Introduction to Tort Law and Theory

- What is Tort Law?
  - the branch of private law dealing with the duties persons owe to one another outside of the context of formal agreement.
  - Intentional torts i.e. pushing someone down the stairs
  - Non-intentional torts - failure through negligence

- The Aims and Approaches in Tort Law
  - Focus of torts is to restore the individual after being harmed by a breach of a duty of reasonable care.
  - Broadly divided into corrective justice/morality and social utility
  - Justice and Policy
    - Morality/Corrective Justice
      - righting of wrongs done to individuals, heavy on the concept of fault, unjust to assign liability to a party that is not in some way at fault
        - Could be the cause of injury but not at fault
      - Moral responsibility of people who visit harms on others
    - Social Utility
      - The interest of compensating injuries and distributing the cost of injuries
      - spread the cost to those parties that can most readily bear the cost of retribution
      - deter socially harmful conduct, and promote socially useful conduct
  - Compare example: building out of cheap materials - hospital, someone gets injured in minor collapse
    - corrective justice - hospital at fault, pay for injuries
    - social utility - conduct shaping - might adopt a rule that hospital is so useful that we don't want to discourage building such future hospitals so we will lessen the liability
  - Economic analysis
    - maximize net good
who is at the best position at the lowest cost to bear liability

- Provide a Dispute Resolution Process
  - one party injured by another the law provides a system for redress

**Compensation**
- Meant to make plaintiff whole again
- *What falls under the heading of compensatory damages?*
  - lost wages or earning capacity
  - medical expenses
  - pain & suffering - how much money is this kind of suffering work?
  - mental & emotional pain

**Deterrence**
- *What falls under punitive damages?*
  - special kind of punishment to deliver just deserts and deter them from continuing this action in the future
Torts – Professor Snead – Fall 2007 – Intentional Torts

• **Overview**
  o All intentional torts require a voluntary act and intent
    ▪ Voluntary act does not include involuntary movements

• **Battery**
  o Act intending to cause harmful or offensive contact or unwanted touching and when this intent is realized
    ▪ no intent to harm required, just intent to contact
    ▪ Offensive must be of a reasonable sense, not to those that are overly sensitive, what would a reasonable person find offensive?
      • Unless previously stated/aware of what would otherwise be unreasonable Ex. COHEN v. SMITH: woman did not want to be touched or seen naked by male doctor, did anyway despite expressly being told not to
  o Historical Strict Liability -liable had there been a strict liability policy even though he is not at fault
  o Element of intent is crucial to battery (and all intentional torts)
    ▪ Intent required to establish fault rather than mere cause of injury
    ▪ VAN CAMP v. McAFOOS - McAfoos hits Van Camp in the back of her Achilles tendon when he drove his tricycle into her. You cannot hold someone responsible for a tort that is not their fault. While McAfoos on his tricycle was the cause of Van Camp's harm he was not negligent or deemed at fault under the precedents Van Camp presented.
  o Doesn’t have to be the person touching, could set in motion something else i.e. bullet, smoke etc.
    ▪ Smoker's Battery - anyone who smokes is perpetrating a battery on those around them, this theory is not valid per the court, but this case has different stipulations
      • LEICHTMAN v. WLW JACOR COMMUNICATIONS INC.
    ▪ Could intentionally set in motion events leading to injury
      • GARRATT v. DAILEY – Brian Dailey moved Ruth Garratt’s lawn chair, Did Brian have substantial certainty that Ruth would hit the ground? If so it is battery although he did not necessarily intend to hurt her
Transferred intent – when you intend to commit a tort against one person, but injury to another results instead.
   - I intend to do Tort A and end up doing Tort B then intent transfers accordingly here as well
   - Corrective Justice – making the person whole for a tort on them
   - 5 torts covered by transferred intent
     • False imprisonment, trespass to land, trespass to chattels, battery, & assault
Insanity/mental illness is not a defense
   - If you intend harm regardless of whether your reasoning is logical you are liable for the tort of battery or wrongful death
   - If both parties are innocent, the one who caused the harm should bear the loss
   - Preventing tortfeasors from lying to say that they are insane to get out of liability
Dual-intent jurisdictions
   - require not only the intent to contact but also for that contact to be offensive and harmful
   - Sole intent jurisdiction require only that you intend to make contact and a reasonable person would find that offensive

**Assault**
   - Act intending to cause apprehension of imminent bodily harm, there is assault even if no battery happens. Assault is a touching of the mind.
   - Standard of assault is the reasonable apprehension or fear of imminent bodily harm
   - Words in the vacuum not around circumstances would not constitute assault i.e. a joke, colorful language would not usually constitute assault
     - Words combined with actions or circumstances can constitute assault
       • CULLISON v. MEDLEY
   - Moment of awareness required for assault
     - Comes from behind, could be battery but not assault
     - KOFFMAN v. GARNETT – football player case - Assault by definition requires apprehension of contact consistent with

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battery. Because Andy admitted that he had no idea the coach was going to tackle him he could not possibly have been worried it would happen and thus apprehensive about it

• **False Imprisonment**
  o Acts intending to confine another without lawful privilege within boundaries fixed by the actor for an appreciable amount of time.
  o Victim has to be conscious of the confinement or harmed by it.
  o Means of confinement
    ▪ False assertion of legal authority – “the police are coming” when not true
      • McCANN v. WAL_MART STORES
    ▪ Threat of physical reprisal for leaving the confined area
  o Exclusion does not equate to false imprisonment
    ▪ i.e. You can’t come into my park, does not mean I imprison you to the rest of the world

• **Trespass**
  o Trespass to Land
    ▪ Intentional and unauthorized physical invasion of plaintiff’s land
    ▪ Can be personal entry or entry of an object such as a rock or bullet
    ▪ Extends beneath the surface and to a reasonable height above the ground
    ▪ Refusal to leave constitutes trespass
    ▪ Intent to enter the land is enough to constitute trespass
      • Even if you did not know it didn’t belong to you
    ▪ Liable for damages even if no harm is done
      • Punitive damage if entry is malicious
• **Defenses to Intentional Torts – Privileges**
  o 9 Major Defenses to Intentional Torts
    ▪ Consent (may be part of prima facie case)
    ▪ Self-defense
    ▪ Defense of third person
    ▪ Defense of property
    ▪ Recapture of chattels
    ▪ Shopkeeper’s privilege
    ▪ Necessity (public or private)
    ▪ Legal Authority
    ▪ Discipline
  o Affirmative Defenses
    ▪ Must be brought up in the response to the complaint by the defendant
    ▪ Defendant has the burden of proof for the defense
  o Defense Against Apparent Misconduct of Plaintiff
    ▪ Self Defense
      • Entitles you to use reasonable force to prevented threatened harmful/offensive contact or confinement
      • Depends on the apparent necessity not the actual necessity, must be reasonable in light of the perceived threat
      • You can use reasonable force to defend against harmful or offensive bodily contact
        o Covers only reasonable not excessive force
        o Deadly force may be used to prevent murder, rape, serious bodily harm
      • Verbal provocation does not warrant self defense
      • Resisting Unlawful arrest is a valid reason to invoke self defense
      • Revenge is not self defense, must be imminent threat, not retaliation for a past threat
    ▪ Defense of Third Persons
      • Old rule: only family members & servants
      • If defendant C witnesses A beating up B he may intervene on behalf of B in the same way B might defend himself
• Some jurisdictions allow for reasonable mistake, some do not
  
  ▪ Arrest and Detention
    • Shopkeeper’s privilege - Allows a merchant who reasonably believes that a person is stealing merchandise to detain the person for a reasonable time to investigate whether she has in fact committed theft
      o Privilege lost if means are not reasonable
      o GREAT ATLANTIC & PACIFIC TEAS CO. v. PAUL - The shopkeeper claims that because he reasonably believed Paul was stealing it is his right under the law to detain him until a proper investigation can be made. This however was in that restatement of torts and not the law of Maryland. The justices go on to say if it were the law of Maryland it should be noted that as a private person the shopkeeper did not have this right given that he did not see Paul take the item and put it in his coat but also due to the nature of a self-service grocery store until Paul was deemed to be leaving without paying he wasn’t stealing even if he had the item in question in his possession.
    • Needs to be reasonable grounds to suspect person
    • Detention must occur in or immediately near the store
    • Needs to be probable cause of a felony, or a misdemeanor causing disturbance of the peace
  
  ▪ Defense and Repossession of Property
    • Cannot use deadly force to protect property
      o KATKO v. BRINEY: spring gun case
    • Force must be reasonable and proportionate
      o Law puts greater weight on human safety than on property rights
    • Assault but not battery is acceptable
    • Must demand the intruder desist/leave prior to using force
• Not allowed to use force when plaintiff has their own privilege i.e. necessity (docked boat to avoid drowning)
• Recapture of Chattels
  o Can go in hot pursuit, can’t go a week later
  o No expanded vigilantism

- Consent
  • 3 types of consent
    o Express
    o Implied-in-fact
      ▪ Silence can constitute consent where a reasonable person would speak if they objected
      ▪ Custom and usage (contact sports)
    o Implied by law
      ▪ Emergency situations
      ▪ P is unable to consent & a reasonable person would consent
  • Can be implied/conditional (often in medical procedures where operation is underway and they find another problem)
    o Implied not allowed if they expressly said the opposite
      ▪ Ashcraft v. King- No blood donations outside the family and they did anyway and she contracted HIV from this blood, Hospital committed battery as she did not consent to this blood
  • Ineffective consent in 5 ways
    o Consent obtained through **duress**
    o Consent obtained through **fraud**
      ▪ Although there are clear reasonable exceptions
        • Ex. Sex procured by lying about love is not rape, sex procured by lying about it being medically beneficial is
- Defraud to the nature of the transaction negates consent, but fraud on some ancillary part of the transaction does not
  - Plaintiff lacked **capacity** to consent
    - 12 year old can’t consent to statutory rape
    - Infant
    - Mentally disabled
  - Act exceeded **scope** of consent
  - Can’t consent to a **criminal act**
    - Not allowed to say yes to a fist fight
- Privileges not based on Plaintiff’s Conduct
  - **Necessity**
    - Public or private necessity
    - Natural law dictates that the necessity of self preservation can override certain other obligations
    - Privilege to trespass if it is necessary to prevent an imminent disaster to society itself
    - Who decides public necessity?
      - Public official
      - Anyone can act on behalf of the public as long as it is reasonable
    - Private property shall not be taken for public use without just compensation
Torts – Professor Snead – Fall 2007 – Negligence – Duty & Breach

Definition: Creation of an unreasonable risk of harm to other that results in an actual injury or harm. Should be no liability without fault, negligence is in favor of corrective justice more so than social utility.

• Overview - How to Assess Responsibility
  o Duty, Breach, Causation, Harm/Injury
    ▪ Fault as a principle determinant
    ▪ Duty of Reasonable Care – is it owed at all? You were in a position to stop a harm but it wasn’t necessarily your duty to do so
    ▪ Causation – if you didn’t cause the harm in a legal or actual sense then most likely the argument that you’re liable is going to fail
      • Scope of responsibility – breach your duty of care and things happen which of those things are you responsible for
    ▪ Injury - Only legally cognizable injuries are actionable
      • No one injured even though you are acting unreasonably you are not negligent, this is not actionable

• Duty of Care
  o Duty to act reasonably under the circumstances includes duty to avoid certain risks and harms to others
    ▪ Standard isn’t raised in dangerous activities
      • Sudden emergency instructions are repetitious because the “circumstances” are already included in the analysis
  o Must be foreseeable risks of harm
    ▪ Not simply more probably than not
    ▪ But enough that someone would reasonably anticipate in shaping their conduct
    ▪ Factual question for the jury “Would a reasonable person under these circumstances take steps to prevent this harm?”
    ▪ Foreseeable must involve nature and type of risk not necessarily a specific risk
  o Prudent Person Standard - Unless under the circumstances a prudent man would have foreseen the harm
  o Special Categories for duties
- Standard for children – reasonable child of the same age and intelligence
  - Not applicable for inherently dangerous/adult activities, there a reasonable adult standard is applied
  - Note: Some jurisdictions follow the rule of 7’s
    - 14 year olds capable of negligence
    - 7-14 presumed incapable
    - Below 7 incapable as a manner of law
- Mental disability does not mean you are not held to a reasonable standard of care
  - Policy reasons
    - Allocate losses of 2 innocent parties to the one who caused the loss
    - Incentive for caretakers to watch out for mentally disabled better
    - Removes possibility of fake mental illness as a defense
    - Forces mentally disabled to pay for damages if they are to “live in the world”
- Sudden medical emergency defense – not a duty to foresee and prevent i.e heart attack, did not act unreasonably
  - *does not include mental illness
- Recognized physical illness i.e. blindness or frequent seizures held to the standard of a reasonable person with that disability
  - **Negligence Per Se**
    - Importation of a penal statute into a tort law to give definition to the duty standard
    - 2 ways the legislature can affect the duty analysis
      - May create a legal duty with a civil cause of action
        - Legislatively create a tort
      - Penal statute from which courts can derive a civil action
        - Negligence per se
          - designed to protect the kind of people injured?
          - was this the type of injury meant to be prevented?
          - Is injury a direct result of the violation?
• Still must be foreseeable incidence
• Would invoking the statute define liability without fault

  o Defenses to negligence per se
    • Incapacity
      • Infancy, heart attack, mental incompetence
    • Lack of Knowledge
      • Didn’t know tail light on car was out
    • Unable to Comply after Reasonable Diligence or Care
    • Emergency not due to your own misconduct
      • Failing brakes on a car
    • Compliance would cause greater risk of harm to actor or others

• Breach *little negligence is the breach of a duty (no injury/causation)
  o Creation of an unreasonable risk that results in a cognizable harm
    • What is an unreasonable risk?
      • Foreseeable is an important part of what makes something reasonable or unreasonable
      • All actions may involve some kind of risk of injury but that doesn’t mean they are unreasonable
      • Burden < Probability of the Harm * The Magnitude of Harm (Hand formula)
      • Ex. No negligence when kid slips on grass at camp, social utility outweighs the risk
    • Risk Utility Formula – Learned Hand (CARROL TOWING case)
      • Owner has a duty if Burden < probability of the harm * magnitude of the loss(injury)
        o B < PL
      • Whole analysis is usually in economic/monetary terms
      • Meets aims of tort law: efficiency & social utility
      • Problems
        o Moral blame is set aside for economics
        o How do you quantify injury/death in monetary terms?
        o More about inefficiency than justice
  o Special Circumstances
- **Sudden emergency doctrine** – when faced with an emergency not of your own making, no duty to risk life and limb or anything else substantial to save another’s property (looks at reasonableness of the behavior under the circumstances)

- **Employer's duty to provide reasonably safe work environment**
  - Asking someone to take an inherently dangerous job is not inherently unreasonable
    - Roof painter case
  - Duty is not breached automatically when/if a risk is created
  - When employer has better knowledge of the dangers, duty to reasonably warn/take precautions

- **Assessing Responsibility of Multiple Negligent Parties**
  - Apportionment of Responsibility & Allocation of Damages
    - **Joint & Several Liability**
      - more than one tortfeasor and the damages they each cause are indivisible.
      - Can enforce 100% of the damages against either tortfeasor
      - One who suffers the burden must obtain contribution from the non-contributing party
        - Tortfeasor A pays full amount to Plaintiff, Tortfeasor B pays A their portion
      - Most popular/common standard
      - Aims served: compensating the plaintiff, corrective justice
      - Tied to idea that you should only be liable if you’re at fault, and only should bear the portion of your fault
      - If B is insolvent, some jurisdictions do not allow holdings against them
    - **Proportional Share Liability**
      - Defendants are responsible for their share of the compensation
        - A is 30% responsible, pays 30% of damages
Most courts don’t require plaintiff to show apportionment

**Indemnity**
- 100% shifting of liability, shifts burden away from a secondary tortfeasor who had a judgment entered against him onto the primary tortfeasor
- Commonly used in vicarious liability situations

**Proving Conduct**
- 3 means of proving negligence claims
  - Direct Evidence
  - Circumstantial evidence – jury permitted to draw inferences
  - Res Ipsa Loquitur
- Must be facts alleged that could establish negligence even if situation is one in which it would be difficult to prove anyway
  - Santiago v. First Student – bus accident plaintiff doesn’t remember and couldn’t prove any of the details, not sufficient evidence
- Witnesses are not allowed to testify as to ultimate conclusions of law
  - i.e. was this person negligent? Yes
- Questions of credibility lie with the original tryers of fact (jury)
  - only way they will overturn a jury verdict is if it is contrary to the overwhelming weight of the credible testimony
- experts can testify as to the matters within their realm of expertise
  - not always needed, common knowledge will often suffice
    - HAMMONS v. POLETIS – hotel shower ball fell off and injured plaintiff, jury could use common knowledge to know defendant was negligence as shower bars properly cared for do not fall off

**Evaluating Conduct**
- **Slip and Fall cases**
  - Plaintiff must show that the owner of the premises
    - Either created the dangerous condition
- Or had actual knowledge of the dangerous condition and did nothing to fix it (discovered or should have discovered and fixed it)
- Or defendant’s business methods made it all too likely that others would create a dangerous condition

- Ex. THOMA v. CRACKER BARREL - Duty of reasonable care would include cleaning up spills in a timely fashion

**Company standards**

- Breach of company standards does not necessarily equal breach of duty of reasonable care
- Ex. WAL-MART v. WRIGHT - If Wal-Mart didn’t follow the standards in their manuals then they were negligent, judge put this in their instructions, Higher court said the manual being included in the instructions was incorrect, Manual was not relevant to standard of care element
- Should be an objective standard both ways – can’t expect more or less from employees
- Otherwise would deter employers for setting higher standards which they could be legally held to

**Custom/Common Industry Practice**

- Just because something is the norm for your industry does not mean it meets the reasonable care standard
- Otherwise, industries would be unduly slow in raising their standards when new safety devices became available
- *The TJ HOOPER case* – just because most barges don’t have a radio does not mean it was not negligence to neglect to have one. Hand formula, burden of having a radio is less than the likelihood and extent of losses

- **Res Ipsa Loquitur “speaks for itself”**

  **Overview**

- Clearly there has been an injury but the facts are not available to the plaintiff
- Injury would not normally occur absent negligence
  - Circumstances of the injury allow inference of negligence
• No direct evidence
  
  **Requirements to invoke Res Ipsa Loquitor**
  • The event in question does not ordinarily occur without negligence
    o Plaintiff must show any facts that she can
  • Instrumentality which caused the accident was under the exclusive control of the defendant
  • Other possible responsible parties are reasonably eliminated by the evidence
  • Indicated negligence is within the scope of the duty owed to the plaintiff by the defendant
  
  **Notes**
  • Does not shift the burden of proof but allows more inferences and circumstantial evidence
  • Policy reasons: defendant is in a better position to give evidence the plaintiff could not get on their own (asymmetry of knowledge)
    o Will not apply when plaintiff has equal knowledge or means of gaining equal knowledge
    o Also doesn’t apply when there is an equality of ignorance
  • Allows jurors to draw a common sense conclusion
Torts – Professor Snead – Fall 2007 – Negligence

Definition: Creation of an unreasonable risk of harm to other that results in an actual injury or harm. Should be no liability without fault, negligence is in favor of corrective justice more so than social utility.

- **Causation**
  - **Overview**
    - Cause in Fact/But for the negligence in question, would this injury occur?
      - If it would have occurred without your negligence it is not your fault
    - Legal or proximate causation
      - Scope of the risk that one creates through their negligence specified by public policy values
      - Designate the kinds of risks created by my negligence
        - If harm comes outside this scope, even if the actual cause is you it’s not the legal cause and you aren’t liable
  - **Cause in Fact**
    - Not a policy question
    - Simply a factual question
    - 2 tests
      - But for causation – injury would not have occurred without defendants negligent conduct
      - Substantial factor – when there are multiple causes, was this a material element in causing the harm (only when multiple/2 or more parties)
    - “but-for” causation
      - SALINETRO v. NYSTROM – pregnancy x-ray case, even though he was negligent in failing to ask her if she was pregnant since she would have said no anyway the injury would have happened even without his negligence
      - RESTATEMENT: If tortuous conduct fails a but-for test only because of another conduct that would have produced the result, that act is still a cause in fact
    - Damages for multiple tortfeasors
- 2 but for injuries, each is liable for their own if it can be divided, if indivisible it will be divided according to fault/responsibility
- Only appropriate to hold both 100% liable if they acted together/conspired
- SEE JOINT & SEVERAL UNDER BREACH

**Scope of Risk or “Proximate Cause”**

- Mechanism by which the law cuts off the chain of liability which could hypothetically go on indefinitely
- **Test:** Act is a proximate cause if it is an actual cause that is a substantial factor in the resulting harm
  - Substantial factor test: harm which occurred was of the same general nature as the foreseeable risk created by the defendant’s negligence (scope of the risk)
- Injury must be tied to the type of injury foreseeable and reasonable to the negligent behavior

**“Scope of Risk” Principle**

- Only liable for injuries that fall within the scope of the risk created by your actions or negligence
- there is a duty that is breached and causes a cognizable injury
  - Is the injury suffered within the scope of the risk generated by the negligence?
  - Is this the kind of injury reasonably existing as a result of this breach?
  - And is this the kind of person meant to be protected?
- Manner of injury doesn’t need to be foreseeable just the same type of injury that is to be expected
- RESTATEMENT: an actor is not liable for harm different from the harms whose risks made the actor’s conduct tortuous
- Modern view: focus is on foreseeability, but factors in:
  - Was act a substantial factor?
  - Was there a natural and continuous sequence between cause/effect?
o Direct connection without too many intervening causes?
o PALSGRAF v. LONG ISLAND RAILROAD - Plaintiff waiting for a train and another guy runs to catch a train that is moving, guard helps him on and he drops a package which contained fireworks which went off shaking loose a scale to fall over onto Ms. Palsgraf.
  ▪ Majority decision – duty defined by risks foreseeable by your conduct
  ▪ No reasonable person would have foreseen risk
  ▪ Dissent – liable to anyone who is injured by the chain reaction of your injury as long as there is proximate cause

Assessing the Scope of the Risk
  • What would a reasonable person be afraid would happen as a result of this negligence?
  • Manner in which the risk materializes
    o An act is a proximate cause of an injury when the type of injury sustained and the nature of the accident are reasonably foreseeable even when the manner in which the injury occurs is not
    o Kind of injury is what is important, not the extent of the injury
      ▪ Thin Skull Cases
        • Unexpected magnitude of the harm is not a defense if it was the type of harm done by the actions generally
        • Take the plaintiff as you find her
  • Intervening Cause
    o Comes into active operation in producing the result after the defendant’s negligence from a source independent of defendant’s negligence
    o Relieves liability only when it is outside the scope of the foreseeable risk
Traditionally not liable for the intentional criminal acts of others, not still liable if these crim acts are reasonably foreseeable and therefore within the scope of the risk

- Key: manner/extent don’t have to be reasonably foreseeable

- RESTATE: a negligent defendant whose conduct creates or increases the risk of a particular harm and is a substantial factor in causing that harm, he is not relieved from liability from the intervention of another person, except when the harm is intentionally caused by the third person and is not within the scope of the risk created by the defendant’s conduct

- Superseding causes
  - Cancels defendant’s liability
  - may break the chain of causation
  - extraordinary/unforeseeable under the circumstances it might relieve defendant from liability. Kind of injury is important, not manner!

  - SHEEHAN v. CITY OF NEW YORK - bus driver when dropping off passengers he didn’t pull into the required spot but rather stayed in the travelling lane and is hit from behind by sanitation truck whose brakes failed. Bus could have been there for plenty of valid reasons at the same time so it is the sanitation trucks fault according to the court

- Termination of the risk doctrine
  - No longer present and then another act happens, the first act is not a proximate cause (plaintiff achieves a position of safety
Torts – Professor Snead – Fall 2007 – Duties based on status

• Carrier and Host Drivers
  o Must protect passengers as far as human care and foresight allow
  • Many courts reject this and consider reasonable care
  • Some specific obligations – i.e. duty to rescue

• Landowner’s Duties
  o 3 categories of entrant, different duties for each
  • Trespasser - no duty except to refrain from willful, wanton, or reckless
  • Licensee – no duty except to refrain from willful, wanton, or reckless
  • Invitee – ordinary care standard
  o New rule (rejects entrant classifications)
    • Apply ordinary care – reasonable care under the circumstances
    • Still keeps trespasser distinction (viewed less favorably)
      o No duty unless aware of the trespasser
  o Children
    • Attractive Nuisance doctrine – applies to children of tender years and anyone trying to save them
    • Possessor of land is subject to liability for physical harm to children trespassing thereon caused by an artificial condition on their land if:
      • P knows children are likely to trespass there
      • P knows/has reason to know that condition poses an unreasonable risk of death or serious bodily harm
      • Children because of their youth would not recognize the danger
      • Utility of maintaining the condition and the burden of eliminating it are slight compared to the risk involved
      • Possessor fails to exercise reasonable care (i.e. fence around pool)
    • BENNETT v. STANLEY – swamp pool case
  o Open and Obvious Danger Rule
    • No duty of care to safeguard against open and obvious risks
    • Not reasonably foreseeable that someone would take such risks
• Obviousness means any further warning would not likely reduce the likelihood of injury
• Ex. OSULLIVAN v. SHAW – dove into shallow end of pool

• Lessors
  o Old rule: general non-liability because the lease is conveyance of property and duty would fall with the tenant
  • Modern Exceptions
    • contracts to repair defects,
    • latent hazards: knowing of and concealing a defect,
    • leased for public use
    • common areas (walkways, hallways)
    • negligent repairs
  o New rule: Landlord is under a duty to exercise ordinary care in the maintenance of the premises under all circumstances
Prima Facie Case

- Plaintiff must establish:
  - Universal standard of care by which defendant’s conduct is to be measured
    - Judged by industry standard (old rule: local standard)
    - Common sense/Reasonable person will not suffice
  - Usually need to provide expert testimony
    - Not necessary if common knowledge of a layperson would be sufficient (i.e. amputated the wrong leg)
  - Test: Doctor must exercise a degree of care, skill, and proficiency exercised by reasonably careful, skillful, and prudent practitioners in the same class to which he belongs (i.e. OB/GYN to OB/GYN standards) acting under the same or similar circumstances
    - Can’t establish through books (can’t be cross examined)

SMITH v. KNOWLES

Res Ipsa Loquitur in Health Care Setting

- Same basic principals
  - Doesn’t happen in the absence of negligence
  - Instrumentality/agent was in exclusive control of defendant
  - Plaintiff did not contribute any fault
- Medical expert opinion can be used here to fill in the gap of common knowledge
- Array of defendants does not hurt medical res ipsa
  - When there are multiple possible tortfeasors, burden shifts to the defendants to prove they didn’t cause the injury
- STATES v. LOURDES HOSPITAL – arm injured while under anesthesia, can use res ipsa loquitur in medical cases, clearly there is an imbalance of knowledge

Informed Consent

- Interest in patient autonomy
- Surgeon who performs a surgery without patient’s consent commits a battery
- Test: Physician owes a duty to disclose to the patient in a reasonable manner all significant medical information that the physician possesses or should reasonably possess that is material to an intelligent decision by the patient whether to undergo the surgery
  - Info possessed – average qualified physician/specialist
  - Material info – that which is significant to a reasonable person in what the physician knows or should know is his patient’s position
  - If the information would not have changed his decision, will not apply, reasonable person still would have had surgery or wouldn’t have had surgery
- What type of information needed?
  - Life expectancy – don’t need to disclose when it wouldn’t prompt someone to prepare their affairs
  - Risks of having the procedure as well as risks of not having it
    - Patient has the right not to consent even if it means death
- Risk that never materializes is not compensable
  - i.e. you could lose your voice but you didn’t
Case examples
HARNISH v. CHILDREN'S HOSPITAL
- You didn’t tell me about this risk and if I had known I wouldn’t have had the surgery
- In order to make a judgment, doctor has to tell me of the risks and rewards of surgery
- Failure to disclose risks is professional misconduct
- Do not have to disclose risk the patient already knows about
- Duty of care to disclose material information

WOOLLEY v. HENDERSON
- Normal risk but it was not disclosed
- Found plaintiff would have had the surgery even if he had known about the risk

ARATO v. AVEDON
- Had cancer that was very much untreatable, doctor didn’t tell him
- Patient died and family sued because he did not get his financial affairs in order because he had hope he would live
- Found for the defendant, Doctor not required to voluntarily reveal information
- Request has to be explicit

BROWN v. DIBBELL
- Comparative fault jurisdiction can award damages on informed consent cases
- Contributing to the doctor’s not telling you
  - i.e. not telling doctor you smoke, lying about family history
Emotional Harm

- Intentional Infliction of Emotional Distress
  - Definition: intentional or reckless infliction by extreme and outrageous conduct of severe emotional or mental distress even in the absence of physical harm
  - Test: Acted intentionally or recklessly, conduct was extreme or outrageous
    - More than mere insults, annoyances
      - Racial slurs may be considered above mere insult
  - Consider context and relationship between parties
    - Workplace: consider conduct necessary to manage business, captive audience of employee to employer vs. if just insulted by a person on the street
    - Other factors: repeated/long period of continued abuse, abuse of a person known to be vulnerable
      - Standards of conduct may be lowered when there are special sensitivities that the defendant is aware of
        - Children, mentally infirm, pregnant women
        - Or public utility i.e. innkeeper to guests lower standard
  - Actions of the defendant must have caused the distress
  - Emotional stress must be severe
    - Possible physical manifestations (sleeplessness etc)
  - Cannot be parasitic or incidental to another tort
    - Can be included in the damages but not as a stand alone tort
  - Must be intent to cause the distress, this is an intentional tort

- Negligent Infliction of Emotional Distress
  - Towards a third person
  - Recovery is limited to those present at the scene when the act occurred (such that defendant could reasonably anticipate they might suffer from his conduct)
  - Restatement: liable to immediate family present at the time or any other person present if the distress results in physical harm
    - Hearing from the other room may be sufficient
• Hostage situations (limited to immediate family)
  ▪ Stricter than foreseeable, must be a substantial certainty that conduct will cause mental distress to others

• Fright or Shock from Risks of Physical Harm
  o Old Rule: Required impact for recovery; then adopted rule that you must show physical manifestation of emotional distress
  o Zone of Danger Exception – must be within the zone of danger and suffer imminent apprehension of physical harm which causes or contributes to emotional injury
    ▪ Fear: must be expressed at or near the time of danger
    ▪ Foreseeability is still necessary
  o Dillon Test (most flexible): defendant might owe a duty to anyone who might foreseeably suffer emotional harm because of the following:
    ▪ Plaintiff was near the scene (actual sensory perception)
    ▪ Shock results from direct emotional impact not from merely learning of the incident after it happened
    ▪ Whether the victim and the plaintiff were closely related
  o Thing Test (1989): Plaintiff may recover for negligently inflicting injury on a 3rd person if plaintiff:
    ▪ Closely related by blood or marriage
    ▪ Present and aware that it is causing the injury to the victim
    ▪ Suffers severe distress as a result
      ▪ Reaction which is beyond that of a disinterested witness
    ▪ Expanded in some jurisdictions to include: if injury is death/severe harm, witnessed or came to the scene soon after

• Prenatal Harms
  o Prenatal injury: unique relationship between parties prevent child from bringing claims against its mother for injuries sustained as a fetus.
    ▪ Can sue other parties for those injuries, or mother for injuries post-birth
  ▪ Rules
    ▪ Not viable at the time of the injury:
      o Born alive – instant of life outside the mother although incapable of sustaining life on own (Y)
      Stillborn (N)
• Viable at the time of injury
  o Born alive: Y, Still born: Y
    ▪ Many courts look to the foreseeability of the injury to the fetus, some don’t
  o Wrongful conception cases: can recover if all of the elements of negligence are present; however doctor will be able to provide evidence of any potential benefits the plaintiff incurred in having the child and these will be used to offset costs.
    ▪ Benefits must be of the same interest that was harmed by the tort
    ▪ Injury requirement: injury is not the child itself but the intrusion into financial stability. Unreasonable burden to expect abortion or adoption, therefore plaintiff has not assumed the benefits of the risk.
    ▪ Most courts go the other way: damages are out of proportion to fault, plaintiff could have had abortion/adoption
  o Wrongful birth/life: failed to diagnose a defect which would have caused parents to abort, many courts uphold.
    ▪ Life: child can’t recover for being born, can however recover for cost of extraordinary care in his name

• Death
  o Common law there is no lawsuit available if:
    ▪ Plaintiff dies before decision
    ▪ Defendant dies before decision
    ▪ Survivors could not sue for wrongful death
  o Survival Statutes
    ▪ Allow lawsuit to survive the death of a plaintiff or defendant
    ▪ Brought in the name of the decedent
    ▪ What could have been gotten if he or she had lived
    ▪ No limitation on type of damages (punitive acceptable)
  o Wrongful Death Action
    ▪ Survivor’s are the injured party
    ▪ Bring claim to compensate them for monetary losses
      ▪ Only calculable losses, not punitive damages
    ▪ Heirs estates can recover even if heir dies

Case Examples - Emotional distress
• GTE SOUTHWEST v. BRUCE
  o Boss yells and is abusive towards his employees frequently
  o Employer has to be able to tell someone uncomfortable facts
  o However, employee/employer context makes this easier to sustain because the employee is a captive audience to his employer
    ▪ Vs. being able to walk away from a random offensive person on the street
  o Severity and regularity of behavior is a big factor
  o Consistent severe pattern of inappropriate conduct
• TAYLOR v. METZGER
  o Jungle bunny case
  o A jury could properly conclude that this was extreme and outrageous as it was employer to employee and racially pertinent
• HOMER v. LONG
  o Plaintiff’s wife was hospitalized for depression and her therapist seduces his wife while she is hospitalized and eventually as a result the P and his wife divorce
  o Husband brings claim (tort of outrage) against the therapist
  o Can’t recover because the outrageous behavior was to his wife not to him and he was not present to witness it
• BETTIS v. ISLAMIC REPUBLIC OF IRAN
  o Kidnapping causing emotional distress to family
  o Only immediate family could recover
Torts – Professor Snead – Fall 2007 – Defenses to Negligence

Definition of Negligence: Creation of an unreasonable risk of harm to other that results in an actual injury or harm. Should be no liability without fault, negligence is in favor of corrective justice more so than social utility.

- **Contributory Negligence:** The Common Law Rule
  - Definition: plaintiff’s conduct that does not meet the standard of care for his own protection and is a cause of his harm (but for/substantial factor)
  - All or nothing/complete bar, burden is on the defendant to raise
    - Very easy to apply
  - Purposes of tort law served
    - Policy: encourage ordinary care, not take advantage of the negligence of others
    - Efficiency of court
    - Justice – not have to pay for other’s mistakes
  - Traditional Exceptions to Contributory Negligence Bar in Comparative Fault Regime
    - Last clear chance – defendant will still be liable if she had the last chance to avoid the harm, yet failed to do so
    - Applies when defendant knew or should have known of the plaintiff’s harm (occurring as a result of the plaintiff’s negligence that has rendered him helpless)
    - Discovered Peril - defendant has to actually discover the peril in this case instead of “should have” discovered
    - *These doctrines are not needed in comparative fault regime

- **Comparative Fault**
  - Divides liability between the plaintiff and the defendant in proportion to their fault
  - Statutory addition to curtail the harshness of contributory negligence
  - Most common: pure comparative fault
    - Minority: P can only recover if her fault is less than 50%
  - Ways of determining allocation of fault
    - Determine the costs required to each party to avoid the injury
      - Whoever has less cost has more negligence
      - Restatement: nature of the risk creating conduct
• Awareness/indifference with respect to the risks and intent with respect to the harm created
• Strength of the causal connection between the conduct and the harm
  - Court is required to give an instruction as to how the fault will affect the ultimate allocation of damages according to the fault apportionment system in the jurisdiction

• **Res Ipsa Loquitur**
  - If plaintiff is not ruled out as a possible cause of his own injury, defendant wins

• **Illegal Activity** (on the part of the plaintiff)
  - Injury is a direct cause of knowingly and intentionally participating in a criminal act he cannot seek compensation for the loss if the act is deemed to be so serious as to warrant denial of recovery

• **Assumption of the Risk**
  - Two elements:
    - Individual must know and appreciate the risk (subjective)
    - Must freely and voluntarily assume it
  - Rule: plaintiff who voluntarily consents, either expressly or impliedly, to exposure of a known risk cannot later sue for damages incurred from exposure to that risk
    - In assuming risk, you relieve defendant of duty of care
  - **Contractual assumed risk:** P expressly assumed risk, P barred from recovery
    - Type of service performed (social utility? Necessary?)
    - Whether party seeking exculpation had a decisive advantage in bargaining strength
    - Waiver only protects against risks inherent in the activity, not unreasonable risks outside the scope of the activity
    - Scope of the waiver – all encompassing at trial
      - On appeal, not a general waiver that precludes everything
      - Waiver must be unequivocal and conspicuous
      - Must be absolutely explicit
    - Special: employment, sports
      - **Implied assumption**
- Rule: plaintiff who voluntarily consents, either expressly or impliedly, to exposure to a known risk cannot later sue for damages incurred from exposure to that risk, complete bar
- Whether plaintiff:
  - Had knowledge of the risk of danger / A reasonable person would have had knowledge
  - Appreciated the scope of the risk
  - Voluntary exposure to risk
Torts – Snead – Fall 2007 – Vicarious Liability

• Overview
  o Not a fault based tort
  o Strict liability – if tortfeasor is liable so are you
    ▪ No intentional wrong doing required on the part of the employer
  o Designed to ensure compensation for the victims

• Respondeat Superior
  o Modern Justifications: preventing future injuries, assure compensation, equitable spreading of the loss
    ▪ Policy reasons: efficiency, businesses are better able to spread the costs. Employer is benefitting so should also absorb costs of harms.
  • Cost of accidents: purpose of tort law is to reduce the cost of accidents, if prices reflect costs including accidents then consumers would choose the less expensive/safer products and services

• Two tiered test
  o Test 1: Were they an agent? Were they under the control of the employer?
    ▪ How to tell if they are an agent:
      • Can they discharge this person
      • Is the work part of the regular business of the employer?
      • Does the employer have the power to control their conduct?
        ▪ Exception: hospital still liable for doctors even though they don’t control their day to day conduct/schedule
    ▪ Apparent agency – principal creates the appearance this person is an agent and the innocent third party reasonably relies on this belief and is harmed, principal would be held liable. Must have showed injury would not have occurred but for the reliance
      • Ex. MCDONALDS franchise case – still would have used the restroom even if he had known that it was a franchise not actually owned by McDonalds directly
• EXCEPTION: employer is not liable for the torts of independent contractors
  • Old rule: borrowed servants doctrine: either original or temporary could be held liable based on who had the most control and who was receiving the most benefit
  • Employers Who Are Not Masters – control over the employee’s action is the essential element; however if employee works for others as well as the employer, provides his own tools or uses special skills he is likely an independent contractor and not an employee for whom the employer will be vicariously liable
• Non-delegable duties
  • Arises where the nature of the work is inherently dangerous (peculiar risk) and requires special protections to protect people; company cannot pass off the duty of maintaining premises.
  • Not necessary that the risk be unavoidable or very great
  • Ex. PUSEY security guard case
• Collateral negligence
  • Limited to cases in which the negligence created a temporarily unsafe condition while the work was in progress (does work in an improper manner) does not apply when the negligent is present in the final structure (restaurant bleachers case)
  
  o Test 2: Were they in the scope of their employment at the time?
    • Must be in furtherance of the master’s business, even if explicitly told not to
    • Traditional going and coming rule
      • An employee going to and from work is generally considered outside the scope of his employment (employer not liable)
    • Exceptions
      • Some jurisdictions weigh the predominant purpose of the trip
      • Remote work site, compensated for travel = within scope of employment, benefit to the employer more so than usual
• When the drive includes special hazards
  o Distance alone is not a special hazard
• Dual purpose: employee serves employer performs a service in addition to commuting which would have necessitated a trip by another employee had the commuting employee not done it on her way
  ▪ Frolic and detour
  • Mere detour the employer can still be liable
    o Minor/slight departure from one’s daily tasks, reasonable under the circumstances
  • Frolic is outside the scope of employment
    o Re-entry occurs when the employee is reasonably near the authorized space and time limits and acting with the intent to serve the employers business (Restatement)
  o **Vicarious Liability for intentional torts (stricter standard)**
    ▪ Still part of the scope of employment analysis
    ▪ Liable if the tort is engendered by the job. Look to motive because intentional torts are wrong because of bad motive.
    ▪ Must be reasonably foreseeable as arising from the employment
    ▪ Factors: nature of the work environment (authority granted, emotionally charged nature
      • Ex. Sonogram tech battery on patient, was hospital liable? No

**Tips from flashcard:**
• Not limited to negligence
• Strict instructions to do otherwise do not insulate employer from liability
• Business partners same concept applies
• Parents not vicariously liable for torts committed by their children
Torts –Snead – Fall 2007 – Strict Liability & Products Liability

- **Strict Liability**
  - 3 general situations where applicable
    - Wild Animals
    - Abnormally dangerous activities
    - Defective, unreasonably dangerous products
  - History
    - trespass writ, plaintiff only had to show
      - Force
      - Direct application to person or property
      - Not necessary to show damages or fault
    - Case writ, plaintiff had to show
      - Defendant’s acts caused harm
      - Did not result directly (more like negligence)
  - Restatement 2d: liability without proof of negligence if:
    - Defendant’s activities create a reasonably foreseeable risk of physical harm
    - The risk is a significant risk (abnormally dangerous)
    - Gravity & probability – does the risk remain after use of reasonable care
      - Ex. Noxious chemicals, lateral support, explosives, fire, fireworks all strict liability due to danger
  - Restatement 3rd: utility of risk is irrelevant. Impossible for anyone to take actions to alleviate risk, if anyone could alleviate the risk it will not be strict liability (negligence will be standard) Plaintiff cannot collect if their own conduct is a causal factor in bringing about the injury.

- **Defenses to Strict Liability**
  - Assumption of the risk yes, but contributory negligence, no
    - Where the plaintiff knowingly, voluntarily, and unreasonably subjects himself to a risk of harm from an abnormally dangerous activity, he assumes the risk and this will be a defense
      - i.e. taking a job working with explosives or wild animals
• **Products Liability - species of strict liability**

  o **Overview**

    ▪ **History**

      • Early on: derived from contractual relations. Privity of contract – had to sell directly to plaintiff (poison an exception) expanded to great bodily harm/death (no privity needed). Cardoza applied general negligence principles in 1916 – negligent where a defect is foreseeable and still product is put into the stream of commerce.

    ▪ **Express warranty**: express guarantees create contract.

      • Broadened to implied warranty – meet the normal expectation as to quality and safety eventually dropped need for privity

      • Reasonable consumer expectation standard developed from implied warranty

    ▪ **Strict products liability**

      • Negligence without breach or duty

      • Requirements

        o Defect: defective condition unreasonably dangerous to the consumer

        o Control: defective when it left D’s control

        o Changes: no significant changes before it gets to the harmed user

        o Causation: Damage resulted from the defect

        o NO privity required anymore

      • Restatement: sellers strictly liable for physical injuries to person/property other than the product itself

        o No privity needed

        o Defective products deemed unreasonably dangerous to the consumer

        o Consumer expectations test

    ▪ **Rationales**

      • consumer expectations – rely on rep of products as safe and healthy

      • enterprise liability or loss spreading – raises price/purchase insurance, let the market bear the cost
ensures compensation for innocent injured party

fairness – if you have the advantage of selling products, you should likewise have to deal with the disadvantages

non-reciprocal risks

deterrence – force companies to want to make safer products

Recovery – Strict liability only applies to personal injury or direct injury to property when the defective product is unreasonably dangerous to the user not when the plaintiff suffers a purely economic loss

Economic losses should be dealt with using contract law

- **Manufacturing defects**
  
  Strict liability – majority of cases where there is a manufacturing defect result from negligence but this is a more efficient standard (policy)

- Must prove
  
  - Product was in fact defective
    
    - Departs from the intended design
      
      - Does not have to be an inherently dangerous departure
    
    - RST (2) consumer expectation test
    
    - RST (PL) when product departs from its intended design even though all possible care was exercised in the preparation and marketing
      
      - Can infer defect when can’t prove what aspect of the product was defective
  
  - Defect existed when it left the defendant’s control
  
  - Defect was the proximate cause of the injury sustained
    
    - RST (PL): May infer cause when 1) event was one that ordinarily occurs as a result of a product defect and 2) was not solely the result of causes other than the product defect
  
  - Foreign to the product/natural to the product
    
    - Ex. MEXICALI ROSE CASE – bone natural to chicken enchilada?

- **Design defects**
  
  - Entire product line as opposed to one item
Negligence analysis NOT strict liability applies
- **DUTY** – to create a product that is not unreasonably safe in its intended use
- **BREACH** – failing to produce a reasonably safe alternative

Minority of jurisdictions use the Consumer Expectations Test

**Majority/REST:** *Reasonable Alternative Design Standard*
- Product is defective in design if the seller could have reduced or avoided the product’s foreseeable risks of harm by the adoption of a reasonable alternative design, and the omission of the alternative design renders the product unsafe. Consumer expectations are relevant to foreseeability and frequency of risk.
- **Risk Utility Analysis**
- To prove plaintiff must show
  - **Safer Alternative (Reasonable Alternative Design)**
    - Would have prevented or reduced the injury without impairing utility (causation element)
    - Safer alternative must be technically and economically feasible when the product left the manufacturer’s control
      - Not enough to show that another company used your safer alternative
      - RST: must have been available at the time the product was sold. Don’t have to apply a 1995 innovation to a 1975 product
    - Safety benefits from the proposed design are foreseeably greater than the resulting costs, including any diminished usefulness or diminished safety
      - Case Ex. Honda seatbelt design
  - **Warning defects** (negligence standard)
    - Restatement: product becomes defective when the product’s foreseeable risks of harm could have been reduced or avoided by the provision of a reasonable warning, and the omission of such a warning renders the product not reasonably safe
    - Companies need to:
• Alert users of risks that are not obvious
• Inform users of safer alternatives
  ▪ No duty to warn of dangers that are obvious or should be obvious
  ▪ Breach: Adequacy of warning: warnings must have sufficient force and intensity to convey the nature and extent of the risks to a reasonable person (and the nature of the potential harm) convey in an appropriate manner, lay out info in a way that is clear and easy to understand (Ex. Smoke detector case)

  **Heeding Presumption**
  • Unless plaintiff would have read, understood, and heeded the warning, failure to warn is not a cause.
    o Usually presume read unless proved otherwise

  **Learned Intermediaries/Sophisticated Users**
  • Product is not defective for lack of warning to the ultimate consumer when it is reasonable that someone else should have warned
    o Ex. Physicians prescribing medication, vaccinations

  **Post Sale Warnings**
  • If a duty to warn of a known danger exists at the time of sale, same duty exists when a latent defect becomes apparent shortly after the product has been put on the market
  • Many courts look at in a risk/utility model – even for defects not latent or known at the time of sale
  • Restatement: seller required to give post-sale warning when a reasonable person would do so when
    o He knew/should have known of a substantial risk
    o Those needing the warning can be easily identified and assumed to be otherwise unaware of risk
    o Warning can be effectively communicated
    o Risk of harm outweighs burden of giving warning

  o **Defenses to Product Liability**
    ▪ Comparative Fault (Assumption of the Risk)
• Contributory negligence is not applicable to strict products liability, since it relates to diffusing of costs and not to fault
• Assumption of the risk applies to negligence situations where plaintiff is aware of the risk but goes forward anyway
• Restatement: whatever comparative response system is used in the state applies
  ▪ Failure to Prove Defect (proximate cause and misuse)
    • Part of P’s prima facie case in proving that product was unreasonably dangerous in a reasonably foreseeable use.
    • No liability if product is misused
      o Misuse: use that is not reasonably foreseeable. Does not mean negligent use, as that could be foreseeable.
      o Exception: substantial modifications in which a party affirmatively abuses a product by consciously bypassing built in safety features, when the product was not purposely designed to permit use without the feature
    • Most courts reject old test of just for intended users/use and apply reasonably foreseeable use test
    • Causation: matters if plaintiff suffered, not whether an ordinary consumer would have suffered. Causal relationship still needs to be proven.
    • Disclaimers: general rule, manufacturers cannot avoid liability by disclaimers
      o Final notes:
        ▪ Employers rarely on the hook for punitive, usually just compensatory. Employers and individuals can both be on the hook, one does not preclude the other from being liable