

B L A C K   L E T T E R   O U T L I N E S

# Torts

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# Capsule Summary of Tort Law

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## ■ PART ONE: INTRODUCTION

### I. GENERAL CONSIDERATIONS

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“Torts” is a general classification encompassing several different civil causes of action providing a private remedy (usually money damages) for an injury to P caused by the tortious conduct of D. Each tort cause of action is separately named and defined, each with its own rules of liability, defenses, and damages. There is no useful general definition of “tort” or “tortious conduct.”

Tort law is primarily judge-made law, and no American jurisdiction has yet adopted a tort “code.” However, tort law is being increasingly modified by statute.

In tort litigation, judges and juries have distinct functions. Juries decide questions of fact, such as (1) what happened, (2) certain legal consequences of those facts (e.g., was D negligent, was P an invitee), and (3) P’s damages. Judges decide issues of law, such as (1) whether D had a duty to P and the nature and extent of that duty, (2) the elements of the cause of action or defense, and (3) whether

certain legal rules apply (e.g., can a particular statute be used to set the standard of care). The judge also can decide fact issues if she determines that the evidence overwhelmingly favors one conclusion. The judge also applies rules of civil procedure and evidence.

## ■ PART TWO: INTENTIONAL TORTS

### II. LIABILITY RULES FOR INTENTIONAL TORTS

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#### A. Intent

##### 1. Rule

In tort law, conduct is intentional if the actor (a) desires to cause the consequences of his act, or (b) believes that the consequences are certain to result from it.

##### 2. Proof of Intent

D will be presumed to have intended the natural and probable consequences of his conduct.

##### 3. Intent Distinguished From Motive

Intent is the desire to cause certain immediate consequences; motive is the actor's reason for having that desire. Motive is usually irrelevant on the issue of liability.

##### 4. Intentional Conduct Distinguished From Negligent or Reckless Conduct

If harm is intended, the tort is intentional. If not, and D's conduct merely creates a foreseeable risk of harm, then D's conduct is either negligent or reckless depending upon the magnitude and probability of the risk and D's consciousness of it.

## 5. Children

Young children may be found capable of intentional torts even though too young to be capable of negligence.

## 6. Mentally Incompetent Persons

In most jurisdictions, a mentally incompetent or insane person is liable for his intentional torts, even when incapable of forming a purpose or understanding the consequences of his conduct.

## 7. Transferred Intent

D's intent to commit any one of the original trespass-based torts (assault, battery, false imprisonment, trespass to land or chattels) automatically supplies the intent for any of the other four. It also transfers from X (D's intended victim) to P (D's actual but unintended victim).

## 8. Scope of Liability (Proximate Cause)

Broader scope of liability rules apply to intentional torts.

## B. Battery

### 1. Rule

Battery is a harmful or offensive contact (direct or indirect) with P's person, caused by D, with the required intent. D must have acted intending to cause a harmful or offensive contact with P (or another), or an apprehension of such a contact.

### 2. P's Person

P's "person" includes his body and those things in contact with it or closely associated with it.

### 3. P's Awareness

P need not have been aware of the contact at the time.

#### **4. No Harm Intended**

D need only have intended the contact. It does not matter that D intended no harm or offense.

#### **5. Harmful or Offensive Contact**

A harmful contact is one which produces bodily harm. An offensive contact is one which offends a reasonable sense of personal dignity, as by being hostile, insulting, loathsome, or unduly personal.

#### **6. Consent**

If P consents to the contact, D is privileged to make it and there is no tort.

### **C. Assault**

#### **1. Rule**

Assault is an act by D, done with the required intent, which arouses in P a reasonable apprehension of an imminent battery. D must have acted intending to cause a harmful or offensive contact with P (or another), or to cause an imminent apprehension of such a contact.

#### **2. Apprehension**

P must have been aware of D's threatening act at the time, before it is terminated. Apprehension is all that is required; P need not be afraid. If D's assault is directed against P, D is subject to liability even though P's apprehension is unreasonable.

An assault may occur even when D's act is directed against a third person, or when it is apparent to P that D intended only an assault, provided P reasonably perceives the threat of a battery to P.

#### **3. Imminent**

The contact must be perceived as imminent. There must be an apparent intent and apparent present ability to carry out the threat immediately.

Mere words, unaccompanied by a physical act, are not an assault. But words may give meaning to movement. A conditional threat may be an assault, unless D is privileged to enforce the condition.

## **D. False Imprisonment**

### **1. Rule**

False imprisonment occurs when D, intending to confine P (or another) within boundaries fixed by D, so confines P, and P is conscious of the confinement or is harmed by it.

### **2. Intent**

The requisite intent is merely the intent to confine. A mistake of identity is no excuse, nor is a good faith belief that the confinement is justified.

### **3. Confinement**

Confinement occurs when P is prevented from leaving a given area, even when that area is relatively large. The confinement must be complete, and P must have no reasonable or safe exit or escape known to him. The confinement may be by means of actual or apparent physical barriers, physical force, or credible threats of physical force, or duress sufficient to vitiate P's consent, as where D threatens to harm another or P's valuable property, or restrains such property. However, merely moral or social pressure is not sufficient. Refusal to release from a once-valid confinement is also sufficient.

Confinement by color of legal authority is sometimes called false arrest. If D has or purports to have legal authority to take P into custody, exercises it, P believes that D has or may have such authority, and P submits against his will, there is confinement. P must be aware of the confinement, unless P suffers physical harm from it.

### **4. Shoplifters**

Shopkeepers may have a privilege to detain persons suspected of shoplifting for a reasonable time for the purpose of conducting an investigation.

## **5. Accessories**

To be liable for false imprisonment, D must have been an active and knowing participant in procuring or instigating the confinement, including its wrongful aspect.

## **E. Intentional or Reckless Infliction of Emotional Distress**

### **1. Rule**

When D, by extreme and outrageous conduct, intentionally or recklessly causes severe emotional distress to P, D is subject to liability to P for that emotional distress and for any resulting bodily harm.

### **2. D's Conduct**

D's conduct must be extreme, outrageous, intolerable, and not merely insulting, profane, abusive, annoying, or even threatening. Unless D knows of some special sensitivity of P, mere verbal abuse, namecalling, rudeness, insolence, and threats to do what D has a legal right to do are generally not actionable, absent circumstances of aggravation.

### **3. P's Response**

Only severe emotional distress is actionable. Mere unhappiness, humiliation, or mild despondency for a short time is not sufficient. However, most jurisdictions no longer require that the mental suffering have a physical manifestation or result in bodily harm.

### **4. Abuse of Power**

A common fact situation resulting in liability involves an abuse by D of some relation or status which gives him actual or apparent power to damage P's interests, where D's threats go beyond the ordinary demands or means of persuasion and become flagrant abuses of power in the nature of extortion.

### **5. Conduct Directed At Third Persons**

D's distress-producing conduct directed at a third person (T) is actionable by P if D intentionally or recklessly causes severe emotional distress

to P by such conduct, provided *either*: (1) P witnesses D's conduct, T knows of P's presence, and T is a member of P's immediate family; *or* (3) P's severe emotional distress results in bodily harm. In compelling cases, the presence requirement may be relaxed.

## 6. Proximate Cause

The "eggshell plaintiff" rule does not apply to this tort. D is liable only to the extent that P's emotional response is within the bounds of normal human reactions to D's conduct, unless D knew that P was extraordinarily sensitive.

## 7. Transferred Intent

The doctrine of transferred intent does not apply insofar as D's intent was to commit some other intentional tort.

## 8. Public Official and Public Figure Plaintiffs

"Public officials" and "public figures" may not recover for emotional distress resulting from a media publication unless the publication contains a false statement of fact that was made with "actual malice" (under the *NY Times* standard).

## 9. Mishandling of a Corpse

Next of kin may have a claim for intentional or reckless mishandling of a corpse.

## F. Trespass to Land

### 1. Rule

D trespasses on P's land when he intentionally (a) himself enters the land or causes a thing or third person to do so, (b) remains on the land after his privilege to be there has expired, or (c) fails to remove from the land a thing which he is under a duty to remove. P may sue in trespass only if P is in possession of the land or is entitled to immediate possession.

## 2. Intent

The intent required is merely to enter upon the land, cause the entry, or remain. D's good faith (but erroneous) belief that he has a right to be there, or his reasonable mistake concerning title, right to possession, consent, or privilege, is no defense.

## 3. Manner

The trespass may be directly or indirectly caused.

**Vertical Boundaries.** The boundaries of land extend above and below the surface, and therefore the trespass may be by an intrusion at, above or beneath the surface.

**Exception: Aircraft.** Aircraft flights over private property present a special problem. Several theories are used to balance the possessor's rights against the needs of aviation.

**Causing Trespass by Things.** It is no less a trespass if D does not personally enter the land but merely causes some thing to do so.

## 4. Damages

If the trespass is intentional, the tort is complete without proof of any actual harm. Of course, P may recover for all harm resulting to his property, and persons and things upon it, and a broad range of consequential damage.

## 5. Reckless or Negligent Intrusions

An intrusion upon P's land may result from D's negligent conduct or abnormally dangerous activity. In such cases liability is determined in the usual fashion by the rules of those other torts. Actual harm must be shown.

## G. Chattels

### 1. Trespass to Chattels

**Rule.** D commits a trespass to P's chattel when he intentionally interferes with it, either by physical contact or by dispossession. P must be in possession or entitled to future possession of the chattel.

**Intent.** No wrongful motive is necessary. The intent required is merely to act upon the chattel. Thus, D's good faith, reasonable (but mistaken) belief that he owns the chattel or for some other reason is privileged to deal with it is no defense.

**Interference by Physical Contact.** One form of trespass is interference by physical contact, which may be direct or indirect, and consists of any impairment of the chattel's condition, quality or value.

**Dispossession.** A dispossession consists of taking a chattel from P's possession without his consent, or by fraud or duress, or into custody of the law; barring P's access to the chattel; or destroying it while it is in P's possession. Dispossession even for a short time is still a trespass.

**Damages.** If the trespass consists of physical contact, P must prove actual damages. But any dispossession is a trespass for which at least nominal damages may be awarded.

## 2. Conversion

**Rule.** Conversion is an intentional exercise of dominion or control over a chattel which so seriously interferes with P's right to control it that D may justly be required to pay P its full value. It is a trespass to the chattel which is so serious, aggravated, or of such magnitude as to justify forcing D to purchase it.

**Test.** There is no simple test for determining when the interference is so aggravated as to constitute a conversion. The important factors are: (1) the extent and duration of D's exercise of dominion or control; (2) D's intent to assert a right which is in fact inconsistent with P's right of control; (3) D's good faith; (4) the extent and duration of the resulting interference with P's right of control; (5) the harm done to the chattel; and (6) the inconvenience and expense caused to P.

**Intent.** While D's beliefs, motives and intentions may be relevant in assessing the seriousness of his interference, the only intent required for the tort is an intent to exercise dominion or control over the chattel. Thus, D's good faith or honest mistake is no defense if the interference is sufficiently great (e.g., destruction).

**Ways In Which Conversion May Occur.** A conversion may occur when D (1) acquires possession, (2) moves the chattel, (3) makes an unautho-

rized transfer, delivery, or disposal, (4) withholds possession, (5) destroys or materially alters the chattel, or (6) under certain circumstances, merely uses the chattel.

**Types of Chattels.** Originally, only tangible chattels could be converted. Today, most courts have extended it to include intangible personal property represented by, or merged into, a document.

**Damages.** Damages include the full value of the chattel at the time of conversion, plus interest. Under the prevailing view, P is never required to (but may) accept a tender of the chattel's return in mitigation of damages.

### 3. Trespass and Conversion Distinguished

A conversion is a trespass to a chattel that is so serious that D can be forced to buy it. In such cases, P may choose either action.

## III. DEFENSES TO LIABILITY FOR INTENTIONAL TORTS: PRIVILEGES

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### A. Privilege

#### 1. Introduction

"Privilege" is the general term applied to various defenses in which special circumstances justify conduct which would otherwise be tortious.

#### 2. Other Defenses Distinguished

Privileges differ from other defenses such as contributory negligence and immunities which operate to reduce or bar P's recovery but do not negate the tortious character of D's conduct. Privileges do.

#### 3. Types

Privileges may be divided into two general categories: (a) consent, and (b) privileges created by law irrespective of consent. Today, both types are affirmative defenses.

#### **4. Mistake**

In general, D's mistaken belief that he has a privilege is per se no defense to an intentional tort, nor does it negate the required intent. However, D's mistake may be relevant in determining the existence of a privilege.

### **B. Consent**

#### **1. In General**

Consent is a defense to almost any tort, but it is applied most frequently to the intentional torts.

#### **2. Existence**

There is consent when one is, in fact, willing for conduct to occur. It is a matter of P's subjective state of mind. It is valid whether or not communicated.

#### **3. Apparent Consent**

P's words or conduct manifesting consent are sufficient to create a privilege to D to act in light of the apparent consent, even if P's actual (but undisclosed) state of mind was to the contrary.

#### **4. Conduct**

Conduct can manifest consent. Even silence and inaction may indicate consent when such conduct would ordinarily be so interpreted.

#### **5. Custom, Prior Relationship**

Consent may be inferred from custom and usage, from prior dealings between the parties, or from the existence between them of some relationship.

#### **6. Capacity to Consent**

Consent can only be given by one having the capacity to do so, or one authorized to consent for him. Infancy, intoxication, or mental incapacity normally will vitiate effective consent.

### **7. Implied Consent**

When an emergency actually or apparently threatens death or serious bodily harm and there is no time or opportunity to obtain consent, consent will be implied.

### **8. Scope of Consent**

The consent is to D's conduct, and once given, P cannot complain of the consequences of that conduct, however unforeseen. But D's privilege is limited to the conduct consented to or acts substantially similar. The consent may be conditioned or limited as to time, place, duration, area, and extent.

### **9. Mistake, Ignorance, Misrepresentation**

Even though given pursuant to P's material mistake, misunderstanding or ignorance as to the nature or character of D's proposed conduct or the extent of the harm to be expected from it, P's consent is effective as manifested unless D knows of the mistake or induced it by his misrepresentation.

### **10. Informed Consent**

Under the doctrine of informed consent, if D (e.g., a physician) misrepresents or fails to disclose to P the material risks and possible consequences of his conduct (e.g., a medical procedure), P's consent is not an informed one. Under the prevailing view, the failure to disclose mere risks is deemed collateral, and therefore a matter of negligence only. It does not vitiate the consent and therefore there is no battery.

### **11. Duress**

Consent given under duress is not effective. Duress includes threats of immediate harm directed against P, his family or valuable property, but usually not threats of future harm or of economic duress.

### **12. Consent to Crime**

Under the majority view, the consent is not effective if the conduct consented to is a crime, at least in battery cases. The minority and

Restatement view is that consent to criminal conduct is valid unless in violation of a statute making conduct criminal to protect a class of persons irrespective of their consent.

## C. Self-Defense and Defense of Others

### 1. Self-Defense

D has a privilege to use so much force as reasonably appears to be immediately necessary to protect himself against imminent physical harm threatened by the intentional or negligent conduct of another. D may use force likely to inflict death or serious bodily harm only when (a) he reasonably believes that he is in danger of similar harm, and (b) he is not required to retreat or escape.

The privilege exists even when D reasonably but mistakenly believes that self-defense is necessary. The reasonableness of D's belief is judged by the objective standard of the reasonable person of average courage.

### 2. Defense of Third Persons

**Rule.** D is privileged to come to the defense of any other person under the same conditions and by the same means as he would be privileged to defend himself.

**Effect of Mistake.** Under the majority view, D's privilege exists only if and to the extent that the third person in fact had a right of self-defense.

### 3. Duty to Protect

If D is under a duty to protect another or his land or chattels, he is privileged to use reasonable force or confinement to do so.

## D. Defense and Recovery of Property

### 1. Defense of Property

**Rule.** A possessor is privileged to use reasonable force to expel another or a chattel from his land, or to prevent another's imminent intrusion

upon or interference with his land or chattels, or to prevent his dispossession, even though such conduct would otherwise be a tort.

**Request.** The possessor must first request that the intruder desist, unless it appears that the request would be useless or cannot be made before substantial harm is done.

**Amount of Force.** D may then use force or the threat of force, but only such actual force as is minimally required to prevent or terminate the intrusion. Force likely to cause death or great bodily harm is not privileged. The intruder is not privileged to resist.

**Watchdogs, Spring Guns.** Spring guns, concealed traps, and other mechanical devices, and vicious animals, used to defend D's property, are used at D's risk. D is subject to liability for harm they cause to an intruder which he would not have been privileged to inflict himself if present.

**Effect of Mistake.** If the intruder in fact has one of these privileges, D has no privilege to defend his property, even though D through ignorance or mistake reasonably believes that the intruder has no privilege, unless the intruder himself was responsible for that mistake. Conversely, the intruder's mistake does not defeat D's privilege unless the mistake was caused by D's fault.

**Property of Others.** There is a similar privilege to defend the property of others, at least if the third person is a member of D's immediate family or household or is one whose possession D has a duty to protect.

## 2. Forcible Retaking of Chattels

There is a limited self-help privilege to use force or threats of force to recapture D's chattel, wrongfully and forcibly taken from D's possession, even under claim of right, or obtained by fraud or duress. D must be in fresh pursuit, and first demand its return. Then, only reasonable force may be used.

## 3. Possession of Land

D, who is entitled to the immediate possession of land, may peacefully enter and retake possession without liability for trespass, and thereafter defend his possession.

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## **E. Necessity**

### **1. Rule**

The privilege of necessity may be invoked when D, in the course of defending himself or his property (or others or their property) from some threat of imminent serious harm for which P is not responsible, intentionally does some act reasonably deemed necessary toward that end, which results in injury to P's property and which would otherwise be a trespass or conversion.

### **2. Public Necessity**

If the danger affects an entire community, or so many persons that the public interest is involved, the privilege is complete and D's tort liability is entirely excused.

### **3. Private Necessity**

If the danger threatens only harm to D or his property (or to a third person or his property), D is privileged to commit the act which causes the trespass or conversion, but he is subject to liability for compensatory damages for any resulting actual physical harm.

### **4. Scope of Privilege**

D's reasonable belief that his act is necessary is sufficient; but his conduct must be reasonable considering the extent of the threatened harm in relation to the foreseeable damage to P's property.

## **F. Authority of Law**

### **1. Rule**

One acting under authority of law is privileged, under certain circumstances, to commit acts which would otherwise constitute an assault, battery, confinement, trespass, or conversion. The scope of the privilege varies according to the type of authority being exercised and other factors.

## 2. Scope: Ministerial vs. Discretionary Acts

If D must exercise significant judgment or discretion in determining whether or how to act, the act is privileged if done in good faith. Ministerial acts are not privileged if done improperly, regardless of D's good faith.

## 3. Scope: Jurisdiction

Acts done without jurisdiction are not privileged. But acts merely "in excess of" D's jurisdiction are privileged if done in good faith.

## 4. Types of Acts

The most common types of such acts are arrest and prevention of a crime; execution of civil process, writs, or court orders; and acts required or authorized by legislation.

## 5. Use of Force

Whether D is privileged to break and enter an enclosure or building, or to use force against P's person, and the amount of such force permitted, depends upon the source and nature of the privilege being exercised.

## G. Discipline

**Parents.** A parent is privileged to apply such reasonable force or to impose such reasonable confinement upon his child as he reasonably believes to be necessary for the child's proper control, training, or education.

**Loco Parentis.** The privilege extends to persons having responsibility for the custody, control, training, or education of the child, except so far as the parent has restricted their authority to do so.

**Reasonableness.** The reasonableness of the force or confinement depends upon: (1) whether D is a parent; (2) the age, sex, physical and mental condition of the child; (3) the nature of the offense and D's apparent motive; (4) the influence of the child's example; (5) its necessity and appropriateness to compel obedience to a proper command; and (6) whether disproportionate to the offense, unnecessarily degrading, or likely to cause serious or permanent harm.

**Purpose.** It must be administered in good faith, for a proper purpose, and without malice.

## ■ PART THREE: NEGLIGENCE

### IV. NEGLIGENCE LIABILITY RULES

#### A. The Elements of the Negligence Cause of Action

“Negligence” is both (1) the name of a tort *cause of action*, and (2) the term given to *conduct* which falls below the standard which the law requires. The elements of a *negligence* cause of action (prima facie case) are:

- (1) A duty by D to act or refrain from acting;
- (2) A breach of that duty by D’s failure to conform his conduct to the required standard (i.e., “negligence”);
- (3) A sufficient causal connection between the negligent conduct and P’s injury; and
- (4) Actual (provable) harm—i.e., harm which the law says is measurable and compensable in money damages.

It is sometimes said that there is a fifth element, “proximate cause”—the harm must be within the scope of liability. Strictly speaking, this is not an element of the negligence cause of action but a liability limitation that cuts off recovery, similar to a duty limitation, even when the four traditional elements are established. In some cases, the court determines the scope of D’s liability as a matter of law. But in some cases, the jury determines whether D’s negligence was a “proximate cause” of P’s harm.

#### B. Characteristics of Negligent Conduct

##### 1. Definition

“Negligence” is conduct which falls below the standard established by law for the protection of others against unreasonable risks of harm.

## 2. Objective Test

The test for negligence is objective—not whether D intended to exercise due care, nor whether D did the best he could to be careful, but whether D’s conduct was that of a hypothetical “reasonably prudent person” placed in the same or similar circumstances.

## 3. Care Required

The standard is “reasonable care” (sometimes called “ordinary care” or “due care”) under the circumstances. The law does not require D to be perfect, but only to behave as a reasonably prudent person would behave. And D need only protect others against unreasonable risks of harm.

## 4. Attributes of the Reasonable Person

**Knowledge, Experience and Perception.** In judging D’s conduct, D will be charged with what he actually knew and observed, and also with those things which a reasonable person would have known and perceived. And if D has superior intelligence, memory perception, knowledge, or judgment, he will be held to that standard. But D’s deficiency in any of these attributes is ignored; he is still held to the standard of the reasonable (i.e. normal) person.

**Knowledge Common to Community.** The reasonable person knows those things which at that time are common knowledge in the community—commonly known qualities, habits, and characteristics of human beings, animals, and things.

**Activities Requiring Skill.** If D chooses to engage in an activity requiring learned skills or certain knowledge, his conduct is measured against the hypothetical person who is reasonably skilled and knowledgeable in that activity.

**Physicians.** In most jurisdictions, the standard of care of medical doctors (and sometimes other professionals) is conclusively established by the customary practice of reasonably well-qualified practitioners in that field.

Physicians or others who are certified specialists, or who hold themselves out as specialists, are held to the standards of that specialty.

**Physical Characteristics.** The “reasonable person” standard is subjective to the extent that if D has a physical deficiency or disability, his conduct is measured against that of a reasonably prudent person with his physical characteristics.

**Mental Capacity.** In judging D’s conduct, no allowance is made for deficiencies in D’s mental capacity to conform to the “reasonable person” standard of care. The fact that D is mentally deficient, voluntarily intoxicated, or even insane does not matter. His conduct is measured against the reasonably prudent sane, sober and normal person. A few courts apply a subjective standard to insane or mentally disabled persons.

**Minors.** Minors are an exception. If D is a minor, the test is what is reasonable conduct for a child of D’s age, intelligence, and experience under the circumstances. But this exception does not apply to minors engaging in “adult” activities requiring special skills and training, such as driving a car or flying an airplane. Below a certain age (in some states, arbitrarily fixed at seven), a young child is incapable of negligence because he or she lacks the mental maturity and experience to assess and respond to risks.

## 5. Conduct in Emergencies

The fact that D is confronted with a sudden emergency which requires rapid decision is a factor which may be taken into account in determining the reasonableness of his choice of action. However, D may have been negligent in (a) failing to anticipate the emergency or (b) creating the emergency; as to such negligence, this rule would not apply.

## 6. Sudden Incapacity

D’s conduct during a period of sudden incapacitation or loss of consciousness resulting from physical illness is negligent only if D ought to have foreseen such an incapacity and was negligent in failing to take reasonable precautions to prevent its occurrence

## 7. Anticipating Conduct of Others

The reasonable person will regulate his conduct in light of what he can anticipate others will do.

## 8. Failure to Warn or Instruct

It may be negligent to fail to warn or instruct another so that he can take proper precautions for his own safety. Conversely, D's exercise of reasonable care to give others an adequate warning of a danger does not necessarily prevent D's conduct (the subject of the warning) from being negligent. If there is an unreasonable risk of harm inherent in D's conduct, D must reduce that risk so far as reasonably possible; only then will an adequate warning of the remaining risk constitute "reasonable care."

## 9. Other Types of Negligent Conduct

Any conduct may be negligent under the circumstances. Negligence may consist of an act or a failure to act, lack of competence, or lack of preparation, or a misrepresentation. It may be negligence to prevent protective action by another; to use an incompetent, defective or inappropriate instrumentality; or to permit another to use a thing or engage in an activity under D's control so as to subject another to an unreasonable risk of harm.

## 10. When Is a Risk "Unreasonable"?

Under the classic formulation, a risk is unreasonable when the foreseeable probability and gravity of the harm outweigh the burden to D of alternative conduct that would have prevented the harm. This is the classic "Hand" test.

**Magnitude of Risk.** The probability or likelihood that the harm will result, in conjunction with the gravity or seriousness of the potential harm, are placed on one side of the scale. The gravity of the harm includes both the extent of the damage and the relative societal value of the protected interest.

**Burden of Alternative Conduct.** The burden of reducing or eliminating the risk by alternative conduct is placed on the other side of the scale. Factors relevant in assessing this cost include: (1) the importance or social value of the activity or goal of which D's conduct is a part; (2) the utility of the conduct as a means to that end; (3) the feasibility of alternative, safer conduct; (4) the relative cost of safer conduct; (5) the relative utility of safer conduct; and (6) the relative safety of alternative conduct.

## 11. Judge and Jury

Whether conduct was or was not negligent is a question of fact for the trier of fact.

### C. Sources of Standards of Care

#### 1. Rules of Law

Appellate courts, reviewing fact situations and deciding that there was or was not sufficient evidence of negligence, often state that given conduct is or is not negligent. Such statements may be either (a) guidelines for the review of jury determinations of an issue of fact, or (b) fixed rules of law that given conduct is or is not negligent as a matter of law.

Some such rules of law may be desirable and lend stability to the law, so long as they are not immutable and admit exceptions. But better results are usually achieved if negligence is treated as a question of fact for the jury, and such “rules” are merely regarded as guidelines for the courts in determining that certain conduct in certain recurring situations so clearly is (or is not) negligent that the question may be taken from the jury.

#### 2. Legislation

**In General.** Legislation (statutes, ordinances, regulations) often prescribe standards of conduct for the protection of others from harm. For tort law purposes, two types may be distinguished:

- (1) legislation which (a) expressly or (b) by necessary implication creates a civil remedy for damages for violation (e.g., F.E.L.A., F.S.A.A.); and
- (2) legislation which does not (limited to criminal penalties).

Courts routinely use legislation of the second type in negligence cases as evidence of, or as establishing, the standard of care which D was required to meet.

**Legislative Purpose.** Legislation is relevant on the standard of care in a negligence case only if the statute was intended, at least in part, to protect a class of persons which includes P against the particular hazard and kind of harm which resulted.

**Licensing Statutes.** Violation of a statute requiring a license to engage in a particular trade, profession or activity is generally not admissible to show that D was negligent on a particular occasion.

### **Effect of Violation**

**Majority Rule.** Most courts hold that violation of a relevant statute is prima facie negligence or negligence per se. This means that if D introduces no evidence to excuse the violation, D's negligence is conclusively established.

**Minority View.** In some jurisdictions, violation is merely evidence of negligence, which the jury can consider along with all other evidence in determining whether D was negligent. This is the rule in all jurisdictions when a minor violates a relevant statute.

**Cause.** A violation does not per se establish a sufficient causal relation between the violation and P's injury.

**Children.** A minor's violation of a statute is only evidence of negligence, not negligence per se.

**Defenses.** Contributory negligence and assumption of risk defenses (if otherwise available) apply, except in the case of statutes intended to protect a class of persons against their own inability to protect themselves.

### **Excused Violations**

**Certain Safety Statutes.** A few statutes having a strong safety purpose (e.g., F.S.A.A., child labor laws, some factory and construction safety acts, pure food acts, some motor vehicle equipment and maintenance laws) permit no excused violations.

**Other Statutes.** As to most other statutes, courts will permit excuses for violations to be shown to rebut the per se or prima facie negligence. These include (a) physical circumstances beyond D's control; (b) innocent ignorance of facts which make the statute applicable; (c) sudden emergencies not of D's making; (d) situations in which it would be more dangerous to comply with the statute than to violate it; (e) violations that are reasonable in light of D's childhood, physical disability, or physical incapacity; and (f) D used

reasonable care in attempting to comply with the statute. In jurisdictions where the statute is merely evidence of negligence, any proof tending to excuse or make reasonable the violation would be relevant.

**Compliance With Statute.** D may ordinarily show compliance with a statute as evidence of his reasonable care, but such compliance is not conclusive since a reasonable person might have taken precautions greater than the statutory minimum.

## D. Proof of Negligence

### 1. Burden of Proof

P must introduce sufficient evidence to support a finding by a preponderance of the evidence on each element of his cause of action—duty, negligence, causation, damages. Whether a duty exists is usually an issue of law for the court; the trier of fact determines the other elements.

### 2. Presumptions

Each jurisdiction's tort law has its own set of legal presumptions, which are codified rules of circumstantial evidence.

### 3. Experts and Opinion Evidence

In a large number of tort cases, expert testimony is necessary or desirable to furnish the jury facts beyond its common knowledge. Expert testimony may be required to establish the standard of care in professional negligence cases. Expert witnesses are permitted to testify to opinions when they will be helpful to the jury.

### 4. Res Ipsa Loquitur

Like presumptions, *res ipsa loquitur* ("the thing speaks for itself") is basically a rule of circumstantial evidence.

**Rule.** If P can establish a prima facie *res ipsa loquitur* case, he need not prove by direct or other evidence the specific conduct of D which was

negligent. If P makes a prima facie showing that (1) his injury was caused by an instrumentality or condition which was under D's exclusive management or control at the relevant time(s), and (2) in the ordinary course of events, P's harm would not have occurred unless D was then and there negligent, then the jury is instructed on *res ipsa loquitur* and may infer that D was negligent.

**Control by D.** D need not have been in control of the injury-causing instrumentality at the time of P's injury. P need only establish that D's negligence, if any, must have occurred while the instrumentality was in D's control.

**Multiple Defendants.** The exclusive control requirement ordinarily precludes use of RIL against multiple defendants. However in a few cases, the courts have applied a variation of the doctrine and required each defendant to prove that he was not negligent. If there are multiple defendants but their relationship was such that they were jointly responsible for the instrumentality at the relevant time, or one would be vicariously liable for the conduct of the other, then the doctrine may be applied.

**Inference of Negligence.** P need not show that D's negligence was the only possible explanation, only that the inference that it was D's negligence outweighs the sum of the other possible causes.

**P's Conduct.** At one time, P was required to prove that his injury was not due to any "voluntary act" by P, or that P's own conduct was not a significant causative factor, or, most recently, that P was not contributorily negligent. However, with the adoption of comparative negligence, this requirement has been eliminated in most jurisdictions.

**Procedural Effect.** Once the court determines that P has established a prima facie *res ipsa* case, the issue becomes one for the jury to determine whether or not to draw the inference, taking into consideration D's contrary evidence (if any). Both *res ipsa* and specific negligence theories may go to the jury, so long as the two are not inconsistent.

**Products Liability Cases.** There is an analogous circumstantial evidence rule in strict product liability cases. P need not prove the specific defect in the product, so long as the evidence tends to show that the product malfunctioned in such a way that the existence of a defect may be inferred and also tends to exclude possible causes other than a product defect.

## 5. Custom, Character

**Custom and Usage.** In determining whether conduct is negligent, the customary conduct of the community, industry, profession, or other relevant group in similar circumstances is relevant but not conclusive. *Exception:* In professional negligence cases involving physicians and certain other professionals, customary conduct usually is conclusive as to the standard of care.

**Character.** Evidence that D or P was or was not a careful person is not admissible to prove that he acted or failed to act carefully on the occasion in question.

## 6. Trade Rules and Standards

Rules and standards for the conduct of an activity promulgated by authoritative groups, if relevant and recognized as authoritative, are similar to custom and often admitted as some evidence of the standard of care.

## 7. D's Own Rules and Standards

D's own rules and standards are admissible but not conclusive as evidence of the appropriate standard of care.

# E. Degrees of Negligence

## 1. Degrees of Care

The duty of those who conduct certain dangerous activities is sometimes stated as greater than "ordinary" or "reasonable" care.

In some jurisdictions, common carriers (operators of airplanes, ships, buses, trains, taxicabs, and even elevators, escalators and amusement devices) are said to owe their passengers "the highest degree of care consistent with the mode of conveyance used and the practical operation of their business." In some jurisdictions, persons responsible for certain **dangerous instrumentalities** (e.g., high-voltage electricity, explosives) must exercise a "high degree of care," commensurate with the danger.

The trend is to reject such special duty rules, holding that “under the circumstances” achieves the same result without modifying the standard duty.

## **2. Degrees of Negligence**

Occasionally, efforts have been made to subdivide the negligence concept into finer gradations—“slight,” “ordinary,” and “gross” negligence. These distinctions have proved unworkable and are rarely used.

## **F. Reckless Conduct (“Wilful and Wanton Misconduct”)**

### **1. Definition**

Conduct is in “reckless disregard of the safety of another” (also called “wilful and wanton misconduct”) when D knows or has reason to know that (1) it creates an unreasonable risk of harm and (2) the risk is relatively high, either in degree or in the probability that harm will occur.

### **2. Distinguished From Negligent Conduct**

Negligent conduct merely creates an unreasonable risk; no awareness of that risk is required. For conduct to be reckless, D must be conscious (or a reasonable person in D’s situation would have been conscious) that it creates a relatively high risk of harm to another.

### **3. Distinguished From Intentional Torts**

Conduct is intentional when D either intends to bring about the consequences or knows that they are substantially certain to occur. Reckless conduct lacks that certainty of result.

### **4. When Required**

Certain statutes and common law rules exempt D from liability for ordinary negligence, thereby requiring proof of reckless conduct for liability.

### **5. Effect**

**Defenses.** In some jurisdictions, ordinary contributory negligence is not a defense or damage-reducing factor if D’s conduct is found to be

reckless. However, in the majority of comparative negligence jurisdictions, P's contributory negligence will reduce his recovery even against D's reckless conduct. Assumption of the risk was formerly a defense to reckless conduct, but in many jurisdictions it is now merely a damage-reducing factor.

**Punitive Damages.** In most jurisdictions, reckless conduct will support an award of punitive damages.

## G. Duty Concepts and General Limitations

### 1. In General

In negligence law, D's duty can best be analyzed as a general principle with exceptions and limitations, rather than as a collection of specific duties. In general, D has a duty to exercise reasonable care to avoid subjecting others (and their property) to unreasonable risks of physical harm. Specific limitations on that duty are sprinkled throughout the law of torts. The most common general duty limitations include the following.

### 2. Relationship Between P and D

Negligence law has traditionally held that D is not subject to liability to P unless D breached a duty owed to P and not to someone else. Cf. *Palsgraf v. Long Island R. Co.* (N.Y. 1928). "Negligence in the air, so to speak, will not do." No simple formula exists for determining when this duty exists. The most important factors include (a) a pre-existing relationship between P and D, (b) foreseeability of harm, (c) the nexus between D and P's injury, and (d) reliance by P upon D to protect him.

### 3. Nature and Scope of the Risk

Conduct may be negligent because it foreseeably threatens property damage, but it actually causes some unforeseen personal injury. Or conduct may be negligent because it foreseeably threatens one type of harm to P, but it actually causes another type of harm, as to which the risk was not unreasonable. Some courts will hold that there was no duty to protect against the harm which actually resulted. Other courts will reach the same result under proximate cause principles.

#### 4. Interest Invaded

Certain types of interests are given less than full protection against negligent invasion, such as (1) pecuniary loss alone, unaccompanied by physical harm, (2) harm to the unborn, and (3) psychic trauma.

#### 5. Misfeasance vs. Nonfeasance

Tort law traditionally distinguished between “misfeasance” (tortious conduct consisting of an affirmative act) and “nonfeasance” (inaction which results in, or allows, harm to P). As a general rule, D is not liable for harm to P resulting from his mere failure to intervene to aid or protect P unless there is some pre-existing relationship between P and D sufficient to create the duty, or unless D is responsible for P’s situation.

**Rescue.** Absent a pre-existing relationship between P and D or a duty to act arising from some other source, D has no duty to protect or aid P, who D realizes is in a position of danger.

**First Aid.** Absent a pre-existing relationship between P and D, or unless D was responsible for P’s injury, D has no duty to render aid or assistance to an injured or otherwise needy P.

**Relationships Creating Duty.** Pre-existing relationships which will support a duty to aid or protect another include carrier-passenger, innkeeper-guest, landowner-lawful entrant, employer-employee, jailer-prisoner, school-student, parent-child, husband-wife, store-customer, and host-guest. A duty has even been found as to friends engaged in a joint social outing.

**Responsible for Peril or Injury.** The duty arises when D is responsible for P’s injury or position of peril, whether or not D was negligent.

**Aid to Helpless.** One who undertakes to render aid or to protect P, who is helpless to adequately aid or protect himself, must do so with reasonable care. And, having undertaken this duty, he may not abandon P and leave him worse off. This rule has led to “Good Samaritan” statutes in many states which relieve physicians (and others) who render emergency medical aid from all liability for negligence.

**Services.** When D (gratuitously or otherwise) undertakes to render services which he knows or should know are for P’s protection, D must

perform those services with reasonable care, at least if (a) his failure to do so increases the risk of harm to P or (b) P's injury results from his reliance on D.

**Duty Arising Ex Post Facto.** If D does an act, not tortious at the time, and later discovers that his act creates an unreasonable risk of harm to P, D must exercise reasonable care to prevent the risk from taking effect.

**Statutory Duty of Protection.** When a statute requires one to act for the protection of another, the court may (or may not) use the statute as a basis for an affirmative duty and its scope. This is different from using a statute to establish the standard of care when a duty already exists, or statutes that expressly or impliedly create a cause of action.

**Duty to Control Conduct of Another.** Certain relationships carry with them a duty by D, the dominant or custodial member, to use reasonable care to regulate the conduct of (1) the person within his custody or control so as to protect third persons or (2) third persons so as to protect the person in his custody or care.

**Parent-Child.** A parent must exercise reasonable care to prevent tortious conduct by his child, provided the parent knows or has reason to know he has the ability, and knows or should know of the necessity and opportunity to exercise such control.

**Master-Servant.** A master has a similar duty with respect to a servant; this even extends to one acting outside the scope of his employment, if the servant is on the master's premises or is using his chattel.

**Person on D's Land.** D has a similar duty with respect to a person using his land or his chattel in his presence and with his permission.

**Custodian of Dangerous Person.** If D has custody of a person D knows to have dangerous propensities, D must exercise reasonable care to prevent that person from doing harm.

**Duty to Protect Person in Custody.** If D has custody of P under circumstances such that (a) P is deprived of his normal power of self-protection or (b) P must associate with persons likely to harm him, then D has a duty to exercise reasonable care to prevent tortious conduct against P.

## H. Duty: Tort and Contract

### 1. Parties to the Contract

One possible source of D's duty to P is a contract between them under which D agrees to perform certain services. If D breaches that contract and as a result P sustains physical or other harm, special rules apply to determine whether that breach may give rise to tort liability.

**General Rule: Misfeasance vs. Nonfeasance.** Where D's duty to act arises because of a contractual relation between D and P, D is not liable in tort for harm caused by his breach of that contract where the breach consists merely of his failure to commence performance at all. But once having begun to perform, he will be liable for his tortious misperformance, whether consisting of acts or omissions to act.

#### **Exceptions: Liability for Nonfeasance**

**Public Callings.** Those engaged in the public or "common" callings—common carriers, innkeepers, public warehousemen, public utilities, and public officers—are subject to tort liability for nonperformance.

**Other Relationships.** Other relationships, which may or may not be based on contract, impose a duty of affirmative action.

**Fraud.** A promise made without any intent to perform it may be fraud for which a tort action in deceit will lie.

### 2. Third Persons Not Parties to the Contract

**Common Law Rule.** The general common law rule was that P, not a party to a contract between D and another, had no cause of action in tort for harm sustained as a result of D's misperformance or nonperformance. P was not in "privity of contract" with D.

**Exceptions: Nonfeasance.** In the case of nonfeasance, various exceptions to the privity rule have developed, such as (1) the failure of a telegraph company to transmit a telegram; (2) the nonperformance by an agent of his contractual duty to supervise property or persons over which he has been given control, or to take certain precautions for the safety of third persons; (3) nonperformance of a contract to maintain, inspect, or repair

an instrumentality which foreseeably creates a substantial risk of harm to third persons; (4) nonperformance by a landlord of his contract to repair the premises; and (5) in some cases, where D undertakes to render services to reduce the risk of harm to a third person if (a) the failure to exercise reasonable care increases the risk of harm beyond that which existed without the undertaking, (b) D has undertaken to perform a duty owed by the other to the third person, or (c) the person to whom the services are rendered, the third party, or another relies on D's exercising reasonable care in the undertaking.

**Exceptions: Misfeasance.** Where D's negligence consists of misperformance after having begun to perform, the privity rule is now obsolete, and the overwhelming majority of courts will subject D to liability to P.

## V. DEFENSES TO NEGLIGENCE AND OTHER LIABILITY

### A. Contributory and Comparative Negligence

#### 1. Rule

Contributory negligence is conduct by P which creates an unreasonable risk of harm to P, and which combines with D's negligence to cause P's injury.

#### 2. Burden of Proof

Contributory negligence is an affirmative defense.

#### 3. Applicable Rules

In general, contributory negligence uses the same rules and tests as negligence.

#### 4. Effect of Plaintiff's Contributory Fault

**Complete Bar vs. Mitigation of Damages.** Contributory negligence was once a complete defense that totally barred P's recovery. Now, in most jurisdictions it merely reduces his damages pro tanto, although it can still be a complete bar.

**Comparative Negligence.** All but four states and the District of Columbia have finally accepted the doctrine of comparative negligence. Under this rule, P's contributory negligence is not a complete bar to his recovery. Instead, P's damages are calculated and then reduced by the proportion which P's fault bears to the total causative fault of P's harm.

**Types of Comparative Negligence.** Under the pure form (minority rule), P may recover a portion of his damages no matter how great his negligence in comparison to that of D. Under the modified form (most jurisdictions), P recovers nothing if his negligence was "as great as" (50%) or "greater than" (51%) that of the defendant (or defendants collectively).

**Factors for Assigning Shares.** In deciding how to assign percentage shares of responsibility, the trier of fact should consider (1) the duty owed by each person, (2) the extent to which each person's conduct deviated from that duty, and (3) the extent to which the tortious conduct of each person caused the injury in question.

**Intentional or Reckless Conduct.** Traditionally, ordinary contributory negligence was not a defense to an intentional tort or to reckless conduct (but contributory reckless conduct was a defense to the latter). In most comparative negligence jurisdictions, P's contributory negligence will reduce his recovery even though D's conduct was reckless, but not if it was intentional.

**Strict Liability.** Prior to the adoption of comparative negligence, mere contributory negligence was not a defense to a strict liability action. Some comparative negligence jurisdictions permit P's ordinary contributory negligence to reduce his damages; others reduce his damages only for assumption of the risk.

**Safety Statutes.** Contributory negligence is not a defense to actions founded upon certain types of safety statutes intended to protect a class of persons from dangers against which they are incapable of protecting themselves. Some statutes expressly prohibit this defense.

**Serious Misconduct.** In some jurisdictions, if P's contributory fault was seriously unlawful or immoral conduct, he will be barred from recovery altogether.

## 5. Causal Relation

The same rules of causation apply as in the case of negligent conduct. And the defense is not available unless P's harm results from the risk which made P's conduct negligent.

## 6. Imputed Contributory Negligence

**General Rule.** With three exceptions, the negligence of a third person will not be imputed to P so as to reduce or bar P's recovery for injuries caused by D's negligence.

**Exception: Master–Servant.** A master's recovery against a negligent D is reduced (or barred) by the negligence of his servant acting within the scope of his employment.

**Exception: Joint Enterprise.** P, a member of a joint enterprise, is injured by the concurrent negligence of D, a third person outside the enterprise, and M, another member of the enterprise. P's recovery against D is reduced by M's negligence.

**Exception: Consequential Damages.** Where P has a cause of action based upon personal injuries to another (A), P's recovery is reduced by A's contributory negligence.

## 7. P's Negligent Failure to Exercise Control

**In General.** If P has a duty to control the conduct of A and negligently fails to do so, A's contributory negligence (combined with that of P) reduces or bars P's recovery against D whose negligence was also a cause of P's injury.

**Parent.** A parent's (P's) recovery from D for injuries to P's child caused by D's negligence may be reduced or barred by P's negligence in protecting or supervising his child.

## B. Last Clear Chance

The doctrine of "last clear chance" is now primarily of historical interest; it survives in a dwindling minority of jurisdictions.

The doctrine applies only when D's negligence is later in time than P's contributory negligence. In essence, P (or P's property) is in a zone of danger from which he cannot escape in time, leaving D with the last opportunity to do something to prevent the harm which otherwise will occur. If D then negligently fails to act to prevent the harm, he is not permitted to use P's prior negligence as a defense.

### C. Assumption of Risk

#### 1. Rule

Under the traditional common law rule, if P voluntarily assumes a risk of harm arising from the negligent or reckless conduct of D, P cannot recover for such harm. Assumption of the risk is an affirmative defense.

Until recently, most (but not all) jurisdictions recognized this defense, some by a different name. A few have limited it to (1) master-servant and (2) express assumption cases. Some courts analyze P's assumption of risk as affecting D's duty, e.g., negating D's duty to exercise care for P's safety.

#### 2. Meanings of Term

The term "assumption of risk" can mean different things, some of which are not truly defenses to negligent conduct. The term is used to describe several different situations:

**Express.** P expressly agrees in advance (usually in a written contract) to relieve D of D's duty to exercise care for P's safety with respect to a known or possible risk.

**Inherent Hazards Not Arising From Negligence.** P chooses to engage in an activity which has certain inherent and commonly accepted risks, even though the others involved exercise proper care. As to these risks, there is no negligence, and therefore the doctrine does not properly apply. Some courts call this "primary" assumption of risk.

**Risk of Future Negligence.** P voluntarily enters into a relationship with D knowing that there is a risk that D will act negligently. Here, the true basis of liability is P's unreasonable conduct in entering into the relationship (i.e., contributory negligence).

**Assumption of Existing Negligently–Created Risk.** P, aware of a risk created by the negligence of D, proceeds or continues voluntarily to encounter it. This is true implied assumption of risk.

### 3. Contributory Negligence Distinguished

In theory, implied assumption of the risk is P's implied voluntary consent to encounter a known danger created by D's negligence. Contributory negligence is unreasonable conduct. The former is a subjective test; the test for the latter is objective.

### 4. Express Assumption of Risk

**Rule.** If P, by contract or otherwise, expressly agrees to accept a risk of harm arising from D's negligent conduct, P cannot recover for such harm, unless the agreement is invalid as contrary to public policy.

**Construction.** Such agreements are strictly construed against D, and are not enforceable if P reasonably was ignorant of that term. They are unenforceable as to intentional torts, and some courts will not enforce them as to reckless conduct.

**Public Policy.** Such agreements are unenforceable when contrary to public policy. In general, they will not be enforced in favor of employers, those charged with a duty of public service, and those having a significantly superior bargaining position as compared to P.

### 5. Implied Assumption of Risk

**Rule.** If P knows, appreciates, and understands the risk of harm created by D's negligent or reckless conduct, and nevertheless voluntarily subjects himself to the risk by conduct which impliedly manifests his consent to accept the risk, then he is subject to the assumption of risk defense. The effect of the defense varies.

**Elements: Manifestation of Consent.** The essence of the defense is consent to accept the risk, and therefore P's conduct must impliedly manifest that consent.

**Elements: Knowledge and Appreciation of Risk.** The consent must be an informed one, and therefore D must show that P knew of the existence of the risk, and understood and appreciated its unreasonable character.

**Elements: Voluntariness.** P's assumption of the risk must be voluntary. However, P's conduct in proceeding into the zone of danger, even reluctantly or under protest, ordinarily may be deemed voluntary. Even if P has no reasonable alternative but to encounter the risk, his doing so is voluntary unless D's tortious conduct is responsible for P's predicament and other conditions are met. Additionally, many courts have held that mere economic duress does not make encountering the risk involuntary.

**Violation of Statute.** P's assumption of risk bars or reduces his recovery based on D's violation of a statute, unless this result would defeat a policy of the statute. Some statutory torts expressly exclude the defense.

**Modern Status of the Defense.** There is a strong trend to abolish the defense of implied assumption of risk as a separate defense in negligence cases on the ground that it overlaps completely with the doctrine of contributory negligence. In particular, jurisdictions adopting comparative negligence frequently merge the defenses of contributory negligence and assumption of risk under a general "comparative fault" concept.

**Participation in Sporting Events.** In many jurisdictions, those who participate in professional or amateur sporting events assume the risk of injuries resulting from other players' misconduct, even when violations of rules of the game having a safety purpose, unless the violation was more than carelessness incident to the play of the game. But D may be liable if he intentionally or recklessly injures P. This may also be analyzed as a limited duty rule.

## D. Statutes of Limitations and Repose

### 1. Statutes of Limitations

**In General.** A statute of limitations is a statutory time period within which P must file his lawsuit.

**Classification.** Since there are different time periods for different causes of action, the courts must classify actions for purposes of determining which time period applies. P's characterization in his complaint is not controlling.

**Procedural Effect.** A statute of limitations is usually an affirmative defense that is waived if not asserted.

**Commencement of Running: General Rule.** The statute of limitations begins to run on the date the cause of action “accrues,” usually the date on which the injury occurs. In wrongful death cases, this is the date of death.

**Concealment.** D’s fraudulent concealment or nondisclosure of the existence of the cause of action from P tolls the running of the statute.

**Continuing Duty or Negligence.** In some contexts, the courts will extend the available time by finding a continuing duty to disclose or continuing negligence or other tort. In medical negligence cases, some courts hold that the statute does not begin to run until P’s course of treatment has been concluded. If D’s conduct constitutes a continuing nuisance, the statute may not start to run until D’s conduct in creating the nuisance ceases, or it may not start to run as long as the harm continues.

**Discovery Rule.** Most jurisdictions have adopted a “discovery” rule whereby tort statutes of limitations do not begin to run until P discovers (or by the exercise of reasonable care should discover) that (a) he is injured and (b) the injury is the result of someone’s tortious conduct.

**Minors and Others Under Disability.** A statute of limitations normally does not run against a minor or person under some other legal disability.

**Death Cases.** In wrongful death cases, the statute begins to run on the date of death, even though the fatal injury occurred earlier.

**Latent Potential Harm.** Where P may have been exposed to a toxic material resulting in no present symptoms or minor symptoms but a measurable risk that P may contract a serious or fatal illness at some uncertain time in the future, some courts will allow recovery now for the present symptoms or medical monitoring and either (1) damages for the potential future harm times the probability of its occurrence or (2) allow a later suit if and when the potential future harm actually occurs.

**Repressed Childhood Sexual Abuse.** Some courts have permitted the statute of limitations to be tolled during the time when P has repressed her memory of childhood sexual abuse (assuming the repression began before the applicable statute expired). Others have rejected the defense, holding that whatever “repression” is, it does not toll the statute of limitations. Some legislatures have adopted extended statute of limitations in such cases.

**Estoppel.** If D actively induces P not to take timely legal action on a claim, and P reasonably relies on D's inducement, D may be estopped to assert the statute of limitations defense.

## 2. Statutes of Repose

Statutes of repose are special limitation periods which supplement and override statutes of limitations, the discovery rule, and other similar rules and exceptions. They set an outer limit beyond which D can no longer be held responsible for a completed activity, irrespective of whether an injury has occurred.

## 3. Notice of Claim Statutes

In suits against state or local governments, statutes sometimes require P to give notice to the potential D within a certain time period.

## E. Immunities

### 1. Government and Its Employees: Sovereign Immunity

**Prior Common Law.** At one time, all levels of government were entirely immune from tort liability.

**U.S.: Federal Tort Claims Act.** The United States has waived its tort immunity for damages "caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C.A. § 1346(b).

**FTCA Exceptions.** In addition to exceptions for specified activities, there are two important general exceptions:

**Specified Torts.** The U.S. is not liable for (1) assault, battery, false imprisonment, false arrest, or malicious prosecution, except in the case of investigative or law enforcement officers; or (2) abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights. Nor is it subject to strict tort liability in any form.

**Discretionary Acts.** The U.S. is not liable for acts done with due care in the execution of a statute or regulation (even though invalid), or for “an act or omission . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty . . . , whether or not the discretion be abused.”

**Current Rule: State and Local Government.** Most states have largely abolished state and local governmental sovereign immunity. However, there is limited liability for certain governmental functions. Judicial and legislative functions and executive policy decisions remain immune.

**Governmental Officers and Employees.** Governmental officers and employees are immune when exercising a judicial or legislative function. The highest executive officers are absolutely immune except when acting clearly beyond the bounds of their authority. Lower level executive and administrative employees have a qualified immunity for the good faith exercise of a discretionary function, but are liable for their tortious ministerial acts.

## 2. Charities

The common law tort immunity of charitable, educational, religious, and benevolent organizations is no more, except in a few jurisdictions that retain vestiges. However, legislation is recreating immunities for particular charitable activities or for individuals engaged in certain charitable activities.

## 3. Spouses, Parents and Children

**Husband and Wife.** At one time, the general common law rule was that husband and wife were each immune from tort liability to the other spouse for torts committed during coverture. The majority of states have now abolished this immunity; most of the rest recognize exceptions.

**Parent and Child.** At common law, a parent and his unemancipated minor child were each immune from suit by the other for a personal tort, whether intentional or negligent. Some states have largely abolished this immunity. The remainder increasingly recognize exceptions, such as for (a) intentional or reckless conduct, (b) torts occurring during D's business activity, (c) breach of a duty external to the family relationship,

and (d) suits after the parent-minor child relationship has ended, as by emancipation of the child or the death of either party. Some states have abolished the immunity in certain classes of cases (e.g., auto). Among the states that have abolished the immunity, some hold that the parent cannot be held liable for negligent supervision, or the exercise of parental authority, or where the negligent act involves the exercise of parental discretion with respect to the provision of food, clothing, housing, medical and dental services, and other care.

#### 4. Infants and Incompetents

**Infants.** Assuming that the requisite mental state (if any) can be proved, an infant or minor is not ordinarily immune from tort liability.

**Incompetents.** One with deficient mental capacity is not for that reason alone immune from tort liability. Particularly in torts involving physical harm, the incompetent D is held to the same standard as a normal person. However, D's mental condition may sometimes be relevant in determining whether any tort has been committed.

#### F. Preemption

Under the supremacy clause of the U.S. Constitution, when a federal statute or regulations expressly or impliedly preempt a particular field, state tort law either cannot regulate the field at all or cannot impose a higher standard than the applicable federal law. Whether (and the extent to which) a federal statute or regulation is preemptive is a question of statutory interpretation for the court.

## ■ PART FOUR: CAUSATION

### VI. CAUSATION

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#### A. Overview of Causation Issues

Causation problems may be analyzed in two categories:

1. **Proximate cause**, also called "legal cause" or scope of liability. Some courts and writers use these terms to encompass all causal relation

issues. Others distinguish between (a) proximate or legal cause and (b) cause in fact. Many now categorize proximate cause issues under the term “scope of liability,” completely separating proximate cause issues from the issue of factual causation. This is the preferred approach.

2. **Cause in fact** exists when the “cause-and-effect” chain of events leading to P’s injury includes D’s tortious conduct.

*Proximate (legal) cause* (scope of liability) concepts may be used to cut off D’s liability when the court decides that it would be unjust under the circumstances, despite the fact that D’s tortious conduct was a cause in fact of P’s injury. Courts sometimes treat the same or similar scope of liability problems as *duty* issues or *fault* issues.

## B. Cause In Fact

### 1. General Rule

Cause in fact is a question of fact, requiring that the injury would not have occurred “but for” D’s conduct (the “sine qua non” rule).

Earlier, many courts added a second element: that D’s tortious conduct was a “substantial factor” (or sometimes “a material element [and] [or] a substantial factor”) in bringing about P’s injury. Increasingly, this factor has been discredited, and many courts now reject the “substantial factor” element as part of the definition of factual causation, while retaining it as a scope of liability issue.

### 2. Proof

Most cause in fact problems are nothing more than fact questions involving the adequacy of P’s circumstantial evidence linking P’s injury and D’s tortious conduct.

### 3. Multiple Causes

**Concurrent Tortfeasors, Indivisible Injury.** If the tortious conduct of D1 and D2 concur and both are causes in fact of P’s injury, either or both are subject to liability in full for all of P’s damages. It does not matter that D1 and D2 did not act in concert, or that neither’s conduct by itself would have caused P’s injury.

### **Concurrent Tortfeasors, Divisible Injury**

**General Rule.** If D1 and D2 each cause separate parts of P's harm, each will be liable only for the part he caused if it is even theoretically possible to determine who caused which part.

**Exception: Concert of Action.** Both D1 and D2 are liable for all of P's damages, even though divisible, if they were acting in concert or engaged in a joint enterprise.

**Exception: Risk of Further Injury.** If D's tortious conduct injures P and also foreseeably exposes P to the risk of further injury by another, D is liable both for the injury he caused and also for such further injury.

**Burden of Proof.** Traditionally, the burden was on P to prove which part of his injury was attributable to which defendant, at the risk of failing to recover against any. Today, in some circumstances defendants may have the burden of proof on apportionment.

**Concurrent Independent Tortfeasors, One Cause.** Suppose the tortious conduct of D1 and D2 (acting independently) occurs so that either D1 or D2 (but not both) was the cause in fact of P's injury, but P cannot prove which one. Traditionally, P would lose. Today, each defendant may be required to prove that he was not the cause.

**Enterprise Liability.** Courts may impose "enterprise liability" when: (1) the injury-causing product was manufactured by one of a small number of defendants in an industry; (2) the defendants had joint knowledge of the risks inherent in the product and possessed a joint capacity to reduce those risks; (3) each defendant failed to take steps to reduce this risk, delegating this responsibility to a trade association; and (4) most, if not all, of the manufacturers are joined as defendants. Liability is joint and several. A manufacturer can escape liability only by proving that its product could not have been the one that injured the plaintiff.

**Market Share Liability.** A few courts permit "market share" liability when a person was injured by a product (such as a drug) that was produced and sold by multiple manufacturers, but the plaintiff cannot now identify the particular manufacturer that sold the product that caused her injury. Manufacturers representing a substantial share of the relevant market at the time the product was used or consumed can be sued jointly and held severally liable for a proportional part of the

plaintiff's damages. The operative details vary among jurisdictions, but in general the plaintiff must join enough manufacturers to encompass the great majority of the relevant market, and prove their relevant market shares. A manufacturer can then escape liability by proving that its product could not have been the one that injured the plaintiff.

**Liability for Reduced Chance.** Some courts will permit recovery for tortious conduct that did not cause P's harm but merely reduced P's chances of a favorable outcome. Some deny all recovery unless the victim's chances were initially over 50%; some allow damages based on the jury's determination that the defendant's negligence was a "substantial factor" in hastening or precipitating the adverse result; and some allow damages based on the percentage difference attributable to the defendant's negligence times the plaintiff's total damages.

## C. Scope of Liability (Proximate Cause)

### 1. General Principle

Rules of proximate or legal cause limit D's liability to persons and consequences that bear some reasonable relationship to D's tortious conduct. Whether and how proximate cause rules shall be applied is a question of law for the court. However, in some instances the jury is allowed to decide whether the scope of liability in a particular case extends to P's harm.

Proximate cause rules can be grouped into two categories: (1) unforeseeable or remote or indirect consequences; and (2) intervening causes.

### 2. Unforeseeable Consequences

**Majority View: The Risk Principle.** Under the majority view, sometimes called the "risk principle" or the "foreseeable-risk rule," D's liability is limited (1) to those consequences, the foreseeability of which made D's conduct tortious in the first place, and (2) to persons within that foreseeable zone of danger.

**Minority View: The Direct Consequences Rule.** Under the minority view, D is subject to liability for consequences which are a direct result of his tortious conduct, whether or not foreseeable. The result is direct if

it follows in an unbroken natural sequence from the effect of D's act upon conditions existing and forces already in operation at the time, without the intervention of any external forces which were not then in active operation. The Restatement (Second) of Torts § 435 adopted a modified direct consequences rule. D is subject to liability if he could have foreseen any harm from his tortious conduct, even though the manner or extent of the harm was unforeseeable, unless the court finds it "highly extraordinary" that the conduct should have brought about the harm.

**The Duty–Risk Rule.** Some have proposed that all questions of scope of liability or "proximate cause" should be treated as duty issues, to be decided by the court based on a variety of factors: social policy, fairness, expediency, etc. This approach, known as the "duty-risk rule," has won few adherents in principle, but it is not uncommon for courts to rule against plaintiffs on the ground that D had no "duty" to protect P against a particular risk or that D owed no "duty" to P. See, e.g., Judge Cardozo's opinion in the *Palsgraf* case.

**Current Status of the Risk Principle.** Although most courts follow Cardozo's approach in the *Palsgraf* case and limit D's liability to the foreseeable risks which made his conduct negligent, many tend to allow juries to determine when the harm realized is too remote from D's negligence. They tend to see *all* causation issues as for the jury, and questions as to whether the risk realized is too disproportionate or different from the risk that made D's conduct tortious as questions of duty for the court.

**Elasticity of "Foreseeable."** Under the majority view, courts can expand or contract the bounds of D's liability by expansive or constrictive rulings on the foreseeability question.

**Elasticity of "Hazard."** The bounds of D's liability may also be expanded or contracted depending on how the court defines the hazard or risk that makes D's conduct tortious.

**Rescuers.** The intervention of would-be rescuers is usually deemed foreseeable.

**Physical Consequences.** Under the so-called "thin-skulled" or "egg-shell" plaintiff rule, D is liable for the full consequences of P's injury even though, due to P's peculiar susceptibility (of which D was unaware), those consequences were more severe than they would have been in a normal person.

**Intentional Torts; Strict Liability.** Courts tend to expand the limits of foreseeability when D's conduct amounts to an intentional tort, and conversely confine liability to foreseeable consequences when liability is strict.

### 3. Intervening Cause

**Definition.** An intervening cause is conduct by some third person (or an event which occurs) after D's tortious conduct, and operates with or upon D's conduct to produce P's injury.

**General Rule.** If (1) an intervening cause was foreseeable, or (2) the intervening cause was not foreseeable but the consequences were of the type which D could foresee, the intervening cause will not operate to relieve D of liability. But if both the intervening cause and the resulting consequences were not foreseeable, it is called a *superseding* cause and D's tortious conduct is not deemed a proximate cause of P's injury.

**Types of Intervening Causes.** An intervening cause may consist of either human conduct or any other natural force or event.

**Foreseeable Intervening Causes.** Foreseeable intervening causes may include (1) foreseeable weather conditions; (2) negligence by third persons; (3) criminal conduct or intentional torts by third persons, provided D's conduct exposes P to a greater-than-normal risk of such conduct, or if the exposure to such risks is what makes D's conduct tortious; (4) P's self-inflicted harm while insane; (5) acts by rescuers; (6) efforts by P to mitigate the effects of his injury; and (7) disease or subsequent injuries resulting from the impairment of P's health caused by the original injury.

**Foreseeable Consequences.** If the result is foreseeably within the risk created by D's tortious conduct, then even an unforeseeable intervening cause does not supersede D's liability, unless (1) the unforeseeable intervening cause is the criminal act of a third person, or (2) a third person, who has a duty to act, discovers the danger and has sufficient time and opportunity to prevent the harm but fails to do so.

### 4. Substantial Factor

The "substantial factor" requirement has been eliminated as part of the definition of cause in fact, but it may be relevant as a scope of liability

issue. When D's negligent conduct makes only a trivial contribution to multiple factual causes of P's harm, the harm is not within the scope of D's liability. However, this rule does not apply if the trivial contributing cause is necessary for the outcome; it only applies when the outcome is overdetermined.

The remainder of this outline has been omitted.  
Please see the book for the full outline.

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