

# Torts Wypadki Fall 2009



Torts I  
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# 'Black Letter Law'

## Part I: Preliminaries'

### Module 1: Models of Tort Law and Context of Torts

#### Elements of a Tort

1. Act
2. Causation
  1. actual causation - "but-for" - it wouldn't have happened "but for" this happening . . .
  2. proximate causation - "close to" - causation must be closely related to act
3. Damages
4. Culpability

#### TERMS

- *cause of action* - legal entitlement to sue someone
  - *prima facie case* - P can prove all elements of a cause of action (if all elements are NOT present=no case)
  - *defenses*
1. disprove one of the elements in the prima facie case
  2. assert a defense

### Module 2: Overview of Tort Law

#### Generally

1. Act
  1. Volitional movement
  2. Not reflex
2. Intent
  1. Standard of intent differs from tort to tort
  2. Substantial certainty sufficient for intent
  3. Intent can be transferred person to person and tort to tort
  4. Motive is irrelevant
3. No issue of incompetence - children as well as mentally ill, developmentally disabled, and demented can commit intentional torts
  1. Example - Garratt v. Dailey - 5 year old pulled chair out from under older woman
4. Causation - Important in all torts. Considered in-depth under the heading of negligence (same concepts apply)
  1. Actual
  2. Proximate

## [A] ASSAULT

### General

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

### Elements

1. Act
  1. Example: faking to hit someone, don't actually have to hit
2. Intent
  1. can be intent to effect an assault
  2. or intent to effect a battery
3. Causation: There is 'factual' + 'legal' causation.
  1. Factual Causation: Did the plaintiff's loss come from Def.'s Act? -- "The BUT FOR TEST" = Would the harm have happened if Def.'s act had not happened?
    1. Legal Causation: One is liable for things that are foreseeable. PROXIMATE CAUSE functions as a legal limit on results of factual causation. Causation of an act alone does not make legal liability.
4. Apprehension (believing you will be hit or even touched)
  1. Fear distinguished from apprehension, not the same as fear
  2. Apparent ability sufficient-looks good enough to happen.
  3. Examples: finger in pocket looking like a gun; pretending to hit someone but stopping before
5. Words alone are not sufficient
  1. Must appear about to do something
  2. But words can negate the effect of conduct
  3. Example: saying, "This is just my finger in my pocket, but if it was a gun I'd shoot."
6. Immediacy - threat to assault later is not sufficient
  1. has to happen right away
  2. Example: saying, "I will beat you up later tonight" is not immediate, so not assault

## [B] BATTERY

### General

- Statement: An intentional infliction of a harmful or offensive touching of a person
- Examples: poking stranger's shoulder not battery, but grabbing someone inappropriately is

### Elements

1. Act
2. Intent
  1. Can be intent to effect a battery
  2. or intent to effect an assault
3. Causation
  1. Defendant need not actually contact the victim.
4. Touching

1. Can be direct or indirect (e.g., setting something in motion, laying a trap)
2. Touching of a person includes anything connected to the person (e.g., a person's car while they are in it)
5. Harmful or Offensive
  1. Judged by a reasonable-person standard

#### Issues

- "Eggshell plaintiff" rule
  - Liable even if the victim suffers unusual damages due to a pre-existing vulnerability or medical condition
  - Example: tapping shoulder breaks arm
  - Another example: if you tap someone on the head and that person has a soft head shell and you cause damage, you are responsible

#### [C] FALSE IMPRISONMENT

##### General

- Statement: The intentional confinement, experienced or harmful, of a person to a bounded area
- Example: Locking someone in a car trunk

##### Elements

1. Act (or omission to act)
  1. Keeping someone confined
  2. OR Failure to release
2. Intent
3. Causation
4. Confinement
  1. Sufficient methods of confinement
    1. Physical barriers
    2. Physical force
    3. Threats of force (Ex. "You move & I'll shoot you")
    4. Invalid assertion of legal authority (Ex. A fake cop arresting you)
  2. Insufficient methods of confinement
    1. Moral pressure
    2. Future threats (Ex. "If you leave, I'll come tonight and hurt you")
  3. Duration of confinement is irrelevant
5. Bounded area
  1. Movement must be limited in all directions
  2. Any reasonable and reasonably knowable means of escape negates this element (Ex. If your locked in a house, you need to check all the doors)
  3. 3. The bounded area cannot be the rest of the world
6. Awareness or harm
  1. Person must be aware of confinement OR be harmed by it.
    1. Ex. If someone is sleeping in their hotel and you weld the door shut, and while they are still sleeping someone fixes the door, and they wake up unharmed and unaware of what happened, it is not a tort

2. If plaintiff is unharmed, but is aware of the confinement, this element is satisfied
3. Likewise, if plaintiff is unaware of the confinement, but is harmed by it, the confinement, this element is satisfied

## **[D] OUTRAGE / IIED**

### **General**

- Also known as "intentional infliction of emotional distress" or "IIED"
- Statement: The intentional or reckless infliction, by extreme and outrageous conduct, of severe emotional distress

### **Elements**

1. Act
2. Intent or recklessness
  1. Note that recklessness counts as "intent" for outrage
3. Extreme and outrageous conduct
  1. The standard here is high
  2. Must be truly outrageous
    1. Ex. Telling someone their family died and they did not
4. Causation
5. Severe emotional distress
  1. Must be enough that plaintiff sought medical attention-for example obtaining a prescription.

### **Issues**

- The "eggshell plaintiff" doctrine does not apply to allow unusually sensitive plaintiffs to recover for act that would not cause severe emotional distress in persons generally
- However, if the defendant knows about the unusual sensitivity, a cause of action will lie

## **[E] TRESPASS TO LAND**

### **General**

- Statement: An intentional physical invasion of a person's real property
- counts if you invade someone's possessory interest(tenants may recover...but landlords may not have a possessory interest)

### **Elements**

1. Act
  1. Example: Includes failure to leave
2. Intent
  1. The only intent needed is the intent to do the act that results in the physical invasion
  2. Not knowing that the land belongs to another person does not negate the intent element. Not knowing doesn't excuse! ...Did you intend it?
    1. Example: Throwing a baseball too far
3. Causation

4. Physical invasion
  1. Person or object (example: walk on lawn or throw ball on lawn)
  2. Does not include intangibles, like vibrations or odors. Smoke doesn't count.(these are actionable under "nuisance")
5. Real property
  1. Surface
  2. Subsurface, down to center of earth
  3. Airspace to a reasonable distance-Here is your throwing a ball over is trespass example.

## [F] TRESPASS TO CHATTELS

### General

- Statement: An intentional interference with plaintiff's chattel by physical contact or dispossession
  - This is "stuff"(not real property) and stuff attached to land.
- Defendant need not act in bad faith or intend to interfere with rights of others
- Chattel
  - Includes objects not attached to land (e.g. pets)
  - Not people
  - Not real property
  - Not intangible property, like intellectual property
    - Unless reduced to a tangible form (example: bonds)

### Elements

1. Act
2. Intent
  1. The only intent needed is the intent to do the act that results in the physical invasion
3. Causation
4. Interference with right of possession
  1. Physical contact
  2. Dispossession(take it away from someone and act like you own it)
  3. Interference with use
5. Chattel

### Issues/Examples:

- Distinguish from conversion - difference is remedy
- Different examples of chattels v. conversion:
  - Borrowing/stealing burberry coat (trespass to chattels) v. altering coat (conversion)
  - Neutering cat v. Neutering champion stud cat
  - Borrowing car for 20 minutes (trespass to chattels) v. Taking car for 1 year (conversion)

## [G] CONVERSION

### General

- Statement: An intentional exercise of dominion or control over a chattel which so substantially interferes with the plaintiff's rights as to require defendant to be forced to purchase it
  - "You break it, you buy it"
- Defendant is liable for the entire market value of the chattel and not simply a small repair or rental cost (Trespass to chattels)
- Example: Defendant borrows coat from P and alters so no longer fits P. Another example would be taking a payload to a car. (must buy a new one).

### Elements

1. Act
2. Intent
3. Interference
4. Chattel
5. Substantiality
  1. so substantial, the act warrants a forced sale

### Issues

- Distinguishing conversion from trespass to chattels (see notes above)
- In the remedy for conversion, Defendant retains converted property after paying damages
- Factors mitigating in favor of conversion
  - Length of time withheld
  - Amount and severity of damage
  - If chattel is "totaled"
- Factors tending to negate conversion
  - Repairable damage
  - Temporary nature of deprivation

### Intentional Tort Defenses

1. Consent
  1. Scope: Must be within scope (within the boundaries of what you agreed)
    1. Ex- can't hit someone with a bat when they told you to punch them with your fist
  2. Types:
    1. Express: In writing or oral
    2. Implied in fact: assume one is ready
      1. Example: jumping into a boxing ring with gloves on and acting like a boxer
    3. Implied by law:
      1. Example: unconscious from car accident in ER and need surgery, it is performed -- /or/ If you are taken to a hospital and bleeding/unconscious there is implied by law consent.
2. Defense of self



1. A person is entitled to use reasonable force (same level as what other person did to you) to prevent any reasonably believed threat of imminent battery or false imprisonment
2. Retaliation is NOT a defense
3. Defense of others
  1. Similar to self defense
  2. BUT in a majority of jurisdictions, a mistake in perceiving a threat, even if reasonable, will void the defense
    1. Ex.-Keifer Sutherland defending someone that appeared to be harrassed on prank show...he was liable
4. Defense of property
  1. A person is entitled to use reasonable force to protect land and chattels
  2. Warning: there's more to this, so check local law before doing anything
5. Arrest
  1. Police
  2. Citizen
    1. privilege is much more limited than for police
6. Private necessity
  1. A person is privileged to invade the property rights of another to avoid injury to person or property, but must pay compensatory damages
  2. Note: Necessity is a defense to property torts only: trespass and conversion
    1. e.g.: if you use someone's car to save their life and bang the car up, you have to pay for the car's damages
7. Public necessity
  1. Doing something to protect the public at large, no compensatory damages are owed.
  2. Note: Necessity is a defense to property torts only: trespass and conversion
8. Recapture of Chattels
  1. Where another's possession began lawfully(ex:conditional sale), one may use peaceful means to recover chattel
  2. Force may be used to recapture a chattel only when in "hot pursuit" of one who has obtained possession wrongfully (ex:theft)
9. Discipline
  1. A parent or teacher may use reasonable force in disciplining children, taking into account the age and sex of the child and the seriousness of the behavior. (barbri book)

**Things that are NOT Defenses:**

1. Deserve-"he deserved to be slapped."
  2. Retaliation- going at a person with a butcher knife if all they did was push you
- What must defendant do to win?
1. Prove one of the elements in Plaintiff's cause of action not there
  2. OR prove affirmative defense

## STRICT LIABILITY

- 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
  - Wild animals on property, to licensees and invitees
  - Domestic animals with known, uncommon, dangerous propensities
  - 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

## Module 4: Examples of a Tort Lawsuit: Walter v Wal-Mart

*Walter v. Wal-Mart*

### Complaint

- Wal-Mart (D) pharmacist gave wrong prescription to Walter (P). Caused prolonged hospitalization and severe physical and emotional injuries.

### Answer/Wal-Mart's Defense

- D denied negligence on behalf of pharmacist
- At a later point changed to a defense of contributory negligence,
  - P failed to seek timely medical help and blood test

## Verdict

- Lower Ct granted \$550,000.00 in damages
- Appellate Opinion
  - affirmed
  - D had a duty to P which was breached
  - Caused P harm
  - P was not negligent or not negligent as to add to harm
  - damages (determination of jury)

# The Prima Facie Case for Negligence

## Generally

### Elements: Four elements to establish prima facie case

- Duty: legally recognized relationship between parties-Can only be sued by someone to whom you owe a duty.
- Breach of Duty: failure to meet the standard of care. Were you in fact careless?
- Causation
  - Cause-in-fact(Actual Causation): Plaintiff's harm caused by Defendant's breach of duty. Did your act actually cause the damages?
  - Proximate Cause: no reason to relieve Defendant of liability. Is there a close enough causation between your acts and the damages?
- Damages: Plaintiff suffered a cognizable injury. 3 types: 1)compensatory-ex: hospital bills; 2)punitive-punish defendants; 3)nominal-No compensatory damages but can get \$1, or \$5 for example. Not available in negligence cases-Need real damages.
- Plaintiff must establish each of the following elements by a preponderance of the evidence (50.00001%)
- One cause of action with several permutations, different than strict liability - proving a blame.
- Defined- Conduct falling below the standard of care established by law for the protection of others against the unreasonable risk of harm. You did not want to hurt person but you did create a reasonable risk.

### Two phases in a negligence issue

- Whether the defendant was negligent at all
  - Unreasonably risked harm to someone else
  - Decided under the rubric of negligence
- Whether the harm was a foreseeable result of the negligence
  - Decided under the rubric of proximate cause
  - Asks a particular question about the nature of the relation between the defendant's negligence and what actually happened to plaintiff

## *Subpart A: The Duty Element*

### Module 5: Foreseeability

- - **1. Duty**
    - a. **General duty**
      - i. A general duty of care is owed to all foreseeable plaintiffs
    - b. **Specific Situations**
      - i. **Rescuers**

- 1. A rescuer is a foreseeable plaintiff where the defendant negligently put the self or a third person in peril. "Danger invites rescue."
- c. **Unborn, unconceived children**
  - i. Differs by jurisdiction.
  - ii. **Wrongful birth**
    - Parents of child sue doctors for failing to diagnose birth defects.
    - Must prove abortion would have occurred if defect was known
    - Provides financially strapped parents means to pay for lifelong care of a child.
  - iii. **Wrongful life**
    - When child sues, "wish I had never been born" case.
    - Provides \$\$ for child's medical problems
    - Dobson v. Dobson** - Mother injures unborn from her negligence in car accident. Court held that Mother was not liable because it infringes on the rights of the mother and negligence would be pursued by unborn kids.

### Basics

1. If the harm was a foreseeable result – act is negligent
  2. Was the Defendant negligent at all – unreasonably risked harming someone or some thing
  3. Whether harm to a particular Defendant (class) was a foreseeable result of negligence
    1. All-risks-considered whether the Plaintiff was negligent
    2. Nature of the relation between Defendant's negligence and what actually happened to Plaintiff
- **Weirum v. RKO General, Inc.** - Radio show contest where listener had to follow mobile DJ. A minor listener attempted to follow and negligently forced another car off road and other driver killed. Surviving wife filed suit against radio station.
    - **If one's affirmative act creates an undue risk of harm, is he liable for any actions taken by third parties resulting from that risk of harm?**
      - Yes. Station created unreasonable risk of harm and intervening act of 3rd party was irrelevant because this was foreseeable.

### Harm-Within-The-Risk Test

- general risk foreseeable/imaginable by negligent act
  - Is the risk of the injury suffered by the plaintiff one of the risks that makes the defendant negligent in his action?
1. *Berry v. The Borough of Sugar Notch* - whether negligence of operating a trolley above the speed limit was a proximate cause of harm resulted when a tree fell on the speeding trolley as it passed by.
    1. Speeding did not increase risk (coincidence)
    2. Negligence issue was not a proximate cause of the damage

## General Categories of Unforeseeableness

### 1. Unforeseeable P

1. *Palsgraf v. Long Island Railway* - any person standing on the railway platform would be unforeseeable
  1. Reasoning - it was not reasonable to hold the railroad's alleged negligence was the cause of the passenger's injuries (under foreseeability test). The explosion was the proximate cause and the railroad could not have reasonably expected such a disaster.

### 2. Unforeseeable types of harm

1. proximate cause determination

### 3. Unforeseeable extent of harm

1. foreseeable P who suffers and unforeseeable extent of harm - not a valid defense that P had an unforeseeable weakness that caused injury
2. Thin-Skull Rule ("Eggshell P Doctrine")
  1. rejection of the rule would create practical problems
  2. imposes a desirable kind of strict liability - promotes optimal deterrence

### 4. Unforeseeable manner of harm

1. act is unforeseeable to P who is foreseeable and type of injury is foreseeable
2. *Marshall v. Nugent* - D's driving forced P's car off the road. P was unharmed from initial accident and struck by second car while attempting to warn oncoming traffic of initial accident.
  1. General rule: unforeseeable manner of harm does not bar recovery if P and type of harm is foreseeable.

## Module 6: Special Plaintiff Categories

Special Relationships: Mother and Child **Dobson v. Dobson** - Supreme Court of Canada July 9, 1999 - Cynthia Dobson (appellant) – mother of respondent – allegedly drove negligently causing harm to her unborn child after birth (mental defects including cerebral palsy) - Issue: Should a mother be liable in tort for damages to her child arising from a prenatal negligent act which allegedly injured the fetus in her womb? - No, Mother can't be sued for damage to her unborn fetus – Her freedoms would be invaded – Baby born alive could sue 3rd party for damages caused when it was in the womb

## Module 7: Failure to Act

There is no general affirmative duty to act (Nonfeasance)

- Exceptions:
  - Assumption of duty by acting (start helping someone)
    - Once you undertake an attempt to rescue, the rescue has to be done reasonably
    - Exception: good samaritan statutes exempting medical professionals from liability for ordinary, but not gross, negligence in voluntarily acting to help someone
  - Peril caused by negligence - Defendant has a duty to assist someone in peril because of the defendant's negligence
    - Duty to Aid Another Harmed by Actor's Conduct
    - If person knows or has reason to know that by his conduct he has caused bodily harm to another to make him helpless and in danger of further harm, the person is under a duty to exercise reasonable care to prevent further harm.

- *Example: South v. Amtrak* - Plaintiff's view was obstructed while driving & collided with train. Court held that duty is owed to Plaintiff where Defendant knows or has reason to know his conduct, whether innocent or tortuous, has caused harm to another - has affirmative duty to render assistance to prevent further harm.
  - Common carriers, innkeepers, shopkeepers
    - Those who solicit and gather the public for their own profit owe a duty to aid patrons
      - Ex.-If someone has a heart attack at Target, Target needs to help...But, you need to be in or on their property
      - *Example: Boyd v. Racine Currency Exchange* - Patron in bank was shot by robber after teller refused to give the robber money. Court held the duty did not include complying with the robbers demands.
  - Duty to Inform of Threats to Another
    - **Tarasoff** - parents of slain college student sued campus police, two doctors, and University for not warning daughter about a patient's desire to harm her.
    - one person owed no duty to control conduct of another nor to warn those endangered by such conduct. However, the exception is when  $\Delta$  stands in some special relationship to either the person whose conduct needs to be controlled or in a relationship to the foreseeable victim of that conduct. In this case,  $\Delta$  therapists relationship to  $\pi$  daughter or killer suffices to establish a duty of care.
      - Restatement 2d Torts: duty of care may arise from either
        - Special relation...btwn actor & 3rd person which imposes a duty upon the actor to control 3rd person's conduct
        - Special relation...btwn actor and the other which gives to the other a right of protection

## ***Subpart B: The Breach Element***

### **Module 8: The Reasonable-Person Standard of Care**

#### General standard

- Reasonable person
  - The care that would be exercised by a reasonable person under the circumstances
  - Example: Looking in the rear-view mirror before backing up

#### Objective standard

- Mental deficiencies not taken into account
- Inexperience not taken into account
- Physical disabilities and limitations are taken into account
- Defendant acting in good faith or trying their best is no defense.

#### Flexibility in the Reasonable Person Standard

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

## **Emergency**

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

## **Physical Conditions**

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

## **Characteristics of a Reasonable Person**

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

## **Specific Standards**

### **1. Professionals**

- General practitioner
  - The knowledge, skill, and custom of practice among practitioners in the local community
- Specialist
  - The knowledge, skill, and custom of practice among members of the specialty across the nation



## 2. Bailment - Caretakers of Property

- Bailor
  - Gratuitous bailment
    - Must inform of known, dangerous defects in chattel
  - Bailment for hire
    - Must inform of known and reasonably discoverable defects in the chattel
- Bailee
  - Sole benefit of bailor
    - Low standard
  - Mutual benefit of bailor and bailee
    - Ordinary care standard
  - Sole benefit of bailee
    - High standard of care

## 3. Children

- Children under the age of 5 are not negligent
- Children above 5 are expected to exercise the degree of care that would be reasonable of a child of similar age, intelligence, and experience.
  - There is usually little reason to sue a child as they often have few assets.

## 4. Infirm Adults

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

### Foreseeable Requirement

- Known or knowable possibility that there exists a risk that will result in harm.

- Defendant is not negligent unless he knew or should have reasonably known that his actions posed a risk of harm.

## 5. Owners/occupiers of land

- Trespassers
  - Undiscovered = No duty
  - Discovered/anticipated = Duty to warn or make safe concealed artificial conditions, known to the owner/occupier, involving risk of death or serious bodily injury
  - Infant trespassers
    - "Attractive nuisance" doctrine
      - Duty to avoid foreseeable risk to children caused by artificial conditions, if:
        - A dangerous artificial condition the owner/occupier does or should know about
        - The owner/occupier knows or should know that children frequent the area
        - The condition is dangerous to children
        - Cost/benefit analysis: the expense of remedying condition is slight compared to magnitude of risk
- Licensees
  - Persons who enter land with permission for their own benefit, rather than the benefit of the owner/occupier. (Licensees include friends and contractors coming on to the premises to make sales or repairs.)
  - Duty to warn of or make safe any known, concealed dangerous condition (whether natural or artificial)
  - No duty to inspect
- Invitees
  - Persons entering land with permission for the owner/occupier's business or as members of the public on land open to the public
  - Same duty as to licensees, plus a duty to inspect and render safe concealed dangers
  - Statutory standard (negligence per se)
    - When applicable, statute's specific standard replaces the general negligence standard
    - Test: class-of-persons/class-of-risk
      - The plaintiff is in the class of persons the statute was designed to protect
      - The harm suffered is among the risks that the statute was designed to protect against

## Module 9: Custom and the Negligence Calculus

### Learned Hand Calculus

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

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

### **Economic View of Negligence Calculus**

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

### **The Untaken Precaution**

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

### **Custom Application**

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

### **Custom Rationale**

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

### **Example**

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

## Module 10: Negligence per se

- Negligence Per Se / Statutory Standard of Care
- Requirements for Statutory Standard to Apply
  - Plaintiff must fall within the protected class.
  - Statute must protect against this kind of harm.
- **See Wawanesa Mutual Insurance Co. v. Matlock**
  - 17 yr old gives cigs to 15 yr old who starts fire on property upon which they trespassed. Is the risk of fire the intent of what the statute was trying to prevent? Court held no. Starting fires is not the type of harm “giving cigs to minors” statute intended to prevent.
- If statute applies there is negligence per se
  - but NOT necessarily liability since there might be no damages
- Violation of some statutes may be excused if:
  - Where compliance would cause more danger than violation.
  - Where compliance would be beyond defendant’s control.

## Module 11: Res Ipsa Loquitur

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

### Elements

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

### Burden of Proof

- The Plaintiff has the burden of proving that the defendant breached a duty
- The burden then switches to the defendant to prove that they acted reasonably
- *Byrne v. Boadle* - Guy walking down sidewalk gets hit with barrel of flour. Owner of flour warehouse is found negligent under res ipsa loquitur.

### Application

#### “Smoking out the Evidence” from the Defendant

- The doctrine of Res ipsa Loquitur creates an artificial inference of negligence, in order to give the defendant the incentive to explain what actually happened.
- Therefore Res ipsa Loquitur can be use to “smoke out” or “give incentive” for the defendant(s) to divulge information that the Plaintiff would not have known/couldn’t obtain otherwise.

### **The Ybarra Problem**

- Illustrates that in order for Res ipsa Loquitur’s “smoking out” device to activate, 2 basic elements must be met:
  - One or more defendant must actually have some knowledge about the cause of the plaintiff’s injury.
  - Any defendant having evidence would be willing to lie under oath in a deposition, but willing to tell the truth under oath at trial.
- The Multiple Defendant Problem: See Yabarra v. Spangard
  - The source of the negligence falls within the scope of the duty owed by the defendant to the plaintiff; this usually (but not necessarily)arises where the instrument causing the injury was within the exclusive control of the defendant, or where there is an inability to identity the specific source of harm. [Frequently it arises where the source of negligence lies within a group of people who are unwilling or unable to divulge the actual source.]

### ***Subpart C: The Actual-Causation Element***

#### **Module 12: But-For Analysis**

- Short Intro: After finding there has been a breach of duty, consider actual cause. Actual Cause is another way to say **Cause in Fact**.
- Tests to determine the Cause in Fact
  - But For Test
    - “But for” Defendant's conduct would the injury have occurred?
    - Example: Would the injury still occur, even without defendant's negligence?
      - Answer to the above question is Yes → No to Causation → No to Liability
      - Answer to the above question is No → Yes to Causation → Yes to Liability
  - Substantial Factor Test
    - If multiple factors bring about an injury, and any one of those factors alone would have been sufficient to cause the injury, then it is sufficient to show defendant's conduct was a “substantial factor.”
    - A cause can be a substantial factor without satisfying the “but for” test.

#### **Module 13: Multiple Possible Causal Relationship**

##### **Multiple Necessary Causes**

- When each of multiple careless acts is necessary for an injury, each is deemed an actual cause of that injury.

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

- Ask the "but-for" question
- In these cases, never say *the* actual cause; think *an* actual cause

### Multiple Sufficient Causes

- When each of multiple discrete careless acts committed by different multiple actions, by itself, cause the injury that resulted from the confluence of those acts, each act is deemed an actual cause, even though neither satisfied the but-for test.
- Caveat: if the act is only a trivial necessary condition, then proximate causation is not satisfied.

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

### Burden Shifting and Problems in Cause-In-Fact Summers v. Tice

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

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

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

### Market share liability

- Theory of causation used by consumers who allege that they were injured by a product but cannot identify who made it. This is so that Plaintiffs that do not know exactly how they were injured are still able to recover damages.
- Burden of proof is on the defendants to prove that they did not manufacture the product that caused the injury
- If defendant cannot prove that it wasn't the cause of the injury, that manufacturer is liable for its percentage share of the market at the time the injury took place. For example, if Defendant's product accounted for 10% of the market at the time of the incident, then damages are rewarded respective of the market they hold (10% of the damages).
- Plaintiffs must join enough defendants to represent a substantial share of the market of manufacturers of the product at the time of the injury

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

### Medical Uncertainty Cases

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

See **Herskovits** -  $\pi$  argued that misdiagnosis cut chances of survival by 14%.

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

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

### **Causation and Medical Malpractice Three Views**

1. Traditional and Majority View
  1. negligence of medical professional is a "but-for" cause of  $\pi$ 's injury
  2.  $\pi$  bears the burden of proving more likely than not that  $\Delta$ 's negligence caused harm
  3. using this approach in *Herskovits*,  $\pi$  would not recover
2. Relaxed "but-for"
  1. court asks jury whether or not causation is established under a more elastic concept of causation
  2. substantial factor: w/o "but-for" test whether malpractice caused death and doctor is liable
  3. recovery limited to certain types of damages per *Herskovits* (lost earnings, add'l med expenses, etc.)
3. Lost Opportunity
  1. court assesses value of reduction in  $\pi$ 's chances of recovery and compensates for the value of lost chance of recovery

Abraham mentions the greater trend is toward the lost opportunity approach

### ***Subpart D: The Proximate-causation element***

#### **Module 14: The Place of Proxi**

- *Plasgraf v Long Island Railroad*
  - Railroad not liable for injury to P when fireworks went off and caused scales to move.

- Under foreseeability test, it was not reasonable to hold railroad's alleged negligence was cause of P's injuries. The *explosion* was proximate cause, and railroad could not have reasonably expected such a disaster.

## Module 15: Various Tests for Proximate Causation

**Proximate Causation:** When the cause is close enough to hold one liable A cause that does not necessarily or immediately cause an event or injury Most issues of proximate cause can be resolved by the foreseeability test or by the harm-within-the-risk-test.

### Foreseeability Test

- the basic test of proximate causation
- The defendant's negligence is a proximate cause of the plaintiff's harm if causing that harm was a foreseeable result of acting as the defendant did
- Ex: defendant fails to stop at a red light and collides with the plaintiff's vehicle
  - was the defendant's negligence a "proximate" cause of the plaintiff's harm?
    - Yes - it was highly foreseeable that someone passing through the intersection would be harmed if the defendant did not stop at the red light

### Harm-Within-The-Risk-Test

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

## *Subpart E: The Damages Element*

### Module 16: Compensatory Damages

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

#### Sufficient kinds of compensatory damages

- Personal injury - physical pain and suffering can be included
- Property damage (tangible)
- Severe emotional distress (for NIED only)



- Not mere economic damages, harm to reputation, or other oblique injuries
  - But note that oblique injuries may create liability covered under the heading of oblique torts
- Pecuniary injury - damages include compensation for the victim's medical expenses, lost wages or diminished earning capacity, and other economic expenses because of the injury.
- Non-pecuniary injury - pain, suffering, and other variations of mental distress.

**"Collateral Source" Rule**-P may recover damages even for benefits that have been paid from her own sources of insurance.

**The successful plaintiff in a personal injury case is entitled to recover:**

- 1. the "special," or out-of-pocket, losses proximately resulting from the defendant's tortious action
- 2. "general" damages for pain and suffering

**Burden of Proof** "P must prove by a preponderance of the evidence that she has suffered, or will in the future suffer, the losses for which she claims damages."

**The Principle of a Single Recover: Compensation for Both Past and Future Loss**

1. Advantages

- The case does not go on forever
- The defendant gets repose similar to the running of a statute of limitations
- The legal system avoids multiple judicial proceedings

2. Disadvantages

- Less accuracy in estimating future damages compared to if there were periodic awards
- P must be a good investor

3. Discounting Awards to Present Value

- "This principle requires the jury to "discount to present value" awards made for future losses by awarding less than the absolute dollar amount of those losses"

**Module 17: Punitive Damages**

- Punishes defendant
- Compensatory damages are a prerequisite
- Conduct must be wonton, willful, reckless, or malicious
  - The conduct for which the plaintiff being sued can be beyond the conduct at issue

# Defenses to Negligence

## Module 18: Plaintiff's negligence

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

### 1. *Contributory Negligence*

1. Definition: Conduct on the part of the plaintiff which falls below the standard of conduct to which he should conform for his own protection; and which is a legally contributing cause cooperating with the negligence of the defendant in bringing about the plaintiff's harm.
2. Complete bar to recovery- if plaintiff contributes to negligence, no recovery
3. Most jurisdictions have rejected contributory negligence in favor of comparative negligence

### 2. *Comparative Negligence*

#### 1. **Pure comparative negligence**

1. Plaintiff's award is reduced by percentage of fault
2. Example: If P is responsible for 90% of the negligence that caused his injuries, he may still recover 10% of his damages.

#### 2. **Partial comparative negligence**

1. Plaintiff's award is contingent upon defendant meeting a certain threshold percentage of fault
2. Plaintiff's award is then reduced by percentage of fault
3. Two types of Partial Comparative Negligence depending on the jurisdiction:
  1. In order for Plaintiff to recover, Defendant's negligence has to be equal to or greater than 50% (tie would go to the Plaintiff)
  2. In order for Plaintiff to recover, Defendant's negligence has to be greater than 50% (tie would go to Defendant)

## Module 19: Assumption of Risk

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

1. Not valid for certain defendants, including common carriers (e.g. airlines)
2. Not valid for gross negligence or willful acts
3. Signing a release form is generally an acknowledgement of the risk rather than a contract.
2. Implied: Based on the circumstances, plaintiff impliedly assumed the risk
4. **Example: Murphy v. Steeplechase** - Plaintiff was injured on an amusement park ride. Court barred recovery for injuries because plaintiff assumed the risk. The court stated that the risk of being injured was part of the thrill.

## Module 20: Statutes of Limitations and Repose

**Statute of Limitations - Limits the time available to commence an action.**

1. Rationales
  1. Deterioration of evidence
  2. Avoiding the re-ignition of conflicts quieted by time
  3. Peace of mind for potential defendants
  4. Ability to throw out trash
  5. Promotes forward-looking investments
  6. Avoids cost to society through increased insurance costs
  7. Social value of stable transactions and relationships
2. Criticisms
  1. Irrational
  2. Bars otherwise just claims
  3. Inflexible
  4. Prevents some kinds of torts from being compensable at all
3. When Does the Statute Start Running?
  1. Accrual Rule
    1. Harm (vs. act) - starts when the harm occurs, not when the harmful act occurs
    2. When damage is done and you can sue
  2. Discovery Rule
  3. When relevant facts are discovered (or should be discovered by the reasonable person)
    1. I.E., foreign object left by a surgeon in someone's body
4. Tolling
5. Legal Doctrine that allows for the delay or pause of the running time in a "Statute of Limitations."
  1. Examples of Tolling
    1. Minority age
    2. Prison
    3. Military service
    4. Mentally incompetent
    5. Another suit pending on same subject matter
    6. Administrative proceedings prerequisite to suit
    7. Defendant's agreement

## Statute of Repose

1. Is a statute, similar to a "Statute of Limitations," that is designed to cut off certain legal rights if they are not acted on by a certain time.
2. Main Difference is that a "Statute of Limitations" is triggered by an **injury**, while a "Statute of Repose" is triggered by the **completion of an act**.
3. Unlike a "Statute of Limitations," a "Statute of Repose" is designed to bar actions after a specified period of time has run from the occurrence of some **event** other than the injury which gave rise to the claim.
4. Courts hold a Statute of Repose much more stricter than a "Statute of Limitations"
5. There is no "Accrual" or "Discovery" rule.
  1. i.e. a "Statute of Repose" is triggered when a blender is made, not when it injures the plaintiff.
6. Defendants helped:
  1. Architects
  2. Engineers
  3. Product Manufacturers
  4. Physicians

## Module 21: Immunities and Exemptions

### Exemptions

- The Firefighter's Rule
  1. Precludes firefighters (and other professionals) from suing for injuries sustained fighting negligent fires (or other incidents related to a profession) kind of a reverse immunity
  2. The generally accepted rule that firefighters are excluded from suing for injuries sustained while fighting "negligent" fires.
  3. Arsonists can be sued by firefighters
  4. in essence, a form of assumption of risk.
    1. Firefighters have assumed the risk and their compensation already reflects the ordinary risks of negligently created fires inherent in their job
    2. the rule also helps address the concern that victims would be deterred from seeking assistance if liability to the firefighter was imposed on their negligent behavior which created the fire.
- Possible Non-legal Exemptions
  1. Custom
  2. Social Norms
    1. Example: Employer suing employee. There's no legal barrier; however, it doesn't usually happen.
  3. Economic Realities

**Immunities - Classes of individuals/entities immune from tort liability.**

1. Charitable Immunity
  1. Historically, charitable organizations were immune from tort liability.
  2. Today, many state laws have abolished the charitable immunity. Most of the remaining states have only partially retained the immunity.
    1. This has evolved this way because of prevalence of liability insurances and the business-like operations of large charities.
  3. Policy Reasons
    1. A means to protect the important work done by charities.
    2. Funds given to the charity are meant to forward that work, not defend against litigation.
2. Spousal Immunity
  1. Historically, spouses could not sue each other; many said such suits would damage marital harmony.
  2. Today, the majority of states have eliminated spousal immunity and those that have retained it tend to impose limitations upon it.
3. Parent Child Immunity
  1. Historically, this immunity was created in the U.S. Precludes tort actions between parents and non-adult children.
  2. Today, Still kept in most states to prevent fraud and collusion; litigations that will deplete family resources; and destroy the harmony of the family. Some states have completely abolished parent-child immunity.
  3. Never held to bar property or purely economic torts, but does prevent intentional torts such as assault or battery and liability for personal injuries caused by negligence
4. Governmental Immunity
  1. Under the common law, immunities were complete and prevented any tort suits against the government.
  2. There is Immunity for discretionary (policy-making) functions but not ministerial (policy implementation) acts.
    1. Cannot sue the government for its "negligent" policy-making decisions
    2. Can sue the government for "negligent" ministerial acts
      1. Ex: Government decides to build a bridge, and the bridge is built negligently. A person injured by the negligently built bridge can sue.
  3. The federal government is also immune from claims based on strict liability.

# Liability Relating to Medical Care

## Module 22: Medical Malpractice/Professional Negligence

- A “regular” or "general" malpractice case against a physician involves professional negligence (prof. neg. also governs conduct of attorneys and accountants):
- Elements of negligence [Note difference in breach]:
  - Duty
  - Breach – standard of care is key difference
    - In Ordinary negligence failure to comply with custom is not automatically a breach of duty
    - In medical malpractice failure to comply with custom constitutes breach of duty
    - Standard of care
      - Custom (aka accepted practice) is dispositive
      - Sword and shield, it works for and against a physician
  - Actual causation
  - Proximate causation
  - Damages
    - Damages are necessary for negligence (but not medical battery)
    - Consent issue is irrelevant here if it causes harm
- Good results are not guaranteed.
- New physicians are judged by the same standard as experienced physicians.
- Can result from negligent diagnosis or treatment
- Must cause damages
- Many states have statutory reforms or limitations
- Statutory Changes:
  - Caps on pain-and-suffering damages
  - Threshold determination of merit by panel or administrative before lawsuit can go forward
  - ERISA (federal statute) effectively bars most lawsuits against insurance companies for wrongful denial of coverage
    - Damages are limited to cost of denied benefits
    - Only applies to employer-provided
- - **Traditional, common law rule:**
    - General practitioners standard: Minimally qualified general practitioners in the community (or a similar one) [LOCAL AREA COMPARISON]
    - Specialist standard: Minimally qualified specialists in the nation. [WHOLE NATION COMPARISON]
  - Problem with traditional rule: Difficult to find experts to testify against neighbor to establish community standards.
  - Trend is to hold general practitioners to a national standard.
    - Allows meritorious lawsuits that would not survive the local area comparison
    - With new methods of transportation/information access doctors have the ability to become well informed

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

## Module 23: Informed Consent

### Informed Consent Actions

- Counts as a negligence action
- Policy premise: Patients should get enough information ahead of time to make an intelligent, reasoned decision about care.
- Typical facts for suit: A complication of treatment arises about which the patient was not apprised ahead of time.
- May also be applied to:
  - Lack of disclosure about treatment alternatives
  - Lack of disclosure of risks of forgoing treatment
- As a negligence action, the elements of negligence action are required.
- The elements of negligence:
  - Duty
    - Two types:
      - Patient centered
      - Physician centered
  - Breach
  - Actual causation
    - A key issue in many cases; need to show "but for" the lack of disclosure, you would not have had the procedure
  - Proximate causation
  - Damages
    - Required to have a cause of action

### Key Points:

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

### Example: Heart Bypass Surgery

- A patient with severe blockage in coronary arteries undergoes a triple bypass operation. The Surgeon never discloses that there is a rare risk of chest wound infection. The patient suffers a chest wound infection, resulting in considerable injury. Even if the patient had been told about the risk, the patient would have undergone the surgery.
- Result: no action for informed consent.

- Why? Actual causation is lacking. The patient would have had the surgery anyway [not "but for" causation].

#### Standard of Care:

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

#### Module 24: Medical Battery

- Medical battery
  - Intentional tort
  - Elements of battery
    - Act
    - Intent
    - Causation (actual and proximate)
    - Touching
    - Harmful or offensive
- - - 
    - Example: Cutting on someone's ear without permission is battery, even if it helps them. Lack of damages does not invalidate an intentional tort action. However, there is no negligence because there are no damages.
    - Example: No battery if hospital and physicians can prove an affirmative defense of consent. For a patient incapable of giving or withholding consent, consent is implied by law. However, there is negligence because



the hospital and physicians had a duty to perform the surgery competently. Consent is irrelevant.

- Damages are not necessary to make out a case for battery. Thus, the patient who is not injured, and is in fact better off because of the touching, still has a case.
- Note: A “harmful” touching for purposes of battery is not necessarily one that causes harm
- Consent for emergency treatment is implied by law for public policy reasons.

#### **Three ways to sue health care providers:**

- Medical battery
- Professional negligence
- Informed consent

#### **Informed Consent Actions**

##### **Standard of Care**

- Two Approaches:
  - 1. Physician rule:
    - Question: Is it the custom among physicians to disclose the risk?
    - Custom sets the standard as in regular professional negligence actions.
    - Criticized as paternalistic—who should decide what you know and think about?
  - 2. Patient rule:
    - Question: Is the undisclosed risk or alternative course of treatment material information?
      - A risk is material if it would affect a patient’s decision about treatment.
        - Two approaches for materiality:
          - Objective
          - Subjective
        - Growth of recognition of doctrine in late 1960s and 1970s
        - No liability for failure to disclose where justified:
          - Emergency
          - Patient requests non-disclosure
        - Therapeutic privilege:
          - Justifies non-disclosure where disclosure would have a detrimental effect on the patient’s physical or psychological well being.
          - The therapeutic privilege is only recognized in some jurisdictions.
          - Substantially undermines significance of the patient rule.

#### **Module 25: Tort Reform and Medical Torts**

#### **Module 26: Liability to Health Insurers**