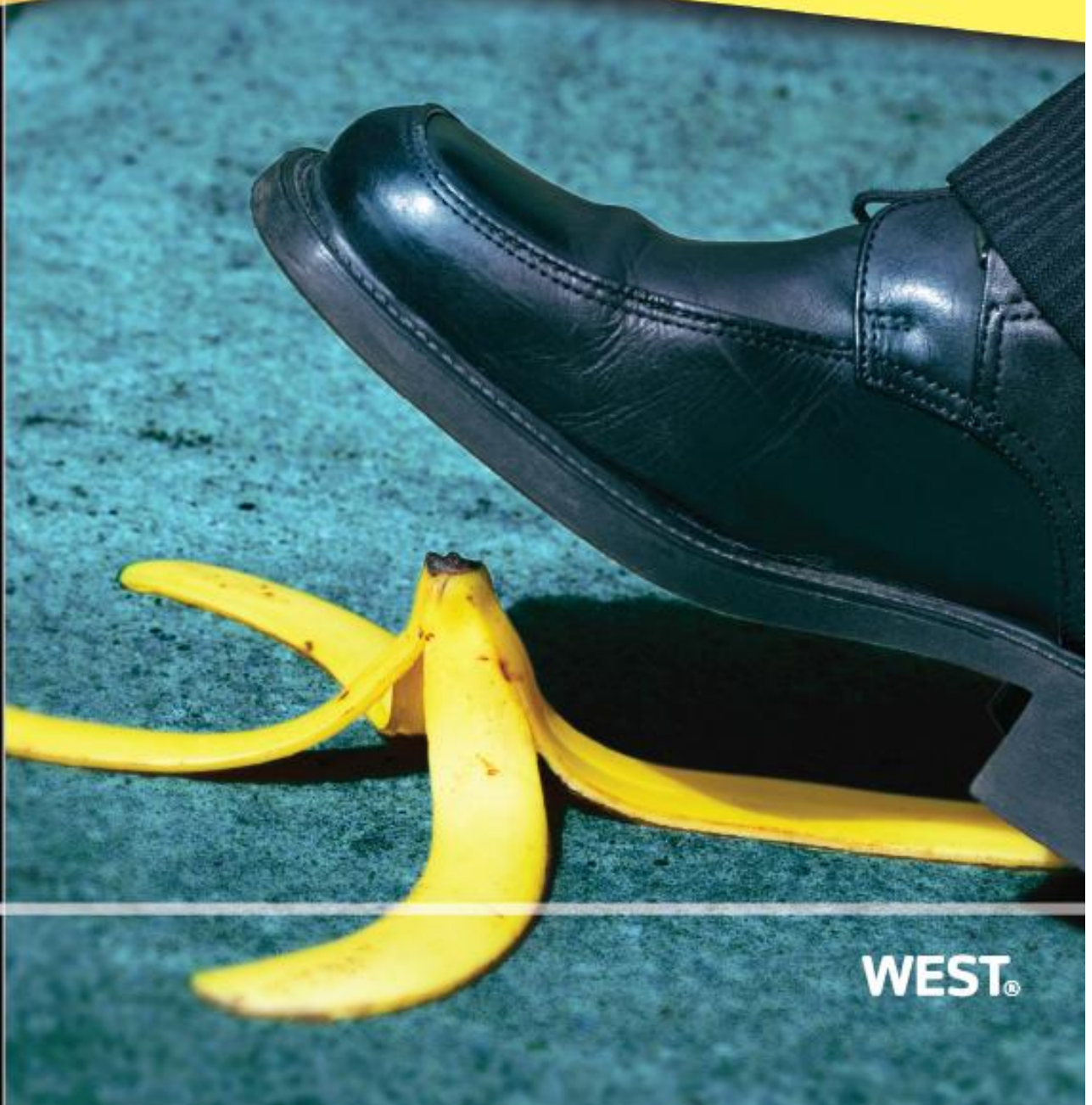


FIFTH EDITION

Torts

Edward J. Kionka

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Torts

by **Edward J. Kionka**

Professor of Law Emeritus
Southern Illinois University at Carbondale

FIFTH EDITION

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Preface

This “Black Letter” is designed to help a law student recognize and understand the basic principles and issues of law covered in a law school course. It can be used both as a study aid when preparing for classes and as a review of the subject matter when studying for an examination.

Each “Black Letter” is written by experienced law school teachers who are recognized national authorities on the subject covered.

The law is succinctly stated by the author of this “Black Letter.” In addition, the exceptions to the rules are stated in the text. The rules and exceptions have purposely been condensed to facilitate quick review and easy recollection. For an in-depth study of a point of law, citations to major student texts are given. In addition, a **Text Correlation Chart** provides a convenient means of relating material contained in the “Black Letter” to appropriate sections of the casebook the student is using in his or her law school course.

If the subject covered by this text is a code or code-related course, the code section or rule is set forth and discussed wherever applicable.

FORMAT

The format of this “Black Letter” is specially designed for review. (1) **Text.** First, it is recommended that the entire text be studied, and, if deemed necessary, supplemented by the student texts cited. (2) **Capsule Summary.** The Capsule Summary is an abbreviated review of the subject matter which can be used both before and after studying the main body of the text. The headings in the Capsule

Summary follow the main text of the “Black Letter.” (3) **Table of Contents.** The Table of Contents is in outline form to help you organize the details of the subject and the Summary of Contents gives you a final overview of the materials. (4) **Practice Examination.** The Practice Examination in Appendix B gives you the opportunity of testing yourself with the type of question asked on an exam, and comparing your answer with a model answer.

In addition, a number of other features are included to help you understand the subject matter and prepare for examinations:

Short Questions and Answers: This feature is designed to help you spot and recognize issues in the examination. We feel that issue recognition is a major ingredient in successfully writing an examination.

Perspective: In this feature, the authors discuss their approach to the topic, the approach used in preparing the materials, and any tips on studying for and writing examinations.

Analysis: This feature, at the beginning of each section, is designed to give a quick summary of a particular section to help you recall the subject matter and to help you determine which areas need the most extensive review.

Examples: This feature is designed to illustrate, through fact situations, the law just stated. This, we believe, should help you analytically approach a question on the examination.

Glossary: This feature is designed to refamiliarize you with the meaning of a particular legal term. We believe that the recognition of words of art used in an examination helps you to better analyze the question. In addition, when writing an examination you should know the precise definition of a word of art you intend to use.

We believe that the materials in this “Black Letter” will facilitate your study of a law school course and assure success in writing examinations not only for the course but for the bar examination. We wish you success.

THE PUBLISHER

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Capsule Summary of Tort Law

■ PART ONE: INTRODUCTION

I. GENERAL CONSIDERATIONS

“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

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

Intent usually must be proved circumstantially—that is, inferred from D's 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 intent, but can aggravate or mitigate the damage award, or be part of an affirmative defense.

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): The Extended Liability Principle

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

The tort is the contact; P need not have been aware of the contact at the time.

4. No Harm Intended?

The courts are split on whether it is only required that D intend the contact which is in fact harmful or offensive ("single intent"), or whether P must also prove that D intended not only the contact but also harm or offense ("dual intent").

5. Harmful or Offensive Contact

A harmful contact is one that produces bodily harm. An offensive contact is one that 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. Apprehension of a future battery is not an assault.

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 often have a common-law or statutory privilege to detain persons reasonably suspected of shoplifting for a reasonable time and in a reasonable manner 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—"so extreme in degree as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in civilized society"—not merely insulting, profane, abusive, annoying, or even threatening. Unless D knows of some special sensitivity of P, mere verbal abuse, name-calling, rudeness, insolence, and threats to do what D has a legal right to do are generally not actionable, absent circumstances of aggravation. However, a single instance of conduct that falls short of the required standard may become actionable if repeated or carried out over time.

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. R.3d removes these limitations and requires only that P contemporaneously perceive the distress-producing event. 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 or vulnerable. But if the required threshold is met, D is liable for greater harm (e.g. illness or other bodily harm) even if that harm was unforeseeable.

7. Transferred Intent

The doctrine of transferred intent does not apply insofar as D's intent was to commit some other intentional tort. But D's intent to harm X will support a claim by P.

8. First Amendment Limitations

"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). The First Amendment also provides some protection to religiously-motivated conduct.

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 or was the last occupier.

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 to 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 reckless or 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 unauthorized 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, or where the document is important to the exercise of the property right.

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.

2. 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

A. Privilege

1. Introduction

"Privilege" is the general term applied to various defenses in which special circumstances justify conduct that otherwise would 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. P can revoke his consent at any time.

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. However, minors of a certain age and capacity may consent to certain contacts and medical procedures. Adult family members or guardians may sometimes be empowered to give consent on behalf of a minor or an incapacitated adult. But a competent patient may not be treated over her objection.

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 mere 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. Consent to certain conduct does not negate other torts arising from the same transaction.

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 or a sexual assault, 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.

In many states, statutes create rights of self-defense or defense of property that justify the use of deadly force in certain situations, such as

defense of one's dwelling, or eliminate the retreat requirement if D reasonably believes he is in imminent danger of death, serious bodily harm, or a sexual assault.

2. Defense of Third Persons

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

Effect of mistake. Under one view, D's privilege to defend T exists only if and to the extent that T in fact had a right of self-defense. Others hold that D's reasonable mistake does not negate the privilege

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.

4. Form of Defensive Conduct

D's self-defensive conduct may take the form of an assault, battery, or false imprisonment, as appropriate to the situation.

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 that 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.

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. But where a state actor destroys private property in an emergency for the public good, some states extend their "takings" clause in the state constitution to allow compensation to the owner.

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 that 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; acts required or authorized by legislation; and acts required by the constitution or civil rights laws.

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* that 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 in that situation. 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 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. A person with exceptional strength, agility, etc. is held to the standard of a reasonably prudent person with those exceptional abilities.

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” or inherently dangerous activities requiring special skills and training, such as driving a car or flying an airplane. In those cases, the minor is held to the adult standard. 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; 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; to hire, retain, or fail to supervise persons that D knew or should have known were dangerous, incompetent, or otherwise unfit for the work for which they were hired.

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" or "risk-utility" 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 that 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.

Statutes that impose new duties. If the statute creates a wholly new obligation (but not a new cause of action) and D had no corresponding common law duty to P, courts tend to give the statute no tort law effect at all.

Licensing statutes. Most courts hold that 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. However, if D lacks a license because D failed necessary qualifications that have a safety purpose, the violation may be relevant and admissible.

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.

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 construc-

tion 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. The usual burden and sufficiency of proof rules apply.

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 and assist it in drawing inferences. 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, she 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 products 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.

Relevance. Such evidence might show that a risk is foreseeable, or that D knew or should have known of the risk, that the risk is an unreasonable one unless the customary precaution is taken, or that a particular safety precaution is feasible.

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 (“Willful and Wanton Misconduct”)

1. Definition

Conduct is in “reckless disregard of the safety of another” (also called “willful 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. The Restatement (Third) standard is: D knew or must have known of the risk, and the precautions that would reduce or eliminate the risk are so slight relative to the magnitude of the risk that D’s conduct (in failing to take those precautions) shows a conscious indifference to the risk.

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 that 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, even when D realizes P 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 that 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 or take custody of 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.

Statutory duty to report child abuse. Most courts hold that a statutory requirement to report child abuse does not serve as a basis for tort liability for failure to report. A few courts have held that the reporting statute implies a private right of action, or will support a negligence claim.

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.

Duty to protect school children. Students in primary and secondary schools who are abused by teachers or other school personnel of course

have a cause of action against the abuser. But the school is not vicariously liable because the employee's acts are outside the scope of employment. The school, however, may be liable for negligence in hiring, retaining or supervising the abusers. It may also be liable if school officials knew or should have known of the abuse but took no effective action. The student may also have a civil rights claim against the school. The school may also be liable for negligently failing to protect students from violence by other students, or from attacks by intruders on school grounds.

Landlords. Generally, courts have been slow to impose on landlords a duty to protect tenants and their guests from criminal attack by third persons. A duty may arise when the landlord has created, or is responsible for, a known defective condition on the premises that foreseeably enhances the risk of criminal attack. In addition, a landlord who undertakes to provide security in common areas and other areas over which the landlord has control may be held to have assumed a duty to provide that security with reasonable care. The Restatement (Third) of Torts advocates an unqualified duty of reasonable care. Some courts have found a duty to tenants and even third persons to use reasonable care to protect them from dangerous tenants or their dangerous animals if the landlord has the power to do so.

The *Tarasoff* rule: Duty to warn third persons of patient's threat. Under the *Tarasoff* rule, followed in some but not all states, a mental health professional has a duty to use reasonable care to warn a specific third person of a specific serious threat by his patient against that person if the professional, exercising proper professional judgment, in fact predicted or should have predicted that the patient was likely to carry out the threat.

Health care professionals: Duty to warn patient or third persons of risks to third persons. Courts are split on whether a health care professional has a duty to warn her patient of dangers to third persons resulting from treatment or medication administered to the patient, or that the patient's communicable disease puts third persons at risk. Courts are also split on whether and when a health care professional has a duty to communicate such warnings to such third persons directly.

Duty of land possessor to protect lawful entrants from violence by third persons. There are several tests used in cases involving attacks upon patrons on business premises. These tests focus on the foreseeability aspect.

- 1) Specific harm rule. Under this rule, a landowner does not owe a duty to protect visitors from violent acts of third persons unless he is aware of specific, imminent harm.
- 2) Prior similar incidents rule. Under this test, foreseeability is established by evidence of previous crimes on or near the premises.
- 3) Totality of the circumstances test. This test takes additional factors into account, such as the nature, condition, and location of the land, and any other relevant factual circumstances.
- 4) Balancing test. The foreseeability of harm is balanced against the burden on the business of imposing a duty to protect against the criminal acts of third persons.

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.

Contracts for security services. When D contracts to provide security services intended to reduce the risk of physical harm, D is liable for failure to use reasonable care in doing so if the failure increases the risk of harm beyond that which otherwise would have existed, or the other person relies on the undertaking.

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.

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. reduction of damages. Contributory negligence was once a complete defense that totally barred P's recovery. Now, in most jurisdictions, within certain limits, it merely reduces P's 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 (one-fourth of states), 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%, ~12 states) or "greater than" (51%, ~21 states) that of the defendant (or the 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. Another version: (1) the nature of the risk-creating conduct (including any awareness of the risk or indifference to it, and any intent to harm) and (2) the causal connection between the D's risk-creating conduct and the harm.

Intentional or reckless conduct. Traditionally, ordinary contributory negligence was not a defense to an intentional tort or to D's 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 perhaps not if D's conduct was an intentional tort.

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 or fault. In some jurisdictions, if P's contributory fault was seriously unlawful or immoral conduct, P will be barred from recovery altogether. In some cases, P's serious fault has been found to be a superseding cause of P's own harm.

Public policy exceptions. Courts have sometimes refused to permit D to assert the defense of contributory negligence in cases where an overriding public policy prevails.

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 that 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 or derivative loss. 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 was 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 other persons 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 P's fault 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. Most courts have held that a parent's pre-injury release of a child's rights is invalid.

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.

Assumption of risk as negating defendant's negligence. Where D's alleged negligence was in failing to provide certain safety protection, defendant may not be negligent at all if D reasonably believes that P has accepted the risk and D is relying on P to provide his own protection.

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 does not extinguish the cause of action. It 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, active concealment of the existence of the cause of action from P tolls the running of the statute. Mere nondisclosure is not enough, unless there is a fiduciary relationship between the parties.

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 limitation 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 for which D might be subject to liability.

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 as a further condition on the right to sue.

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 by comprehensive tort immunity statutes. 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 activities by nonprofit charities, 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

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. P was injured by a product (such as a drug) that was produced and sold by multiple manufacturers, but P 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. There is some variation as to the effect of absent or escaped manufacturers on the shares of the remaining defendants. Many courts have disallowed market share liability altogether.

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. Some courts have also applied the loss-of-chance doctrine to cases in which P's enhanced injury did not result in death, or where D's negligence created an increased risk of future harm.

C. Scope of Liability (Proximate Cause)

1. General Principle

Proximate cause or scope of liability rules 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. This has been superseded and replaced by R.3d Liability for Physical & Emotional Harm § 29, which adopts the risk principle.

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 a third person; (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 foreseeable self-inflicted harm; (5) acts by rescuers; (6) efforts by P to mitigate the effects of his injury; and (7) disease or subsequent physical or mental injuries resulting from the impairment of P's health caused by the original injury.

Foreseeable consequences. If the resulting harm is foreseeably within the risk created by D's tortious conduct, then even an unforeseeable intervening cause ordinarily does not supersede D's liability.

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.

■ PART FIVE: SPECIAL LIABILITY RULES FOR PARTICULAR ACTIVITIES

VII. OVERVIEW

Certain activities are governed by special tort liability rules. In some cases, these rules are merely special applications of the general principles of tort liability previously discussed. In other cases, these rules expand or contract the duty which D would otherwise have had under those general principles. These special duty rules often have the effect of taking issues that under the general rules of tort liability would have been issues for the jury and making them issues for the court.

VIII. OWNERS AND OCCUPIERS OF LAND

A. Persons Liable

Certain special duty rules apply to claims against possessors of land for injuries resulting from either a condition of the premises or an activity being conducted on the premises.

B. Persons Outside the Premises

1. Rule

As a general rule, a possessor must exercise reasonable care to see that *activities* (conduct) and *artificial conditions* on the land do not harm his neighbors or passers-by on adjacent ways.

2. Natural Conditions

Traditionally, a possessor's duty to persons outside the premises with respect to natural conditions of the land was limited. The modern view (R.3d Liability for Physical & Emotional Harm § 54) is that for *natural* conditions that pose a risk of physical harm to persons or property not on the land, he has a duty of reasonable care if the land is commercial; otherwise he has a duty of reasonable care only if he knows of the risk or the risk is obvious. As to land adjacent to a public walkway, the possessor has no duty with regard to a risk posed by the condition of the walkway to pedestrians or others if the possessor did not create the risk.

C. Trespassing Adults

1. Trespasser Defined

A trespasser (T) is one who enters or remains upon D's land without a privilege to do so.

2. General Rule

Under the traditional common-law rule, D is under no duty to exercise reasonable care (1) to make the premises reasonably safe for T (or to warn T of hidden dangers) or (2) to carry on activities on the premises so as not to endanger T. But D's immunity from liability to T does not extend to intentional torts or to harm caused by D's reckless ("willful and wanton") misconduct.

3. Exceptions to the Common-Law No-Duty Rule

a. Frequent trespassers on a limited area. When D knows or should know that trespassers constantly intrude upon a limited area of his premises, D owes a duty of reasonable care to such a T (1) in the conduct of active operations on the premises, and (2) to warn T of a dangerous artificial condition on the land (created or maintained by D) which D has reason to believe T will not discover, provided the risk to T is one of serious bodily harm.

b. Discovered trespassers. Once D discovers the presence of a T on his land, D must exercise reasonable care to (1) conduct his activities with regard to T's safety, (2) warn T of an artificial condition which poses a risk of serious bodily harm, if D knows or has reason to know that T is in dangerous proximity to it and that T will probably not discover the danger or realize the risk, and (3) control those forces within his control which threaten T's safety, or give T an adequate warning of them.

c. Duty to Rescue. D may have to exercise reasonable care to come to the aid of a discovered T who is injured or in peril on D's premises, even though D is not responsible for T's situation.

4. The Restatement (Third) of Torts

The Restatement (Third) creates a new classification: the flagrant trespasser. R.3d Liability for Physical & Emotional Harm § 52. The duty to a flagrant trespasser is the same as the traditional common law duty—not to injure him by intentional or "willful and wanton" conduct. Under § 51, the possessor owes a duty of reasonable care to all other entrants on the land, including non-flagrant trespassers.

D. Trespassing Children ("Attractive Nuisance" Doctrine)

1. Discussion

Most jurisdictions have special rules applicable to child trespassers, sometimes called the "turntable" or "attractive nuisance" doctrine.

2. Rule

A possessor of land is subject to liability for physical harm to trespassing children caused by an artificial condition upon the land if the following requirements are met, and D fails to exercise reasonable care to eliminate the danger to such children or otherwise to protect them.

Knowledge of child trespassers. D must know or have reason to know that the place where the condition exists is one where children are likely to trespass.

Attraction of condition. The child need not be attracted onto the premises by the condition that injures him. It is enough that children who do foreseeably trespass can be expected to encounter the condition.

Knowledge of condition. D must know or have reason to know of the condition, and D must realize or should realize that it involves an unreasonable risk of death or serious bodily harm to such children. D need not have created the condition, but merely maintain it or permit it to exist.

Type of condition. The doctrine applies only to artificial conditions (not activities or natural conditions) upon the land. In addition, some courts have created categories of “common hazards” as to which D is not liable, such as fire, falling from a height, drowning in water, visible machinery in motion, piles of lumber, etc. However, the better view is that whether the risk is unreasonable depends on the facts and circumstances of each case.

Risk of harm. The condition must create a risk of serious bodily harm or death; but if it does, D is subject to liability for any lesser injury.

Child’s awareness of risk. The child, because of his youth, did not (a) discover the condition or (b) realize the risk.

Reasonableness of D’s conduct. The utility to D of maintaining the condition and the burden of eliminating the danger were outweighed by the risk to the children.

3. General Duty of Reasonable Care

Some courts, and R.3d Liability for Physical & Emotional Harm § 51 cmt. *l*, hold that the possessor owes a duty of reasonable care to children whose trespasses can be anticipated.

E. Licensees and Invitees

1. Licensee

A licensee is a person who has a privilege to enter or remain on D's land, but is not an invitee.

2. Invitee

An "invitee" is either a public invitee or a business visitor.

Public invitee. A public invitee is a person who is invited to enter or remain on land as a member of the public for a purpose for which the land is held open to the public.

Business visitors. A business visitor is a person who is invited to enter or remain on D's land for a purpose directly or indirectly connected with business dealings with the possessor of the land. This includes potential or future business.

Express or implied. The invitation may be either express, or implied from D's conduct, prior dealings, usages in the community, etc.

Incidental visitors. Invitees include persons whose visit is for the convenience, or arises out of the necessities of, others who are on the land for a business purpose.

Social guests. Traditionally, a social guest in D's home is a licensee, despite incidental services performed by the guest or an incidental business motive behind the invitation. However, some courts and legislation now classify social guests as invitees.

Scope of invitation. The invitation may be expressly or impliedly limited, as to (a) duration, (b) purpose, or (c) the portion of the premises to which the invitation extends. If P exceeds the scope of the invitation, he becomes a trespasser or licensee, depending upon whether or not D consents to his remaining.

3. Duty to Licensees

D's duty to a licensee is similar (but not identical) to that owed a discovered trespasser. Specifically:

Intentional and reckless conduct. D is subject to liability to a licensee for intentional and reckless ("wilful and wanton") conduct.

Active operations (latent dangers). In conducting his activities on the premises, D must exercise reasonable care for the safety of licensees, provided (a) he should expect that they will not discover or realize the danger and (b) they do not know or have reason to know of D's activities and the risk involved.

Latent conditions. As to dangerous conditions, D is subject to liability to a licensee if (a) D knows or has reason to know of the condition and the risk it creates, (b) the licensee does not, (c) D should expect that the licensee will not discover or realize the danger, and (d) D fails to exercise reasonable care to make the condition safe, or to warn the licensee of the condition and the risk involved.

4. Duty to Invitees

Rule. As to invitees, there is no duty limitation; D must exercise reasonable care for their safety.

Open and obvious dangers. Until recently, it was commonly held that even as to invitees, D was not liable for "open and obvious" dangers. The emerging and better view is that the obviousness of the danger is merely one fact bearing on whether D was negligent or on P's contributory fault or assumption of risk.

Acts of third persons. D must exercise reasonable care to protect his business invitees against foreseeable harm by third persons on the premises, and to discover that such acts by third persons are being done or are likely to occur. Some courts have held that, on particular facts, D's duty does not extend to protection against criminal violence by third persons, but the prevailing view is that in such cases D's negligence is a question of fact for the jury.

5. Other Privileged Entrants; Public Employees

General rule. One who enters D's land by virtue of a privilege other than that created by D's consent is ordinarily classified a licensee.

Public employee, economic nexus. Public employees who are required by law regularly to enter D's premises to make inspections, deliveries, or collections necessary to D's operations are invitees.

Firemen, policemen. Firemen and policemen traditionally were classified as licensees. However, there is a trend to make them invitees, at least

when upon those parts of the premises held open to the public or when their presence at the place of injury was foreseeable.

Firefighter's rule. In many jurisdictions, the possessor has no general duty of reasonable care to professional emergency responders with respect to negligence that occasioned the emergency response, and in some cases for conditions of the premises.

6. Recreational Entrants

Most states now have statutes that deny invitee status to persons invited or permitted to come upon D's land without charge for recreational purposes (e.g., hunting, fishing, swimming).

F. Rejection of Categories

1. General Duty of Ordinary Care

Some jurisdictions have abolished or merged the traditional categories, either completely or as to licensees and invitees but not trespassers, substituting a general duty of ordinary care under the circumstances.

2. Expansion of Invitee Status

In jurisdictions retaining the traditional categories, there is a trend to expand the scope of invitee status. In some, all social guests are invitees.

3. The Restatement (Third) of Torts

Under R.3d Liability for Physical & Emotional Harm § 51, except for flagrant trespassers, the possessor owes a duty of reasonable care to all entrants with regard to almost all risks—those created by activities on the land, artificial conditions, natural conditions, and other risks when any of the affirmative duties apply.

G. Lessors

1. General Rule

Under the traditional general rule, a lessor of real property is not liable to his lessee (or anyone on the premises with the lessee's consent) for physical harm sustained by such persons during the term of the lease as a result of a condition of the leased premises.

2. Exception: Latent Hazards

When the lessor knows or has reason to know of a concealed unreasonably dangerous condition (artificial or natural) existing on the premises

at the time the lessee takes possession, but fails to warn the lessee about it, the lessor is subject to liability to the lessee and his guests for physical harm caused by that condition.

3. **Exception: Persons Outside the Premises**

Pre-existing conditions. The lessor remains liable for a condition (existing at the time the lessee takes possession) which the lessor realizes or should realize unreasonably endangers persons outside the premises.

Conditions and activities during lease. A lessor is generally not liable for conditions which come into existence after the lessee takes possession or for the lessee's activities on the premises. But the lessor is subject to liability to persons off the premises if he knows when the lease is executed that the lessee intends to conduct an activity on the premises dangerous to such persons and nevertheless consents to that activity or fails to require proper precautions.

Contract to repair. In some jurisdictions, negligent failure to perform the lessor's contract to repair the premises subjects him to liability to persons off the premises.

4. **Exception: Public Admission**

If the lease is for a purpose which involves the admission of the public, the lessor must exercise reasonable care to inspect the premises and remedy unreasonably dangerous conditions which exist when possession is transferred, if he has reason to expect that the public will be admitted before the lessee has remedied the condition.

Lessee's Agreement. The lessee's agreement to make the repair does not exonerate the lessor unless the lessor could reasonably expect him to perform in time.

5. **Exception: Retained Control**

The lessor is subject to liability for physical harm caused by a dangerous condition located on a part of the premises which the lessee is entitled to use and over which the lessor has retained control, provided the lessor by the exercise of reasonable care could have (1) discovered the condition and the unreasonable risk and (2) made it reasonably safe.

Liability extends to the lessee, members of his family, employees, and all lawful visitors on the premises. It does not extend to areas where tenants and their guests are forbidden.

The fact that the danger is open and obvious does not affect D's duty, but may be relevant on P's contributory fault.

Lease exculpatory clause. A clause in the lease exonerating the lessor from this liability may or may not be effective as to the tenant, but is always ineffective as to third persons not parties to the lease.

Criminal violence. The cases are divided on whether a landlord is subject to liability to his tenants for criminal violence by third persons occurring in common areas of the building, based on his failure to provide adequate security.

6. **Exception: Agreement to Repair**

In most jurisdictions, the lessor's contractual promise to repair or maintain the leased premises subjects him to tort liability for negligence in failing to perform his contract resulting in an unreasonable risk of physical harm, whether the disrepair existed before or after the lessee took possession. The contract to repair must be supported by consideration.

The lessor's liability extends to the tenant and all others on the premises with the tenant's consent. The extent of D's duty is defined by the contract.

Notice. Unless otherwise provided by the lease, the lessor's duty is only to exercise reasonable care to make the repairs after he has notice of the need for them. He need not inspect the premises.

Services. The lessor may be liable for failure to provide a service required by the lease (e.g. heat, light) where the premises cannot be safely used without it.

7. **Exception: Negligent Repairs**

A lessor who undertakes (or purports to undertake) repair of the leased premises is subject to liability for physical harm resulting if (a) he increases the danger which existed before he undertook the repairs, or (b) a concealed danger remains and his repairs create a deceptive appearance of safety, or (c) the danger is a latent one and the lessor assures the lessee that the repairs have been made when in fact they have not, provided the danger (or enhanced danger) is such that the lessee neither knows nor should know that the repairs were not made or were made negligently.

8. Independent Contractors

The lessor is liable for the negligence of an independent contractor in performing these duties to the same extent as if the contractor were his employee.

9. General Duty of Reasonable Care

Several states have abandoned this scheme and substituted the rule that the lessor is under a general duty of reasonable care under the circumstances. R.3d Liability for Physical & Emotional Harm § 53 provides that lessors have a duty of reasonable care for a) the portions of the leased premises over which the lessor retains control, b) conduct of the lessor creating risks to others, and c) disclosure of certain dangerous conditions. It further states that a landlord also has a duty based on applicable statutes, contractual or voluntary undertakings, and compliance with an implied warranty of habitability.

10. Statutes

Statutes and ordinances often impose specific requirements on lessors, for example, to keep the premises in repair. Violation of these statutes can subject the lessor to tort liability for resulting physical harm.

H. Vendors and Vendees

1. Vendors and Grantors

General rule. A former possessor of land is not subject to liability to his transferee for physical harm resulting from a dangerous condition of the premises (natural or artificial), whether existing when, or arising after, the transferee took possession.

Exception: Latent hazards. A transferor (D) is subject to liability to his transferee (P) (or others on the premises with his consent) for physical harm resulting from a concealed dangerous condition, provided (1) P did not know or have reason to know of the condition or the risk involved; (2) D knew of the condition, realized or should have realized the risk it created, and could anticipate that P would not discover the condition or appreciate the risk; and (3) the risk is an unreasonable one.

2. Builder–Vendors

Courts are increasingly subjecting persons who build and market new buildings to tort liability for unreasonably dangerous conditions in them, via (1) ordinary negligence principles, (2) strict liability for breach

of warranty, or (3) in a few cases, strict liability analogous to strict products liability, at least where the builder-vendor is a mass-producer of homes.

3. **Vendees and Other Transferees**

A transferee of land thereby becomes its possessor and is subject to a possessor's duties and liabilities, but not until he discovers or should have discovered any dangerous conditions and has had a reasonable time to remedy them.

IX. **PRODUCTS LIABILITY**

Liability for physical harm caused by an unsafe product may be based on one or more of three legal theories: negligence, breach of warranty, or strict tort liability.

A. **Negligence**

In general, ordinary negligence principles apply to products liability actions brought on a negligence theory.

1. **Privity Limitations**

At one time, the general rule was that the manufacturer or other seller of an unsafe product was not liable in negligence to the user or consumer absent privity of contract between P and D (*Winterbottom v. Wright*)—that is, unless P had bought the product directly from D. Exceptions arose and expanded, and eventually *MacPherson v. Buick Motor Co.* (N.Y.1916) held that lack of privity is not a defense when it is foreseeable that the product, if negligently made, can cause injury to a class of persons which includes P. This effectively abolished the privity limitation.

2. **Persons Protected**

D is subject to liability not only to the ultimate purchaser or lessee of the product but also to all foreseeable users or consumers, and to all other persons foreseeably exposed to the risk.

3. **Types of Negligent Conduct**

Manufacturers. Negligence in the manufacturing process includes negligent design; errors or omissions during production; failure to properly test or inspect; unsafe containers or packaging; inadequate warnings or directions for use; and misrepresentation. A subsequent seller's failure to inspect does not relieve the manufacturer of liability for his negligence.

Subsequent sellers. Subsequent sellers (distributors, retailers) may be negligent in failing to warn of the existence of an unsafe condition or otherwise protect the user. Under the majority view, such seller is liable only for dangers of which he knew or had reason to know; he has no duty to inspect or test the product to discover latent dangers.

Other suppliers. Lessors and others who furnish chattels commercially are liable for negligence in furnishing an unsafe chattel; their duty includes a duty to inspect. Other suppliers—e.g., donors, gratuitous bailors—are subject to liability if they knew or had reason to know that the product was unsafe. And D may be liable for furnishing a chattel to one who he knows or has reason to know is incompetent to use it safely.

Independent contractors. Contractors who make, rebuild, or repair a chattel are subject to similar rules.

Ostensible suppliers. A supplier who puts out as its own a chattel manufactured by another is subject to the same liability as though the supplier was its manufacturer.

B. Breach of Warranty

1. Types of Warranties

Warranty is not a tort concept, but breach of certain (usually, U.C.C.) warranties gives rise to an action for resulting physical harm. Liability is strict.

Express (§ 2-313). Express warranties are promissory assertions of fact or descriptions which are part of the basis of the bargain.

Implied warranty of merchantability (§ 2-314). The implied warranty of merchantability implies minimum standards of quality including safety. (D must be a “merchant” with respect to goods of that kind).

Implied warranty of fitness for a particular purpose (§ 2-315). This warranty arises when the buyer relies on the seller to furnish goods suitable for a particular specified use.

2. Limitations

The principal limitations on breach of warranty liability are (1) the seller must be given prompt notice of the breach, (2) the buyer must have relied upon the warranty, and (3) the seller in certain cases can limit or disclaim these warranties (but see U.C.C. § 2-719(3)).

3. Privity

As in the case of negligence, liability for breach of warranty was once limited to the parties to the contract of sale, but that limitation has been modified.

C. Strict Tort Liability for Defective Products

Strict tort liability for defective products was first adopted in *Greenman v. Yuba Power Products, Inc.* (Cal. 1963). Shortly thereafter this principle was codified in R.2d § 402A, and it is now the law in most jurisdictions.

1. Rule

D is strictly liable for physical harm to P or his property caused by a defective condition of a product which renders it unreasonably dangerous, if (1) D sold the product in that condition and (2) D is engaged in the business of selling such products. R.2d § 402A.

2. Products

The term “product” includes all forms of tangible personal property (chattels). In addition to manufactured products, it includes products which undergo little or no processing, (e.g., bottled water). The doctrine has not been extended to transactions which, although incidentally involving a product, are essentially the rendition of a service.

3. Elements of Plaintiff’s Claim

In a strict liability claim, P must prove: (1) the product was “defective” (and perhaps also that the defect made the product “unreasonably dangerous”); (2) the defect was a factual and proximate cause of P’s harm; and (3) the product was defective when it left D’s possession and control.

4. Defect Unreasonably Dangerous

In most jurisdictions, D is subject to liability only if the product contains a “defect” which renders it “unreasonably dangerous” to the user or consumer. These include (1) *design* defects, such as the use of inadequate materials or the absence of feasible safety devices; (2) *manufacturing* defects (those that occur in a particular product unit because of errors or omissions in manufacturing, assembly or processing); and (3) inadequate warnings or directions for use. The defect may be in the product itself or in its container or packaging.

5. Informational Defects

In general. Warnings and directions for use may be defective if they do not *adequately* and *effectively* communicate not just that there is a danger

but its nature and extent, the possible consequences of encountering the risk, and, if applicable, alternatives that will minimize or negate the risk.

Open and obvious dangers. A product that fails to warn of an open and obvious danger, or a danger that is common knowledge, may not be defective. But if D can anticipate harm despite the obviousness of the danger, the product could be found defective if it could have been made safer, or if a warning could be found to have effectively prevented the harm.

Causation. As to informational defects, P must also prove that he would have read, understood, and heeded the hypothetical warning or instruction, although this may be inferred. D has no duty to warn of risks that were not known or knowable when the product was sold.

The learned intermediary rule. When prescription drugs or medical devices are sold to a physician with physician-appropriate warnings, the manufacturer ordinarily can rely on the physician to protect the ultimate user, and so the manufacturer has no duty to provide a warning aimed at, or communicated to, the consumer. However, the rule may be otherwise if the manufacturer markets its drugs directly to consumers.

Sophisticated users. Similar rules apply to “sophisticated users”—those users who are already aware or should be aware of the product’s dangers—for example, members of a trade or profession who are presumed to have common knowledge of the risks.

Suppliers of raw materials and component parts. Where products are sold in bulk so that further processing or distribution is contemplated, some courts hold that the supplier can rely on its buyer to use the goods properly and pass on any necessary or appropriate warnings or instructions. The same is true of manufacturers of component parts. In these cases, the product is not defective for lack of a warning to the ultimate user. Other courts hold that whether such a warning is required depends on the reasonableness of relying on the particular intermediate buyer to pass on the warnings.

6. Unreasonably Dangerous

Most jurisdictions require a showing that the product was “unreasonably dangerous.” Jurisdictions differ as to the test or tests to be applied in resolving this issue. In some jurisdictions, more than one of these tests are available, sometimes in a single case.

Consumer expectation test. One popular test is the “consumer expectation” test, requiring the product to be dangerous “to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics.”

Presumed seller’s knowledge test. Would the seller have been negligent in marketing the product if the seller had known of its harmful or dangerous condition?

Risk-benefit balancing test. The popular “risk-benefit” or “risk-utility” test requires the trier of fact to balance (1) the safety risks of the product as designed, and (2) the utility and other benefits of the product as designed, against (3) the safety risks and benefits of the product if it had been designed as the plaintiff claims it should have been. The factors most often used in this test are: (1) the usefulness and desirability of the product as designed; (2) the likelihood and probable seriousness of injury from the product as designed; (3) the availability of an alternative product or design that would meet the same need and not be as unsafe; (4) the manufacturer’s ability to eliminate the danger without impairing the product’s usefulness or making it too expensive; (5) the user’s ability to avoid the danger; (6) the user’s anticipated awareness of the danger; and (7) the feasibility of the manufacturer’s spreading the risk of loss by pricing or insurance.

Feasible alternative design. As part of P’s risk-utility case, P will usually try to show that there was a feasible alternative design—some practicable, cost-effective, and reasonable way to have designed the product that would likely have prevented P’s harm. In some situations, P risks defeat in a design-defect case without such proof. This will almost always require a qualified expert witness.

Unavoidably unsafe products. Under comment *k* to § 402A, some highly useful products (e.g., certain drugs and vaccines) may be “unavoidably unsafe” because of inherent dangerous side effects which “in the present state of human knowledge” cannot be eliminated. Such products, “properly prepared, and accompanied by proper directions and warnings,” are not defective or unreasonably dangerous. Under R.3d Products Liability § 6, if a reasonable health care provider, knowing the benefits and risks of the product, would prescribe it, then the manufacturer is not liable.

Crashworthiness. A product such as a vehicle may be defective and unreasonably dangerous because it is insufficiently crashworthy.

Food products. In the case of food products that contain a harm-causing ingredient, most courts hold that the ingredient constitutes a defect if a reasonable consumer would not expect the food product to contain that ingredient, regardless whether the ingredient is foreign (a piece of glass) or natural (a chicken bone in a chicken pie). A few courts allow strict products liability if the ingredient is foreign but not if it is natural, but permit recovery for natural ingredients on a negligence theory.

Intrinsically dangerous products. Intrinsically dangerous products—for example, tobacco, firearms, and ammunition—are not per se defective even if they could be made safer, or not sold at all.

7. Type of Harm

In most jurisdictions, strict tort liability is limited to physical harm to persons or other property and consequential damages resulting from such harm. Pecuniary loss caused by a defect in the product without an *accidental* injury to the product or to other persons or property, or resulting from non-accidental physical damage confined to the product itself, is recoverable only under a breach of warranty theory. This is known as the “economic loss” rule.

8. Plaintiffs

Liability extends not only to the purchaser or lessee of the product but to all foreseeable users or consumers. Most jurisdictions also allow recovery by “bystanders” whose exposure to the risk of injury was foreseeable.

9. Proof of a Manufacturing Defect

In a strict products liability case, the existence of an unspecified manufacturing defect may be shown by circumstantial evidence, analogous to the use of *res ipsa loquitur* in a negligence case.

10. Defenses

Contributory negligence. Prior to the adoption of comparative fault, most jurisdictions held that “ordinary” contributory negligence (i.e. failing to discover the defect or guard against the possibility of a defect) was not a defense to strict products liability. Today, some of the jurisdictions adopting comparative negligence permit P’s ordinary contributory negligence to reduce P’s damages; others do not.

Implied assumption of risk. Prior to the adoption of comparative fault, in most jurisdictions implied assumption of the risk—unreasonably proceeding to use the product after discovering the defect—was a complete bar to recovery under strict products liability. Today, in most comparative fault jurisdictions implied assumption of the risk is only a damage-reducing factor. It remains a complete bar in a few states.

Misuse. D is not liable for an injury caused by an *unforeseeable* misuse of his product. But a product may be found defective because it was not designed so as to be reasonably safe in light of an unintended but *foreseeable* misuse. Foreseeable misuse may be contributory fault.

Statute of limitations and repose. In some jurisdictions, there is an additional limitation period, called a “statute of repose,” which runs from the date of the product’s manufacture or first sale.

Disclaimer. A purported disclaimer of strict products liability is ineffective.

State of the art. In some jurisdictions, D can defend by showing that the product was designed in accordance with the “state of the art” when it was manufactured and first sold.

Preemption. When federal legislation or regulations expressly or impliedly preempt a particular field (e.g., statutes governing cigarette warnings, certain medical products), state tort law either cannot regulate the field at all or cannot impose a higher standard than the applicable federal law.

Presumption of non-defectiveness. Some state statutes provide that when a product is in compliance with a federal or state regulation concerning that product, there is a rebuttable presumption that the product is not defective with respect to its design or informational characteristics.

Government contractor defense. Liability for design defects in military equipment cannot be imposed, pursuant to state law, when (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States.

11. Defendants

Strict products liability extends to (1) the producer (manufacturer, processor, assembler, packager, or bottler) of the product, and of the

component part which was defective, and (2) all downstream vendors and commercial lessors and bailors. D must be “engaged in the business” of dealing in that product, but such product need not be D’s principal business. Courts usually refuse to extend strict liability to dealers in used products or “casual” sellers.

12. Nondelegable Duties

Although the manufacturer is usually not liable unless the product was defective when it left his control, an exception exists when the manufacturer places in the stream of commerce an unfinished or unassembled product which must be assembled or finished by his dealer, who in doing so creates the defect. And a manufacturer cannot delegate to his purchaser the duty to select and purchase optional safety devices, without which the product is not reasonably safe.

13. Post-Sale Duties

In some jurisdictions, a manufacturer may be subject to liability for failure to “retrofit” a previously marketed product with safety devices (or to provide appropriate warnings) when locating current users and furnishing such devices or warnings is not an unreasonable burden compared to the risk of injury inherent in the product without them, even though the product was arguably not unsafe when it was first marketed.

14. Misrepresentation

A similar form of strict liability is imposed on one who misrepresents a material fact to the public concerning the character or quality of a chattel sold by him, and the purchaser relies upon such misrepresentation and thereby sustains physical harm.

D. The Restatement (Third) of Torts: Products Liability

1. New Standards for Different Types of Product Defects

The new products liability provisions, which supersede § 402A, now explicitly recognize the three categories of product defects: manufacturing defects, design defects, and informational defects (warnings and directions for use). Sellers remain strictly liable for manufacturing defects, but the Restatement’s proposed liability for design defects is close to a negligence standard, imposing liability only for “foreseeable risks of harm” that could have been avoided by the adoption of a “reasonable alternative design or by reasonable instructions or warn-

ings.” Similarly, there is no duty to warn under this provision unless P can prove that the manufacturer knew or should have known of the risk about which P claims she should have been warned. However, if the product’s design is “manifestly unreasonable” because of its negligible utility and high risk of danger, defectiveness can be found even without proof of an alternative design (e.g., a dangerous toy gun).

As an alternative, P can recover if she can prove that the product as designed, or the warning, failed to comply with an applicable safety statute or administrative regulation. On the other hand, as evidence that the product was not defective, D can prove the product’s compliance with an applicable safety statute or administrative regulation, although such compliance is not conclusive on the issue of defectiveness.

2. Prescription Drug and Medical Device Liability

Under the Restatement (Third), a prescription drug or medical device is not defective in design unless the foreseeable risk of harm is so “great in relation to its foreseeable therapeutic benefits that reasonable health-care providers, knowing of such foreseeable risks and therapeutic benefits, would not prescribe the drug or medical device for any class of patients.” Warnings need only be given to “health care providers” unless the manufacturer “knows or has reason to know that health-care providers will not be in a position to reduce the risks of harm in accordance with the instructions or warnings.” In that case, but only in that case, an adequate warning is owed to the patient.

Strict liability will still apply to drugs and medical products for manufacturing defects.

X. VICARIOUS LIABILITY

A. Introduction

1. General Rule

One (D1) who, while acting on behalf of another, commits a tortious act and thereby subjects himself to tort liability to P may also thereby subject the person on whose behalf he is acting (D2) to tort liability to P. It is said that D2 is *vicariously* liable to P.

2. Relationships Giving Rise to Vicarious Liability

The forms of relationships that potentially give rise to vicarious liability are (1) master-servant, (2) principal-agent, and (3) employer-independent

contractor. For purposes of tort law, there is little distinction between the liability rules governing master-servant and principal-agent relationships. However, the vicarious liability of one who employs an independent contractor is significantly different.

B. Employers and Employees (Master–Servant)

1. Vicarious Liability

If, at the time of his negligent or reckless act, the servant was acting in the “scope” or “course and scope” of his employment, then his employer is vicariously liable to P for his servant’s tort.

2. Scope of Employment

Whether the employee was acting in the scope of his employment is a question of fact, which depends upon (a) the employee’s job description and assigned duties, (b) the time, place and purpose of the employee’s act, (c) the similarity of his conduct to the things he was hired to do, or which are commonly done by such employees, and (d) the foreseeability of his act.

The fact that the employee disregarded the employer’s instructions or work rules does not necessarily, in and of itself, remove the employee from the scope of his employment.

3. Employees in Transit

Under the “going-and-coming” rule, an employee is normally outside the scope of his employment when in transit to and from work. However, where the trip involves some incidental benefit to the employer, not common to commuting trips by ordinary workers, or where the employee is traveling away from home on the employer’s business, the employee may be found within the scope of his employment during the trip.

4. Frolic and Detour

An employee who is in transit during working hours on the employer’s business, such as traveling from one job site to another, is still within the scope of employment if he makes a *minor* or trivial deviation from the assigned travel for personal reasons. However, if the employee makes a substantial deviation, in time or space, from the expected route, he may be found outside the scope of employment during that deviation.

5. Intentional Torts

An employer is vicariously liable for his employee’s intentional torts committed in the scope of his employment and in furtherance of his

employer's business, at least if the employee's act was foreseeable. And where there is some special relationship between the employer and P such that the employer owes P a duty of protection, the employer is subject to vicarious liability for his servant's intentional torts even if committed for personal reasons. Statutory and other special relationships may expand liability for such acts.

6. Employer's Liability

An employer may be directly (not vicariously) liable for torts committed by his employee based upon the employer's own negligence or other conduct. Thus, the employer may have been negligent in selecting, instructing, supervising, or retaining the employee; or he may have commanded, authorized or ratified the employee's tortious act.

7. Partnerships, Joint Ventures

A partner or joint venturer acting in the scope of the business subjects his other partners and joint venturers to vicarious tort liability to third persons.

C. Independent Contractors

1. General Rule

An employer is not vicariously liable for physical harm caused by the tortious conduct of his independent contractor or his independent contractor's employees.

2. Exception: Employer's Own Negligence

Negligent selection. An employer is subject to liability for physical harm resulting from his failure to exercise reasonable care to select a reasonably competent, experienced, careful, and properly equipped contractor.

Negligent instruction. An employer is subject to liability for the negligence of an independent contractor acting in accordance with the employer's instructions.

Failure to inspect completed work. An employer has a duty to inspect his contractor's completed work, at least where he has a duty to third persons to maintain the land or chattels for their protection.

Failure to require precautions. If the work will create a foreseeable danger to third persons, the employer must require (in the contract or otherwise) that appropriate precautions be taken for their safety.

Retained supervision and control. To the extent that the employer retains or exercises supervision or control over the work of the contractor, he must do so with reasonable care.

Duty as possessor of land. A possessor of land held open to the public must exercise reasonable care to protect that public from unreasonably dangerous conditions or activities of an independent contractor on the land.

3. **Exception: Nondelegable Duties**

Where the safe performance of some duty is of sufficient importance to the community, an employer is vicariously liable for the negligence of his independent contractor in performing that duty which results in physical harm. In other words, these duties are personal to D, and are not “delegable” to an independent contractor so as to relieve D of tort liability if they are negligently performed.

4. **Exception: Inherently Dangerous Work**

When the contracted work involves a special, greater-than-ordinary danger to others which the employer knows or has reason to know is inherent in, or normal to, the work, or which is contemplated at the time of the contract, the employer is vicariously liable for physical harm caused by the independent contractor’s failure to take reasonable precautions against such danger.

5. **Collateral Negligence**

As a general rule, the employer’s vicarious liability is limited to the particular risk(s) which gave rise to the exception.

6. **Liability to Contractor’s Employees**

In most cases, the employer’s liability does not extend to employees of the contractor whose injuries result from those risks created by the conditions upon which the contractor was hired to work.

D. **Apparent Agency**

If D creates the appearance that someone is his agent or employee, D is not permitted (i.e., he is “estopped”) to deny the agency if a third party, who does not know otherwise, reasonably relies on the apparent agency. D can be held vicariously liable in tort for an injury caused by the negligent acts of his apparent agent if the injury would not have occurred but for P’s justifiable

reliance on the apparent agency. There is some difference among the authorities as to the meaning of "reliance." Does P have to rely on the agency relationship, or just the institution? Some courts do not require reliance at all, just that the D created the appearance that the person providing the service was D's agent.

Some states have enacted statutes abolishing such vicarious liability against certain health care providers.

XI. EMPLOYER'S LIABILITY TO EMPLOYEES

A. Common Law Duties of Employer to Employee

1. Safe Place to Work

The employer must provide his employee with reasonably safe working conditions and warn him of unsafe conditions which he should anticipate will not be discovered by the employee.

2. Defenses

The employer's traditional defenses include assumption of risk, contributory negligence, and the fellow servant rule (i.e. an employer is not vicariously liable for an injury to an employee caused solely by the negligence of a fellow servant in the performance of the operative details of the work).

B. Workers' Compensation

1. Workers' Compensation Acts

Introduction. The employee's common law tort action against his employer has been replaced in all states and several other jurisdictions by workers' compensation acts, which make the employer strictly liable to pay scheduled benefits for most accidental injuries occurring "in the course of" and "arising out of" the employment. With minor exceptions, workers' compensation is mandatory for all employers with a certain number of employees.

Exclusive remedy against employer. If an employee's injury occurs in the course of, and arises out of, an employment covered by a workers' compensation act, his remedy under the act is usually his exclusive remedy against his employer, even if for some reason the particular injury is not compensable.

Compensation. In exchange for strict liability and a relatively speedy remedy, the employee's compensation is limited to a statutory schedule

of limited benefits, usually a percentage of P's average weekly wage for a specified number of weeks which varies according to the severity of the injury. The employee receives more or less unlimited medical benefits, benefits for partial or total disability (temporary or permanent), and if his injury results in death, his survivors receive death benefits.

Third party actions. In most jurisdictions, the workers' comp act does not bar the employee from bringing a tort action and recovering his full damages, even though his injury is compensable under the act, if he can find a third party (other than his employer) whose tort contributed to his injury. If P is successful against the third party (T), he must ordinarily repay the workers' compensation he has received. In several liability states, the law may allow a finding as to the employer's fault to be included in the mix, in which case T would only have to pay his comparative fault share.

2. Railroad and Maritime Employees

Employees of common carriers by rail and "seamen" have a special common law negligence action against their employer under the Federal Employers' Liability Act and the Jones Act, respectively. Seamen also have other remedies under admiralty law.

C. Retaliatory Discharge

Under a new tort cause of action known as retaliatory discharge, an at-will employee who is fired for conduct protected by an important, well-defined public policy can sue his former employer for wrongful discharge.

XII. AUTOMOBILES

A. Joint Enterprise

A joint enterprise is an express or implied agreement among two or more persons to use an automobile for a common (usually, business) purpose, with all participants having a mutual and equal right of direction and control over its operation. All participants are vicariously liable to third persons for the negligence of the driver. A participant injured by the driver's negligence may recover from the driver, but not from any other participants.

B. Owner-Passenger

An auto owner who is a passenger in his own vehicle is not vicariously liable for the negligence of the driver, but may be directly liable for his own negligence in failing to exercise control over the driver.

C. Owner–Bailor

Absent a statute or some other tort theory, an owner-bailor (not a passenger) who merely permits another to use his auto is not per se vicariously liable for the driver's negligence.

D. Family Purpose Doctrine

In about half the states, the owner of an auto which he makes generally available for personal (noncommercial) use by members of his immediate household is vicariously liable for its negligent operation by such persons within the scope of the express or implied permission.

E. Consent Statutes

In about one-fourth of the states, an auto owner is vicariously liable for the negligence of anyone operating it on a public highway with his consent, within the scope of the express or implied permission. However, the bailee's negligence is ordinarily not imputed to bar or reduce the owner's damages in an action against a third person.

F. Guest Passengers

Statutes in some states limit a driver's liability for injuries to "guests" in his vehicle to situations where (1) the driver's conduct was more than ordinary negligence, or (2) the driver's intoxication caused the injury, or (3) the injury was caused by a defect in the vehicle of which the driver had knowledge and failed to warn. There is a trend to repeal these guest statutes, and some courts have held them unconstitutional.

G. "No–Fault" Auto Compensation Plans

About 15 states have some form of "no-fault" compensation legislation under which mandatory insurance compensates the less seriously injured victims of auto accidents, and in most cases restricts or eliminates such victims' tort cause of action.

**XIII. MEDICAL AND OTHER PROFESSIONAL NEGLIGENCE
("MALPRACTICE")**

A. Standard of Care**1. Customary Practice = Standard of Care**

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

Hospitals owe a duty of reasonable care under national standards fixed by the Joint Commission on Accreditation of Hospitals.

2. Specialists

Physicians or others who are certified specialists, or who hold themselves out as specialists, are held to the standards of that specialty, but again, in most cases the customary conduct of reasonably well-qualified specialists conclusively sets the standard of care.

3. Locality Rule

Until recently, the standard of care of medical professionals (and, occasionally, other professionals as well) was further limited by the “locality rule,” under which the standard of care was the customary or usual practice of reasonably well-qualified similar professionals in that geographic locality, or alternatively, in the same or similar localities. Today, almost all jurisdictions have abandoned the locality rule as applied to board-certified specialists, and most jurisdictions have also rejected the rule generally.

B. Proof of Negligence, Standard of Care, and Causation

1. Expert Testimony

In most cases involving a claim of professional negligence, P will be unable to establish a submissible case without expert testimony establishing (1) the relevant standard of care, (2) that D’s conduct did not conform to that standard, and (3) that there was a causal relationship between D’s breach and P’s injury. Although some states have adopted statutes regulating expert testimony in medical negligence cases (e.g. by requiring that the expert not be a mere testifying consultant, or requiring that the expert have the same license and certification as the defendant), the common law applies the usual qualifying tests to such expert testimony.

2. Substitutes for Expert Testimony

Standard of care. In addition to proof by expert testimony, the standard of care in medical negligence cases can sometimes be established in other ways, such as by (1) admissions by the defendant, (2) authoritative medical literature, (3) standards adopted by government or trade groups, such as hospital licensing rules, (4) hospital by-laws and rules, and (5) literature accompanying medical products that contains warnings and directions for use.

Proof of negligence: Res ipsa loquitur

Common knowledge res ipsa. Occasionally, the facts will be such that the ordinary layperson can determine that the defendant's conduct did not conform to the standard of care. In such "common knowledge" cases, no expert testimony is required to prove the defendant's negligence.

Expert res ipsa. Sometimes an expert witness cannot testify to an opinion as to exactly what the defendant did that was negligent, but can testify that the adverse result would not have occurred if the defendant had exercised ordinary care.

C. Informed Consent

1. Rule

Under the doctrine of informed consent, a patient's/client's consent to a particular treatment, procedure, or other professional conduct must be based on the professional's disclosure of the material risks and alternatives to the proposed conduct so that patient/client can make an informed decision as to whether to consent.

2. Standard

Professional rule. In medical cases, at one time the prevailing standard only required the doctor to inform the patient of those risks and alternatives that doctors customarily chose to disclose. This has become known as the "professional rule."

Reasonable patient or "material risks" rule. The professional rule is being replaced by one which gives greater autonomy to the patient: the doctor must disclose those risks and alternatives of which a reasonable patient would want to be informed so as to be able to make an intelligent choice—in other words, all risks material to the decision of the ordinary patient in the plaintiff's position.

Distinguished from consent to a battery. In medical negligence cases, most courts hold that violation of this standard does not negate the patient's consent (so as to give rise to a battery) but rather is simply another instance of negligent conduct.

Proof of causation. Some courts require an objective standard for proof of causation—that a reasonably prudent patient in the plaintiff's position

would not have consented if he had been furnished the required information—as opposed to a subjective standard under which the plaintiff is allowed to prove that he would not have consented, regardless of what anyone else would have done. But whether the objective standard is required or not, P must still prove that *he* would not have consented.

What must be disclosed?

In addition to the material risks and alternatives of the proposed treatment and the prognosis, material facts *might* include the physician's own success rate, the success rate of the procedure, the physician's experience with that procedure, and any of the physician's personal issues that could affect his performance. Whether any of these *must* be disclosed is an open question.

D. Statutory Remedies

Federal and state statutes may provide supplemental remedies for torts against medical patients.

E. The “Medical Malpractice Crisis” and Tort Reform

Many states have adopted special rules governing medical malpractice cases. These include modifications to the medical standard of care and medical res ipsa loquitur rules; partial abrogation of the collateral source rule; statutes of repose; restrictions on expert testimony; arbitrary limits on the amount recoverable in a medical malpractice action, either generally or for non-economic losses; and mandatory submission of the case to a screening panel prior to taking the case to court.

XIV. NUISANCE

A. Introduction

“Nuisances,” public and private, are two distinct fields of tort liability that provide remedies for particular types of harm. It is the interest of P which has been invaded, and not the conduct of D, which determines whether an action for nuisance will lie.

B. Private Nuisance

1. Definition

A private nuisance is a thing or activity which substantially and unreasonably interferes with P's use and enjoyment of his land.

2. Relation to Trespass

A trespass is an invasion of P's interest in the exclusive possession of land. A nuisance is an interference with P's interest in the private use and enjoyment of the land. Unlike trespass, the interference must be unreasonable and cause substantial harm.

3. Basis of Liability

Fault. Liability is not absolute. Absent a statute, D's interference with P's protected interest must be intentional, reckless, negligent, or the result of an abnormally dangerous activity such that principles of strict liability will apply.

Substantial interference. Nuisance liability requires substantial harm, of a type which would be suffered by a normal person in the community, or by property in normal condition and used for a normal purpose.

Continuing or recurring interference. There is no requirement that the interference be continuing or recurring, although some interferences will not be sufficiently substantial unless they are.

Unreasonable interference. The interference must be unreasonable, which generally means that either (a) the gravity of P's harm outweighs the utility of D's conduct, or (b) if intentional, the harm caused by D's conduct is substantial and the financial burden of compensating for this and other harms does not render unfeasible the continuation of the conduct.

Gravity. In determining the gravity of the harm, the important factors include (i) its extent, (ii) its character, (iii) the social value of P's use or enjoyment it affects, (iv) the suitability of that use or enjoyment to the locality, and (v) the burden to P of avoiding the harm.

Utility. In determining the utility of D's conduct, important factors include (i) its social value, (ii) its suitability to the locality, (iii) the practicability of preventing or avoiding the interference, and (iv) the practicability of continuing D's activity if it is required to bear the cost of compensating for the interference.

4. Remedies

Damages. The usual remedy is damages. If the nuisance is permanent, all damages must be recovered in one action. If the nuisance can be

abated, P recovers all damages to the time of trial. If D then fails to abate, future invasions give rise to a new cause of action.

Self-help. There is a limited privilege to trespass to abate a private nuisance.

Injunction. If the nuisance threatens to continue and P has no adequate legal remedy, equitable relief may be sought. The court then will undertake a further balancing.

5. Persons Liable

Liability for nuisance includes not only one who carries on or participates in a nuisance-creating activity, but in some cases a lessor or possessor who fails to prevent or abate one carried on by third persons on his land.

6. Defenses

Contributory negligence, assumption of risk. P's contributory negligence or assumption of risk is a defense to the same extent as in other tort actions.

Coming to the nuisance. The fact that P has acquired or improved his land after a nuisance has come into existence is not itself sufficient to bar his action, but is a factor to be considered in determining whether the nuisance is actionable.

Others contributing to the nuisance. Except as it may affect the character of the locality, the fact that others contribute to a nuisance is not a bar to D's liability for his own contribution.

Legislation. Legislation authorizing a particular activity or use of land may be used to establish that it is not a nuisance, but such authority is usually narrowly construed to include only reasonable conduct.

C. Public Nuisance

1. What Constitutes

A public nuisance is an unreasonable interference with a right common to the general public. It includes interference with the public health, safety, morals, peace, comfort, or convenience.

2. Public Right

The right interfered with must be common to the public as a class, and not merely that of one person or even a group of citizens.

3. Remedies

A private citizen has no civil remedy for the harm he has sustained as a result of a public nuisance if that harm is of the same kind as that suffered by the general public, even though he has been harmed to a greater degree than others. The remedy is a criminal prosecution or suit to enjoin or abate the nuisance by public authorities or others on behalf of the public. A private citizen may sue for harm caused by a public nuisance only if his harm is different in kind from that suffered by other members of the public.

XV. NEGLIGENCE INFLICTION OF EMOTIONAL DISTRESS

A. Introduction

If D is subject to liability to P for negligence based on bodily injury (e.g. a broken leg), P's damages include resulting pain, suffering, mental and emotional harm. If P sustains no direct physical harm, then the traditional rule was that P had no claim for negligent infliction of emotional distress. Today, in most jurisdictions, P can recover for stand-alone emotional distress under limited circumstances.

There are two lines of authority. In the first category, most cases can be classified in one of three different fact situations—impact, zone of danger, and bystander.

B. Impact Rule

If D's negligent conduct results in any impact, however slight, with P's body, that impact will support liability for P's emotional distress resulting from the same negligent conduct. No impact, no cause of action. A few states still adhere to this rule in some form, but most have moved on.

C. Zone of Danger Rule

If D's negligent conduct *threatens* (but does not result in) bodily harm (impact) to P (a "near miss" situation), most courts will allow P to recover for *bodily harm* resulting from the fear, shock or other emotional disturbance caused by his presence in the zone of danger. Some courts no longer require bodily harm and allow recovery for the emotional distress itself.

D. The Bystander Rule: Emotional Harm Caused by Injury to Another

1. Traditional Rule

If P is not himself in the zone of danger, but suffers emotional distress as a result of witnessing a shocking event in which D's negligent conduct threatens or causes physical harm to a third person, courts traditionally refused to hold D liable to P.

2. The *Dillon* Rule

Following *Dillon v. Legg* (Cal. 1968), most jurisdictions now allow P to recover in such situations under certain conditions. Typically, the requirements are: (a) the actual injury to T is a serious one; (b) P is a member of the immediate family of, or closely related to, the person in peril; (c) the shock results in serious emotional distress to P; (d) the event is of short duration; and (e) P actually witnesses the traumatic event, or at least comes upon the scene almost immediately and witnesses its aftermath.

3. Zone of Danger, Fear for Another's Safety

In jurisdictions that have adopted the zone-of-danger rule but not the *Dillon* rule, most courts will allow P to recover for bystander shock under the circumstances stated in the preceding paragraph if P was also within the zone of danger.

E. Proximate Cause Limitations

1. Physical Illness Requirement

Absent impact, in some jurisdictions, P may recover only if his emotional distress results in physical illness or comparable objective bodily consequences. Most jurisdictions have now diluted or abolished the physical injury or objective manifestation rule.

2. "Eggshell Plaintiff" Rule Inapplicable

Unless D has actual knowledge of some special sensitivity of P, D will be liable only to the extent that P's physical response to the emotional trauma was within the normal range of ordinarily sensitive persons. D is not liable for unforeseeable physical consequences.

F. Direct Victims

A line of cases is emerging allowing recovery where there is no contact or threat of physical harm, but the plaintiff is a "direct victim" of negligent conduct whose only consequence is emotional distress.

G. Fear of Future Harm From Toxic Exposure

Where P has been exposed, or fears he has been exposed, to a toxic substance due to D's negligence, but P has no present symptoms or diagnosis of the feared disease, P may be allowed to recover for the mental distress resulting from the fear of future harm, or for medical monitoring.

1. Parasitic to Actual Physical Injury

If P can prove that he sustained any immediate physical harm, however slight, as a result of an actual exposure, the case fits within the traditional “impact” rule, and P can recover emotional distress damages parasitic to that injury.

2. Actual Exposure But No Physical Harm

If P can show actual exposure to the toxic substance but no immediate physical injury, many courts will allow P to recover for medical monitoring and emotional distress, but some courts require P to prove a greater-than-50% chance that he will contract the feared disease at some time in the future. If P can show actual exposure to HIV, he can usually recover for emotional distress between the time of exposure and the time when testing determines that P will not be infected with AIDS.

3. Possible Exposure and No Physical Harm

If P can only establish a possibility or fear of exposure and no present physical harm, almost all courts will deny recovery for emotional distress damages or medical monitoring. Some courts will allow emotional distress damages in HIV/AIDS cases even if P cannot establish actual exposure and there is no physical harm, so long as a channel of exposure exists and P’s fear is reasonable.

XVI. PRENATAL HARM

A. Child Born Alive

Injuries caused by third person. One who tortiously causes harm to an unborn child is subject to liability to the child for such harm if the child is subsequently born alive. The prevailing view is that the fetus need not have been viable at the time of the injury. If the child is born alive but then dies from the injury, a wrongful death action can be maintained. A few recent decisions have extended recovery to include pre-conception as well as post-conception negligence, at least where the pre-conception negligence created a foreseeable risk of the harm to the child that later resulted.

Injuries caused by mother’s negligence. Even in those jurisdictions where the parent-child immunity is abolished, the prevailing view is that a mother cannot be held liable for her negligent conduct that results in an injury to her then-unborn child.

B. Child Not Born Alive

As to the wrongful death of an unborn child, most courts allow the action if the fetus was viable at the time of the injury. A few support liability even if the fetus was not viable. The mother may also be allowed to recover emotional distress damages.

C. Damages for Unintended Children

1. Wrongful Conception

When D's negligent conduct (e.g. a failed attempt to sterilize one parent) fails to prevent conception resulting in the birth of an unwanted but healthy child, most courts allow the parents to recover, but their damages are limited to the cost of pre-natal care and delivery and the associated pain and other general damages. Some courts have allowed, in addition, child-rearing expenses, most (but not all) requiring that such expenses be offset by the accompanying financial and emotional benefits to the parents.

2. Wrongful Birth and Wrongful Life

Description. Another category of claims arises when D's negligence results in the birth of an unwanted child who is physically or mentally defective. Actions brought by the parents of such children for their damages (including damages for the ordinary and extraordinary costs of caring for such children and their mental distress) are usually referred to as wrongful birth claims. Actions brought by the deformed child for his damages (e.g., pain, suffering, disability, disfigurement) are called wrongful life actions.

Wrongful birth. Most courts now allow recovery for wrongful birth. Some courts limit damages to the parents' pecuniary losses, but others now award damages for their emotional distress as well.

Wrongful life. So far, almost all jurisdictions have rejected wrongful life claims. A few courts have allowed such claims, the damages being limited to the child's extraordinary medical expenses (to the extent not recovered by the parents).

XVII. ALCOHOLIC BEVERAGES

A. Commercial Vendors of Alcohol

1. Common Law Liability

The common law rule in most jurisdictions was that one who sells intoxicating beverages is not liable to third persons injured by the person

thereby intoxicated, even when the sale is in violation of a statute or ordinance or is negligent. Many courts held that furnishing alcohol was not a “proximate cause” of P’s injury. In a few states, this immunity is statutory.

A few jurisdictions have overturned this rule where the application of ordinary negligence principles would support liability, particularly where the sale was unlawful because the purchaser was a minor or was already intoxicated.

2. Dram Shop Acts

A number of states have enacted statutes (called “dram shop acts”) which impose civil liability on commercial sellers in favor of third persons injured by an intoxicated person. Some statutes require that the sale have been illegal, others merely that the beverage sold have caused or contributed to the intoxication.

B. Social Hosts

So far, most courts have refused to impose negligence liability on persons who are not licensed dram shops for serving alcohol or for failing to control their intoxicated guests. A few jurisdictions have, based on (1) violation of a liquor control statute as negligence per se, or (2) common law negligence principles such as negligent entrustment or negligent supervision or ordinary duty rules. Some states allow social host liability if based on recklessness.

XVIII. INTERFERENCE WITH FEDERAL CONSTITUTIONAL RIGHTS

A. Persons Acting Under Color of State Law

42 U.S.C.A. § 1983 creates a tort cause of action against one who “under color of” state law interferes with a federal constitutional right of another.

B. Federal Officers and Employees

One whose federal constitutional rights have been violated by a federal officer or employee may have an action against him for damages under the doctrine of *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics* (U.S. 1971).

XIX. ACTIVITIES CAUSING ONLY ECONOMIC HARM

A. In General

Tort law has been reluctant to extend liability for negligent conduct that results solely in economic harm to P (in contrast to the freedom with which economic losses are recoverable in tort actions based on physical harm to P).

B. Economic Loss Caused by Physical Harm to Another

Rule. In general, P cannot recover in negligence for economic loss that P sustains that results from physical harm to another or to property in which P has no proprietary interest. A fortiori, unless there is some specific tort cause of action allowing recovery, P cannot recover for any other negligent conduct that results solely in economic loss.

C. Negligent Misrepresentation

Rule. In general, P may not recover for economic loss caused by reliance on a negligent misrepresentation that was not made directly to P or specifically on P's behalf.

D. Exceptions

A number of cases have allowed recovery for pure economic loss, usually in situations in which there is either privity or some "special relationship" between P and D.

1. Negligent Performance of a Service

In the case of negligence in the rendition of certain professional or business services (accountants and auditors, surveyors, termite inspectors, engineers, attorneys, notaries public, architects, weighers, and telegraph companies), liability has been extended in favor of clients (and sometimes others) who foreseeably relied on the service or who were its intended beneficiaries. Liability extends only to the person (or one of a limited, specific and identifiable group of persons) for whose benefit and guidance the furnisher intends to supply the information, or where the furnisher knows that the recipient intends to rely on it. If D has a public duty to furnish the information, D's liability extends to pecuniary loss suffered by any member of the class of persons for whose benefit the duty is created.

2. Exercise of Public Right

In a few cases, a plaintiff whose business is based on the exercise of a public right has been allowed to recover for economic loss caused by D's negligent interference with that right.

■ PART SIX: STRICT LIABILITY

XX. STRICT LIABILITY

A. Strict Liability for Animals

1. Trespassing Animals

Possessors of all animals, including domesticated ones (excluding cats and dogs), are strictly liable for harm resulting from the trespass of their animals on the property of another.

2. Other Harm Caused by Animals

Domestic animals. One who possesses or harbors an animal customarily domesticated in that region is strictly liable for other harm only if (a) he knew or had reason to know that the animal had a harmful or dangerous propensity or trait and (b) that particular trait or propensity was the cause of the harm. Otherwise he is liable only if he was negligent.

Wild animals. One who possesses or harbors animals not customarily domesticated in that region is strictly liable for all harm done by the animal as a result of a harmful or dangerous propensity or characteristic of such animals.

Scope of strict liability. Under R.2d, P cannot recover if he “knowingly and unreasonably” subjects himself to the risk, or if he makes contact or comes into proximity to D’s animal for the purpose of securing some benefit from that contact or that proximity, or if D maintains ownership or possession of the animal pursuant to an obligation imposed by law. R.3d (which does not recognize assumption of risk as a separate defense) provides that strict liability does not apply (a) if P suffers physical harm as a result of making contact with or coming into proximity to D’s animal for the purpose of securing some benefit from that contact or that proximity, or (b) if D maintains ownership or possession of the animal pursuant to an obligation imposed by law.

Comparative fault. Under R.3d, If P was contributorily negligent in failing to take reasonable precautions, P’s recovery is reduced in proportion to P’s comparative fault.

Watchdogs. One is privileged to use a watchdog to guard his property only if and to the extent that he would be privileged to use a mechanical protection device.

B. Strict Liability for Abnormally Dangerous Activities

1. *Rylands v. Fletcher*: Original Rule

Strict liability for abnormally dangerous activities originated in the 1868 English case of *Rylands v. Fletcher*, which held D strictly liable for damage to P's mine on neighboring property caused by water which escaped from D's reservoir because a reservoir was a "non-natural use" of land in that area.

2. *Rylands v. Fletcher*: Modern Rule

General rule. The doctrine has evolved to one of liability for harm resulting from the conduct by D of "abnormally dangerous activities" (formerly called "ultrahazardous" activities). It is not necessary that the activity be conducted on D's land, or that the harm be caused by something which "escapes."

Abnormally dangerous. Several factors may be considered in determining whether an activity is "abnormally dangerous" including (1) the magnitude of the risk, (2) D's inability to eliminate the risk by the exercise of reasonable care, (3) the abnormality of the activity in that area, (4) the appropriateness of the activity in that location, and (5) the social utility of the activity balanced against its dangerous attributes.

Abnormally dangerous: The new test. According to the new formulation in R.3d PH § 20(b), an activity is abnormally dangerous if (1) the activity creates a foreseeable and highly significant risk of physical harm even when all actors exercise reasonable care; and (2) the activity is not one of common usage. Under this formulation, the location at which the activity is conducted does not independently determine if it is abnormally dangerous, but could be relevant under either or both criteria. The social utility of the activity is no longer a separate factor.

Candidates for strict liability. Activities that are good candidates for strict liability include blasting, crop dusting, pest control and fumigation, the escape of hazardous wastes, other high-energy activities (e.g., rocket testing, pile driving, oil well blowouts, use of explosives), and perhaps large fireworks displays. However, much depends on the facts and circumstances, and few activities are always abnormally dangerous.

Ground damage from aircraft. Subject to statutory variations, some jurisdictions impose strict liability for ground damage caused by "the ascent, descent or flight of aircraft, or by the dropping or falling of an

object from the aircraft.” Other jurisdictions impose liability only for negligence. And state law rules may be affected by federal aviation statutes and regulations.

3. Liability Limitations

Scope of liability. The harm must result from the abnormal danger, but it is no defense that it was precipitated by an unforeseeable intervening cause. D is not strictly liable to one who intentionally or negligently trespasses on his land where the activity is being conducted. And D is not strictly liable to the extent that P’s harm results because P’s activity is abnormally sensitive. Under R.3d, D is not strictly liable where P suffers physical harm as a result of coming into proximity to the abnormally dangerous activity for the purpose of securing some benefit from that proximity, or if D carries on the abnormally dangerous activity pursuant to an obligation imposed by law. Also, P cannot assert a strict liability claim if he is a participant in the activity.

Defenses. Under R.2d, assumption of the risk is a defense, but contributory negligence is not except when P “knowingly and unreasonably subjects himself to the risk.” Under R.3d, comparative fault rules apply, and if P was contributorily negligent for failing to take reasonable precautions, his recovery in a strict liability claim for physical harm is reduced by P’s proportionate share of the total comparative fault.

Apportionment. Although the traditional rules may have differed, the modern view is that the fact finder can assign shares of fault or responsibility to all parties, including a party that is strictly liable.

Legislative and public duty privileges. When legislation expressly authorizes or imposes a duty to carry on an activity, strict liability is usually not imposed. There is no strict liability under the FTCA.

■ PART SEVEN: DAMAGES FOR PHYSICAL HARM

XXI. DAMAGES FOR PHYSICAL HARM

A. Compensatory Damages

1. General vs. Special Damages

General damages or “noneconomic loss.” Traditionally, “general” damages are compensatory damages for a type of harm which so frequently

results from the tort involved that such damages are normally to be anticipated and hence need not be specifically alleged. Today, such damages are more often categorized as “noneconomic loss” because they are losses not directly measured in dollars.

Special damages or “economic loss.” Special damages are those awarded for all other compensable harms (for example, medical expenses or lost wages). Historically, special damages had to be specifically pleaded in order to be recoverable. Modernly, such damages are usually called “economic loss,” but sometimes are referred to as “specials.” Today, the practice is to specifically allege all types of damages.

2. Nominal Damages

Nominal damages are a trivial sum awarded to a litigant who has proved a cause of action but has not established that he is entitled to compensatory damages.

3. Damages for Personal Injury

When P proves a compensable personal injury, he may recover for all adverse physical and mental consequences of that injury, past and future, including pecuniary or economic loss; noneconomic or nonpecuniary damages, such as conscious pain and suffering and mental or emotional distress in various categories; and physical impairment or “disability,” although the latter may be classified with the other noneconomic losses.

4. Pre-Existing Conditions

D is responsible in damages for all the consequences of P’s injury, including those caused or aggravated by some pre-existing condition, predisposition, or vulnerability of P which a normal person would not have sustained, even if that condition was unknown to D.

5. Present Value

If P is awarded damages for pecuniary losses he will incur in the future, the amount of such damages must ordinarily be reduced to present cash value. Certain noneconomic damages (e.g. pain and suffering) are not so reduced.

6. Inflation

Some jurisdictions still do not allow the jury to take into account the effects of future inflation in calculating damages for future economic losses. A growing number do.

7. Taxation

Although a growing minority of jurisdictions disagree, the prevailing majority rule is that the nontaxability of compensatory damages may not be the subject of evidence, argument or instructions to the jury.

8. Collateral Source Rule

As a general rule, payments made to, or benefits conferred on, the injured party from sources other than D are not credited against D's liability, even though they cover all or part of the damages for which D is liable. Statutes in an increasing number of jurisdictions either abolish or modify the collateral source rule. Many allow D a partial credit in some or all cases. In some cases this credit is offset by the insurance premiums or other payments P paid for the collateral source benefit for a specified period of time.

9. Limitation or "Caps"

As a result of recent tort reform legislation, about half the states place statutory caps or other limits on the amount of noneconomic damages recoverable, either in personal injury actions generally or in medical malpractice cases only.

10. Mitigation (Avoidable Consequences)

Under the doctrine of avoidable consequences, P is required to make reasonable efforts to mitigate the consequences of his injury and to take reasonable steps to prevent further harmful consequences from developing. Under the traditional rule, P cannot recover the part of his damages attributable to his failure to mitigate. Under R.3d, comparative responsibility applies in this situation. D is solely responsible for all damages not attributable to P's failure to mitigate; damages attributable to P's failure to mitigate are apportioned based on P's fault in failing to mitigate.

11. Seat Belts

In some jurisdictions, P cannot recover to the extent that his injuries, sustained in an auto crash, were the result of his failure to make use of an available seat belt.

B. Consequential Damages**1. Spouse**

In most jurisdictions, if D's tort has injured one spouse, the other spouse has a separate cause of action for the damages resulting from his or her

loss of the injured spouse's society, companionship, and other benefits characteristic of the marital relationship. The entire claim is sometimes referred to as loss of consortium.

2. Parents

A parent can recover damages for loss of services resulting from a tortious injury to his minor child. A few courts permit, in addition, damages for loss of the child's society, companionship and affection.

3. Medical Expenses

A spouse or parent can recover medical and other expenses incurred as the result of an injury to his spouse or child.

4. Children

Except in a few jurisdictions, a child has no action for loss of his parent's care, support, training, guidance, companionship, love, and affection resulting from a tortious injury to the parent.

5. Nature of Action

Such actions by a spouse or parent are independent of the injured spouse's or child's action, but are derivative from it. Thus, D may invoke any defense which would have been available in a suit brought by the injured person, as well as defenses available against P.

C. Punitive Damages

1. Basis

In most jurisdictions, the trier of fact in its discretion may award punitive damages when D's misconduct is sufficiently serious, to punish him and deter him and others from similar conduct in the future.

2. Conduct Required

D must have acted from a wrongful motive, or at least with gross or knowing indifference to the rights or safety of another. In addition to the intentional torts, most jurisdictions also allow them in all cases of reckless or "willful and wanton" misconduct; others require, in addition, a kind of "malice," which here means a conscious and deliberate disregard of a high probability of harm.

3. Limitations

Several states do not allow punitive damages at all, except where authorized by statute. Typically they are not allowed in wrongful death

actions. They cannot be awarded in F.E.L.A. or Jones Act cases. They cannot be awarded against public entities. And usually they may not be awarded unless P has proved some actual damages. There is a trend to limit further by statute the recovery of punitive damages.

4. Amount

Common-law punitive damages are never required. Whether to award punitive damages at all and, if so, the amount of the award is largely within the discretion of the trier of fact, subject to review for excessiveness. Many courts, particularly in personal injury cases, require that they bear some reasonable relation to the compensatory damages awarded, or at least to the seriousness of the injury. Evidence of D's wealth is ordinarily admissible. Punitive damages are not reduced by P's comparative fault. One factor in judging the excessiveness of the award is the ratio between the punitive damages and the actual or potential compensatory damages.

5. Vicarious Liability

Many jurisdictions allow punitive damages against an employer for any tort committed by his employee for which the employer is vicariously liable, provided the employee's tort will support them. Other jurisdictions refuse to allow them against the employer unless (a) the employer authorized the doing and the manner of the act, or (b) the employee was unfit and the employer was reckless in employing him, or (c) the employee was working in a managerial capacity, or (d) the employer or one of his managerial agents ratified or approved the act.

6. Constitutional Limitations

Decisions by the United States Supreme Court have established due process limits on awards of punitive damages. Under these cases, review of punitive damages by the trial and reviewing courts is constitutionally required, using three guideposts: (1) the degree of reprehensibility of D's misconduct; (2) the disparity between P's actual or potential harm and the punitive damages award; and (3) the difference between the punitive damages awarded and any applicable civil penalties for similar misconduct. And D cannot be punished for conduct that bears no relation to P's harm, such as similar conduct that occurred elsewhere or similar conduct that occurred in other cases. However, such evidence may be relevant as to D's culpable state of mind.

D. Allocation Among Tortfeasors

1. Multiple Tortfeasors

P may join in a single action all tortfeasors responsible for a single injury (or closely related injuries) and obtain judgments against all who are found liable. Depending on the nature of the injury and other factors, the judgments may be (a) joint and several or (b) several. However, P is entitled only to one satisfaction.

Concert of action. Two or more persons who, in pursuance of a common plan or design to commit a tortious act, actively take part in it, or further it by cooperation or request, or who lend aid or encouragement to the wrongdoer, or ratify or adopt the wrongdoer's acts done for their benefit, are equally (jointly and severally) liable to P for the resulting tort.

Joint tortfeasors. Joint tortfeasors are those whose fault combined to produce P's injuries, or who are vicariously liable for another such tortfeasor.

2. Divisible Damages

If different persons are each responsible for separate, identifiable parts of P's harm, absent concert of action, each is liable only for the harm traceable to him.

3. Indivisible Harm

Traditional rule: Joint and several liability. Traditionally, two or more persons responsible for the same harm are jointly and severally liable for all of P's damages, together with anyone else who is vicariously liable. P may sue one, some, or all, obtain judgments for the full amount of his damages against as many as he can, and collect his judgment from one or any combination of them, as he chooses. As long as his judgment is not satisfied in full, he can continue to bring further suits or collection proceedings. About one-quarter of U.S. jurisdictions have retained pure joint and several liability.

Several liability. With the advent of comparative fault, some jurisdictions now make a joint tortfeasor only "severally" liable to P, i.e., his liability is limited to his proportional share of the total liability. About one-quarter of U.S. jurisdictions now have pure several liability.

Hybrid liability and reallocation of damages. About half of U.S. jurisdictions have adopted a mixture of joint and several and several

liability. The schemes vary widely and resist simple categorization, and some systems have characteristics of more than one category. Categories include:

Reallocation of uncollectible shares. This category begins with joint and several liability for independent tortfeasors who cause an indivisible injury to P. It then places the risk of a T's uncollectibility on all parties who bear responsibility for P's damages, including P. An insolvent tortfeasor's comparative share of responsibility is reallocated to the other parties in proportion to their comparative responsibility. A very similar result is obtained by starting with a rule of several liability but then providing for reallocation in the event a share is uncollectible.

Joint and several liability threshold. In this category, all tortfeasors whose percentage of comparative responsibility exceeds a specified threshold are jointly and severally liable. Tortfeasors whose percentage falls below that threshold are only severally liable.

Type of harm. In this category, the variable that determines joint and several liability or several liability is the type of harm suffered by P. Independent tortfeasors are jointly and severally liable for damages for certain harms (e.g. pecuniary loss) but are severally liable for compensatory damages awarded for other types of harm.

Type of defendant. In some jurisdictions, joint and several (or several) liability is restricted to certain categories of defendants.

Whether P was free from contributory fault. In some cases, P gets the benefit of joint and several liability only if P was free from contributory fault.

Intentional tortfeasors. Regardless of the scheme in a particular jurisdiction for nonintentional torts, joint and several liability is the norm for intentional joint tortfeasors. If D1 is negligent because of D1's failure to take precautions to protect P against the specific risk created by D2, an intentional tortfeasor, then D1 is jointly and severally liable for the share of comparative responsibility assigned to D2 as well as the share assigned to D1.

Whether the negligence of D1 or P can be compared with the intentional or willful tort of D2 depends on the interpretation of the comparative fault statute (if any). If a statute does not control, R.3d permits this comparison. But courts rarely permit P's contributory negligence to reduce his recovery from an intentional tortfeasor.

Strict liability. Most courts and R.3d allow the trier of fact to apportion damages between parties liable on a negligence theory and those liable based on strict liability.

Vicarious liability. If D1's liability is entirely vicarious, or imputed, based on the tortious conduct of D2, D1 is jointly and severally liable for whatever share the law of that jurisdiction assigns to the fault of D2. In other words, D1 and D2 are jointly responsible for a single share. If D1 pays that share to P, D1 ordinarily can obtain indemnity from D2.

4. Settlement of P's Claim(s)

P may enter into a settlement agreement with D (or more than one D) by which P settles his claim(s) against D for a fixed sum. The agreement may take the form of a release, covenant not to sue, or loan receipt agreement. Ordinary rules of contract interpretation apply. Settlement agreements may be set aside for fraud, duress, incapacity, or mutual mistake. A dispute may arise as to whether the settlement should be set aside due to mutual mistake when it later develops that P's injuries are much more serious, or of a different type, than the parties believed when the settlement was entered into, particularly if the release by its terms extended to "unknown" injuries.

Release. A release is a form of settlement agreement whereby P completely surrenders his claim against one or more potential defendants. At one time, the general rule was that a release executed in favor of any one tortfeasor released all other tortfeasors potentially liable for the same harm. The modern rule is that if the release is not intended as a full satisfaction, the release does not ipso facto discharge their potential liability to P.

Covenant not to sue. A covenant not to sue (or not to execute) is a settlement device designed to avoid the former effects of a release. It is a contract by which P does not release his claim against D, but merely promises to forego any further attempts to enforce it. It does not discharge other potential defendants, even if it contains no reservation of rights against them, unless it is expressly intended as a satisfaction of all P's claims.

Loan receipt agreement. Some courts have approved settlement with one potential defendant by a loan receipt agreement (sometimes called a "Mary Carter" agreement), whereby D "loans" P a sum, without interest,

to be repaid only if and to the extent that P is successful in his claims against other joint tortfeasors, and only from the proceeds of any amount which P eventually collects from the others. Most courts now disapprove these agreements as against public policy.

High-low agreements. Another type of settlement is a “high-low” agreement, where P and one of the defendants (or the sole defendant) contract for a minimum and maximum amount, depending on the jury’s verdict.

Effect of partial settlement on amount recoverable from non-settling tortfeasors in a joint and several liability situation. If P settles with one tortfeasor (T1) prior to obtaining a judgment against the remaining joint tortfeasor(s), reserving P’s right to proceed against the others, and P then succeeds in his remaining claim(s), the tortfeasor(s) against whom P obtains a judgment receive a credit based on the settlement with T1. The amount of that credit varies.

Dollar credit. In some jurisdictions, the credit is the dollar amount of the settlement with T1. This is called the “pro tanto” or dollar credit rule. In most pro tanto or dollar credit jurisdictions, T1 will be immune from contribution, but only if the court finds that the settlement was in “good faith.”

Proportional or percentage credit. In some jurisdictions, the credit is the settling tortfeasor’s (T1’s) proportional share of the common liability, regardless of the dollar amount of the settlement with T1. This is called the proportional or percentage credit rule.

Pro rata credit. A third, little-used approach, the “pro rata” method, gives a nonsettling tortfeasor a credit against the judgment equal to the settling tortfeasor’s share of damages, which is determined by dividing the recoverable damages by the number of liable parties.

Effect of partial settlement on amount recoverable from non-settling tortfeasors in a several liability situation. If a settling tortfeasor (T1) is only subject to several liability, any nonsettling tortfeasors simply pay their proportional share(s) as determined by applicable apportionment rules. T1 has settled her several liability, and it matters not whether her settlement is more or less than the amount of her proportional share as later determined.

5. Contribution

Common law rule. When P obtains a judgment against two or more tortfeasors, he can collect that judgment from any one, all, or any combination of Ds in any proportion he desires. The common law rule in most jurisdictions was that D1, who paid P more than D1's proportionate share of the judgment, was not entitled to obtain contribution from the other joint tortfeasors. The "no contribution" rule originally applied only to intentional torts, but the majority of U.S. jurisdictions extended it to negligence and strict liability actions.

Modern status. Contribution among (negligent or strictly liable) joint tortfeasors in some form is now the rule in most jurisdictions. Contribution is only available if and to the extent that parties are jointly and severally liable. There is no right to contribution by or against a party who is only severally liable.

Amount. In most jurisdictions, the damages are allocated among the joint tortfeasors in proportion to their relative fault as determined by the trier of fact, and those shares determine contribution liability.

Absence of judgment. D can seek contribution against other joint tortfeasors, including those not sued by P. There is a split of authority as to whether contribution can be obtained against a D who is immune from suit by P. A tortfeasor who settles prior to trial can obtain contribution, provided he settles for all tortfeasors and he can prove the others' liability, the amount of the damages, and the reasonableness of his settlement. The prevailing view is that a tortfeasor who settles only his own liability cannot be sued for contribution nor can he obtain contribution from others.

Intentional tortfeasors. Courts are split as to whether intentional tortfeasors can seek contribution.

Immune tortfeasors. Jurisdictions are split, but most require D to prove that T was subject to liability to P, so D cannot seek contribution if T is immune with respect to P.

6. Non-Party Tortfeasors

If a particular tortfeasor is not joined as a defendant or third-party defendant (T), the courts are split as to whether that tortfeasor's proportional share of the total fault can be found by the factfinder and

included in the responsible fault calculation. Whether T is included or not may depend on the purpose of the calculation.

Joint and several liability. If all tortfeasors are subject to joint and several liability and there is no contribution claim, then there is no reason to allocate fault among multiple tortfeasors, whether joined or not. However, whether T is included could still make a difference in determining P's share of the fault, if P is found contributorily at fault. For purposes of calculating P's share, the total fault should include all tortfeasors, whether joined as a defendant or not.

Several liability. If some or all defendants are potentially subject only to several liability, then the factfinder must allocate fault proportionally, and it makes a difference whether T's fault is included in the fault calculation. Jurisdictions are split; some require T to be included if there is enough evidence from which the factfinder can assess fault against T. In others, no one who is not a party to the lawsuit can be included in the fault calculation.

Several or enhanced injury cases. In certain cases where D's tort does not cause the original accident but enhances P's injuries, T1 (the tortfeasor responsible for the accident) is liable for all of P's damages, and D is liable for the enhanced damages only. T1's fault is not apportioned between T1 and D for purposes of damages against D.

Contribution. Where contribution is available to some or all of the defendants (or in a separate action for contribution), it becomes necessary to allocate fault among tortfeasors. For this purpose, the calculation is restricted to the tortfeasors who are parties to the action in which contribution is being sought. In most cases, contribution may not be sought from settling tortfeasors.

7. Indemnity

Distinguished from contribution. Contribution is an equitable sharing of the loss among joint tortfeasors. Indemnification is a shifting of the entire loss from one tortfeasor to another, by operation of either (1) a prior agreement of the parties, or (2) law, based on equitable considerations.

Indemnity by agreement. A contract in which T2 agrees to indemnify T1 if T1 is held liable to P is frequently enforceable, although in some instances agreements to indemnify for T1's own negligence may be void

by statute or as against public policy. Agreements to indemnify T1 for T1's liability for reckless or intentional misconduct are usually unenforceable.

Indemnity by operation of law. Indemnity by operation of law (often called "implied indemnity") is based on the concept of unjust enrichment. It is available when T1 and T2 are both liable for the same harm to P, and (1) T1's liability is based entirely on T1's vicarious liability for the tort of T2, or (2) T1 is the seller of a product (e.g., a retailer), the product was supplied to T1 by T2 (e.g., the manufacturer), and T1 is held liable to P solely because he sold the product to P (i.e., T1 was not independently culpable). If T1 satisfies P's judgment, T1 is entitled to indemnity from T2 for the amount paid to P plus reasonable legal expenses.

■ PART EIGHT: SURVIVAL AND WRONGFUL DEATH

XXII. SURVIVAL AND WRONGFUL DEATH

A. Survival of Tort Actions

1. Rule

At common law, all causes of action for personal torts abated with the death of either the tortfeasor or the person injured. That rule has been changed by statute so that today, most tort actions survive the death of either P or D, regardless of the cause of death. Among the statutes, there is a wide variety of inclusions and exclusions.

2. Personal Injury Actions

Personal injury actions survive in almost all jurisdictions, sometimes with limitations on the damages recoverable. In a few states, PI actions do not survive except as part of a wrongful death action. Actions for consequential damages sometimes do not survive. In most states, wrongful death actions survive the death of the tortfeasor.

3. Damages

The measure of compensatory damages in a survival action is generally the same as if no one had died, except that P's death terminates the

accrual of future damages which P otherwise could have recovered based on his life expectancy. A few states allow “loss of life” damages.

Punitive damages. In most jurisdictions, D’s death terminates P’s right to seek punitive damages. In some states, P’s death does also, but in many jurisdictions, P’s estate can seek punitive damages in a survival action.

Medical, funeral and burial expenses. In some cases, funeral and burial expenses and the decedent’s last medical expenses may be an element of damages in the survival action, or, in the alternative, in the wrongful death action (if there is one). In some jurisdictions, medical, funeral and burial expenses are a separate claim altogether.

4. Defenses

A survival action is just a continuation of the decedent’s tort case; the same defenses or liability limitations apply. The fact that a beneficiary’s negligence contributed to the death is not directly relevant and does not affect the damages recoverable. However, in a joint-and-several liability system, the defendant can seek contribution from the negligent beneficiary, thereby indirectly reducing or negating his share. And in a several liability system, fault will be apportioned, so defendant’s proportional share may be lower due to the fault of a beneficiary, thereby reducing the estate’s recovery.

B. Wrongful Death

1. Types of Statutes

Any tort theory which would have supported a personal injury action will support an action for wrongful death. There are two basic types of wrongful death acts.

Lord Campbell’s Act (most states) creates a new cause of action for the benefit of specified near relatives of P when P would have had a cause of action had he been merely injured and not killed.

A minority of jurisdictions have a “**survival**”-type statute which preserves the cause of action which was vested in P at the moment of his death and enlarges it to include the damages resulting from the death itself.

Statutory torts. Most statutory tort actions have their own provisions for recovery in the event of death. If not, then an appropriate general death act will be held to apply.

2. Concurrence of Remedies

If P survived his injuries for a time before dying from them, in most jurisdictions either a survival action or a wrongful death action or both may be brought.

3. Beneficiaries

The beneficiaries are the relatives or classes of relatives designated in the statute.

4. Damages

Pecuniary loss. Many statutes are phrased in terms of “pecuniary loss,” which includes at the very least loss of support, services, and contributions that decedent would have provided.

Nonpecuniary loss. Nonpecuniary loss of P’s society, companionship, love and affection is recoverable in some jurisdictions, either by specific statutory language or by judicial construction of the term “pecuniary loss.”

Medical and other expenses. Medical and other expenses, such as funeral and burial costs, ordinarily may be recovered by the survivor paying them.

Loss to the estate. A minority of jurisdictions measure damages by the loss to the estate.

Punitive damages. Jurisdictions are split on whether punitive damages may be recovered in a wrongful death action.

Limits. Although most states have removed prior limits on wrongful death damages, a few limit particular elements of damage or limit damages as to certain beneficiaries.

5. Defenses

The same defenses are available as if P had lived. In addition, a beneficiary’s contributory negligence bars or reduces that beneficiary’s recovery in accordance with the applicable contributory/comparative fault rules.

As to the statute of limitations, courts are split as to whether beneficiaries are barred from bringing a wrongful death action which otherwise

would have been viable if the statute of limitations applicable to decedent's cause of action had expired by the time the decedent died, or after he died but before suit was filed.

6. Procedure

Survival actions. In a survival action, the plaintiff is the executor or administrator of the decedent's estate, and the surviving cause of action is an asset of the estate. Any recovery in the survival action goes to the estate and is distributed in accordance with the applicable estate law.

Wrongful death actions. A wrongful death cause of action is an independent claim by the beneficiaries. It is not an asset of the decedent's estate and does not pass through the estate. The plaintiff may be the executor or administrator of the estate, but it is brought on behalf of the beneficiaries and any recovery goes directly to them. In some jurisdictions, the plaintiff is one of the beneficiaries or their representative who sues on behalf of all the beneficiaries. If there is more than one beneficiary for whom damages are awarded, the recovery is divided in accordance with applicable local procedure.

■ PART NINE: NON-PHYSICAL HARM: MISREPRESENTATION, DEFAMATION, AND PRIVACY

XXIII. MISREPRESENTATION

A. Introduction

1. In General

Misrepresentation is often an element of different torts and other causes of action. However, there is a tort action called "misrepresentation" (formerly deceit), where D in the course of some transaction makes a false statement to P (or another), P acts in justifiable reliance on the statement, and thereby sustains pecuniary loss. (If P sustains physical harm, then one of the other tort actions will lie.)

2. Basis

At common law, this action was called "deceit," and would lie only if D's misrepresentation was *fraudulent*—i.e., was made with "scienter." Today, liability is recognized for some types of negligent misrepresentations.

B. Deceit

1. Elements

The elements necessary to establish a prima facie case in an action for deceit are: (a) D's false representation, ordinarily of a fact; (b) D knew that his statement was false, or else he made it in conscious ignorance or reckless disregard of whether it was true or false; (c) D intended that P act in reliance upon the representation; (d) P acted in justifiable reliance upon the representation; and (e) P sustained actual damage.

2. Scienter

A misrepresentation is "fraudulent" if D (1) knows or believes that the matter is not as he represents it to be, or (2) does not have the confidence in the accuracy of his representation that he states or implies, or (3) knows that he does not have the basis for his representation that he states or implies.

3. Form of Representation

Fact. In general, the representation must be of a fact. It may be by words or conduct.

Ambiguous. A representation capable of two interpretations, one true and the other known to be false, is actionable if made with the intent that it be understood in the false sense or with reckless indifference as to how it will be understood.

Opinion. Statements which represent only D's opinion or prediction are generally not actionable. However, an opinion may be understood as an implied representation concerning its underlying facts.

Quantity, quality, and value. Statements of *quantity* ordinarily may be taken as statements of fact. But statements of *quality* and *value* are usually opinions upon which no reliance can justifiably be placed, unless sufficiently specific.

Law. Some specific representations as to the state of law may be representations of fact, and even if opinion, may be actionable if reasonably understood as implying a statement of fact.

Intent. A statement that the speaker or another person presently intends to do (or not do) something in the future is generally regarded as a statement of fact which is actionable if untrue.

Incomplete statements. A representation stating the truth so far as it goes, but which D knows or believes to be materially misleading because of his failure to state additional or qualifying matter, is actionable.

Concealment. If D conceals or otherwise prevents P from acquiring material information, he is liable as though he had stated its nonexistence.

Nondisclosure. At one time, mere silence could not amount to a misrepresentation. Today, there are several significant exceptions. Fiduciary or confidential relations require disclosure of all material facts. The rule does not apply where D actively conceals material information or prevents investigation. Incomplete statements may be actionable. Subsequently acquired information which makes the prior statement untrue or misleading must be disclosed if D knows or believes that P is still acting on the basis of the original statement. If D makes a statement without expecting that P will rely upon it (therefore, not actionable) and D later discovers that P, in a transaction with him, is about to rely upon it, he has an affirmative duty to disclose its falsity. There is a growing trend to find an affirmative duty to disclose essential facts known to D when D has special access to those facts which P does not, and in other cases where there is some reason why non-disclosure would be unconscionable or very unfair. Statutes may impose an affirmative duty to disclose.

4. **Scope of Liability**

Persons. D is liable to the specifically identifiable person(s) or group of persons he (1) *intends* to act (or has *reason to expect* will) act (or refrain from acting) in reliance upon his representation. If D intends or has reason to expect that his representation will be communicated to a third person, and that it will influence his conduct in the type of transaction involved, he is subject to liability to that third person.

Proximate cause. D's representation must have been a substantial factor in influencing P's conduct, and P's loss from the reliance must have been reasonably foreseeable.

5. **Contributory Negligence**

If P justifiably relies upon a fraudulent misrepresentation, he is not barred from recovery by his contributory negligence in doing so.

6. **Justifiable Reliance**

P can recover only if he relied upon the representation, and his reliance was justifiable.

Materiality. Reliance is not justifiable unless the matter misrepresented is material.

Duty to investigate. At one time, persons dealing at arm's length could not justifiably rely on the other's statements if a reasonably independent investigation would have revealed the truth. Today, P may rely on fact representations without further investigation even when their falsity could have been easily and quickly discovered, unless something known to him or apparent in the situation at hand should have warned him that the statement ought not to be accepted without further inquiry. Reliance may also be justified without investigation if D somehow prevents or deters further inquiry.

Opinion of adverse party. P cannot justifiably rely on D's statement in the form of an opinion, unless the fact to which the opinion relates is material and D (1) purports to have special knowledge, or (2) stands in a fiduciary or confidential relation to P, or (3) has some other special reason to expect that P will rely on his opinion.

Opinion of apparently disinterested person. P can justifiably rely on the opinion of an apparently disinterested person if the fact that he holds the opinion is material.

7. Damages

Damages for fraudulent misrepresentations are measured by P's pecuniary loss, including the difference between the value of what he paid and the value of what he actually received and consequential damages, or (if a business transaction) the benefit of his bargain.

C. Negligent Misrepresentation

1. Discussion

Even though D honestly believed his erroneous statement to be true, he may have been negligent in (a) failing to exercise reasonable care to ascertain the true facts, or (b) failing to possess or apply the skill and competence required by his business or profession (e.g., attorney, accountant, surveyor, weigher, product manufacturer), or (c) the manner in which he expressed his assertion. Most courts, following *Derry v. Peek*, have refused to extend the traditional deceit action to merely negligent misrepresentations which cause only pecuniary loss. However, most jurisdictions now recognize a limited form of liability for such negligent misrepresentations as a separate tort action.

Physical harm. If D's negligent misrepresentation proximately causes physical harm, ordinary negligence principles apply, not the rules in this section.

2. Scope of Liability

Interest in transaction. D is not liable for his negligent misrepresentation (causing only pecuniary loss) unless made in the course of his business, profession or employment, or other transaction in which he has a pecuniary interest.

Third persons in known class. At first, D was liable only to the specific person or persons for whose benefit and guidance he intended to supply the information. Today, many courts have extended D's liability to include persons in a limited group, even though not specifically known to D, if D knows that one or more persons in that group will receive and rely upon that information.

Foreseeable harm to one remote user. Some courts have extended liability to the case where D knows that the information he furnished will be used by a succession of persons whose specific identity is presently unknowable, but only one such person will suffer loss.

Public duty to furnish. Certain kinds of statutes require D to furnish, file or publish information for the protection of a class of persons. If such information is negligently erroneous, a member of that class who relies upon it to his injury may recover.

3. Contributory Negligence

P's contributory negligence in relying upon a negligent misrepresentation is a defense. Comparative negligence rules, if any, apply.

4. Damages

Damages for negligent misrepresentation include P's out-of-pocket loss and consequential damages, but not the benefit of the bargain.

D. Innocent Misrepresentation

1. Physical Harm: Products

If D is engaged in the business of selling products, he is subject to strict liability for physical harm resulting from a misrepresentation made to the public concerning the character or quality of a product sold by him.

2. Pecuniary Loss: Sale, Rental, or Exchange Transaction

The Restatement (Second) § 552C proposes a limited form of strict liability for pecuniary loss sustained as the result of a misrepresentation made by D in a sale, rental, or exchange transaction with P.

XXIV. DEFAMATION

A. General Rules

1. Elements of Cause of Action

The elements of a defamation action are: (1) a false and defamatory statement concerning another; (2) an unprivileged, intentional or negligent publication to a third party; (3) in some cases (depending on the status of the defendant), D's fault in knowing or failing to ascertain the statement's falsity; and (4) in some cases (depending upon the type of statement), actual damages.

2. What Is Defamatory?

Rule. A communication is defamatory if it tends to harm P's reputation in the community, either by (1) lowering others' estimation of him, or (2) deterring others from associating or dealing with him.

Standard. A communication is defamatory if a substantial and respectable minority of P's community or associates would so regard it, unless the minority's views on that subject are so anti-social or extreme that it would not be proper for the courts to recognize them.

3. Truth

A defamatory statement is not actionable unless it is false. Traditionally, truth has been regarded as an affirmative defense. Today, in cases involving issues of public interest, the First Amendment now requires P to bear the burden of proving falsity. Additionally, (as discussed below) the law now requires P to establish D's fault with respect to the falsity of the statement in at least some, if not all, defamation cases.

4. Who May Be Defamed

Deceased persons. Except as otherwise provided by statute, no action lies for the defamation of a deceased person. Whether the action survives P's death (where P was defamed while alive) depends on the local survival statute.

Entities. Corporations, partnerships and unincorporated associations may be defamed.

5. Meaning of Communication

Understanding of recipient. The recipient must understand it in a defamatory sense, and understand that it was so intended. If he reasonably so understood it, it does not matter that he was mistaken.

Extrinsic circumstances. Extrinsic facts and circumstances known to the recipient are taken into account in determining its meaning.

Pleading. At common law, if the statement is not facially defamatory, P was required to plead the extrinsic circumstances which gave it a defamatory meaning (“inducement”), set forth the communication verbatim, and explain the defamatory meaning he claimed to have been understood (“innuendo”). Some states have retained these requirements.

6. Application to P

The communication must have been understood by the recipient (correctly, or mistakenly but reasonably) as intended to refer to P. The applicability of the defamatory matter to P may depend upon extrinsic facts or circumstances known to the recipient. If so, such facts and the manner in which they connect the defamatory matter to P (“colloquium”) may have to be pleaded.

7. Group Defamation

As a general rule, no action lies for the publication of defamatory words concerning a large group or class of persons. But a member of a small group may recover if the statement may reasonably be understood as applying to him. And so may a member of any size group if the circumstances indicate that it is intended to apply to him.

8. Types of Defamatory Communications

Fact. A defamatory communication (typically, a fact) may be direct or indirect, as where words or pictures imply a defamatory meaning.

Opinion. At common law, a defamatory statement of opinion (if not privileged) was actionable the same as one of fact. This rule appears to have been modified by recent constitutional law interpretations.

Based on known or stated facts. If the defamatory opinion is based entirely on facts (a) known to those making and receiving the statement,

or (b) stated as a predicate to the opinion, recent cases indicate that the First Amendment permits one to express one's opinion, however misguided or debatable, without defamation liability. However, to the extent that the opinion implies the allegation of undisclosed defamatory facts, it may be actionable.

Ridicule. Humorous or satirical writings, verses, cartoons, or caricatures which may be understood as making a statement about P are similarly protected, at least to the extent that they represent merely negative opinions not implying false facts.

Verbal abuse. Profanity and similar statements, directed at P in anger and obviously intended as mere vituperation or abuse, ordinarily cannot be taken literally and therefore are not defamatory.

Fabricated quotation. To attribute a fabricated quotation to P may be defamatory.

B. Libel and Slander

1. Distinguished

Libel is the publication of defamatory matter by (1) written or printed words, or (2) embodiment in physical form, or (3) any other form of communication that has potentially harmful characteristics comparable to those of written or printed words. Radio and television publications are regarded in most jurisdictions as libel, unless otherwise provided by statute.

Slander is the publication of defamatory matter by spoken words, transitory gestures, or other form of communication not amounting to a libel.

Factors to be considered. The factors to be considered in distinguishing libel and slander are the area of dissemination, the deliberate and premeditated character of the publication, and the persistence or permanency of the publication.

Radio and television publications are usually regarded as libel, unless otherwise provided by statute. Libel includes most communications by computer

2. Defamation Actionable Without Proof of Special Damage

Libel. In most jurisdictions, any libel is actionable without proof that P sustained any special harm or damage ("per se"). In a minority, a libel

which is not defamatory on its face but requires reference to extrinsic facts to establish its defamatory meaning (“libel per quod”) is not actionable without proof of special harm.

Slander. Publication of a slander is not actionable without proof of special damages unless it imputes (1) conduct that constitutes a crime punishable by imprisonment or involving moral turpitude; (2) that P has a venereal or other loathsome and communicable disease; (3) conduct, characteristics or a condition that would adversely affect P’s fitness for the proper conduct of his business, trade, profession, or office; or (4) serious sexual misconduct.

Special damage. In this context, special harm or damages refers to the loss of something having economic or pecuniary value resulting from the harm to P’s reputation.

C. Publication

1. Definition

Publication is the communication of defamatory matter by D to someone other than P.

2. Fault

The publication must have been intentional or the result of D’s negligence.

3. Agent

In most jurisdictions, publication to D’s agent is sufficient (but may be privileged). If dictated with the intent that it will be reduced to writing, it is libel. And D is liable for a publication by his agent where he directed or procured it.

4. Multiple Publications

General rule. Each of several communications to a third person by the same D is a separate publication.

Single communication. A single communication heard at the same time by two or more third persons is a single publication.

Single publication rule. One edition of a book or newspaper, or one radio or TV broadcast, one exhibition of a motion picture, or a similar aggregate publication is deemed a single publication.

Effect. For each single publication, only one action can be maintained in which P must claim all damages resulting from that publication.

5. Wills

Generally, an action will lie against D's estate for libelous matter published in his will after his death.

6. Liability of Republisher

General rule. One who repeats or otherwise republishes a defamation is subject to liability to the same extent as if he had originally published it.

Exception. One who only delivers or transmits defamatory matter published by a third person is subject to liability only if he knows or has reason to know of its defamatory character. This exception does not apply to broadcasters. Information published on the Internet or other similar network will probably be treated as published only by the content provider and not by the ISP or one who merely provides the web site.

7. Causation: Liability of Original Publisher for Republication

D is liable for the republication of his defamatory statement by another if (a) the third person was privileged to repeat it, (b) D authorized or intended the repetition, or (c) the repetition was reasonably foreseeable. D is usually not liable for a repetition by P.

D. Fault

1. Common Law

At common law, D's ignorance of the falsity or defamatory character of the statement was no defense. The only fault required was with respect to its publication: D had to intentionally or negligently publish the matter.

2. First Amendment

Today, the First Amendment imposes fault requirements, at least in the case of defamatory matter concerning public officials, public figures, or matters of public concern when D is exercising the freedom of the press protected by that amendment. Some states have followed suit and imposed fault requirements as common law rules.

3. Public Official, Public Figure (*N.Y Times* Rule)

One who publishes a false and defamatory communication concerning a public official or a public figure with regard to his conduct, fitness, or

role in that capacity is subject to liability only if D (a) knows that the statement is false and that it defames P, or (b) acts in reckless disregard of these matters.

Fault. The requisite fault is “actual malice” (sometimes described as “constitutional malice”), which means nothing more than knowledge of the statement’s false and defamatory character or D’s reckless disregard of these matters. Proof of D’s fault must be clear and convincing.

4. **Private Persons (*Gertz v. Robert Welch, Inc.*)**

One who publishes a false and defamatory communication concerning a private person, or concerning a public official or public figure with regard to a purely private matter is subject to liability only if D (a) knows that the statement is false and that it defames P, or (b) acts in reckless disregard of these matters, or (c) acts negligently in failing to ascertain them.

Effect of *Gertz*. After *Gertz*, strict liability for defamation published in the press, media, and possibly books is unconstitutional, regardless of the status of P. However, the states are free to determine the degree of fault required for defamation actions by private persons, provided at least negligence is required.

Majority rule. So far, the majority of states passing on the question have followed the *Gertz* criteria, so that in those jurisdictions private persons need only prove that D was negligent in ascertaining the falsity and defamatory character of the statement.

Minority rule. In some jurisdictions, if the defamation concerns a matter of general or public interest, even private persons are required to prove actual malice.

Burden of proof. Private persons need only prove falsity and the requisite fault by a preponderance of the evidence.

Private communications. It remains to be seen whether the *Gertz* rule ever applies to publications other than in the press, media or books. U.S. Supreme Court rulings appear to indicate that the *Gertz* rule will apply only when the subject matter of the defamation involves an issue of public interest. In all other cases, state common-law rules will apply.

E. **Defenses to Actions for Defamation**

1. **Consent**

P’s consent to the publication of defamatory matter concerning him is a complete defense, except that D may be liable for a republication that

results from P's honest inquiry or investigation to ascertain the existence, source, content, or meaning of the defamatory publication.

2. Absolute Privileges

Judicial proceedings. During the course of performing their functions in judicial proceedings, judges and judicial officers, attorneys, parties, witnesses, and jurors are absolutely privileged to publish defamatory matter having some relation to the proceeding.

Legislative proceedings. A member of Congress or a state or local legislative body is absolutely privileged to publish defamatory matter in the performance of his legislative functions. A witness is absolutely privileged to publish defamatory matter as part of a legislative proceeding in which he is testifying or in communications preliminary to the proceeding, if the matter has some relation to the proceeding.

Executive and administrative officers. An executive or administrative officer of the U.S., or a governor or other superior executive officer of a state, is absolutely privileged to publish defamatory matter in communications made in the performance of his official duties.

Husband and wife. A husband or wife is absolutely privileged to publish defamatory matter to the other.

Publication required by law. One who is required by law to publish defamatory matter is absolutely privileged to publish it.

3. Conditional or Qualified Privileges in General

At common law, certain defamatory communications are conditionally or qualifiedly privileged. As to these privileges, the chief limitation is that D must (1) believe his statement to be true, and (2) (a) in some jurisdictions, have reasonable grounds for believing it to be true, or (b) in other jurisdictions, not have acted recklessly in failing to ascertain its truth or falsity. But the *N.Y Times* and *Gertz* cases, when applicable, require P to prove that D acted either recklessly or negligently in ascertaining the truth or falsity of the statement. Thus, the following privileges apply only when and to the extent that they are not superseded by the *N.Y Times* or *Gertz* rules.

Protection of the publisher's interest. D correctly or reasonably believes that (1) the information affects a sufficiently important interest of D, and (2) the information will be useful to the recipient in the lawful protection of that interest.

Protection of interest of recipient or third person. D correctly or reasonably believes that (1) the information affects a sufficiently important interest of the recipient or a third person, and (2) the recipient is one to whom (a) D is under a legal duty to publish it or (b) its publication is otherwise within accepted standards of decent conduct.

Protection of common interest. D correctly or reasonably believes that another who shares a common interest is entitled to know it.

Family relationships. D correctly or reasonably believes that: (1) the recipient's knowledge will help protect the well-being of a member of D's immediate family; or (2) the recipient's knowledge will help protect the well-being of a member of the immediate family of the recipient or a third person, and the recipient has requested the information or is a person to whom its communication is otherwise within generally accepted standards of decent conduct.

Public interest. D correctly or reasonably believes that a sufficiently important public interest requires its communication to a public officer or other person who is authorized or privileged to take action if it is true.

Inferior state officers. Lower level state or local government employees who are not entitled to an absolute privilege have a conditional privilege for communications required or permitted in the performance of their duties.

"Abuse" (loss) of the privilege:

Knowledge, recklessness, or negligence concerning falsity. Prior to *Gertz*, in some jurisdictions a conditional privilege was lost if D did not honestly believe the truth of his statement, or if he did not have "reasonable grounds" to believe in its truth. It remains to be seen whether this rule has any purpose after *Gertz*. Other jurisdictions have held that only actual malice destroys a conditional privilege. Where *Gertz* or *NY Times* applies, any conditional privilege will be irrelevant.

Rumor. D may be privileged to publish a defamatory rumor or suspicion, even though he believes or knows that it is untrue, provided: (a) he states the defamatory matter as a rumor or suspicion and not as a fact; and (b) the publication is reasonable.

Purpose. There is no conditional privilege unless D publishes the defamatory matter for the purpose of protecting the interest which gives rise to the privilege and reasonably believes the publication to be necessary for that purpose.

Excessive publication. There is no conditional privilege to the extent that D knowingly publishes the defamatory matter to a person outside its scope, unless he reasonably believes that such publication is a proper means of communicating it to a proper person.

Unprivileged matter. The privilege is lost to the extent that D adds unprivileged matter to the communication. If not severable, the entire privilege is lost.

Fair comment on matters of public concern. At common law, there was a qualified privilege for “fair comment” (i.e., publicly expressing one’s opinion) on matters of public concern. This privilege appears to have been subsumed under the constitutional right to express such opinions without defamation liability.

4. Special Types of Privilege

Report of official proceeding or public meeting. D is privileged to publish defamatory matter in a report of an official action or proceeding or of a meeting open to the public that deals with a matter of public concern, provided the report is accurate or a fair abridgment of the occurrence reported. As applied to the press and news media, P must also establish D’s actual malice in failing to make a fair and accurate report.

Transmission of message by public utility. A public utility under a duty to transmit messages is privileged unless the utility knows or has reason to know that the message is defamatory and that the sender is not privileged to publish it.

Providing means of publication. One who provides a means of publication of defamatory matter published by another is privileged to do so if the other is privileged to publish it.

F. Damages

1. Types Recoverable

Damages which may be recoverable in a defamation action include (a) nominal damages, (b) general (or “presumed”) damages for harm to reputation, (c) damages for proved special harm caused by the harm to P’s reputation, (d) damages for emotional distress and resulting bodily harm, and (e) punitive damages.

2. General Damages

Rule. At common law, once D’s liability was established, the jury could award P general damages for harm to his reputation, whether P proved

actual harm or not (“presumed” damages). However, *Gertz* prohibits the states from permitting recovery for presumed damages unless P proves D’s actual malice; otherwise, proof of actual harm is required.

Exception. A state can award presumed damages when the plaintiff is a private figure and the speech did not involve any issue of public interest or concern.

3. Special Damages

Special damages (i.e., economic or pecuniary loss) resulting from the defamation may always be recovered. They are a prerequisite to liability for slander per quod (and libel per quod in some jurisdictions).

4. Emotional Distress and Bodily Harm

Once D’s liability is established, damages for emotional distress and resulting bodily harm are recoverable.

5. Punitive Damages

The common law generally allows punitive damages in a defamation action when D’s conduct involves “actual malice,” which in this context means an intent to harm P or a reckless disregard of whether or not P will be harmed. In addition, the First Amendment prohibits punitive damages, at least against the press and media defendants, unless P proves D’s knowledge of the statement’s falsity or his reckless disregard for its truth.

6. Mitigation

In most jurisdictions, D’s retraction is not a complete defense, but may be considered with other circumstances in mitigation of P’s damages.

XXV. PRIVACY

A. Introduction

The tort action for invasion of privacy encompasses four distinct wrongs:

1. **Appropriation** of one’s name or likeness;
2. **Intrusion** upon another’s privacy or private affairs;
3. **Public disclosure of private facts** about P; and

4. Placing P in a **false light in the public eye.**

The action for invasion of privacy is recognized in most jurisdictions, but not in all forms. It is sometimes affected by statute.

B. Appropriation

D is subject to liability for appropriating P's name or likeness for his own use or benefit, for the *purpose* of taking advantage of P's reputation, prestige or other value associated with his name or likeness. This is often called the "right of publicity." Unless otherwise required by statute, the use need not be for business or commercial purposes, but many states do impose such a requirement.

Commercial uses usually involve sales. An advertisement is a commercial use, but not feature stories, biographies, news, and creative works. P's identity may be used in noncommercial works.

D must use P's name or identity for the purpose of taking advantage of P's reputation, prestige, or other value associated with P's name or likeness.

C. Intrusion

1. Rule

D is subject to liability for intrusion (physical or other) upon the solitude, seclusion, or private life and affairs of another, provided the intrusion would be highly offensive to a reasonable person.

2. Form

The forms of intrusion are varied—unpermitted entry into P's home or hospital room; an illegal search of P's person or property; tapping P's telephone; hacking P's email account; using mechanical aids to observe P's private activities in his home; opening P's personal mail; and persistent and unwanted communications or close physical presence.

3. Publication

The tort is complete when the intrusion occurs. No publication or publicity of the information is required.

4. Private Matters

The intrusion must be into what is, and is entitled to remain, private. Photographing or watching P in a public place, or inspecting or copying nonprivate records, is not actionable.

5. Substantial Interference

The intrusion must be highly offensive to the ordinary person, resulting from conduct to which the reasonable person would strongly object.

6. Governmental Intrusion

The courts are beginning to recognize a constitutional right of privacy, to be free from excessive or unreasonable governmental intrusion.

D. Public Disclosure of Private Facts

1. Rule

D is subject to liability for giving publicity to some private fact about P, provided the fact publicized would be highly offensive to a reasonable person and is not a matter of legitimate public concern.

2. Publicity

The information about P need not be “published.” It is sufficient if it is disclosed so as to be likely to become public knowledge.

3. Private Facts

Since the facts disclosed are true, there is no liability for facts which are already known by, or available to, the public. The facts must be intimate or at least private details of P’s private life, the disclosure of which would be embarrassing, humiliating or offensive. And P’s right to keep these facts private is balanced against the public’s legitimate interest. There are fewer “private facts” of the famous and those in high positions.

4. Legitimate Public Concern or Interest

Constitutional limitations. The First Amendment is a further limitation. It permits (to a certain extent) publication of private facts that are matters of legitimate public concern or interest—i.e., “news.”

Public figures. Persons who have voluntarily become public figures, and even those involuntarily in the public eye by being part of a newsworthy event, cannot complain of the publication of facts, otherwise private, which are of legitimate public concern or interest in connection with that person, activity, or event. This legitimate concern may even extend to the family and close friends of the public figure, and to some facts about persons who were public figures at some time in the past.

E. False Light in the Public Eye

1. Rule

D is subject to liability for giving publicity to a matter which places P before the public in a false light, provided (a) the false light would be highly offensive to a reasonable person, and (b) D had knowledge of the falsity of the matter and the false light it created, or acted in reckless disregard of these matters.

2. Relation to Defamation

In this case, the information is false, and so if it is also defamatory, an action for libel or slander may be an alternative remedy. However, P need not be defamed. It is enough that he is given unreasonable and highly objectionable publicity that attributes to him characteristics, conduct or beliefs that are false.

3. Highly Offensive

The matter must be highly offensive to a reasonable person.

4. Constitutional Limitations

Under *Time, Inc. v. Hill* (U.S. 1967), as to press and media defendants, P must prove by clear and convincing evidence that D knew of the statement's falsity or acted in reckless disregard of its truth or falsity. Whether the *Gertz* case has modified this rule (to include negligence in the case of private individuals), and the extent to which this limitation applies to others than the press and media, has yet to be decided.

F. Privileges

The absolute, conditional and special privileges to publish defamatory matter also apply to the publication of any matter that is an invasion of privacy.

G. Damages

In an action for invasion of privacy, P can recover damages for (1) harm to his interest in privacy; (2) mental distress, if of a kind that normally results from such an invasion; and (3) special damages.

H. Persons Who May Sue

Unless otherwise provided by statute, and except for appropriation, only a living individual whose privacy is invaded can maintain an action for invasion of privacy. Whether an action survives P's death depends on the local survival statute.