[Note: Numbers in brackets refer to the printed pages of the Emanuel Law Outline where the topic is discussed.]

Emanuel Law Outlines
Torts

Chapter 1
INTRODUCTION

I. GENERAL INTRODUCTION

A. Definition of tort: There is no single definition of "tort." The most we can say is that: (1) a tort is a ***civil wrong*** committed by one person against another; and (2) torts can and usually do arise ***outside of any agreement*** between the parties. [1]

B. Categories: There are three broad categories of torts, and there are individual named torts within each category: [2 - 4]

1. Intentional torts: First, ***intentional*** torts are ones where the defendant desires to bring about a particular result. The main intentional torts are:

a. ***Battery.***

b. ***Assault.***

c. ***False imprisonment.***

d. ***Infliction of mental distress.***

2. Negligence: The next category is the generic tort of ***"negligence."*** Here, the defendant has not intended to bring about a certain result, but has merely behaved ***carelessly***. There are no individually-named torts in this category, merely the general concept of "negligence." [3]

3. Strict liability: Finally, there is the least culpable category, ***"strict liability."*** Here, the defendant is held liable even though he did not intend to bring about the undesirable result, and even though he behaved with utmost carefulness. There are two main individually-named torts that apply strict liability: [3 - 4]

a.Conducting of ***abnormally dangerous activities*** (e.g., blasting); and

b.The ***selling*** of a ***defective product*** which causes personal injury or property damage.

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C. Significance of categories: There are two main consequences that turn on which of the three above categories a particular tort falls into: [4]

1. Scope of liability: The three categories differ concerning D’s liability for ***far-reaching, unexpected, consequences***. The more culpable D’s conduct, the more far-reaching his liability for unexpected consequences – so an intentional tortfeasor is liable for a wider range of unexpected consequences than is a negligent tortfeasor. [4]

2. Damages: The ***measure of damages*** is generally broader for the more culpable categories. In particular, D is more likely to be required to pay punitive damages when he is an intentional tortfeasor than when he is negligent or strictly liable. [4]

D. Exam approach: First, review the fact pattern to spot each individual tort that has, or may have been, committed. Then, for each tort you have identified:

1. Prima facie case: Say whether a prima facie case for that tort has been made.

2. Defenses: Analyze what ***defenses*** and justifications, if any, D may be able to raise.

3. Damages: Finally, discuss what ***damages*** may be applicable, if the tort has been committed and there are no defenses. Pay special attention to: (1) punitive damages; (2) damages for emotional distress; (3) damages for loss of companionship of another person; (4) damages for unlikely and far-reaching consequences; and (5) damages for economic loss where there has been no personal injury or property damage.

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Chapter 2
INTENTIONAL TORTS AGAINST THE PERSON

I. "INTENT" DEFINED

A. Meaning of intent: There is no general meaning of "intent" when discussing intentional torts. For each individual intentional tort, you have to memorize a different definition of "intent." All that the intentional torts have in common is that D must have intended to bring about some sort of physical or mental effect upon another person. [6 - 7]

1. No intent to harm: The intentional torts generally are ***not*** defined in such a way as to require D to have intended to ***harm*** the plaintiff. [8] (***Example:*** D points a water gun at P, making it seem like a robbery, when in fact it is a practical joke. If D has intended to put P in fear of imminent harmful bodily contact, the "intent" for assault is present, even though D intended no "harm" to P.)

2. Substantial certainty: If D ***knows with substantial certainty*** that a particular effect will occur as a result of her action, she is deemed to have intended that result. [7] (***Example:*** D pulls a chair out from under P as she is sitting down. If D knew with "substantial certainty" that P would hit the ground, D meets the intent requirement for battery, even if he did not desire that she do so. [*Garratt v. Dailey*])

a. High likelihood: But if it is merely "highly likely," not "substantially certain," that the bad consequences will occur, then the act is not an intentional tort. "Recklessness" by D is not enough.

3. Act distinguished from consequences: Distinguish D's act from the ***consequences*** of that act. The act must be intentional or substantially certain, but the consequences need not be. [8] (***Example:*** D intends to tap P lightly on the chin to annoy him. If P has a "glass jaw," which is broken by the light blow, D has still "intended" to cause the contact, and the intentional tort of battery has taken place, even though the consequences – broken jaw – were not intended.)

B. Transferred intent: Under the doctrine of ***"transferred intent,"*** if D held the necessary intent with respect to person A, he will be held to have committed an intentional tort against ***any other person*** who happens to be injured. [8] (***Example:*** D shoots at A, and accidentally hits B. D is liable to B for the intentional tort of battery.)

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II. BATTERY

A. Definition: Battery is the ***intentional infliction of a harmful or offensive bodily contact***. (***Example:*** A intentionally punches B in the nose. A has committed battery.) [10]

B. Intent: It is not necessary that D desires to physically ***harm*** P. D has the necessary intent for battery if it is the case ***either*** that: (1) D intended to cause a harmful or offensive bodily contact; or (2) D intended to cause an ***imminent apprehension*** on P's part of a harmful or offensive bodily contact. [10]

Example 1: D shoots at P, intending to hit him with the bullet. D has the necessary intent for battery.

Example 2: D shoots at P, intending to miss P, but also intending to make P think that P would be hit. D has the intent needed for battery (i.e., the "intent to commit an assault" suffices as the intent for battery).

C. Harmful or offensive contact: If the contact is "harmful" – i.e., it causes pain or bodily damage – this qualifies. But battery also covers contacts which are merely ***"offensive,"*** i.e., damaging to a ***"reasonable sense of dignity."*** [10]

Example: D spits on P. Even if P is not "harmed" in the sense of being caused physical pain or physical injury, a battery has occurred because a person of average sensitivity in P's position would have her dignity offended.

D. P need not be aware: It is ***not*** necessary that P have ***actual awareness*** of the contact at the time it occurs. [11] (***Example:*** D kisses P while she is asleep. D has committed a battery.)

III. ASSAULT

A. Definition: Assault is the intentional causing of an ***apprehension*** of ***harmful or offensive contact***. [12]

Example: D, a bill collector, threatens to punch P in the face if P does not pay a bill immediately. Since D has intended to put P in imminent apprehension of a harmful bodily contact, this is assault, whether D intends to in fact hit P or not.

B. Intent: There are two different intents, either of which will suffice for assault:

1. Intent to create apprehension: First, D intends to put P in ***imminent apprehension*** of the harmful or offensive contact, even if D does not intend to follow through (e.g., D threatens to shoot P, but does not intend to actually shoot P); [12 - 13] or

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2. Intent to make contact: Alternatively, D intends to in fact ***cause*** a harmful or offensive bodily contact. (***Example:*** D shoots a gun at P, trying to hit him. D hopes P won't see him, but P does. P is frightened, but the shot misses. This is assault.)

3. Summary: So D has the requisite intent for assault if D either "intends to commit an assault" or "intends to commit a battery." [12 - 13]

C. No hostility: It is not necessary that D bear malice towards P, or intend to ***harm*** her. (***Example:*** D as a practical joke points a toy pistol at P, hoping that P will falsely think that P is about to be shot. D has one of the two alternative intents required for assault – the intent to put P in imminent apprehension of a harmful or offensive contact – so the fact that D does not desire to "harm" P is irrelevant.) [13]

D. "Words alone" rule: Ordinarily, ***words alone*** are not sufficient, by themselves, to give rise to an assault. Normally there must be some overt act – a physical act or gesture by D – before P can claim to have been assaulted. (***Example:*** During an argument, D says to P "I'm gonna hit you in the face." This is probably not an assault, if D does not make any gesture like forming a fist or stepping towards P.) [13]

1. Special circumstances: However, the ***surrounding circumstances***, or D's past acts, may occasionally make it reasonable for P to interpret D's words alone as creating the required apprehension of imminent contact. [13]

E. Imminence: It must appear to P that the harm being threatened is ***imminent***, and that D has the ***present ability*** to carry out the threat. [14] (***Example:*** D threatens to shoot P, and leaves the room for the stated purpose of getting his revolver. D has not committed an assault on P.)

F. P unaware of danger: P must be ***aware*** of the threatened contact. [14]

G. Threat to third persons: P must have an apprehension that ***she herself*** will be subjected to a bodily contact. She may not recover for her apprehension that ***someone else*** will be so touched. (***Example:*** P sees D raise a pistol at P's husband. D shoots and misses. P cannot recover for assault, because she did not fear a contact with her own body.) [15]

H. Conditional threat: Where D threatens the harm only if P does not obey D's demands, the existence of an assault depends on whether D had the ***legal right*** to compel P to perform the act in question. (***Example:*** P, a burglar, breaks into D's house. D says, "If you don't get out, I'll throw you out." There is no assault on P, since D has the legal right to force P to leave.) [16]

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IV. FALSE IMPRISONMENT

A. Definition: False imprisonment is defined as the intentional infliction of a ***confinement***. [17]

Example: D wants to have sex with P, and locks her in his bedroom for two hours hoping that P will agree. She does not, and D lets her go. This is false imprisonment, because D has intentionally confined P for a substantial time.

B. Intent: P must show that D either ***intended*** to confine him, or at least that D ***knew with substantial certainty*** that P would be confined by D's actions. The tort of false imprisonment cannot be committed merely by negligent or reckless acts. (***Example:*** D, a shopkeeper, negligently locks the store while P, a customer, is in the bathroom. This is not false imprisonment, since D did not intend to confine P.) [17]

C. "Confinement": The idea of confinement is that P is held ***within*** certain limits, not that she is prevented from entering certain places. (***Example:*** D refuses to allow P to return to her own home. This is not false imprisonment – P can go anywhere else, so she has not been "confined.") [17 - 18]

D. Means used: The imprisonment may be carried out by direct physical means, but also by ***threats*** or by the assertion of ***legal authority***. [18 - 20]

> **1. Threats:** Thus if D threatens to use force if P tries to escape, the requisite confinement exists. [18 - 19]
>
> **2. Assertion of legal authority:** Also, confinement may be caused by D's assertion that he has ***legal authority*** to confine P – this is true even if D does not in fact have the legal authority, so long as P reasonably believed that D does, or is in doubt about whether D does. (***Example:*** Storekeeper suspects P of shoplifting, and says, "I hereby make a citizen's arrest of you." Putting aside whether Storekeeper has a privilege to act this way, Storekeeper has "confined" P, if a reasonable person in P's position would think that Storekeeper had the authority to make such an arrest, even if under local law Storekeeper did not have that authority.) [19]

E. P must know of confinement: P must either be ***aware*** of the confinement, or must suffer some actual harm. (***Example:*** P is locked in her hotel room by D, but P is asleep for the entire three-hour period, and learns only later that the door was locked. This is probably not false imprisonment.) [21]

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V. INTENTIONAL INFLICTION OF MENTAL DISTRESS

A. Definition: This tort is the intentional or reckless infliction, by ***extreme and outrageous conduct***, of ***severe emotional or mental distress***, even in the absence of physical harm. [21]

Example: D threatens that if P, a garbage collector, does not pay over part of his garbage collection proceeds to D and his henchmen, D will severely beat P. Since D's conduct is extreme and outrageous, and since he has intended to cause P distress (which he has succeeded in doing), D is liable for infliction of mental distress. [*State Rubbish Collectors Assoc. v. Siliznoff*]

B. Intent: "Intent" for this tort is a bit broader than for others. There are three possible types of culpability by D: (1) D ***desires*** to cause P emotional distress; (2) D knows with ***substantial certainty*** that P will suffer emotional distress; and (3) D ***recklessly*** disregards the high probability that emotional distress will occur. [21 - 23] (***Example:*** D commits suicide by slitting his throat in P's kitchen. D, or his estate, is liable for intentional infliction of mental distress because although P did not desire to cause distress to P, or even know that distress was substantially certain, he recklessly disregarded the high risk that distress would occur. [*Blakeley v. Estate of Shortal*])

1. Transferred intent: The doctrine of ***"transferred intent"*** is applied only in a very ***limited*** fashion for emotion distress torts. So if D attempts to cause emotional distress to X (or to commit some other tort on him), and P suffers emotional distress, P usually will not recover. [22]

a. Immediate family present: The main exception is that the transferred intent doctrine is applied if: (1) D directs his conduct to a member of P's ***immediate family***; (2) P is ***present***; and (3) P's presence is ***known*** to D. (***Example:*** While P is present, and known to D to be present, D beats up P's father. If P suffers severe emotional distress, a court will probably allow her to recover from D, even though D's conduct was directed at the father, not P.)

C. "Extreme and outrageous": P must show that D's conduct was ***extreme and outrageous***. D's conduct has to be "beyond all possible bounds of decency." [23 - 25]

Example: D, as a practical joke, tells P that her husband has been badly injured in an accident, and is lying in the hospital with broken legs. This conduct is sufficiently outrageous to qualify. [*Wilkinson v. Downton*]

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D. Actual severe distress: P must suffer ***severe*** emotional distress. P must show at least that her distress was severe enough that she ***sought medical aid***. Most cases do not require P to show that the distress resulted in bodily harm. [25 - 26]

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Chapter 3
INTENTIONAL INTERFERENCE WITH PROPERTY

I. TRESPASS TO LAND

A. Definition: As generally used, ***"trespass"*** occurs when either: (1) D ***intentionally enters P's land***, without permission; (2) D ***remains*** on P's land without the right to be there, even if she entered rightfully; or (3) D ***puts an object on*** (or refuses to remove an object from) P's land without permission. [32]

B. Intent: The term "trespass" today refers only to ***intentional*** interference with P's interest in property. There is no strict liability. [33] (***Example:*** D, a pilot, loses control of the aircraft, and the aircraft lands on P's property. This is not trespass to land.)

1. Negligence: If D ***negligently*** enters P's land, this is generally treated as the tort of negligence, not trespass. [33]

C. Particles and gasses: If D knowingly causes ***objects***, including particles or gases, to enter P's property, most courts consider this trespass. [36] (***Example:*** D's factory spews pollutants onto P's land. This is a trespass. [*Martin v. Reynolds Metals Co.*])

D. Air space: It can be a trespass for a plane to ***fly over*** P's property. However, today most courts find liability only if: (1) the plane enters into the ***immediate reaches*** of the airspace (below federally-prescribed minimum flight altitudes); and (2) the flight ***substantially interferes*** with P's use and enjoyment of his land (e.g., by causing undue noise, vibrations, pollution). [36 - 37]

II. TRESPASS TO CHATTELS

A. Definition: "Trespass to chattels" is defined as any ***intentional interference*** with a person's ***use or possession*** of a chattel. [39] D only has to pay damages, not the full value of the property (as in conversion, below).

1. Loss of possession: If P ***loses possession*** of the chattel for any time, recovery is allowed even if the chattel is returned unharmed. [40] (***Example:*** D takes P's car for a five-minute "joy ride," and returns it unharmed. D has committed trespass to chattels.)

III. CONVERSION

A. Definition: Conversion is an ***intentional*** interference with P's possession or ownership of property that is ***so substantial*** that D should be required to pay the property's ***full value***. [40]

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Example: D steals P's car, then seriously (though not irreparably) damages it in a collision. D is liable for conversion, and will be required to pay P the full value of the car (though D gets to keep the car).

B. Intent: Conversion is an intentional tort, but all that is required is that D have intended to take possession of the property. Mistake as to ownership will generally not be a defense. [41] (***Example:*** D buys an old painting from an art dealer, and reasonably believes that the art dealer has good title. In fact, the painting was stolen from P years before. D keeps the painting in his house for 10 years. D is liable for conversion, notwithstanding his honest mistake about title.)

C. Distinguished from trespass to chattels: Courts consider several factors in determining whether D's interference with P's possessory rights is severe enough to be conversion, or just trespass to chattels. Factors include: (1) duration of D's ***dominion*** over the property; (2) D's ***good or bad faith***; (3) the ***harm*** done to the property; and (4) the ***inconvenience*** caused to P. [41 - 42]

D. Different ways to commit: There are different ways in which conversion may be committed: [42 - 46]

1. Acquiring possession: D takes ***possession*** of the property from P.

a. Bona fide purchaser: Most courts hold that a ***bona fide purchaser*** of ***stolen goods*** is a converter, even if there is no way he could have known that they were stolen. [42]

2. Transfer to third person: D can also commit conversion by ***transferring*** a chattel to one who is not entitled to it. (***Example:*** D, a messenger service, delivers a package to the wrong person, X. X absconds with the goods. D has committed conversion, even though D did not end up with possession of the goods.) [43 - 44]

3. Withholding good: D may commit conversion by ***refusing to return*** goods to their owner, if the refusal lasts for a substantial time. (***Example:*** D, a parking garage, refuses to give P back her car for a day.) [44 - 45]

4. Destruction: Conversion may occur if D ***destroys*** the goods, or fundamentally alters them.

E. Forced sale: If P is successful with her tort suit, a ***forced sale*** occurs: D is required to pay the ***full value*** of the goods (not just the amount of the use or damage, as in trespass to chattels), but gets to keep the goods. [46]

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Chapter 4
DEFENSES TO INTENTIONAL TORTS

I. CONSENT

A. Express consent: If P expressly ***consents*** to an intentional interference with his person or property, D will not be liable for that interference. [53] (***Example:*** P says to D, "Go ahead, hit me in the stomach – I'll show you how strong I am." If D does so, P's consent prevents P from suing for battery.)

B. Implied consent: Existence of consent may also be ***implied*** from P's conduct, from custom, or from the circumstances. [53 - 54]

1. Objective manifestation: It is the ***objective manifestations*** by P that count – if it reasonably seemed to one in D's position that P consented, consent exists regardless of P's subjective state of mind. [53] (***Example:*** D offers to vaccinate all passengers on their ship. P holds up her arm and receives the vaccination. Since it reasonably appeared to D that P consented, there will be consent regardless of P's actual state of mind. [*O'Brien v. Cunard*])

C. Lack of capacity: Consent will be invalidated if P is ***incapable*** of giving that consent, because she is a child, intoxicated, unconscious, etc. [54 - 55]

1. Consent as a matter of law: But even if P is incapable of truly giving consent, consent will be ***implied*** "as a matter of law" if these factors exist: (1) P is unable to give consent; (2) immediate action is necessary to save P's life or health; (3) there is no indication that P would not consent if able; and (4) a reasonable person would consent in the circumstances. [54 - 55] (***Example:*** P is brought unconscious to the emergency room of D, a hospital. D can perform emergency surgery without P's actual consent – consent will be implied as a matter of law. Therefore, P cannot sue for battery.)

D. Exceeding scope: Even if P does consent to an invasion of her interests, D will not be privileged if he goes substantially ***beyond the scope*** of that consent. [56 - 58]

Example: P visits D, a doctor, and consents to an operation on her right ear. While P is under anesthetic, D decides that P's left ear needs an operation as well, and does it. P's consent does not block an action for battery for the left-ear operation, since the operation went beyond the scope of P's consent. [*Mohr v. Williams*]

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1. Emergency: However, in the surgery case, an ***emergency*** may justify extending the surgery beyond that consented to. [56 - 57]

E. Consent to criminal acts: Where D's act against P is a ***criminal act***, courts are split. The majority rule is that P's consent is ***ineffective*** if the act consented to is a crime. [60 - 61] (***Example:*** P and D agree to fight with each other. In most states, each may recover from the other, on the theory that consent to a crime – such as breach of peace – is ineffective.)

II. SELF-DEFENSE

A. Privilege generally: A person is entitled to use ***reasonable force*** to prevent any threatened ***harmful or offensive bodily contact***, and any threatened ***confinement or imprisonment***. [61]

B. Apparent necessity: Self-defense may be used not only where there is a real threat of harm, but also where D ***reasonably believes*** that there is one. [61 - 62]

C. Only for protection: The defense of self-defense applies only where D uses the force needed to ***protect himself*** against harm. [62]

1. Retaliation: Thus D may not use any degree of force in ***retaliation*** for a tort already committed. [62] (***Example:*** P hits D with a snowball. Ten minutes later, D hits P with a snowball, in retaliation. D has committed battery on P, because D's act was not done in true self-defense.)

2. Imminence: D may not use force to avoid harm which is ***not imminent***, unless it reasonably appears that there will not be a later chance to prevent the danger. [62] (***Example:*** P says to D, "I will beat you up tomorrow." D cannot beat P up today, to prevent tomorrow's attack, unless it appears that there will be no way for D to defend tomorrow.)

D. Degree of force: Only the ***degree*** of force necessary to prevent the threatened harm may be used. If D uses more force than necessary, he will be liable for damage caused by the excess. [63]

1. Deadly force: Special rules limit the use of ***deadly force***, i.e., force intended or likely to cause death or serious bodily injury. [63 - 64]

a. Danger must be serious: D may ***not*** use deadly force unless he himself is in danger of ***death or serious bodily harm***. (***Example:*** P attacks D with his fists, in a way that does not threaten D with serious bodily harm. Even if there is no other way for D to prevent the attack, D may not use his gun to shoot P, even if the shot is

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intended only to injure P – D must submit to the attack rather than use deadly force.)

E. Retreat: Courts are split on whether and when D has a ***"duty to retreat"*** (i.e., to run away or withdraw) if the threatened harm could be avoided this way. [64]

1. Restatement view: The Second Restatement holds that: (1) D may use ***non-deadly force*** rather than retreating; but (2) D may not use ***deadly force*** in lieu of retreating, except if attacked in his ***dwelling*** by one who does not reside in the dwelling. [64] (***Example:*** If P attacks D on the street with a knife, under the Restatement D may use his fists rather than running away, but may not use a gun rather than running away if running away would avoid the danger. If the attack took place in D's home, where P was not also a resident, then D could use the gun.)

III. DEFENSE OF OTHERS

A. General rule: A person may use reasonable force to defend ***another person*** against attack. The same rules apply as in self-defense: the defender may only use reasonable force, and may not use deadly force to repel a non-deadly attack. [65]

1. Reasonable mistake: The courts are split on the effect of a ***reasonable mistake***. Older courts hold that the intervener "steps into the shoes" of the person aided, and thus bears the risk of a mistake. But Rest.2d gives a "reasonable mistake" defense to the intervener. [65]

IV. DEFENSE OF PROPERTY

A. General rule: A person may generally use reasonable force to ***defend her property***, both land and chattels. [65 - 68]

1. Warning required first: The owner must first make a ***verbal demand*** that the intruder stop, unless it reasonably appears that violence or harm will occur immediately, or that the request to stop will be useless. [66]

B. Mistake: The effect of a ***reasonable mistake*** by D varies:

1. Mistake as to danger: If D's mistake is about whether force is necessary, D is protected by a reasonable mistake. [66] (***Example:*** D uses non-deadly force to stop a burglar whom he reasonably believes to be armed. In fact, the burglar is not armed. D can rely on the defense of property.)

2. Privilege: But if the owner's mistake is about whether the intruder has a ***right*** to be there, the owner's use of force will not be privileged. [66] (***Example:*** D reasonably believes that P is a burglar. In fact, P is a friend

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who has entered D's house to retrieve her purse, without wanting to bother D. Even non-deadly force by D will not be privileged.)

C. Deadly force: The owner may use ***deadly force*** only where: (1) non-deadly force will not suffice; and (2) the owner reasonably believes that without deadly force, ***death*** or ***serious bodily harm*** will occur. [66] (***Example:*** D sees P trespassing in P's backyard. D asks P to leave, but P refuses. Even if there is no way to make P leave except by shooting at him, D may not do so, since P's conduct does not threaten D with death or serious bodily harm.)

1. Burglary: But a homeowner is generally ***allowed*** to use deadly force against a ***burglar***, provided that she reasonably believes that nothing short of this force will safely keep the burglar out. [67]

D. Mechanical devices: An owner may use a ***mechanical device*** to protect her property only if she would be privileged to use a similar degree of force if she were present and acting herself. [67 - 69]

1. Reasonable mistake: An owner's right to use a dangerous mechanical device in a particular case will be measured by whether deadly force could have been used against ***that particular intruder***. [67] (***Example:*** D uses a spring gun to protect his house while he is away. If the gun shoots an actual burglar, and state law would have allowed D to shoot the burglar if D was present, then D will not be liable for using the spring gun. But if a neighbor, postal carrier, or someone else not engaged in a crime happened to enter and was shot, D would not have a "reasonable mistake" defense – since D could not have fired the gun at such a person directly, the spring gun may not be used either.)

V. RECAPTURE OF CHATTELS

A. Generally: A property owner has the general right to use reasonable force to ***regain*** possession of ***chattels*** taken from her by someone else. [69 - 72]

1. Fresh pursuit: The privilege exists only if the property owner is in ***"fresh pursuit"*** to recover his property. That is, the owner must act without unreasonable delay. [69] (***Example:*** A learns that B has stolen a stereo and is in possession of it. A may use reasonable force to reclaim the stereo if he acts immediately, but not if he waits, say, a week between learning that D has the property and attempting to regain it.)

2. Reasonable force: The force used must be reasonable, and ***deadly force*** can never be used. [69]

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3. Wrongful taking: The privilege exists only if the property was taken ***wrongfully*** from the owner. If the owner parts willingly with possession, and an event then occurs which gives him the right to repossess, he generally will not be able to use force to regain it. [69 - 70] (***Example:*** O rents a TV to A. A refuses to return the set on time. O probably may not use reasonable force to enter A's home to repossess the set, because A's original possession was not wrongful.)

B. Merchant: Where a merchant reasonably believes that a person is stealing his property, many courts give the merchant a privilege to ***temporarily detain*** the person for investigation. [70 - 71]

1. Limited time: The detention must be limited to a short time, generally 10 or 15 minutes or less, just long enough to determine whether the person has really shoplifted or not. Then, the police must be called (the merchant may not purport to arrest the suspect himself). [71]

VI. NECESSITY

A. General rule: Under the defense of ***"necessity,"*** D has a privilege to harm the property interest of P where this is ***necessary*** in order to prevent ***great harm*** to third persons or to the defendant herself. [72 - 75]

B. Public necessity: If interference with the land or chattels of another is necessary to prevent a disaster ***to the community*** or to many people, the privilege is that of "public necessity." Here, no compensation has to be paid by the person doing the damage. [73 - 74] (*Example:* Firefighters demolish D's house, in which a fire has just barely started, because that is the best way to stop the fire from spreading much further. The firefighters, and the town employing them, probably do not have to pay, because they are protected by the privilege of public necessity.)

C. Private necessity: If a person prevents injury to himself or his property, or to the person or property of a third person, this is protected by the privilege of "***private*** necessity," if there is no less-damaging way of preventing the harm. [74 - 75] (***Example:*** A, while sailing, is caught in very rough seas. To save his life, he may moor at a dock owned by B, and will not be liable for trespass.)

1. Actual damage: Where the privilege of private necessity exists, it will be a complete defense to a tort claim where P has suffered no actual substantial harm (as in the above example). But if actual damage occurs, P must ***pay for the damage*** she has caused. (***Example:*** On the facts of the above example, if A's boat slammed into B's dock and damaged it, A would have to pay.) [75]

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2. Owner may not resist: The main purpose of the doctrine of private necessity is to prevent the person whose property might be injured from defeating the exercise of the privilege. [75]

Example: P moors his ship at D's dock, to avoid being shipwrecked by heavy seas. D, objecting to what he thinks is a trespass, unmoors the ship, causing the ship to be harmed and P to be injured. P may recover from D, because P's mooring was privileged by private necessity and D, therefore, acted wrongfully. [*Ploof v. Putnam,* 74]

VII. ARREST

A. Common law rules:

1. Arrest with warrant: Where a police officer executes an arrest with an ***arrest warrant*** that appears to be correctly issued, he will not be liable even if it turns out that there was no probable cause or the procedures used to get the warrant were not proper. [76]

2. Arrest without warrant: [76 - 77]

a. Felony or breach of peace in presence: A police officer may make a warrantless arrest for a ***felony*** or for a ***breach of the peace***, if the offense is being committed or seems about to be committed ***in his presence***. A citizen may do the same.

b. Past felony: Once a felony has been committed, an officer may still make a warrantless arrest, provided that he reasonably believes that the felony has been committed, and also reasonably believes that he has the right criminal. A citizen may make an arrest only if a felony has ***in fact*** been committed (though the citizen is protected if she makes a reasonable mistake and arrests the wrong person).

c. Misdemeanor: At common law, no warrantless arrest (either by an officer or by a citizen) may be made for a ***past misdemeanor not involving a breach of the peace***.

3. Reasonable force: One making an arrest may not use more ***force*** than is ***reasonably necessary***. [77 - 78]

a. Prevention: Where the arrest is made to ***prevent a felony*** which threatens human life or safety, even deadly force may be used, if there is no other way to prevent the crime. But where the felony does not involve such danger, deadly force may not be used.

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b. Apprehension after crime: If a crime has already been committed, the police may use ***deadly force*** only if the suspect poses a significant threat of ***death or serious physical injury*** to others. (***Example:*** Officer spots Burglar escaping after his crime. Officer knows that Burglar is unarmed and unlikely to be violent. Officer may not shoot at Burglar to arrest him, even if there is no other way to make the arrest.)

VIII. JUSTIFICATION

A. Generally: Even if D's conduct does not fit within one of the narrower defenses, she may be entitled to the general defense of ***"justification,"*** a catch-all term used where there are good reasons for exculpating D from what would otherwise be an intentional tort. [79]

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Chapter 5
NEGLIGENCE GENERALLY

I. COMPONENTS OF TORT OF NEGLIGENCE

A. Generally: The tort of "negligence" occurs when D's conduct imposes an ***unreasonable risk*** upon another, which results in injury to that other. The negligent tortfeasor's mental state is irrelevant. [87]

B. Prima facie case: The components of a negligence action are: [87]

1. Duty: A legal ***duty*** requiring D to conduct himself according to a certain standard, so as to avoid unreasonable risk to others;

2. Failure to conform: A failure by D to conform his conduct to this standard. (This element can be thought of as ***"carelessness."***)

3. Proximate cause: A sufficiently close ***causal link*** between D's act of negligence and the harm suffered by P. This is ***"proximate cause."***

4. Actual damage: ***Actual damage*** suffered by P. (Compare this to most intentional torts, such as trespass, where P can recover nominal damages even without actual injury.)

II. UNREASONABLE RISK

A. Generally: P must show that D's conduct imposed an ***unreasonable risk of harm*** on P (or on a class of persons of whom P is a member). [87]

1. Not judged by results: It is not enough for P to show that D's conduct resulted in a terrible injury. P must show that D's conduct, viewed ***as of the time it occurred***, without benefit of hindsight, imposed an unreasonable risk of harm. [87 - 88]

B. Balancing: In determining whether the risk of harm from D's conduct was so great as to be "unreasonable," courts use a ***balancing test***: "Where an act is one which a reasonable [person] would recognize as involving a risk of harm to another, the risk is unreasonable and the act is negligent if the risk is of such magnitude as to ***outweigh*** what the law regards as the ***utility*** of the act or of the particular manner in which it is done." [88 - 89]

III. THE REASONABLE PERSON

A. Objective standard: The reasonableness of D's conduct is viewed under an ***objective standard***: Would a ***"reasonable person*** of ordinary prudence," in D's

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position, do as D did? D does not escape liability merely because she intended to behave carefully or thought she was behaving carefully. [91]

B. Physical and mental characteristics: The question is whether D behaved reasonably "under the circumstances." "The circumstances" generally include the ***physical characteristics*** of D himself. [91 - 94]

1. Physical disability: Thus if D has a physical ***disability***, the standard for negligence is what a reasonable person with that physical disability would have done. [91 - 92] (***Example:*** P is blind and is struck while crossing the street using a cane. If the issue is whether P was contributorily negligent, the issue will be whether a blind person would have crossed the street in that manner.)

2. Mental characteristics: The ordinary reasonable person is *not* deemed to have the particular ***mental*** characteristics of D. [92] (***Example:*** If D is more stupid, or more careless, than an ordinary person, this will not be a defense.)

3. Intoxication: Intoxication is no defense – even if D is drunk, she is held to the standard of conduct of a reasonable ***sober*** person. [93]

4. Children: A ***child*** is held to the level of conduct of a reasonable person of that ***age*** and ***experience***, not that of an adult. [93 - 94]

a. Adult activity: But where a child engages in a potentially ***dangerous activity*** normally pursued only by ***adults***, she will be held to the standard of care that a reasonable adult doing that activity would exercise. (***Example:*** If D operates a motorboat, an activity that is potentially dangerous and normally pursued by adults, D must match the standard of care of a reasonable adult boater.)

C. Custom: Courts generally allow evidence as to ***custom*** for the purpose of showing presence or absence of reasonable care. However, this evidence is generally ***not conclusive***. [96]

1. Evidence by D: Thus where D shows that everyone else in the industry does things the way D did them, the jury is still free to conclude that the industry custom is unreasonably dangerous and thus negligent. [96] (***Example:*** D operates a tugboat without a radio; the fact that most tugboats in the industry do not yet have radios does not prevent the jury from holding that D's lack of a radio was negligent. [*The T.J. Hooper*])

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2. Proof by plaintiff: Conversely, proof offered by P that others in D's industry followed a certain precaution that D did not, will be suggestive but not conclusive evidence that D was negligent. [96]

D. Emergencies: If D is confronted with an ***emergency***, and is forced to act with little time for reflection, D must merely behave as a reasonable person would if confronted with the same emergency, not as a reasonable person would with plenty of time to think. [97 - 97] (***Example*****:** D is a cab driver. A thief jumps in the cab, points a gun at D's head, and tells him to drive fast. D, in a panic, mistakenly puts the car in reverse and injures P. The issue is whether a cab driver confronted with a gun-pointing thief would or might have behaved as D did, not whether a cab driver in ordinary circumstances would have behaved that way.)

E. Anticipating conduct of others: A reasonable person possesses at least limited ability to ***anticipate the conduct of others***. [98 - 99]

1. Negligence: D may be required to anticipate the possibility of ***negligence*** on the part of others. [98] (***Example:*** It may be negligence for D to presume that all drivers near him will behave non-negligently, and that these others will not speed, signal properly, etc.)

2. Criminal or intentionally tortious acts: Normally the reasonable person (and, hence, D) is entitled to presume that third persons will *not* commit ***crimes*** or intentional torts. [98 - 99]

a. Special knowledge: But if D has a ***special relationship*** with either P or a third person, or special knowledge of the situation, then it may be negligence for D not to anticipate a crime or intentional tort. (***Example:*** It may be negligence for D, a psychiatrist, not to warn P that a patient of D's is dangerous to P. [*Tarasoff v. Regents,* 99])

IV. MALPRACTICE

A. Superior ability or knowledge: If D has a ***higher degree*** of ***knowledge***, skill or experience than the "reasonable person," D must ***use*** that higher level. [100] (***Example:*** D, because she is a local resident, knows that a stretch of highway is exceptionally curvy and thus dangerous. D drives at a rate of speed that one who did not know the terrain well would think was reasonable, and crashes, injuring her passenger, P. Even though D's driving would not have represented carelessness if done by a reasonable person with ordinary knowledge of the road, D was responsible for using her special knowledge and is negligent for not doing so.)

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B. Malpractice generally: Professionals, including doctors, lawyers, accountants, engineers, etc., must act with the level of skill and learning ***commonly possessed by members of the profession in good standing***. [100 - 103]

1. Good results not guaranteed: The professional will not normally be held to guarantee that a ***successful result*** will occur, only that she will use the requisite minimum skill and competence. [100]

2. Differing schools: If there are ***conflicting schools*** of thought within a profession, D must be judged by reference to the belief of the ***school he follows***. [100] (***Example:*** An osteopath is judged by the standards of osteopathy, not the standards of medicine at large.)

3. Specialists: If D holds herself out as a ***specialist*** in a certain niche in her profession, she will be held to the minimum standard of that specialty. [101] (***Example:*** An M.D. who holds herself out as an ophthalmologist must perform to the level of the minimally competent ophthalmologist, not merely to the minimum level of the internist or general practitioner.)

4. Minimally qualified member: It is not enough for P to prove that D performed with less skill than the ***average*** member of the profession. D must be shown to have lacked the skill level of the ***minimally qualified member*** in good standing. [101]

a. Novice: One who is just ***beginning*** the practice of his special profession is held to the same level of competence as a member of the profession generally. [103] (***Example:*** A lawyer who has just passed the bar does not get the benefit of a lower standard – he must perform at the level of minimally competent lawyers generally, not novices.)

5. Community standards: Traditionally, doctors and other professionals have been bound by the professional standards prevailing in the ***community in which they practice***, not by a national standard. [102] (***Example:*** Traditionally, the "country doctor" need not perform with the skill commonly found in cities.)

a. Change in rule: But this rule is on its way out, and many if not most courts would today apply a ***national*** standard. In "modern" courts, P may therefore use expert testimony from an expert who practices outside of D's community.

6. Informed consent: In the case of a physician, part of the professional duty is to adequately disclose the ***risks*** of proposed treatment to the patient in advance. The rule requiring adequate disclosure is called the rule of

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"informed consent." The doctor must disclose to the patient all risks inherent in the proposed treatment which are sufficiently ***material*** that a reasonable patient ***would take them into account*** in deciding whether to undergo the treatment. Failure to get the patient's adequate consent is deemed a form of malpractice and thus a form of negligence. (In some cases, usually older ones, failure to get informed consent transforms the treatment into battery.) [102 - 103]

V. AUTOMOBILE GUEST STATUTES

A. Generally: A minority of states still have "automobile guest statutes" on their books. These generally provide that an owner-driver is not liable for any injuries received by his ***non-paying passenger***, unless the driver was grossly negligent or reckless. [104]

VI. VIOLATION OF STATUTE

A. "Negligence *per se* " *doctrine:* Most courts apply the ***"negligence per se"*** doctrine: when a safety statute has a sufficiently close application to the facts of the case at hand, an unexcused ***violation*** of that statute by D is "negligence *per se*," and thus ***conclusively establishes that D was negligent***. [105]

Example: D drives at 65 m.p.h. in a 55 m.p.h. zone. While so driving, he strikes and injures P, a pedestrian. Because the 55 m.p.h. limit is a safety measure designed to protect against accidents, the fact that D has violated the statute without excuse conclusively establishes that D was negligent – D will not be permitted to argue that it was in fact safe to drive at 65 m.p.h.

1. Ordinances and regulations: In virtually all states, the negligence *per se* doctrine applies to the violation of a ***statute***. Where the violation is of an ***ordinance*** or ***regulation***, courts are split about whether the doctrine should apply. [106]

B. Statute must apply to facts: The negligence *per se* doctrine will apply only where P shows that the statute was intended to guard against the ***very kind of injury*** in question. [107 - 112]

1. Class of persons protected: This means that P must be a member of the ***class of persons*** whom the statute was ***designed to protect***. [107] (***Example:*** A statute requires all factory elevators to be provided with a certain safety device. The legislative history shows that the purpose was only to protect injuries to employees. P, a business visitor, is injured when the elevator falls due to lack of the device. P cannot use the negligence *per se* doctrine, because he was not a member of the class of persons whom the statute was designed to protect.)

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2. Protection against particular harm: Second, the statute must have been intended to protect against the ***particular kind of harm*** that P seeks to recover for. [108 - 109] (***Example:*** A statute requires that when animals are transported, each breed must be kept in a separate pen. D, a ship operator, violates the statute by herding P's sheep together with other animals. Because there are no pens, the sheep are washed overboard during a storm. P cannot use the negligence *per se* doctrine, because the statute was obviously intended to protect only against spread of disease, not washing overboard. [*Gorris v. Scott,* 108])

3. Excuse of violation: The court is always free to find that the statutory violation was ***excused***, as long as the statute itself does not show that no excuses are permitted. [108 - 110]

a. Typical reasons: Some typical reasons for finding D's violation to be excused are: (1) D was reasonably ***unaware*** of the particular occasion for compliance; (2) D made a reasonable and diligent ***attempt*** to comply; (3) D was confronted with an ***emergency*** not of his own making; or (4) compliance would have involved a ***greater risk of harm***. (***Example:*** A statute requires all brakes to be maintained in good working order. D's brakes fail, and he can't stop, so he runs over P. If D can show that he had no way to know that his brakes were not in working order, his violation of the statute would be excused, and the negligence per se doctrine will not apply. [*Freund v. DeBuse*, 109])

4. Contributory negligence *per se* : If the jurisdiction recognizes ***contributory negligence***, D may get the benefit of contributory negligence *per se* where P violates a statute. [111 - 112] (***Example:*** Cars driven by P and D collide. If P was violating the speed limit, and the jurisdiction recognizes contributory negligence, D can probably use the negligence *per se* doctrine to establish that P was contributorily negligent.)

5. Compliance not dispositive: The fact that D has ***fully complied*** with all applicable safety statutes does not by itself establish that he was *not* negligent – the finder of fact is always free to conclude that a reasonable person would take precautions beyond those required by statute. [112]

VII. PROCEDURE IN JURY TRIALS

A. Burden of proof: In a negligence case (as in almost all tort cases) P bears the "burden of proof." This is actually two distinct burdens: [112 - 113]

1. Burden of production: First, P must ***come forward*** with some evidence that P was negligent, that P suffered an injury, that D's

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negligence proximately caused the injury, etc. This burden is known as the ***"burden of production."*** This burden shifts from P to D, and perhaps back again during the trial. [112 - 113]

2. Burden of persuasion: Second, P bears the ***"burden of persuasion."*** This means that as the case goes to the jury, P must convince the jury that it is ***more probable than not*** that his injuries are due to D's negligence. [113]

B. Function of judge and jury

1. Judge decides law: The judge decides all questions of ***law***. Most importantly, the judge decides whether reasonable people could differ as to what the facts of the case are; if they could not, he will direct a verdict. [114 - 115] (***Example:*** In a car accident case, if the judge decides that D drove so fast that no reasonable person could believe that D acted non-negligently, he will take this issue away from the jury by saying that they must find D negligent.)

2. Jury decides facts: The jury is the finder of the ***facts***. In a negligence case (assuming that the judge does not direct a full or partial verdict), the jury decides: (a) what really happened; and (2) whether D breached his duty to P in a way that proximately caused P's injuries. This means that it is the jury that usually decides whether D's conduct satisfied the "reasonable person" standard. [115]

VIII. *RES IPSA LOQUITUR*

A. Generally: The doctrine of *res ipsa loquitur* ("the thing speaks for itself") allows P to point to the fact of the accident, and to create an ***inference*** that, even without a precise showing of how D behaved, D was probably negligent.

Example: A barrel of flour falls on P's head as he walks below a window on the street. At trial, P shows that the barrel fell out of a window of D's shop, and that barrels do not fall out of windows without some negligence. By use of the *res ipsa loquitur* doctrine, P has presented enough evidence to justify a verdict for him, so unless D comes up with rebuttal evidence that the barrel did not come from his shop or was not dropped by negligence, D will lose. [*Byrne v. Boadle*] [115]

B. Requirements for: Courts generally impose four requirements for the *res ipsa* doctrine: [116 - 117

1. No direct evidence of D's conduct: There must be ***no direct evidence*** of ***how D behaved*** in connection with the event. [116]

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2. Seldom occurring without negligence: P must demonstrate that the harm which occurred ***does not normally occur*** except through the negligence of someone. P only has to prove that ***most of the time***, negligence is the cause of such occurrences. [116]

Example: If an airplane crashes without explanation, P will generally be able to establish that airplanes usually do not crash without some negligence, thus meeting this requirement.

3. Exclusive control of defendant: P must demonstrate that the instrumentality which caused the harm was at all times within the ***exclusive control*** of D. [117 - 118] (***Example:*** P, while walking on the sidewalk next to D hotel, is hit by a falling armchair. Without more proof, P has not satisfied the "exclusive control" requirement, because a guest, rather than the hotel, may have had control of the chair at the moment it was dropped. [*Larson v. St. Francis Hotel*])

a. Multiple defendants: If there are ***two or more defendants***, and P can show that at least one of the defendants was in control, some cases allow P to recover. This is especially likely where all of the Ds participate together in an integrated relationship. (***Example:*** P is injured while on the operating table, and shows that either the surgeon, the attending physician, the hospital, or the anesthesiologist must have been at fault, but is unable to show which one. P gets the benefit of *res ipsa*, and it is up to each individual defendant to exculpate himself. [*Ybarra v. Spangard*])

4. Not due to plaintiff: P must establish that the accident was probably not due to his ***own*** conduct. [119]

5. Evidence more available to D: Some courts also require that ***evidence*** of what really happened be ***more available to D*** than to P. [119] (***Example:*** This requirement is satisfied on the facts of *Ybarra*, *supra*, since the Ds obviously knew more than the unconscious patient about who was at fault.)

C. Effect of *res ipsa* : Usually, the effect of *res ipsa* is to permit an inference that D was negligent, even though there is no direct evidence of negligence. *Res ipsa* thus allows a particular kind of circumstantial evidence. When *res ipsa* is used, P has ***met his burden of production***, and is thus entitled to go to the jury. [119 - 121]

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D. Rebuttal evidence:

1. General evidence of due care: If D's rebuttal is merely in the form of evidence showing that he was ***in fact careful***, this will almost never be enough to give D a directed verdict – the case will still go to the jury. [122]

2. Rebuttal of *res ipsa requirements:* But if D's evidence directly disproves one of the requirements for the doctrine's application, then D will get a directed verdict (assuming there is no prima facie case apart from *res ipsa*). [122] (***Example:*** If D can show that the instrument that caused the harm was not within his control at all relevant times, the doctrine will not apply, and D may get a directed verdict.)

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Chapter 6
ACTUAL AND PROXIMATE CAUSE

I. CAUSATION IN FACT

A. Generally: P must show that D's conduct was the ***"cause in fact"*** of P's injury. [129]

B. "But for" test: The vast majority of the time, the way P shows "cause in fact" is to show that D's conduct was a ***"but for"*** cause of P's injuries – ***had D not acted negligently, P's injuries would not have resulted.*** [129]

Example: A statute requires all vessels to have life boats. D sends out a boat without life boats. P, a sailor, falls overboard in a storm so heavy that, even had there been a life boat, it could not have been launched. P drowns. Even assuming that D was negligent *per se*, D's failure to provide life boats is not a cause in fact of P's death, because that death would have occurred even without the failure. Therefore, D is not liable.

1. Joint tortfeasors: There can be ***multiple*** "but for" causes of an event. D1 cannot defend on the grounds that D2 was a "but for" cause of P's injuries – as long as D1 was also a "but for" cause, D1 is viewed as the "cause in fact." [130]

C. Concurrent causes: Sometimes D's conduct can meet the "cause in fact" requirement even though it is *not* a "but for" cause. This happens where two events ***concur*** to cause harm, and either one would have been sufficient to cause substantially the same harm without the other. ***Each*** of these concurring events is deemed a cause in fact of the injury, since it would have been sufficient to bring the injury about. [130] (***Example:*** Sparks from D's locomotive start a forest fire; the fire merges with some other unknown fire, and the combined fires burn P's property. Either fire alone would have been sufficient to burn P's property. Therefore, D's fire is a cause in fact of P's damage, even though it is not a "but for" cause. [*Kingston v. Chicago & N.W. Ry.*])

D. Multiple fault: If P can show that each of two (or more) defendants was at fault, but only one could have caused the injury, the ***burden shifts*** to each defendant to show that the other caused the harm. [135] (***Example:*** P, D1 and D2 go hunting together. D1 and D2 simultaneously fire negligently, and P is struck by one of the shots. It is not known who fired the fatal shot. The court will put the burden on each of the Ds to show that it was the other shot which hit P – if neither D can make this showing, both will be liable. [*Summers v. Tice*])

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1. The "market share" theory: In ***product liability*** cases, courts often apply the ***"market share"*** theory. If P cannot prove which of three or more persons caused his injury, but can show that all produced a defective product, the court will require each of the Ds to pay that percentage of P's injuries which that D's sales bore to the total market sales of that type of product at the time of injury. The theory is used most often in cases involving prescription drugs. [135 - 138]

Example: 200 manufacturers make the drug DES. P shows that her mother took the drug during pregnancy, and that the drug caused P to develop cancer. P cannot show which DES manufacturer produced the drug taken by her mother. *Held*, any manufacturer who cannot show that it could not have produced the particular doses taken by P's mother will be liable for the proportion of any judgment represented by that manufacturer's share of the overall DES market. [*Sindell v. Abbott Laboratories,* 136]

a. Exculpation: Courts are split on whether each defendant should be allowed to ***exculpate*** itself by showing that it ***did not make*** the particular items in question – some more modern cases hold that once a given defendant is shown to have produced drugs for the national market, no exculpation will be allowed. [136]

b. National market share: In determining market share, courts usually use a ***national***, rather than local, market concept. [137]

c. No joint and several liability: Courts adopting the "market share" approach often ***reject joint-and-several liability*** – they allow P to collect from any defendant only that defendant's proportionate share of the harm caused. [137] (***Example:*** P sues a single D, and shows that that D counted for 10% of the market. P's total damages are $1 million. If "market share" is the theory of liability, most courts will allow P only to recover $100,000 from D – D will not be made jointly and severally liable for P's entire injuries.)

d. Socially valuable products: The more ***socially valuable*** the court perceives the product to be, the less likely it is to apply a market-share doctrine. For instance, a court is likely to reject the doctrine where the product is a vaccine. [137 - 138]

E. Increased risk, not yet followed by actual damage: Where D's conduct has increased the ***risk*** that P will suffer some later damage, but the damage has ***not yet occurred***, most courts ***deny*** P any recovery for that later damage unless he can

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show that it is more likely than not to occur eventually. But some courts now allow recovery for such damage, discounted by the likelihood that the damage will occur. [134 - 135] (***Example:*** D, an M.D., negligently operates on P. The operation leaves P with a 20% risk of contracting a particular disease in the future. At the time of trial, P does not yet have the disease. Most courts would not let P recover anything for the risk of getting the disease in the future. But some might let P recover damages for having the disease, discounted by 80% to reflect the 80% chance that P won't get the disease after all. [*Petriello v. Kalman*])

F. "Indeterminate plaintiff": Sometimes it's clear that D has behaved negligently and injured some people, but not clear exactly ***which people*** have been injured. This happens most often in toxic tort and other mass-tort cases. Courts today sometimes allow a ***class action*** suit, in which people who show that they were exposed to a toxic substance made or released by D, and that they suffer a particular medical problem, can recover something, even if they can't show that it's more probable than not that their particular injuries were caused by the defendant's toxic substance. [138 - 139]

Example: D makes a silicone breast implant, which hundreds of plastic surgeons implant into thousands of women. Epidemiological evidence shows that a substantial percentage of women getting such implants will suffer a particular auto-immune disease (but there can be other causes of the disease as well.) Many courts today would let a class action proceed on these facts. Any woman who received a breast implant made by D and who has the auto-immune condition could be a member of the plaintiff class, and could recover at least some damages, even if she couldn't show that her particular disease was more likely than not caused by D's product.

II. PROXIMATE CAUSE GENERALLY

A. General: Even after P has shown that D was the "cause in fact" of P's injuries, P must still show that D was the ***"proximate cause"*** of those injuries. The proximate cause requirement is a ***policy determination*** that a defendant, even one who has behaved negligently, should not automatically be liable for ***all*** the consequences, no matter how ***improbable*** or ***far-reaching***, of his act. Today, the proximate cause requirement usually means that D will not be liable for the consequences that are very ***unforeseeable***. [139]

Example: D, driving carelessly, collides with a car driven by X. Unbeknownst to D, the car contains dynamite, which explodes. Ten blocks away, a nurse who is carrying P, an infant, is startled by the explosion, and drops P. P will not be able to recover against D, because the episode is so far-fetched – it was so unforeseeable that the injury would occur from D's negligence – that courts will hold that D's careless driving was not the "proximate cause" of P's injuries.

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1. Multiple proximate causes: Just as an occurrence can have many "causes in fact," so it may well have more than one proximate cause. [140] (***Example:*** Each of two drivers drives negligently, and P is injured. Each driver is probably a proximate cause of the accident.)

III. PROXIMATE CAUSE – FORESEEABILITY

A. The foreseeability rule generally: Most courts hold that D is liable, as a general rule, only for those consequences of his negligence which were ***reasonably foreseeable*** at the time she acted. [140]

Example: D's ship spills oil into a bay. Some of the oil adheres to P's wharf. The oil is then set afire by some molten metal dropped by P's worker, which ignites a cotton rag floating on the water. P's whole dock then burns. *Held*, D is not liable, because the burning of P's dock was not the foreseeable consequence of D's oil spill, and thus the oil spill was not the proximate cause of the damage. This is true even though the burning may have been the "direct" result of D's negligence. [*Wagon Mound No. 1*] [142]

B. Unforeseeable plaintiff: The general rule that D is liable only for foreseeable consequences is also usually applied to the ***"unforeseeable plaintiff"*** problem. That is, if D's conduct is negligent as to X (in the sense that it imposes an unreasonable risk of harm upon X), but not negligent as to P (i.e., does not impose an unreasonable risk of harm upon P), P will not be able to recover if through some fluke he is injured. [143 - 145]

Example: X, trying to board D's train, is pushed by D's employee. X drops a package, which (unknown to anybody) contains fireworks, which explode when they fall. The shock of the explosion makes some scales at the other end of the platform fall down, hitting P. *Held*, P may not recover against D. D's employee may have been negligent towards X (by pushing him), but the employee's conduct did not involve any foreseeable risk of harm to P, who was standing far away. Since D's conduct did not involve an unreasonable risk of harm to P, and the damage to her was not foreseeable, the fact that the conduct was unjustifiably risky to X is irrelevant. D's conduct was not the "proximate cause" of the harm to P. [*Palsgraf v. Long Island R.R. Co.,* 143]

C. Extensive consequences from physical injuries: A key ***exception*** to the general rule that D is liable only for foreseeable consequences is: once P suffers any foreseeable impact or injury, even if relatively minor, D is liable for ***any additional unforeseen physical consequences***. [145]

1. Egg-shell skull: Thus if P, unbeknownst to D, has a very ***thin skull*** (a skull of "egg-shell thinness"), and D negligently inflicts a minor impact on

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this skull, D will be liable if, because of the hidden skull defect, P dies. The defendant ***"takes his plaintiff as he finds him."*** [145]

D. General class of harm but not same manner: Another exception to the "foreseeable consequences only" rule is that as long as the harm suffered by P is of the ***same general sort*** that made D's conduct negligent, it is irrelevant that the harm occurred in an ***unusual manner***. [146]

Example: D gives a loaded pistol to X, an eight-year-old, to carry to P. In handing the pistol to P, X drops it, injuring the bare foot of Y, his playmate. The fall sets off the gun, wounding P. D is liable to P, since the same general kind of risk that made D's conduct negligent (the risk of accidental discharge) has materialized to injure P; the fact that the discharge occurred in an unforeseeable manner – by the dropping of the gun – is irrelevant. (But D is not liable to Y, since Y's foot injury was not foreseeable, and the risk of it was not one of the risks that made D's conduct initially negligent.)

E. Plaintiff part of foreseeable class: Another exception to the foreseeability rule: the fact that injury to the particular plaintiff was not especially foreseeable is irrelevant, as long as P is a ***member of a class*** as to which there was a general foreseeability of harm. [147]

Example: D negligently moors its ship, and the ship breaks away. It smashes into a draw bridge, causing it to create a dam, which results in a flood. The Ps, various riparian owners whose property is flooded, sue. *Held*, these owners can recover against D, even though it would have been hard to foresee which particular owners might be flooded. All of the Ps were members of the general class of riverbank property owners, as to which class there was a risk of harm from flooding. [*Petition of Kinsman Transit Co.*]

F. The "extraordinary in hindsight" rule: Many courts, and the Second Restatement, articulate the foreseeability rule as an ***"extraordinary in hindsight"*** rule. D's conduct will not be the proximate cause of P's harm if, "after the event and the ***looking back*** from the harm to [D's] negligent conduct, it appears to the court ***highly extraordinary*** that it should have brought about the harm." [147 - 148]

IV. PROXIMATE CAUSE – INTERVENING CAUSES

A. Definition of "intervening cause": Most proximate cause issues arise where P's injury is precipitated by an ***"intervening cause."*** An intervening cause is a force which takes effect ***after*** D's negligence, and which contributes to that negligence in producing P's injury. [148]

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1. Superseding cause: Some, but not all, intervening causes are sufficient to prevent D's negligence from being held to be the proximate cause of the injury. Intervening causes that are sufficient to prevent D from being negligent are called ***"superseding"*** causes, since they supersede or cancel D's liability. [148]

B. Foreseeability rule: Generally courts use a ***foreseeability*** rule to determine whether a particular intervening cause is superseding. [148 - 149]

1. Test: If D should have ***foreseen*** the possibility that the intervening cause (or one like it) might occur, *or* if the ***kind of harm*** suffered by P was foreseeable (even if the intervening cause was not itself foreseeable), D's conduct will nonetheless be the proximate cause. But if *neither* the intervening cause nor the kind of harm was foreseeable, the intervening cause will be a superseding one, relieving D of liability. [148 - 149]

C. Foreseeable intervening causes: Often the risk of a particular kind of intervening cause is the ***very risk*** (or one of the risks) which made D's conduct negligent in the first place. Where this is the case, the intervening cause will almost never relieve D of liability. [148 - 151]

Example: D leaves his car keys in the ignition, and the car unlocked, while going into a store to do an errand. X comes along, steals the car, and while driving fast to get out of the neighborhood, runs over P. If the court believes that the risk of theft is one of the things that makes leaving one's keys in the ignition negligent, the court will almost certainly conclude that X's intervening act was not superseding.

1. Foreseeable negligence: The ***negligence of third persons*** may similarly be an intervening force that is sufficiently foreseeable that it will not relieve D of liability. [149 - 151] (***Example:*** D is a tavern owner, who serves too much liquor to X, knowing that X arrived alone by car. D also does not object when X gets out his car keys and leaves. If X drunkenly runs over P, a court will probably hold that X's conduct in negligently (drunkenly) driving, although intervening, was sufficiently foreseeable that it should not absolve D of liability.)

2. Criminally or intentionally tortious conduct: A third person's ***criminal conduct***, or ***intentionally tortious acts***, may also be so foreseeable that they will not be superseding. But in general, the court is more likely to find the act superseding if it is criminal or intentionally tortious than where it is merely negligent. [151]

D. Responses to defendant's actions: Where the third party's intervention is a ***"normal" response*** to the defendant's act, that response will generally ***not*** be

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considered superseding. This is true even if the response was not all that foreseeable. [151 - 154]

1. Escape: For instance, if in response to the danger created by D, P or someone else attempts to ***escape*** that danger, the attempted escape will not be a superseding cause so long as it was not completely irrational or bizarre. [152] (***Example:*** D, driving negligently, sideswipes P's car on the highway. P panics, thrusts the wheel to the right, and slams into a railing. Even though most drivers in P's position might not have reacted in such an extreme or unhelpful manner, P's response is not sufficiently bizarre to constitute a superseding cause.)

2. Rescue: Similarly, if D's negligence creates a danger which causes some third person to attempt a ***rescue***, this rescue will normally not be an intervening cause, unless it is performed in a ***grossly careless*** manner. D may be liable to the ***person being rescued*** (even if part or all of his injuries are due to the rescuer's ordinary negligence), or ***to the rescuer***. [152 - 153]

3. Aggravation of injury by medical treatment: If D negligently injures P, who then undergoes ***medical treatment***, D will be liable for anything that happens to P as the result of negligence in the medical treatment, infection, etc. (*Examples:* P is further injured when the ambulance carrying her gets into a collision, or when, due to the surgeon's negligence, P's condition is worsened rather than improved.) [153]

a. Gross mistreatment: But some results of attempted medical treatment are so ***gross*** and unusual that they are regarded as superseding. [153] (***Example:*** While P is hospitalized due to injuries negligently inflicted by D, a nurse kills P by giving him an injection of morphine which she knows may be fatal, because she wants to spare him from suffering. D is not liable for P's death because the nurse's conduct is so bizarre as to be superseding.)

E. Unforeseeable intervention, foreseeable result: If an intervention is neither foreseeable nor normal, but leads to the ***same type of harm*** as that which was threatened by D's negligence, the intervention is usually ***not*** superseding. [154 - 155]

Example: D negligently maintains a telephone pole, letting it get infested by termites. X drives into the pole. The pole breaks and falls on P. A properly-maintained telephone pole would not have broken under the blow. Even though the chain of events (termite infestation followed by car crash) was bizarre, X's intervention will not be superseding, because the result that occurred was the

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same general *type* of harm as that which was threatened by D's negligence – that the pole would somehow fall down. [*Gibson v. Garcia*]

F. Unforeseeable intervention, unforeseeable results: If the intervention was not foreseeable or normal, and it produced results which are *not* of the same general nature as those that made D's conduct negligent, the intervention will probably be ***superseding***. [155 - 156]

1. Extraordinary act of nature: Thus an ***extraordinary act of nature*** is likely to be superseding. (***Example:*** Assume that it is negligent to one's neighbors to build a large wood pile in one's back yard, because this may attract termites which will then spread. D builds a large wood pile. An unprecedentedly-strong hurricane sweeps through, takes one of the logs, and blows it into P's bedroom, killing him. The hurricane will probably be held to be a superseding intervening cause, because it was so strong as to be virtually unforeseeable, and the type of harm it produced was not of the type that made D's conduct negligent in the first place.) [155]

G. Dependent vs. independent intervention: Courts sometimes distinguish between ***"dependent"*** intervening causes and ***"independent"*** ones. A dependent intervening cause is one which occurs only in ***response*** to D's negligence. An independent intervention is one which would have occurred even had D not been negligent (but which combined with D's negligence to produce the harm). Dependent intervening events are probably somewhat more foreseeable on average, and thus somewhat less likely to be superseding, than independent ones. But a dependent cause can be superseding (e.g., a grossly negligent rescue attempt), and an independent intervention can be non-superseding. [156 - 157]

H. Third person's failure to discover: A third person's ***failure*** to ***discover and prevent*** a danger will almost never be superseding. For instance, if a manufacturer negligently produces a dangerous product, it will never be absolved merely because some person further down the distribution chain (e.g., a retailer) negligently fails to discover the danger, and thus fails to warn P about it. [158]

1. Third person does discover: But if the third person does ***discover*** the defect, and then willfully and negligently fails to warn P, D may escape liability if D took all reasonable steps to remedy the danger. [158] (***Example:*** D manufactures a machine, and sells it to X. D then learns that the machine may crush the hands of users. D offers to X to fix the machine for free. X declines. P, a worker for X, gets his hand crushed. X's failure to warn P or allow the machine to be fixed by D probably supersedes, and relieves D of liability because D tried to do everything it could.)

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Chapter 7
JOINT TORTFEASORS

I. JOINT LIABILITY

A. Joint and several liability generally: If more than one person is a proximate cause of P's harm, and the harm is ***indivisible***, ***each defendant*** is liable for the ***entire harm***. The liability is said to be ***"joint and several."*** [163] (***Example:*** D1 negligently scratches P. P goes to the hospital, where she is negligently treated by D2, a doctor, causing her to lose her arm. P can recover her entire damages from D1, or her entire damages from D2, though she cannot collect twice.)

1. Indivisible versus divisible harms: This rule of joint and several liability applies only where P's harm is ***"indivisible,"*** i.e., not capable of being ***apportioned*** between or among the defendants. If there is a rational basis for apportionment – that is, for saying that some of the harm is the result of D1's act and the remainder is the result of D2's act – then each will be responsible only for that directly-attributable harm. [163]

B. Rules on apportionment:

1. Action in concert: If the two defendants can be said to have acted ***in concert***, each will be liable for injuries directly caused by the other. In other words, apportionment does not take place. [161] (***Example:*** D1 and D2 drag race. D1's car swerves and hits P. D2, even though his car was not part of the collision, is liable for the entire injuries caused by D1's collision, because D1 and D2 acted in concert.)

2. Successive injuries: Courts often are able to apportion harm if the harms occurred in ***successive incidents***, separated by substantial periods of time. [165] (***Example:*** D1, owner of a factory, pollutes P's property from 1970-1980. D1 sells to D2, who pollutes P's property from 1981-1990. The court will apportion the damage – neither defendant will have to pay for damage done by the other.)

a. Overlapping: It may be the case that D1 is jointly and severally liable for the harm caused by both her acts and D2's, but that D2 is liable only for his own. This is especially likely where D2's negligence is in ***response*** to D1's. [165] (***Example:*** D1 negligently breaks P's arm. D2 negligently sets the arm, leading to gangrene and then amputation. D1 is liable for all harm, including the amputation. D2 is only liable for the amount by which his negligence worsened the condition – that is, he's liable for the difference between a broken and amputated arm.)

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3. Indivisible harms: Some harms are ***indivisible*** (making each co-defendant jointly and severally liable for the entire harm).

a. Death or single injury: Thus the plaintiff's ***death*** or any ***single personal injury*** (e.g., a broken arm) is not divisible. [165]

b. Fires: Similarly, if P's property is ***burned*** or otherwise destroyed, this will be an indivisible result. [165] (***Example:*** D1 and D2 each negligently contribute to the starting of a fire, which then destroys P's house. There will be no apportionment, so D1 and D2 will each be liable for P's full damages.)

C. One satisfaction only: Even if D1 and D2 are jointly and severally liable, P is only entitled to a ***single satisfaction*** of her claim. [166] (***Example:*** P suffers harm of $1 million, for which the court holds D1 and D2 jointly and severally liable. If P recovers the full $1 million from D1, she may not recover anything from D2.)

II. CONTRIBUTION

A. Contribution generally: If two Ds are jointly and severally liable, and one D pays more than his ***pro rata share***, he may usually obtain partial ***reimbursement*** from the other D. This is called ***"contribution."*** [167] (***Example:*** A court holds that D1 and D2 are jointly and severally liable to P for $1 million. P collects the full $1 million from D1. In most instances, D1 may recover $500,000 contribution from D2, so that they will end up having each paid the same amount.)

1. Amount: As a general rule, each joint-and-severally-liable defendant is required to pay an ***equal share***. [168]

a. Comparative negligence: But in ***comparative negligence*** states, the duty of contribution is usually ***proportional to fault***. (***Example:*** A jury finds that P was not at fault at all, that D1 was at fault 2/3 and D2 at fault 1/3. P's damages are $1 million. P can probably recover the full sum from either D. But if P recovers the full sum from D1, D1 may recover $333,000 from D2.)

B. Limits on doctrine: Most states ***limit*** contribution as follows:

1. No intentional torts: Usually an ***intentional*** tortfeasor may ***not*** get contribution from his co-tortfeasors (even if they, too, behaved intentionally). [168]

2. Contribution defendant must have liability: The contribution defendant (that is, the co-tortfeasor who is being sued for contribution) must ***in fact be liable*** to the original plaintiff. [168] (***Example:*** Husband

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drives a car in which Wife is a passenger. The car collides with a car driven by D. The jury finds that Husband and D were both negligent. Wife recovers the full jury verdict from D. If intra-family immunity would prevent Wife from recovering directly from Husband, then D may not recover contribution from Husband either, since Husband has no underlying liability to the original plaintiff.)

C. Settlements:

1. Settlement by contribution plaintiff: If D ***settles***, he may then generally obtain contribution from other potential defendants. (Of course, he has to prove that these other defendants would indeed have been liable to P.) [169 - 170]

2. Settlement by contribution defendant: Where D1 settles, and D2 – against whom P later gets a judgment – sues D1 for contribution, courts are split among three approaches: [169 - 171]

a. Traditional rule: The traditional – and probably still majority – rule is that D1, the settling defendant, is ***liable*** for contribution.

b. "Reduction of P's claim" rule: Some courts ***reject*** contribution, but reduce P's claim against D2 pro-rata (so that D2 comes out the same as if contribution had been allowed, but P loses out if what she received from D1 in settlement was less than half of the total damages she suffered).

c. "No contribution" rule: Some courts now ***discharge*** D1, the settling defendant, from contribution liability completely. This approach is increasingly popular, since it gives defendants strong incentive to settle.

III. INDEMNITY

A. Definition: Sometimes the court will not merely order two joint-and-severally-liable defendants to split the cost (contribution), but will instead completely ***shift*** the responsibility from one D to the other. This is the doctrine of ***"indemnity"*** – a 100% shifting of liability, as opposed to the sharing involved in contribution. [171]

B. Sample situations: Here are two important contexts in which indemnity is often applied:

1. Vicarious liability: If D1 is only ***vicariously liable*** for D2's conduct, D2 will be required to indemnify D1. [172] (***Example:*** Employee injures

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P. P recovers against Employer on a theory of *respondeat superior*. Employer will be entitled to indemnity from Employee; that is, Employee will be required to pay to Employer the full amount of any judgment that Employer has paid.)

2. Retailer versus manufacturer: A ***retailer*** who is held strictly liable for selling a defective injury-causing product will get indemnity from others further up the distribution chain, including the ***manufacturer***. [172]

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Chapter 8
DUTY

I. DUTY GENERALLY

A. Concept: Generally, a person owes everyone else with whom he comes in contact a general ***"duty of care."*** Normally, you don't have to worry about this duty – it is the same in all instances, the duty to behave with the care that would be shown by a reasonable person. But there are several situations in which courts hold that the defendant owes plaintiff ***less*** than this regular duty. The most important of these situations are: (1) D generally has no duty to take ***affirmative action*** to help P; (2) D generally has no duty to avoid causing unintended ***mental suffering*** to P; and (3) D has no duty to avoid causing ***pure economic loss*** to P in the absence of more tangible types of harm such as physical injury. [176]

II. FAILURE TO ACT

A. No general duty to act: A person generally cannot be liable in tort solely on the grounds that she has ***failed to act***. [177]

1. Duty to protect or give aid: This means that if D sees that P is in danger, and fails to render assistance (even though D could do so easily and safely), D is ***not liable for refusing to assist***. (***Example:*** D, passing by, sees P drowning in a pond. D could easily pull P to safety without risk to D, but instead, D walks on by. D is not liable to P.)

B. Exceptions: But there are a number of commonly-recognized ***exceptions*** to the "no duty to act" rule: [178 - 184]

1. Business premises: In most courts, anyone who maintains ***business premises*** must furnish warning and assistance to a business visitor, regardless of the source of the danger or harm. (Traditionally, this rule applied to common carriers and innkeepers, and has since been expanded to business premises generally.) [178 - 179] (***Example:*** P gets his finger stuck in an escalator operated by D, a store where P is a customer. If D does not give P assistance, D will be liable.)

a. Employers and universities: Similarly, ***employers*** must give assistance to employees, and universities must give assistance to students.

2. Defendant involved in injury: If the danger or injury to P is ***due to D's own conduct***, or to an instrument under D's control, D has the duty of assistance. This is true today even if D acted without fault. [179] (***Example:*** A car driven by D strikes P, a pedestrian. Even though D has

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driven completely non-negligently, and the accident is due to P's carelessness in crossing the street, D today has a common-law duty to stop and give reasonable assistance to P.)

3. Defendant and victim as co-venturers: Where the victim and the defendant are engaged in a ***common pursuit***, so that they may be said to be ***co-venturers***, some courts have imposed on the defendant a duty of warning and assistance. For instance, if two friends went on a jog together, or on a camping trip, their joint pursuit might be enough to give rise to a duty on each to aid the other. [180]

4. Assumption of duty: Once D ***voluntarily begins*** to render assistance to P (even if D was under no legal obligation to do so), D must ***proceed with reasonable care***. [180 - 181]

a. Preventing assistance by others: D is especially likely to be found liable if he begins to render assistance, and this has the effect of ***dissuading others*** from helping P. (***Example:*** If D stops by the roadside to help P, an injured pedestrian, and other passers-by decline to help because they think the problem is taken care of, D may not then abandon the attempt to help P.)

b. Mere promise: Traditionally, a mere ***promise*** by D to help P (without actual commencement of assistance) was *not* enough to make D liable for not following through. But many modern courts would make D liable even in this situation, if P has a reliance interest.

5. Duty to control others: If D has a duty to ***control third persons***, D can be negligent for failing to exercise that control. [183]

a. Special relationship: A duty to control a third person may arise either because of a special relationship between D and P, or a special relationship between D and a third person. For instance, some courts now hold that any ***business*** open to the public must protect its patrons from wrongdoing by third parties. (***Example:*** D, a storekeeper, fails to take action when X, an obviously deranged man, comes into the store wielding a knife. P, a patron, is stabbed. Most courts would find D liable for failing to take action.)

III. MENTAL SUFFERING

A. Accompanied by physical impact: If D causes an actual ***physical impact*** to P's person, D is liable not only for the physical consequences of that act but also for all of the ***emotional*** or mental ***suffering*** which flows naturally from it. Such

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mental-suffering damages are called "parasitic" – they attach to the physical injury. [189]

B. Mental suffering without physical impact: But where there has been ***no physical impact*** or direct physical injury to P, courts ***limit*** P's right to recover for mental suffering. [189 - 193]

1. No physical symptoms: Where there is not only no impact, but no ***physical symptoms*** of the emotional distress at all, nearly all courts ***deny recovery***. [189 - 191] (***Example:*** D narrowly misses running over P. No one is hurt. P has no physical symptoms, but is distraught for weeks. Few if any courts will allow P to recover for her emotional distress.)

a. Exceptions: Some courts recognize an exception to this rule in special circumstances (e.g., negligence by telegraph companies in wording messages, and by funeral homes in handling corpses). [189]

b. Abandoned: About six states, including California and probably New York, have simply abandoned the rule against recovery for the negligent infliction of purely mental harm. [190 - 191]

c. The "at risk" plaintiff: The general rule means that if P, by virtue of his exposure to a certain substance, suffers an ***increased likelihood*** of a particular disease, P may generally not recover for the purely emotional harm of being at risk. [190 - 191] (***Example:*** D releases toxic chemicals into the water. This causes P to have a greatly increased risk of throat cancer. Most courts will not allow P to recover for distress at being extra vulnerable to cancer.)

d. Intentional torts: Remember that the general rule applies only to ***negligent*** conduct by D – if D's conduct is intentional or willful, P may recover for purely emotional harm with no physical symptoms, by use of the tort of intentional infliction of emotional distress. [191]

2. Physical injury without impact: Where D's negligent act (1) physically ***endangers*** P, (2) does not result in physical ***impact*** on P, and (3) causes P to suffer emotional distress that has ***physical consequences***, nearly all courts ***allow*** recovery. [191] (***Example:*** D narrowly avoids running over P. P is so frightened that she suffers a miscarriage. P may recover.)

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3. Fear for others' safety: If P suffers purely emotional distress (without physical consequences), and P's distress is due solely to fear or grief about the danger or harm to ***third persons***, courts are split. [192 - 193]

a. Zone of danger: If P was in the ***"zone of danger"*** (i.e., physically endangered but not struck), nearly all courts ***allow*** him to recover for emotional distress due to another person's plight. (***Example:*** D narrowly avoids running over P, and in fact runs over P's child S. Most courts will allow P to recover for her emotional distress at seeing S injured.)

b. Abandonment of zone requirement: A number of states – probably still a minority – have abandoned the "zone of danger" requirement. In these courts, so long as P ***observes*** the danger or injury to X, and X is a ***close relative*** of P, P may recover. (***Example:*** P is on the sidewalk when D runs over P's son, S. In a court which has abandoned the "zone of danger" requirement, P will be able to recover for his emotional distress at seeing his son injured, even though P himself was never in physical danger. [*Dillon v. Legg*])

IV. UNBORN CHILDREN

A. Modern view: Most courts have rejected the traditional view that an infant injured in a pre-natal accident could never recover if born alive. Today, recovery for pre-natal injuries varies:

1. Child born alive: If the child is eventually ***born alive***, nearly all courts ***allow*** recovery. [194] (***Example:*** D makes a drug taken by P's mother while P is a fetus only a few weeks old. P is born with serious birth defects resulting from the drug. Nearly all courts would allow P to recover.)

2. Child not born alive: Courts are ***split*** about whether suit can be brought on behalf of a child who was *not* born alive. Usually, a court will allow recovery only if it finds that a fetus never born alive is a "person" for purposes of the wrongful death statute. [194]

3. Pre-conception injuries: The above discussion assumes that the injury occurred while the child was *in utero*. Suppose, however, that the injury occurred before the child was even ***conceived***, but that some effect from the injury is nonetheless suffered by the later-conceived child. Here, courts are ***split*** as to whether the child may recover. [195 - 196] (***Example:*** P's mother, before getting pregnant with P, takes a drug made by D. The drug damages the mother's reproductive system. When P is conceived, she suffers from some congenital disease or defect (e.g., sterility) as a result.

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P's mother can clearly recover from D for her own injuries, but courts are split as to whether P can recover against D for these pre-conception events. [*Enright v. Eli Lilly*])

4. Wrongful life: If a child is born illegitimate, or with an unpreventable congenital disease, the child may argue that it should be entitled to recover for ***"wrongful life,"*** in the sense that it would have been better off aborted. But almost no courts have allowed the child to make such a wrongful life recovery. Courts do, however, often allow the ***parents*** to recover for their medical expenses, and perhaps their emotional distress from the child's condition. [195 - 196]

V. PURE ECONOMIC LOSS

A. Traditional rule: Where D tortiously causes physical injury or property damage to X, but only ***pure economic loss*** to P, the traditional rule is that P may ***not*** recover anything. [197] (***Example:*** A ship owned by D damages a dock owned by X. P, owner of a different ship, is required to dock elsewhere and suffers extra labor and docking costs, but no physical injury. Under the traditional view, P may not recover these expenses from D, even though D was a tortfeasor vis-a-vis X. [*Barber Lines v. M/V Donau Maru*])

1. Rationale: The rationale for this restrictive rule is the fear of ***open-ended liability***. [198]

B. Modern approach: But most modern courts probably no longer impose a blanket rule of no liability for pure economic loss. If a court does decide to relax the no-liability rule, it is most likely to award recovery where: (1) the injury to P was relatively ***foreseeable***; (2) relatively ***few plaintiffs*** would be permitted to sue if liability were found for pure economic loss; and (3) D's conduct is relatively ***blameworthy***. [199 - 200]

Example: D, a railroad, negligently causes a fire. P, an airline with nearby operations, is forced to close for 12 hours and loses business. *Held*, P may maintain its suit, because it was part of an "identifiable class" who D knew or had reason to know was likely to suffer such damages from its conduct. [*People Express Airlines v. Consolidated Rail Corp.*]

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Chapter 9
OWNERS AND OCCUPIERS OF LAND

I. OUTSIDE THE PREMISES

A. Effect outside: There are special rules lowering a landowner's standard of care. However, these rules do not apply to conduct by the landowner that has effects ***outside*** of his property. Therefore, the general ***"reasonable care"*** standard usually applies to such effects. [205 - 207]

1. Natural hazards: However, if a hazardous condition exists ***naturally*** on the land, the property owner generally has ***no duty*** to remove it or guard against it, even if it poses an unreasonable danger to persons outside the property. But in an urban or other thickly-settled area, courts are less likely to apply this traditional rule. [205 - 206] (***Example:*** O allows a tree to grow in such a way that it may hit a tall truck passing on the roadway. Traditionally, O may not be held liable to the driver of the truck. But in an urban or suburban context, O might be liable.)

2. Artificial hazards: Where the hazardous condition is ***artificially*** created, the owner has a general duty to prevent an unreasonable risk of harm to persons outside the premises. [206]

II. TRESPASSERS

A. General rule: As a general rule, the landowner owes ***no duty to a trespasser*** to make her land ***safe***, to ***warn*** of dangers on it, to avoid carrying on dangerous activities on it, or to protect the trespasser in any other way. [208] (***Example:*** P trespasses on D railroad's track. His foot gets caught, and he is run over by a train. Even if the reason that P caught his foot was that D negligently maintained the roadbed, P cannot recover because D owed him no duty before discovering his presence. [*Sheehan v. St. Paul Ry. Co.*])

B. Exceptions: There are three main ***exceptions*** to the general rule that there is no duty of care to trespassers:

1.Constant trespass on a limited area: If the owner has reason to know that a ***limited portion*** of her land is ***frequently used*** by various trespassers, she must use reasonable care to make the premises safe or at least warn of dangers. This is the ***"constant trespass on a limited area"*** exception. [208] (***Example:*** If trespassers have worn a path across a railroad, the railroad must use reasonable care, such as whistles, when traversing that crossing.)

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2. Discovered trespassers: Once the owner has ***knowledge*** that a particular person is trespassing, the owner is then under a duty to exercise reasonable care for the trespasser's safety. [209] (***Example:*** A railroad's engineer must use reasonable care in stopping the train once he sees P trespassing on the tracks.)

3. Children: The owner owes a duty of reasonable care to a trespassing ***child*** if: (1) the owner knows that the area is one where children are likely to trespass; (2) the owner has reason to know that the condition poses an unreasonable risk of serious injury or death to trespassing children; (3) the injured child either does not discover the condition or does not realize the danger, due to his youth; (4) the benefit to the owner of maintaining the condition in its dangerous form is slight weighed against the risk to the children; and (5) the owner fails to use reasonable care to eliminate the danger. [209 - 211]

Example: O knows that children often swim in a swimming pool on O's land. One part of the pool is unexpectedly deep. It would not cost very much for O to install fencing. P, a child trespasser, walks on the bottom of the pool, panics after suddenly reaching the deep part, and drowns. O is probably liable to P on these facts.

Note: Traditionally, some or all of these elements are summarized by saying that O is liable for maintaining an *"attractive nuisance."*

a. Natural conditions: The court is less likely to find liability where the condition is a ***natural*** one than where it is artificial. [210 - 211]

b. No duty of inspection: The child trespass rules do not generally impose any ***duty of inspection*** upon O. [211]

III. LICENSEES

A. Definition of licensee: A ***licensee*** is a person who has the owner's ***consent*** to be on the property, but who does ***not have a business purpose*** for being there, or anything else entitling him to be on the land apart from the owner's consent. [211]

B. Duty to licensees: The owner does ***not*** owe a licensee any duty to ***inspect for unknown dangers***. On the other hand, if the owner ***knows*** of a dangerous condition, she must ***warn*** the licensee of that danger. [212] (***Example:*** Rear steps leading from O's house to her back yard contain a rotten wood plank. If O knows of the rotten condition, she must warn P, a licensee, if P cannot reasonably be expected to spot the danger himself. But O need not inspect the steps to make sure they are safe, even if a reasonably careful owner would do so.)

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C. Social guests: The main class of persons who qualify as licensees are ***"social guests."*** [212] (***Example:*** Even if P is invited to O's house for dinner, P is a "licensee," not an "invitee.")

IV. INVITEES

A. Duty to invitee: The owner *does* owe an ***invitee*** a duty of ***reasonable inspection to find hidden dangers***. Also, the owner must use reasonable care to take ***affirmative action*** to remedy a dangerous condition. [213]

B. Definition of "invitee": The class of invitees today includes: (1) persons who are invited by O onto the land to conduct ***business*** with O; and (2) those who are invited as members of the ***public*** for purposes for which the land is held ***open to the public***. [213 - 214]

1. Meaning of "open to the public": The ***"open to the public"*** branch of invitees covers those who come onto the property for the purposes for which it is held open, even if these people will not confer any economic benefit on the owner. [214] (***Example:*** P, a door-to-door sales representative, pays an unsolicited sales call on D, a storekeeper. D in fact never buys from such unsolicited callers. However, since P reasonably understood that the premises were held open to salespeople, P is an invitee.)

2. Scope of invitation: If the visitor's use of the premises goes ***beyond*** the business purpose or beyond the part of the premises held open to the public, that person will change from an invitee to a licensee. [214 - 215] (***Example:*** P visits O's store to buy cigarettes. O then allows P to use a private bathroom in the back of the store not held open to the public. Even though P was an invitee when he first came into the store, he becomes a licensee when he goes into the private bathroom. [*Whelan v. Van Natta*])

C. Duty of due care: The owner owes an invitee the duty of ***reasonable care***. [215] In particular**:**

1. Duty to inspect: The owner has a duty to ***inspect*** her premises for hidden dangers. O must use ***reasonable care*** in doing this inspecting. This is true even as to dangers that existed before O moved onto the premises. [215]

2. Warning: The giving of a ***warning*** will often, but not always, suffice. If O should realize that a warning will not remove the danger, then the condition must actually be remedied. [215]

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3. Control over third persons: Reasonable care by O may require that she exercise ***control over third persons*** on her premises. [216]

V. REJECTION OF CATEGORIES

A. Rejection generally: A minority of courts have ***rejected*** the categories of trespasser, licensee and invitee. These courts now apply a general single "reasonable person" standard of liability. California [*Rowland v. Christian*] and New York are included in this group. [217 - 218]

VI. LIABILITY OF LESSORS AND LESSEES

A. Lessee: A ***tenant*** is treated ***as if she were the owner*** – all the rules of owner liability above apply to her. [218]

B. Lessors: In general, a ***lessor*** is ***not*** liable in tort once he transfers possession to the lessee. However, there are a number of exceptions to this general rule**:**

1. Known to lessor, unknown to lessee: The lessor will be liable to the lessee (and to the lessee's invitees and licensees) for any dangers existing at the start of the lease, which the lessor ***knows or should know about***, and which the lessee has no reason to know about. (This usually does not impose on the lessor a duty to ***inspect*** the premises at the start of the lease.) [218]

2. Open to public: If the lessor has reason to believe that the lessee will hold the premises ***open to the public***, the lessor has an affirmative duty to ***inspect*** the premises to find and repair dangers before the lease starts. [219]

3. Common areas: The lessor has a general duty to use reasonable care to make ***common areas*** (e.g., the lobby or stairwells of an apartment building) safe. [219]

4. Lessor contracts to repair: If the lessor ***contracts***, as part of the lease, to keep the premises in good repair, most courts hold that the landlord's breach of this covenant to repair gives a tort claim to anyone injured. However, P must show that D failed to use reasonable care in performing – it is not enough to show that D breached the contract. [220]

5. Negligent repairs: The landlord may incur liability even without a contractual repair obligation if she ***begins*** to make repairs, and either performs them unreasonably, or fails to finish them. This is clearly true where the landlord worsens the danger by performing the repair

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negligently. Courts are split about what happens where the landlord starts the repair, then abandons it, without worsening the danger. [220 - 221]

6. General negligence standard: Courts that impose a general negligence standard on occupiers of land often impose a similar general requirement of due care upon lessors. [222]

VII. VENDORS

A. Vendor's liability: Generally, a ***seller*** of land is released from tort liability once he has turned over the property. But there are exceptions**:**

1. Concealment: If the vendor fails to disclose to the buyer a ***dangerous condition*** of which the vendor is or should be ***aware***, and which the buyer will probably not discover, the vendor is liable. [222] (***Example:*** S sells a house to P. S is aware of a rotten step in the back. If P falls through the step before discovering the danger, S is liable. Once P knows about the danger, S is off the hook.)

2. Builders: Where the vendor of the house is the company or person that ***built it***, some courts apply general principles of negligence to the vendor. (Also, some courts impose strict liability, treating the vendor like a manufacturer of defective goods who is liable without regard to negligence.) [223]

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Chapter 10
DAMAGES

I. PERSONAL INJURY DAMAGES GENERALLY

A. Actual injury required: In any action based on negligence, the existence of ***actual injury*** is required. Unlike intentional tort actions, ***nominal*** damages may ***not*** be awarded. [226]

1. Physical injury required: Furthermore, P must usually show that he suffered some kind of ***physical*** harm. (***Example:*** P may not recover where he sustained only mental harm, with no physical symptoms.) [227]

2. Elements of damages: But once physical harm has been proven, a variety of damages may be recovered by P. [227] These include:

a. Direct loss: The value of any direct loss of bodily functions. (***Example:*** $100,000 for the loss of a leg.)

b. Economic loss: Out-of-pocket ***economic losses*** stemming from the injury. (*Examples:* Medical expenses, lost earnings, household attendant.)

c. Pain and suffering: ***Pain and suffering*** damages.

d. Hedonistic damages: Damages for loss of the ability to ***enjoy*** one's previous life. (***Example:*** Compensation for loss of the ability to walk, even if loss of that ability has no economic consequences.)

B. Hedonistic damages: As noted, most courts now allow a jury to award ***hedonistic damages***, i.e., damages for the loss of the ability to ***enjoy life***. [227]

1. Consciousness required: Courts are ***split*** about whether P must be ***conscious*** of the loss in order to be able to recover damages. Some states (e.g., New York) do not allow hedonistic damages where P is in a coma. [228]

C. Future damages: P brings only ***one action*** for a particular accident, and recovers in that action not only for past damages, but also for likely ***future*** damages. [228 - 231]

1. Present value: When P is recovering future values, courts generally instruct the jury to award P only the ***"present value"*** of these losses. [229]

2. Periodic payments: Some states now allow D to force P to accept ***periodic payments*** in certain situations. These payments generally

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terminate upon P's death. [229 - 230] (***Example:*** In New York medical malpractice cases, where the judgment is for more than $250,000, D may pay the judgment by purchasing an annuity for P, which will terminate on P's death.)

D. Tax: Any recovery or settlement for personal injuries is ***free*** of ***federal income tax***. [231]

E. The collateral source rule: At common law, P is entitled to recover her out-of-pocket expenses, even if P was ***reimbursed*** for these losses by some ***third party***. This is known as the ***"collateral source rule."*** [232 - 233] (***Example:*** P has hospital bills of $100,000. A health insurance policy owned by P pays every dime of this. When P sues D, and establishes liability, P may recover the whole $100,000 even though in a sense she has collected twice.)

1. Statutory modifications: Nearly half the states have ***modified*** the common law collateral source rule in one way or another. [233]

2. Subrogation: Where the common law rule remains in effect, P may not get a windfall after all. An insurance company that makes payments to P will normally be ***subrogated*** to P's tort rights. That is, it is the insurance company, not P, who will actually collect any judgment from D up to the amount of the payments made by the insurer. [233]

F. Mitigation: P has a ***"duty to mitigate."*** That is, P cannot recover for any harm which, by exercise of reasonable care, he could have ***avoided***. In particular, P cannot recover for any harm which would have been avoided had P sought ***adequate medical care***. [233]

1. Seat belt defense: In some states, failure to use a ***seat belt*** may deprive P of recovery under the duty to mitigate – if D can show that P would not have been seriously injured had P worn a seat belt, D may escape liability for the avoidable injuries. [234]

II. PUNITIVE DAMAGES

A. Punitive damages generally: Punitive damages can be awarded to penalize a defendant whose conduct is particularly ***outrageous***. [235]

1. Negligence cases: In cases of negligence (as opposed to intentional torts), punitive damages are usually awarded only where D's conduct was ***"reckless"*** or ***"willful and wanton."*** [235]

a. Product liability suits: Punitive damages are also frequently awarded in ***product liability suits***, if P shows that D knew its

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product was defective, or recklessly disregarded the risk of a defect.

b. Multiple awards: In a product liability context, a defendant who has made many copies of a defective product may face ***multiple suits***, each awarding punitive damages. The possibility of multiple awards by itself generally does not mean that such awards should not be made. But many courts take into account the possibility of multiple awards in fixing the amount of punitive damages in each case.

2. Constitutional limits: The U.S. Constitution places some – but not severe – limits on the award of punitive damages. [237 - 238]

a. Due process: A defendant might be able to show that a particular punitive damages award violated its Fourteenth Amendment ***due process*** rights. If a jury is given unlimited discretion in deciding whether and in what amount to award punitive damages, this may violate due process. [*Pacific Mutual Life Ins. Co. v. Haslip*, 237] However, the mere fact that the punitive damages are large relative to the compensatory damages will not by itself lead to a due process violation.

III. RECOVERY BY SPOUSE OR CHILDREN

A. General action by spouse: Most states allow the ***spouse*** of an injured person to bring an independent action for his or her own injuries. [238 - 239] (*Examples:* A spouse of the injured person may recover for loss of companionship or loss of sex.)

B. Recovery by parent: Similarly, nearly all jurisdictions allow a ***parent*** to recover ***medical expenses*** incurred due to injury to the child. Also, there may be an action for loss of companionship (e.g., the child is in a coma). [239]

C. Child's recovery: Some – but still not most – courts allow a child to recover for loss of companionship or guidance where the parent is injured. [239]

Note: The discussion in paragraphs A, B and C above assumes that the victim is only injured, not killed. Where the victim is killed, the "wrongful death" statutes discussed below apply instead.

D. Defenses: In such third-party actions, generally any ***defense*** which could have been asserted in a suit brought by the injured party may be asserted against the plaintiff. [240] (*Example:* In a suit by Husband for loss of companionship and sex due to injuries to Wife, D may assert that Wife was contributorily negligent.)

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1. Defenses against plaintiff: Furthermore, defenses may be asserted against the plaintiff even though these could not have been asserted in a suit brought by the victim. [240] (***Example:*** Husband drives and collides with D; Wife is injured. If Husband sues for loss of companionship, D can raise Husband's contributory negligence as a defense, even though this would not be a defense in a suit brought by Wife.)

IV. WRONGFUL DEATH AND SURVIVOR ACTIONS

A. Wrongful death distinguished from survivor: Most states have two types of statutes which take effect when a personal injury victim dies. The "survival" statute governs whether the victim's own right of recovery continues after his death. The "wrongful death" statute governs the right of the victim's survivors (typically, spouse and children) to recover. [240]

B. Survival statutes: The ***survival*** statute in most states provides that when an accident victim dies, his estate may sue for those elements of damages that the victim himself could have sued for had he lived. Thus a survival statute typically allows the estate to sue for pain and suffering, lost earnings prior to death, actual medical expenses, etc. In many states, if death is ***instantaneous***, there is no survival action at all, since all damages are sustained on account of or after the death. [240 - 241]

C. Wrongful death: Most states have ***"wrongful death"*** statutes, which allow a defined group to recover for the loss they have sustained by virtue of the decedent's death. Typically, the decedent's ***spouse*** and ***children*** are covered. If the decedent has no spouse or children, usually the ***parents*** are covered. [241 - 243]

1. Elements of damages: In a wrongful death action, the survivors may recover for: (1) the ***economic support*** they would have received had the accident and death not occurred; and (2) usually, the companionship (including sexual companionship) and moral guidance that would have been given by the decedent. Some – but not most – states also allow the survivors to recover for ***grief***. [241 - 242]

a. Recovery by parent where child is dead: Many courts now allow a parent whose child has died to recover for the loss of companionship of that child. [242]

2. Defenses: In a wrongful death action, D may assert any defense which he would have been able to use against the decedent if the decedent was still alive and suing in her own name. [242 - 243] (*Examples:* The decedent's contributory negligence, assumption of risk, consent, etc. will all bar an action for wrongful death by the survivors.)

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Chapter 11
DEFENSES IN NEGLIGENCE ACTIONS

I. CONTRIBUTORY NEGLIGENCE

A. General rule: At common law, the doctrine of ***contributory negligence*** applies. The doctrine provides that a plaintiff who is negligent, and whose negligence contributes proximately to his injuries, is ***totally barred from recovery***. [246 - 247] (***Example:*** P, while crossing the street, fails to pay attention. D, traveling at a high rate of speed while drunk, hits and kills P. Had P behaved carefully, he would have been able to get out of the way. Even though D's negligence is much greater than P's, P will be totally barred from recovery because of his contributory negligence, if the doctrine applies.)

B. Standard of care: The plaintiff is held to the ***same standard of care*** as the defendant (i.e., the care of a ***"reasonable person*** under like circumstances"). [248]

C. Proximate cause: The contributory negligence defense only applies where P's negligence ***contributes proximately*** to his injuries. The same test for "proximate causation" is used as where D's liability is being evaluated. [248 - 249] (***Example:*** On the facts of the above example, suppose that D was traveling so fast that even had P been careful, D would still have struck P. P will not be barred by contributory negligence, because his negligence was not a "but for" cause, and thus not a proximate cause, of P's injuries.)

D. Claims against which defense not usable: Since the contributory negligence defense is based on general negligence principles, it may be used as a bar only to a claim that is itself based on negligence. [250 - 251]

1. Intentional torts: Thus the defense may not be used where P's claim is for an ***intentional tort***. [250]

2. Willful and wanton: Similarly, if P's conduct is found to have been ***"willful and wanton"*** or ***"reckless,"*** the contributory negligence defense will not be allowed. (But if D's negligence is merely "gross," contributory negligence usually will be allowed.) The idea is that the defense does not apply where D disregards a ***conscious*** risk. [250 - 251]

3. Negligence *per se* : Contributory negligence can usually be asserted as a defense even to D's ***"negligence per se,"*** i.e., his negligence based on a statutory violation. (But if the statute was enacted solely for the purpose of protecting a class of which P is a member, contributory negligence usually may not be asserted as a defense.) [251]

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E. Last clear chance: The doctrine of ***"last clear chance"*** acts as a limit on the contributory negligence defense. If, just before the accident, D had an ***opportunity to prevent the harm***, and P did not have such an opportunity, the existence of this opportunity (this last clear chance) ***wipes out*** the effect of P's contributory negligence. [251 - 254] (***Example:*** P crosses the street without looking. D, who is traveling faster than the speed limit, discovers P's plight shortly before the collision. D tries to hit the brake, but negligently hits the accelerator instead. P never spotted D's car at all. D's discovery of the danger gave him a last clear chance to avoid the accident, which D failed to take advantage of. This last clear chance wipes out the effect of P's contributory negligence, and P may recover against D.)

1. Inattentive defendant: In the above example, D actually discovered P's plight, and failed to deal with it carefully – all courts would apply the last clear chance doctrine in this situation. If, on the other hand, because of D's inattentiveness D ***failed to discover*** the plight and thus never had a chance to deal with it, most but not all courts would also apply the last clear chance doctrine. [252 - 253]

2. Antecedent negligence: Where D discovers P's plight, and tries to avoid it but is unable to do so due to her ***earlier*** negligence, most courts do *not* apply the last clear chance doctrine. In other words, for last clear chance to apply according to most courts, D must have had an ***actual*** opportunity to avoid the harm at the last moment, not merely an opportunity which "would have existed" had D not previously been negligent. [253 - 254]

II. COMPARATIVE NEGLIGENCE

A. Definition: A ***"comparative negligence"*** system rejects the all-or-nothing approach of contributory negligence. It instead attempts to divide liability between P and D in proportion to their ***relative degrees of fault***. P is not barred from recovery by his contributory negligence, but his recovery is reduced by a ***proportion*** equal to the ratio between his own negligence and the total negligence contributing to the accident. [254] (***Example:*** P suffers damages of $100,000. A jury finds that P was 30% negligent and D was 70% negligent. P will recover, under a comparative negligence system, $70,000 – $100,000 minus 30% of $100,000.)

1. Commonly adopted: 46 states have adopted some form of comparative negligence.

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B. "Pure" versus "50%" systems: Only 13 states have adopted "pure" comparative negligence. The rest completely bar P if his negligence is (depending on the state) ***"as great"*** as D's, or ***"greater"*** than D's. [255 - 256]

C. Multiple parties: Where there are ***multiple defendants***, comparative negligence is harder to apply**:**

1. All parties before court: If all defendants are joined in the same lawsuit, the solution is simple: only the negligence due directly to P is deducted from his recovery. [256] (***Example:*** Taking all negligence by all parties, P is 20% negligent, D1 is 50% negligent, and D2 is 30% negligent. P will recover 80% of his damages.)

2. Not all parties before court: If not all defendants are before the court, hard questions arise concerning ***joint-and-several liability***. The issue is whether the defendant(s) before the court, who is/are found to be only partly responsible for P's loss, must pay for the whole loss aside from that caused by P's own fault. (***Example:*** P's accident is caused by the negligence of D and X. P sues D, but can't find or sue X. The jury finds that P was 20% responsible; D, 30% responsible; and X, 50% responsible. P's damages total $1 million. It is not clear whether P can collect the full $800,000 from D. Under traditional "joint and several liability" rules, P would be able to collect this full $800,000.)

a. Various approaches: States have four or five different approaches to this problem. Some states have completely abolished the doctrine of joint-and-several liability in comparative negligence cases (so that P could recover only $300,000 on the above example). An important emerging approach is the ***"allocative"*** approach, by which P and the Ds ***share the burden*** of an absent or insolvent defendant, in proportion to their own fault. [256 - 257] (***Example:*** On the facts of the above example, P would bear 2/5 and D 3/5 of the burden of X's absence. So P would recover $600,000 total.)

D. Last clear chance: Courts are ***split*** about whether the doctrine of ***last clear chance*** should survive in a comparative negligence jurisdiction. [258]

E. Extreme misconduct by D: If D's conduct is not merely negligent, but ***"willful and wanton"*** or ***"reckless,"*** most states nonetheless will reduce P's damages. [258]

1. Intentional tort: But if D's tort is ***intentional***, most comparative negligence statutes will *not* apply. [258]

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F. Seat belt defense: The ***"seat belt defense"*** is increasingly ***accepted*** in comparative negligence jurisdictions. In this defense, D argues that P's injuries from a car accident could have been reduced or entirely avoided had P worn a seat belt; P's damages should therefore be reduced. [259]

1. Contributory negligence jurisdictions: In most ***contributory*** negligence jurisdictions, courts ***refuse*** to allow the seat belt defense at all. That is, P's failure to wear a seat belt does not count against his recovery in most courts. [259]

2. Comparative negligence jurisdictions: But in states that have comparative negligence, the seat belt defense is more successful. There are various approaches: (1) D is liable only for those injuries that would have occurred even had P worn a seat belt; (2) D is liable for all injuries, with a reduction made equal to the percentage of P's fault; and (3) D is liable for all injuries, but P's fault reduces his recovery for those injuries that would have been avoided. [260 - 261]

a. Effect of statute: Thirty-two states have ***mandatory*** seat belt use statutes. But the majority of these either prohibit the seat belt defense completely or make the defense almost valueless by allowing only a small reduction of damages. [261]

III. ASSUMPTION OF RISK

A. Definition: A plaintiff is said to have ***assumed the risk*** of certain harm if she has ***voluntarily consented*** to take her chances that harm will occur. Where such an assumption is shown, the plaintiff is, at common law, completely barred from recovery. [261]

B. Express assumption: If P ***explicitly*** agrees with D, in advance of any harm, that P will not hold D liable for certain harm, P is said to have ***"expressly"*** assumed the risk of that harm. [261] (***Example:*** P wants to go bungee jumping at D's amusement park. P signs a release given to him by D in which P agrees to "assume all risk of injury" that may result from the bungee jumping. If P is injured, he will not be able to sue D, because he has expressly assumed the risk.

1. Public policy against assumption: But even P's express assumption of the risk will not bar P from recovery if there is ***a public policy*** against the assumption of the risk involved. [262 - 263]

a. Bargaining power: For instance, if D's position as a ***unique provider*** of a certain service gives him ***greater bargaining power*** than P, and D uses this power to force P into a waiver of liability, the court is likely to find that public policy prohibits use of the

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assumption of risk doctrine. (***Example:*** D is a public utility or common carrier, whom P must patronize because of D's monopoly. Even if P expressly assumes the risk, this will probably not bar recovery.)

b. Intentional or willful misconduct: Public policy usually prohibits a waiver of liability for D's ***willful and wanton*** or ***"gross"*** negligence, and for D's ***intentionally*** tortious conduct. [262 - 263]

c. Health care: Courts almost never allow P to expressly assume the risk of harm with respect to ***medical services***. [263] (***Example:*** Even if P signs a contract with D, her doctor, saying, "I agree not to sue you for malpractice if anything goes wrong with my operation," no court will enforce this.)

C. Implied assumption of risk: Even if P never makes an actual agreement with D whereby P assumes the risk, P may be held to have assumed certain risks ***by her conduct***. Here, the assumption of risk is said to be ***"implied."*** [263]

1. Two requirements: For D to establish implied assumption, he must show that P's actions demonstrated that she: (1) ***knew of the risk in question***; and (2) ***voluntarily consented*** to bear that risk herself. [263]

Example: D owns a baseball team. D posts big signs at the gates warning of the danger of foul balls. P has attended many games, and in each game buys a seat right behind home plate, a place where she and all other fans know many foul balls are hit. If P is hit by a foul ball, she will not be able to recover against D even if D negligently failed to screen the home plate area. This is because P knew of the risk in question, and voluntarily consented to bear that risk.

2. Knowledge of risk: The requirement that P be shown to have ***known*** about the risk is strictly construed. For instance, the risk must be one which was ***actually*** known to P, not merely one which ***"ought to have been"*** known to her. [263]

3. Voluntary assumption: The requirement that P consented ***voluntarily*** is also strictly construed. [264]

a. Duress: For instance, there is no assumption of the risk if D's conduct left P with ***no reasonable choice*** but to encounter a known danger. (***Example:*** P rents a room in a boarding house from D. She has to use a common bathroom at the end of a hallway. After the lease starts, a hole in the floor leading to the bathroom develops,

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and D negligently fails to fix it. P knows about the hole, but nonetheless steps in it while going to the bathroom. P will not be barred from recovery by an implied assumption of risk, because D's conduct left P with no reasonable alternative but to walk down the hallway to get to the bathroom.)

b. Choice not created by D: Where it is ***not D's fault*** that P has no reasonable choice except to expose herself to the risk, the defense ***will*** apply. (***Example:*** P is injured and needs immediate medical help. He asks D – who had nothing to do with the injury – to drive him to the hospital, knowing that D's car has bad brakes. P assumes the risk of injury due to an accident caused by the bad brakes, because P's dilemma is not the result of D's wrongdoing.)

4. Distinguished from contributory negligence: Often, P's assumption of risk will also constitute contributory negligence. [266] (***Example:*** P voluntarily, but unreasonably, decides to take her chances as to a certain risk.)

a. Reasonable assumption of risk: But this is not always true: sometimes conduct which constitutes assumption of risk is *not* contributory negligence. (***Example:*** P, injured, asks for a ride to the hospital in D's car, which P knows had bad brakes. This is assumption of risk, even though P has behaved perfectly reasonably in view of the lack of alternatives.)

b. Defense to reckless conduct: Distinguishing between assumption of risk and contributory negligence may be important where D's conduct was ***reckless***: contributory negligence is not a defense to reckless conduct, but assumption of the risk generally is.

5. "Primary" versus "secondary" assumption: Distinguish between ***"primary"*** implied assumption of risk and ***"secondary"*** implied assumption. In the "primary" case, D is never under any duty to P at all. [267] (***Example:*** Foul balls at a baseball game.) In the "secondary" case, D would ordinarily have a duty to P, but P's assumption of risk causes the duty to dissipate. (***Example:*** P, injured, asks for a ride to the hospital in D's car, which P knows has bad brakes.)

a. Effect of comparative negligence statute: Where there is a ***comparative negligence*** statute, most states eliminate the "secondary" assumption doctrine, but not the "primary" assumption doctrine. [267 - 268]

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Example 1: In a comparative negligence state, P, knowing of the risk of foul balls, goes to a baseball game and is hit by one. D can still raise assumption of risk as a complete defense, because the assumption here was a primary one – it prevented D from ever having any duty to protect P from foul balls.

Example 2: In a comparative negligence state, Landlord negligently allows Tenant's premises to become highly flammable, and a fire results. Tenant reenters the premises to try to rescue his child, and is injured. This is a "secondary" implied assumption of risk situation. Therefore, most courts would merge assumption of risk into comparative negligence. If Tenant behaved reasonably, his recovery will not be reduced at all. If Tenant behaved unreasonably, his recovery will be reduced only by the percentage of fault.

b. Sports and recreation: In a ***sporting event*** or ***recreational activity***, one participant often sues another. Here, most courts hold that each participant assume the risk of hazards that are ***"inherent"*** in the sport, including the ***ordinary carelessness*** of other participants; this assumption is "primary," and thus remains a complete defense under comparative negligence. But a participant has at most only a ***"secondary"*** assumption of risk as to another's participant's ***intentional*** or ***reckless*** causing of injury; this type of assumption of risk does not remain as a defense in a comparative negligence jurisdiction. [268 - 269]

Example: P and D are playing touch football together. D steps on P's hand and injures it badly. In a comparative negligence jurisdiction, P will probably be found to have assumed the risk of D's ordinary carelessness, but not of D's recklessness or intent to cause injury. Therefore, if D was merely negligent, P is completely barred by primary assumption of risk. But if D was reckless, then at most P's recovery will be reduced by the amount of P's fault in not anticipating D's bad conduct. [*Knight v. Jewett,* 269])

IV. STATUTE OF LIMITATIONS

A. Discovery of injury: If P does not ***discover*** his injury until long after D's negligent act occurred, the statute of limitations may start to run at the time of the negligent act, or may instead not start to run until P discovered (or ought to have discovered) the injury. [270 - 271]

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1. Medical malpractice: In ***medical malpractice cases***, statutes and case law today frequently apply the "time of discovery" rule. [270] (***Example:*** D performs an operation on P in 1970, and leaves a foreign object in P's body. P discovers the problem in 1990, and sues immediately. The statute of limitations is six years on tort actions. Many, probably most, states today would allow P to sue, on the theory that the statute only started to run at the earliest time P knew or should have known that the object was left in his body.)

2. Sexual assaults: Some states also apply the "discovery" rule to toll the statute of limitations in ***sexual assault*** cases. [271] (***Example:*** P is sexually abused by D, her father, when P is five years old. P represses the whole episode, but rediscovers it under psychoanalysis at the age of 30. A modern court might allow P to sue at age 31, on the theory that the statute of limitations was tolled until P remembered, or should have remembered, the abuse.)

V. IMMUNITIES

A. Family immunity: The common law recognizes two ***immunities*** in the family relationship: between ***spouses***, and between ***parent and child***. [272 - 275]

1. Husband and wife: At common law, inter-spousal immunity prevented suits by one spouse against the other for personal injury. [272] (*Examples:* If W is injured while a passenger in a car driven negligently by H, W cannot sue H. If H intentionally strikes W, W cannot sue for battery.)

a. Abolition: But over half the states have now completely ***abolished*** the inter-spousal immunity, even for personal injury suits. Other states have partially abolished it (e.g., not applicable for intentional torts, or not applicable for automobile accident suits).

2. Parent and child: At common law, there is an immunity that bars suit by a ***child against his parents*** or vice versa. Again, many (though not most) states have abolished this immunity, and others have limited it. [273 - 275]

B. Charitable immunity: ***Charitable organizations***, as well as educational and religious ones, receive immunity at common law. [275 - 276]

1. Abolished: But more than 30 states have now abolished charitable immunity. Others have cut back on the doctrine (e.g., abolished as to charitable hospitals, or abolished where there is liability insurance). [275 - 276]

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C. Governmental immunity: At common law, there is ***"sovereign immunity,"*** preventing anyone from suing the ***government***. [276 - 281]

1. United States: Suits against the ***federal government*** are generally allowed today, under the Federal Tort Claims Act (FTCA). But the FTCA does not allow certain types of tort suits. [276 - 278]

a. Discretionary function: Most important, no liability may be based upon the government's exercise of a ***discretionary or policy-making function***, even if the discretion is abused. (***Example:*** The U.S. government conducts underground testing of biological weapons. The tests are carried out as carefully as can be done, but the government behaves negligently in making the basic decision that such tests can be done safely. Since this high-level decision is "discretionary," P, injured by escaping gas, probably cannot sue under the FTCA.)

2. State governments: State governments have traditionally had similar sovereign immunity. But many have abolished that immunity. [278]

3. Local government immunity: Local government units (cities, school districts, public hospitals, etc.) have traditionally had sovereign immunity as well. [278 - 279]

a. "Proprietary" functions: But even at common law, where a local government unit performs a ***"proprietary"*** function, there is no immunity. Proprietary functions are ones that have not been historically performed by government, and which are often engaged in by private corporations. (*Examples:* The running of hospitals, utilities, airports, etc., is generally proprietary, since these are revenue-producing activities; they can therefore be the subject of suit for personal injuries. Police departments, fire departments and school systems are not proprietary, and cannot be sued at common law.)

b. Abolition: In any event, most states have abolished the general local government immunity, and some that have not done so allow suits where there is liability insurance.

4. Government officials: Courts often grant ***public officials*** tort immunity, even where their public employer could be sued. [280] (*Examples:* Legislators and judges generally receive complete immunity, as long as their act is within the broad general scope of their duties.)

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Chapter 12
VICARIOUS LIABILITY

I. EMPLOYER-EMPLOYEE RELATIONSHIP

A. *Respondeat superior* doctrine: If an employee commits a tort during the ***"scope of his employment,"*** his employer will be ***liable*** (jointly with the employee). This is the rule of ***"respondeat superior."*** [288]

1. Applies to all torts: The doctrine applies to ***all*** torts, including intentional ones and those in which strict liability exists, provided that the tort occurred during the scope of the employee's employment. [288]

B. Who is an "employee": *Respondeat superior* is applied to all cases involving ***"employees,"*** but ***not*** to most cases involving ***"independent contractors."*** You must therefore distinguish between these two. [288 - 289]

1. Distinction: The main idea is that an employee is one who works ***subject to the close control*** of the person who has hired him. An independent contractor, by contrast, although hired to produce a certain result, is not subject to the close control of the person doing the hiring. [288 - 289]

a. Physical details: The "control" required to make a person an employee rather than an independent contractor is usually held to be control over the ***physical details*** of the work, not just the general manner in which the work is turned out. (***Example:*** A "newspaper boy" is likely to be an independent contractor, not an employee, because the newspaper usually controls only the general terms of employment – such as the time by which the deliveries must take place – not the physical details, such as whether the work should be done by bike or automobile.)

C. Scope of employment: *Respondeat superior* applies only if the employee was acting ***"within the scope of his employment"*** when the tort occurred. The tort is within the scope of employment if the tortfeasor was acting with an ***intent to further his employer's business purpose***, even if the means he chose were indirect, unwise or even forbidden. [289 - 292]

1. Trips from home: Most courts hold that where an accident occurs where the employee is travelling ***from her home*** to work, she is not acting within the scope of her employment. If the employee is ***returning home*** after business, courts are divided. [290]

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2. Frolic and detour: Even a ***detour*** or side-trip for personal purposes by an employee may be found within the scope of employment if the deviation was "reasonably foreseeable. " [290 - 291] (***Example:*** While D, a salesperson, is taking a two-hour trip to visit a business prospect, she makes a five-minute detour to buy a pack of cigarettes. If an accident occurred during the detour, this would probably be held to be "within the scope of employment," so that D's employer would be liable. But a two-hour detour for personal business while on a one-day trip would probably not be within the scope of employment.)

3. Forbidden acts: Even if the act done was expressly forbidden by the employer, it will be "within the scope of employment" if done in furtherance of the employment. [291] (***Example:*** D, a storekeeper, expressly orders his clerk never to load a gun while showing it to a customer. The clerk ignores this rule and loads the gun, the gun goes off and the customer is hurt. D will be liable because the loading, though forbidden, was done in furtherance of the employer's business purposes, i.e., sale of guns.)

4. Intentional torts: The fact that the tort is an ***intentional*** one does not relieve the employer of liability. [291 - 292] (***Example:*** X is a bill collector for D. X commits assault, battery and false imprisonment on P in attempting to collect a debt. D will be liable.)

a. Personal motives: But if the employee merely acts from ***personal motives***, the employer will generally not be liable. (***Example:*** Nurse at D hospital has always hated P because of a prior fight. While P is in the hospital, Nurse kills P. D will not be liable, because Nurse has obviously acted from personal motives, not in an attempt to further D's business.)

II. INDEPENDENT CONTRACTORS

A. No general liability: One who hires an ***independent contractor*** is *not* generally liable for the torts of that person. [292 - 294]

B. Exceptions: However, there are some important ***exceptions*** to the rule that an employer is not liable for the torts of his independent contractor:

1. Employer's own liability: First, if the employer is ***herself*** negligent in her own dealings with the independent contractor, this can give rise to employer liability. [292 - 293] (***Example:*** D knows that the work to be done is hazardous if not done with special precautions. She chooses a contractor, X, who she should know will probably not do the work safely.

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X, performing the work negligently, injures P. D is liable for the consequences, because of her own negligence in selecting X.)

2. Non-delegable duty: Second, there are some duties of care that are deemed so important that the person doing them will ***not be allowed to delegate*** them to anyone. [293] (*Examples:* A city cannot delegate its duty to keep its streets in good repair; a business owner cannot delegate his duty to keep the premises safe for business visitors; a driver cannot delegate the duty to keep her brakes in good working order.)

3. Inherently dangerous activities: Finally, one who employs an independent contractor will also be liable where the work is such that, unless ***special precautions*** are taken, there will be a ***high degree*** of danger to others. [293 - 294]

a. Unusual risk: This special rule of vicarious liability applies only to ***"peculiar risks,"*** i.e., risks differing from commonly-encountered risks. (***Example:*** D, a city, hires X, an independent contractor, to dig a sewer in the street. X leaves the trench unguarded without warning lights at night. D will be liable to P, who drives his car into the trench – D knew or should have known that the work being done posed peculiar risks to motorists.)

III. JOINT ENTERPRISE

A. Generally: A ***"joint enterprise,"*** where it exists, may subject each of the participants to vicarious liability for the other's negligence. A joint enterprise is like a partnership, except that it is for a short and specific purpose (e.g., a ***trip***). [294 - 295]

1. Use in auto cases: The doctrine is used most often in ***auto accident cases***. The negligence of the driver is imputed to the passenger (either to allow the occupant of a second car to recover against the passenger, or to prevent the passenger from recovering against the negligent driver of the other car under the doctrine of imputed contributory negligence). [294]

B. Requirements for joint enterprise: There are four requirements for a joint enterprise: (1) an ***agreement***, express or implied, between the members; (2) a ***common purpose*** to be carried out by the members; (3) a ***common pecuniary interest*** in that purpose; and (4) an equal right to a ***voice*** in the enterprise, i.e., an equal right of control. [294 - 295]

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IV. BAILMENT AND AUTO CONSENT STATUTES

A. Family purpose doctrine: The family purpose doctrine provides that a car owner who lets ***members of her household*** drive her car for their own personal use has done so in order to further a "family purpose," and is, therefore, vicariously liable. This doctrine is probably now accepted by less than half of American courts. [296] (***Example:*** Parent lets Child use the car. Child negligently smashes into P. In a state adopting the family purpose doctrine, Parent will be vicariously liable for Child's negligence. Notice that if the state has adopted an auto consent statute, as described below, the family purpose doctrine would not be necessary in this example.)

B. Consent statutes: Many, though not most, states have enacted ***"automobile consent statutes,"*** which provide that the owner of a car is vicariously liable for any negligence committed by one using the car with the owner's ***permission***. [296]

1. Scope of consent: If the use by the borrower goes clearly ***beyond*** the scope of that consent, there is no liability. [296] (***Example:*** O lets B use O's car, but forbids B to drive on the highway. B drives on the highway, and injures D. D probably cannot recover against O under the auto consent statute, because B's use clearly exceeded the scope of O's consent.)

C. Non-statutory bailment: If there is no consent statute, the mere existence of a ***bailment*** does *not* make the bailor vicariously liable for the bailee's negligence. [297]

1. Negligence by bailor: But the bailor may be negligent herself in entrusting a potentially dangerous instrument to the bailee, where the bailor should know that the latter may use it unsafely. [297] (***Example:*** D, a car rental company, rents to X. D knows or should know that X is drunk. X immediately runs over P. P will be able to recover against D, not because of vicarious liability, but because D was directly negligent in entrusting the instrumentality to a drunk driver.)

V. IMPUTED CONTRIBUTORY NEGLIGENCE

A. Traditional rule: The common law recognized the doctrine of ***"imputed contributory negligence"*** in many three-party situations. That is, because of some relation between A and B, B's suit against C might be defeated because of *A's* contributory negligence, "imputed" to B. [297 - 298]

1. Driver and passenger: For instance, traditionally a driver's negligence could be imputed to his passenger so as to prevent the passenger from

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recovering against the driver of another vehicle whose negligence contributed to a collision between the two cars. [297]

2. Family: Similarly, a husband's negligence was frequently imputed to his wife, and vice versa. And a parent's negligence was imputed to his child. [297] (***Example:*** Father fails to supervise Child. Child runs in the street and is hit by D. Traditionally, D could defend by saying, "Father negligently failed to supervise, and his negligence should be imputed to Child, thus giving me a complete defense. ")

B. Modern rule: But in the vast majority of states today, contributory negligence will be imputed *only* if the relationship is one which would make the plaintiff ***vicariously liable*** if he were a defendant. [298] (***Example:*** Passenger rides in a car owned and driven by Driver. Driver collides with Trucker. Passenger is injured. Passenger sues Trucker. Trucker shows that Driver was negligent, and asserts that Driver's negligence should be imputed to Passenger. Traditionally, this argument would work. But today, most courts would reject it, because the driver-passenger relationship is not one in which the passenger would be vicariously liable for the driver's negligence if the passenger were being sued, unless a joint enterprise existed between them.)

1. "Both ways" rule: Conversely, if the relationship *is* one which would give rise to vicarious liability, in most courts contributory negligence *is* still imputed. [298]

Example: Company owns an expensive truck. Worker, who is an employee of Company, drives the truck on Company's business. While en route, he negligently collides with Driver, who is also negligent. Company sues Driver for damage to the truck. Since Company would be vicariously liable for any negligence by Worker in a suit brought by Driver, Worker's contributory negligence will be imputed to Company, thus barring Company from recovery from Driver in a contributory negligence jurisdiction. If the state follows comparative negligence, probably Company's recovery will be reduced by Worker's comparative fault.

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Chapter 13
STRICT LIABILITY

I. ANIMALS

A. Trespassing animals: In most states, the owner of livestock or other animals is liable for property damage caused by them if they ***trespass*** on another's land. This liability is "strict" – even though the owner exercises utmost care to prevent the animals from escaping, he is liable if they do escape and trespass. [302 - 303]

B. Non-trespass liability: A person is also strictly liable for non-trespass damage done by any ***"dangerous animal"*** he keeps. [303]

1. Wild animals: A person who keeps a ***"wild"*** animal is strictly liable for all damage done by it, as long as the damage results from a ***"dangerous propensity"*** that is typical of the species in question. (***Example:*** D keeps a lion cub, which has never shown any violent tendencies. One day, the cub runs out on the street and attacks P. Even if D used all possible care to prevent the cub from escaping, he is liable for P's injuries, because the cub is a wild animal and the damage resulted from a dangerous propensity typical of lions, that they can attack without warning.) [303]

2. Domestic animals: But injuries caused by a ***"domestic"*** animal such as a cat, dog, cow, pig, etc., do not give rise to strict liability unless the owner ***knows*** or has ***reason to know*** of the animal's dangerous characteristics. [303] (***Example:*** Same facts as above example, except that the animal is a dog. If the dog has never attempted to bite anyone before, D is not liable. But if D knew or had reason to know that the dog sometimes attacks people, he would be liable.)

II. ABNORMALLY DANGEROUS ACTIVITIES

A. General rule: A person is strictly liable for any damage which occurs while he is conducting an ***"abnormally dangerous"*** activity. [304 - 305]

1. Six factors: Courts consider six factors in determining whether an activity is "abnormally dangerous": (1) there is a ***high degree of risk*** of some harm to others; (2) the harm that results is likely to be ***serious***; (3) the risk ***cannot be eliminated*** by the exercise of reasonable care; (4) the activity is ***not common***; (5) the activity is not ***appropriate*** for the place where it is carried on; and (6) the danger outweighs the activity's ***value*** to the ***community***. [305]

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2. Requirement of unavoidable danger: Probably the single most important factor is that the activity be one which ***cannot be carried out safely***, even with the exercise of reasonable care. [302]

Example: D, a construction contractor, carries out blasting operations with dynamite, to excavate a foundation. D uses utmost care. However, a piece of rock is thrown out of the site during an explosion, striking P, a pedestrian on the street. Blasting is an abnormally dangerous activity, in part because it cannot be conducted with guaranteed safety. Therefore, D will be strictly liable for the injury to P.

B. Examples: Here are some types of activities that are generally held to be abnormally dangerous:

1. Nuclear reactor: Operation of a ***nuclear reactor*** [305];

2. Explosives: The use or storage of ***explosives*** (see above example) [306];

3. Crop dusting: The conducting of ***crop dusting*** or spraying [306];

4. Airplane accidents: There usually is *not* strict liability in suits by passengers for ***airplane accidents***. Therefore, in a suit by the estate of a passenger against the airline, the plaintiff must show negligence. (But most courts do impose strict liability for ground damage from airplane accidents.) [306 - 307]

III. LIMITATIONS ON STRICT LIABILITY

A. Scope of risk: There is strict liability only for damage which results from the ***kind of risk*** that made the activity abnormally dangerous. [308 - 309] (***Example:*** D operates a truck carrying dynamite, and the truck strikes and kills P. P must show negligence. Transporting dynamite may be ultrahazardous, but P's death has not resulted from the kind of risk that made this activity abnormally dangerous.)

1. Abnormally sensitive activity by plaintiff: A related rule is that D will not be liable for his abnormally dangerous activities if the harm would not have occurred except for the fact that P conducts an ***"abnormally sensitive"*** activity. [309] (***Example:*** D's blasting operations frighten female mink owned by P; the mink kill their young in reaction to their fright. D is not strictly liable, because P was conducting an abnormally sensitive activity. [*Foster v. Preston Mill Co.*])

B. Contributory negligence no defense: Ordinary ***contributory negligence*** by P will usually *not* bar her from strict liability recovery. [309 - 310]

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1. **Unreasonable assumption of risk:** But ***assumption of risk*** is a defense to strict liability. Thus if P ***knowingly and voluntarily*** subjects herself to the danger, this will be a defense, whether P acted reasonably or unreasonably in doing so. [310] (***Example:*** P, an independent contractor, agrees to transport dynamite for D. P understands that dynamite can sometimes explode spontaneously. If such an accident occurs, P cannot recover from D in strict liability, because P has assumed the risk; this is true whether P acted reasonably or unreasonably.)

IV. WORKERS' COMPENSATION

A. Generally: All states have adopted ***workers' compensation*** (WC) statutes, which compensate the employee for ***on-the-job*** injuries without regard either to the employer's fault or the employee's. [310 - 314]

1. **No fault:** The employer is liable for on-the-job injuries even though these occur ***completely without fault*** on the part of the employer. Even if the employee is contributorily negligent, the statutory benefits are not reduced at all. [310]

2. **Arising out of employment:** A typical statute covers injuries arising out of and in the ***course of employment***. Thus activities which are purely personal (e.g., injuries suffered while the employee is traveling to or from work) are typically not covered. [310]

3. **Exclusive remedy:** The WC statute is the employee's ***sole remedy*** against the employer. The employee gives up his right to sue in tort, and does not recover anything for ***pain and suffering***. [312 - 313]

a. **Intentional wrongs:** But if P can show that the employer ***intentionally*** injured him, the employee may pursue a common-law action. (***Example:*** A few cases have allowed the employee to sue where the employer has willfully disregarded safety regulations. But most have held that the employer's failure to observe safety regulations or to keep equipment in good repair does not amount to an intentional act, and thus does not permit the employee to escape WC as the sole remedy.)

b. **Third parties:** The WC statute does not prevent the worker from suing a ***third party*** who, under common-law principles, would be liable for the worker's injuries. (***Example:*** At P's job, P uses a machine manufactured by D and sold by D to Employer. If P is injured on the job, he cannot bring a common law action against Employer, but can bring a product liability suit at common law against D.)

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Chapter 14
PRODUCTS LIABILITY

I. INTRODUCTION

A. Three theories: "Product liability" refers to the liability of a seller of a tangible item which, because of a defect, causes injury to its purchaser, user, or sometimes bystanders. [319] Usually the injury is a personal injury. The liability can be based upon any of three theories:

1. ***Negligence;***

2. ***Warranty;***

3. ***"Strict tort liability."***

II. NEGLIGENCE

A. Negligence and privity: Ordinary negligence principles apply to a case in which personal injury has been caused by a carelessly manufactured product. [318] (***Example:*** D, a car manufacturer, carelessly fails to inspect brakes on a car that it makes. P buys the car directly from D, and crashes when the brakes don't work. P can recover from D under ordinary negligence principles.)

1. Privity: Historically, the use of negligence in product liability actions was limited by the requirement of ***privity***, i.e., the requirement that P must show that he contracted ***directly*** with D. But every state has now ***rejected*** the privity requirement where a negligently manufactured product has caused personal injuries. It is now the case that ***one who negligently manufactures a product is liable for any personal injuries proximately caused by his negligence***. [318 - 319]

Example: D manufactures a car, and negligently fails to make the brakes work properly. D sells the car to a dealer, X, who resells to P. While P is driving, the car crashes due to the defective brakes. P may sue D on a negligence theory, even though P never contracted directly with D.

a. Bystander: Even where P is a ***bystander*** (as opposed to a purchaser or other user of the product), P can recover in negligence if he can show that he was a "foreseeable plaintiff. " (***Example:*** A negligently manufactured car driven by Owner fails to stop due to defective brakes, and smashes into P, a pedestrian. P can sue the manufacturer on a negligence theory.)

B. Classes of defendants: Several different classes of people are frequently defendants in negligence-based product liability actions:

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1. Manufacturers: The manufacturer is the person in the distribution chain most likely to have been negligent. He may be negligent because he: (1) carelessly ***designed*** the product; (2) carelessly ***manufactured*** it; (3) carelessly performed (or failed to perform) reasonable ***inspections*** and tests of finished products; (4) failed to package and ship the product in a reasonably safe way; or (5) did not take reasonable care to obtain quality ***components*** from a reliable source. [319 - 320]

2. Retailers: A ***retailer*** who sells a defective product may be, but usually is *not*, liable in negligence. The mere fact that D has sold a negligently manufactured or designed product is ***not by itself*** enough to show that she failed to use due care. The retailer ordinarily has ***no duty to inspect*** the goods. Thus suit against the retailer is now normally brought on a warranty or strict liability theory, not negligence. [320 - 321]

3. Other suppliers: ***Bailors*** of tangible property (e.g., rental car companies), ***sellers*** and ***lessors*** of real estate, and suppliers of product-related ***services*** (e.g., hospitals performing blood transfusions) may all be sued on a negligence theory. [321]

III. WARRANTY

A. General: A buyer of goods which are not as they are contracted to be may bring an action for ***breach of warranty***. The law of warranty is mainly embodied in the ***Uniform Commercial Code*** (UCC), in effect in every state except Louisiana. There are two sorts of warranties, ***"express"*** ones and ***"implied"*** ones. [321]

B. Express warranties: A seller may ***expressly represent*** that her goods have certain qualities. If the goods turn out not to have these qualities, the purchaser may sue for this breach of warranty. [322 - 323]

Example: D, a car dealer, promises that a particular car has "shatterproof glass. " While P is driving the car, a pebble hits the windshield, shatters the glass, and damages P’s eyes. P can sue D for breach of the express warranty that the glass would be shatterproof. [*Baxter v. Ford Motor Co.*]

1. UCC: UCC §2-313 gives a number of ways that an express warranty may arise: (1) a statement of ***fact*** or promise about the goods; (2) a ***description*** of the goods (e.g., "shatterproof glass"); and (3) the use of a ***sample or model***. [322]

a. Privity: There is usually ***no*** requirement of ***privity*** for breach of express warranty. (***Example:*** D manufactures a car, and prepares a brochure stating that the glass is "shatterproof. " D sells the car to

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Dealer, who resells it to P. P never reads the brochure, and is injured when the glass is not shatterproof. P can recover against D for breach of express warranty, because there is no privity requirement, and D's statement was addressed to the public at large.)

2. Strict liability: D's liability for breach of an express warranty is ***a kind of strict liability*** – as long as P can show that the representation was not in fact true, it does not matter that D reasonably believed it to be true, or even that D could not possibly have known that it was untrue. [323]

C. Implied warranty: The existence of a warranty as to the quality of goods can also be ***implied*** from the fact that the seller has offered the goods for sale. [323 - 327]

1. Warranty of merchantability: The UCC imposes several implied warranties ***as a matter of law***. Most important is the warranty of ***merchantability***. Section 2-314(1) provides that ***"a warranty that goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. "*** [323 - 324]

a. Meaning of "merchantable": To be ***merchantable***, the goods must be "fit for the ordinary purposes for which such goods are used. " (***Example:*** A car which, because of manufacturing defects, has a steering wheel that does not work, is not "merchantable," since it is not fit for the ordinary purpose – driving – for which cars are used.)

b. Seller must be a merchant: The UCC implied warranty of merchantability arises only if the seller is a ***"merchant with respect to goods of that kind. "*** Thus the seller must be ***in business*** and must regularly sell the ***kind of goods*** in question. (*Examples:* A consumer who is reselling her car does not make any implied warranty of merchantability; nor does a business person who is selling a piece of equipment used in that person's business rather than held in inventory.)

2. Fitness for particular purposes: A second UCC implied warranty is that the goods are ***"fit for a particular purpose. "*** Under §2-315, this warranty arises where: (1) the seller knows that the buyer wants the goods for a particular (and not customary) purpose; and (2) the buyer ***relies on the seller's judgment*** to recommend a suitable product. [324 - 325] (***Example:*** Consumer tells Shoe Dealer that he wants a pair of shoes for mountain climbing. Dealer recommends Brand X as having good traction.

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If the shoes don't have good traction, and Consumer falls, he can sue Shoe Dealer for breach of the implied warranty of fitness for a particular purpose.)

3. Privity: States have nearly all ***rejected*** any ***privity*** requirement for the implied warranties. [325 - 327]

a. Vertical privity: Thus ***"vertical"*** privity is not required. In other words, a manufacturer's warranty extends to ***remote purchasers*** further down the line. (***Example:*** Manufacturer sells a widget to Distributor, who sells to Dealer, who sells to Owner. Owner resells to Buyer. Buyer is injured when the widget does not behave merchantably. In all states, Buyer can sue Manufacturer, despite the lack of any contractual relationship between Buyer and Manufacturer.)

b. Horizontal privity: Similarly, ***"horizontal"*** privity is usually not required. In all states, any member of the ***household*** of the purchaser can recover if the member uses the product. In most states, ***any*** user, and even any foreseeable ***bystander***, may recover.

D. Warranty defenses: Here are three ***defenses*** unique to warranty claims:

1. Disclaimers: A seller may, under the UCC, ***disclaim*** both implied and express warranties. [327 - 328]

a. Merchantability: A seller may make a written disclaimer of the warranty of merchantability, but only if it is ***"conspicuous"*** (e.g., in capital letters or bold print). Also, the word "merchantability" must be specifically mentioned. (Also, the circumstances may give rise to an implied disclaimer, as where used goods are sold ***"as is"***.)

2. Limitation of consequential damages: Sellers may try to ***limit the remedies*** available for breach (e.g., "Our sole remedy is to repair or replace the defective product"). But in the case of goods designed for personal use ("consumer goods"), limitation-of-damages clauses for ***personal injury*** are automatically ***unconscionable*** and thus unenforceable. UCC §2-719(3). [328]

E. Where warranty useful: Generally, any plaintiff who could bring a warranty suit will fare better with a strict liability suit. But there are a couple of exceptions:

1. Pure economic harm: If P has suffered only ***pure economic harm***, he will usually do better suing on a breach of warranty theory than in strict

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liability. For instance, loss of profits is more readily recoverable on a warranty theory. [328]

2. Statute of limitations: The ***statute of limitations*** usually runs sooner on a strict liability claim than on a warranty claim. [329]

IV. STRICT LIABILITY

A. General rule: Nearly all states apply the doctrine of ***"strict product liability. "*** Most have based their approach on Restatement Second §402A. The basic rule is that a ***seller*** of a product is ***liable without fault*** for personal injuries (or other physical harm) caused by the product if the product is sold: (1) in a ***defective condition*** that is (2) ***unreasonably dangerous*** to the user or consumer. Once these requirements are satisfied, the seller is liable even though he used all possible care, and even though the plaintiff did not buy the product from or have any contractual relationship with the seller. [329]

Example: Manufacturer makes a car with defective brakes. Manufacturer sells that car to Dealer, who resells it to Owner, who resells it to Consumer. Consumer is injured when the car crashes because the brakes don't work. Consumer can recover from Manufacturer in "strict tort liability," by showing that the brakes were in a defective condition unreasonably dangerous to users at the time the car left the plant. This is true even though Manufacturer used all possible care in designing and building the car, and even though Consumer never contracted with Manufacturer.

1. Non-manufacturer: Strict product liability applies not only to the product's manufacturer, but also to its ***retailer***, and any other person in the distributive train (e.g., a wholesaler) who is in the business of selling such products. [330] (***Example:*** On the above example, Consumer can recover against Dealer, even though Dealer merely resold the product and behaved completely carefully.)

B. What product meets test: A product gives rise to strict liability only if it is "defective" and also "unreasonably dangerous. " [330 - 331]

1. Meaning of "defective and unreasonably dangerous": A product meets these twin requirements of "defective" and "unreasonably dangerous" if it is "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. " (Therefore, if a product ***obviously*** presents a particular danger to all reasonable consumers, it is not defective or unreasonably dangerous because of that condition.) [330]

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C. Unavoidably unsafe products: A product will not give rise to strict liability if is ***unavoidably unsafe***, and its ***benefits outweigh its dangers***. [331 - 334]

1. Prescription drugs: For instance, a ***prescription drug*** is not "defective and unreasonably dangerous" merely because it causes some side effects and may in an individual case cause more damage than it cures. This is also true of ***vaccines***. [331 - 332]

2. Measured by time of sale: Generally, "unreasonable danger" and "defectiveness" are measured by reference to the state of human knowledge at the ***time the product was sold***, not the time the products liability case comes to trial. In other words, ***if the manufacturer did not and could not reasonably have known of the danger at the time of manufacture, it will not be strictly liable***. This is often called the ***"state of the art"*** defense. [331 - 332]

Example: P's mother, while pregnant, takes the drug DES to prevent miscarriage. After P is born and reaches adulthood, she sues D, the manufacturer of the DES, arguing that it caused her to get cancer. If D can show that it neither knew nor reasonably should have known of the cancer danger at the time it manufactured the product, it will not be strictly liable.

3. No way to discover individual defect: A similar rule applies where the manufacturer knows that ***certain items*** may be defective, but there is no way for it to discover which particular ones fall in this category – such a product is usually held to be "unavoidably unsafe," and strict liability will not apply. [332] (***Example:*** D operates a blood bank. D knows that some units of blood may be infected with the HIV virus but no blood test for such infection yet exists. If a particular unit of blood causes P to contract AIDS, P will probably not be able to recover from D, because the product was "unavoidably unsafe. ")

4. Low social utility: Plaintiffs have argued that certain products – such as ***cigarettes***, ***liquor*** and ***convertible cars*** – are of ***so little social utility*** that their dangers outweigh their benefits, and that they should give rise to strict liability because they are "unreasonably dangerous" even though they do not contain any "defect. " But courts have almost always ***rejected*** this concept of ***"generically risky"*** products. [333]

a. "Saturday Night Special" guns: But one case has accepted this argument in the case of a "Saturday Night Special" gun. [*Kelley v. R.G. Industries*]

5. "Foreign-natural" distinction for food: Some courts make a special distinction in the case of ***food***. These courts distinguish between

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"foreign" and ***"natural"*** objects. Under this approach, there is strict liability for "foreign" matter found in food (e.g., a piece of metal inside a can of tuna fish), but there is no strict liability for the vendor's failure to remove a naturally-occurring substance from the food (e.g., bone fragments in canned tuna, or pits in cherries). In essence, these courts are saying that the naturally-occurring substance is "inherent" in the product, even though technology exists for removing it. [333 - 334]

D. Obvious dangers: If the danger posed by a product is very ***obvious*** or ***commonly known*** to consumers in general, the product will generally be found not to be defective or unreasonably dangerous. [334]

1. Cigarettes: For instance, a court would almost certainly hold that although ***cigarettes*** are dangerous, the dangers they pose are so obvious and well known that a cigarette manufacturer cannot be held strictly liable for making an unreasonably dangerous or defective product. [334]

E. Proving the case: P in a strict liability case must prove a number of different elements:

1. Manufacture or sale by defendant: She must show that the item was in fact manufactured, or sold, by the defendant. [335]

2. Existence of defect: She must show that the product was ***defective***. [335 - 336]

a. Subsequent remedial measures: Most courts ***do not*** allow defectiveness to be proved by evidence that D subsequently ***redesigned*** the product to make it safer.

b. Toxic torts: In the case of a ***"mass toxic tort,"*** plaintiffs often use ***epidemiological*** evidence of defectiveness. (***Example:*** To prove that DES causes cancer, P offers expert testimony that daughters of women who took DES in pregnancy have a much higher incidence of cancer than those whose mothers did not.)

3. Causation: P must show that the product, and its defective aspects, were the ***cause in fact***, and the ***proximate cause***, of her injuries. [336 - 338]

a. Epidemiology: In ***mass toxic tort*** cases, this element, like existence of a "defect," will often be proved by ***epidemiological*** evidence. (***Example:*** Expert testimony showing that daughters of women who took DES in pregnancy get 10 times as much of a particular rare cancer as those whose mothers did not would

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probably suffice to establish that P's own cancer of this rare sort was in fact caused by DES, assuming that P showed her mother took the drug.)

4. Defect existed in hands of defendant: Finally, P must show that the defect existed ***at the time the product left D's hands***. [338]

a. Res ipsa: But an inference similar to ***res ipsa loquitur*** is permitted – once P shows that the product did not behave in the usual way, and the manufacturer fails to come forward with evidence that anyone else tampered with it, the requirement of defect in the hands of defendant is satisfied.

V. DESIGN DEFECTS

A. Definition of "design defect": A ***"design defect"*** must be distinguished from a "manufacturing defect. " In a design defect case, all the similar products manufactured by D are the same, and they all bear a feature whose design is itself defective, and unreasonably dangerous. [339]

B. Negligence predominates: Most design defect claims have a heavy ***negligence*** aspect, even though the complaint claims strict liability. A design defect claim requires P to show that D chose a design that posed an ***unreasonable danger*** to P. [339]

1. Practical other design: The defectiveness of a design is judged by comparing it to ***other possible designs***. A product's design will be deemed defective if two conditions are met: (1) there was a ***feasible alternative design*** which, consistent with the consumer's expected use of the product, would have avoided the particular injuries; and (2) the ***costs*** of the alternative design are ***less*** than the costs of the injuries thereby avoidable. [340]

C. Types of claims: Two types of common design-defect claims are as follows:

1. Structural defects: P shows that because of D's choice of materials, the product had a ***structural weakness***, which caused it to break or otherwise become dangerous. [341]

2. Lack of safety features: P shows that a ***safety feature*** could have been installed on the product with so little expense (compared with both the cost of the product and the magnitude of the danger without the feature) that it is a defective design not to install that feature. [342 - 343]

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a. State of the art: D will be permitted to rebut this by showing that competitive products similarly lack the safety feature. But such a showing will not be dispositive – the trier of fact is always free to conclude that all products in the marketplace are defective due to lack of an easily-added feature.

D. Suitability for unintended uses: D may be liable not only for injuries occurring when the product is used as intended, but also for some types of injury stemming from ***unintended uses*** of the product. [343 - 344]

1. Unforeseeable misuse: If the misuse of the product is ***not reasonably foreseeable***, D has no duty to design the product so as to protect against this misuse. [343]

2. Foreseeable misuse: But if the misuse is ***reasonably foreseeable*** by D, D must take at least reasonable design precautions to guard against the danger from that use. (Alternatively, a ***warning*** to the purchaser against the misuse may sometimes suffice.) [343] (***Example:*** A car is not "intended" to be used in a collision, and most collisions are in a sense "misuse" of the product. Nonetheless, a car manufacturer must design a reasonably ***crashworthy*** vehicle if it is feasible to do so, because collisions are reasonably foreseeable.)

E. Military products sold to and approved by government: If a product is ***sold*** to the ***U.S. government*** for ***military use***, and the government ***approves*** the product's specifications, the manufacturer will generally be immune from product liability even if the design is grossly negligent. [*Boyle v. United Technologies Corp.*] [345]

F. Regulatory compliance defense: Suppose the manufacturer has ***complied with federal or state regulations*** governing the design of the product. At common law, this compliance does ***not*** absolve D of product liability – regulatory compliance is an item of ***evidence*** that the jury may consider, but it is not dispositive. [346 - 346]

1. Labeling: Thus if Congress or a state requires that a substance be ***labeled*** in a particular way, and the manufacturer follows that requirement, P can still bring a product liability suit on the theory that the labeling was inadequate and constituted a design defect. (But if the requirement was imposed by Congress, and the court finds that Congress intended to ***preempt*** the states from requiring stricter or different warnings, then D has a defense.) [346]

2. Design or manufacture: Similarly, if the government regulation imposes a particular ***design*** or manufacturing technique, regulatory

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compliance is in most states not a defense, merely an item of evidence. [346] (***Example:*** An airplane manufacturer whose design meets FAA safety standards is probably not immune from a claim that a safer design was required.)

VI. DUTY TO WARN

A. Significance of the duty to warn: The ***"duty to warn"*** is essentially an ***extra*** obligation placed on a manufacturer. [347 - 348]

1. Manufacturing defect: Thus if a product is ***defectively manufactured***, ***no warning can save D from strict liability***. [347]

2. Design defect: Similarly, if a product is ***defectively designed***, a warning will generally ***not*** shield D from strict product liability. [348 - 349]

3. Properly manufactured and designed product: If a product is ***properly designed*** and ***properly manufactured***, D must nonetheless give a warning if there is a ***non-obvious*** risk of personal injury from using the product. Similarly, in this situation, D may be liable for not giving ***instructions concerning correct use***, if a reasonable consumer might misuse the product in a foreseeable way. [348] (*Examples:* Prescription drugs, even when properly designed and properly manufactured, must contain warnings about side effects. Similarly, a household utility like a lawn mower, if it poses a non-obvious risk of personal injury such as cutting a foot, must contain instructions concerning correct use.)

a. "Learned intermediary" doctrine for drugs: In the case of prescription drugs, the warning generally needs to be given only to the ***physician*** – who is a ***"learned intermediary"*** between manufacturer and user – not to the user.

b. Cigarettes: In the case of ***cigarettes*** sold before 1966 (the year federally-mandated labeling requirements came into effect), a court might find that the manufacturer had a duty to warn of lung cancer and other dangers. [*Cipollone v. Liggett Group,* 349]

B. Unknown and unknowable dangers: If D can show that it ***neither knew*** nor, in the exercise of reasonable care ***should have known*** of a danger at the time of sale, most courts hold that there was ***no duty to warn*** of the unknown danger. [350 - 351] (***Example:*** If D sells a prescription drug without having any ability to know of a particular side effect, failure to warn of that side effect will not give rise to strict product liability.)

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C. Government labeling standards: The scope of D's duty to warn may be affected by the fact that the ***government*** imposes certain ***labeling*** requirements. [350 - 352]

1. Evidence: If D can show that it has complied with a federal or state labeling requirement, most courts permit this to be shown as ***evidence*** that the warning was adequate. But in most courts, this evidence is not dispositive – the jury is always free to conclude that a reasonable manufacturer would have given a more specific, or different, warning. [350]

2. Preemption: But where the labeling requirement is imposed by the ***federal government***, and the court finds that Congress intended to ***preempt*** more-demanding state labeling rules, then compliance with the federal standard *is* a complete defense to P's "failure to warn" claim. [351 - 352] (***Example:*** Congress has passed a statute controlling what warnings must be printed on cigarette packs. *Held*, by the Supreme Court, a cigarette smoker's state common-law damage claim for failure to warn is pre-empted by this federal statute. [*Cipollone v. Liggett Group*])

D. Obvious danger: If the danger is ***obvious*** to most people, this will be a factor reducing D's obligation to warn. But where a warning could easily be given, and a substantial minority of people might not otherwise know of the danger, the court may nonetheless find a duty to warn. [353]

VII. WHO MAY BE A PLAINTIFF

A. Purchasers and users: Virtually any reasonably foreseeable ***user*** or ***purchaser*** of a defective product will have standing to sue its manufacturer or seller, under negligence and strict liability (and perhaps warranty) theories. [355]

1. Negligence: To recover in ***negligence***, the user simply has to be ***"reasonably foreseeable,"*** which he will almost always be. [355]

2. Strict liability: Any user or consumer injured by the product can recover in ***strict liability***. [355]

3. Warranty: Almost any ***purchaser*** can recover on the implied warranty of merchantability. [355]

a. User: If P was not a purchaser, but merely a ***user***, his state's version of UCC §2-318 may or may not allow him to recover. Even if it does not, case law may permit him to recover on a warranty theory.

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B. Bystanders: It is somewhat more difficult for a ***bystander*** to recover. A bystander is someone who is neither a purchaser nor user of the product, but who is injured merely because he happens to be nearby. [355]

1. Negligence: If the claim is based on ***negligence***, P apparently has to show that he was a ***"reasonably foreseeable"*** plaintiff. [355]

2. Strict liability: As a matter of case law, courts have generally given ***strict liability*** protection to any bystander whose presence was ***reasonably foreseeable***. [355] (***Example:*** P is a pedestrian who is hit when the brakes on a car manufactured by D, and driven by X, fail due to defective design. Nearly all courts would allow P to recover in strict liability against D.)

3. Warranty: Courts are split as to whether the bystander can recover on an implied or express ***warranty*** against the remote manufacturer. This will depend in part on which version of UCC §2-318 is in force in the state. [327]

VIII. WHO MAY BE A DEFENDANT

A. Chattels: In any case involving a ***"good"*** or ***"chattel,"*** both strict and warranty liability will apply to ***any seller*** in the ***business*** of selling goods of that kind. [356]

1. Retailer: This means that a ***retail dealer*** who sells the good, but has not manufactured it, will have strict liability as well as warranty liability, even if she could have done nothing to discover the defect. But this is true only if the seller is in the ***business of selling goods of that type*** (so that a private individual selling a good, or a business person selling outside of the usual course of his business, will not have liability). [356]

2. Used goods: Courts are split as to whether there is strict or warranty liability for the seller of ***used goods***. Probably most courts would hold that there is no such liability. [356] (***Example:*** Dealer, a used car dealer, sells a used car to X. The brakes are defective, and X is unable to avoid hitting P, a pedestrian. Most courts would not allow P to recover in strict liability against Dealer.)

B. Lessor of goods: Courts frequently impose strict liability upon a ***lessor*** of defective goods. [358] (***Example:*** A ***car rental*** company may be strictly liable if it rents a defective car and that car injures a pedestrian due to the defect.)

1. Negligence or warranty liability: The lessor may also be liable for negligence in failing to discover the defect, or on an implied warranty theory by analogy to the UCC. [358]

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C. Sellers of real estate: Sellers of ***real estate*** have also sometimes been subjected to strict and warranty liability when the property turns out to be dangerously defective. But probably only a ***professional builder***, not a consumer who resold the house, would be subject to such liability (unless the consumer actively concealed the facts of which he was aware). [358]

D. Services: One who sells ***services***, rather than goods, does not fall within standard strict liability nor within the UCC implied warranties. [359 - 360]

1. Services by professionals: Where the services are rendered by a ***"professional,"*** he will almost never be liable in strict tort or warranty for using a defective product. [355-56] (***Example:*** D, a dentist, uses a defective needle that breaks in P's jaw, injuring him. P cannot recover for breach of the implied warranty of merchantability or for strict product liability, because D did not "sell" the needle. [*Magrine v. Krasnica*])

IX. INTERESTS THAT MAY BE PROTECTED

A. Property damage: All the above analysis assumes that P's injury consists of ***personal*** injury. If P's damages consist only of ***property damage***, special rules may apply [360 - 361]**:**

1. Strict liability and negligence: P may generally recover in ***strict liability*** and ***negligence*** even though his damage consists only of property damage rather than personal injury. [360]

a. Warranties: But he might not win on a ***warranty*** theory. If P is suing a ***remote defendant*** (one with whom he did not contract), two of the three alternative versions of UCC §2-318 do *not* allow P to recover for property damage unaccompanied by personal injury.

2. "Property damage" defined: Since the rules for recovering for property damage are easier for the plaintiff to satisfy than those for recovering "pure economic" damages, the two must be distinguished. If P's property apart from the defective product is destroyed (e.g., the product causes a fire), this obviously counts as property damage. Also, if the defect causes the ***product itself*** to be destroyed or visibly harmed (e.g., an automobile catches on fire due to a defective radiator), this is probably property damage, and thus recoverable in strict liability or negligence. [361 - 362]

a. Loss of bargain: But if P's damages stem from the fact that the product simply ***doesn't work*** because of the defect, or is ***worth less*** with the defect than without it, courts are split – most would probably treat this as intangible economic harm (discussed below).

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B. Intangible economic harm: Where P's damages are found to be solely ***intangible economic*** ones (as opposed to personal injury or property damage), P will find it much harder to recover. [362 - 363]

1. Direct purchaser: If P is suing the person who sold the goods to him:

a. Warranty: P can readily recover for breach of ***implied or express warranty***. P can recover the difference between what the product would have been worth had it been as warranted, and what it is in fact worth with its defect. He can also generally recover consequential damages, including lost profits.

b. Strict liability and negligence: P may not be able to recover for the intangible economic harm in ***strict liability*** or ***negligence*** – the court might well hold that the UCC warranty claims were intended as the ***sole remedy*** for intangible economic harm by a purchaser against his immediate seller.

2. Remote purchaser: Where P is suing not his own seller, but a ***remote person*** (e.g., the manufacturer), he will probably ***not*** recover anything if his only harm is an intangible economic one. [362 - 363]

a. Warranty: Most courts would deny an implied ***warranty*** claim, on the grounds that P must sue his own immediate seller for such breaches.

b. Strict liability: Almost all courts would deny recovery to the remote buyer for economic harm on a ***strict liability*** theory.

c. Negligence: Most courts deny P recovery in ***negligence*** for pure intangible economic harm.

d. Combined: But remember that if P can show that he has received either physical injury or "property damage," he may then be able to ***"tack on"*** his intangible economic harm as an ***additional*** element of damages. This would certainly be the case in a negligence action, and might possibly be true in a strict liability or warranty action.

X. DEFENSES BASED ON PLAINTIFF'S CONDUCT

A. Contributory negligence: A defendant is not quite as free to use contributory negligence to defend against a strict liability or warranty claim as against a negligence claim.

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1. Strict liability: Only certain types of contributory negligence are defenses to a strict liability claim [363 - 365]:

a. Failure to discover danger: If P's contributory negligence lies in ***failing to inspect*** the product, or otherwise failing to become aware of the danger from it, virtually all courts agree that this is ***not*** a defense.

b. Abnormal use: If P's contributory negligence consists of her ***abnormal use*** or misuse of the product, this ***is*** a defense to strict liability, but only if the misuse was ***not relatively foreseeable***. [366 - 367]

c. Comparative negligence: In states following ***comparative*** negligence, courts are split about whether P's contributory negligence should result in a proportionate reduction in her strict liability recovery.

2. Warranty claims: More or less the same rules described above apply concerning the effect of contributory negligence on ***warranty*** claims. [365] (***Example:*** If the buyer discovers the defect and uses the goods anyway, this will probably be a defense to a warranty claim.)

B. Assumption of risk: The defense of ***assumption of risk*** applies in general the same way in ***strict liability*** cases and ***warranty*** cases as it does in negligence cases. [365]

1. Must be voluntary and unreasonable: But, again as in negligence cases, P's use must be both ***voluntary*** and ***unreasonable***. [366] (***Example:*** P buys a car from D. P learns that the seat belt is defective, orders a new one, but meanwhile drives without fastening the old one. If the trier determines that P was "unreasonable" in driving without the belt, assumption of risk will be a defense; but if P was reasonable, this will not be a defense to P's strict liability action. [*Devaney v. Sarno*])

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Chapter 15
NUISANCE

I. NUISANCE GENERALLY

A. Type of injury: The term "nuisance" refers not to a type of tort, but to a ***type of injury*** which P has sustained. In the case of "public nuisance," the injury is the loss of any right that P has by virtue of being a "member of the public. " In the case of "private nuisance," P's injury is interference with his ***use or enjoyment of his land.*** [379]

1. Three mental states: A suit for nuisance may be supported by any of the three defendant mental states: (1) intentional interference with P's rights; (2) negligence; or (3) abnormally dangerous activity or other conduct giving rise to strict liability. [379]

II. PUBLIC NUISANCE

A. Definition: A ***"public nuisance"*** is an interference with a ***"right common to the general public. "*** [380 - 381]

1. Examples: Examples of things that have been held to constitute public nuisances include: ***health hazards***, maintenance of ***improper businesses*** (e.g., an unlicensed bar), and ***obstruction*** of public streets. [380]

2. Factors: Courts look at a number of factors in deciding whether something is a public nuisance, including the ***type of neighborhood***, the frequency/duration, the degree of damage, and the social value of the activity. [380]

a. Substantial harm required: A public nuisance will not be found to exist unless the harm to the public is ***substantial***.

b. Must injure public at large: P must show that there has been actual injury, or possibility of injury, to the ***public at large*** (not just P himself).

3. Need not be a crime: It is no longer the case that for conduct to be actionable as a public nuisance, it must also be a ***crime*** (though the fact the conduct *is* a crime will make it more likely to be held to be a public nuisance). [380]

B. Requirement of particular damage: A private citizen may recover for his own damages stemming from a public nuisance, but only if he has sustained damage that is ***different in kind***, not just degree, from that suffered by the public

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generally. [380 - 381] (***Example:*** An oil tanker runs aground, discharging oil onto the beach. Fishermen and clam diggers have suffered the requisite "damage different in kind. " But operators of tourist businesses, who have suffered only indirect interference based on the drying up of tourism, have suffered only damage "greater in degree," not different in kind, so they may not recover in public nuisance. [*Burgess v. M/V Tamano*])

1. Magnitude of monetary loss irrelevant: In determining whether P's damage is different in kind from that suffered by the public generally, the ***magnitude*** of the financial harm is usually ***irrelevant***. [381]

2. Injunction: The requirement of a "different kind" of harm will *not* necessarily be imposed in suits for an ***injunction***, as opposed to one for damages. [381]

III. PRIVATE NUISANCE

A. Nature of private nuisance: A ***private nuisance*** is an ***unreasonable interference*** with P's ***use and enjoyment*** of his ***land***. [381]

1. Must have interest in land: P can sue based on a private nuisance only if he has an ***interest in land*** that has been affected. [381 - 382] (***Example:*** A fisherman who is injured by an oil spill cannot sue for private nuisance, because no interest in land held by him is affected.)

a. Tenants and family members: But a fee simple is not necessary – a ***tenant***, or members of the ***family*** of the owner or tenant, may sue.

2. Elements: P must demonstrate ***two*** elements in order to recover: (1) that his ***use and enjoyment of his land*** was interfered with in a ***substantial way***; and (2) that D's conduct was either ***negligent***, ***abnormally dangerous***, or ***intentional***. [382]

B. Interference with use: The interference with P's use and enjoyment must be ***substantial***. If P's damage is merely a small ***inconvenience*** (e.g., somewhat extra noise, mildly unpleasant smells), there will be no recovery. [382]

C. Defendant's conduct: There is ***no general rule of "strict liability" in nuisance***. P must show that D's conduct fell within one of the three classes for tortious defendant conduct: ***negligence***, ***intent***, or ***abnormal dangerousness***. [382 - 383] (***Example:*** D, a utility, suddenly spews polluted smoke onto the land of P, a nearby owner. Unless P can show that D was careless in allowing the pollutants, intended to pollute, or was carrying out an abnormally dangerous activity, P cannot recover for private nuisance.)

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1. Intentional: In nuisance cases, D's conduct will be deemed "intentional" even though D did not ***desire*** to interfere with P's use and enjoyment of her land, as long as D ***knew with substantial certainty*** that such interference would occur. [383] (***Example:*** In the above example, if P put D on notice that pollution was occurring, and D continued with the conduct, the continuing conduct would be deemed intentional, and D could be liable for nuisance.)

2. Unreasonableness: D's interference with P's interest must be ***"unreasonable. "*** [383]

a. Test for unreasonableness: The interference will be deemed unreasonable if *either*: (1) the harm to P outweighs the utility of D's conduct; *or* (2) the harm caused to P is greater than P should be required to bear without compensation. (***Example:*** On the above pollution example, even though operation of a utility is socially beneficial, and even if the social benefits outweigh the damage to P from the pollutants, D probably will have to pay for the polluting because it is not fair that P should have to bear the burden of this pollution without compensation.)

3. Nature of neighborhood: One important factor in determining whether D's conduct is "unreasonable" is the kind of ***neighborhood*** in which D and P are located – the more commercial or industrial the neighborhood, the less likely given conduct is to be a nuisance. [384]

D. Remedies: P may be entitled to one or both of the following ***remedies*** for private nuisance**:**

1. Damages: If the harm has already occurred, P can recover ***compensatory damages***. [385]

2. Injunction: If P can show that damages would not be a sufficient remedy, she may be entitled to an ***injunction*** against continuation of the nuisance. (But to get the injunction, P probably has to show that the harm to her and to all others similarly situated ***outweighs*** the utility of D's conduct.) [385]

E. Defenses: P's conduct may give rise to the defenses of contributory negligence and/or assumption of risk. [386]

1. Contributory negligence: Where the claim is based on D's ***negligent*** maintenance of the nuisance, contributory negligence will normally be a defense. [386]

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2. Assumption of risk: The defense of ***assumption of risk*** is generally applicable to nuisance cases. [386]

a. "Coming to the nuisance": Most commonly, the defense arises where D claims that P ***"came to the nuisance,"*** i.e., P purchases property with ***advance knowledge*** that the nuisance exists. Today, "coming to the nuisance" is not an absolute defense, but merely ***one factor to be considered*** in determining whether P should win. (***Example:*** P, a developer, buys a parcel next to D's cattle feed lot, and sells off some of the parcels as homesites. D will be enjoined from operating the feed lot – the manure from which creates flies and odor – even though P came to the nuisance, because the rights of innocent parties, including the homeowners, are at stake. [*Spur Industries, Inc. v. Dell E. Webb Development Co.,* 387])

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Chapter 16
MISREPRESENTATION

I. INTENTIONAL MISREPRESENTATION ("DECEIT")

A. Definition: The common law action of ***"deceit"*** or "fraud" corresponds to what we today call ***"intentional misrepresentation***." [391]

1. Elements: To recover for intentional misrepresentation, P must establish the following elements [391]:

a. A ***misrepresentation*** by D;

b. ***Scienter*** (i.e., a culpable state of mind – either knowledge of the statement's falsity or reckless indifference to the truth);

c. An ***intent to induce the plaintiff's reliance*** on the misrepresentation;

d. ***Justifiable reliance*** by P; and

e. ***Damage*** to P, stemming from the reliance.

B. Misrepresentation: D must make a ***misrepresentation*** to P. Normally, this will be in ***words***. [391 - 393]

1. Actions: But D's ***actions*** may also constitute a misrepresentation. [391] (***Example:*** A used car dealer turns back the odometer on a car.)

2. Concealment: If D intentionally ***conceals*** a fact from P, he will be treated the same way as if he had affirmatively misstated that fact. [391 - 392]

3. Non-disclosure: If D simply ***fails to disclose*** a material fact (as opposed to taking positive steps to conceal it), it is harder for P to establish the requisite misrepresentation [392 - 393]:

a. Common law: At common law, failure to disclose was almost never a misrepresentation.

b. Modern view: In modern courts, the general rule remains that failure to disclose by itself does not constitute misrepresentation. But modern cases recognize some ***exceptions***, including: (1) matters which must be disclosed because of a ***fiduciary relationship*** between the two parties (e.g., lawyer/client); (2) matters which must be disclosed in order to prevent a ***partial*** statement of the facts from being misleading; (3) ***newly acquired***

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information, which, if not disclosed, would make a previous statement misleading; and (4) facts ***basic to the transaction***, if the party with knowledge knows of the other's reliance and knows that the other would reasonably expect a disclosure of those facts.

Example: A homeowner who fails to disclose to the buyer the presence of *termites* will today often be found to have made a misrepresentation – this is a fact basic to the transaction that, as the seller should know, a buyer would normally expect to be told about. This represents a change from the common-law rule. [*Obde v. Schlemeyer,* 392]

C. Scienter: P must show that D had that culpable state of mind called ***"scienter***." D acts with scienter if he either: (1) knew or believed that he was not telling the truth; (2) did not have the confidence in the accuracy of his statement that he stated or implied that he did; or (3) knew that he did not have the grounds for a statement that he stated or implied that he did. [393 - 394]

1. Negligence not enough: Scienter does not exist where D was merely ***negligent*** in making the misrepresentation. (In this instance, a claim for negligent misrepresentation, discussed below, must be brought.)

D. Third-party recovery: Where the fraudulent misrepresentation was not made to P, but to some third person, the rules have changed [394 - 396]:

1. Common law rule: At common law, D was liable only to those persons whom he ***intended*** to influence by his misrepresentation, and not to others, even though their reliance may have been foreseeable. [394] (***Example:*** The Ds, directors of a company, prepare an intentionally false prospectus, intending to influence people who buy stock at the initial public offering. P later buys "used" stock from an existing stockholder, and relies on the misrepresentation. At common law, P may not recover against D, because D did not intend to influence P, even though P's reliance was quite foreseeable. [*Peek v. Gurney*])

2. Modern rule: But modern cases make it easier for P to recover. Even if D did not intend to influence P, P can recover if she can show that: (1) she is a member of a class which D had ***reason to expect*** would be induced to rely; and (2) the transaction is of the ***same sort*** that D had reason to expect would occur in reliance. [395 - 397] (***Example:*** D falsely claims to have good title in an auto, and sells the car to X, who D knows is wholesaler. X resells to P, repeating the misrepresentation. Under modern law, P could recover against D, because P is a member of a class – ultimate buyers – whom D had reason to expect might rely on the misrepresentation, and the

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transaction is of the same sort – sale of the car – as D had reason to expect would occur in reliance. [*Varwig v. Anderson-Behel Porsche/Audi*])

E. Justifiable reliance: P must also show that he in fact ***relied*** on the misrepresentation, and that his reliance was ***justifiable***. [396 - 397]

1. Investigation by P: If, after receiving D's misrepresentation, P makes his ***own investigation***, and ***relies totally*** or almost totally upon this investigation, P will be held not to have met the reliance requirement. (But if the misrepresentation is a ***substantial factor*** in inducing the reliance, P can recover even though his own investigation was also a substantial factor.) [396]

2. Justifiability: P must show that his reliance was ***justifiable***. [396]

a. No general duty to investigate: P has no ***duty to investigate*** on his own, even where an investigation could be easily done, and would disclose the falsity of D's statements. (But P may not overlook the ***"obvious"*** – if he does, his reliance is unjustifiable.)

3. Materiality: P must show that the fact that he relied on was ***material*** to the underlying transaction. [397]

F. Opinion: It is hard for P to recover for a statement that is fairly characterizable as an ***"opinion***." [397 - 400]

1. Adverse party: It is especially hard for P to recover where D was an ***"adverse party"*** to P at the time of the misstatements. But even here, P may be justified in relying on D's expression of opinion if: (1) D purports to have ***special knowledge*** that P does not have; (2) D stands in a ***fiduciary*** relationship to P; or (3) D knows that P is especially ***gullible***. [398]

a."Puffing" still not actionable: ***"Puffing"*** or ***"trade talk"*** is *not* actionable. (***Example:*** Car Dealer says to Consumer, "This is the best two-door car for the money." In fact, Car Dealer believes that the car is a terrible value. Consumer cannot recover for intentional misrepresentation, because Car Dealer's statement is obviously "puffing.")

2. Opinion of apparently disinterested person: If the opinion is expressed not by one of the parties to a business deal, but by someone whom the plaintiff reasonably perceives as being ***"disinterested*,"** it is ***easier*** for P to recover. [398]

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3. Opinion implying fact: The above rules apply only to statements of "pure" opinion. Where an opinion either ***expresses*** or ***implies facts***, P can recover for misstatement of the underlying facts. [399]

a. Lack of knowledge of inconsistent facts: Thus an opinion often contains the implied statement that its maker knows of no facts ***incompatible*** with that opinion. If P can show that D really knew facts incompatible with his opinion, P can recover. (***Example:*** Seller tells Buyer, "In my opinion, this house is structurally sound." Seller really knows that the foundation is badly cracked. Buyer can probably recover.)

G. Statements about law: Today, statements involving ***legal principles*** are generally treated the same as any other statement. Thus if D's representation of law includes an implied statement about ***factual*** matters, P may rely upon the factual part of the statement. [399 - 400] (***Example:*** Seller tells Buyer that the house to be sold meets all applicable zoning regulations. If Seller knows that the house violates the local set-back rules, Buyer can recover.)

H. Prediction and intention:

1. Prediction: If the defendant ***predicts*** that something will happen, this will generally be treated as an opinion, which means that in most instances it cannot be relied on. [400]

2. Intention: But where D makes a statement as to her own ***intentions***, this is generally treated as a factual representation that can be relied on. [400]

I. Damages: If the misrepresentation was made directly by D to P, most courts give P the ***"benefit of the bargain"*** measure of damages. [401 - 402]

II. NEGLIGENT MISREPRESENTATION

A. General: At common law, there was no action for "negligent misrepresentation." Unless P suffered personal injury or direct property damage (thus enabling her to bring a conventional negligence action), P was out of luck. But today, most courts ***do*** allow recovery for negligent misrepresentation, even where only ***intangible economic harm*** is suffered. [402]

1. Same requirements: Most requirements for a negligent misrepresentation action are the same as for an intentional misrepresentation action. [402]

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B. Business relationship: Courts are quickest to allow recovery for negligent misrepresentation where D's statements are made in the course of his ***business or profession***, and D had a ***pecuniary interest*** in the transaction. (Thus if D is P's friend, and makes a representation that is not in the course of D's business, P cannot recover.) [403]

C. Liability to third persons: The maker of a negligent misrepresentation is liable to a much ***narrower class*** of third persons than is the maker of a fraudulent misstatement. [403 - 405]

1. Persons intended to be reached: According to the Restatement, D is liable for negligent misrepresentation to a ***"limited group of persons"*** whom D either: (1) ***intends to reach*** with the information; or (2) whom D knows the ***recipient intends to reach***. [403 - 405] (***Example:*** D runs a stock ticker service, which negligently reports that X Corp has declared higher earnings, when in fact its earnings are lower. P, an investor, learns of the "higher" earnings from a subscriber to D's service, and buys the stock, losing money. P probably cannot recover from D, since they were not in contractual privity, and since P was not a member of a "limited group of persons" whom D intended to reach or whom D knew that its subscriber intended to reach.)

a. Persons covered: Even though the class of third persons covered is narrow, it is still important. Examples where liability might attach include: (1) a surveyor knows or should know that his survey will be given to a prospective purchaser, and a purchaser relies on the survey in buying the property; (2) a lawyer drafts a will negligently cutting out a particular intended heir, and the heir sues the lawyer; (3) an accountant negligently certifies the books of X Corp, knowing that X Corp plans to seek a loan from Bank; Bank makes the loan, X Corp goes bankrupt, and Bank sues the accountant.

III. STRICT LIABILITY

A. Not generally allowed: Generally, a person has no liability for an ***"innocent"*** misrepresentation. In other words, as a general rule there is no strict liability for misrepresentations. But there are some exceptions, discussed below. [406]

B. Sale, rental or exchange: If two parties are involved in a ***sale***, ***rental*** or ***exchange*** transaction, and one makes a material misrepresentation to the other in order to close the deal, he will be liable even if the misrepresentation is innocent. [406]

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1. Warranty: Usually, the buyer can get as much relief from a claim of ***breach*** of express warranty as from the tort claim of strict liability for misrepresentation. But P may avoid certain contract defenses by relying on the tort theory rather than the warranty theory (e.g., the parol evidence rule). [406]

2. Service transactions: A few courts have applied strict liability where D sells P a ***service***, and makes a misrepresentation. [406] (***Example:*** An agent for Insurance Co. tells P that the policy he is buying will cover him for liability from drunk driving, and through no fault of the agent, the policy does not in fact cover P for this. Some courts might allow P to recover from the agent.)

3. Privity: The sale, rental or exchange must have been ***directly*** between P and D. [407]

C. Sale of chattel: A seller of goods who makes any misrepresentation on the label, or in public advertising, will be strictly liable for any ***physical injury*** which results, even if the injured person did not buy the product directly from D. [407]

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Chapter 17
DEFAMATION

I. GENERAL PRINCIPLES

A. Meaning of "defamation": The tort called ***"defamation"*** is actually two sub-torts, "libel" and "slander." These both protect a person's interest in his ***reputation***. A state's freedom to define these torts as it wishes is sharply curtailed by the First Amendment. [412]

B. Prima facie case: To establish a prima facie case for either libel or slander, P must prove [412]:

1. Defamatory statement: A ***false*** and ***defamatory*** statement concerning him;

2. Publication: A ***communicating*** of that statement to a person other than the plaintiff (a ***"publication"***);

3. Fault: ***Fault*** on the part of D, amounting to at least ***negligence***, and in some instances a greater degree of fault;

4. Special harm: Either ***"special harm"*** of a pecuniary nature, or the actionability of the statement despite the non-existence of such special harm.

II. DEFAMATORY COMMUNICATION

A. Injury to reputation: To be defamatory, a statement must have a tendency to ***harm the reputation*** of the plaintiff. [413]

1. Reputation not actually injured: For the statement to be defamatory, it need not have ***actually*** harmed P's reputation. It must simply be the case that, ***if the statement had been believed***, it would have injured P's reputation. [413] (But in most cases of slander, and in cases of libel where the defamatory meaning is not apparent from the face of the statement, P has to prove "special damage," i.e., that his reputation was in fact damaged and caused him pecuniary harm – this is not part of the definition of "defamatory," however.)

B. Meaning attached: Many statements can be ***interpreted in more than one way***. Where this is the case, the statement is defamatory if ***any one*** of the interpretations which a reasonable person might make would tend to injure P's reputation, and P shows that at least one of the recipients did ***in fact*** make that interpretation. [413 - 414]

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1. Meaning not apparent from face: The defamatory nature of the statement need not be apparent on its face. Some statements become defamatory when certain ***extrinsic facts*** are known. [414] (***Example:*** A newspaper runs a story saying that P gave birth on May 1. This becomes defamatory if the reader knows that P only got married on Feb. 1 of the same year.)

C. Reference to plaintiff: P must show that the statement was reasonably interpreted by at least one recipient as ***referring to P***. [414 - 415]

1. Intent irrelevant: But P does not necessarily have to show that D ***intended*** to refer to him, rather than to someone else. As a common-law matter (putting aside constitutional decisions), even if D behaved non-negligently and intended to refer to someone else entirely, P can still sue. [414]

2. Groups: If D's statement concerns a ***group***, and P is a member of that group, P can recover only if the group is a ***relatively small one***. [415] (***Example:*** The statement, "All lawyers are shysters," would not be defamatory as to any particular lawyer, assuming there was no evidence indicating that the statement was intended to refer to P in particular.)

3. Reference need not be by name: If a non-explicit reference to P is reasonably understood as in fact referring to P, it does not matter that P is referred to by a ***different name*** or characterization. This is true even if the publication is labelled a "novel." [415]

D. Truth: A statement is ***not defamatory*** if it is ***true***. At common law, it is always the ***defendant*** who has had the burden of proving truth. [415 - 416]

1. Matters of public interest: Today, as the result of constitutional decisions, the ***plaintiff*** must bear the burden of proving falsity, if: (1) D is a media organization; and (2) the statement involves a matter of ***"public interest"*** (whether P is a public figure or a private figure). [415]

2. Private figure, no public interest or non-media defendant: It is probably the case that the states may still require the ***defendant*** to bear the burden of proving truth if: (1) the defendant is not a media organization; *or* (2) the plaintiff is a private figure and the statement is not of public interest. [415 - 416]

3. Substantial truth: For truth to be a barrier to recovery, it is not necessary that the statement be ***literally*** true in all respects. Instead, the statement must merely be ***"substantially"*** true. [416]

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E. Opinion [416 - 419]

1. Pure opinion: A statement of ***pure opinion*** can never be defamatory. [416] (***Example:*** "I think Smith is a disgusting person," without any factual basis for this statement either expressed or implied.)

2. Implied facts: But if a statement of opinion ***implies undisclosed facts***, and a statement of those facts would be defamatory, then the statement will be itself treated as defamatory. [417] (***Example:*** "I think P must be an alcoholic" is probably actionable, because it implies that the speaker knows precise facts about P's alcohol consumption which would justify an opinion of alcoholism.)

III. LIBEL vs. SLANDER

A. Significance of distinction: Distinguish between "libel" and "slander." It makes a difference only with respect to the requirement of ***special harm***: to establish slander, P must show that he suffered pecuniary harm (unless the statement falls into one of four special categories). To prove libel, by contrast, P does not have to show such special harm (except, in some courts, if the defamatory nature of the statement is not evident on its face). [419]

B. Libel: Libel consists mainly of all ***written or printed matter***. [419 - 420]

1. Embodied in physical form: Most states hold that it also includes any communication embodied in ***"physical form."*** [419] (*Examples:* A phonograph record, or a computer tape, would be libel in most courts.)

2. Radio and TV: Where a program is ***broadcast*** on radio or TV:

a. Written script: If it originated with a ***written script***, all courts treat it as libel.

b. No script: If the program is "adlibbed" rather than coming from a written script, courts are split as to whether it is libel or slander.

C. Slander: All other statements are ***slander***. An ordinary ***oral statement***, for instance, is slander. [420]

D. Special harm: P may generally establish slander only if he can show that he has sustained some ***"special harm."*** This harm generally must be of a ***pecuniary nature***. [420 - 421] (***Example:*** P shows only that his friends believed D's defamatory statements, and the friends now socially reject P. If the statement is slander, and does not fall within one of the four "slander per se" categories, P cannot recover.)

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1."Slander per se": There are four kinds of utterances which, even though they are slander rather than libel, require ***no showing*** of special harm [420]:

a. Crime: Statements imputing morally culpable ***criminal behavior*** to P.

b. Loathsome disease: Statements alleging that P currently suffers from a ***venereal*** or other loathsome and communicable disease.

c. Business, profession, trade or office: An allegation that adversely reflects on P's fitness to conduct her ***business***, trade, profession or office. (***Example:*** "P cheats his customers.")

d. Sexual misconduct: Statement imputing serious ***sexual misconduct*** to P.

2. Libel: In the case of ***libel***, at common law courts do not require proof of actual harm, and can award ***"presumed"*** damages even without a showing of harm. However, recent Supreme Court decisions cut back on the states' ability to do this [421 - 422]:

a. Matters of public concern: If the statement involves a matter of public concern or a public figure, and recovery is allowed without proof of "actual malice," presumed damages may not constitutionally be awarded.

b. Matter of private concern: But if the defamatory statement does *not* involve a matter of "public concern," presumed damages *may* be allowed, even without a showing of "actual malice." (***Example:*** D, a credit reporting agency, sends a subscriber a written report falsely stating that P is insolvent. Since the statement is not of "public interest," P may recover $50,000 presumed damages without showing any financial loss, and without showing that D knew of the falsity or recklessly disregarded the truth. [*Dun & Bradstreet v. Greenmoss Builders*]

c. Actual malice: If P does show "actual malice" (that D either knew of the falsity or recklessly disregarded the truth), presumed damages may probably be constitutionally awarded, even if P is a public figure and the matter is one of public interest.

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IV. PUBLICATION

A. Requirement of publication generally: P must show that the defamation was ***"published. "*** "Publication" means merely ***"seen or heard by someone other than the plaintiff. "*** [422]

1. Must be intentional or negligent: D's publication must have been either intentional or negligent. Thus there is no "strict liability" as to the publication requirement. [422] (***Example:*** D makes a defamatory statement to P himself; D does not realize that X may overhear the statement, but X does overhear it. D has no liability for defamation.)

B. Repeater's liability: One who ***repeats*** a defamatory statement made by another is held to have published it, and is liable as if he were the first person to make the statement. [423] This is true even if he indicates the source, and indicates that he himself does not believe the statement. (***Example:*** D says, "X told me that P is a thief who steals from his customers, though I doubt it." Technically, D has published the defamatory statement, and can be liable.)

V. INTENT

A. Common-law strict liability: At common law, libel and slander were essentially ***strict liability*** torts. P had to show that the ***publication*** occurred due to D's intent or negligence, but did not have to show intent or negligence as to any of the other aspects. For instance, it was irrelevant that D had every reason to believe that the statement was ***true***. [424]

B. Constitutional decisions: But recent Supreme Court decisions on the First Amendment have eliminated courts' right to impose strict liability for defamation. The precise mental state which D must be shown to have met depends on whether P is a public figure [424 - 428]**:**

1. Public figure: If P is a ***"public figure,"*** he can recover only if he shows that D made the statement with either: (1) ***knowledge that it was false***; or (2) ***"reckless disregard"*** of whether it was true or false. [*New York Times v. Sullivan*] (These two alternate states of mind are collectively called ***"actual malice,"*** which is a term of art.) [424 - 425]

a. Meaning of "reckless disregard": For P to show that D "recklessly disregarded" the truth, is *not* enough to show that a "reasonably prudent person" would not have published, or would have done further investigation. Instead, P must show that D ***in fact entertained serious doubts*** about the truth of the statement. [425]

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2. Private figures: But if P is ***neither*** a public official nor a public figure, he is ***not constitutionally required*** to prove that D knew his statement was false or recklessly disregarded whether it was true or false. [*Gertz v. Robert Welch, Inc.*] [425]

a. No strict liability: However, the First Amendment prohibits a state from applying ***strict liability***, even in the "private figure" situation, at least if the suit is against a media defendant. In other words, even in suits brought by private figure plaintiffs, P must prove that D was at least ***negligent*** in not ascertaining the statement's falsity. (In suits by a private-figure plaintiff against a ***private individual*** or other ***non-media*** defendant, the Supreme Court has never said whether strict liability is allowable, so it may be.) [425]

b. Negligence, recklessness or intent: Thus in suits brought by private figures against media defendants, the states are free to decide whether they wish to use ***negligence, recklessness*** or ***intent*** as the standard.

VI. PRIVILEGES

A. Absolute privileges: An ***"absolute"*** privilege applies even if D was motivated solely by malice or other bad motives. The following classes of absolute privilege are usually recognized:

1. Judicial proceedings: Judges, lawyers, parties and witnesses are all absolutely privileged in what they say during the course of ***judicial proceedings***, regardless of the motives for their statements. [428] (***Example:*** D, in a pleading in a civil lawsuit between him and P, calls P a crook. P cannot recover from D for defamation, even if P shows that D knew D's statement was a lie.)

2. Legislative proceedings: ***Legislators*** acting in furtherance of their legislative functions are absolutely privileged. [428]

3. Government officials: Many ***government officials*** have absolute immunity for statements issued in the course of their jobs. Thus all federal officials, and all high state officials, have this privilege. [429]

4. Husband and wife: Any communication between a ***husband and wife*** is absolutely privileged. [429]

5. Consent: Any publication that occurs with the ***consent*** of the plaintiff is absolutely privileged. [429]

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B. Qualified privilege: Other privileges are merely ***"qualified"*** or "conditional" ones. A qualified privilege will be lost if D is acting primarily from ***malice***, or from some other purpose not protected by the privilege. [429 - 435]

1. Protection of publisher's interests: D is conditionally privileged to ***protect his own interests***, if these are sufficiently important, and the defamation is directly enough related to those interests. [429 - 430] (***Example:*** If D reasonably believes that his property has been stolen by P, he may tell the police of his suspicions. If D's belief is reasonable, he is protected against a slander action by P, even if his suspicions are wrong.)

2. Interest of others: Similarly, D may be qualifiedly privileged to act for the protection of the ***recipient*** of his statement, or some other third person. The issue is whether D's statement is "within the generally accepted standards of ***decent conduct***." [430]

a. Old boss to new boss: Thus an ex-employer generally has the right to give information about his ***ex-employee*** to a new, prospective, employer if asked by the latter.

3. Public interest: D may be conditionally privileged to act in the ***public interest***. [431] (***Example:*** A private citizen's reasonable but mistaken accusation made to the police that P committed a crime would be covered.)

4. Report of public proceedings: There is a conditional privilege to report on ***public proceedings***, such as court cases, legislative hearings, etc. [431 - 432] (***Example:*** D, a newspaper, accurately reports that in a lawsuit, X has called P a crook and a liar. Even if X's statement is completely untrue and was made with malice, D has a qualified privilege to make the report of the public proceeding, and therefore may not be sued for libel.)

5. Neutral reportage: A few cases have recognized a ***"neutral reportage"*** privilege. Under this privilege, one who ***correctly*** and ***neutrally*** reports charges made by one person against another will be protected if the charges are a matter of ***public interest,*** even if the charges are false. [433 - 435] (***Example:*** D, a newspaper, runs a story saying, "Citizen said at a press conference that he saw Mayor Brown take a bribe from a developer." If Citizen really made these charges, D would be protected under the "neutral reportage" privilege even if D had serious doubts about the truth of the charges. This is so even though D's doubts would cause D's conduct to constitute "actual malice" under *New York Times v. Sullivan*.)

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C. Abuse of qualified privilege: Even where a qualified privilege exists, it may be ***abused*** (and therefore forfeited) in a number of ways. [435 - 436]

1. Actual malice: Most importantly, the privilege will be lost if D ***knew that his statement was false***, or acted in ***reckless disregard*** of whether it was true. [435] (***Example:*** D, P's ex-employer, is asked for information by X, P's new prospective employer, concerning P's work. D's clerk negligently misreads the file, and asserts that P was fired for dishonesty, when in fact P quit voluntarily. If the clerk is shown to have behaved recklessly, D's qualified privilege – to protect the interest of a third person by commenting on an employee's fitness – will be deemed abused and thus forfeited. But if the clerk was only negligent, the privilege will probably not be lost.)

2. Excessive publication: The privilege is abused if the statement is made to persons to whom publication is ***not reasonably necessary*** to protect the interest in question, or if more damaging information is stated than is reasonably needed. [436]

VII. REMEDIES

A. Damages: A successful defamation plaintiff may recover various sorts of damages**:**

1. Compensatory damages: First, of course, P may recover ***compensatory*** damages. These can include [436]:

a. Pecuniary: Items of ***pecuniary loss*** (e.g., P's lost earnings from being fired from her job, due to D's statement to P's boss that D was dishonest in the last job).

b. Humiliation, lost friendship: Compensation for ***humiliation***, lost friendship, illness, etc. (even though these items would not count as "special harm" for purposes of slander).

2. Punitive damages: Also, under some circumstances ***punitive*** damages may be awarded [436 - 437]:

a. Public figure or matter of public interest: If P is a ***public figure***, or the case involves a matter of ***public interest***, punitive damages may be awarded only on a showing that D knew his statements were false or recklessly disregarded the truth. (That is, the "actual malice" requirement of *New York Times v. Sullivan* extends, as far as punitive damages go, not only to public figures

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but also to private figures suing on matters of public interest.) [*Gertz v. Robert Welch*]

b. Private figure/private matter: But if P is a ***private*** figure and D's statement relates to a private matter, then punitive damages may be awarded even if P shows only that D was ***negligent***. (***Example:*** D, a credit reporting agency, falsely reports to a few subscribers that P, a corporation, is insolvent. Because P is a private figure and the report did not involve any matter of public concern, punitive damages can be awarded, as a constitutional matter. [*Dun & Bradstreet Greenmoss Builders,* 436])

3. Nominal damages: Even a plaintiff who has suffered no direct loss may recover ***nominal*** damages, to "clear his name." Certainly if P shows knowledge of falsehood or reckless disregard of the truth on the part of D, P may recover nominal damages. It is not clear whether or when a plaintiff who shows less than this may recover nominal damages. [437]

B. Retraction: Most states have enacted ***"retraction"*** statutes. Some of these statutes hold that if D publishes a retraction within a certain period, this bars P from recovery. Other statutes merely ***require*** news organizations to grant a right of response to P, without providing that this eliminates P's defamation action. [437]

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Chapter 18
MISCELLANEOUS TORTS: INVASION OF PRIVACY; MISUSE OF LEGAL PROCEDURES; INTERFERENCE WITH ADVANTAGEOUS RELATIONS; FAMILIAL AND POLITICAL RELATIONS

I. INVASION OF PRIVACY

A. Four torts: The so-called ***"invasion of privacy"*** cause of action is essentially four distinct mini-torts. They all involve P's "right to be let alone." The four are: (1) ***misappropriation*** of P's name or picture; (2) ***intrusion*** on P's solitude; (3) undue publicity given to P's ***private life***; and (4) the placing of P in a ***false light***. [444]

B. Misappropriation of identity: P can sue if her ***name or picture*** has been ***misappropriated*** by D for his own financial benefit. [444 - 445] (***Example:*** D, a cereal maker, runs an ad containing a photo of P eating D's cereal. P does in fact eat D's cereal, but has never agreed to endorse it. P can recover for appropriation of his picture.)

C. Intrusion: P may sue if his ***solitude*** is ***intruded upon***, and this intrusion would be "highly offensive to a reasonable person." [445 - 446] (***Example:*** To gain derogatory information about P to use in their upcoming civil case, D hires a detective to wiretap P's home, and to eavesdrop on P using a directional microphone pointed at P's front window. P has an invasion-of-privacy claim against D of the "intrusion upon solitude" variety.)

1. Must be private place: This "intrusion upon solitude" branch is triggered only where a ***private place*** is invaded. Thus if D takes P's picture in a public place, this will normally not be enough. [445 - 446]

D. Publicity of private life: P may recover if D has ***publicized*** the details of P's ***private life***. The effect must be "highly offensive to a reasonable person." [446 - 446] (***Example:*** D, a sensationalist newspaper, prints the details of the extramarital sex life of P, who is wealthy but not a public figure. P can recover against D for publicity of private life.)

1. Not of legitimate public concern: As a constitutional matter, it is probably a requirement for the "publicity of private life" action that the material ***not be of legitimate public concern***. [447] (***Example:*** If P is on trial for murder, it is not an invasion of his privacy for newspapers to give reports on even minor private details of his past life, such as his sexual history.)

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E. False light: P can sue if he is placed before the public eye in a ***false light***, and this false light would be highly offensive to a reasonable person. [447 - 448] (***Example:*** P is war hero. D makes a movie about P's life, including fictitious materials such as a non-existent romance. D is liable for invasion of privacy, of the "false light" variety.)

1. Actual malice: But at least where P is a public figure, he can recover for "false light" only if he can show that D knew the portrayal was false, or acted in reckless disregard of whether it was. In other words, *New York Times v. Sullivan* applies to false light actions by public figures. [*Time, Inc. v. Hill*] Probably private figures do not have to meet this "actual malice" standard.

II. MISUSE OF LEGAL PROCEDURE

A. Three torts: Three related tort actions protect P's interest in not being subjected to ***unwarranted judicial proceedings:*** (1) ***malicious prosecution***; (2) ***wrongful institution of civil proceedings***; and (3) ***abuse of process***. [449]

B. Malicious prosecution: To recover for ***malicious prosecution***, P must prove the following: (1) that D instituted ***criminal proceedings*** against him; (2) that these proceedings terminated ***in favor of P*** (the accused); (3) that D had ***no probable cause*** to start the proceedings; and (4) that D was motivated primarily by some purpose other than bringing an offender to justice. [449 - 450]

1. Initiating proceeding: P must show that D took an ***active part*** in instigating and encouraging the prosecution. [449] (***Example:*** If D merely states what she believes to be the facts to the prosecutor, and lets the prosecutor decide whether to prosecute, this is probably not "institution" of proceedings. But if D attempts to persuade the prosecutor to prosecute, this will be sufficient.)

2. Favorable outcome: The criminal proceedings must ***terminate in favor of the accused*** (P). An acquittal will of course be enough; so will a prosecutor's decision not to prosecute (but a plea bargain to a lesser offense will not suffice). [449]

3. Absence of probable cause: P must show that D ***lacked probable cause*** to institute the criminal proceedings. [449 - 450]

a. Reasonable mistake: If D made a ***reasonable mistake***, she does not lack probable cause.

b. Effect of outcome: The fact that P was ***acquitted*** does not itself establish lack of probable cause. D still has the right to show, in

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the tort case, by a preponderance of evidence, that P was guilty and that D therefore had probable cause.

4. Improper purpose: P must show that D acted out of ***malice***, or for some other purpose than bringing an offender to justice. [450]

C. Wrongful civil proceedings: In most states, a tort action exists for wrongful institution of ***civil*** proceedings. The requirements are virtually identical to the "malicious prosecution" action, except that the original proceedings are civil rather than criminal. [450 - 451]

1. Elements: Thus P must prove that: (1) D initiated civil proceedings against P; (2) D did not have probable cause to believe that his claim was justified; (3) the proceedings were started for an improper purpose (e.g., a "nuisance" suit or "strike suit," brought solely for the purpose of extorting a settlement); and (4) the civil proceedings were terminated in favor of the person against whom they were brought. [450]

D. Abuse of process: The tort of ***"abuse of process"*** occurs where a person involved in criminal or civil proceedings uses various ***litigation devices*** for improper purposes. [451 - 451] (***Example:*** Even if a civil suit is properly brought by P, if P then uses his power of ***subpoena*** to harass D or make him settle, rather than for the proper purpose of obtaining his testimony, this is an abuse of process.)

III. INTERFERENCE WITH ADVANTAGEOUS RELATIONS

A. Three business torts: Three related torts protect business interests: (1) injurious falsehood; (2) interference with contract; and (3) interference with prospective advantage. [452]

B. Injurious falsehood: The action for ***"injurious falsehood"*** protects P against certain false statements made against his business, product, or property. Most important is so-called ***"trade libel."*** This occurs where a person makes false statements disparaging P's ***goods or business***. [452 - 453]

1. Elements: P must prove the following elements for trade libel [452]:

a. False disparagement: D made a ***false statement disparaging*** P's goods, business, etc. (***Example:*** D falsely states that P is out of business);

b. Publication: P must show that the statement was "published," as the word is used in defamation cases;

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c. Scienter: P must show ***scienter*** on D's part. That is, P must show that D knew her statement was false, acted in reckless disregard of whether it was false, or (in some courts) acted out of ill-will or spite for P.

d. Special damages: P must prove ***"special damages,"*** i.e., that P suffered ***"pecuniary"*** harm.

2. Defenses: D can raise a number of ***defenses***, including [453]:

a. Truth: that the statement was ***true***; and

b. Fair competition: that D was ***pursuing competition by fair means***. In particular, D is privileged to make ***general comparisons*** between her product and P's, stating or implying that her product is the better one. In other words, "puffing" is protected. But if D makes ***specific*** false allegations against P's product, D will not be protected.

C. Interference with existing contract: The tort of ***"interference with contract"*** protects P's interest in having others perform ***existing contracts*** which they have with him. The claim is against one who ***induces*** another to breach a contract with P. [454 - 457] (***Example:*** P, a theater owner, has contracted to have X perform in P's theater on a certain date. D, a competing theater owner, induces X to perform for him on that date instead. P can recover against D for interference with contract.)

1. Privileges: D can defend on the grounds that his interference was ***privileged***. [456]

a. Business competition: D's desire to ***obtain business*** for herself, however, is *not* by itself enough to make her privileged to induce a breach of contract. (But in most courts, if P's contract was ***terminable at will***, D is privileged to induce a termination of it for the purpose of obtaining the business for herself.)

D. Interference with prospective advantage: If due to D's interference, P loses the benefits of ***prospective***, ***potential*** contracts (as opposed to existing contracts), P can sue for ***"interference with prospective advantage."*** [457 - 458]

1. Same rules: Essentially the same rules apply here as for "interference with contract." The big difference is that D has a much greater scope of ***privilege*** to interfere. [457]

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a. Competition: Most importantly, D's desire to ***obtain the business for herself*** will be enough to give her a privilege, which is usually not the case where there is an existing contract. (***Example:*** P and D are competitors. D learns that P has been pursuing a certain prospect for nine months, and is about to sign a long-term supply contract with that customer. D can jump in, and offer a money-losing low price, even if this is for the sole purpose of weakening P.)

IV. INTERFERENCE WITH FAMILY AND POLITICAL RELATIONS

A. Family: A family member's interest in having the ***continued affections*** of the other member of his family is sometimes protected. [459 - 460]

1. Husband and wife: In some states, a jilted ***spouse*** may bring either of two tort claims against an outsider who has interfered with the marital relation:

a. Alienation of affections: Some states allow P to sue for ***"alienation of affections"*** against anyone who has caused P's spouse to lose his or her affection for P. (This is usually, but not always, a romantic rival – for instance, the action can be brought against a friend or relative who has convinced the spouse to leave P.) But D has a ***privilege*** to interfere to advance what D reasonably believes to be the alienated spouse's welfare. [459]

b. Criminal conversation: A person who has ***sexual intercourse*** with one spouse may be liable to the other for ***"criminal conversation."*** [459]

2. Parent's claim: A ***parent*** will *not* usually have a tort claim against one who alienates his ***child's affections***. But there are a couple of exceptions, where suit is allowed:

a. Minor leaves home: The parent has a claim against the person who has caused his minor child to ***leave home***, or not to return home. [459] (***Example:*** A parent might sue the members of a cult, such as the "Moonies," if the cult induces the minor child to leave home.)

b. Sex: The parent has a tort claim against anyone who has ***sexual intercourse*** with the parent's minor ***daughter*** (but not son).

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B. Interference with political and civil rights: There may be a common-law tort action for interfering with P's ***political rights*** (e.g., his right to vote), his ***civil rights*** (e.g., his right to make a public protest), or his ***public duties*** (e.g., his duty to serve on a jury). [460]

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