Torts Outline[1]

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Contents

1 Overview

1. Tort law rests on three frameworks:
   (a) Fairness.
   (b) Loss distribution.
   (c) Law and economics.

2 Intentional Torts

2.1 Intent

1. Intent requires **desire** or **substantial certainty**.
2. Reckless behavior can sometimes suffice for intent (see below).
3. "...the law of torts is not criminal law and does not condemn, but only shifts the burdens of economic loss."[1]
4. Can a child meet the requirements for intent? ***Garratt v. Dailey***: A five year old moved a chair from the place where the plaintiff was about to sit. The plaintiff fell and fractured her hip. The plaintiff's battery claim requires proof that the defendant had intent to cause contact that was not consensual or otherwise privileged. The Second Restatement indicates that intent exists if the actor is **substantially certain** that the harmful contact **will** (not might) occur. Court finds that it's unclear whether the defendant had substantial certainty. Remanded to trial court for clarification.
   (a) When should infancy make a difference in intent?
5. Can an insane person meet the requirements for intent? ***Williams v. Kearbey***: Minor shot up a school and claimed insanity. Court held that defendant intended to commit the action (even if his motivation was irrational) and is therefore liable.
6. Insanity is never a defense to intentional torts. It can sometimes be used as a defense in criminal law.[2]
7. Other notes on torts and intent:
   (a) Torts are generally excepted from workers' comp immunity.
   (b) In most jurisdictions, you can't insure against intentional torts.
   (c) The constitution's Supremacy Clause leads to three kinds of preemption of federal laws over state laws:

[1] *Understanding Torts*, p. 6.
[2] See Dressler, *Criminal Law*, p. 613.

i. *Express preemption*: Explicit or implicit overriding of a state statute.

ii. *Conflict preemption*: In case of direct conflict, federal law preempts state law.

iii. *Field preemption*: Congress legislates for an entire field of regulation, leaving no room for states to regulate.

(d) The Second Restatement on Torts blends purpose and knowledge (i.e., substantial certainty) into one rule. The Third Restatement proposes separating them into two distinct rules, since limiting liability to "purpose" can have consequences in areas like workplace litigation.

(e) Inadvertent results of actions are not intentional. (But, mistakes usually constitute intent—see below.)

(f) The substantial certainty test significantly expands the use of intentional torts in workplace and environmental litigation.

(g) A few jurisdictions have rejected the substantial certainty rule.[3]

8. Can the different approaches towards insanity and infancy and torts and criminal law be justified?

2.2 Battery

1. Battery requires **intent to cause harmful or offensive contact** and that harmful or offensive contact directly or indirectly results.

   (a) "Unpermitted" touching can be enough—see *White v. University of Idaho*, where a piano teacher touched a student's back and caused significant injury.

   (b) Any touching in anger can also be enough.

2. Is battery actionable for very small harms? ***Leichtman v. WLW Jacor Communications, Inc.***: A cigar smoker blew smoke in the face of an anti-smoking advocate. The court finds that "No matter how trivial the incident, a battery is actionable..." But it rejects the "smoker's battery" (which imposes liability if there is substantial certainty that second-hand smoke will touch a nonsmoker).

3. Does compliance with safety standards affect liability for intentional torts? Can radiation constitute contact? ***Bohrmann v. Maine Yankee Atomic Power Co.***: University of Southern Maine students took a tour of a nuclear power plant. Plaintiffs allege the company knew a flushing procedure would release radioactive gases during the tour, and that tour guides knowingly took students through plumes of unfiltered radioactive gases.

[3] Casebook p. 6.

Plaintiffs also allege the company falsely told them they had not been exposed to "bad" radiation. The court holds that compliance with federal safety standards does not affect the defendant's liability for intentional acts.

4. The proposed Third Restatement would limit intent liability based on substantial certainty to small, localized groups of people. So, for instance, tobacco companies would not be liable for second-hand smoke damages.

2.3 Assault

1. The threat or use of force on another that causes that person to have a **reasonable apprehension of imminent harmful or offensive contact**.

2. The Second Restatement does not require apprehension to be "reasonable," but most courts do.

3. Assault in torts is different than assault in criminal law. The criminal law definition requires an attempt to inflict harmful or offensive contact, but it does not require perception.[4]

4. Can damages be awarded if physical harm did not occur? ***I de S et Ux v. W de S***: Defendant tries to buy wine from the plaintiff. He beats on the door with a hatchet. When the plaintiff's wife asks him to stop, he tries to hit her with the hatchet (but did not hit her). The court ruled that the plaintiff was entitled to damages even though no physical harm was done.

5. Can forward looking verbal threats suggest imminent harm? ***Castro v. Local 1199, National Health & Human Services Employees Union***: Plaintiff has asthma, which prevented her from working in extremely hot or cold situations. After a disability leave, she attended a meeting where she didn't receive her usual assignment. She asked what was going on, and Frankel (another employee) replied, "If I was you, I would take whatever they give me, because you could lose more than your job." When asked he was threatening her life, Frankel said, "Take it any way you want." The court held that **verbal threats, without "circumstances inducing a reasonable apprehension of bodily harm," do not constitute an assault**. Here, the threat was "forward-looking" and did not suggest imminent harm. The court granted the defendant's motion for summary judgment.

6. More questions on assault:

   (a) Is it possible to rationalize the difference between the criminal and tort definitions of assault?

[4] Casebook p. 21.

(b) Why prevent assault?

(c) Why must assault be imminent?

(d) Can words alone ever be enough to constitute assault? See *Campbell v. Kansas State University*, where a university head said "he felt like hitting his assisstant on the buttocks, after he had already slapped her on the buttocks," which the court held to be assault.[5]

2.4 Transferred Intent

1. Historically, transferred intent means that intent to commit any of the five traditional torts (battery, assault, false imprisonment, trespass to land, trespass to chattel—because these are torts where you would file a writ of trespass in old English contexts) can constitute the necessary intent to commit any of the other five.

2. Transferred intent is a legal fiction.

3. The Second Restatement only incorporates transferred intent for assault and battery.

4. Generally, **intent towards anyone for anything is intent towards anyone else for anything else**.

5. Does the intended target matter? ***Alteiri v. Colasso***: The defendant threw a rock that hit the plaintiff in the eye, but he intended to scare somebody else. He did not intend to hit anyone, and he did not throw the rock recklessly. The court ruled that there was no error in the jury's verdict for willful battery.

6. Is it appropriate to transfer intent from a property tort to a personal tort?

2.5 False Imprisonment

1. Intentional, unlawful, and unconsented restraint.

2. Can the implied threat of physical restraint be enough to constitute false imprisonment? ***Dupler v. Seubert***: Dupler was fired from her job. Her superiors (including Deubert) kept her against her will in a 1.5-hour meeting. Dupler argued that Deubert and the other defendant screamed and shouted. The trial jury found false imprisonment and awarded damages of $7,500. The trial judge offered a remittitur of $500, and Deubert appealed. The Supreme Court of Wisconsin affirmed the order, holding that false imprisonment occurred when Dupler was held against her will after her hours of employment had ended at 5 PM (in contrast to Weiler v. Herzfeld-Phillipson, where the imprisonment occurred during work hours).

[5] Casebook p. 20.

3. According to the Second Restatement, confinement may be caused by:
   (a) Physical barriers.
   (b) Force or threat of immediate force.
   (c) Omissions where there is a duty to act.
   (d) False arrest.
4. Victim must be confined in a bounded area (e.g., if movement is allowed in any direction, even if it's not the desired direction, false imprisonment did not occur).
5. The victim must usually be conscious of confinement, but not always (e.g., infant abduction).
6. False imprisonment usually does not recognize highly coercive but non-physical threats (e.g., economic retaliation).
7. Lawful restraint does not constitute false imprisonment
8. *Additur* and *remittitur*: after jury delivers damages, judge adjusts them up or down.
   (a) Should appellate courts be allowed to issue remittances? Levy says no, because appellate courts get a thin version of the case (only transcripts, etc.) and more is needed to make an accurate determination about damages.
   (b) There are generally no limits on the damages a jury can award (with a few exceptions).
9. *Shopkeeper's privilege*: Shopkeepers can detain suspected shoplifters.
10. "[A] form of false imprisonment whereby the improper assertion of legal authority can unlawfully restrain a victim."[6]

2.6 Malicious Prosecution

1. Second Restatement requires initiation of proceedings without probable cause and for a purpose other than bringing the offender to justice. It also requires that the proceedings have terminated in favor of the accused—so, a defendant who is sued and loses can't claim malicious prosecution (i.e., the defendant must have been exonerated to have a cause of action for malicious prosecution).[7] The defendant can't bring a malicious prosecution claim until the initial suit is resolved, and if charges are dropped, there are no grounds for malicious prosecution.
2. Anti-SLAPP statutes also help prevent against frivolous litigation.

[6] Casebook p. 38 n. 1.
[7] Understanding Torts p. 48.

3. Some jurisdictions recognize malicious prosecution only in criminal contexts, with the parallel civil tort "wrongful institution of civil proceedings."[8]

4. The "American Rule" dictates that the loser in a suit doesn't have to pay the winner's legal fees (in contrast to the "British Rule").

5. Can a legal process be used for a purpose other than that for which it was intended? ***Maniaci v. Marquette University***: Saralee Maniaci became dissatisfied with Marquette University and, with her father's permission, decided to leave. School administrators tried to persuade her not to leave. When they were unsuccessful, they requested that the Milwaukee police bring papers for temporary emergency detention in a mental hospital for people considered "irresponsible and dangerous." The school physician, the Dean of Women, and a registered nurse signed the application for temporary custody.

   She was held for a night until her father demanded her release. Maniaci and her father filed suit on multiple charges, all of which were dismissed except false imprisonment. The jury assessed compensatory and punitive damages, which the court reduced on motions after the verdict.

   The defendants appeal, arguing that the only legitimate cause of action was **malicious prosecution**, and moreover that the evidence was insufficient to prove malicious prosecution and that the damages were excessive. Court agrees that there is no cause of action for false imprisonment because the restraint was "lawful."

   The court does not find that malicious prosecution applies. It finds no malice because the defendants "had a genuine concern for the plaintiff's welfare."

   The court believes there is support—"skeletally at least"—for a cause of action on the basis of abuse of process. The defendants did not have serious concerns about Maniaci's mental health. Rather, their purpose was to restrain her until her parents had been notified of her decision to leave school, and had either given their permission or directed Saralee to stay in school.

   Judgment is reversed and remanded, and the plaintiffs are required to amend their claim to allege cause of action for abuse of process.

6. You can file multiple (and in California, even contradictory) causes of action.

2.7 Abuse of Process

1. Misuse of legal process for an ulterior purpose.

[8] Casebook p. 39 n. 2.

2. Does not require termination of the legal process in favor of the one bringing the complaint (or even termination at all).

3. Can a legal process be used for a purpose other than that for which it was intended? ***Maniaci v. Marquette University***: Saralee Maniaci became dissatisfied with Marquette University and, with her father's permission, decided to leave. School administrators tried to persuade her not to leave. When they were unsuccessful, they requested that the Milwaukee police bring papers for temporary emergency detention in a mental hospital for people considered "irresponsible and dangerous." The school physician, the Dean of Women, and a registered nurse signed the application for temporary custody.

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   Judgment is reversed and remanded, and the plaintiffs are required to amend their claim to allege cause of action for abuse of process.

2.8 Intentional Infliction of Emotional Distress

1. "Intentional infliction of emotional distress occurs when the defendant, through extreme and outrageous conduct, intentionally or recklessly causes the victim severe emotional distress."[9]

2. Can overlap with other torts—e.g., wrongful termination, sexual/racial harassment.

3. Not a historic tort, but a product of the 20th century. The torts (above) all have rigid factors. Courts invented intentional infliction to get around these restrictions.

[9] Casebook p. 44 n. 1.

4. No need to prove physical injury. Most states require a showing of outrageous behavior beyond all reasonable bounds of decency.

5. The relationship between the plaintiff and defendant can impact the court's characterization of the conduct as extreme or outrageous.

6. Should employers be liable for wrongful termination as well as intentional infliction of emotional distress?

7. What constitutes gross recklessness or intent to cause severe distress? ***Slocum v. Food Fair Stores of Florida, Inc.***: A shopper in a store asked the price of an item. An employee replied, "if you want to know the price, you'll have to find out the best way you can...you stink to me." She had a heart attack and sued for intentional infliction of emotional distress. The court denied the claim, reasoning that the language did not constitute "gross recklessness," nor was it intended to cause "severe emotional distress."

   (a) Would racial identities have affected the court's holding?

   (b) Levy thinks *Slocum* is wrong—the jury's verdict should have been taken into account.

8. ***Rulon-Miller v. International Business Machines Corporation***: The plaintiff, a longtime IBM employee carried on a relationship with an employee at a rival office products firm, QYX. Her managers at first indicated they did not think the relationship constituted a conflict of interest—"I don't have any problem with that." But then her manager told her to end the relationship or lose her job, giving her "a couple of days to a week" to think about it. The next day, he said "he had made up her mind for her" and dismissed her. The court held that the manager "intended to emphasize that she was powerless to to do anything to assert her rights," affirming the judgment for intentional infliction of emotional distress.

9. Does sexual harassment constitute intentional infliction of emotional distress? ***Jones v. Clinton***: Paula Jones claimed Bill Clinton's "actual exposure of an intimate private body part" constituted extreme and outrageous conduct. The court found no evidence that the incident caused any significant lasting emotional distress and rejected the claim in a summary judgment.

10. Spectrum of intent:

    (a) Desire.

    (b) Substantial certainty.

    (c) Negligence.

    (d) Gross negligence.

    (e) Recklessness.

11. The plaintiff's sensitivity usually isn't enough—e.g., *Nickerson v. Hodges*, where a woman believed her dead relatives had buried a pot of gold in her backyard. The defendants buried a pot of dirt, which she opened at the bank, expecting gold. The court found that the joke caused her extreme distress.

2.9 Defenses to Intentional Torts

2.9.1 Self Defense

1. Force intended to inflict death or serious injury must be necessary and is only reasonable in response to the **immediate threat of serious bodily injury or death**.

2. The Restatement of Torts also requires retreat if safely possible (except from the victim's own dwelling) before the victim can respond with force intended to inflict serious bodily injury or death. Most courts disagree.[10]

3. If the threat is not immediate, self-defense is not valid. There is dispute about spousal abuse cases, however—should the smaller spouse be required to wait until the physical threat is immediate before asserting the right to self-defense?

4. There is a limited right to self defense against excessive police force.

5. Reasonable mistakes in perceiving threats can be valid bases for self defense.

6. Should good samaritans be encouraged to intervene? The Second Restatement allows bystanders to assert self defense if they reasonably believe that the third party has a privilege of self defense and that intervention is necessary to protect him. The traditional rule, however, only allows intervention when the third party is privileged. The Second Restatement would allow reasonable mistakes.

7. ***Drabek v. Sabley***: Ten-year-old Drabek and friends were throwing snowballs at passing cars. One driver, Sabley, stopped, caught Drabek, took him by the arm to his car, and drove him back to the village of Williams Bay. He turned Drabek over to the police. Drabek was with Sabley for a total of 15-20 minutes. The court held that Sabley was justified in preventing the commission of a crime, and so it was reasonable to admonish Drabek and march him home. But it was not reasonable to detain him and take him to the police station, so Sabley is liable for false imprisonment and nominal battery. Remanded to determine compensatory (but not punitive) damages.

[10] Casebook p. 64.

2.9.2 Defense of Property

1. Reasonable force can be used to protect property. Force intended to cause death or serious injury (i.e., wounding force) to protect property is **never reasonable**.

2. The Second Restatement holds that reasonable force can be used when intrusion on property is not privileged, when the actor believes the intrusion can only be prevented by force, and when the owner first makes a request to desist (or believes a request will be useless).

3. The person using force must give notice if feasible.

4. *Katko v. Briney*: spring guns protecting property are not reasonable unless the owner would have been privileged to use the same force if present.

2.9.3 Private Necessity

"Private necessity is a privilege which allows the defendant to interfere with the property interests of an innocent party in an effort to avoid a greater injury. The privilege is incomplete since the actor must still compensate the victim for the property."[11]

1. ***Vincent v. Lake Erie Transp. Co***: Defendant was moored at the plaintiff's dock to unload goods when a severe storm struck. Defendant kept his boat secured (and repeatedly replaced damaged or broken lines) to the dock throughout the storm, causing $500 in damages to the dock. The court held that an actor is justified in using another's property in extreme circumstances, but will be held responsible for any damages incurred.

2. The dissent analyzed this as a contracts problem, not a torts problem.

2.9.4 Public Necessity

Public necessity allows appropriation of property in order to prevent a greater public harm. Compensation to the property owner is not required. In *Surocco v. Geary*, the city San Francisco ordered the destruction of a building to create a gap to prevent the spread of a citywide fire. The owner unsuccessfully claimed he should have been allowed to remove his wine cellar before the building was destroyed. Not all courts, however, hold that public necessity can insulate municipalities from damages in all cases.

2.10 Intentional Interference with Contractual and Economic Relations

1. Economic torts: we want competition, but not too much.

[11] Casebook pp. 69–70.

2. Contractual interference torts are rooted in anti-labor motivations.
3. According to the Second Restatement, the elements of these two torts are:
   (a) A valid contract or economic expectancy.
   (b) Defendant's knowledge of the contract or economic expectancy.
   (c) Defendant's intent to interfere.
   (d) Interference.
   (e) Damage to the plaintiff.[12]
4. Many courts recognize various justifications:
   (a) Fair competition or proper protection of one's own financial interest (as long as the contract is freely terminable at will).
   (b) Protecting the welfare of another for whom one is responsible.
   (c) Providing truthful or honest information if requested.
   (d) Assertion of a bona fide property right (e.g., preventing a thief from selling your car).
   (e) Interfering with an agreement that is illegal or against public policy.
5. Not all courts treat these as distinct torts, though California does.
6. For non-legal reasons (e.g., public relations), these torts are rarely brought (do you really want to sue several people for leaving your firm?).
7. ***Calbom v. Knudtzon***: Mr. Henderson died and left Mrs. Henderson to execute his estate. Harry Calbom, a lawyer, had been hired to help sort out the legal issues. Mrs. Henderson's accountant, Mr. Knudtzon, told Mrs. Henderson that Calbom was unsatisfactory and provided a list of other attorneys. Mrs. Henderson found another attorney, and Calbom sued for intentional interference with his employment contract. The court held that an attorney-client relationship existed, which Calbom had every right to expect would continue. It found that the "defendants' interference was malicious, intentional, and without justification," affirming the judgment for Calbom.
   (a) Levy: this case is wrong. Knudtzon gave multiple suggestions for other attorneys, and there is no evidence of favoritism or kickbacks.
8. ***Lowell v. Mother's Cake & Cookie Co.*** : TODO (85–90)
9. ***Texaco, Inc. v. Penzoil, Co.***: TODO (90-97)
10. ***Environmental Planning and Information Council of Western El Dorado County, Inc., Superior Court***: TODO (98–104)

[12] Casebook p. 82 n. 1.

2.11 Wrongful Termination of Employee

1. An employer can be liable for wrongful termination if the termination contradicts significant public policy.

2. Can an employee be fired for protecting the interests of his employer? ***Foley v. Interactive Data Corp.***: A well-regarded employee, Foley, became concerned when he learned that the person hired to be a new Vice President was under FBI investigation for embezzlement from Bank of America, his previous employer. Foley was fired within a few days. The court found that there was no wrongful termination because Foley's disclosure benefited only the private interests of his employer, not the public.

2.12 Tortious Breach of the Covenant of Good Faith and Fair Dealing

1. Every contract imposes a duty of good faith and fair dealing. Some courts hold that a breach of this covenant constitutes a tort, allowing tort damages (e.g., punitive damages and compensation for mental distress) as well as contract remedies.

2. What duties do insurance companies have to policyholders? ***Egan v. Mutual of Omaha Insurance Co.***: The plaintiff purchased a disability insurance policy from the defendant. When the plaintiff became disabled, the insurance company wrongly and maliciously withheld payments, calling the plaintiff a "fraud." The court found that the insurer "cannot reasonably and in good faith deny payments to its insured without thoroughly investigating the foundation for its denial." The court found for the plaintiff (but deemed the punitive damages of $5 million to be excessive).

3. Two types of insurance: first party (which bets on whether an event will happen—disability, life, etc.) and third party (which addresses incidents involving third parties–liability, homeowners, auto, etc.).

4. Many courts have limited this tort to insurance contexts. However, as many as 16 of the 36 states that recognize the tort have applied it to non-insurance contexts.[13]

2.13 Intentional Misrepresentation

1. Second Restatement definition: "One who fraudulently makes a [material] misrepresentation of fact, opinion, intention or law for the purpose of inducing another to act or to refrain from action in reliance upon it, is subject to liability to the other in deceit for pecuniary loss caused to him by his justifiable reliance upon the misrepresentation."[14]

[13] Casebook p. 115.
[14] Casebook p. 121.

2. Misrepresentation must be intentional or reckless. It usually has to be a statement of fact, not opinion, except in the case of a fiduciary.

3. ***Nader v. Allegheny Airlines, Inc.***: Allegheny Airlines bumped Nader from a flight, causing him to miss a speaking engagement. The airline intentionally overbooked the flight, but told all passengers that they had "confirmed reservations." Allegheny argued that "confirmed" was reasonable language because the probability of being bumped was very low. The court held, however, that the airline's nondisclosure was misleading. It awarded $10 in compensatory damages to Nader and $15,000 in punitive damages. The court of appeal reversed the decision, arguing that Nader's reliance was not justifiable because he had been bumped many times before and knew about the airline's policy.

4. To succesfully recover, a plaintiff must have authentically relied on the misrepresentation.

5. Courts have traditionally not included broken promises within this tort (though they may constitute breach of contract). However, some courts and the Second Restatement have begun to distinguish between promises that are lies (which are tortious) and sincere promises.[15]

6. Failure to disclose can constitute concealment.

3 Negligence

3.1 Overview

1. "The failure to exercise the standard of care that a **reasonably prudent person** would have exercised in a similar situation."[16]

2. Negligence requires proof that the defendant acted unreasonably.

3. The standard of care is objective.

4. Negligence has six factors:

   (a) Duty.

   (b) Breach of duty.

      i. Negligence.

      ii. Breach of the standard of care.

      iii. Failure to act as a reasonably careful person would under the circumstances.

   (c) Cause-in-fact.

[15] Casebook p. 124.
[16] Black's Law.

(d) Proximate cause.

(e) Damages.

5. The Hand Formula is Judge Learned Hand's test for determining negligence. It works best in scenarios where the actor takes a calculated risk (e.g., business decisions). It is less useful in cases where the actor was simply not paying attention.

   (a) B = Burden of precautions necessary to prevent an accident.

   (b) P = Probability that an accident will occur.

   (c) L = Magnitude of the loss if the accident occurs.

   (d) Negligence exists if B<PL—i.e., if the burden of precautions is less than the harm multiplied by the probability of occurrence.

3.1.1 *Pitre v. Employers Liability Assurance Corporation*

1. The plaintiffs' son died when a patron at a carnival game was winding up a pitch and hit him in the head. The trial court found in favor of the plaintiffs. The determining factor, the Court of Appeal reasoned, is how a "reasonably prudent individual" would have acted or what precautions he would have taken under similar circumstances. **Negligence occurs only if the danger is both foreseeable and unreasonable.** The court held that the danger was foreseeable but not unreasonable, and therefore there was no negligence.

3.1.2 *United States Fidelity & Guaranty Company v. Plovidba*

1. Inside a dark room, the hatch to a cargo hold on a ship was left open. A longshoreman fell through it and died. The trial court found for the defendant. Here, Richard Posner writing for the Seventh Circit applies the Hand Formula, reasoning that B was relatively small (it would have been easy to close the hatch or leave a light turned on) and L was high (the victim died). P, however, was very small. There was no reason for the longshoreman to enter the hold. In fact, he was probably there to steal liquor, and the evidence suggests he knew the hatch was open and tried to skirt around it. The shipowner was therefore not liable for negligence.

3.2 Standard of Conduct

3.2.1 *Cordas v. Peerless Transp. Co.*

1. A man was mugged at gunpoint by two other men in New York City. He chased after them. One of the muggers jumped into a taxi, held the driver at gunpoint, and told him to drive. While the cab was in motion, the driver jumped out, and a few seconds later, so did the hijacker. The cab crashed into a sidewalk and injured the defendants. The trial court held

that the driver was not negligent because he acted as a reasonable person would act under similar circumstances.

2. Courts are divided on the question of whether juries should receive special instructions regarding negligence claims in emergency circumstances. On the one hand, it is redundant to reiterate that a defendant must be held to the standard of what a reasonable person would do in a similar emergency situation. Others claim it helps clarify the standard.

3. **Conditional privilege**: choose the lesser of two harms.

3.2.2 *Breunig v. American Family Insurance Company*

1. A schizophrenic woman had a psychotic episode while driving her car. The question was whether she had foreknowledge of her susceptibility to such attacks. The general rule is that insanity or another mental deficiency does not limit liability for negligence. In other words, **insane people are held to the reasonable person standard**. The court here notes that may be too harsh to exclude the insanity defense when a driver is suddenly overcome without warning. The Supreme Court agrees with the lower courts that the defendant did have the necessary foreknowledge, and held for the plaintiff.

2. Two frameworks for assessing liability from the sudden onset of mental illness:

   (a) Fairness: it's not fair to punish someone who could not have avoided having a seizure.

   (b) Loss distribution: if someone has to bear the cost of repairing the harm, it should be the perpetrator, not the victim.

3.2.3 *Neumann v. Shlansky*

1. Should courts hold underage defendants to the standard of reasonable adults?

2. An eleven-year-old hit a golf ball that struck the defendant in the knee, causing serious injury. Generally, children are held to the standard of a **reasonable person of like age, intelligence, and experience under the circumstances.** In this case, however, the child was engaging in an "adult activity," and therefore the court held him to the adult reasonable person standard.

3. Some states are moving from "adult activity" to "inherently dangerous activity."

3.2.4 *Melville v. Southward*

1. The defendant, a podiatrist, operated on the plaintiff's foot. The plaintiff sued for malpractice, and introduced the testimony of an orthopedist, who questioned the necessity and sanitation of the operation. The question is whether the orthopedist, a practitioner from a different school of medicine, should have been allowed to testify about the standard of care in podiatry. The trial court allowed the orthopedist to testify. The Supreme Court of Colorado here agreed with the appellate court that the testimony should not have been allowed because it was "nothing more than an expression of opinion that that the general practice of podiatry did not meet the standard of care observed by an orthopedic surgeon." It remanded the case for a new trial.

2. In malpractice cases, the "competent professional" standard replaces the "reasonable person" standard.

3. There is disagreement about whether doctors in rural areas should be held to different standards than urban doctors.

4. Medical specialists in the same geographic region are often reluctant to testify against each other—a "conspiracy of silence."

5. In a limited range of cases, a jury of laypeople can determine whether a practice met an acceptable standard of care.

3.2.5 *Cobbs v. Grant*

1. Doctors are required to obtain **informed consent** from patients. The plaintiff here sued a doctor who operated on a stomach ulcer but did not discuss the surgery's inherent risks. Complications developed, another operation was required, more complications developed, and so on. The plaintiff argued that (1) the doctor acted negligently in the performance of the surgery (which the jury found in favor of the plaintiff) and (2) that the doctor failed to obtain informed consent. The Supreme Court of California here notes that courts are divided as to whether this type of tort should be deemed a **battery or negligence**. The court aligned itself with a "majority trend" that advocates reserving battery for cases where a doctor performs an operation without the patient's consent. Generally, physicians are required to tell patients about major risks (but not every minor risk) and obtain the patient's consent. In this case, the court finds that there is not enough evidence to show that the doctor acted negligently, and the case is remanded for a new trial.

2. **Failure to obtain informed consent can subject a physician to negligence liability.** Unless the physician misrepresents the entire procedure, most courts will not characterize the behavior as intentional battery.

3.3 Rules of Law

1. Juries typically determine what constitutes reasonable conduct under the circumstances. Judges, however, ill sometimes establish a rule for what constitutes negligent conduct under particular circumstances.

2. For instance, in *Baltimore & Ohio R.R.*, Justice Holmes established a rule requiring drivers to get out of their cars and examine railroad crossings.

3.3.1 *Akins v. Glens Falls City School District*

1. A foul ball injured a spectator at a baseball game. She sued the ballpark's owners, the local school district, for negligence. The trial court helf in favor of the plaintiff. The appellate court reversed, finding that the school district had not acted negligently, and establishing a specific rule for ballpark backstops. The dissent argued that such a rule "robs the jury" of the ability to consider important circumstances and locks the law in "a position that is certain to become outdated."

3.4 Negligence Per Se

1. In some states, a jury **must presume** negligence when a statute is breached. The defendant is free to rebut. California basically follows this rule, with a few exceptions.[17]

2. In states that do not follow negligence per se, juries are free to (but need not) **infer** that breach of statute constitutes negligence—e.g., a car doesn't slow down and hits a pedestrian in a crosswalk.

3. Plaintiff can, and usually will, plead both common law negligence and negligence per se.

4. Compliance with a statute is generally not proof of due care.

3.4.1 *Wawanesa Mutual Insurance Co. v. Matlock*

1. A minor bought cigarettes for another minor, who later dropped the cigarette and caused a fire that led to significant property damage. The insurer sued the first minor's father, and the trial court found for the insurer. The appellate court overturned the ruling. It argued that the statute in question was meant to protect against the health hazards of tobacco, not the fire hazard, and therefore cannot be used to establish a standard of conduct in this case.

[17] Cal. Evid. C. 669. See course reader p. 11.

3.4.2 *Stachniewicz v. Mar-Cam Corporation*

1. A patron injured in bar brawl sued the bar owner. The plaintiff relied on (1) an Oregon statute which prohibits giving alcohol to an intoxicated person and (2) an Oregon regulation that prevents bar owners from allowing disorderly conduct on their premised. The trial court found for the defendant. The appellate court overturned, reasoning that (1) the statute is inapplicable because the brawler was already drunk when he arrived, so there is no way to tell if another drink caused the brawl, but (2) the regulation was intended specifically to protect customers from injury, and therefore can be an appropriate standard for negligence in this case.

3.4.3 *Gorris v. Scott*

1. Several sheep on a ship were swept overboard. The plaintiff sued the shipowner, arguing that the Contagious Diseases (Animals) Act required the shipowner to enclose the sheep in pens of certain dimensions, which the shipowner failed to do. The court found in favor of the shipowner, reasoning that the Act was intended to prevent the spread of contagious diseases, not to prevent sheep from falling overboard.

2. **Statutory purpose doctrine**: for the statute to be relevant, the harm must be one of the harms the statute was meant to prevent.

3.5 Cause in Fact

1. Plaintiff must prove that the harm would not have occurred **but for** the defendant's actions.

2. If there are multiple causes of harm, each can be but-for causes as long as the harm would not have occurred without it.

3. If there are multiple causes of harm, but none alone is a but-for cause, courts can use the substantial factor test. See *Northington* below.

4. **Proximate cause** removes liability when "the connection between the plaintiff's harm and defendant's liability is unforeseeable or so attenuated that public policy preclused liability."[18]

3.5.1 *East Texas Theatres, Inc. v. Rutledge*

1. At the defendant's movie theater, somebody threw a bottle from a balcony which struck and injured the plaintiff. The jury found the theater liable because it negligently failed to remove "rowdy persons" from the balcony during the game, and the Texas appellate court affirmed. The Texas Supreme Court clarified that proximate cause has two elements: (1) cause-in-fact and (2) foreseeability. The court held that the prosecution failed

[18] Casebook p. 206.

to show that the injuries would have occurred but for the removal of the "rowdy persons." It reversed the lower court's ruling and held for the defendants.

3.5.2 *Anderson v. Minneapolis, St. P. & S. S. M. Ry. Co.*

1. A spark from a railroad started a fire in a bog on one side of the defendant's property. Another unrelated fire was burning on the other side. The fire from the railroad destroyed the defendant's property, and a few days later it joined with the other fire to make one big fire. The railroad argues that it cannot be held liable because the defendant's house would have been destroyed by the other fire anyway. The trial court refused to instruct the jury to follow a rule from an earlier case, *Cook*, which held that there is no liability when two fires jointly destroy property. On this basis, the trial court found for the plaintiff. The railroad requested a motion for judgment notwithstanding the verdict, which was denied. On appeal, the Supreme Court of Minnesota held that the trial court was correct in refusing to apply the *Cook* rule and found for the plaintiffs.

2. **Substantial factor test**: If two independent fires join to cause property damage, there is joint liability, even if neither alone is a but-for cause. Redundant causation is not necessary.

3. Courts split on whether to use the substantial factor test when only one actor is liable. California courts do use it (and reject the but-for test).

3.5.3 *Northington v. Marin*

1. The plaintiff, a prison inmate, sued the defendant, a prison guard, for circulating rumors that labeled him a snitch and caused other inmates to assault him. Other guards had spread the same rumors. The trial court found that although the defendant's action was not a but-for cause (since the harm would have occurred without his action), his contribution to the harm was nonetheless a **substantial factor**. The Tenth Circuit affirmed: "Multiple tortfeasors who concurrently cause an indivisible injury are jointly and severally liable; each can be held liable for the entire injury."

3.5.4 *Herskovitz v. Group Health Cooperative of Puget Sound*

1. The plaintiff brought the action on behalf of her husband, a deceased lung cancer patient, against a doctor that negligently failed to diagnose the patient's lung cancer on his first visit, proximately causing his chance of survival to drop from 39 percent to 25 percent. Neither fact was in dispute. The defendant argued that the plaintiff must prove that the patient "probably" would have lived but for the negligence—that is, without the doctor's negligence, the patient's chance of survival must have been more

than 50 percent. The trial court granted summary judgment for the defendant on this argument. The Supreme Court of Washington reversed, arguing that any other decision would mean a "blanket release" for doctors' negligence any time the patient's chance of survival was less than 50 percent. The court reasoned that if a defendant's acts have *increased the risk* of harm to the plaintiff, a jury should decide whether the increased risk actually caused the harm in question.

3.5.5 *Summers v. Tice*

1. The *Summers* rule applies where there are a small number of defendants, only one of them committed the harm, and we don't know which one.

2. The plaintiff and the two defendants were hunting quail. The two defendants shot at a quail in the direction of the plaintiff. The plaintiff suffered injuries, but it's not clear which defendant's shot was the cause. The court reasons that in this case, the burden of proof shifts to the defendants to determine which one of them caused the injury. If they cannot, "each defendant is liable for the whole damage whether they are deemed to be acting in concert or independently." The lower courts found the defendants liable and the Supreme Court of California affirmed.

3. Can you hold three defendants liable under the *Summers* test?

4. Another case with joint tortfeasors, see *Drabek v. Sabley* above (kids throwing snowballs at cars).

3.5.6 *Sindell v. Abbott Laboratories*

1. The plaintiff was harmed by DES, a prenatal drug intended to protect against miscarriages but which turned out to pose significant danger to unborn children. The plaintiff did not know which company manufactured the specific drug her mother took, but since several companies manufactured the drug according to the same formula, she sued them all. The companies won a dismissal at trial on the grounds that the plaintiff could not identify which company caused the harm.

2. The Supreme Court of California considered four theories of liability:

   (a) The *Summers* test: this fails because there are so many defendants (over 200) that it is highly unlikely that any one of them caused this specific injury.

   (b) The "concert of action" theory: if the defendants had acted in concert to cause the injury, they would be equally liable. In this case, there is not sufficient evidence to show that the defendants had a common plan to cause harm (e.g., by conducting inadequate safety tests or giving insufficient safety warnings).

(c) "Industry-wide" or "enterprise" liability: if an entire industry cooperates on an element of the harm in question—e.g., by delegating safety testing to a trade association—they can be held jointly liable. Here, the fact that DES manufacturers shared testing and promotion methods does not establish industry-wide liability, because (1) there are so many manufacturers and (2) safety standards are mostly regulated by the FDA.

(d) **Market share liability**—a variation of the *Summers* test: each manufacturer's liability and share of the damages are proportionate to its market share.

3. Relying on the fourth theory, the Supreme Court of California reversed, allowing the plaintiff to proceed with her cause of action.

4. Most states have not adopted market share liability.

5. Defendants are allowed prove definitively that they did not contribute to the harm (e.g., if they can show that they did not produce the drug at the time).

6. Some states require defendants to be joined so that a significant share of the market is represented, and that missing market share proportionally reduces the plaintiff's compensation. Usually (but not always) this must be the nationwide market.[19]

3.5.7 *Ayers v. Township of Jackson*

1. A town in New Jersey was found to have caused toxic exposure by its "palpably unreasonable" management of a landfill. Plaintiffs did not develop any illnesses, but they sought to recover (1) damages for the enhanced risk of future illness due to exposure and (2) regular medical testing for diseases from exposure. The Supreme Court of New Jersey found that he task of litigating hypothetical injuries would unreasonably strain the tort system (although it suggests that the state legislature could pass a remedy that allowed damages if toxic exposure caused a "statistically significant incidence of disease"). On the second claim, it held for the plaintiffs.

3.6 Duty and Proximate Cause

3.6.1 *Atlantic Coast Line R. Co. v. Daniels*

1. Cause in effect are infinite. An act is the proximate cause if it's close enough. Courts and juries have to rely on reason and common sense to judge whether a cause is proximate.

2. Some sources, like the Restatement on Torts, prefer "legal cause."

3. Proximate cause is a tool for protecting defendants.

[19] Casebook p. 229 n. 2.

3.6.2 *Palsgraf v. The Long Island Railroad Company*

1. A railroad employee caused a passenger's package to fall. The package turned out to be full of fireworks. It exploded, causing a scale to break and injure the plaintiff.

2. The trial court found negligence. The Court of Appeals here reversed.

3. Cardozo: negligence requires the defendant to have a duty to the plaintiff. There must be a point in the chain of causation where an actor is no longer liable—otherwise, anybody who jostles someone in a crowd could be liable. To be negligent, the actor must have breached a reasonable standard of care. In this case, however, the railroad employee could not have known that the package was full of fireworks.

4. Andrews, dissenting: The actor owes a duty of care to the public at large. Ultimately, proximate cause is about expediency, not logic, and judges must rely on common sense. In this case, the defendant's actions were a but-for cause of the plaintiff's injuries. It's not possible to say that plaintiff's injuries "were not the proximate result of the negligence."

3.6.3 Directness vs. Foreseeability: *Overseas Tankship (U.K.) Ltd. v. Morts Dock & Engineering Co. (The Wagon Mound) Privy Council*

1. The plaintiffs' ship, the *Corrimel*, was moored for repairs. The appellants' ship, the *Wagon Mound*, was moored nearby. The crew of the *Wagon Mound* accidentally spilled a large amount of oil into the bay. They left soon after without cleaning up the oil.

2. The plaintiff checked with the manager of the wharf where the *Wagon Mound* was moored to see if the oil on the water was flammable. They agreed it was not. Soon after, a small drop of molten metal from the plaintiffs' worked ignited the oil, severely damaging the *Corrimal* and the wharf.

3. *In re Polemis* dealt with another scenario involving fire and negligence. Although the fire was not a foreseeable consequence of the negligence, it was clear that the defendant's action was the direct cause, and the court held for the plaintiffs.

4. The court here replaced the direct test from *Polemis* with a foreseeability test.

5. The defendants could not have foreseen a massive fire to be the result of their negligence. Ruling for the defendants.

6. *Kinsman*: foreseeability is a weaker requirement when the consequences are direct and the damage is of the same sort that was risked.[20]

[20] Casebook p. 258.

3.6.4 Intervening Events: *Thomas v. United States Soccer Fedn.*

1. The plaintiff suffered injuries when a soccer game turned violent. He sued the soccer federation for failing to provide a properly trained referee and failing to maintain a safe playing environment. The defendants moved for a summary judgment on the grounds that the alleged negligence was not the proximate cause. The court reasoned that when an intervening act occurs, liability will turn on whether the defendant should have foreseen the act as a consequence of the negligence. It reversed the lower courts and granted the motion for dismissal.

2. "Superseding intervening forces are those new forces which are extraordinarily unexpected."[21]

3. Intervening criminal acts are generally found to be unforeseeable and therefore superseding.

4. "Dependent" intervening forces are results of the defendant's action (e.g., an ambulance driver's collision while rushing to the scene of the defendant's accident). "Independent" intervening forces do not have a causal connection to the defendant (e.g., a lightning bolt).

5. "...ultimately the determinative issue is whether or not the intervening force is extraordinarily unexpected."[22]

3.6.5 *Bigbee v. Pacific Telephone and Telegraph Co.*

1. Plaintiff was inside a telephone booth. He saw a car approaching, and he claims he tried to get out but couldn't. He alleges the telephone booth company was negligent in (1) its manufacture of the booth, which prevented his escape, and (2) its placement in proximity to a busy street, where damage from an oncoming car was foreseeable. The lower courts upheld a motion to dismiss. Here, the Supreme Court of California held that a jury could find that the danger was reasonably foreseeable. Reversed and remanded.

2. Unlikely intervening events are often not found to be superseding events. For instance, if an owner leaves the keys in her car in a high crime area, she may be liable for the harm the car thief causes. (But generally, car owners are not responsible for the actions of car thieves.)

3.6.6 The Egg-Shell Plaintiff Rule: *Steinhauser v. Hertz Corporation*

1. The plaintiff was involved in a car accident. She suffered no injuries, but the accident triggered serious schizophrenia. The court held that as

[21] Casebook p. 261.
[22] Casebook p. 263.

long as there is a causal relationship between the small accident and the catastrophic result, the defendant can be held liable for the "precipitating cause." The probability that the condition would have developed is not a defense, but it can be considered in fixing damages.

2. The large injury from the small cause need not be foreseeable.

3.7 Proof of Negligence: Res Ipsa Loquitur

1. Res Ipsa Loquitur: "the thing speaks for itself."
2. It usually has three requirements (with variations among jurisdictions):
   (a) The accident would not have occurred without negligence.
   (b) The negligent act was within the actor's control.
   (c) The plaintiff was not at fault.
3. It's an expansion of the common sense cookie jar rule: if a parent returns to see a child next to a broken cookie jar, it's reasonable to infer that the child broke the cookie jar.
4. Some courts have relaxed the requirement that the defendant must have had exclusive control of the accident.[23]
5. Some courts follow the *Ybarra* rule, which expands the res ipsa loquitur doctrine to medical cases with multiple defendants, where multiple defendants did not have exclusive control of the accident and not all of them were necessarily negligent. It's an extension of the situation where a teacher punishes the entire class for breaking the goldfish bowl.

3.7.1 *Krebs v. Corrigan*

1. The defendant inexplicably flew through the air and landed on the plaintiff's plexiglass sculpture, destroying it. The trial court granted the defendant's motion for a directed verdict.
2. "...human bodies do not generally go crashing into breakable personal propert," said the appellate court.
3. Defendant argued (1) that res ipsa loquitur does not apply when the instrumentatality is a human body and (2) the doctrine does not apply because there was an eyewitness. The court rejected both of these arguments.
4. The doctrine exists, the court reasoned, to deal with cases where only the defendant knows the details of the negligent act.
5. The appellate court held that the evidence was sufffficient to raise an inference of negligence, so it reversed the directed verdict for the defendants.

[23] Casebook p. 275 n. 4.

3.7.2 *Ybarra v. Spangard*

1. The plaintiff underwent surgery for appendicitis. During the procedure, he suffered a shoulder injury that caused paralysis and muscle atrophy. The trial court entered a judgment of nonsuit for all defendants.

2. The plaintiff argued that the doctrine of res ipsa loquitur should apply to the defendants, all of whom were involved at different stages of his medical care.

3. The defendants argue that the plaintiff cannot show that any single defendant caused the injury.

4. As in *Krebs*, the court noted that the purpose of the res ipsa loquitur doctrine is to address cases where the circumstances of the negligence were unknown to the plaintiff (in this case, because he was unconscious).

5. Classic examples where res ipsa loquitur would apply: passenger sitting awake in a train car at the time of a collision; person walking down the street and hit by a falling object.

6. These sorts of cases "raise the inference of negligence, and call upon the defendant to explain the unusual result."[24]

7. It could be found in this case that some of the defendants are liable and others are absolved. But that should not preclude the application of res ipsa loquitur. It would not be reasonable to ask the plaintiff to identify which of the individual defendants were responsible for the harm.

8. The defedants' argument would undermind the rights of patients to recover for injuries suffered while unconscious.

9. Judgment of nonsuit was reversed.

3.8 Limitations on Duty

3.8.1 Failure to Act: *L. S. Ayres & Co. v. Hicks*

1. todo

3.8.2 *Miller v. Arnal Corp.*

1. todo

3.8.3 *Wells v. Hickman*

1. todo

[24] Casebook p. 279.

3.8.4 *Tarasoff v. The Regents of the University of California*

1. todo

3.8.5 *Davidson v. City of Westminster*

1. todo

3.8.6 Mental Distress: *Thing v. La Chusa*

1. todo

3.8.7 *Potter v. Firestone Tire and Rubber Co.*

1. todo

3.8.8 C.C.P. 377

1. todo

3.8.9 Wrongful Death and Survival Actions: *Gary v. Schwartz*

1. todo

3.8.10 *Selders v. Armentrout*

1. todo

3.8.11 *Compania Dominicana de Aviacion v. Knapp*

1. todo

3.8.12 Loss of Consortium and Society: *Borer v. American Airlines, Inc.*

1. todo

3.8.13 Wrongful Life and Wrongful Birth: *Turpin v. Sortini*

1. todo

3.8.14 *Rowland v. Christian*

1. todo

3.8.15 *Ann M. v. Pacific Plaza Shopping Center*

1. todo

3.8.16 *Wiener v. Southeast Childcare*

1. todo

3.8.17 Negligent Misrepresentation: *Bily v. Arthur Young & Co.*

1. todo

3.8.18 Economic Loss: *J'Aire Corp. v. Gregory*

1. todo

3.8.19 *Li v. Yellow Cab Co.*

1. todo

3.8.20 Assumption of Risk: *Murphy v. Steeplechase Amusement Co.*

1. todo

3.8.21 *Rush v. Commercial Realty Co.*

1. todo

3.8.22 *Emmette L. Barran, III v. Kappa Alpha Order, Inc.*

1. todo

3.8.23 *Knight v. Jewett*

1. todo

3.8.24 *Priebe v. Nelson*

1. todo

3.8.25 *Shin v. Ahn*

1. todo

3.8.26 *Metcalfe v. County of San Joaquin*

1.

3.9 Joint and Several Liability

3.9.1 *American Motorcycle Association v. Superior Court*

1. todo

3.9.2 Fair Responsibility Act of 1986

1. todo

4 Final Exam

1. Closed book.
2. Not necessary to memorize case names.
3. Three ways to organize a response:
   (a) Chronologically.
   (b) By party.
   (c) By tort causes of action.
4. No purposeful red herrings—so **use all facts**.
5. Disputed facts should go to a jury.
6. Always discuss each part of a rule, in case you're wrong about an element.
7. Need to know California and federal rules, but no others.
8. In negligence, discuss *both* negligence per se and common law negligence.

5 Bibliography

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