) magnitude of the harm (3) inevitability of risk irrespective of precautionary measures (4) the ordinary/unusual nature of the activity for where it's happening and (5) the activity's value to the community compared to the risk of harm.
  - [1] danger unavoidable even with due care - if any reasonable care can be taken that will mitigate the danger, this element is overcome and the case is over.
  - [2] requirement of an activity under D's control - If D wasn't in control of the activity, they are not liable (ie a chemical manufacturer cannot be held liable for injuries resulting from a spill that happened during transportation, unless they are also the transporter). Product cases against manufacturers don't usually succeed under this. Also the claim that selling the hazardous whatever is a hazardous activity usually fails too. It is the actual USE that stratifies this. These belong in products liability.
  - [3] Type of hazard - generally "ultra hazardous" is required - noise and vibration are a nuisance unless they are from an explosion right next door.



- [c] application - this boils down to a court decision and a balancing test, even though some prefer to weight the scales.
- [d] Defenses - really the only one allowed is assumption of risk. The fact that P failed to use reasonable care for their own safety is irrelevant, but comparative fault can mitigate this.

## Products Liability

The decisional and statutory law permitting money damages from manufacturers and sellers of defective products that injure persons or property

- NO DUTY to warn of obvious hazardous conditions Ex) guns
- NO DUTY to warn members of a trade or professionals against dangers generally known to that group.
- Manufacturer must produce product safe for intended/foreseeable use
- Unavoidably unsafe products are not defective with proper warning EX) pharmaceuticals
- Blood/Biological Products - some statutes make strict liability inapplicable to blood transfusions.

### Requirement for Products Liability Claim

- **Warning Defect** - failure to adequately warn can be imposed throughout distribution chain - manufacturer, suppliers & distributors
- **Manufacturing Defect** - product departs from its intended design even though all possible care was exercised
- **Design Defect** - foreseeable risks of harm posed by product could have been reduced/avoided by alternative design
  - Design Defect - 2 tests
    - **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
    - **Risk-utility test:** a product is defectively designed if the risks of its design outweigh its utility

### The 4 Principal Doctrines Underlying Products Liability Suits

1. **Negligence** - a manufacturer of any product capable of serious harm if negligently made, owes duty of care in design, inspection & fabrication.
2. **Breach of One or More Warranties**
  1. Express Warranty - seller's factual representation to buyer of quality preceding or accompanying sale (more than seller's opinion)
  2. Implied Warranty of Merchantability - seller warrants goods pass within ordinary description of like goods.
    1. *Warranty Disclaimer* - seller can disclaim warranties if written so the average buyer would see and understand them.
3. **Strict Products Liability** - applies to any person who sells product in a defective condition unreasonably dangerous to user. P must establish that product was defective & that it was the substantial factor in bringing about the harm.

4. **Misrepresentation** - subject to liability for physical harm if consumer relied upon the misrepresentation even if it was not made (1) fraudulantly/negligently or (2) the consumer did not buy the item or enter into contractual agreement.

**Prima Facie Case Elements** D is subject to liability if:

1. P has suffered an injury;
2. D sold a product;
3. D is a commercial seller of such products;
4. 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.

**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 are NOT products.
- Human body parts/blood usually not considered products.
- Pets or livestock frequently not considered products.
- Some JX deem item "product" but have made a deliberate decision to exempt the product from reach of product liability laws (i.e. prescription drugs and vaccines)

**New vs. Used Goods** - difference between new & used goods liability is the difference in reasonable consumer expectations.

- Used goods generally cheaper, therefore, consumer tends to expect a lesser quality, decreasing consumer expectations.

NOTES FROM DLM:

### **PRODUCTS LIABILITY: GENERALLY**

- The common and statutory law allowing \$ damages from manufacturers and sellers of defective products that injure persons or property. 4 theories for recovery: (1) negligence (2) breach of 1 + warranties (3) liability without fault (strict liability) and (4) misrepresentation. Restatements say it should be (1) manufacturing defect (2) design defect or (3) warnings/instructions defect. Almost always involves the SALE of an item - unless it is something like a lease where D is in the effective role of a seller. Many are pushing the restatement view to cut down on confusing multiple claims under the traditional view. A successful P can get proven compensatory damages (economic and non) as long as the economic damage involves damage to something/one other than the defective product itself.

### **PRODUCTS LIABILITY IN TORT**

- [a] NEGLIGENCE - usually focuses on loss from failing to act with due care under the circumstances. D's liability limited by duty, reasonable foreseeability, and reasonable risk. P must prove duty and foreseeability is not always tied in with duty. Whether duty is owed is a question of law, foreseeability and causation are patterns of fact. Back to Learned Hand's B < PL formula. Not always prima facie but usually persuasive.
- [b] STRICT LIABILITY (RESTATEMENTS)
  - [1] GENERALLY - the biggest obstacle for Ps claiming negligence was the evidentiary burden to pinpoint the part of manufacture/sale that fell below the duty requirement, as well as notice and warranty-limiting options. Strict liability started in CA in 1963 - "A mfr is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being." Restatements went to "sells a product in a defective condition reasonably dangerous to the user or consumer or his property." D must be a seller or must resemble a seller for detecting and correcting hazards (lessors and bailors). The R view usually means that it has to be defective AND dangerous - if it is just defective it should be under warranty law. Minority have removed "unreasonably dangerous" from the prima facie requirements. "Unreasonably dangerous" is supposed to mean "dangerous to an extent beyond that which would be contemplated by the ordinary consumer, with ordinary common knowledge about its characteristics." Most jurisdictions have gotten more particular.
  - [2] NECESSITY OF SHOWING A DEFECT - P must establish that the product was defective and the defect was a substantial factor in bringing about P's harm. Focus on condition of product, not conduct of mfr or seller. Just using the product is not enough, the product must be defective and the defect was the cause of the injury. D's violation of a safety statute often supports a defective finding without anything more. Statutes of repose limit filing to a certain # of years after a sale (kinda like SoL)
    - [a] Consumer expectations test - at the time the product leaves the seller's hands, is it in a condition not contemplated by the buyer, which will be unreasonably dangerous to him. This is often tough to determine. "Foreign natural" - ie cherry pits may not be "expected" in cherry pie, but are natural, where beetles are not "natural" in soda. The consumer is the ordinary adult consumer. The knowledge requirement throws out what THAT consumer knows, just what the ordinary common knowledge about the product is. P's special knowledge can be used as a defense (assumption of risk) but not on whether it creates unreasonable hazard.
    - [b] risk/utility test - negligence and strict liability require most of the same elements (just no duty for strict liability). So this test says that only reasonably safe products should be marketed and reasonably safe means those whose utility outweighs the inherent risk, provided that the inherent risk has been minimized as much as possible while still allowing the product to be useful. 7-factor eval: (1) utility of the product to the public and to the user, (2) the likelihood of injury, (3) the availability of safer design (4) potential to make it safer in a way that it remains functional and useful, (5) P's ability to have avoided injury through careful use, (6) P's awareness of the potential danger, and (7) Mfr's ability to spread the cost related to improving safety and design.
    - [c] hybrid test - a product is defective in design if (1) P demonstrates the product fails to perform as safely as expected by ordinary consumer when used in an intended/foreseeable manner OR (2) if P proves that the design caused the injury AND D fails to prove that the benefits of the design outweighed the design's inherent risks of danger. In prong 1, P is relieved of proving an actual defect -

they just have to show they used it the way it was supposed to be used. In prong 2, product is performing as expected but is still too risky - uses a test similar to the risk/utility test above.

- [3] NECESSITY OF SHOWING AN UNREASONABLE DANGER - the product must be more dangerous than the average consumer would reasonably expect, when used as intended or in a reasonably foreseeable manner. This cannot be measured in absolute terms. Some sort of balancing test is used. Failure to provide adequate warnings or instructions may create such a risk, BUY mfr is not required to warn against every conceivable risk. Unless the product is so frivolous it has NO utility, P must usually show that, at the time of manufacture, there was a technologically feasible, safer alternative method.
- [4] EFFECT OF CHANGES AFTER LEAVING D'S CONTROL - in strict liability, the defect must have been present at the time the product left D's control. If the product is substantially altered, that is a complete defense. The change must be responsible for the injury rather than anything under D's control. P's burden to establish that this existed, P has to show that the defect did not arise from improper intermediate handling. Reasonable handling creates an inference that the defect occurred prior to the handling.

#### **PRODUCTS LIABILITY RESTATEMENT: THE FUNCTIONAL APPROACH**

- [a] manufacturing defects - when the product departs from its intended design even though all possible care was exercised in the preparation and marketing of the product." A strict liability approach, no need to prove negligence at any level. All sellers and mfrs may be liable but the sellers can generally pass along their liability. Encourages dealing with reputable mfrs.
- [b] design defects - when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design . . . And the alternative design renders the product not unreasonably unsafe." Rejects the consumer expectation approach (risk/benefit eval) - strict liability again. Not supposed to find liability for widely available and used items like firearms.
- [c] Inadequate warnings or instructions - when the foreseeable risk of harm posed by the product could have been reduced or avoided by the provisions of reasonable instructions or warnings. Standard = reasonableness of the circumstances and considers things like "content and comprehensibility, intensity of expression, and the characteristics of the expected user groups."
  - [1] Warnings call attention to danger, instructions describe procedures for efficient and reasonably safe product use. mfr may be liable if the lack of warning renders the item "unreasonably dangerous." May render a product unsuitable for its ordinary use. An adequate warning must use size, location, and intensity of language or symbol to impress the product nature and extent of the hazard upon a reasonably prudent person. Should also advise of hazards from misuse and antidotes to misuse. Duty to warn attaches to when mfr knows or should know of the hazard, more significant if ONLY mfr knows. If seller knows they have duty to warn. Weighing of costs and benefits again - likelihood of harm v. cost of precautions.
  - [2] the effect of obviousness of danger - Majority rule is no duty to warn of certain obviously hazardous conditions. Even where the parties are children. If there are uncertainties about the common knowledge or obviousness then it is a jury question. In some states failure to warn is statutory liability.
  - [3] the effect of unintended or unforeseeable misuse - the product has to be reasonably safe for its intended or reasonably foreseeable uses. Foreseeable misuse = duty to warn

(not likely just foreseeable), also defined as a commonly known area of conduct (standing on a chair). Mfr must anticipate the environment which is typical for use of the product and reasonable hazards in that environment, even though such risks are incidental to the intended use of the product. 3P negligence is not a defense unless that was the sole proximate cause of the injuries. 3P's act/omission cannot be foreseeable. When product issues are a substantial factor then mfr is still liable.

- [4] causation and disregard of warnings - P has to demonstrate that the failure to warn caused the injury. Where warning is given, seller may assume it will be read and heeded. Reverse is that if P had been given a warning it would have been read and heeded.
- [5] The duty of non-manufacturers - all entities in the chain of distribution may be liable. However sellers only have to warn of a known, visible, or easily ascertainable hazard, not hidden or unknowns. This includes commercial lessors.
- [6] Persons to be warned - if the vendee is not likely to be the end user, then the warning has to be conveyed to persons who will foreseeably be endangered by use of or exposure to the product. Balancing - nature of product, form its used in, intensity and form of warnings, burdens of warnings, and likelihood that foreseeable users will get the warning. This does not insure the general public as they can be hard to warn. Outside of household use/consumption/rec activities, end users that are not the vendee are likely to be commercial entities. There is a duty to warn unless mfr has reason to believe the people exposed will know what they are getting into. Weighing the harm v. trustworthiness of intermediate user to pass on warnings.
  - [a] The allergic or idiosyncratic user - if something is generally OK but may create an allergic reaction there is a duty to warn. This depends on your jurisdiction where only a small portion or a large number of people need to be effected before the warning is needed. If it is a very small number but a very sever reaction a warning may still be needed.
  - [b] The professional user - generally no duty to warn. The theory being that a professional will know what the hazards are already. Any warnings given only have to be adequate for a professional's use. No duty if the user knows or should know of the hazard, esp if they are a pro. This is not automatic denial tho - if employer is familiar but employee is not there may still be a duty to warn.
- [7] Adequacy of a warning - once duty is determined, the actual warning/instruction is looked at by the finder of fact to see if it is adequate. Adequacy = if the warning/instruction were followed, it would render the product reasonably safe. must also be timely so the user can act upon them. Eval = dangerousness, use, intensity and form of warnings, burden of warning, likelihood that foreseeable users will get the warning. Content must be comprehensible and convey the nature and extent of the danger. Inadequate can be size/placement so small/obscure that reasonable consumer won't read or fails to advise of a danger/how to avoid it. Warning must also stand out from other parts of the message.
- [8] Continuing duty to warn - if a product has a latent defect sometime after sale there is still a duty to warn. With pharmaceuticals it is a continuous duty to stay up-to-date and if something new has been found about a product/ingredient to warn about that too. This can include further tests or studies. ME has a negligence-based continuing duty to warn.
- [9] Recall or retrofit obligations - a seller does not have a duty to recall/retrofit if found defective after the time of original sale. They only have this duty if (1) required by the gov't or (2) it is undertaken voluntarily and fails to act reasonably in so doing.

- [d] Defenses

- [1] Contributory negligence and assumption of risk. If P fails to exercise due care to protect from harm or if P has actual subjective knowledge of the hazard and subsequent voluntary encounter with it. Warranty issues can usually only use assumption of risk (because they are strict liability). Also product misuse in of a substantial and no foreseeable nature, if it is the proximate cause of the injury. Foreseeable misuse will not bar a claim.
- [2] Comparative fault - for the trier of fact to decide, can lower mfr/seller damages to pay.

**PRODUCTS LIABILITY IN TORT: ISSUES IN APPLICABILITY AND PROOF**

- [a] Applicability
  - [1] Generally - liability applies to “One Who Sells or Otherwise Distributes, commercial context for resale or mixed sales and service.
  - [2] non-manufacturing sellers - usually a retailer or wholesaler. Only liable with respect to marketing or sale of product (usually). If the problem is warning or design defect then these generally will not be liable as they had no input on those processes. Does have a duty to warn of defects or hazardous propensities that they know or have reason to know of, and of which the buyer is probably unaware. IE negligently selling to someone too young.
  - [3] sellers of used products - if they fail to exercise reasonable care or conduct business in such a way that would cause a reasonable buyer to think there was no difference between their used item and a new one/sells as remanufactured or if the product fails to comply with safety regulations.
  - [4] Lessor - same standard of liability as a seller in most areas. Bailors and licensors have also been held strictly liable but this is not uniform.
  - [5] Services - strict liability has not generally been extended to persons providing services because there is no mass production/distribution/need for consumer protection from an unknown mfr/seller. The cases that have allowed strict liability recovery have limited it to commercial, not professional transactions AND the injury was caused by a defective product not service. Where sale of goods and services are mixed, the test to see which is predominant is when either the transaction taken as a whole, or the product component thereof, satisfies the criteria defining a manufacturer, distributor, retailer, lessor, or bailor.
  - [6] Sellers of real property - before 1964 - caveat emptor. After - builder of a new house is liable to initial purchaser on implied warranty of habitability, building, and that it's to code. Vendor is liable on warranty principles.
- [b] Proof - proof of defect, without more, does not prove negligence, therefore negligence claims have a higher standard than strict product liability. Manufacturing defect only needs proof of defect, warnings/design usually also needs some form of risk/utility evaluation.
  - [1] The accident itself - just the accident doesn't make a prima facie case, but accident PLUS circumstantial evidence that negates the possibility of other defenses (mistake, misuse, contrivance) will make the case much stronger. However any possible showing of those defenses can tend to negate the significance of the accident.
  - [2] Other accidents or claims - these may help prove negligent manufacture defect if (1) the product involved was materially indistinguishable and (2) the circumstances surrounding the injury were similar. Sometimes mfr is able to introduce evidence that it had received no reports of the problems. In both cases there must be a foundation of similarity/lack thereof.

- [3] if mfr changes the product, P can't use that as evidence of a defect/negligent conduct.
- [4] Violation or compliance with a statute, ordinance, or regulation - violation of one (depending on the jurisdiction) can be negligence per se, can be a permissible inference, or just be evidence of negligence. Compliance with law can be either (1) strong and substantial evidence of lack of negligence but not conclusive or (2) conclusive on the issue of non-defectiveness. Some have that defined statutorily. Regulation has less weight than statute - regulation violation/compliance is usually only evidence of negligence/due care.
- [5] Res Ipsa Loquitur - this is what allows P to shift the burden of proof to show due care to D, once it is shown that D had control, and that the accident was of such a nature that it would not have occurred if not for negligence on D's part. This can be either pure shifting of burden with a rebuttable presumption of negligence or mere evidence of negligence. If the product left D's control, it may be enough that D had control/likely had control at the time the defect occurred as opposed to any intermediate handler (like the bug in the soda bottle).

#### APPLICABILITY OF CERTAIN PRODUCTS

- [a] Prescription products
  - [1] Unavoidably unsafe products - some products are currently not able to be made completely safe for their intended and ordinary purpose - ie a rabies vaccine - but where the utility of the product outweighs the risks (in the case of the vaccine, the serious side effects AND the certain horrible death if you don't take it) then it is not unreasonably dangerous. BUT avoiding having your product marked "unavoidably unsafe" just avoids strict liability, P may still be able to win on a negligence claim. However, the product needs an extremely high utility for this.
  - [2] Blood and biological products - almost all jurisdictions have statutory waivers of liability for strict tort in blood transfusions. This means that medical entities are liable for contaminated blood on a negligence basis only. In the absence of statutes, most courts have refused to impose strict liability here.
- [b] Persons and transactions
  - [1] non-manufacturing sellers - usually a retailer or wholesaler. Negligence liability only as regards marketing the product. They don't participate in the design/mfr/warnings/instructions usually they can't be held liable. THERE IS a duty to warn of known defects or dangerous conditions (that seller knows/has a reason to know of and of which the buyer is probably unaware). CAN be held liable if they violate a mfr warning (selling a pellet gun to a child under 16 when the label says not to).
  - [2] sellers of used products - the difference in the standard between new and used products is the difference in reasonable consumer expectations between the two. Strict liability will generally not be imposed when the defect occurs simply because the product has worn out (used stuff has that happen). Public policy is split on whether restatement 402A should apply to used items (the language is broad enough that it CAN but it does not SPECIFICALLY). Can be held strictly liable if they rebuild the item or represent it as new.

**STRICT PRODUCTS LIABILITY FOR MISREPRESENTATION**

- [a] Restatement 402b - if a mfr makes a claim that the consumer cannot disprove, or cannot discover a defect by usual and customary examination, then mfr is strictly liable. Restatement expands this to anyone selling chattels/uses advertising. Permits tort recovery for injury from a non-defective product - a 1000-lb-test rope is marketed as 2000-lb-test, is used that way, and fails. Intended as a remedy for those injured due to reliance on seller's representations. There must be a misrepresentation, reliance upon that, and that reliance caused the injury. There is also a cause of action if the mis-represented item is given as a gift and causes injury. Recovery is for physical harm only.
- [b] statements used in advertising or promotion - applies only to those sellers who make and disseminate representations to the public. Individual representations to an individual buyer do not create liability here. Buyer cannot succeed on a claim if they never saw the ad before buying the product. Must also be misrepresentation of a MATERIAL fact pertaining to the quality or character of a product. This excludes "puffing" or "sales talk." Printed representations of safety generally aren't going to be regarded as puffing and a buyer's reliance on them is reasonable and foreseeable. P must prove that the challenged statements involved the same product operated under the same or similar conditions to P's use.

**PRODUCTS LIABILITY IN WARRANTY**

- [a] merging of contract and tort. Broad congruencies between remedies in tort and in warranty.
- [b] Express warranties - seller/mfr representations of quality, performance, construction, and/or durability. May be oral or written, must precede or accompany sale. Does not have to be words (can be something like blueprints, tech specs, samples, models, or past deliveries that have set a standard).
  - [1] representation of fact - The statement must be more than the seller's opinion, a factual description of an important aspect of the product that one would expect the seller but not the buyer to be familiar with. "A high-quality ladder" is puffing but a specific and unambiguous statement of safety or harmlessness is an express warranty. Can be found pretty much anywhere writing shows up on or with or in relation to a product.
  - [2] basis of the bargain - if the fact becomes a basis of the bargain it can be an express warranty - must precede or accompany the sale, or if it can be fairly regarded as part of the contract. No consensus on what to do with the burden of proof.
- [c] Implied warranty of merchantability - seller warrants that products are fit and may be safely used for their intended use. UCC 2-314 lists 6 standards of merchantability. Does not imply absolute perfection, an item that will never wear out, or even high quality. The article just has to conform to average grade, quality, and value of similar goods sold in commerce. Doesn't matter if seller knows what buyer WILL use it for, just the usual/intended use. The moment when the warranty takes effect is somewhere between picking it up off the shelf and actually buying it. The warranty extends to the packaging also. It is a strict liability warranty so lack of negligence is not dispositive. This only applies to "merchants" so garage or bake sales don't qualify,
- [d] implied warranty of fitness for a particular purpose (2-315) - if the seller helps you pick something out for a specific purpose then there is an implied warranty that whatever it is, is fit for that purpose. 2 requirements: (1) buyer relies on seller's skill/judgment and (2) at the time of contract/sale, seller must know or have reason to know what the buyer wants to do with it. The existence or absence of the warranty is usually a question of fact. Seller does not have to



be a merchant. The use of “particular purpose” is deliberate, so it can be applied to a fully functional product that is just the wrong one for that purpose.

- [e] Warranty Disclaimers - the seller can disclaim warranties and limit remedies per UCC 2-316 and 2-719. Disclaimers (2-316) attempt to avoid or eliminate a warranty altogether (leaving buyer totally without remedy), where limitation (2-719) restricts the remedies available (ie a defective product will be repaired or replaced at seller’s discretion), however in this case any express or implied warranties are still in effect. In general an express warranty cannot be disclaimed (esp if it’s in writing). Implied warranties can be generally disclaimed as long as the seller follows 2-316 (2) and (3) carefully. The word “merchantability” has to be specifically used.
  - [1] Conspicuousness - disclaimers have to be conspicuous (“so written that a reasonable person against whom it is to operate ought to have noticed it.” Examples are a printed heading in capitals, larger/contracting type or color. Issue for the court. The idea is to avoid surprise to the buyer. Post-sale disclaimers are generally not upheld (no meeting of the minds).
  - [2] “As Is” disclaimers - by requiring the buyer to accept the item “as is” with all faults then the seller effectively takes care of (2) without having to jump thru its hoops. Language has to call attention to this and make it clear that there is no implied warranty. There are a couple of acceptable phrases but generally use the ones in UCC or risk losing on challenge.
- [f] warranty limitations of remedy - 2-719. If you don’t use disclaim under 2-316 then you are considered to have added limited warranty coverage TO implied warranty coverage. Limitations on consequential damages will not be upheld where they are unconscionable. ie where damage to a person has occurred then a limitation preventing recovery will be prima facie unconscionable.
- [g] to whom warranties run - UCC 2-318. privity is not much of a defense today because of the attenuated nature of doing business. Vertical privity is the chain from mfr to buyer, horizontal privity is outside the distribution chain, is at buyer-level: buyer, family members, invitees, innocent bystanders, etc. 3 versions of a privity defense:
  - -a- warranty extends to any natural person in family or household of buyer or a guest as long as it is reasonable that they used the product and are the injured party. Seller can’t exclude/limit this. [most widely used, most restrictive of class, and only personal injury is compensable. Guest has to be guest in the home - guest anywhere else, like car, won’t count.]
  - -b- warranty extends to any natural person who may use or consume the product and who is injured in person by breach of warranty, seller may not exclude/limit this. [less restrictive, would include employees and bystanders, but also requires personal injury.]
  - -c- warranty extends to any person who may be reasonably expected to consume and who is injured by breach. Seller may not exclude/limit with respect to injury to the person of an individual to whom this extends. [most expansive version, not limited to natural persons, and permits recovery for losses other than personal injury.]
- This is mostly concerned with horizontal privity. The last sentence does not prohibit the seller from using 2-316, 2-718 and 719 to limit/exclude the warranties themselves, it just means they can’t exclude those people from the warranties.

## Safety Regulation

**OSHA** - general duty clause prohibits dangerous conditions & specific standards for specific industries.

- Occupational Safety and Health Administration: Operates under Dept. of Labor and applies to all employers affecting interstate commerce (exceptions below).
- Compared to tort law - creates an ex anti regime by working before the injury seeking directly to prevent injuries.
- No private right of action (injured employee cannot bring suit under OSHA)
- Suit must be brought by secretary of labor & OSHA
- Meeting specific standard can be an employer's defense if employee still gets hurt
  - EXCEPTION: Employer is liable if he knew the standard was known to be deficient
- OSHA applies to all employees
  - EXCEPT:
    - 1) Government agencies with specific alternative regulatory schemes
    - 2) States can opt out of OSHA if they have created their own improved alternative

**To Take Action against Employer** - OSHA must show the hazard was: **Preventable & Recognized** --> Accident is not required.

- **Preventable**
  - Feasible - Remedial measures may be unfeasible because of terrific costs or technological unsoundness.
  - Effective - To make the hazard an issue preventable, the proposed safeguard must be demonstrated to be effective
- **Recognized**
  - **Objectively Recognized** - hazard recognized by the industry as a whole
  - **Subjectively Recognized** - hazard recognized by the employer can establish liability even if the industry is generally ignorant of such danger.
    - Ex) If woodshop using new model of band saw knows the band can snap off injuring workers, that employer can be liable even if no one else in the industry knows of the saw's harmful potential.

### Implementing New Standards

- **Interim Standards Sec.6A** - Regulations implemented when OSHA was enacted

### Appeals

- Employer or OSHA may appeal to the US Court of Appeals
- **New Standards Sec.6B** - Procedural & Substantive requirements
  - Procedural Requirements - Complex process requiring public review & public hearings
  - Substantive Requirements - Limits secretary of labor rule making
    - Must be a significant risk
    - Must be reasonably necessary
    - Must be feasible - technological & economical

### **Emergency Temporary Standard Sec.6C**

- Procedural Requirements - Standard is effective immediately upon its publication in the federal register
  - Only effective for 6 months
- Substantive Requirements - two prong test
  - 1) Rule is necessary to protect workers 2) from a grave danger

### **Enforcement**

- Inspections - employers may require warrant but there is no requirement for OSHA to show probable cause to obtain warrant
- Remedies - OSHA can:
  - Calculate fines
  - Proscribe abatement for the hazardous condition (tell employer how to fix)
  - Issue a citation

### **OSHRC - Occupational Safety & Health Commission**

- After hearing - administrative law judge enters judgment

### **Appeals - Employer or OSHA may appeal to US Court of Appeals**

**Employee Misconduct Defense** - generally, where the dangerous condition was created by the employee & not reasonably preventable by the employer, employer may assert employee misconduct defense.

- Four Part Test:
  - Since violation the employer has established rules to prevent further violations
  - Those rules have been adequately communicated to the workers
  - The employer has attempted to discover unknown violations
  - Employer has corrected violations when they have been discovered

### **Administrative Law**

- Enabling Statute – gives agencies the power to regulate things within their area. (FAA, FDA etc.)
- Administrative Procedures Act: Procedures that regulatory agencies must follow for how to perform their rulemaking and adjudication authority.
- **Agencies make laws in two ways:**
  - Rule making process = “mini statutes” that have the power of law.
  - Adjudication = Ability to make decisions when disputes arise.
- **Limits on Regulatory Agencies by the Different Branches**
  - Congressional branch grants power to regulatory agencies through an enabling statute. They have the power to take this power away at anytime. Congress also has the power to take money away from a regulatory agency.
  - Executive branch appoints leadership, sets policy goals and budget parameters. President has not power over the Federal Election Commission.

- Judicial branch reviews rulemaking, reviews adjudications and can overturn agency action when it is unconstitutional. Generally the courts defer to the agency unless they do something *really* stupid.
- **Types of Regulation Agencies can Conduct:**
  - Substantive: Make rules and law pursuant to its power given in the enabling statute
  - Interpretive: Announcements by the agency about how they are going to interpret Congressional statutes and judicial decisions as they relate to the agency.
  - Procedural: Procedures as to how the agency operates day to day. They cannot conflict with the Administrative Procedure Act (APA).
- **Process of Rulemaking** (Covered by the Administrative Procedure Act and the Enabling Act)
  - *Informal Rulemaking*
    - Agency gives notice to the public that they are changing or are considering a rule. They make this in the Federal Register.
    - After notice is given, they collect comments sent to them from the notice.
    - Final Regulations is put into the Federal Register after it is made.
    - They then post the changed regulation into the Code of Federal Regulations.
  - *Formal Rulemaking*
    - They have studies similar to a trial where they listen to evidence and then make a decision.
    - This finding must be made from “clear and justifiable findings of law and fact.”
- **Agency Adjudication:** Someone feels they have been wronged so they file a complaint with the agency for adjudication. If the agency finds that someone was wronged. They act as a quasi-prosecution.

## Workers’ Compensation

**Overview** A statutory regime that replaces tort law. Employees give up right to sue, but are automatically compensated for almost any injuries arising out of their employment regardless whether their employer is negligent.

### Who is an employee?

- **Right-To-Control Common Law Test**
  - If the employer has the ability to control your work, then you’re an employee
  - This test is more narrow than the economic realities test
  - The IRS uses the Right-To-Control Test to determine whether workers are employees for the purposes of federal taxation.
- **Economic Realities Test**
  - If the worker is economically dependent on the hiring party, then the worker is an employee.
  - Factors considered:
    - **Control**
      - If a D controls the manner in which the work is done, rather than relinquishing control to the worker, the D is an employer
      - This factor is similar to the entire common-law test.
    - **Profit and Loss**

- If the workers are more exposed to profit and loss, then they are likely an independent contractor
- **Capital Investment**
  - Interrelated to profit-and-loss, the more of an investment workers make in tools, supplies, or other initial outlays, the less likely they are to be employees
- **Degree of Skill Required**
  - High degree of skill militates in favor of workers not being employees
- **Permanency**
  - The more temporary the relationship, the less likely it is to be an employment relationship. Permanent arrangements (even if they are seasonal and recurring) favor finding that workers are employees.
- **Integral Part of Hiring Party's Business**
  - The more integral the work is to the would-be employer's business, the more likely it is that the persons doing such work are employees.
- **Dependence of Workers**
  - The more the workers depend upon income from the D, the more likely it is that they are employees. Independent contractors often have more than one party for which they work.
- Fair Labor Standards Act (FLSA) which requires minimum wage
- This test is more broad than the Common Law test due to FLSA (wanting people to get minimum wage)

#### Pros and Cons for Workers

- Pros for Workers
  - Don't have to prove fault, any injury from workplace qualifies for coverage
  - You can recover for accidents that did not happen with negligence
  - Causation and duty concepts taken away, replaced w/ "in the course of and arising out of employment"
  - Because you don't have to prove fault, there is no real need for lawyers
  - Generally get benefits like medical cost and part of lost wages
- Cons for Workers
  - Give up suing under tort law
  - Thus, can't get punitive damages or kinds of compensatory like pain and suffering

#### Needs to Be a Personal Injury

- Physical-Physical: Generally compensable in most jurisdiction
  - Where both the cause and the effect are physical
  - Ex- Security camera falls from ceiling and causes blackjack dealer to lose a finger.
- Physical-Mental: Generally compensable in most jurisdiction
  - Where the cause is physical and the effect is physical and mental
  - Ex. security camera falls in front of blackjack dealer, who loses her arm, causing a nervous breakdown.
- Mental-Physical: Generally compensable in most jurisdiction
  - Where the cause is mental and the effect is physical
  - Ex. Employee held up at gunpoint, suffers emotional distress causing her to injure herself.

- Mental-Mental: Not held compensable in most jurisdictions
  - Where both the cause and the effect are mental and there is no accompanying physical cause or effect
  - Ex. Employee is held up at gun point and suffers a nervous breakdown as a result.

#### **Has to Result From an Accident**

- Long term exposure is generally held to be not an accident
  - E.g. Asbestos linked cancer

#### **Has to Occur In the Course of Employment**

- Recreational Activities: not usually covered?
  - E.g. Company softball game - may or may not be covered
  - Reasonable Expectancy Test - if employee was expected to participate in recreational activity, then covered
    - must be met both subjectively and objectively
    - Relevant Factors: encouragement by employer, benefit to employer, involvement by employer
- Horseplay: usually covered
  - e.g. rubber band fights
  - Instigator Defense by employer - the person who started it doesn't get covered, generally
- Commuting and Travel
  - Coming and Going Rule:
    - Going to work and back home is generally not covered
    - Business Trips: Generally not covered, but increasingly are.
  - Exceptions
    - Necessary Narrow Passage
    - Special Hazards Near Employers Property
      - E.g. Avalanches on road up to ski resort
    - Returning to Work
      - When employee has been at work and goes home, but is called back in
      - Usually covered
    - Travel On Employer Owned Conveyances
      - Exception applies even if not clocked in yet
    - If Your Vehicle is Required at Work
      - E.g. Reporter at newspaper - commute is covered here because reported needs vehicle at work

#### **Must Arise Out of the Employment**

- Replaces Causation
- Need to Ask "What Type of Risk Is This?"
  - Occupational Risk
    - Covered
  - Personal Risk
    - Not covered
    - I.E. Dying of a heart attack because of poor dieting

- Neutral Risk
  - Proximate Cause Doctrine
    - If the employer did something creating a foreseeable risk of harm to the employee
    - Generally Covered, Not very Favored
    - Most Conservative
  - Peculiar Risk
    - Is there a risk peculiar to that workplace
    - Not Favored
    - Accident must be something the public would not normally be at risk from
    - I.E. Having a box of GAP sweaters fall on you
  - Increased Risk
    - I.E. Like a delivery man
    - Used by courts
    - Ask-does employment put you at increased risk for harm?
  - Actual Risk
    - Is the accident an actual risk of employment
    - Does not include acts of God like meteor strikes
  - Positional Risk
    - If you were where you were because of your job.
    - Any accident
    - Includes Acts of God
    - Most Liberal

#### **Types of Benefits**

- Disabilities Benefits
  - Pay for your inability to work: lost wages, death, permanent disability that harms ability to work
  - When reach a plateau, get lump sum permanent disability payment

#### **Type of payments**

- Temporary Partial Disability
  - Doesn't prevent you from work but does prevent you from working to full capacity
- Temporary Total Disability
  - Can't work at all for certain amount of time
  - Cash payments equal to some percentage of wages (e.g. 2/3 - not taxed)
- Permanent Partial Disability
  - Different states have different ways of doing this - some unscheduled (case by case); others have schedules
    - Have nothing to do with reduced earning capacity (e.g. losing a leg as a typer and losing a leg as a supermodel - both get same amount if supermodel is an employee)
- Permanent Total Disability
  - Usually based on earnings capacity - what disabled party lost out on
- Death
  - Survivors get some kind of payment in most jurisdictions

### **Exclusivity**

- If the employer intentionally hurts you, then you can sue
- If it is wanton or reckless, it depends
- Can sue over worsening of injury even though initial injury covered by workers comp
- Dual capacity relationship with employer
  - E.g. Employee works for chicken company and eats chicken as consumer, employee can sue in court over tainted chicken

### **No Fault Insurance**

## **SPECIAL CONCERNING RIGHTS OF ACTION**

### **Implied Rights of Action**

- Is a term used in United States statutory and constitutional law for circumstances when a court will determine that a law that creates rights also allows private parties to bring a lawsuit, even though no such remedy is explicitly provided for in the law.
- Implied causes of action arising under the Constitution of the United States are treated differently than those based on statutes.
- These are similar to *negligence per se*, but are a little more direct because they avoid negligence and the standard of care.

### **Bivens Action**

- Most public officials do not have absolute protection for violating constitutional rights
- If constitutional rights are invaded by government officials under color of federal authority, there is an action for damages
  - Bivens v. Six Unknown Agents

### **1983 Action**

- 42 U.S.C. § 1983 Civil action for deprivation of rights
  - Leaves out federal government, but is for government officials under color of state authority in federal action if civil rights are deprived
  - Constitutional tort

## **SPECIAL ISSUES CONCERNING PARTIES TO THE LITIGATION**

### **Firefighter Rule**

- *Precludes firefighters* from suing for injuries sustained fighting *negligently-started fires*
  - Immunity based on status of P (as opposed to D: see below)
  - Does not apply to ARSON



- Assumption of risk & compensation reflects ordinary risks of responding to negligently-started fires
- Policy: Fire V's deterred from seeking assistance if risk of liability.

NOTES FROM DLM:

- [C] THE FIREFIGHTER'S RULE - precludes firefighters from suing for injuries sustained fighting negligent fires. Generally accepted and suggests that pros shouldn't be able to recover for negligence they are supposed to fix. they are assuming the risk and public policy (ie we want people to report ALL fires).

## Immunities

- Immunities protects D from liability not because of P's behavior, but because of D's status and relationship to P

### Charitable Immunity

- Historically: charitable organizations immune from tort liability.
  - Justification: protect important work charities perform for their communities; those funds donated to charity w/ purpose of benefitting a certain cause shouldn't be diverted as a result of litigation; beneficiaries have implicitly waived their right to sue
- Today: many state abolished. Most remaining states have only partially retained the immunity (i.e. when P is a beneficiary).
  - Why abolish? Prevalence of liability insurances and the business-like operations of large charities make it harder to justify absolute immunity.

### Spousal Immunity

- Historically: Spouses could not sue each other.
  - Rationale:
    - Historically b/c of W's status as H's chattel. A chattel can't sue.
    - Recently: Suits damage marital harmony, risk fraudulent testimony & collusion where liability insurance involved, incites frivolously legal complaints over trivial, if heartfelt (!), disagreements.
- Today: Eliminated in majority of states. Those that have retained it tend to impose limitations. (no immunity for property & economic torts)
  - Rationale: Tortuous conduct, not liability, creates disharmony. Insurance fraud & frivolous suits can exist in many contexts & generally frivolity not used as a defense for denying legit recovery.

### Parent Child Immunity

- Historically: Precluded tort actions between parents and non-adult children.
- Today: Exists in many jurisdictions.
  - Justifications: Cts reluctant to impose judicial review of child-rearing.

- However, immunity less compelling b/c domestic violence should be subject to judicial review. Cts can likely distinguish b/t a school of child-rearing and negligent child care.
- Never held to bar property or purely economic torts; Immunity for intentional torts such as assault, battery & personal injuries caused by negligence.
- Immunity cuts both ways: sometimes a parent WANTS to be sued for insurance purposes.

### Governmental Immunity

- CL: Complete immunity
- Today: Immunity **for discretionary** (policy-making) functions but **not ministerial** (policy implementation) acts. Most immunity for local govs abolished w/o reference to categories.
  - Ex: Gov decides to build a bridge & bridge is built negligently. A person injured by the negligently built bridge can sue b/c bridge building was a policy implementation.
  - Rationale:
    - Held accountable for discretionary functions through electoral. Immunity would interfere w/ democratic process & infringe on separation of gov.
    - Ministerial actions are not manifestations of pub policy decisions by electorate.
- See FTCA.

### NOTES FROM DLM:

- [a] protects D from tort liability. Not dependant on behavior but on D's status or relationship to P. IE a husband can't "batter" his wife by kissing her.
- [b] charitable immunity - charitable organizations used to be immune but this is changing. it used to be a good-samaritan sort of thing but as these are becoming more and more businesslike it is harder to justify. Some states have abolished the immunity, others have only partially retained it.
- [c] spousal immunity - it used to be that spouses couldn't sue each other - legal ID of wife was not separate from husband. the reasoning changed to promoting harmony, etc in marriage but that isn't great either. the majority of states have eliminated spousal immunity, or have retained it with limitations.
- [d] parent-child immunity - precludes action between parents and non-adult children. still exists in some form in many jurisdictions. some have abolished, some have it with restrictions, usually to preclude negligent parenting. No real definition of that. the persistence is largely due to judicial reluctance to pass judgment on parenting styles. Domestic abuse is an exception. Also it forces parents to be more responsible.
- [e] governmental immunity - protects the government from tort liability. usually allows immunity for discretionary functions (policy making decisions) but not ministerial functions (government conduct which implements or executes policy decisions). This is subtle and not always consistent. The extent to which it applies varies between state and federal levels and between jurisdictions. see 28 USCS 2680(h) for the list, and also immune to strict liability. State torts claims acts detail what torts each state can be sued for. Also local governments, like cities, have "governmental" and "proprietary" functions and only can be held liable for the "proprietary" ones. now usually regulated by state statute.

## Joint Tortfeasors

### Acting In Concert

- A person acts in concert to commit a tort with another when she aids or encourages another in committing the tort
- If an individual intentionally aids or encourages another to commit a tort, they are equally liable

### Independent Acts Acts Causing a Single Indivisible Injury

- Two or more individuals who act independently but whose acts cause a single indivisible tortious injury are also joint tortfeasors.

### Vicarious Liability

- Employers are held liable for the actions of their employees within the scope of their employment. (Respondeat superior)
- Employers are generally not held liable for actions of independent contractors.
  - Exceptions
    - When Independent Contractors perform superhazardous activities
    - When an company closely supervises the contractor's day to day activities
- Parents, under common law, are not liable for their children's actions
  - Many states have enacted statutes creating liability for children's intentional torts
- Owners of motor vehicles are generally not liable for the negligence of a permitted user

### Joint and Several Liability

- Joint tortfeasors are "jointly and severally" liable for the plaintiff's damages
- Each individually is responsible for the entire damages

NOTES FROM DLM:

### OVERVIEW AND DEFINITION

- joint tortfeasors are 2+ individuals who either (1) act in concert to commit a tort, (2) act independently but cause a single indivisible tortious injury, or (3) share responsibility for a tort because of vicarious liability. they are both fully liable for to P for the damage award. This has been limited to protect more affluent d's from shouldering more than their fair share of liability. The method of sharing liability is controversial.

### JOINT TORTFEASORS

- [a] acting in concert - when an actor aids or encourages another in committing the tort. no requirement that it be the but for cause.
- [b] independent acts causing a single indivisible injury - this is only if V's injury cannot be separately allocated to either tortfeasor and there was no aiding or encouraging between the tortfeasors.

- [c] vicarious liability - where you can be held liable for someone else's tortious actions - ie respondeat superior. employers cannot insulate themselves by enacting safety rules or even by taking all possible precautions. because they are ultimately responsible for the acts of their employees within the scope of employment. not liable for contractors, except for public policy reasons or inherently dangerous activities, or if they are under close supervision. also parents can be held liable for acts of their children, usually per statute, same with car owners who loan the car to someone.
- [d] joint and several liability - "several" = more than one tortfeasor. "joint" = each of the tortfeasors is fully liable for all the damage. P can't get multiple damage amounts but any 1 tortfeasor can be tapped for the whole amount.

### SPECIAL PROBLEMS AFTER COMPARATIVE FAULT

- [a] allocations of liability among tortfeasors - when all are required and able to pay, how do you decide who pays how much? traditionally is was by pro-rata share. Has been replaced in many areas by comparative negligence model. Jurisdictions disagree about whether a negligent P should also share responsibility for a negligent tortfeasor defaulting. some states require the other tortfeasors to make P whole, others re-allocate according to original theory so p has to take on some of that.
- [b] impact of settlement on percentage shares - difference between settlements that act as satisfactions and those executed as releases. satisfaction = receipt of full compensation and no more liability for the injury. a release = P surrenders their claim against 1+tortfeasors. historically a release for one released all and was gotten around by a covenant not to sue. now a release only effects the named party. This effects in 1 of 2 ways:
  - (1) settling D's payment is deducted from damages, rest of tortfeasors split the difference. Often a hearing requirement to make sure this is a good faith settlement so the other tortfeasors don't overpay. popular because it encourages settlement over litigation.
  - (2) settling D's percentage of fault is deducted from the final award (regardless of if P got more or less than that amount). Puts P at risk but protects non-settling D's. Mary Carter agreements to reduce D's liability depending on the outcome of the trial are allowed some places, others only if public, and still others not at all.
- [c] contribution and indemnification - if P doesn't name someone they should have, how does the named D go about getting money from the other D? In most states they can seek contribution in court. They must prove the others liable. Procedural rules also allow D to implead the others. cannot seek contribution from an immune D. Some areas also allow indemnification if the non-named D was far more liable, allows a complete shift of liability instead of just a contribution. usually allowed in employment or product liability situations (the retailer or employer can get indemnification from the employee or manufacturer). In pro rata jurisdictions, allows for equitable shifting of responsibility to the more liable tortfeasor. this also allows flexibility in deciding who pays more instead of who pays all.
- [d] policy issues - comparative responsibility has undermined the "joint and several liability" concept. has frequently been altered by statute. the problem is the minimally liable but deep-pocket Ds are held liable for far more than their share when insolvent D's can't pay. BUT that is really just a jury estimate, they all were liable so it is their joint responsibility to make P whole. "joint and several" better takes care of P but can harm deep-pocket D's, but that can have negative consequences when D's stop offering goods and services to avoid being held totally liable financially regardless of their actual fault. it was more appealing prior to

contributory negligence theories. and comparative negligence is better still because it allows recovery but not full recovery based on P's actions.

## **Allocation, Contribution, Indemnification**

### **Allocations of Liability Among Joint Tortfeasors**

- Traditional approach
  - Each defendant is liable for a pro rata share of the damages based on the number of tortfeasors
  - Replaced in most states
- Comparative approach
  - Liability is divided by the proportion of responsibility each defendant bears towards the plaintiff.
  - This approach does not alter joint liability - If one party is unable to pay, the others have to pay that parties share.

### **Impact of Settlement on Percentage Shares**

- If one party settles the remaining tortfeasors still remain liable
- Two primary approaches to dividing responsibility to remaining parties
  - Minority approach - The amount of any settlements is subtracted from the total awarded damages.
    - Example - Defendant #1 settles with plaintiff for 200,000. Plaintiff then wins \$1,000,000 in court against other two defendants. They are now liable for only 800,000.
  - Majority approach - Remaining defendants pay a portion of the total damages based their proportion of fault.
    - Example - Defendant #1 settles for 200,000. Plaintiff then wins \$1,000,000 in court against two other defendants. Jury rules that remaining defendant was only 50 percent at fault. The remaining defendant is only liable for \$500,000 instead of \$1,000,000

### **Contribution**

- If a plaintiff fails to name one or more potential tortfeasors, the named parties are fully liable
- Originally, courts would not allow named parties to seek contribution from non-named parties
- Defendants can now seek appropriate contribution from unnamed parties
  - Exception: Intentional Torts
  - States differ whether any contribution must be sought after a court judgement or can be sought after settlement.
  - Cannot seek contribution from immune parties (Example: Cannot obtain contribution from parents if they are immune from suit from their child)

### **Indemnification**

- Defendants may seek indemnification from other parties.
  - Allowed where a defendant is vicariously liable for another's negligence

- Allowed where a retailer is liable for selling a defective product negligently constructed by the manufacturer
- Can be established by contract
  - Example: Employer agree to accept all liability for employee's actions.

## **Wrongful Death**

### *Overview*

- All jurisdictions, by statute, permit an action against a person who negligently inflicted wrongful death.
- Principal Issue is who has standing to sue

### **Standing**

- Spouse, parents, and children are usually permitted to bring the action
- If the victim leaves his estate, for example, to a museum, the museum can bring a wrongful death and/or survival suit and receive the money.
- If the victim has no immediate family and is killed instantly, the defendant has no civil liability for anything.
- Courts tend to not allow cohabitants, including significant others and life companions, to sue

### **Damages**

- Initially only pecuniary damages could be recovered, which usually led to minimal recovery in many cases.
- Damages has been expanded over time
  - Most jurisdictions permit dependents to recover lost support and other benefits arising from the death
  - Some states have expanded damages to included lost love and affection
  - Most states still do not permit recovery for grief, sorrow and upset.

### **Proof Problems**

- Plaintiff must prove with some degree of certainty the losses suffered from the tortious 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
- Plaintiffs need to provide factual support for claim of damages not pure speculation

### **Defenses**

- P's recovery may be limited or barred based upon P's own fault.
- Also, recovery could be limited if deceased contributed to their own death.
- In contributory negligence jurisdictions, the wrongful death P's action is barred.
- In comparative negligence states, recovery is reduced by the deceased's percentage of fault.

**Cases**

- *Benally v. Navajo Nation*
  - When a Navajo dies, immediate family members are able to recover general damages, special damages, monetary value of the life of the deceased minor, and for the loss of affection, love, and companionship of the deceased minor child.

NOTES FROM DLM:

**LOSS OF CONSORTIUM, WRONGFUL DEATH, AND SURVIVAL**

- [a] overview - sometimes a tort hurts more than just the direct victim. Loss of consortium and wrongful death are types of injury and the damages may be recovered outside of a negligence context. You have to look at WHO can recover, as well as WHAT is recoverable (duty issues).
- [b] Loss of consortium - If D inflicts serious physical harm on V, the P (who is married to V) can recover too. The original idea was to compensate a husband for the loss of his servant-wife services. Has expanded to include the loss of a husband as well as the loss of companionship, comfort, and sexual services. Recovery is not automatic - P must prove the loss (the injury led to an impairment of a formerly fulfilling and strong relationship). Courts are hesitant to expand the rights beyond spouses, largely because of how vastly that would increase liability (ie several children and a spouse v. just the spouse). This is slowly expanding to parents and children, especially noting the inconsistency that they can recover for wrongful death but not loss of consortium? Some courts get around this by defining it to be a sexual services thing. Life partners and cohabitators have been repeatedly denied.
- [c] Wrongful death - all jurisdictions provide for wrongful death recovery for a spouse and minor children. Common law used to not provide for this at all, and because of the death there was no loss of consortium charge. That was changed via statute in England in 1846, which influenced the US courts
  - [1] who may recover - P has to be a close relative, usually defined as spouse, parents, and children. Some states exclude siblings, or stepchildren who haven't been adopted.
  - [2] recoverable damages - it started out as pecuniary damages only, which meant minimal recovery for the young, the old, and those not working outside the home. Today there is a widespread loss-to-the-survivor approach: what is the survivor missing out on, such as lost support and replacement value of services provided. Some jurisdictions include consortium-type damages also. Most do not allow damages for grief, sorrow and upset arising out of the death.
  - [3] Proof problems - P must prove the losses with some degree of certainty. Start with the time period for support - usually the remainder of decedent's life or P's life, whichever is less. Then the value of the support provided - you can't take ALL of Dec's wages because some of them would have gone to Dec. Also Dec's character is important - if they were stingy you get less. Minor children are tough cause you don't know what they would have done with their lives. Things like education level, and other professionals in the family can help establish a potential income level. Some jurisdictions limit this by saying any award should be lessened by what the parent would have spent on raising the child (food, clothing, etc) but others get around this by being liberal with the "pecuniary" damages or by allowing recovery for intangible damage like loss of comfort and companionship.
  - [4] defenses - P's negligence can be a factor (if P didn't supervise her child closely enough for example). Or V's wrongful actions, if contributing to the death, may reduce

recovery for P. In contributory negligence jurisdictions, the action would be barred entirely, in comparative fault jurisdictions damages would be reduced.

- [d] Survival - Created by statute but different from wrongful death in that they are a continuation of the decedent's action against the tortfeasor. It is not a new legal claim, it is a pre-existing one. Brought by the administrator, the executor or personal rep of the estate. That person works to recover any damages Dec. would have gotten if they had lived. Limited to no punitive damages and minimal pain and suffering, also any defenses that could have been used against Dec can still be used. Instant death = no survival action (no chance of surviving). The tortious conduct does not have to be the cause of death for a survival action: D injures P and P's car, but P dies of natural causes before this could go to trial. No wrongful death suit but a survival action, sure. Usually wrongful death and survival are provided for in statute. You can do both if the wrongful conduct contributes to the death (survival to get pain and suffering, medical expenses, lost wages, etc). Then wrongful death to get post-death expenses and losses.

## Survival Actions

"Overview"

- An action created by statute allowing survivors to continue existing claims after plaintiff has die
  - The action is brought by the administrator, executor, or personal representative of the decedent's estate
  - The rep can recover any damages the decedent would have recovered if he/she had lived
  - Estate can usually recover the decedent's medical expenses, lost wages, and sometimes pain and suffering.
    - Pain and suffering can only be awarded if the decedent was aware of the pain prior to death
  - Damages are for the decedent not the family but they eventually pass to the family as a part of the estate.

## Defenses

- Any defenses that could have been raised against the decedent could be raised by the rep
- Where the defendant's tortious conduct leads to the instantaneous death of the plaintiff, there is no survival action available to the plaintiff's estate.

## 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
- Allows compensation to spouse of person who was injured due to the negligent actions of a tortfeasor.
- Started with compensation to a husband for loss of his wife's services due to D's tortious conduct.
  - Gradually expanded to include more than the economic loss, but also loss of companionship, comfort, and sexual services.



- Virtually all states now permit either spouse to recover.
- Courts have been reluctant to expand beyond spousal recovery because the potential of double recovery (more than one child recovering, or parent and child).
  - But restricting recovery b/c the spouse context itself raise substantial concerns about potential collusion or double recovery.
- 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
  - Recent movement to expand it to parents and children
- In some courts it only applies where you can show pecuniary (money) losses

## OBLIQUE TORTS

### Negligent Infliction of Emotional Distress

- Traditionally, as a prerequisite to recovery for mental distress, the D's negligence must have caused some form of physical impact on the P's person.
  - Still minority rule.
- Most states today only require that the Defendant must have been in some risk of physical impact known as the "zone of danger"
  - P must be at risk of physical impact and suffered a physical manifestation of distress.
  - Allows Plaintiffs to recover for mental distress caused by near misses.
- Bystander recovery
  - Majority of states allow a bystander to recover if also within the zone of physical risk
    - P can recover for emotional harm suffered from witnessing negligently inflicted harm causing death or serious injury to another (generally a close relative) when she is in a position to fear for her own safety.
  - Minority allow to bystanders not in the zone of physical risk if they
    - Are physically near the accident
    - Have contemporaneous sensory perception of the accident and
    - Are closely related to the victim

NOTES FROM DLM:

### NEGLIGENT INFLECTION OF EMOTIONAL DISTRESS (NIED)

- [a] historically, V could only get comp for mental distress when it was the result of a physical injury. Now it is independent of physical harm to the claimant. The problems with it are concerns about fraudulent claims and unlimited claims from the same event. Today the requirement is usually a "zone of danger" or at risk of physical impact, and usually also that the mental distress was so severe that physical symptoms resulted. Some jurisdictions have gotten rid of even the physical symptoms requirement but it is still handled very narrowly. Also gradually bystanders are able to recover for injury inflicted to someone else. Check your

jurisdiction tho. Where allowed, usually the bystander also has to be within the zone of danger. Minority allow if (1) are physically near the accident (2) have contemporaneous perception of the accident and (3) are closely related to the victim. Usually still a physical symptom requirement. Not all of these are required in all jurisdictions - check it!

- [b] DIRECT ACTIONS
  - [1] the impact rule: P must suffer physical contact by D's negligence. Not required very often any more. The impact does not have to cause an injury and even the slightest things (a slight electric shock, or even x-rays) were found sufficient. Gotten rid of to cut down on overly creative pleadings and looking for too many exemptions.
  - [2] risk of impact rule - zone of danger: most states allow for recovery if P was at risk of impact and suffered physical manifestations of the emotional distress. Allows recovery for "near misses." for physical impact even stomach trouble has sufficed but that depends on your jurisdiction.
  - [3] special cases - sometimes courts will relax the requirements in extreme/unusual situations - distress caused by the negligent handling of a loved one's corpse or being incorrectly told a loved one is dead. Physical symptoms are not usually required. Sometimes for distress for damage to an heirloom but not to any old chattel and D should have been able to foresee the distress.
  - [4] Broadest direct recovery - some areas use foreseeability instead of impact or danger zone and allow anyone foreseeable to recover. Some areas limit this more than others.
  - [5] Recovery for fear of future physical harm - some areas allow you to recover if you are afraid of say getting cancer in the future, as an addition to a toxic/environmental tort or product liability claim. Or of getting HIV - what level of exposure is needed? Most courts do not allow this tho.
  - [6] No state allows recovery on foresee ability alone.
- [c] BYSTANDER ACTIONS - random people who are emotionally harmed by D's negligent action. Many courts require V to establish recovery first - if V can't recover then no one else should. BUT they don't want infinite recovery so there have been a lot of lines drawn to try and balance it out.
  - [1] Zone of danger - if P witnesses a close relative's injury or death caused by D's negligence, P can recover for her own trauma from being in the zone of danger AND for the extra trauma of the witnessing. Usually the logic is the joint liability theory - D is responsible for all of it even tho only part was from direct action toward P. It is an indivisible injury.
  - [2] Dillon v. Legg - minority rule: some states allow recovery for bystanders who weren't in the zone of danger - the zone being too arbitrary. P must be (1) near the scene of the accident, (2) the shock must result from a direct emotional impact on P from the sensory and contemporaneous observance of the accident and (3) P and V must be closely related. Most states also require a physical manifestation of the distress. There have been a lot of arguments about what counts for each of those criteria; check your jurisdiction. Also for closeness one reason to limit is that the family unit has likely already received compensation for the death/injury anyway, where a random bystander with significant issues may not.
  - [3] The restatement (2d) of torts - this supports recovery for close family in the zone of danger. Requires bodily harm or other compensable damage - this is to cut down fraud and avoid overcompensation.

## **Negligently Inflicted Economic Loss**

### No-Duty Rule

- Plaintiffs generally cannot recover for economic losses they have suffered as a result of negligence absent a special relationship
- Example - Careless driver gets in accident on bridge resulting in closure. Plaintiff who suffers economic loss cannot sue the driver because driver owed plaintiff no duty of care.

### Negligent Information Suppliers

- Frequent cases involve accounts and auditors
- A duty is created when a plaintiff contracts with defendant for certain information
- Most states allow certain third parties to recover (3 approaches)
  - Quasi-privy - duty expands to third parties who are specifically identified to defendant who may rely on the information
  - Restatement approach (most widely used) - a duty is owed to any member of a limited group that defendant is aware the information will be provided
  - Foreseeability approach - a duty is owed to any foreseeable party that could rely on the provided information

### Attorney Liability

- Attorney is generally not liable to third parties
- Exceptions are made if the attorney was aware if the information was intended for the benefit of a third party.

### NOTES FROM DLM:

- [a] overview - D's unreasonable conduct caused ONLY economic harm. Most jurisdictions refuse to find duty. If the loss follows some other injury (personal, chattels) then it is compensable but this is ONLY for economic loss with no other injury.
- [b] Pure economic loss - businesses losing profits, workers who are laid off, delayed workers losing deals, these are all economic injuries that are not compensable. Reasons include potential liability would be out of proportion to fault - if the act was intentional, sure, but for unreasonable behavior the losses would be crushing and not warranted. Also that this would not deter the unreasonable behavior, P's should self-insure to protect themselves against limited losses rather than D trying to insure everyone, and there is a benefit to the litigants and courts in having a bright-line rule and it would be very difficult to measure damages. The counter to that is that duty would be fair (negligent D taking the costs not innocent P), fewer accidents, and more simplicity because it would be treated like any other tort. The problem is designing a rule that permits recovery for meritorious claims while barring others. Some areas use foreseeability, but that still gets arbitrary lines drawn.
- [c] liability of negligent information suppliers - a negligent accountant, auditor or other information supplier causes an economic loss. This is recoverable if there is a special relationship between P and D. If someone has a contract - like someone hired to perform a service - this is good evidence. The person would then have to fail to conform to professional custom or be liable. The controversy is the degree to which the duty is owed to 3Ps not in contract (investors who didn't contract with the auditors). All courts agree that duty extends beyond the contract here but how far? 3 theories:

- [1] Quasi-privity (most restrictive) - The bond between P and D is so close as to approach that of privity - the service is performed primarily for P's benefit instead of "only incidentally or collaterally." P generally has to be specifically ID'd to D.
- [2] Restatement section 522 - extends duty to people who D intended to supply information so as to guide them. Removes the ID requirement. Also limits to a group D KNOWS the info is going to, and only for transactions D intends, or knows the recipient intends to influence or to a substantially similar transaction. Most widely used.
- [3] foreseeability - Duty is extended to any foreseeable P. They must have received the information directly from D's client for a legitimate business purpose and the client must have intended the information to influence P. The difference between (2) and (3) is that (2) is limited to "foreseen P's" where (3) is limited to up's who are foreseeable.
- [4] Which is best? - those favoring (3) argue that professional D's should not be treated any differently than any other D's. Also that this will encourage greater accuracy and provide harmed P's with a valid recovery option. It isn't usually the clients that are so badly harmed by an audit, it is the investors. Those favoring (2) say that malpractice insurance was intended for this sort of thing and professional D's are already more protected than other D's. Also that the expanded role of professional D's in today's society require expanded liability. Mostly the justification for limitation is the fear of excessive liability, it encourages diligence on the part of P's and malpractice insurance is threatening to put D's out of business.
- [d] Attorney liability - the above was mostly accountant liability, but attorney liability to a non client is an issue too. Most jurisdictions hold no duty to a non-client. Some allow limited expansion in particularly compelling cases, like where D understood the client's intend was to benefit a 3P (ie wills, because the person in contract is now dead). However anything else may limit the attorney because they would be looking out for the interests of people who are not their client. The obligation of an attorney is to their client, and anyway the 3P can always hire their own attorney to verify the info and they would then be in privity with their attorney.

## Fraud

### Overview

- Intentional or reckless misrepresentation which induces a victim's reliance and causes economic damage.

### Elements

- A material misrepresentation
  - Must be of a past or present material fact
  - Material means that a reasonable person would regard it as important
  - Failure to disclose a fact can qualify
- The defendant acted with the requisite scienter:
  - the statement was false or made it with reckless disregard as to its truth or falsity
- The defendant intended to induce reliance:
  - A joke which is not intended to be taken seriously is not actionable
- The misrepresentation caused plaintiff's justifiable reliance
  - If the victim is not deceived, the tort is not actionable
  - Reliance must have been foreseeable by defendant
- Pecuniary damages resulted to the plaintiff

- Majority view: Damages based on the "benefit of the bargain" if the representation had been true
- Minority view: Damages limited to actual losses that would restore plaintiff to position prior to occurrence.
- Mental distress generally not recoverable
- Punitive damages available if done with malice.

NOTES FROM DLM:

### **FRAUDULENT MISREPRESENTATION**

- [a] provides recovery for pure economic loss with no real injury required. Can also get punitive damages if malice can be proven. The idea is that an intentional or reckless misrepresentation influences V's reliance and causes economic damages. Should be distinguished from liability for negligent or innocent misrepresentations. Can exist as part of other torts - a misrepresentation that causes physical harm for example. This is an attempt to address liars and how vast the impact can be.
- [b] definition - 5 elements: (1) a material misrepresentation, (2) D acted with the requisite scienter (knew the statement was false or made it with reckless disregard as to its truth or falsity), (3) D intended to induce reliance, (4) the misrepresentation caused P's justifiable reliance, and (5) pecuniary damages resulted to P.
  - [1] Material misrepresentation by D - the misrepresentation must be of a past or present material fact. Even if the statement is technically correct, if it is stated in such a way as to mislead it can still count here. Does not have to be in words - physically disguising a defect works too. Generally of "present" fact - if D made a promise with no intention of keeping it will satisfy here but just a broken promise doesn't if the promise was made in good faith. Misrepresentations of opinion are usually not actionable. Exceptions = an expert talking to a non-expert, or someone who represents that they are an expert or about their objectivity. Can happen with misrepresentations of law, too, but it is tough unless the liar represents themselves to be a law expert. The misrepresentation must also be material - a reasonable person would attach importance to it when they're figuring out what to do, or the maker of the statement knows or should know that the person they are telling is likely to regard it as important. Sometimes there is a duty to disclose; courts have been expanding on that, also a duty to disclose and correct misimpression. Some courts have a rule that a seller must disclose material defects the purchaser wouldn't discover.
  - [2] Scienter - D has to know that the misrepresentation was false or D has to act with reckless disregard as to its truth or falsity. Recklessness = D said whatever but was aware that he had no idea if it was true or not.
  - [3] intent to induce reliance - D must have intended for V to rely on the misrepresentation as being true. A joke not intended to be taken seriously is not covered here. V must be the intended recipient, or a recipient D had reason to expect would hear of it and rely on it. Generally a wider range of liability than negligent tort, due to the intentional nature but even then courts don't like accidental or unforeseen V's.
  - [4] Causation - the misrepresentation must have caused reliance. If V is not deceived then D is not liable. It does not have to be the sole factor, just a substantial factor in the reliance.

- [5] justifiable reliance - reliance is not justified if it is immaterial to the transaction. Also if the V is knowledgeable but relies on an obvious falsity despite ability to easily recognize that, is unjustified in reliance. NOT like contributory negligence - P does not have to exercise the reasonable person caution.
- [6] Damages - usually either measured in terms of “the benefit of the bargain” if the lie had been true. More typical for breach of contract, but the majority rule. Minority rule = V’s out-of-pocket expenses only. Some are in-between allowing for out-of-pocket-plus, as long as the damages are certain enough. The first usually results in higher damages. Damages for mental distress are not usually awarded.

## **Intentional Interference with Contract**

### **Overview**

- Allows recovery when the defendant intentionally interferes with a valid contract between other parties

### **Elements**

- A valid contract or economic expectancy between the plaintiff and 3rd Party
- Knowledge of the valid contract or economic expectancy by defendant
  - Just means defendant must know the facts from which she should have concluded a contract existed.
- Intent by defendant to interfere with the contract or economic expectancy
  - Substantial certainty counts as intent
- Interference caused by the defendant
- Damages to plaintiff
  - Damages in such cases can be awarded for: economic losses, mental distress, Punitive Damages if malice is proven

NOTE: This tort is applicable only to the intermeddler who disrupts a contract between other parties and is not applicable to parties who may breach or disrupt their own contracts.

NOTES FROM DLM:

### **INTENTIONAL INTERFERENCE WITH CONTRACT AND WITH PROSPECTIVE ECONOMIC RELATIONS**

- [a] overview - protect parties from intentional disruptions in economic relationships. Similar basic elements, but ec.rel. has wider definitions. IIwC = recovery when D intentionally interferes with a valid contract between 2 other parties. Damages = econ losses, mental distress, punitive damages (if malice is proven). Justifications are very limited - usually if the contract was illegal or against public policy. IIwER = D intentionally and unjustifiably disrupts V’s expectations not embodied in an actual contract. Same justifications PLUS fair competition, and apply generally to at-will contracts.
- [b] Definitions - IIwC requires a valid contract, while IIwER requires a legitimate econ expectancy. Elements=
  - - (1) A valid contract or expectancy between P and 3P

- (2) knowledge of (1) by D
- (3) intent by D to interfere with (1)
- (4) interference caused by D AND
- (5) Damages to P.
- This only applies to an intermeddler in the contract/expectancy, not one of the contracting/discussing parties who mess it up themselves.
- [1] requires proof of a valid contract or of a valid economic expectation. Mere hope for customers or profit is not enough.
- [2] D must know of the valid contract - generally means that D should know facts from which D should have concluded that a valid contract existed. Also similar for knowing of the valid econ expectancy.
- [3] “intentional” per restatements means either purposeful interference or a substantial certainty that interference will occur.
- [4] D must actually cause the interference - if the breach was already there then D didn’t CAUSE the breach.
- [5] Damages may be economic, mental distress, punitive (if malice is proven)
- [c] justifications for interference - first, the burden of proof is usually P’s but check your jurisdiction. Justifications that cover both torts: statements of truthful information or honest advice within the scope of a request, interference by a person responsible for the welfare of another while acting to protect that person’s welfare, interference with a contract that is illegal or violates public policy, interference by someone when protecting his own legally protected interests in good faith and by appropriate means. IIwER/term at will contracts only: fair and ethical competition or ethical action to protect one’s financial interest.
  - Restatement sec 767 has 7 factors to determine when IIwER/term at will is OK:
    - [a] nature of actor’s conduct
    - [b] actor’s motive
    - [c] the interests of the other with which the actor’s conduct interferes
    - [d] the interests sought to be advanced by the actor
    - [e] the social interests in protecting the freedom of action of the actor and the contractual interests of the other
    - [f] the proximity/remoteness of the actor’s conduct to the interference AND
    - [g] the relations between the parties.
  - Biggest issue is that IIwER can be seen as fair competition in a LOT of ways. There is an argument that this should be restricted to when D commits a definable wrong - otherwise the notice they have is limited at best.

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

### **Overview**

- Allows recovery when Defendant intentionally and unjustifiably disrupts Plaintiff’s economic expectations not in an actual contract.
  - Ex. making it unpleasant to visit a competitor’s business.

### **Elements**

- Valid economic expectancy between Plaintiff and a 3rd party
  - Mere hope of profit/customers not enough
- Knowledge of the economic expectancy by the Defendant

- Intent by the Defendant to interfere with the economic expectancy
  - Substantial certainty counts
- Interference caused by the Defendant
- Damages to the Plaintiff
  - Damages in such cases can be awarded for: economic losses, mental distress, Punitive Damages if malice is proven

NOTE: This tort is applicable only to the intermeddler who disrupts a economic relationship between other parties and is not applicable to parties who may breach or disrupt their own economic relationships.

#### **Justifications for Interference**

- Providing statements of truthful information or honest advice within the scope of a request
- Interference by a person responsible for the welfare of another while actin to protect that person's welfare
- Interference wth 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
- Fair and equitable competition is a justification defense
  - Example: Employee can notify clients that he will be leaving before leaving and can solicit those clients after leaving.

### **Tortious Breach of the Covenant of Good Faith and Fair Dealing**

#### **Overview**

- Allows for tort damages as well as tort damages when there is a breach of the implied covenant of good faith and fair dealing.
- Tort is usually limited to breaches by insurance companies

#### **NOTES FROM DLM:**

- Covered this a bit in contracts - there is an implied covenant of good faith and fair dealing in each contract so contracts may be interpreted fairly. This means it depends on the terms of the contract at issue. Sometimes this can be sued for as a tort, so you can get tort AND contracts damages. This means economic loss. Mental distress, and punitive damages (where malice is proven). Usually limited to insurance companies in specific instances like refusing to pay up on a legitimate claim. The threat of punitive and mental distress damages helps out V's because otherwise the insurers would only be liable for what they would have had to pay anyway. Concern is that this will deter contract expectations and economically efficient contract breakers (also increase litigation). In some cases, bad-faith denial of the existence of a contract can also constitute a tort but that has been largely overruled to keep it to the insurance context.



## APPLICABLE RESTATEMENTS

### **RESTATEMENTS 766:** Intentional interference with performance of contract by third person

- One who intentionally and improperly interferes with the performance of a contract (except to marry) between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract.

### **RESTATEMENTS 766A:** Intentional interference with another's performance of his own contract

- One who intentionally and improperly interferes with the performance of a contract (except to marry) between another and a third person, by preventing the other from performing the contract or causing his performance to be more expensive or burdensome, is subject to liability to the other for the pecuniary loss resulting to him.

### **RESTATEMENTS 766B:** Intentional interference with prospective contractual relation

- One who intentionally and improperly interferes with another's prospective contractual relation (except a contract to marry) is subject to liability to the other for the pecuniary harm resulting loss of the benefits of the relation, whether the interference consists of
  - (a) inducing or otherwise causing a third person not to enter into or continue the prospective relation OR
  - (b) preventing the other from acquiring or continuing the prospective relation.

### **RESTATEMENTS 767:** Factors in determining whether interference is improper

- In determining whether an actor's conduct in intentionally interfering with a contract or a prospective contractual relation of another is improper or not, consideration is given to the following factors:
  - (a) the nature of the actor's conduct
  - (b) the actor's motive
  - (c) the interests of the other with which the other interferes,
  - (d) the interests sought to be advanced by the actor,
  - (e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other,
  - (f) the proximity or remoteness of the actor's conduct to the interference, AND
  - (g) the relations between the parties

### **RESTATEMENTS 768:** Competition as proper or improper interference

- 1) one who intentionally causes a third person not to enter into a prospective contractual relation with another who is his competitor or not to continue an existing contract terminable at will does not interfere improperly with the other's relation if:
  - (a) the relation concerns a matter involved in the competition between the actor and the other AND
  - (b) the actor does not employ wrongful means AND
  - (c) this action does not create or continue an unlawful restraint of trade AND
  - (d) his purpose is at least in part to advance his interest in competing with the other.

- 2) The fact that one is a competitor of another for the business of a third person does not prevent his causing a breach of an existing contract with the other from being an improper interference if the contract is not terminable at will.

**RESTATEMENTS 769:** Actor having financial interest in business of person induced

- One who, having a financial interest in the business of a third person intentionally causes that person not to enter into a prospective contractual relation with another, does not interfere improperly with the other's relation if he
  - (a) does not employ wrongful means AND
  - (b) acts to protect the welfare of the third person.

**RESTATEMENTS 770:** Actor responsible for welfare of another

- One who, charged with the responsibility for the welfare of a third person, intentionally causes that person not to perform a contract or enter into a prospective contractual relation with another, does not interfere improperly if the actor
  - (a) does not employ wrongful means AND
  - (b) acts to protect the welfare of the third person

**RESTATEMENTS 771:** Inducement to influence another's business policy

- One who intentionally causes a third person not to enter into a prospective contractual relation with another in order to influence the other's policy in the conduct of his business does not interfere improperly with the other's relation if
  - (a) the actor has an economic interest in the matter with reference to which he wishes to influence the policy of the other AND
  - (b) the desired policy does not unlawfully restrain trade or otherwise violate an established public policy AND
  - (c) the means employed are not wrongful.

**RESTATEMENTS 772:** Advice as proper or improper interference

- One who intentionally causes a third person not to perform a contract or not to enter into a prospective contractual relation with another does not interfere improperly with the other's contractual relation, by giving the third person
  - (a) truthful information OR
  - (b) honest advice within the scope of a request for the advice.

**RESTATEMENTS 773:** Asserting bona fide claim

- One who, by asserting in good faith a legally protected interest of his own or threatening in good faith to protect the interest by appropriate means, intentionally causes a third person not to perform an existing contract or enter into a prospective contractual relation with another does not interfere improperly with the other's relation if the actor believes that his interest may otherwise be impaired or destroyed by the performance of the contract or transaction.

**RESTATEMENTS 774:** Agreement illegal or contrary to public policy

- One who by appropriate means causes the non-performance of an illegal agreement or an agreement having a purpose or effect in violation of an established public policy is not liable for pecuniary harm resulting from the non-performance.

**RESTATEMENTS 774A:** Damages

- 1) One who is liable to another for interference with a contract or a prospective contractual relation is liable for damages for
  - (a) the pecuniary loss of the benefits of the contract or the prospective relation;
  - (b) consequential losses for which the interference is a legal cause; AND
  - (c) emotional distress or actual harm to reputation, if they are reasonably expected to result from the interference.
- 2) In an action for interference with a contract by inducing or causing a third person to break the contract with the other, the fact that the third person is liable for the breach does not effect the amount of damages awardable against the actor; but any damages in fact paid by the third person will reduce damages actually recoverable on the judgment.

## **Breach of Fiduciary Duty**

### **Overview**

- Is a legal relationship of confidence or trust between two or more parties, most commonly a fiduciary or trustee and a principal or beneficiary

### **Types of Fiduciary Duties**

1. Trustee to the Beneficiary
2. An Agent to his Principal
3. Attorney to Client
4. Business Partners owe a duty to one another
5. Joint Ventures owe a duty to each other
6. Officers owe a duty to the corporation
7. Relationship can be established in an agreement or contract

### **Example Case**

- *April Enterprises v. KTTV* -back in days when videotape was very expensive-April Enterprises on remand got 17.8 Million dollars on remand!

## **Malicious Prosecution and Malicious Institution of Civil Proceedings**

### **Overview**

- Allows action to recover damages as a result of wrongful criminal and civil proceedings

**Elements**

- Institution or continuation of criminal or civil proceedings against the plaintiff
  - May be accomplished by asking another to bring or maintain the suit
  - False testimony alone by defendant is not sufficient
- Termination of the proceeding in favor of the plaintiff
- Absence of probable cause
  - Vindication for the defendant in the previous litigation is not sufficient
  - Plaintiff must prove there was no reasonable basis for the defendant to believe them guilty or liable
- Improper purpose or malice of the accuser
  - Element is satisfied if moving party in previous litigation believed that claims were without merit
  - Is also satisfied if moving party in previous litigation brought action simply to harass or gain some extraneous advantage unrelated to the merits of the litigation (e.g. publicity) , even when the accuser in fact believes the accused is guilty or liable of the charge.
- Damages
  - Economic Damages
  - Emotional Distress
  - Harm to Reputation
  - Punitive damages are available if malice is proven

NOTE: Public officials and the government entity that employs them are immune from liability under this tort.

NOTES FROM DLM:

**MALICIOUS PROSECUTION AND MALICIOUS INSTITUTION OF CIVIL PROCEEDINGS: DEFINITION**

- Elements for the first 2 are: (1) institution or continuation of a criminal or civil proceeding against the accused (2) termination of the proceeding in favor of the accused (3) absence of probable cause for prosecution or civil proceedings (4) improper purpose of the accuser AND (5) damages suffered by the accused
- [a] institution or continuation of a criminal or civil proceeding against the accused: D has to do this, or ask another to do so. BUT someone falsely testifying against P is not enough to maintain this action, however it can be used as evidence towards improper purpose.
- [b] termination of the proceeding in favor of the accused: Unless it's an ex-parte hearing, this can't be filed till the "wrongful" suit is over and decided for P on its merits exonerating P (a settlement or failure to continue prosecuting, SL running out, etc. won't do it). Some authority, including the restatement, allows for this if the suit is dropped because P would win anyway but that is extremely rare.
- [c] absence of probable cause for prosecution or civil proceedings: even if P is vindicated in the previous proceeding, if there was even the tiniest shred of probable cause for the suit then they are SOL.
- [d] improper purpose or malice of the accuser: historically malice was required, possible ambiguity prompted the restatements to re-word. This is established if the accuser brought or maintained a criminal/civil proceeding against someone he did not think was guilty/potentially liable. Just dislike doesn't do it. Harassment or gaining an advantage extraneous to the merits of litigation does qualify per restatements, BUT the accuser still has to act without probable

cause, even if that probable cause was not the primary purpose (so even if they hate P and want to harass them, if P really was driving without a license and they knew it then there was probable cause). This is only critical when the accuser has not acted reasonably in presuming guilt or liability.

- [e] Damages: usually the easiest element given the cost of defending a case. These include economic consequences, emotional distress, reputation injury, and (if malice) punitive damages.

### **IMMUNITY OF PUBLIC OFFICIALS**

- Prosecutors, judges, other public officials (not public defenders) and the gov't that employs them are immune from discretionary decisions to prosecute. However, others who fabricate evidence to support a wrongful prosecution by one of these people is not immune.

### **INTERACTION BETWEEN FALSE IMPRISONMENT AND MALICIOUS PROSECUTION/INSTITUTION**

- This doesn't qualify as long as proper legal procedures are followed, but if there was an imprisonment outside of appropriate legal procedures, or unprivileged arrest, etc, then this (or false arrest) may apply.

## **Abuse of Process**

### **Overview**

- Constitutes the intentional misuse of either a civil or criminal legal process for an ulterior purpose resulting in damage to the plaintiff.
  - Differs from malicious prosecution or institution of Civil Proceeding as the proceeding does not have to have terminated.
  - Does not matter who ultimately won the litigation

### **Example**

- Subpoena power - bringing in witnesses early to cause the witness damages

### **NOTES FROM DLM:**

- No need to wait for the trial to finish - this is the wrongful use of processes WITHIN the litigation, and can be wrongful regardless of the winner (ie, subpoenaing A to be deposed in Fargo, with the intent that they miss a business meeting in Grand Forks). P has to prove ulterior purpose which is tough.

## **Defamation**

### **Overview**

1. How many people must know to be a tort?
  1. At least 1
2. Does it have to be True or False?
  1. False

3. Does it have to be Highly Offensive?
  1. No
4. Does there have to be Intent?
  1. Sometimes- although negligence will count as intent where there is no malicious intent.

#### Elements

- Defamatory statement
  - Must scorn, ridicule, or contempt the Plaintiff; harm the reputation of the Plaintiff.
  - Mere insults, pure opinion do not count.
  - Must show that a substantial and respectable minority or a right thinking minority would comprehend the defamatory nature of the statement.
  - A jury question
- Directed towards the plaintiff
  - Must show that the defamatory communication was understood as referring to the P.
  - Group Defamation
    - Depends on the size of the group
      - The larger the group, the less likely
- That was published
  - Means it must simply reach one person other than the P, and that other person must be able to understand it.
- Damages
  - General Damages
    - Damages for emotional distress and reputation
    - Plaintiff's reputational injury may be presumed
  - Special Damages
    - Covers economic losses such as profits
    - Difficult to prove
    - Damages may be presumed based on whether it is Libel, Slander, Slander Per Se
      - Libel: Written, Photographic, Statute or Sculpture - Special Damages Must Be Proven
      - Slander: Spoken - Special Damages Must Be Proven
      - Slander Per Se (4 Categories) - Special Damages are Presumed
        - Communications that directly call into question the plaintiff's competence to perform adequately in her trade or profession
        - Statements claiming the plaintiff has a current, loathsome disease, such as syphilis or AIDS
        - Allegations of serious criminal misbehavior by the plaintiff, typically criminal activity involving moral turpitude.
        - Suggesting a lack of chastity in a woman.

#### Defenses

- Substantial truth
- If the statement is substantially true, no defamation
- Absolute privilege
  - Judicial, legislative, and executive communications are absolutely privileged.
- Qualified privilege

- Based on social utility of protecting communications made in connection with the D's moral, legal, or social obligations.
- Can be lost if:
  - D failed to have an honest belief that the statement was true
  - Failing to have an objectively reasonable belief that the statement was true
  - By disclosing the information to more people than necessary (excessive publication.)

### **Constitutional Issues**

- Public Officials
  - Must be shown that D either knew that the statement was false or recklessly disregarded whether the communication was false - "actual malice"
    - Failure to investigate the truth of the statement does not count.
    - Basically, a qualified privilege.
    - Public officials are those individuals who are positioned to affect policy.
    - Actual Malice
      - P must prove that D knew of the falsity or was reckless as to truth or falsity if a public official, public figure, or private plaintiff in cases of public concern.

NOTES FROM DLM:

### **OVERVIEW**

- A blend of common law and 1st amendment issues. There are some rights but there are some constitutional limits to these claims. It is a big mess.

### **COMMON LAW DEFAMATION**

- A strict liability tort. Fault and falsity of the statement were presumed, as were damages. P only had to prove (1) a defamatory statement (2) about P (3 that was "published." That made it WAY too easy to recover.
- [a] defamatory statement - P had to persuade the jury that the statement was defamatory - must hold P up to scorn, ridicule or contempt. Restatement 559 says it damages the reputation to the point that it is lowered in the community or that 3P's won't do business with him. So the defamatory statement harms reputation by injuring a person's general character or causing personal disgrace. Insults, hyperbole, obvious jokes or pure opinion don't count. Matter of law = whether it COULD be defamatory, matter of fact = whether it WAS defamatory. Use the "fair ad natural meaning" of the words. Context and punctuation can matter.
  - [1] Defamatory to whom? It doesn't have to prejudice everyone, just a "substantial and respectable" or "right-thinking" minority. Unless the minority is blatantly anti-social (ie a Nazi allegedly marrying a Jew). IT is harder where something like homosexuality is alleged, because "right thinking:" people wouldn't hold that against someone...but it is still not accepted in society so it can cause harm.
  - [2] Statements not facially defamatory: inducement and innuendo. If the statement is not facially defamatory, P needs to plead the extra facts needed to make the statement defamatory (inducement) or explain the defamatory impact (innuendo). IE X spends his

- evenings at Y address...P would have to point out the Y address is a brothel so that is why the statement is defamatory.
- [b] Of and concerning P - P must show that the statement was understood as referring to P. D's intent therein was irrelevant, even if the character was fictional, as long as ppl can ID the character as P. Colloquium = if you are not named, you have to plead the facts that ID you from the statement.
    - [1] group defamation. If the comment is against members of a group, and the group is small, there are individual causes of action. The larger the group, the less likely a cause for action but there is no clear line.
    - [2] Corporate P's can sue when the comment calls into question their business character, trustworthiness, etc. If the attack is on a product the claim is for product disparagement.
  - [c] Publication and republication - "Published" for defamation means it must reach 1 person other than P and that person must understand its defamatory thrust. The # of recipients may be relevant to damages but not to establishing publication. Not usually tough to prove. Repetition of the defamatory material is the same thing even if it is attributed to the original source (that way [people can't get away with publishing whatever they want under the guise of "accurately reporting what someone else said."]). To solve problems, one edition is considered one publishing rather than every book in the edition being considered a new publishing.
  - [d] damages - usually general damages for emotional trauma and harm suffered. Sometimes P has to prove specific damages first before general damages may be recovered. Depends on whether it's libel or slander.
    - [1] libel/slander distinction. Slander is an oral utterance where libel is a more permanent expression like a writing, photo, statue or sculpture. Generally sight = libel, sound = slander. This can be tough...movies = libel but radio/TV? Check your jurisdiction. Majority = radio&TV = libel too.
    - [2] slander and slander per se. Generally requires special damages first. Slander per se doesn't though - that is where the statement was deemed so horrible that reputation injury to P could be presumed without that. These are still generally followed:
      - (1) statements that directly call into question P's competence to perform adequately in their trade or profession,
      - (2) statements claiming P has a current, loathsome disease,
      - (3) allegations of serious criminal misbehavior by P, often involving crimes of moral turpitude, or
      - (4) and most controversial, claiming lack of chastity in a woman.
    - [3] Libel and Libel per Quod. The majority approach allows presumed general damages, but the minority has narrowed this to libel per se. you have to prove special damages for libel per quod (libel that requires extrinsic evidence such as inducement or innuendo) unless it falls into a slander per se category.
  - [e] Common law defenses - prima facie case was easy so D had to do a lot of work.
    - [1] Substantial truth. If D told the truth, even if that truth was harmful there was no cause of action. At common law the statement was presumed false and D had to prove it was true (this has changed with constitutionalization, it is now P's burden to prove false). It does not mean the literal truth of the statement but the underlying accusation. Did not have to be the truth of every aspect, just of a substantial part.
    - [2] Absolute privileges. These allow D to escape even if they did it on purpose. Usually happens in gov't proceedings like communications and trials. So if someone perjures to harm someone else, the harmed person cannot recover. The liar may be tried for perjury tho. Also applies to a legislator who deliberately makes a false statement during debate



on the floor of the legislature. This gets attenuated very quickly - talking to the media in any way usually isn't covered. Private spousal communications and statutorily required broadcasts for the political process are protected too.

- [3] qualified privileges - if someone knows something that is truthful/opinionated and would harm another, they are privileged in giving that info. The 3P must need that info and be able to act on it (so no gossip) and it must be relevant, and if D and the recipient share a common interest (3P is about to hire P and D knows that P was fired for incompetence then D can say so). It has to be an honest belief of truth, it also has to be objectively reasonable to believe that was true, and P cannot disclose to more people than necessary or they lose the privilege. For media, if the report is a fair and accurate, unbiased report of public meetings, and probably info in public records, without liability.

## CONSTITUTIONAL CONSTRAINTS

- Defamatory speech = false speech = not protected under the first amendment. BUT in 1964 the USSC decided that there were some limits in some contexts. Usually requires a determination of P's status (public official, public figure or private person) and the subject matter of the defamation (public or private concern).
- [a] Public officials - an MLK issue where there were significant errors printed resulted in public officials having to show that D either knew a statement was false or recklessly disregarded whether it was false ("actual malice"). There is no absolute privilege to defame public officials, but there is leeway. This was done out of a fear of repression of unpopular viewpoints. There is debate about who qualifies - police officers, teachers, gov't lawyers...
- [b] Public figures - public officials have to prove actual malice too. 2 categories here: all-purpose public figures: widely known people (Bill gates, Madonna) and a limited public figure: someone who voluntarily injects himself or is drawn into a public controversy and becomes a public figure for a limited range of issues (ie the CEO of Target within the retail store community only). #2 is fuzzier, but the USSC made it clear that this is to be narrowly defined.
- [c] private persons - USSC offers little guidance here, You have to figure out if it is a public or private concern then look at the content, form and context of the communication. Wider distribution = more likely a public concern. If there is a media D then it is probable that it is a public concern.
  - [1] Public concern - a public matter. Proof requirements depend on damages - private P's can recover for actual injury = proven impairment of reputation and standing in the community, humiliation and mental anguish and suffering under any standard other than strict liability. Actual malice is OK when P seeks presumed or punitive damages.
  - [2] private concern - private P and a private matter. Recovery is very limited if allowed at all. USSC says that the states don't have to use actual malice but didn't say what they should use. Most use negligence standard, it is unclear if they could go back to common law. Actual malice is OK if they want to use it, they don't HAVE to though.
- [d] Actual malice - P has to prove that D knew of the falsity or was reckless as to the truth or falsity. This can be done by D deliberately deciding not to acquire knowledge of facts that might confirm the probable falsity of a communication or the purposeful avoidance of the truth.
- [e] falsity - P has to prove the statement is false (common law overturned by USSC) but there is no info on whether an elevated burden of proof is required or if private/private can return to common law rules.
- [f] conclusion - The court made a LOT of changes in the 60's and 70's but is slowly backing away from that. That said, it is unlikely that a return to common law standards will be allowed.

## **Intrusion**

### **Overview**

- A person who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for the invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.

### **Examples**

- Repeatedly making unwanted phone calls = liability
- Taking the picture of a drunk = no liability
- Placing a listening device in someone's bedroom = liability

### **Comparison Questions**

1. How many people must know to be a tort?
  1. Not Applicable,
2. Does it have to be True or False?
  1. Not Applicable
3. Does it have to be Highly Offensive?
  1. Yes
4. Does there have to be Intent?
  1. Yes

### **NOTES FROM DLM:**

- Restatement 652B definition is “one who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.” Interference with a “zone of privacy” no communication required just the intrusion. No requirement for trespass although it may also qualify. Liability can still hold even if it would reveal crimes or corruption.

## **False Light**

- Similar to defamation.

### **Comparison Questions**

- How many people must know to be a tort?
  - Must be to the Public
- Does it have to be True or False?
  - False
- Does it have to be Highly Offensive?
  - Yes
- Does there have to be Intent?
  - There must be Actual Malice

## Elements

- Publicizing
  - D must communicate the false facts to a substantial number of people (Defamation only requires one besides victim)
- False facts
- That a reasonable person would object to
- Actual malice required to be proven by all Ps.

## NOTES FROM DLM:

- Restatement 652E. Overlaps a lot with defamation. Some states either reject it or roll it into defamation.
- Elements = D
  - (1) publicizing (communicated to a substantial # of people),
  - (2) false facts
  - (3) that a reasonable person would object to
- both of the last 2 together = a very broad category that can include defamation stuff. But subtler things like docudramas or fabrications in a magazine feature are best addressed here
- If public interest matter there must be actual malice as per defamation, for public and private P's.
- Courts won't let you use false light and the lower requirements to plead something that should be defamation so don't try it.

## Disclosure

### Comparison Questions

- How many people must know to be a tort?
  - Must be to the Public
- Does it have to be True or False?
  - Must be True
- Does it have to be Highly Offensive?
  - Yes
- Does there have to be Intent?
  - Yes

## Elements

- Publicity of
  - Must be communicated to a significant group of people.
- Private facts
  - True facts
- Highly offensive to a reasonable person which are
- Not of a legitimate public interest.

## NOTES FROM DLM:

- Elements =
  - (1) publicity of
  - (2) private facts
  - (3) highly offensive to a reasonable person which are
  - (4) not of legitimate public interest.
- Restatement 652D.
  - (1) is the same as false light; a large group of people.
  - (2) has to be something that pretty much no one else knows, and if it's on public record you are SOL.
  - (3) means that it has to be something that would offend pretty much anyone - not just you in your close circle of friends.
  - (4) if the courts can find any possible "public interest" in the news, despite ALL of the above, you are SOL. This makes the communication of true facts subject to liability. Within these limits, though, if it's true you're SOL.

## Right of Publicity

### Comparison Questions

- How many people must know to be a tort?
  - Must be Commercial
- Does it have to be True or False?
  - Can be True or False
- Does it have to be Highly Offensive?
  - No
- Does there have to be Intent?
  - No intent required

### Elements

- One who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy.
- Applies to unauthorized endorsement of a product.
  - Not to placing a person's picture on the cover of a magazine and writing an article about them.
- Heirs of a celebrity estate may sue for exploitation of celebrity's identity.

NOTES FROM DLM:

### APPROPRIATION OF NAME OR PICTURE AND THE RIGHT OF PUBLICITY

- Restatement 652C definition is "one who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy."
- Tough boundaries -
  - unauthorized product endorsement = liable
  - journalistic articles or books (incl. unauthorized biography w/pics) = not liable
  - grey area = things like a calendar of sports magazine covers with people on the covers.
- Celebrities have a right of publicity

- basically identical to privacy-appropriation tort but may be inheritable.
- Rest aren't generally inheritable.
- Satirical imitations - as long as its clear V isn't endorsing or performing anything - are OK but beyond that it gets fuzzy.
- If it is a performance stunt, broadcasting the entire act was appropriation of exhibition rights.

## **Seduction**

### **Overview**

- The offense that occurs when a man entices a woman of previously chaste character to have unlawful intercourse with him by means of persuasion, solicitation, promises, or bribes, or other means not involving force.

### **Elements**

- Enticement, persuasion or solicitation of some nature (or a promise of marriage)
  - Usually brought by fathers
- Chastity of the female at the time of the alleged seduction
- Sexual intercourse must have taken place as a result of the enticement

## **Criminal Conversation**

### **Overview**

- A tort action for adultery, brought by a husband against a third party who engaged in sexual intercourse with his wife.
- Has been abolished in most jurisdictions.

### **Elements**

- There must be an actual marriage
- Defendant must have had sexual intercourse with plaintiff's spouse

### **Other**

- Only defenses: the consent or connivance of the plaintiff's spouse (non-cheating spouse needs to consent)
- Plaintiff sues the person who cheated with plaintiff's spouse
- Not limited to men or women

### **Case**

- Thomas v. Siddiqui-abolishes the tort of criminal conversation in Missouri

## Alienation of Affections

### Overview

- A tort based on willful and malicious interference with the marriage relation by a third party without justification or excuse.

### Elements

- Defendant must have engaged in wrongful conduct
- Plaintiff must have lost affections or consortium of his or her spouse
- There must be a causal connection between defendant's conduct and the loss of affection

### Case

- Helsel v. Noellsch-abolishes the tort of alienation of affection in Missouri

## Whistleblower Statutes

- Protection of an employee who sees something at their job that is not appropriate (or legal) and they go to authorities.
  - Federal Mines and Safety Act (FMSA) - protects the whistleblowers from retaliation from the employer
  - Federal Railroad Safety Act - some cover all employees (gov't & private) and some cover only gov't
  - Qui Tam - who sues on behalf of the king as well as himself (private person bringing action against someone for defrauding the gov't)
    - 31 USC 29 - The private party can receive compensation if gov't recovers damages (up to 15%)

## Legal Philosophy

- 1. Natural law is a discredited idea that comes from the revolution.
  - the law is out there, we just need smart people who can figure it out by power of reason.
  - we must have contract law, and it must have these doctrines
  - God made that law, we must just figure it out
  - 8 things that make a system fail:
    - 1-Lack of rules of law
    - 2-Failure to publicize or make known the rules of law
    - 3-Obscure legislation that is hard to understand
    - 4-Retroactive legislation
    - 5-Contradictions in the law
    - 6-Demands that are beyond the power of the subjects in the rule
    - 7-Unstable legislation-things that get changed too much
    - 8-The law says one thing, but in fact, other things are done

- 2. Analytic Jurisprudence
  - you can't mash is and ought together
  - laws can be unjust, whereas natural law person would say that it's not a law if it's unjust
  - spectrum of ways of looking at things
  
- - Analytic Jurisprudence-should be seen on a spectrum
    - Legal positivism
      - I can tell you if you will win right now-I'll look it up in the restatement
    - Legal Realism
      - A judicial decision might be determined by what the judge had for breakfast
    - both are wrong-it's somewhere in the middle

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