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Gl. 1223 /

TORTS

Mr. Reed Prosser

PORT 2

1874

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1874

Sept.
Oct. 30

Tort deals with violation of a private legal right other than contract
 crimes are wrongs against the state - for which the remedy is punishment - the government is the plaintiff.

Torts are wrongs against an individual for which the remedy is damages paid to the injured one.

- an act may be both a crime and a tort - and one may be punished under both actions ~~is~~ - either suit may come first and there is no relation between them.
- an act may be considered a violation of property rights, contract rights, or of the miscellaneous rights included under torts.
- Much of the law of torts is not settled - it is "the battleground of social theories"

Texts Pollock - 13th Ed. - English law
 Salmond - 8th Ed. - " " - best text
 Clerk & Lindell - 8th Ed. " "

American Texts - Cooley - 4th Ed. - not good but best
 Chapin - ¹⁹¹³ "hornbook" accurate but incomplete
 Harper - 1933 disciple of Bohlen (casebook author)
 theoretical - presents one view - most useful

Restatements - American Law Institute - Carnegie money
 give rules - cite no cases - beyond first year
 students - doubtful whether courts will follow it

Anonymous - p. 130 1466

History
 One is liable for damage inflicted on his
 neighbor, even it is by pure accident.

strict liability for damage without fault -

OLD
 RULE
 This is the old 1466 rule - we have swung
 away from the rule to the rule that
 one is liable only if at fault - recently we
 have swung back to the old rule in
 certain kinds of cases.

Weaver v Ward ¹⁶¹⁶ is an action when there is damage
 trespass to person and property directly
and immediately caused by the forceful
 act of the defendant.

for inevitable or unavoidable accident - man
not liable.

TREND AWAY
 FROM OLD RULE

Oct. 4

Brown v Kendall - Mass. 1852. p 132

An exception is the losing party's objection to a ruling of the trial court. It is put on the record.

How did the case come up? The trial court said that defendant is liable unless an absolute inevitable accident occurred. This follows Bryson, p. 130, and Weaver v Ward. The court also said that the burden of proof was on defendant.

Was the trial judge correct in his instructions to the jury? No - if defendant was doing a lawful act - and was using ordinary care; i. e., was not negligent - not at fault, then he is not liable.

No liability without fault - burden of proof of negligence rests with plaintiff.

The rule in this case has been followed ever since.

FAULT

wrongful intent

involves:

1. voluntary action - volition

2. consequences intended

a. What you desire.

b. What may be realized as a substantially certain consequence.

Negligence

1. not ordinary care

motive is remote intent - line is hard to draw

Brown v Kendall.
Conviction of
exceptions to the
separate two dogs
hit 9 with the att
Held: New tri
Judge had instruct
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The burden of proo
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and the burden of
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ESTABLISHED

MODERN PRINCIPLE

OF TORT LIABILITY

Oct. 4

Brown v Kendall - Mass. 1852. p 132

Verdict for P. in action of

Brown V Kendall, Mass., 1850, p. 132

~~Conviction~~ of trespass for assault and battery. Exceptions to the judge's instructions. D attempted to separate two dogs who were fighting, and he accidentally hit P with the stick he was beating the dogs with.

Held: New trial. Instructions to jury incorrect. Judge had instructed jury that if it was not a necessary act, and the defendant was not in duty bound to part the dogs, but might with propriety interfere or not as he chose, the defendant was responsible for the consequences of the blow, unless it appeared that he was in the exercise of extraordinary care, so that the accident was inevitable. The burden of proof of extraordinary care, the judge said, was upon the defendant. The upper court reverses this, saying, if the act of hitting the plaintiff was unintentional, on the part of the defendant, and done in the doing of a lawful act, then the defendant was not liable, unless it was done in the want of exercise of due care, and the burden of proving this want of the exercise of reasonable care rests upon the plaintiff.

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Oct. 7

Intent 1. Volitional act2. Consequencesa. Desiredb. Substantially certain

Unintentional torts

jury decides
where an act falls.1. Consequences highly probable - reckless -
wanton conduct.2. Negligence - consequences possible - risk.

OLD - Forms of action

1. Trespass - ^{result of} direct and immediate application
of force to person or property2. ~~Tort~~ a. Intentionalb. Negligentc. Accidental (in old days - Weaver v Ulster
and Dickson v Watson)2. Trespass on the Case - indirect, remote
and consequential application of force.a. Intentionalb. Negligentc. Being a later development, there
was no accidental liability in case.

1800 - new system set up.

never set up since 1880

① Intentional tort

- a. Battery
- b. Assault
- c. False Imprisonment

② Negligent tort

- a. No batteries under negligence now.

see. Ott v G.N.R.R. 70 Minn. 50

What is a battery?

Battery

Cole v Turner 1704 p. 5

1. The least touching in anger is a battery.
2. Touching gently, without violence, in a narrow passage is no battery.
3. Rude violent forcing one's way through a passage or involving a struggle is a battery.

There is intent to touch in all cases.

In situation ① it is a battery because the least touch in anger is likely to lead to a fight and a breach of the peace.

U. S. v Ortega

a criminal case - Fed. Circuit judge's instructions to the jury.

Touching anything so closely connected with the person as to be substantially identified with him is the same as

Cole v Turner, 1704, Minn.
Trespass for battery and assault.
Held: The least touching in anger is a battery.
In a narrow passage, touching without violence, is a battery.

United States v Ortega
Indictment for assault and battery.
Facts: D came up to the witness stand and seized the witness by the neck of the coat and threatened to strike him with his fist.
The jury returned a verdict of guilty.

never see up since 1880

① Intentional tort

a. Battery

b. Assault

c. False Imprisonment

② Negligent tort

a. No batteries under negligence now.

see *Ott v G.N.R.R.* 70 Minn. 50

What is a battery?

Battery

Cole v Turner 1704 p. 5

Cole v Turner, Nisi Prius, 1904, p. 5

Trespass for assault and battery.

Held: The least touching of another in anger is a battery—and any intentional interference with another's person, not consented to by him and unwarranted by the usages of decent society and offensive to a reasonable sense of personal dignity, is a battery.

In a narrow passage, if one touches another gently without violence or design of harm, it is no battery.

Any violence, rudeness, or struggle in the passage is a battery.

there is intent to touch in all cases.

In situation ① it is a battery because the least touch in anger is likely to lead to a fight and a breach of the peace.

United States v Ortega U. S. Circuit Ct., 1825, p. 5.

Indictment for assault. Instructions to the jury:

Facts: D came up behind P at night on the street and seizing the breast of his coat, angrily engaged in conversation with and offered to duel him. If jury decides these acts were done in anger, or a rude and insolent, or with hostile intentions, it is an assault and battery.

Jury returned verdict of guilty.

Touching the person - example: cigar, can, loose, chair, something held in hand, starting up a car on which A was leaning.
Curran v. Olson 88 Minn. 387 - A pours alcohol on drunk's front and sets it on fire - battery.
 Loaded cigar giving - battery.

Commonwealth v. Stratton 144 Mass 303 - giving ^{aphrodisiac} candy with ~~person~~ ^{it} - battery.
 loosening a boat, holding a rope to trip etc. but you must have an act - standing ^{still} in a doorway in no battery.

If P intentionally does any act which produces a contact with P's person or something closely identified with it, there may be a battery

p. 7, 8, p. 12 p. 15 p. 17

D.T. 8

Vosburg v. Putney.

1. A taps B on shoulder to attract attention. No battery.
2. " " " " to annoy him. battery.
3. " slaps B on back in greeting. No battery.
4. " " " (a stranger) on back in greeting battery.
5. " turns B around and says "you listened to me!" battery.
6. A kisses his girl without consent - battery when
- induction kissed a school teacher ^{unlawfully} ^{no battery}.
7. A accidentally jostles B in crowd. ^{no battery}.

Vosburg v. Putney, D. 11 years old, schoolroom with his skin of the leg of the slight touch of assault and battery. Action: Held: the intention was unlawful. If kicking was unlawful. The kid's violation of the no implied license have had on the negligence.

Touching the person - example: cigar, can, horse, chair, something held in hand, starting up a car on which A was leaning. Curran v Olson 88 Minn. 387 - A pours alcohol on drunk's front and sets it on fire - battery. Loaded cigar giving - battery.

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Oct. 8

Vosburg v Putney.

Vosburg V Putney, Wis., 1891, p. 7

D, 11 years old, reached across the aisle of his schoolroom with his foot and touched with his toe the skin of the leg of P, age 14. Owing to a previous injury the slight touch caused serious lameness. On an action of assault and battery, damages were awarded P. Appeal.

Held: Action sustained. P must show either that the intention was unlawful, or that the D is at fault. If kicking was unlawful, the intention to do so was also unlawful. The kicking was unlawful, because it was a violation of the order and decorum of the school. D had no implied license to do the act, as he probably would have had on the playground, if done without malice or negligence.

No battery

battery

y when

Richmond v. Fiska 100 Mass 34

A gently wakes B to collect milk bill against B's wishes. battery

Knowledge of intent
not necessary

a battery can be committed without plaintiff knowing, but assault cannot!

Clark v. Lindsell 92 P. 173

Desire to harm - hostile intent - not test of a battery - absence of consent neither.

Law implies consent to actions reasonably necessary to the ordinary conduct of living, if done without unnecessary force or violence.

Plaintiff has a right to be free from contacts of his person or apprehensions of force to his person to which he does not consent. Includes hostile touches, and contacts not permitted by ordinary ^{custom} ^{may} ~~will~~ reasonably assume that A will consent to any thing that is usually allowed in social usage unless A has said he won't stand for it, and what has previously been permitted is unobjectionable.

If consent can reasonably be assumed there is no battery - & vice versa.

Crawford v Perkins 11 Iowa 675

up to jury

A touches B. saying "Did you feel better after sitting that fire?"

Reynolds v Pearson 29 Ind. App. 273

A talking to B on street - half leaning on B; arm on

B. X (defendant) grabbed A - pulled him away - he was good friend of A - stranger to B - B fell and was hurt. Battery on B - he never consented to it. and X could not assume his consent.
dictum: A could not recover.

2 or a battery you need.

① a contact.

② an intent to produce the contact (not necessarily hostile)

③ an absence of consent on part of plaintiff or situation where def. cannot assume consent.

Summary

Argument p8, p12, p15, p17

October 11

Lalmage v Smith 1894 p8.

Issue: Was the 3rd instruction correct?

179 "Am. 490 Korn v Shepley D shot at dog hit P's cow - guilty of battery.

Originally, trespass was both a criminal and a tort action. In 16th cent. they split. Criminal trespass is

Transfer of intent

based strongly on intent - moral guilt.
It makes no difference if intent was
specified at one person, or that the damage
resulted immediately. This "transfer
of intent" is a carry-over from criminal
law.

Oct. 14.

Alabama case 1938 - lollypop thrown into crowd - hit
P in eye - D. held liable for battery for
negligence. Minnesota would not call it
a battery - it would be a negligent tort.

Battery - is it the same in criminal law as in torts?

In criminal law - intent needed - ^{hostile mind}
contact needed - no consent. Criminal
law is concerned with the guilty mind
(mens rea) of D.

In torts, we're concerned with who
shall pay for damages for an injury resulting
from an act which is not socially acceptable.

The hostile intent is not so necessary. No
Vorberg - v Putney cases in criminal law.

In Tolmage v Smith, we have the
criminal law theory or doctrine of "transfer of
intent" ^{guilty mind} carried over into torts.

Transfer of intent

Talmage v Smith Michigan 1894, p. 8.

P had recovered in an action for trespass for ~~assault~~ ^{battery}. D had ordered two boys to get off his shed, and before they were able to get off, he threw a stick at them, hitting ~~one~~ ^{2nd child} of the boys in the eye, causing the loss of the sight of the eye. Judge charged jury that D's liability depended upon whether he threw the stick with the intent of hitting one of the boys, and whether the throwing of the stick constituted unreasonable and excessive force. Jury found it to be a wilful act.

Held: Judgment affirmed; charge to jury was correct. Liability depends upon D's intention to hit somebody and upon the fact that he used unreasonable and excessive force in inflicting an unwarranted injury to get P off his shed. The fact that he hit another boy but the one he aimed at makes no difference.

O.T. 14.

Alabama case 1938 - lollypop thrown into crowd - hit P in eye - D. held liable for battery for ^{for advertising} negligence. Minnesota would not call it a battery - it would be a negligent tort.

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Summary of battery

Battery

P has interest in being free from unpermitted contacts with his person. Law protects him against all contacts:

1. not permitted by P and which D cannot reasonably assume to be permitted by P.

a. Hostile contacts.

1. Contacts regarded by reasonable man as offensive or undignified
2. resulting from attempts to make hostile contacts with others - rule carried over from criminal law.

Assault

1 de Set up v W de S. 1348 p. 12

In the old common law, a man and his wife are one person, and that person is the husband.

Why give trifling damages where there is no injury? Courts at that time were primarily interested in keeping the peace - an assaulter was punished; incidentally - damages were given to the one assaulted.

Definition: Difference between battery and assault - battery is a contact with a person - assault is an act

Battery

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2. resulting from attempts to make hostile contacts with others - rule carried over from criminal law.

Summary
of battery

assault

S de Set up v W de S. 1348 p. 12

I de S et ux v. W de S. 1348 p. 12

D struck at P with a hatchet but did not hit her or harm her. Inquest said no assault or trespass since no harm was done. Assize justice rules there is trespass even though no actual harm was done and P is entitled to damages for the assault.

the peace - an assaulter was punished; incidentally - damages were given to the one assaulted.

Definition: Difference between battery and assault - battery is a contact with a person - assault is an act

causing a reasonable man to apprehend
a contact with his person. Courts
 sometimes screws up assault & battery.
 calls battery an assault.

State v Davis N.C. 1840 p. 12. Criminal case

1. Fuller v State Tex. Crim. App. 74 S.W. 184

D. make kissing gesture - out of range - no
 assault.

2. D phones P. says "I'll beat you up when I see you" ^{no assault.}

3. Importance of words is - They may give
 color to an act.

State v Berry 45 Mont. 598

D pointed gun at P who did not know
 of it. TP stopped B made him drop gun - no
 assault - because no apprehension of harm
contact with battery - you cannot
assault a person who does not know it.

Assignment p. 15, 17, 20, 289, 297, 299,

Apprehension of a contact is the
 essence of assault.

causing a reasonable man to apprehend
a contact with his person. Courts
 sometimes screw up assault & battery.
 calls battery an assault.

State v Davis N.C. 1840 p. 12. Criminal case

State v Davis N. C. 1840, p. 12

Appeal from conviction of assault. While a party of men were leading their horses down a mountain, a quarrel broke out between them and D, saying, "Hold my horse, I'll whip the rascal", advanced toward P with his hands extended as if to catch hold of him, but before he did so, P stepped to one side, struck him with his rifle, and knocked him down.

Held: Rushing with the intent of striking a blow upon P and approaching, in the execution of that intent, so near as to render it necessary for P's safety to strike him down, amounts to an assault. D does not have to be within striking distance to make it an assault. Judgment affirmed.

D pointed gun at P who did not know of it. TP stopped D made him drop gun - no assault - because no apprehension of harm
contact with battery - you cannot
assault a person who does not know it.

Assignment p. 15, 17, 20, 289, 293, 298,

apprehension of a contact is the
 source of assault.

Oct. 17

Assault. An intentional act which ^{is intended to and} ~~created~~ ^{does} or reasonable apprehension of a battery.
 The difficulty is that, in most cases, both assault and battery are included in the case and the judges and lawyers do not keep the distinction. In criminal law, it is even worse because the statutes often say assault when they mean battery - and courts say assault when they mean attempted battery (no assault where P knows nothing about it - has no apprehension).

Distinguish between fear and apprehension.
 Apprehension means reasonable expectation of a contact of a battery - ^{for Louis case.} fear not necessary.

Keefe v State Ark. 1857 p. 15.

In some cases, the words explain away the conduct. But not here.

Suppose P pulls a gun on his cook and says, "Get out or I'll fill you full of holes".
 assault. because ^{reasonable apprehension created.} ~~unreasonable~~ ^{business} force used.

Effect of words on an act that would otherwise be an assault -

1. The apprehension of an assault must be reasonable.
2. Some words may explain away the apprehension in a person of ordinary firmness.

Keefe v State Ark. D indicted for assault; moved new venue; D called witnesses; D called P's heart and said, "P's heart said, 'I have your life'". P said five dollars, said five dollars, said five dollars. Held: Except cause there is a fact begun, and the words follow the act, there is no assault. Threats to commit things which D has to do.

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Keefe v State Ark. 1857 p. 15.

Keefe v State Ark., 1857, p. 15

D indicted for assault; pled not guilty; was convicted; moved new trial; was overruled; excepted and appealed. D called P from his boarding house and while walking down the street, drew a pistol, pointed it at P's heart and said, "If you don't pay me my money, I will have your life". P went back to boarding house, borrowed five dollars, paid it to D who went away.

Held: Exceptions overruled. It is an assault because there is a forceful, violent, aggressive action begun, and the words which accompany the act do not qualify it so as to show that there is no intent to follow the act through. The conditions under which D threatens to consummate his act of violence are not things which D has the legal right to compel P forcefully to do.

away

D

does

used

is

reasonable

hension

a. "If it were not assault time"

b. "If it were not for your grey hair"

3. But if P puts a condition on P's safety
which D has no right to put, it is an
assault.

4. There are some conditions which D may put
on a threat which he has a right to expect.
a privilege ^{defence} to an act which otherwise would be an assault
means an act which would
otherwise be an assault, but which
releases D from ^{for} liability for
excuses D ~~from~~ using reasonable force
in:

a. getting trespassers off your land.

b. getting burglars out of your house

c. arresting someone caught in breaking law.

but if P uses unreasonable
force in enforcing a privilege, it is
an assault.

Brach v Hancock N.H. 1853 p. 17

No present ability needed to commit
battery; if a reasonable man would
apprehend that D had the present ability
from D's actions. apprehension constitutes
the tort. In criminal law, assault has
been confused with attempted battery, and
there the present ability & intent is necessary.

Brach v Hancock, 1853, N.H. 17
The defendant was charged with assault and battery on the plaintiff. The plaintiff testified that he was walking down the street and saw the defendant coming towards him. The defendant testified that he was walking down the street and saw the plaintiff coming towards him. The court held that the defendant was not liable for assault and battery because he did not have the present ability to commit the crime. The court stated that the defendant's actions were not sufficient to constitute assault and battery.

- a. "If it were not assault time"
- b. "If it were not for your grey hair"
3. But if P puts a condition on P's safety which D has no right to put, it is an assault.
4. There are some conditions which D may put on a threat which he has a right to expect. ^{Defenses to an act which otherwise would be assault} a privilege means an act which would otherwise be an assault, but which releases P from liability for ^{or} excuses P ~~for~~ using reasonable force in:
- getting trespassers off your land.
 - getting burglars out of your house
 - arresting someone caught in breaking law.
- but if P uses unreasonable force in enforcing a privilege, it is an assault.

Beach v Hancock N. H. 1853 p. 17

Beach v Hancock, N. H., 1853, p. 17 ^{judgment for P.}

~~Conviction in trespass for assault.~~ D excepted to instructions to jury and moved new trial. D had pointed a gun in an angry and threatening manner at P who was 3 or 4 rods away. The gun was unloaded but P was ignorant of that fact. The court had ruled that such an act was an assault.

Held: Instructions upheld and judgment sustained. If a person presents a pistol, purported to be loaded, within range of the person threatened, it is an assault even if the pistol were not loaded, because P has a right not to be put in reasonable fear of personal injury.

mit
ould
ability
tutes
& loss
, and
many.

Oct. 21

Damages

(trifling sum - usually 6 cents to a dollar)

- ① Nominal damages - where a legal right of P has been invaded but no actual ^{injury} damages can be proved. Why award such trifling damages?
- ② If rights are not enforced - are not acted upon over a long period of time - the right may be considered to have been surrendered. (This applies in cases of trespass on land) A record is thus made of P's objection to D's acts and the courts upholding of his objection as a legal right.
- ③ Compensatory damages.
 hospital and doctor's bills.
 loss of time, skill, wages etc.
 pain and suffering (even mental)
- ③ Punitive or exemplary damages.
 to make an example of him to others
 not to do it again - this is ^{unreasonable} anomalous
 because this ^{is} the province of criminal
 punishment - and he can be tried for
 the same act in a criminal action.
 too much discretion is left to jury on
 amount of punitive damages.

The argument for punitive damages is that it gives an incentive to P to bring his minor abuses and outrages to court and to keep that sort of abuses under control. P. D. are awarded in tort cases - not for breach of contract with the exception of breach of promise to marry - and P must have acted maliciously or wantonly. 5 or 6 states do not allow punitive damages. These minor outrages would otherwise not get to court because prosecuting attorneys are too busy or too poor to bring criminal actions.

Assault - act creating ~~immediate~~ immediate apprehension of immediate contact.

Threat - act creating apprehension of future contact. mere words - a mere preparation for future act - a question of immediateness of apprehension up to jury to draw line - see State v. Davis.

Intentional Infliction of Mental Suffering.

Lynch v Knight - H. of Lords, 1861, p. 289

Illustrates old view that wife had no rights against her husband except support. Now she may recover for alienation of affection or loss of consortium see 17 M. L. R. 93.

Where nothing happens as result of an act, but mental anxiety, or pain, the law cannot value it and will not give redress for it.

Wilkinson v Downton - Eng, 1897, p. 297

Johnson v Langston 167 Minn. 203

D, high school principal, accused 15 year old girl of sexual intercourse - charge untrue - took to news - girl has action for damages.

Barnett v Collector 1932 242 N.W. 25

La Halle Estienne College v Fogarty 1934 126 Me. 257

Kirby v Jewell Chain Store 1936 210 N.C. 808

In all 3, a creditor wrote extremely abusive language, threat of criminal prosecutions - etc. judgment for P in all cases - punitive damages too.

Senger v Herndon Miss. 1938 178 So. 86

Threats quoted P with insulting language P collects.

Intentional Infliction of Mental Suffering.

Lynch v Knight - H. of Lords, 1861, p. 289

Lynch v Knight, H. of Lords, 1861, p. 289

D told P's husband that P had been all but seduced before her marriage. Husband deserted P. P sues D for damages for causing loss of husband's society, aid, and affections. Judgment for P; affirmed by Exchequer Chamber, and appealed.

Held: Decision reversed. P has no action for loss of consortium of husband because damages are not recoverable for mental anxiety, loss of affection, etc, and she still is getting her support, the only damages in this case which could be measured.

The law cannot value it and will not give redress for it.

Wilkinson v Downton - Eng., 1897, p. 297

Wilkinson v Downton, Eng., 1897, p. 297

D, in a practical joke, told P that her husband was lying at an Inn with two broken legs and that he should go and fetch him home. The statement had serious physical consequences on her nervous system. She sues for damages and expenses.

Held: Judgment for P. Here is a case of an extreme, outrageous, ^{act} ~~intentional act~~ to inflict produce serious mental suffering, resulting in physical illness.

Kirby v Jewell Chain Store 210 N.C. 808

In all 3, a creditor wrote extremely abusive language, threat of criminal prosecutions - etc. Judgment for P in all cases - punitive damages too.

Senger v Henderson Miss. 1938 178 So. 86

Threats excited P with insulting language P collects.

Common cases are of R.R. employees treating passengers abusively.

Emble v De Lila 293 Fed. 17

House dick accuses hotel guests of not being married.

D trespasses on P's property. Cause (a tort) of action exists without use of mental anguish damages.

Landlord unjustifiably evicts tenants. Tort exists already under which mental anguish can be tacked on for damages.

22 M.L.R. 1030 - note on intentional infliction of mental injury which has been ^{unpermitted} 49 H.L.R. 1033 Prof. Moe Kunder article. Nicherson v Hodges. 134 La.

D buried stuff in P's backyard - she, thinking it was gold opened it in public and was greatly mortified she gets damages.

160 Md. 189 - butcher put rat in place of meat. Housewife got damages.

New tort - intentional infliction of mental suffering.

Assignment - 299, 20, 21, 926, 25, 26⁽²⁾, 28, 30, 31, 32, 33,

5 classes next week.

44, 45, 46, 47

Good
sources

Beed v Maly 115 Ky. 816

D invited P to have sexual intercourse with him, a comparative stranger.

No damage allowed

Cramer v Rixmeyer 159 Iowa 48

D called P over phone and swore at her.

No action.

111 So. C. 553

No recovery for profanity to one's face
Recovery limited to extreme, outrageous,
intentional acts to ^{inhibit} produce serious
mental suffering.

Bucknam v Great Northern R.R., 1899, p. 299

R.R. employee used violent language to P's husband in trying to expel him from a waiting room where he had a right to be. No damages allowed to P for the mental suffering and shock she incurred.

compare with Fort Worth R.R. v Bryant

210 S.W. 556 - Bryant swore ^{at} and insulted a father and 8 year old daughter in R.R. station. Both sued - daughter recovers - father not, because he is supposed to be toughened to it.

Lunderson v N. R. R. R. 88 Minn. 862

D's servant ^{politely but mistakenly} put small children off with the mother for having no tickets - No damages for mental suffering.

If minor claims are allowed, the disadvantages of allowing them will be greater than the advantages.

Suppose D beats P's child. Can P recover for mental anguish?

Renner v Canfield 36 Minn. 90

D shot dog, wrongfully, in street. P suffered shock while pregnant - she was out of sight at time. No recovery because no intent.

Lambert v Brewster 97 W. V. 124

Jones v Jones 47 Utah 536

- ① Suppose P suffers mental anguish as result of D's shooting P's child in front of her. Can she collect? Yes, in Lambert

& Brewster - made that to shoot child was a fiction of transfer of intent - of course of action from one person to another - wrong and that he is liable for all consequences which follow from the shooting.

- ② D flourished gun at P's father in front of a girl.

Held. D is liable because it is an act which is

substantially certain to result in mental harm to her
as treated as intentional wrong

Oct. 25

- ③ Hill v. Kimball - Texas - D attacked P's servant in front of P. P had miscarriages. P collected for negligence of D in committing the beating in her presence.

Goodrich 20 Mich. L.R. 497 "Physical Consequences of Emotional Disturbances."

The act must be something which would produce extreme emotional disturbance in a normal person.

Where you have severe emotional shocks you can almost always find physical consequences which follow from it.

Atchison R.R. v. McQuinn, Kansas, 1891, p. 20

No assault because no intent to injure - ~~or~~ there is no negligent assault.

Where D negligently frightens P, he is not liable for damages, unless we find rules later that says he is.

Summary of intentional infliction of mental anguish^{a new tort}.

Not assaults because no physical contact is intended or apprehended.

① Outrageous conduct - extreme practical jokes, insults etc.

as must be intentional or consequence substantially certain to follow.

- ③ Hill v Kimball - Texas - D attacked P's servant in front of P. P had micarriage. P collects for negligence of P in committing the beating in her presence.

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Summary of intentional infliction of mental anguish: a new tort

Atchison R. R. v McGinnis, Kansas, 1891, p. 20

P was thrown across the R. R. Car in which she was riding, due to the derailling of the train because of a switch having been negligently left open. In action for damages, P was awarded \$1000, including item of \$65 for peril and fright. R. R. appeals.

Held: Judgment of damages reduced, because one who is placed in peril by the negligence of another, who escapes without injury, may not recover damages simply because placed in a perilous position or for mere fright, unless injury results therefrom.

intact

el poses

intentionally

- b. Conduct must be outrageous & extreme.
- c. Must result in mental suffering of severe nature, resulting in severe physical consequences.
- d. The mental suffering must be reasonable under the circumstances.

If D actually does an act of outrageous character which is especially calculated to and does result in severe mental suffering, he is liable for a tort.

False Imprisonment

Bird v Jones. Eng. 1849, p. 21.

Bird v Jones, Eng. 1845, p. 21

P was walking over bridge, part of which was walled off for use as a gallery for spectators to watch a boat race. P tried to climb over fence, succeeded in doing so against D's protestations, but was prevented from going farther through the enclosure by two policemen upon D's request. Policemen told P he could go back and around the enclosure to proceed on his way but that he could not go on through the enclosure. D refused for some time and he claimed that he was falsely imprisoned during that time. Verdict for P. Defendant obtains rule nisi for new trial.

Held: Ruse absolute; new trial granted. Facts do not show there was imprisonment. There is partial obstruction and disturbance rather than total obstruction and detention. Imprisonment is the total restraint of a person's liberty--here P was free to go around the enclosure and go on his way. He picked the wrong action.

In this case, P brought wrong action. should have been case.

Cullen v Gorman 23 N.D. 27

In a lake state, girl collects for people not letting her in a beer joint when she was above minimum age.

Ashby v White K.B. 1703 p. 926

Ashby v White, K.B. 1703
A free burgess
privilege of voting for
a bailiff. He brings
judgment for defendant
Held: Judgment
for loss or damages
privilege of voting,
serve that privilege
legal right without a

Oct. 26

Mason v Washington Jockey Club.

35 D.C. App. 82 - P bought ticket to race.

FALSE IMPRISONMENT

Track admission - at the gate they refused
to let him in. False imprisonment? No.
He ^{lost} some action, like breach of contract.

Development of the action.

- ① first cases were for confinement in
a dungeon or locked room.
- ② since expanded to mean ^{complete} restraint upon
liberty of movement - not merely an obstruction.
- ③ the largest area in which there has
been conviction for false imprisonment
is a ⁱⁿ city of 30,000 people. There must be
a limitation somewhere but no case on
larger areas.

Slipshy v Tverin 269 Mass. 261

Held: false imprisonment in a moving car

Ashby v White K.B. 1703 p. 926

Ashby v White, K. B., 1703, p. 986

A free burgess of a corporation was denied his privilege of voting for his parliamentary representative by a bailiff. He brings action on the case against the bailiff. Judgment for defendant. Appeal.

Held: Judgment ~~for P.~~ Even though there is no pecuniary loss or damages to P, because of the denial of his privilege of voting, he is entitled to some action to preserve that privilege—and case is his proper remedy. No legal right without a remedy.

Oct. 26

FALSE IMPRISONMENT

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^{loss} He ~~has~~ some action, like breach of contract.

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Slipshod v Severn 269 Mass. 261

Held: false imprisonment in a moving car

Strawn v. Strawn 195 Ala. 414

D ~~unlawfully~~ ^{unlawfully} momentarily, locking P in a room etc. P may get nominal or punitive damages but not actual damages.

If a man is locked up, and he can get out only at risk of injury to his person, he has action of f.i.

Confinement

by force or threat of force.

215 Ala 116 - not f.i. to lock

one door of a factory, leaving another door open

169 S.W. 385 - crawling through sewer.

Restatement case: A locks door to Turkish bathroom - leaving only exit through ladies waiting room. - held - false imprisonment.

- ① complete confinement where one cannot get out without danger to life and limb, or without considerable inconvenience, or without high degree of unpleasantness.

Bruckhaber v. Stegeman, Mich., 1871, p. 26

You can imprison a man by threats of force, either by words or by menacing actions, and intimidation.

Do parties have to be in presence of each other? How about phone calls, saying 'you are under arrest'. Restatement says 'no'. Prosser wonders about it. No case.

unlawfully v. unlawfully
in fact I think it
was. mistake in
the word prison
unlawfully v. unlawfully
to the fact that
it is a mistake

Thorn v. Levin 195 Ala. 414

D imprisoned momentarily, locking P in a room etc. P may get nominal or punitive damages but not actual damages.

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Bruchhaber v. Stegeman, Mich., 1871, p. 26

Bruchhaber v. Stegeman Mich., 1871, p. 26

D told P they wished to take him to the police station, and he complied through fear, seeing clubs in their hands. D charges false imprisonment - Verdict for P. D excepts

to the charge that ^{imprisonment} ~~arrest~~ might exist without manual arrest.

Held: It is imprisonment. Verdict upheld.

Prosser wonders about it. No case.

Homer v Battyn. K.B., 1738 p.26.

Martin v Houch, N.C., 1906, p.26

We are not supposed to learn in this course when an arrest may be made.

- ① a private citizen may arrest upon suspicion of a felony - but he takes a chance - if there was no felony - he is liable.
- ② a police officer - on the other hand - does not have to take the chance.

We assume that the one who makes the arrest - does not have the legal power to do so.

✓ Aikens R.P.

Whitman 85 Kans. 150 - P slipped & broke leg in getting off train. Conductor told P he would have to stay on spot till he had signed complaint. Held: false imprisonment, because P was entreated to submit to asserted legal authority which did not exist.

✓ forget about it.

False arrest is just one kind of false imprisonment.

submitted & revised

*turns
are relevant
summary, or
first trial
in court
in turn
at all cost*

*well - interested
ought
should help for
no matter*

More threats plus
submission is enough

Homer v Battyn. K.B., 1738 p. 26.

Homer v Battyn K.B. 1738, p. 26

^{- false imprisonment}
arrest may be when D says, you are
under arrest - and P submits. ~~But~~
n. manual touching is necessary.
But if P does not

But mere words are not imprison-
ment unless there is submission
to the threats.

Martin v Hauch

You can have false imp. by assertion
of legal authority, which ^{is} submitted to,
when arrested has not the actual authority.

② a police officer - on the other hand - does not
have to take the lance.

Mere threats plus
submission is enough

We assume that the one who makes the
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^{✓ forget about it.}

False arrest is just one kind of false
imprisonment.

Stevens v O'Neill. N.Y. 1900 p. 28.

Jacques v Quincy Hall 244 Mass. 438.

P waited half hour while management investigated why he had only one meal check to pay when there were two people - Management had said, "Wait here". Would tone of voice of cashier, presence of other employees and their manner - have bearing on issue?

Held: a jury question - sufficient evidence on which a reasonable man might say there was threat of force.

Hunter v Warrent 158 L2 & 74

P voluntarily went with Policeman to show her innocence - no warrant for arrest - and no threat of force - Held: no f. imp. because no restraint against the will of P.

D says to P - "Come along or I'll hit you" - Permits. false imprisonment as matter of law.

D says "I have warrant. Come with me" - warrant false false imprisonment as matter of law.

D says, "Come and help me fix my bars, or I'll have you arrested next week (future time)" - Permits. no false imp.

D says to P, ^{warrant} "if you don't let this up reach your room, I'll fine you." no false imprisonment.

Confinement against
P's will - actual
resistance need not
be shown.

Threats of future force
or of economic distress
not enough to amount
to F.I. even if submitted to.

Stevens v O'Neill, N. Y. 1900 p. 28.

Stevens v O'Neill, N. Y., 1900, p. 28.

Action for damages for false imprisonment; general denial; verdict for P; appeal. P was looking at watches at department store when clerk noticed one missing. Detective told P she was to be searched, and P submitted, going, without physical resistance, to an upstairs room where she was searched. Questions: was evidence sufficient to justify jury in finding false imprisonment and was judge's charge correct? Held: Judgment affirmed. Although there must be a detention against the will in order that there might be a recovery, P does not have to have actually resisted to show that the detention was against her will. The circumstances may show that she was up against a superior force against which resistance would be folly, and that she submitted against her will in response to ~~the~~ implied threat that, if she did not, she would be forced to.

O.T. 28

Confinement of
P's will - actual
resistance need not
be shown.

and no threat of force - Held: no f. imp. because
no restraint against the will of P.

D says to P - "Come along or I'll hit you" - P submits.
false imprisonment as matter of law.

D says "I have warrant. Come with me" - warrant false
false imprisonment as matter of law.

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D says, "Come and help me fix my bars, or I'll have you
arrested next week (future time) - P submits. no false imp.

D says to P, ^{arrest} if you don't let this up reach your room,
I'll fine you." no false imprisonment.

Implied threat of force
is enough

Where there is an implied threat of physical force or of legal authority, ^{assertion} on the same against a close relative, and P submits - you have either false imprisonment as matter of law - (where it would be clear to a reasonable man that

or you have a jury question.

But in cases where there is threat of a lawsuit, of non-payment of obligations, of destruction of property, of discharge, and other forms of economic and moral duress, the law will not recognize this pressure as a cause for false imprisonment.

False imprisonment - The restraint of freedom of movement by the threat of physical force or by assertion of unwarranted legal authority.

Durgin v. Cohen, Minn., 1926, p. 30

Not a jury question, because no evidence that P was restrained from moving. Prosser says it might have been left to jury.

Wiles v. H.P. Co. Wis. 554 - 208 N.W. 599

D called employee into office and questioned her for 2 hours - she asked to go out - he said no - but the door was unlocked and there was no physical force or threat of force.

Implied threat of force

is enough

Where there is an implied threat of physical force ^{assertion} or of legal authority, on the same against a close relative, and P submits - you have either false imprisonment as matter of law - (where

Durgin v Cohen Minn., 1926, p. 30.

Instructed verdict for D in an action for damages for false imprisonment; appeal. D, with two court officers, went to P's apartment at three in the afternoon to recover a diamond ring under a replevin paper. She asked men to wait while she dressed, and then they stood around her for about 21 minutes, questioning her about the diamond ring which she claimed she did not have. Officers used some rather intimidating language, such as "We want you", and come across with that ring", but there were no words or actions indicating that she had to stay where she was or to otherwise hinder her freedom. Held: on question whether a jury could properly find there had been unlawful restraint on her personal liberty of movement? No. Order affirmed. She was not arrested or deprived of liberty or freedom of action by either force or threats.

threat
by
age, and
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this
must

Definition

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Not a jury question, because no evidence that P was restrained from moving. Prosser says it might have been left to jury.

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Wis. 554 - 208 N.W. 549

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no f.i.m.p.

Whittaker v Sanford, Maine, 1912, p. 31

This is a case where non-action constituted false imprisonment, where D ^(arising out of a contract) had a duty (a legal obligation to do something for someone else) and failed to discharge the duty. When have you got a duty?

If D is ^{already} otherwise under a legal duty to release a person from confinement it may be considered false imprisonment if he, at least intentionally, fails to do so.

We do not know yet when you have the obligation
Hend v Ureidale Co. 1913 Eng. Rep. 3 K.B. 771

1915 A.C. 67

P, a miner, by terms of employment was not to come up till 4 P.M. at bottom, he refused to work and ^{wrongly} demanded to be brought up. ^{No emergency.} Hoist in use till 1 P.M. He was not brought up till 1:30. Action for false imprisonment. Liability depends on obligation of D to bring him up. Held: no legal obligation

Spencer v Spooner 12 Met. Mass. 281

P, capt. went on vessel to get criminal, looked for him long time. P told D to get off and gave him plenty of time. P finally set sails taking policeman along. Held: no false imprisonment.

Breach of duty to release from confinement may be F.I.

Whittaker v Sanford, Maine, 1912, p. 31

Whittaker v Sanford, Maine, 1912, p. 31

P was in a religious colony in Jaffa, and wanted to quit and go back to America. D, the leader of the sect, offered to take her back on the sect's yacht, instead of going by steamer, and promised that she would not be detained after they reached port. She was prevented for one month after reaching port in Maine, from leaving the yacht, in that D refused to grant her use of one of rowboats, there being no other way for her to get to shore. Held: Jury may well find this false imprisonment for detention against the will of P. D had the means to give her release from her confinement and in violation of his duty, refused to use it. Though there was no physical touching, there was restraint.

Breach of duty to
release from confinement
may be F.I.

if he, at least intentionally, fails to do so.
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P, cop, went on vessel to get criminal, looked for him long time. P told D to get off and gave him plenty of time. P finally set sails taking prisoner along. Held: no false imprisonment.

Oct. 29

Talcott v National Exhibition Co., N.Y., 1911, p. 32.

What is the source of D's duty?

A owns lake and an island. B swims to island, breaks leg, calls to A to come and get him. Is A under duty to get him - and if he doesn't do it - is his non-action false imprisonment?

see 7 So. Cal. L.R. 102 on obligation to release one from confinement.

Herring v Boyle, Exchequer, 1834, p. 53

A locks door on B who is sleeping and then he unlocks door before B wakes up. No false imprisonment.

A calls B into office to explain a shortage of accounts and has policeman lock them in. B explains all right and upon a buzzer from A, he is allowed to leave without knowing anything about locked door.

Restatement. sec. 42: person must be conscious that he is being restrained.

There is later dictum to the contrary and Salmon takes this view.

Oct. 29

Talcott v National Exhibition Co., N. Y., 1911, p. 32.Talcott v National Exhibition Co., N. Y., 1911, p. 32

Appeal from judgment of \$500 for P in action of false imprisonment. P went into a ticket selling enclosure at the ball park. Failing to get a ticket, he tried to get out again, but the mass of people pouring in through the gates kept him and others from so doing. D's servants prevented P and others from trying to buck the crowd to get out, and only after one hour pointed out another existing means of exit. Held: Judgment affirmed. Even though the preventing of P's going out the gates was justifiable as a police measure, D's servants owed an active duty to point out other existing means of egress.

release one from confinement.

Herring v Boyle, Exchequer, 1834, p. 53Herring v Boyle, Exchequer, 1834, p. 53

P's mother went to get him, a child of 10 years, to take him home from the boarding school for the holidays. D, the schoolmaster, refused to let him go, until an alleged bill was paid, or until compelled by habeas corpus to give him up. Boy detained 17 days. Action in trespass for assault and false imprisonment was non-suited. ^{Dismissal now} Rule to set aside the non-suit. Held: Rule discharged; non-suit upheld. There is no restraint against the boy's will, because the boy did not know he was being detained and no evidence is shown that he was kept against his will. It was against his mother's will, but her will is not his.

locked door.

Restatement. Sec. 42: P must be conscious that he is being restrained.

There is later dictum to the contrary and Salmon takes this view.

Summary on false imprisonment.

A tort which arose out of action of
tortfeasor.

Does not ~~rest~~ ^{rest} on contact or
apprehension thereof.

Does rest on restraint of freedom of
movement.

Elements of false imprisonment

① Confinement - restraint of freedom of
movement - must be general. no
reasonable means of escape left open or
distinct from mere ^{partial} obstruction of
one way of moving. Brid v. Jones. This
may be a fairly large territory - even up
to a city. A means of escape is not
reasonable if it involves danger ^① to
the escapee ^② or others, or if it involves
destruction of property, or if it is confinement
to which a reasonable ^③ ~~man~~ ^{man} would not submit.

x Confinement may be by physical ^④ ~~if submitted to~~
force, or a threat thereof, or by sub-
mission to legal authority ^⑤. Beyond
these forms of duress, the courts shy away
from other forms of pressure - ~~social~~ ^{moral} and
economic under which submission to confinement is
~~obvious~~

Summary

② Knowledge on part of P that he is confined. This is disputed by some authorities - but the Restatement takes this view.

③ Intention to confine P - or the breach of a legal duty to release P from confinement (Whittaker v Sanford Talcott & Mails Exhibition Co.)

[Confinement by negligent acts is not false imprisonment]. There is an action for negligence, if there are actual damages.

Note that there are cases where P has a privilege to confine P.

(a) arrest with warrant -

(b) holding of a burglar till an officer arrives ^{action without legal warrant.}

1. false imprisonment - arrest & confinement

2. malicious prosecution - use of legal process for malicious purposes - the arrest and the warrant are proper, but were obtained without good cause or under false pretences
termination in favor of P.

malice

without probable cause

Consent

Christopherson v Bore, Queen's Bench, 1848, p. 44.

compare with Hibdon v Pepper p. 1
 or battery or false imp. or trespass to land or goods.
No assault if P consents.

"The absence of consent is a part of the definition of assault and battery" - Holmes.
 "Volenti non fit injuria" - to one who consents, there is no injury.

O'Brien v Cunard Steamship Co, Mass., 1891, p. 45.

No reasonable man could find that there was evidence to show no consent. - this is meaning of directed verdict. Consent may be by words, or by conduct which would lead reasonable man to believe consent had been given. Note there may be submission under threat without consent being given - submission under realization that resistance would be useless.

McKee v Katz, U.S. Sup. Ct., 1922, p. 46.

consent may be implied from the customs of the community, where ^{indication} there is no express evidence to contrary.

Consent

Christopherson v Bare, Queen's Bench, 1848, p. 44.Christopherson v Bare, Queen's Bench, 1848, p. 44

Declaration charged D assaulted and imprisoned P against his will. Plea in confession and avoidance that D did commit the assault and imprisonment but that he did it at the leave and license of P. Demurrer.

Held: Judgment for P. D pled incorrectly. You cannot ~~plead confession and avoidance to an assault charge, on grounds of consent~~ because when you admit the assault, you admit that it was done against P's will, for that is what an assault is.

D should have pled not guilty, and then he might have shown that the act was committed in course of sport and was by the plaintiff's leave. Could he have demurred, saying, I admit the act, but it is not an assault action because done with permission? Yes.

O'Brien v Cunard Steamship Co, Mass., 1891, p. 45.

No reasonable man could find that there was evidence to show no consent - this is meaning of directed verdict. Consent may be by words, or by conduct which would lead reasonable man to believe consent had been given. Note there may be submission under threat without consent being given - submission under realization that resistance would be useless.

McKee v Katz, U.S. Sup. Ct., 1922, p. 46.

Consent may be implied from the customs of the community, where there is no express ^{indication} evidence to contrary.

It is a jury question, whether the customs of the community allow D to gather mussel shells

Suppose D goes on land which has "No trespassing sign" on it but which he does not see. No cases on it

47, 51, 52, 54, 57

Nov. 1

Mohr v Williams, Minn. 1905, p. 47

Verdict for P - damages - \$14,322

D moves for {1. Judgment notwithstanding verdict. Denied
2. New trial - Granted.

D appeals from ^{denied} first order.

Issue: was order denying motion for judgment for D notwithstanding verdict correct? This depends on whether there is enough evidence upon which reasonable men might differ.

Court held there was; that it was a jury question.

P then appealed from order granting new trial and was thrown out. P gets nominal damages in the end. ^{for technical battery}

Benson v Paronette 83 N.J.L. 20

D operated, with consent, on rupture on right side - found also a serious rupture on left side and operated on it. Not an emergency because patient would not have died if he had not operated but an operation would have been necessary soon. Held: consent implied, no battery

Mohr v Williams. D operated on P to which operation was under anesthesia. Action for shape. Appeal for notwithstanding verdict (2) if not given action will lie. Held: Orders cannot be implied. Discovery of complication in operation consented to by physician was not negligence, because he was a battery, the full act. In criminal act.

It is a jury question, whether
the customs of the community allow
D to go to gather mussel shells

Suppose D goes on land which
has "No trespassing sign" on it but
which he does not see. No cases on it

47, 51, 52, 54, 57

Nov. 1

Mohr v Williams, Minn., 1905, p. 47

Mohr v Williams, Minn., 1905, p. 47

D operated on P's left ear instead of her right ear,
to which operation she had consented, because when she
was under anesthetic, he found left ear to be in worse
shape. Action for damages by assault and battery. Verdict
for P. Appeal from order denying motion for judgment
notwithstanding verdict on grounds that (1) consent was
given (2) if not given, it was not necessary, (3) and no
action will lie because no malice, intent or negligence.

Held: Orders affirmed. Consent is necessary—it
cannot be implied because there is no emergency or no
discovery of complicated conditions during the course of
an operation consented to. The fact that her family
physician was present and knew of the change in operations
did not make unnecessary the giving of P's consent. Act
was a battery, though there was no malicious intent nor
negligence, because it was a violent, unauthorized, wrong-
ful act. In criminal cases there would have to be consent
intent.

D operated, with consent, on rupture
on right side - found also a serious rupture
on left side and operated on it. Not an emergency
because patient would not have died if he had
not operated but an operation would have been
necessary soon. Held: consent implied, no battery

King v Kearney. 85 OK 12. 62

Consent to a particular operation implies consent to all necessary fixing-up which Dr. discovers in the course of operation.

Hill v Selley 125 Oregon 587

P agreed to blood test. D punctured spine - to test spine fluid - battery.

— P agreed to operation on nasal septum. D. took out tonsils, too. Held. battery - consent to one operation is not consent to the other.

— v — 211 N.Y. 125

P consented to examination of stomach, underneath, with understanding that that was to be all. D took out tumor. Held. battery.

Consent to one operation is not consent to an essentially different operation

as to what reasonable men would believe the patient had consented to, is a matter which ^{upon evidence} should be left to jury. That is what Mohr v Williams decided.

Luke v Lowry. 171 Mich 122

P run over by train - foot crushed.

Surgeon amputated foot - P was unconscious and rapidly bleeding to death. Held: Consent can be assumed in emergency, but leave it to jury.

but not for assault
and battery

If doctor is negligent, careless, or unskillful, he may still be liable even if he has ^{obtained} consent.

Bartell v State Wis., 1900, p. 51

but as

Hill consented to every act done. medical treatment not as entertainment for D.

1 At. 2nd 501 - D posed as a doctor

in making an indecent physical exam of a woman with a wooden leg - when he was a D.D. not as M.D. Held: guilty

A gives B poisoned candy. Does B consent to eat poisoned candy? fracture of foot

you need knowledge of on the part of A; ignorance on part of B; and some false representations on which B relied.

State v Langford 102 At. 63 (D)

A consents to intercourse - not knowing B had venereal disease. B is liable.

Crowell v Crowell 181 N.C. 518 185 F. 206

A consents to intercourse with B believing "mock marriage" him to be husband - he was not. Held: guilty

Blossom v. 37 N.Y. 434

In Minn. a man cannot sue his wife and vice versa for personal tort

46 Mich. 160 - A, doctor, brought B, a stranger along to see childbirth. B allowed A to hold her hands under belief he was a doc. she collected from doc. agency ^{relative}

*but not for assault
and battery*

If doctor is negligent, careless, or unskillful, he may still be liable ^{obtained} even if he has consent.

Bartell v State Wis., 1900, p. 51

Bartell v State, Wis., 1900, p. 51

Appeal on error from conviction for assault and battery D, a massage magnetic healer, induced PW, to remove all clothing in order to have massage treatment. Charge to jury was that if D fraudulently caused the girl needlessly (without reasonable necessity) to expose herself to his view for his lewd personal gratification, and she submitted because of her ignorance, and under those circumstances and for such purpose, he secured the opportunity of laying his hands on her body, he was guilty of the offense of assault and battery.

Held: Affirmed. Correct charge. Implied consent obtained by fraud.

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44 R.I. 494 - consent to fight a man with fists is not consent to fight against a knife.

Oberlin v. Osborn 84 Ohio State 411

A consents to intercourse under promise of marriage. Held: no cause of action. Rule good in Minn. There are other remedies however.

Note distinction between fraud as to the nature of the act - and fraud as to some collateral matter (inducement to indulge in the act) ex: counterfeit \$10 Bill - promise to marry. The latter kind of fraud does not vitiate the consent.

When you consent to an act, you cannot object for unforeseen consequences.

But if D does act of substantially different character from the act consented to - D is liable.

Stout v. Wrenn, N. C., 1821, p. 52

- ① 60 Tex. 168 - drunk's consent is no consent.
- ② Idiot is incapable of consent, and D is liable if he knows it. Children's consent may not be consent - depending on nature of act and other considerations.

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Stout v Wrenn, N. C., 1821, p. 52

P and D agreed to fight. P beat up D, who was drunk. Instructions on suit for damages: If P was too intoxicated to know what he was doing, he should recover, but if he was not ignorant of what he was about, he is not entitled to recover, having consented to fight. Judgment on verdict for D. Appeal

Held: New trial. Charge on matter of intoxication was correct, but charge on freedom from liability if P was sober in giving assent is wrong. If one license another to beat him, such license is void, because the act consented to is a breach of the peace. (a crime)

Bohlen; also Restatement: 11 states (a majority of cases) hold that consent to an assault and battery does not prevent liability even if it is also a breach of the peace. This is the majority American view, but Bohlen says it is unwise, based on slim precedent, and not logical. The rule as given in the Stout v Wrenn case is what the majority of cases hold, but which Bohlen think s unwise.

Stout v Wrenn, N. C., 1821, p. 52

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- ② Idiot is incapable of consent, & P
- ③ is liable if he knows it. Children's consent
may not be consent - depending on nature of act and other considerations.

Assault
+ liable
despite consent
where act is
a breach of peace

assault
not liable
is

Galbraith v Fleming, Mich., 1886, p. 54.

In some cases the consent of the parties will keep act from being a crime. (Trespass on land), but in most cases, such consent does not bar criminal action.

How about consent in fights as affecting or barring civil actions?

The numerical weight of authority is with the rule in Stout versus Wrenn. The later cases, however, tend to favor the minority rule as in Galbraith v Fleming case, which states that consent to a crime is still effective as consent in preventing civil recovery.

The reason for the adoption of the majority rule is historical. Before 1694, the action of trespass had both civil and criminal aspects and, in order to protect the interests of the state, the courts held that even if D consented to, he could sue in trespass ^{as state could indict.}

22 Minn L.R. 546 for consent cases - no cases

in Minn. - probably take Bohlen's view.

Galbraith v Fleming,
P and D quarrel
entering into it volun-
tarily and battery.
Held: Affirmed.
consent in a fight
regardless of the fact
breach of the peace.

Nov. 5

assaulters not liable if consent is given even though act is breach of peace.

Galbraith v Fleming, Mich., 1886, p. 54.

Galbraith V Fleming, Mich., 1886, p. 54

P and D quarrelled and got in a fight, both of them entering into it voluntarily. Action in trespass for assault and battery. Appeal from judgment for D.

Held: Affirmed. P cannot collect for injuries sustained in a fight which he voluntarily entered into, regardless of the fact that the act complained of was a breach of the peace.

Nov. 5

as affecting or barring civil actions?

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22 Minn L.R. 546 for recent cases - no cases in Minn. - probably take Bobbin's view.

Haither v Meacham, Ala., 1926, p. 54

Martin v B-Line Bus Co. 265 N.Y. by. 284

Hold that girl in similar situation cannot collect in civil action. But weight of authority is with Haither. Where a statute makes it a crime to have carnal knowledge of a girl under a certain age, the girl cannot collect in tort. ^{even though defendant} ~~is innocent~~.

83 Minn. 78 for dicta

Sec. 61 of Restatement. compare with Sec. 60

seduction

Woman over age of consent cannot collect for seduction (intercourse with consent) ^{obtained by trick or artifice} under common law.

Oberlin v Upton. 84 This 111 leading Am. case Minn. is in accord. 98 Minn. 475

But common law began to give an action to woman's father for loss of her services - a form of trespass - but he must prove loss of actual services in England. In America, he was allowed to collect for all sorts of things besides loss of services - plus punitive damages. Some loss of services was assumed in every seduction case Sec. 9171 of Minn. Stat. "Father may

Gettner v Meacham, Ala., 1926
Civil suit for damages
15 years of age in a state where
for criminal prosecutions, the
sented. Judgment for P. App.
Held: Affirmed. D is I
suit without regard to any du
by law a girl under 16 is inco
to illicit intercourse.

Gaither v Meacham, Ala., 1926, p. 54

Gaither V Meacham, Ala., 1926, p. 54

Civil suit for damages for intercourse with a girl 15 year of age in a state where the age of consent is 16 for criminal prosecutions, the girl having allegedly consented. Judgment for P. Appeal.

Held: Affirmed. D is liable for damages in a civil suit without regard to any question of consent, because by law a girl under 16 is incapable of giving consent to illicit intercourse. *in criminal law*

certain age, the girl can collect in tort.
even though ^{no} ~~sub~~ ^{fact} ~~consent~~ ^{consent}
83 Minn. 78 for dicta

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Sec. 9171 of Minn. Stat. "Father may

maintain action though there is no loss of service. Held: not to apply where girl is not member of father's household.

Cal. & Iowa give woman action for her own seduction.

10 Minn. L.R. 631

12 " " " 190

Present trend is away from these actions for seduction. N.Y., Indiana and others have anti-heart balm statutes - ~~present~~ abolished actions for seduction and breach of promise, criminal conversation, etc., alienation of affections.

Nov. 12

Other remedies for seduction

1. Criminal

a. rape

b. carnal knowledge of girl under age of consent

c. seduction under promise of marriage ^(some states)

2. Bastardy or filiation statutes

a. woman may have it judicially determined who is father of bastard and get order to support child. (quasi-criminal procedure)

If he doesn't pay, he can be jailed for contempt.

3. Sec. 10125 - age of consent statutes in Minn.
 graduated punishment by age of girl.
 under 10; 10-14; 14-18.

Consent Many states say that where there
 is consent to a criminal act there is
~~no consent~~ ~~no consent~~ consent

But the other view is growing that
consent to a criminal act will prevent
recovery. But even these states regard
 consent ~~for~~ by certain classes as no consent.

1. consent to intercourse by girl under age.
2. consent of children to work around dangerous
 machinery.

See Sec. 61 of the statement.

Why does criminal rule of no con-
 sent by girl under age - apply to
 civil action? Question left open.

abortion - Woman who consents to criminal
 abortion cannot collect from doctor,
 because she is as much at fault.

259 Mass. 518 - Liberty v. Kaulin
 31 Pac II 273 - Nash v. Meyer
 54 Pac II 666 - Bohlan v. Sanford } majority
 view.

110 Ohio 381 - Milliken v. Hoffman.

↑
 holds opposite view - she can collect

Abortion statutes are held not to be for protection of woman but in social interest in the birth of the child.

Reid v Mitchell, Scotland, 1885, p. 57

Scotch cases may be based on civil of a Roman law. This case is not.

If P had consented to roughhouse, he would have to take consequences. He does not consent to very foul play.

110 Mass. 53 Fitzgerald v Haven

208 Ala. 492 Mc Adams v Windsor

no collection for hard blow in boxing match.

The tough cases are those acts which are against the rules of the game
 Sec. 67 Restatement - "no consent to violence different in character from that permitted by rules of games."
 slugging and clipping ^{probably not} actions are possible.
 no cases on these questions.

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Reid v Mitchell, Scotland, 1885, p. 57

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D and P and others were building a straw stack. P was arranging the straw and the others were trampling it down and having a good time jostling each other around in the straw. D, trying to get P into the fun, caught him off balance and knocked him off the stack from which he lit on his head and was severely injured. P sued for damages; Sheriff's substitute held D liable because he was at fault. On appeal, Sheriff held D not liable because the infliction of the injury was not intentional and D was not at fault. Appeal.

Held: Sheriff's substitute's decision upheld. D is liable because P did not engage in the jostling; he was working and should not have to stand the risk of injury.

It cannot be presumed that he consented to take risk through engaging in game.

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Self Defence

Unknown to common law as late as 1319.

Self defence is a privilege - that is an act which otherwise would be actionable but which is justifiable. At first, this privilege was granted only in most extreme cases - where D was about to be killed. Rule early laid down that if he can reasonably escape he must do so - this still goes in homicide - you cannot ^{justifiably} kill a man if you can still retreat. The rule in criminal law goes for torts. We deal with injuries short of killing.

Germolus v Saucier, Minn. 1901, p. 62

Suppose B strikes C with cane. C injures cane. Has C privilege of beating B with cane. No (this case)

Suppose boy hits B with snowball. B is not privileged to chase boy and grab him.

Privilege of self defence extends only to that which appears reasonably necessary to avert injury. and only reasonably force may be used.

Opinion of Grey's Inn v. If A assaults B, it is possible to escape with his life for A to give him a blow.

Brown v. U.S., 1901, p. 62. Appeal from conviction. Assaulted D, so D had advanced upon D, he retreated. Instruction: D is not to great danger, D is not to great danger. Held: Reversed. If self in imminent danger of attack, he may stand and assault, he has not exhausted to consider: 1. Where the attack 2. Character of the

Germolus v Saucier, Minn. Appeal from civil judgment. After calling D over to him, D seized the heavy end of the stock, and claimed self defence. Co. to be allowed, D must show necessity for his self-protected. Order affirmed. Held: Order correct in that there is no necessity to do the act - it is not necessary to use force or apparent necessity in self defence - that there was no reasonableness that he had been distressed.

Self Defence

Unknown to common law as late as 1319.

Self defence is a similar thing

Chapleyn of Grey's Inn v, Exchequer, 1400, p. 60

If A assault B, it not lawful for B to beat A, if he could escape with his life. But B does not have to wait for A to give him a blow.

Brown v U. S., 1921, p. 61

Appeal from conviction of murder. Deceased had twice assaulted D, so D had pistol handy. When deceased advanced upon D, he retreated to where his gun was and killed deceased. Instruction: that if retreat is not subject to great danger, D is obliged to retreat and not retaliate.

Held: Reversed. If a man reasonably believes himself in imminent danger of great bodily harm from his attacker, he may stand his ground and if he kills his assailant, he has not exceeded the bounds of self defense.

Factors to consider:

1. Where the attack is made.
2. Character of the weapon used in self defense.

Germolus v Sausser, Minn., 1901, p. 62

Germolus v Sausser, Minn., 1901, p. 62

Appeal from civil judgment for assault and battery. After calling D over to him, P hit D on the arm with his horse whip. D seized the whip and hit P on the head with the heavy end of the stock, inflicting serious injuries. D claimed self defense. Court charged that for self-defense to be allowed, D must show that his acts were actually necessary for his self-protection.

Held: Order affirmed. Although the charge was not quite correct in that there does not have to be actual necessity to do the act—it is sufficient if there is a real or apparent necessity in eyes of a reasonable man to use force in self defense—the facts of this case show that there was no reasonable necessity to knock P down after he had been disarmed.

as to what is reasonably necessary
for defence, it is up to jury.

82 Ala. 291, Thomason v. Key.

"if big man attacks little man, little
man may be justified in using ^{as a factor} a knife
to defend himself. Comparative strength ^{is a factor} ~~is a factor~~

Ogden v. Claycomb, Ill. 1861, p. 67

1. If P uses more force than is reasonably necessary, he is liable.
2. No accusation - no mere words - however abusive - ^{can} ~~cannot~~ justify use of force to defend himself against words.

52 Minn. 92 Crosby v. Humphrey

directed verdict for P, where D upon provocation of words only, shoved P over backwards.
(provocation)

The words may have effect, however, ^(all courts agree) in determining punitive damages.

The provocation may have effect in reducing compensatory damages (This is only a minority opinion) Majority of courts hold other way - with no Minn. case.

Plaintiff always recovers nominal damages regardless of provocation.

3. Threats of injury in future will not justify use of force in self defence.

4. Previous beatings do not justify self-defense until D starts his attack.

But 5. Words may color acts so as to make them sufficient provocation where they otherwise ^{would not be}

Hulsey v. Tombs. 44 Ill. App. 490

D reached for his pocket after having previously made threats. If D believes reasonably that P was reaching for a gun, he is not liable.

Courvoisier v. Raymond, Colo. 1896, p. 65

Crabtree v. Dawson 119 Ky 148

B, owner of dancehall, threw drunk out. Was told that drunk was collecting bribes outside; he went out on porch; P runs onto porch going to dance; D, thinking him the drunk, hit him. It was a reasonable mistake - not much time available for ascertaining identity.

A mistakes B for friend. Slaps him on back. B is man with boil on back.

A is liable.

Interest of self-protection is socially important enough, so that liability is lifted for injuries inflicted by one reasonably defending himself even mistakenly.

Convoisier v Raymond, Colo. 1896, p. 65
Appeal from civil jury
battery. D pleads self-defense
and a riot occurred outside
which P was assaulted with
saw a man emerge from crowd
he had to his hip pocket
to be a police officer. D
assaulting D when D shot
Held: Reversed. The
al charge to jury, that if
lead D to believe that he
not liable. The jury would
whether D would have been
the rioters and if so, (S)
identity of the cop was ex-

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Courvoisier v Raymond, Colo., 1896, p. 65

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Appeal from civil judgment for P for assault and battery. D pleads self-defense. P's house was invaded and a riot occurred outside his house at night, during which P was assailed with stones and other missiles. P saw a man emerge from crowd and advance toward him, putting his hand to his hip pocket. P shot him and he turned out to be a police officer. Court charged; if P was not assaulting D when D shot him, D is liable.

Held: Reversed. There should have been an additional charge to jury, that if circumstances would reasonably lead D to believe that he was in imminent danger, he is not liable. The jury would then have to determine (1) whether D would have been justified in shooting one of the rioters and if so, (2) whether his mistake as to the identity of the cop was excusable.

A is liable.

Interest of self-protection is socially important enough, so that liability is lifted for injuries inflicted by one reasonably defending himself even mistakenly.

Morris v Platt, Conn., 1864, p. 67

Privilege extends not only to mistakes but to accidental injuries inflicted in course of self defense.

Frew v Teagarden, Kansas, 1922, p. 69

Originally, privilege of going to defense of others was limited to members of head of family's household. Later extended to any relations of family, servant, employee etc.

Present trend to extend privilege to all cases where the social and moral point of view of the community regards it necessary and desirable.

State v Warwick 193 Iowa 639

auto driver privileged to protect guests in his car - merely

Sec. 76 Restatement.

Johnson - says any man may defend any man

71, 75, 76, 77, 85, 87, 97, 99

In criminal law, we will see that a person has a right to intervene to prevent a felony.

Morris v Platt, Conn., 1864, p. 67

Morris v Platt, Conn., 1864, p. 67

D shot P, a bystander, accidentally—not negligently—when he was justifiably shooting in self-defense at some attackers. Held: Not liable.

69

Frew v Teagarden, Kansas, 1922, p. 69.

P came to field where X was working and called him vile names and struck him. X was a relative by marriage and an employee of D. D after warning P struck him in the arm with the broadside of a pitchfork as P was again striking X. Judgment for P getting damages against D. Appeal

Held: Reversed. Instructions were in error.

Force may be used reasonably by TP to prevent an ordinary assault and battery. Reasonable force should be determined by what reasonably seemed necessary to D to prevent the assault. A master may use force in defense of his servant, and a relative may defend his relative. The person who interferes to defend one whom he has the right to defend may go to the same extent that the defended party would be entitled to go in the defense of himself.

State v Warwick 193 Iowa 639

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Nov. 18

Suppose ^C intervenes where there was
^{only appearance} ^{minority rule}
 no necessity. (C takes the risk that there
 was a necessity). C had some rights to
 defend B as B has himself - B can make mistake - C too.
 Restatement - Sec. 76 agrees - no set rule either
 way.

Defence of One's Property from Wrongful Intrusion.

McAlvey v Cochran, Ky., 1820, p. 71

D wanted instruction: if jury believed
 he acted ^{only} in defence of his property, he was
 not liable. Court refused and charged:
 that if he used unreasonable force he
 was guilty. Whether the force was unreasonable
 is a jury question.

A man is justified in using force
 (legal permission)
 in defence of his property - but not too
 much force. Can he use as much force
 as in defending his person? No - the

you can use reasonable force to prevent
or terminate injury to either chattels or
land.

What constitutes reasonable force
 is a jury question - decided on the circumstances
 of each case.

Rules of law setting bounds of reasonableness

1. D is not privileged to use force sufficient to cause death or serious bodily harm to protect his mere property.

It is only where intruder threatens death or serious bodily harm to D that he may use such drastic measures in return.

But if D attempts to put P off by using reasonable force and then P pulls knife or otherwise threatens serious harm, you then may inflict serious harm on him.

D, hearing noise in house at night, takes gun, catches burglar in act, and kills him to pieces. Depends on how much force you can use to prevent felony. Rule seems to be that it must be reasonably necessary to shoot burglar, ^{your} but to protect his personal safety, but jury usually finds that a burglar at night in one's house means threat of serious bodily harm.

2. If P is not hurting ^{P's} ~~your~~ property - only ^{peaceably} ~~being~~ ^{not} on premises, D is ordinarily justified in laying a hand on him, till he tells him to get off and he doesn't. Exception: where P has been told before, and it is reasonable to assume that he won't comply with request by words. If there is a sign "Keep Off", you still must ask him to get off before hitting him.

3. If P is proceeding forcefully - violently, D does not have to ask him to get off.

Austin v Metropolitan Life, Washington, 1919, p. 75
licensee - one who is on D's premises with D's permission.

Here D terminated the license (correctly) and P thus became trespasser. If P won't get off the property, D may use reasonable force to get him off.

see talman v Smith, p. 8

106 Mass. 100 Holmes v —

P was on train without ticket. Refused to get off. Trainmen threw him off after he resisted forcefully. any question whether force used was reasonable.

argument 81, 100, 103, 106, 109 read but we will not discuss them

Assignment

do

76, 77, 85, 87, 97, 99.

and.

81, 100, 103, 106, 109 - not to be discussed in class.

do

(2)

144 (get 2nd one cold, 151, ^{wait on these} 152, 154, 156, 157, 158, 159, 161, 162, 163, 165] 310, 312, 316, 322, 324, 326, 328, 330, 341, 343.

Aneteth v Buffalo R.R., 1895, N.Y., p. 76

A question for the jury.

Appellate court gives benefit of ^{judge} doubt to decision of trial court where a fact is missing in the record. (gesture in this case) is assumed to be a ^{constituting assault} violent, frightening gesture which causes P to fall off car. Held to be unreasonable force to throw a hitch-hiker off a moving vehicle. O must endure the trespass till he can get off with safety. Deane v Flatau 100 Minn 299

at
P, traveling salesman, stopped farmhouse for dinner - suffered sickness - asked to stay over night - refused - farmer carried him out to sleigh - and started off towards town - P was almost unconscious. Held: You cannot put man out of house or off property if it will endanger his life or safety.
152 Minn. 18 Fischer v Burt

see next page

P. member of family of jointer, got an illness a very serious and contagious disease; and owner of building put her out - and she walked to hospital - he put her out to protect himself and other tenants from infection; Held: Owner was justified.

Brid v Holbrook, Common Pleas, 1828, p. 77

Unreasonable force to protect property. One cannot do by mechanical device, indirectly, what he cannot do directly.

Plot v Wilkes 3 B and Ald. 384.
seriously harm threatened.

Spring-guns in woods - P, a poacher, was shot. Was not allowed to recover. This decision caused such a furor that a statute was passed - making the setting of spring-guns a misdemeanor. So held in America, too, even if trespasser is ~~wounded~~ ^{wounded}. Same thing for dangerous dogs.

Bodley v Burns 35 Yale L. J. 527

Suppose P is not merely a trespasser but a thief. D is not privileged to harm seriously or kill to prevent mere theft. Poulter case 4a. 140 So. 425

Set gun for stolen thief - killed him. Held: guilty of manslaughter.

Wheat v. Paul

Nov 9

What is the rule
that a person
is privileged to prevent a felony.
Burglary in a dwelling house is a
felony. D can shoot a burglar - if he
warns him - and he does not have to
warn him if D reasonably believes himself
in grave danger.

from violence
in the house
of a child
has been
expressed
regard
to the
injury

There is the element that a person
is privileged to prevent a felony.
Burglary in a dwelling house is a
felony. D can shoot a burglar - if he
warns him - and he does not have to
warn him if D reasonably believes himself
in grave danger.

Suppose a broken glass in wall
suppose barbed wire fence - P, trespassing,
runs into it and puts out eye. Bohlen
says force is reasonable. risk of serious
harm is small.)

Dunphy case 173 Mass. 429

Anything that doesn't threaten
serious bodily harm is O.K.

Nov. 22

Ploof v. Putnam, Vermont, 1908, p. 85

What is necessity?

Suppose a bridge is washed out - A.
drives through field and fords stream. Does
necessity keep it from being trespass? Yes

You can trespass to save human
life and to prevent personal injury and some
more.

If B tries to prevent ^A forcibly to
keep off his land, he is liable for a tort.

Plouf v Putnam, Vermont, 1908, p. 85

P and his family got caught in a storm on Lake Champlain, and were forced to moor their boat to D's dock until the storm passed. D's servant unmoored the boat causing damage to it and injury to P's family. P brings trespass for forcefully and willfully unmooring the sloop and care for disregard of duty to allow P to moor his sloop and for unmooring it. D's demurrer on grounds that declaration failed to show that P could not have moored any other place and that D's servant was ^{NOT} acting within the scope of his employment, was overruled and he accepts.

Held: affirmed. Entry upon land of another may be justified by necessity. Sufficient necessity was shown to maintain the action, and details of the situation, such as whether P could have moored to any natural objects are not necessary in the allegation. The implication of the charge is that D was acting through his servant. If this can be disproved, it should be done at time of the adjudication. R has sufficient grounds for action.

Nov. 22

Plouf v Putnam, Vermont, 1908, p. 85

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If B tries to prevent ^A forcibly to keep off his land, he is liable for a tort.

Vincent v Lake Erie Transit Co., Minn., 1910, p. 97

D was licensee until he finished unloading - then, as majority holds, his license ends. ^{he becomes a trespasser} By rule of Plouff v Putnam, D is privileged to stay at dock if storm makes it necessary. Is he then liable for damage to dock? Yes.

Bohlen calls this an incomplete privilege to invade the interests of another person, in defending himself against an independent force (storm, threat, bridge washed out, 3rd person), at the expense of an innocent person.

Suppose dog chases A's chickens. A puts across flower bed to protect chickens. A may trespass but is liable for damages.

39 H. L. R. 307 Bohlen

Restatement Sec. 77 approves this rule
Note Morris v Platt ^{P. 44} was just an accident - neither intent nor negligence -
∴ no liability.

Suppose an emergency threatening public interest. Fire sweeping town; D dynamites row of houses to save the town.

Vincent v Lake Erie Transit Co., Minn., 1910, p. 97

Vincent v Lake Erie Transit Co., Minn., 1910, p. 87

D was unloading cargo at P's wharf and, when a storm arose, he found it imprudent to leave wharf, and the pounding of the boat against the wharf caused injuries for which P. sued. Appeal from verdict for P.

Held: Affirmed: Although D used good judgment in remaining moored to the dock, ^{and putting on more cables} he used P's property to its damage in order to preserve his own more valuable property, and P is entitled to compensation for injury done. Dissent: If the boat was lawfully in position when storm broke and D could not in the exercise of due care have left that position, then the damage to the dock was the result of an inevitable accident. A wharf owner must take the risk of damage to his dock by a boat caught there in a storm.

Suppose a wire across flower bed to protect children. A may trespass but is liable for damages.

39 H. L. R. 307 Bohlen

Restatement Sec. 77 approves this rule. Note Morris v Platt ^{P. 44} was just an accident - neither intent nor negligence - ∴ no liability.

Suppose an emergency threatening public interest. Fire sweeping town; D dynamites row of houses to save the town.

Is D liable? No. Not where he is
~~he is liable where he protects his own property.~~
protecting the interests of the whole community.

Am. Print Works — 23 N.J.L. 9 fire

Newcomb v. Tisdale 62 Cal. 575 flood

No case has ever discussed question
 of whether the community is liable.

D may also act on reasonable appearances
 the same as in self defense.

Right of recapture of personal property.

Suppose B takes A's horse. What
 can A do to get it back extra-legally?

1. If B has come lawfully into possession
of A's property, A has no privilege at all
to get it back (on a loan, etc.)

Social interest to keep peace outweighs
 A's interest to get it back. A must use
 legal process. 82 Minn. 235 Watson v.

D delivered sheep to P. Disagreement on
 price. D tried to use force to get sheep back.
 Not so privileged.

Suppose P does not keep up payments
on radio. D cannot use force to get it back
^{linger's}
Endersby v. 34 Minn. 356

If property was wrongfully (by force or by fraud) taken from D, he may use reasonable force to recapture it, provided he acts promptly, ^{continuously} in fresh pursuit. He must discover it promptly and then act ^{and continuously} to recover promptly. Under these circumstances the owner may ^{be} regarded as still defending his original possession. If thief has gotten clear away, he must resort to legal remedies.

With illustrations of 'fresh pursuit'

- ① A leaves car parked on street. On return he finds it taken. One week later he sees B driving it down street. A not privileged to take car from B. But he probably would chase him anyway and take chance on giving awarding little or no damages ^{to B.}
- ② B steals A's car. A sets out in pursuit immediately and follows him for a week. A is privileged to take car away from B. The same doctrine is found in criminal law.

Reasonable force

1. you must ask him for it first.
2. you must not use force that threatens serious bodily harm or death.
3. but if met by resistance, he has privilege of self-defence.

Bowman v Brasson, Vermont, 1882, p. 97

Judgment for P in action for assault and battery. D's cow strayed on P's land; D was going to tie her up but D beat up P in the effort to take the cow back.

Held: affirmed. P had not obtained possession wrongfully and D may not use force to get it back. In some cases a person who is dispossessed may fight himself into legal possession - but this is only where owner was dispossessed by force or fraud and the possessor was fresh.

his original possession. If thief has

Hys v Culver, N.Y., 1867, p. 99

P was stealing wood on D's land; he ordered her to get off and to drop wood; she refused; he ejected her using no more than necessary force. Court charged "such interference with P's person not justified even if she was trespassing." ^{following} this charge was requested and refused - that "if P was trespassing and D, after requesting her to get off, ejected her using only reasonable force that P is not entitled to recover." ~~But for P~~ New trial ordered on basis of incorrect charge.

Held: New trial upheld. The refused charge was the correct one. D has privilege to use reasonable force to prevent trespasser on his land from taking goods away.

A is privileged to take car away from B. The same doctrine is found in criminal law.

Reasonable force

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Negligence

Common law began with strict liability without fault. Then, culminating in Brown v Kendall, the idea was developed that there is no liability unless there is fault. We have been dealing with intentional, unprivileged personal injuries. Now we start on negligence - a form of fault.

Negligence, as a separate tort, was not recognized until early 1800's. Before that time, it was used as "failure to perform a duty". Now used differently.

Definition

[Conduct which is not intended to invade another's interest but which is a departure from the standard of conduct required by law] associated with carelessness but it does not necessarily mean this. ^{may} you do exactly what you mean - it may still be negligent. 282 Rest. "Conduct which falls below the standard established by law for the protection of others against unreasonable risk of injury." Risk means a danger that you can anticipate or foresee. P can anticipate injury to P and in view of that he acts negligently - below standard of conduct required by law

Elements of negligence: (you ^{need} all of them for an action)

- ① A legal duty on part of D to protect P's interests.
- ② A standard of conduct required by the law to satisfy that duty.
- ③ A failure on part of D to conform to that standard of conduct - a breach of the duty.
- ④ A reasonably close causal connection between D's act and P's injury.
(proximate cause)
- ⑤ Actual resulting damage to P.

(no action for nominal damages - as in assault or battery)

Negligence developed from action on the case - for which you had to show damages.

The five elements are really all the same thing. So you can only define each one in terms of the other four.

Heaven v Pender, 2 B, 1883, p. 144.

When have you got a duty to conform to some standard of conduct for benefit of another?

Whenever a risk of injury is reasonably to be anticipated or foreseen, A is under duty to ^{act reasonably} to prevent injury.
to ~~use reasonable~~ see next page for comment.

Negligence.

1. Duty (applies to relationships)

- a. to enforce on P.
- b. To aid others - relationships.
- c. to use care once D assumes to aid P
- d. not to prevent others from aiding P
- e. arising out of contracts with TP
- f. of manufacturer to ultimate consumers..
Lamborn's rule
McPherson Case

2. Standard of Conduct

- a. due care of a reasonable man in circumstances. ^{deputis test}
- b. circumstances take physical differences into consideration but ^{NOT} mental ones except.
 1. Children
 2. Temporary mental defects due to physical causes.
 3. Extreme Cases (no rule etc)
- c. dangers everyone must know
- d. special duties to find out
- e. use care in light of foreseeable risk.
- f. custom not conclusive
- g. skill & knowledge - similar localities - custom strong minimum standard
what D holds himself out as
- h. care & diligence - no set rule
- i. reasonable man may err in emergency -
- j. balance seriousness and certainty of risk against burden, cost of obviating it to D.
- k. Standards imposed by statute.
 1. negligence per se - or only evidence - or not evidence
 2. legislative intent to protect class that D is in from risk of what happened.
 3. absolute liability without fault. ^{safety} ^{pure food} ^{child labor}

3. Res Ipsa Loquitur - thing speaks for itself.

- a. exclusive control on P
- b. does not usually happen without negligence.
- c. get P by a new suit - give him to jury unless D puts in rebutting evidence - 2-1, including Motion. hold as if D does not until P has directed verdict usually.
- d. specific allegations do not deprive P of res ipsa.

When a duty of inquiry is reasonably
to be anticipated or foreseen, it is under duty
to act reasonably to prevent injury.
to use reasonable care
see next page for comment.

Elements of negligence: (you ^{need} all of them for an action)

① A legal duty on part of D to protect

4. Proximate Cause

a. Is connection between D act and damage sufficient to make D liable?

b. Was it a cause?

but for rule
substantial factor test

c. Concurrent causes
joint liability
apportionment.

d. Unforeseeable P

e. Unforeseeable consequences

derivative causation - D liable

intervening forces - D not liable if unforeseen

f. Foreseeable consequences from unforeseeable
apportionment intervening forces.

g. What must D foresee?

1. Rescuers.

2. Negligence of others - especially children

3. Criminal interventions

4. Medical negligence.

5. Insanity.

5. Mental anguish

6. Duties of land owners.

to people off land

to trespassers, adult & child

discovered & not discovered

as to conditions of land

as to affirmative acts
active operations.

When have you got a duty to conform to
some standard of conduct for benefit of another?

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(proximate cause)

Heaven v Pender, 2 B, 1883, p. 144

Whenever one person is by circumstances placed in such a position with regard to another that everyone of ordinary sense who did think would at once recognize that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger.

Heaven v Pender, 2 B, 1883, p. 144.

When have you got a duty to conform to some standard of conduct for benefit of another?

Whenever a risk of injury is reasonably to be anticipated or foreseen, A is under duty to ^{act reasonably to prevent injury} ~~use reasonable~~ _{see next page for comment}.

Duty

Suppose trespasser is going to walk into pit on A's property. Is A under duty to warn B. No.

Le Lewis v. Hold, 1883, 1 Q.B. 491 - last case reversed.

The rule in last case is too broad. you are not always under duty to prevent injury where you can foresee the injury.

Dunbar v. Stevenson, 1932, A.C. 579

"you must not injure your neighbor. your neighbors are those as closely affected by ^{your} act that ^{you} may reasonably be expected to consider them in doing the act."

1. Duty ^{sometimes} falls short of foreseeability.

There are situations where you can say, "it is none of my business"

2. Does duty ^{ever} go beyond foreseeability?

Does duty go to anyone outside the area where you can recognize a risk?

Palagraf v. Long Island R.R., N.Y., 1928, p. 144.

4-3 Cardozo, Pound, Lehman, Kellogg on majority.

Jury found that guards did not act properly - that they acted carelessly - thus this question is closed on appeal - both parties concede it.

Duty

Cardozo

Paleygraf v Long Island R.R., N.Y., 1928, p. 144.

X was trying to catch moving train. D's servant, a guard, tried to help him on but knocked a package containing fireworks which was under X's arm, beneath the wheels. The explosion which followed dislodged some wheels at the other end of the platform which fell, injuring P. Appeal from judgment affirming judgment for P.

Held: Reversed. No liability. Negligence is not actionable unless it involves the invasion of a legally protected interest, the violation of a right - in other words there must be a duty to the complainant, the to use ordinary care and skill, which if done would have averted the injury. P's claim to be protected against invasion of her bodily security is neither greater nor less because the act resulting in the invasion is a wrong to another far removed. The risk reasonably to be perceived defines the duty to be obeyed. Mere injury to person does not give a cause of action. If the harm was not willfully inflicted, P must show that the act as to her

Nov. 26

where you can recognize a risk?

Paleygraf v Long Island R.R., N.Y., 1928, p. 144.

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Jury found that guards did not act properly - that they acted carelessly - thus this question is closed on appeal - both parties concede it.

What risk could be foreseen?

1. Injury to the package
2. Injury to A's person.

not injury to P.

Cardozo says: Negligence must consist of a duty owed specifically to P and not to A. No duty to P unless it is reasonably to be foreseen that injury will result to P because of want of ordinary care. Duty is a matter of relation between parties.

Andrews says: D owes duty to all the world to use care in a situation where he may foresee that injury to anyone may result of want of ordinary care. If D's conduct creates a foreseeable risk of injury to A but not to B, and B is unexpectedly injured - D is liable to B. if it is the proximate cause.
195 N.C. 788 Ramsey v. Lower R.R.

Extent of foreseeability of risk

P. 185-6, 331, 46-50

D shunted string of cars off dead end of spur track. Area of risk concerned cars and area around end of tracks. Car hits guy wire which twisted pole which caused electrification of P, at laundry tub 5 miles away. Held: ~~that~~ D is not proximate cause of P's death

had possibility of danger so apparent as to entitle her to be protected against the doing of it though the harm was unintended.

Andrews Dissent: D is liable for his negligent act not only to those whom he might reasonably expect to be injured by it - but ~~not~~ also to those ~~those~~ who are in fact injured as the result of his act, even though they be outside what would ordinarily be thought of as the danger zone. The negligent act must be so connected with the injury that it may be said to be the proximate cause thereof. One who commits an act that is wrong to someone - a violation of someone's rights - is liable for all the proximate consequences of the act, even if they were unforeseen.

"world to use care in a situation where he
It may foresee that injury to anyone
may result of want of ordinary care. If D's conduct creates a foreseeable risk of injury to A but not to B, and B is unexpectedly injured - D is liable to B. if it is the proximate cause.
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train hit man who was knocked
 against fence. P cannot recover

177	Penn.	306	Wood v Penn.	P can recover same question P cannot recover
80	Ala.	615	Ala. v Chapman	
128	Miss.	505		
120	Miss.	376	Komeratke v G.M.	

↓
 Train struck A's horse - knocked him 195 ft.
 and hit P.

Miss.
 126 Train v B

Timbers on bridge were let loose. Car
 went over bridge - dislodged timber which hit
 child under bridge - Could not be foreseen that
 a child would be under bridge - no collection.

If D intends to injure A and hits
 B instead, you can transfer intent to make
 D liable to B.

How about transferring negligence?

A drove train carefully on Sunday - in
 violation of statute - and hit cow - no recovery.

A Minn. statute required n.r. to block
 frogs in tracks #. A tramp got foot caught
 because, while trespassing, because frogs not
 blocked: Held: no recovery - because duty is
 owed only to those who are lawfully on track.

Agency class during torts hour - extra torts

Exams.

Dec. 15, 16, 17 Th 8:30-10:30 - 1 hour exam. v a day.

Nov. 29

Suppose A negligently sets fire to a house - area of foreseeable risk, depending on the particular circumstances, might be set at $\frac{1}{2}$ mile radius. Suppose whole city burns down - B's house - 20 miles away burns. Is A liable to B? Under Andrews rule he would be - Under Cardozo's rule - he wouldn't be liable.

Suppose in the *Palsgraf* case, a suitcase full of glassware belonging to X was injured ~~injured~~ instead of P. Does D owe duty to X not to injure X's suitcase? sup. 148 12th paragraph.

Suppose in same case, X himself is injured by the exploding fireworks, and D could foresee only injury to package?

But suppose D could foresee injury to X by knocking him off train, but could not foresee injury by exploding fireworks? which was what happened.

- Duty.
- ① Andrews says "D owes duty to P not to be negligent toward any interest of any person."
 - ② Cardozo says - "To hold D for negligence to P, you must show that D could foresee injury to P."
 - ③ Must D foresee injury to a particular interest of P - or if he ~~involves~~ ^{could foresee injury to} one interest (property) can he be held liable for injury to different interest of P.

Nov. 29

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Paley Case, N.Y., 1928, p. 239. Andrews dissent.

1. P must have been injured.
2. D must have been negligent - breaching a standard of due care.
3. The negligent act must be a cause of the injury - that is, the injury must be such that it would ^{a substantial factor} not have happened without the negligent act.
4. But D is not held liable for all injuries which his negligent act causes. The injury must be so connected with the act that the latter may be said to be the proximate cause. This line between proximate cause and causes ~~not~~ for which P is not held liable is an arbitrary one, laid down on the basis of reasonableness, rough justice, convenience, expediency, and public policy.

X by knocking him off train, but could not foresee injury by exploding fireworks? which was what happened.

- Duty,
- ① Andrews says "D owes duty to P not to be negligent toward any interest of any person."
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 - ③ Must D foresee injury to a particular interest of P - or if he ^{could foresee injury to} ~~involves~~ one interest (property) can he be held liable for injury to different interest of P.

- ① If D is negligent toward X's package, is he liable for any injury to P?
- ② Is he liable for any injury to X.
- ③ Is he liable for injury to a different interest of X.
- ④ Is he not liable unless he could foresee the whole thing? (we could ever hold this)

2 hours of torts on Friday.

Dec. 6

Whether you follow Cardozo or Andrews depends on your social philosophy of where the loss should fall:

1. On D who has injured someone by a negligent act, the consequences of which ~~you~~^{he} could ^{not} foresee.
2. On P, who is injured, being entirely innocent of any fault.

Where we should suspend judgment on it

Wagner v. International R.R., N.Y., 1921, p. 151

When D left door open, he could foresee injury to A and has owed duty to him. Jury held no negligence occurred after ^A Wagner fell out.

Suppose train was going to hit child A, on track and B rushes in and saves child, but has by act off in act. D was negligent with respect to A for not keeping lookout. Is D liable to B? Yes - if B was reasonable in his action.

Supposes C runs in to save B and is hurt?

Why does this case hold as it does?

1. Because rescuer must be ^{duty} ~~foreseen~~ ^{Cardozo} ~~andrews~~.
2. Because D is liable for all consequences of his negligent act. ^{proximate}

D owned mine. X, a dumb miner, watched dynamite go off. D was negligent in not warning X as to nature of dynamite. P ran in to save X and was D. Held: He collects.

→ Suppose good Samaritan story. Has P an action against priest and Levite? No

Osterlind v. Hill 263 Mass. 100 N.E. 301

D rented canoe to P.I. P.I. tipped over canoe. D sat among canoes on shore and refused to go to his aid. Is he liable? "No Why not?"

NO DUTY TO AID

If D is liable to X,
he is liable to rescuer
of X.

Wagner v International R.R., N.Y., 1921, p. 151

Wagner v International R.R., N.Y., 1921, p. 151

Conductor on an electric railway did not close doors, and going around a curve on an overpass, a passenger was thrown out. Car proceeded to other end of trestle and passengers and crew went underneath the trestle and found the body. P, cousin of ^(A) man who fell out went back on top of trestle instead of going underneath with the others and he fell off and was hurt. Trial court instructed: negligence toward A would not charge D with liability for injuries suffered by P, unless conductor asked him to climb back on top of trestle. Verdict for D.

Held: Reversed. a wrong that imperils life is a wrong to the imperiled victim and also to the would-be rescuer, if the latter be not wanton in his attempt at rescue.

Rescuer must
be foreseen

If D is liable to X,
he is liable to rescuer
of X.

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no duty

No duty to aid

Mathews v Carolina R.R., 1918, p. 310

Suppose P is starving in middle of Mpls. Many people know it but let him starve. Who could ^{you} make liable? It would be hard to place the responsibility.

This Mathews case is not nearly so clear

Dec. 9

Union Pacific R.R. v Capper, Kansas, 1903, p. 312

The lower court, instead of asking for a general verdict, asked certain specific questions - ex: "Did D bind up P's wounds as soon as possible reasonably" answer, "No". But appellate court said there was no duty to bind up his wounds, and therefore the case did not turn on lower court's question. Why no duty?

Suppose auto driver, with no fault of his own, runs over P, goes on without stopping. He is criminally liable by statute. The statute was passed because under the common law he would be ^{under no} ~~only~~ duty to stop. Never been a tort case on this but D ~~not~~ would probably be liable in tort where there is statute.

No duty to aid

Mathews v Carolina R.R., 1918, p. 310

Mathews v Carolina R.R., 1918, p. 310

By permission of his employer (D), plaintiff, a coal heaver, lived in two box cars on a siding. One night a flood came up and submerged the cars, destroying P's property therein. P called D's shop in the afternoon preceding and asked for an engine to come and move the cars, but D did not have an engine available. Motion for non-suit overruled. ^{Exception} ~~Appeal~~

Held: Non-suit allowed. D was under no legal duty to protect and rescue P's chattels from the destructive consequences of an act of God.

Dec. 9

Union Pacific R.R. v Capper, Kansas, 1903, p. 312

Union Pacific R.R. v Capper, Kansas, 1903, p. 312

P brings action for damages resulting from the loss of her son who allegedly died as result of negligence of the railroad. He was run over, by no fault of the railroad. The train was stopped, but having the approach of a passenger train, ^{he was left lying by the track} the yardmaster ordered tracks over a bridge where an ambulance was called. Yardmaster then went back and found 3 switchmen binding up his wounds. Judgment for P.

Held: Reversed. D was under no legal obligation to care for P - his injuries having been sustained through no fault of P's employees. If P's employees had assumed to take charge of him, the duty arises to exercise such care in his treatment as circumstances would allow.

The statute was passed because under the common law he would be ^{under no} only ~~have~~ duty to stop. Never been a tort case on this but D ~~note~~ would probably be liable in tort where there is statute

The reason for this un-liability is historical. ① Certain public carriers were considered to be under ~~the~~ duty to do affirmative acts in serving public. ② Thus persons under ~~such~~ certain legal relations were obligated to care for other persons. [husband-wife; parent-child; ^{host-guest} employer-employees] ^{minimal and tort.}
Carey v. Davis 190 Iowa 720

Except in special relations:

Farm - land overcome by sun-stroke. Farmer did not care for him and he was held liable. Employee

①

Ross v. Clute 98 Minn. 357

Worker got caught in mangle and employer failed to act promptly to get her out.

②

Ship ^{captain} is supposed to care for sailors when he becomes ill or falls overboard

③

Carrier is supposed to care for its passengers.

But recognizes no duty to aid another if there was no fault ^{or where there is no fault} special relation.

56 Pa L.R. 217 Bohlen - "should be such a duty
 Exception: Whitaker v. R.R. 128 N.C. 229

R.R. held liable to assist person injured by its act but not by its fault.

Restatement - If D was at fault. They are then under duty to use reasonable care in aiding the person injured by their act.

Duty to use care, once you have undertaken to aid someone.

If P is starving, whose duty is it to feed him - and for how long? It is because of the difficulty of drawing the line, that courts impose no duty to aid D where there is no fault.

Blater v Illinois Central R.R., Tenn., 1911, p. 316

Suppose A is drowning. B throws him rope and then negligently drops it. He is liable.
Black v R.R. 193 Mass. 448

P, drunk, was passenger on D's train. D put him off - left him on landing of station stairs. P fell down stairs and was injured. Held. P voluntarily had helped him off and up stairs and was negligent in leaving him there.

Auto driver is under no obligation to pick up hitch-hiker. But if by his negligence the hitch-hiker is injured, he can collect.
O'Leary - p. 317

If you start to aid someone, you are under obligation to exercise due care in performing the service

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Blater v Illinois Central R.R., Tenn., 1911, p. 316

Blater v Illinois Central R.R., Tenn., 1911, p. 316

PI was run over by no fault of the railroad. But D's servant took him in charge and carried him in a box car to a siding a mile away, where he was left, over his protests, without medical care for 4 hours, when he was finally taken to nearest town, too late. Denumer to declaration.

Held: Denumer overruled. Whenever one who has injured another, even without fault, assumes to take charge of the injured person in a helpless condition and removes him from the scene of the accident, there arises a legal obligation to exercise due care concerning him, including that of procuring medical aid, especially where it is clear that if such care is not procured, death will probably ensue.

If you start to aid someone, you are under obligation to exercise due care in performing the service.

Hill - Middleton, Mass., 1870, p. 322

Landlord ought to have warned P at least.

Non-feasance - doing nothing - no liability

Mis-feasance - doing wrong thing - liability

Mal-feasance - doing right thing in the
wrong way - liability

These words are of relatively little value.

D may be liable in some cases - for non-feasance.

This requires a special relation which puts

D under duty to P.

Palaeography.

D may not be liable for doing wrong thing.

Basis of this case, is that D has entered
into a relation which required him to
use due care. How far to you have to
go to assume the obligation? You have to
have assumed control of the situation - a tough
question.

Thorne - Dear, N.Y., 1809, p. 324

"promissory estoppel" - a contract development
If D makes entirely gratuitous promise on
which P relies in good faith and suffers
injury in consequence, D is liable. This
has been twisted into a fictitious contract, substituting
P's reliance for consideration. *Prosser suggests this action should
be in tort not contract*

Hill v Middleton, Mass., 1870, p. 322

Hill v Middleton, Mass., 1870, p. 322

Landlord promised to fix outhouse floor although he was not obligated to do so under the contract of the lease. He undertook to fix it, then, without consideration, and when finished, he assured P it was in good shape. P fell through and was injured. Verdict for P. Exception.

Held: Exception overruled. For an injury occasioned by want of due care and skill in doing what one has promised to do, an action may be maintained against him in favor of the party relying on such promise and injured by the breach of it, though there was no consideration for the promise. Lack of ordinary care and skill here equals gross negligence. ^{B.S.} Why?

Thorne v Dear, N.Y., 1809, p. 324.

P and D each had a half interest in a ship. Paired D to get some insurance on it and D said he would. He failed to do so and the ship was wrecked. P sued for damages.

Held: Judgment for D. One who undertakes to do an act for another, without reward, is not answerable for omitting to do the act, and is only responsible when he attempts to do it and does it amiss. He is responsible for misfeasance but not for non-feasance.

Thorne v Dear, N.Y., 1809, p. 324

"promissory estoppel" - a contract's development
If D makes entirely gratuitous promise on which P relies in good faith and suffers injury in consequence, D is liable. This has been twisted into a fictitious contract, substituting P's reliance for consideration. Proper suggestion this action should be in tort not contract.

Legal v. Spear, N.Y., 1925, p. 326

D has entered into the relation by storing P's goods. He has gone farther than in Thorne v. Dies, where D had ^{only} made promise which ^{was} not enough. But later cases have reversed Thorne v. Dies and doctrine of promissory estoppel has been put in effect for tort liability. Also in a few other jurisdictions.

Carr. v. Maine Central R.R., N.H., 1917, p. 328

Same rule as in legal case.

Legal v. Spear, N.Y., 1925, p. 326

Legal v. Spear, N.Y., 1925, p. 326

P. bought goods on time from D and wanted to store goods in D's warehouse when he went away for the summer. D agreed to insure goods for P and add the cost to P's bills. D never insured the goods and they were destroyed by fire during the summer. Judgment for P, reserving certain questions of law.

Held: Affirmed. Contended: no consideration for the agreement and thus, under rule of Thorne v. Deas, no liability, when D did not carry out agreement. There ~~was no consideration~~ The getting of the insurance is closely connected with the gratuitous storing of the goods. By accepting the goods for storage, D has entered into the performance of the agreement, and his ~~own~~ failure to insure the goods shows lack of due care - misfeasance in performance of gratuitous bailment, for which under rule of Gill v. Widdleton, he is liable. The surrender of the goods by P after D's promise to insure it provides the consideration that was missing in Thorne v. Deas.

Carr v. Maine Central R.R., N.H., 1917, p. 328

Carr v. Maine Central R.R., N.H., 1917, p. 328

D promised to forward P's papers to the S.C.C. to get a rebate from D. P sent the papers to D, but D never delivered them to the S.C.C. until after the time when the S.C.C. could give its consent had expired. Careless negligence - disclaimer - overruled.

Held: Exception refused. The common law imposes a duty of giving average care on those who undertake to perform a gratuitous service for others.

by
a Thorne
ly
le
But
v. Deas
has
liability.

Eric R.R. v Stewart, U. S., 1930, p. 330

Concurring opinion says you do not have to have reliance on part of P to get liability - if P did not have to know that D usually kept watchman there - the liability is good against general public to keep watchman there, once they have established that standard.

Is duty a personal one? Relate to Paleygraf case.

How far is reliance an element in ^{responsibility} saying things duty for an assumed obligation? No rule on this.

D will be liable where his conduct has induced P to rely on him.

In absence of such reliance, liability is still up in the air.

Insurance broker gratuitously agreed to get insurance for P. He changed his mind and backed out. P sued. Held: P need proper care in backing out since he informed P of that fact.

Erie R.R. v Stewart, U. S., 1930, p. 330

Erie Co. R.R. v Stewart, U. S., 1930, p. 330

D's railroad train hit a truck in which P was riding, and P sues and collects for negligence. D had stationed a watchman at the crossing over a long period of time and the driver of the truck knew about it and relied on it, but the watchman failed to warn of the approaching train till too late. Court charged this was negligence as a matter of law - D not denying the evidence.

Held: affirmed. Where company has established for itself a standard of due care and having led travelers to rely upon such standard, responsibility for injury will arise if the service be negligently performed or abandoned without other notice of that fact.

The question of contributory negligence was properly left to jury. The question of proximate cause was also properly left to jury.

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Metallic Casting Co. v Fitchburg R.R., Mass., 1872, p. 341

although ^{under} no duty to help P, D is
^{unreasonably}
under duty not to prevent others from siding?

Erickson v N.Y.R.R. 117 Minn. 348

Identical case - same decision

argument · 184, 466, 336, 333, 469, 481

Metallie Casting Co. v Fitchburg R.R., Mass., 1872, p. 341

Metallie Casting Co. v Fitchburg R.R., Mass., 1872, p. 341

P's plant caught fire and local voluntary fire department laid hose across tracks and were getting it under control, but a freight came along, and although duly warned and they could have stopped - they ran over and crossed the hose and as result, buildings were destroyed.

Held: D's act was ^{direct} proximate cause of P's injury. ~~Premises where rendering voluntary services to P, and by negligently preventing them from aiding P, made themselves liable for P's injuries. Case will stand for law.~~

D is

Brooke v Bosh, K.B., 1928, p. 184

Permitted shop from D. It was arranged that D had right to enter shop at night and see that it was secure. He did this with X one night, and after D lit match to see if gas was escaping and nothing happened, ^(D suggested X come right to do it) X climbed on counter and lit match which caused explosion causing damage to P's goods. Judgment for D

Held: Reversed. D, having right to control X and having permitted and invited him to do what he did, was responsible for the consequences.

Jan. 5

Fall Exam

① A was negligent as to someone, by his speed and by not slowing down.

x Who was reasonably included in the area of foreseeable risk?

1. the truck driver, B

2. possibly C, 50 ft away. (jury question)

3. not D

as long as you can foresee some kind of harm to B, it makes no difference in what manner he was actually ^{slight} injured.

How intent? - analogy to bomb being thrown into Hitler's car case deliberate act from which serious consequences were sure to follow. Conduct so wanton, that jury may classify it as intent to injure B.

Thus, A is liable also to C and D, because of doctrine of transfer of intent which came from criminal law. Johnson v Smith

- ⑤ a. Tell why you follow one line of cases - Galbraith - Fleming is best - because community interest in keeping the peace is protected by criminal action and there is no policy to compensate someone for an injury which he consented to.
- b. privilege of defence of 3rd person, even under a mistake
- c. privilege to defend self - using reasonable force.

How can you tell what questions should go to the jury.

Q. Tell why you follow one line of
 issue. Health - Fluorine is
 better because community interest
 is keeping the press is protected by
 criminal action and there is
 no policy for corporate concern
 for an injury which he is entitled to
 a privilege of defense for a person
 may make an mistake
 regarding to defend self using reasonable
 force
 And now you tell what questions
 should go to the jury

Jan. 7

Contract and tort liability

Can D, by entering into contract with X, assume a tort liability to Y? for not using care.

Winterbottom v. Wright, Exchequer, 1842, ^{yes - sometimes} p. 467

Y cannot recover in contract suit.

in W. v. Wright
in liability
at the time when
contract was made,
D was not
in a position to
know of the
defect in the
machine
and therefore
D is not liable
in contract.

Moch Co v. Rensselaer Water Co., N. Y., 1928, p. 333

D contracts with X.

D breaches contract.

X is injured.

X cannot sue D in contract.

X cannot sue in tort if

D has merely failed to perform

X can sue in tort if D has
performed badly.

D, under contract with city, X,
to supply water. Y's house burned;
D failed to supply water; is D liable?

"Privity" is a relation with a con-
tract which will enable someone to
found some right on it.

A contract may be the occasion
or opportunity for a tort duty to arise,
because of the relation created.

This case represents weight of
authority (10-1). The water company, D,
is not liable.

non-feasance

220 K & 493 Harlan (contra)

52 Fla. 371 Muggs v. Tampa

Jan. 7

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Winterbottom v. Wright, Eschequer, 1842, p. 467 ^{pro-sometimes}

Winterbottom v. Wright, Eschequer, 1842, p. 467

D provided mail-coaches to Postmaster Gen. under contract to keep them in safe condition. Y, mail-coachman was injured due to faulty condition of coach.

Held: D is not liable. He had duty only to contracting party, X, not to everyone who might use the carriage.

Moch Co v. Rensselaer Water Co., N. Y., 1928, p. 333

D contracts with X.

D breaches contract.

Y is injured.

Y cannot sue D in contract.

D, under contract with city, X, to supply water. Y's house burned; D failed to supply water; is D liable?

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220 K 493 Harlan (contra)

52 Fla. 371 Muggs v. Tampa

Old articles against majority view.

Corbin 11 Yale 425 } Liability of fire company
Lundland 3 Mich. L.R. 442 } for fire losses.

misfeasance

Suppose water company supplies
contaminated water. Is it liable to individuals?

Hays v. Torrington 88 Conn. 609

Two Co. v. Conn. 114 Md. 140

Contract with city to supply gas
to householders. failed to maintain
pipes - gas leaked - caused damage

53 S.E. 244 - engineer fails to
blow whistle. is it non-feasance
in failing to blow whistle or
mis-feasance in operating the train.

Employee fails to inspect pole; it
falls on T.P. Is it non-feasance or
misfeasance? Is the test the doing of
something or doing nothing - once the
obligation in contract to do something
has been assumed?

1. Marshall's R.R. Co. - O., by making a con-
tract with X, may assume a tort
duty toward Y.

2. The first attempt, historically, was to
extend contract action to Y. Winterbottom

Old articles against majority view.

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Suppose water company supplies contaminated water. Is it liable to individuals? ^{yes}

Hays v. Torrington 88 Conn. 609

Gas Co. v. Conn. 114 Md. 140

Contract with city to supply gas to householders. failed to maintain pipes - gas leaked - caused damage

53 S.E. 244 - engineer fails to blow whistle. is it non-feasance in failing to blow whistle or

Marshall v. York R.R., Common Pleas, 1851, p. 336
P. valet to X, brings action for loss of grip ^{his} by R.R. Denied because action was founded on contract and contract was with X who should have brought suit.
Held. Reversed. The foundation of the action is not the breach of the contract but the breach of a public duty to carry passengers and their property safely.

1. Marshall R.R. Co. - O., by making a con-
tract with X, may assume a tort
duty toward Y.
2. The first attempt, historically, was to extend contract action to Y. Winterbottom

"Privity" of contract has become a fetish - but progress of the law has been away from requiring it in Tort actions by Y.

general rule

3. D is liable for misfeasance.

One who rents or sells car in poor condition is liable if injury to TP results.

Exception - contractors

But, D turns over theatre poorly built - roof caves in. Contractor, D, not liable.

56 App. D. C. 151 14 Fed 2nd 253 ^{2nd v. Hargis}
140 Pa. 70 v. Home

Reason for decision - burden on indirectly contractors - too great. These cases are impossible to reconcile with majority cases.

4. D is not liable for non-feasance

Water Co. cases where houses ^{burn} and water is not supplied.

But where land agents do not properly maintain a building. they have been held liable - but the courts call it misfeasance.

See "Liability of Agents" 1 Southern L. J. 2. 16
see 254 in Restatement of Agency.

Present tendency is to abandon the subtle distinction between

misfeasance or nonfeasance.

New basis:

New Basis

1. Has D assumed control over situation by which ^{the} interests of P are directly affected?

Land agent cases.

2. Was there interference with other sources of protection? ^{Landlord agrees to maintain premises - TP is injured - tenant believes landlord is taking precautions}

3. Agents who have assumed duty to protect TP are liable if they have assumed control.

4. Where D makes contract for his own economic gain, (usual case) he should ^{be} liable for injuries to TP which result either from his nonfeasance or his misfeasance.

Prosser predicts That Mock Case will not be law 50 years hence.

Where D has assumed

control of a situation

and P has been injured

because of D's lack of care,

D should be liable.

Manufacturer's Liability

Old rule:

manufacturer not liable

Hurst - Case Threshing Machine, U. S., 1903, p. 468 ^{J. Lanborn}

Does O, manufacturer, who delivers defective machines to A, assume liability for injuries to T.P.

Lanborn misstating Winterbottom case, says no one can sue in tort except A, party to contract. Bohlen exploded this in 1905.

No responsibility of manufacturer for injury to ultimate consumer because:

1. Result cannot be anticipated. (B.S.)
2. There is intervening human cause.
(dealer) (whiting)
A assumes responsibility when he ^{re-}sells to B

3. Unreasonable burden on industry.

But Lanborn says there are 3 exceptions: where O, manufacturer will be liable:

1. Where goods are used on manufacturer's premises, he assumes obligation or responsibility for injuries to T.P.

2. p. 474 bottom Where B sells or delivers articles which he knows to be imminently dangerous or defective without notice of its qualities, is liable to all who

(this case)

Lanborn's 3 exceptions:

1. use on manufacturer's premises

2. knowledge of defects and concealment thereof.

are injured in consequence. This is almost on principle of intent - derived from wanton conduct.

Clark v. Army & Navy Co. 1 K.B. 155

D sold baking powder which he knew had been blowing up. He concealed the fact. Lying resulted. Held liable.

Schubert v. Clark 49 Wm. 331

D sold styladher with weaknesses in it (doctored up) to retailer to painter to employee who was injured: and D knew about defects and concealed them - Liable

— — — 110 Wm. 361

D built defective bridge and knew of defects and concealed them - Held: liable.

Huron v. Owens Co 125 Wm. 33

Case just like Hurst case. Knowledge of defects - and concealment of them may make D liable to anyone who is injured as result.

③

articles intended
to preserve, destroy,
or affect human life

3. act of negligence eminently dangerous
to life or health committed in preparation
or sale of article intended to preserve, destroy,
or affect human life, is actionable by TP who ^{suffers} ~~injury~~
drugs, food, firearms, etc. probably not doing
a good guess is that Lamborn.
meant articles which are eminently
or inherently dangerous. But why
this limitation?

Boyd v. Coca-Cola. Cal. Tans., 1914, p. 477

Cigar stub found in Coca-Cola
bottle. Court applies this above
restriction, because it is technically
a food.

138 Mich 567 - bottle blew up.
technically a food - $\therefore$ intended to preserve
human life - $\therefore$ falls under Lamborn rule.
all this questioning is absurd.

253 Fed. 455 air-gun (child's toy)
is a weapon - intended to destroy human
life. $\therefore$ falls under Lamborn rule.

Why distinguish these articles?
if there is any duty at all, it

Thornhill - Carpenter - Motor Co., Mass., 1915, p. 472.

D₂ makes varnish.

D₁ buys it - puts label on it - sells it.
varnish blows up - court says D₁ must
be presumed to know what was in can
although there was no evidence to that
effect. D liable.

145 Ky. 616 Old Motor Co.

D₁ had car made for him by D₂ - One car
not was.

115 Conn. 249 Burkhardt v Armour Co.

Wheat canned in Argentina - bought by
Armour - resold under Armour label -
had sliver of metal in it - Held: Armour
Co. must have known sliver was in
there although in fact it ^{didn't} ~~wasn't~~.

Mc Pherson v Buick Motor Co., N.Y., p. 481, 1916

Now accepted as [↑]
the law in all states
and a few others
but Mass. - see p. 478

very important

If the nature of a thing is such that
it is reasonably certain to be dangerous
when negligently made, the manufacturer
is under a duty to use care, and is
liable if ultimate consumer is
injured because of his negligence.

This throws over all of harbours
exception 3.

Suppose A sells car with defective
to wheel to B. B hits C. Or
B lends to C who hits D.

195 NW 388

Gasoline stove blows up - injuring
someone just standing around. Liable
McClound 318 Mo. 397

D sold tank of vapor to welder -
Valve defective - blew up - injured by - stander
injured - he can collect.

104 N.V. 93 - D filled P's jug with
acid which spilled after cork blew out
because there had been sand in jug

Supplier of a bottle which will
be dangerous to life or health ^{injury} ^(For persons)
if it is negligently made - owes
a duty to use proper care in its
manufacture and sale and that
duty includes "those whom ^{the supplier} supplier
should expect to be in vicinity of
bottle's proper use, (zone of danger)

Lines 152, 154, 156, 157, 158, 159, 186

Jan. 10
Tendency is to hold
 D liable for this, too.

How about goods, which, if
 negligently made, would be reasonably
 expected to damage property? &

Ex. poison chicken feed.

Tennessee County Assoc v. Lonsdale, N.Y. 189 NE 551

Inflammable fireproofing material -
 no warning - barn burned - D held liable
 on basis of foreseeable injury to property
Ellis v. Lindmark, Minn.

D, wholesale drug co., sold something ^{labeled oil}
 purporting to be cod liver oil, to be used for
 chickenfeed. Held: McPherson case applied.
 even where nothing but damage to property
 was foreseen. Miner. goes as far as any state in this
DuPont v. Paradox, C.C.A. 8th Circuit (Iowa)

D, sold plant food and disinfectant; it
 killed tulips. Held: In Dietrich, D liable
 because injury to property can be foreseen.

Suppose injury to ^{only} property is foreseen
and personal injury results. No cases on it.
Quackbush v. Ford 153 N.Y. Sup. 131

Sale of car with defective wheels. Threatened
 injury to both person & property. Car injured.
Held: D is liable for damage to car

Standard of Conduct

Mozetti v. Amman 75 Wash. 622

D made canned tongue - which poisoned customers of R who did not come back to his restaurant. Held: Dis liable.

Duty is a matter of relationships

There is also tendency to hold manufacturer, even if he has not been negligent, for injuries by his product. Making manufacturer the maker of his goods. This will be taken up in sales.

assuming D's duty exists - what does the duty require? Conformance to a standard of conduct required by law.

We will use the term "duty" ^{perhaps M. P. Hughes} in speaking of the relationships.

What is the standard of conduct required?

The Germanic, 1904, U.S., p. 152

D owes duty because ^{he} is in relationship of carrier. D used his own best judgment, but he was still negligent, because the due care is an external, objective standard.

Standard of Conduct

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The Germanic, U.S., 1904, p. 152

Because of the hurried way that the cargo of a steamer was unloaded, the ship rolled into a list and an open port hole went below the water line causing water damage to the goods in the hold. The owners of the goods sue the master.

Held: the standard of negligence must be determined by finding what a reasonable man would have done under the circumstances. The standard of conduct is an external standard and takes no account of the personal equation of the man concerned.

The Germanic, 1904, U.S., p. 152

D owes duty because ^{he} is in relationship of carrier. Exercised his own best judgment, but he was still negligent, because due care is an external, objective standard.

Jan. 13.

Reasonable ManObjective standard

D, contractor, builds bridge, using inferior grade of steel, but he honestly believes the bridge will stand up, but it doesn't. Even an expert is subject to community's standard - reasonable man.
Herbert. "Holy Deadlock"

"Misleading Cases on Common Law"
to do that.

Negligence is the failure which the reasonable man of ordinary prudence would not have failed to do under the circumstances.

But how can you apply an objective standard to persons who are different?
Ex. 6 ft man and 5 ft man walking by 5 1/2 ft fence.
Ex. young man, old man, blind man. crossing street - each is held to same standard but the circumstances are different.
Therefore, the amount of care required is different.

Hill v City of Kewood 124 Iowa 179

Blind man, runs down in traffic. Court held blind man is held to a higher degree of care than a man who can see. Upper court held that blind man was held to some standard, but that under his circumstances that standard required a greater amount of care.

- ① A driving on broad highway - clear view
- ② A driving on Nicollet at rush hour
same act - same person - but different
^{of speed.}
standard because of circumstances.
- ③ A tosses stick
- ④ A tosses dynamite.
- ⑤ A, with good hearing, sees & hears nothing,
- ⑥ and crosses R.R. - deafman must use more
care

Circumstances taken into consideration

The physical difference of the person

How about mental differences?

- ① The fool - the fellow with poor judgment - the
man who is just too dumb to appreciate risk.
how can you ~~of~~ prove anything about his
mental capacity?
- ② the abunt - minded professor
- ③ one gets all rattled - get the jitters
- ④ one who has slow reactions
- ⑤ ^{id} stupidity of individual.
- ⑥ epileptic
- ⑦ one who faints

Physical differences

mental differences

Holmes - The law takes no account
of ~~the~~ ^{character} individual mental differences.

- ① difficulty of proof of intelligence
- ② desirability of holding the ^{ordinary man} mentally
deficient up to the community standard
∴ Physical defects are fairly obvious
and themselves of the community can
make allowances for them.

1. But mental defects do not give
others the opportunity to make allowance
for them.

Exceptions:

- ① Children - the law has set up a
separate standard for them.
- ② Temporary mental defects due to
physical causes - fever delirium,
epileptic fit, fainting - regarded as a
physical defect - if he knows he is sub-
ject to that sort of thing, he may be
negligent in doing the thing he was doing.
- ③ Extreme mental case - lunatic, idiot,
imbecile - ^{the} few cases - held to same
standard as man of reasonable prudence.
But writers like Bohlen have

challenged this. Argument for holding him: better to reimburse the innocent person than to let lunatic keep his money. Also that if law is applied, lunatics will be better taken care of. But the rule is not set.

Jan. 14

What^{if} is the reasonable man supposed to know?

Gobrecht v Beckwith, N.H., 1926, p. 186

Note that standard of care - of ^{man} reasonable care - is different for P and for D. The ordinary man does not know of danger of monoxide gas. The standard of care requires D to take the steps of a reasonable man to find out to inform himself - as to whether his premises are safe or dangerous. If D had ^{reasonably} tried to find out about danger of heater and ^{and failed} P was still injured - D would not be liable.

3 questions:

- ① Does everyone have to know that a gas heater in a small room is dangerous? No.
- ② Is there a duty on D to ^{attempt to} find out whether it is dangerous? yes - or ? - no.

challenged this. Argument for holding him: better to reimburse the innocent person than to let lunatic keep his money. Also that if law is applied, lunatics will be better taken care of. But the rule is not set.

Jan. 14

What is the reasonable man supposed to know?

Gobrecht v. Beckwith, N. H., 1926, p. 186

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P was asphyxiated when taking a bath in a common bathroom that D provided for his tenants. There was no ventilation except a transom over one door, and gas heater in the room gave off carbon monoxide gas which asphyxiated P. Verdict for P in action for negligence.

Held: Sustained. D is under positive duty includes duty to investigate to make the place safe, and he is bound to inform himself as to the natural consequences of the operation of the apparatus that he installed. P was not guilty of contributory negligence because she is not obligated to know of the effect of carbon monoxide gas.

3 questions not be liable.

① Does everyone have to know that a gas heater in a small room is dangerous? No.

② Is there a duty on D to ^{attempt to} find out whether it is dangerous? yes - n9 - no.

- ③ Did D use reasonable care to attempt to find out if it was dangerous? The court does not consider this, but Prosser thinks D did use reasonable care.

He left installation to experts from gas company. He could assume that gas company would not install a heater that was not safe. P could then successfully sue gas co. Gas Co is under duty to know.

- ① Conscious ignorance where there is visible danger

As driver into city - Does not understand traffic signals. He may be negligent in driving in, without finding out what signals mean.

- ② Unconscious ignorance - no visible danger - but negligibility is on him to exercise precaution to make sure that premises are safe. Ex. landlord - automaker.

- ③ Unconscious ignorance - no visible danger - no special duty.

Suppose Ky. mountaineer comes to ordinary city. Does not know anything about traffic signals. Crosses street against lights. Is he required to know - to conform to standard?

Danger everyone must know

Little v — 167 Ky 345

X, dislodged a large boulder, on top of hill. Court holds he is assumed to know that force of gravity will carry it to bottom of hill. Everyone is supposed to know about gravity. danger of fire, moving by water.

15 Ind. App. 552 43 NE 17

Woman stepped on loose board which she knew about, and the other end flew up and hit her. Held: she must know about these things
126 Mass 506

City man did not know about characteristics of a bull. Held: He must know.

Burnett v — 96 Fed ^{Know} 974 If you ^{know} it is gasoline, you are expected to know that it is inflammable.

West City v Ruppel 12 NE 2nd 970

Woman driving car 40 miles an hour onto a road deeply rutted with soft sand. She skidded, when passenger asked her, that she had never driven off of pavement and did not know of danger of loose sand.

Held: she must know.

To 1907, a man was not required to know about danger of electric wires. Rule was then changed in the next 10 years.

But in 1880, the explosiveness of benzine was supposed to be common knowledge.

This may be no longer a matter of common knowledge.

See. 290 Restatement.

✓ Crosser says it goes too far.

↪ D stores oil-coated rags in corner of building - he may be held for negligence because reasonable man must know of danger of spontaneous combustion. U. cases on it.

Jan. 17

Blyth v Birmingham Waterworks, Exchequer, 1856, p. 154

What is a reasonable man expected to foresee and how much care must he exercise to guard against risks?

No such severe frost for 25 years - the company could not be expected to guard against such contingencies.

Suppose D is laying watermain in W. pl. Will he be required to take precautions against 15°, 35°, 50° below-temperature? If 31° was the record he should prepare for 40° - (a little margin!)

To 1907, a man was not required to know

Blyth v Birmingham Waterworks, Exchequer, 1856, p. 154

a fire plug, after 25 years of no trouble, become clogged with ice and allowed water to escape from the neck of the main into P's basement. D could have prevented it by removing ice and putting in a new wooden plug. Judge left it to jury to decide whether D had used due & proper care. Verdict for P.

Held: Reversed. As a matter of law, the lower court should have decided that P had used due care - even though, when submitted to jury, reasonable ^{men} found that he had not. The circumstances of the unusually heavy frost were a contingency against which no reasonable man can provide - the accident was not foreseeable - and its cause wholly was obscure.

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Suppose D is laying watermain in Mpls. Will he be required to take precautions against 15°, 25°, 50° below-temperature? If 31° was the record he should prepare for 40° - (a little margin)

Suppose he was laying water-
main in New Orleans. Same
rule - What a reasonable man
would do in the light of the
foreseeable risk - which depends on
his experience. Certain minimum
knowledge is required of everybody.

Louisville R.R. v. Tower, Tenn., 1887, p. 156

Ordinarily, the reasonable man
case goes to jury, but not to be decided
on what ^(the juryman) they would have done individually.
The court is afraid, that juryman ~~is~~
going to make too much allowance
for the fact that he and most men
are likely to make mistakes and
mistake once in a while.

This is a pretty technical reversal,
but it illustrates the desire of
the courts to keep the standard
on an objective, academic basis.

Allen, "Learned & Unlearned Reason"

20 Juridical Review p? on Blyth case.

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main in New Orleans. Same
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Louisville R.R. v. Fowler Tenn. 1887 p. 156

Louisville R.R. v. Fowler, Tenn., 1887, p. 156

In action for damages for injuries received
by P while coupling D's cars, court charged that, in
order for P to have exercised proper care, he should
have exercised such care as a man of ordinary
prudence would have exercised in that dangerous
situation - and that degree of care could be measured
by what each juror member believed he would
have exercised under the circumstances.

Held: Reversed. The standard of care is what
a man of ordinary prudence would do, but this
cannot be measured by what each juror
thinks he would have done, because each juror
might be very prudent or very imprudent. This
court standard is an objective standard.

on an objective, academic basis.
Allen, "Learned & Unlearned Reason"
20 Juridical Review p. ? on Blyth case.

Maynard v. Buck, Mass. 1868, p. 157

If D has done what people in his profession ordinarily do, why isn't that enough?

D manufactured boilers - one exploded in a factory. D's defense was that the boiler was tested by a test which was universally used in the boiler-making industry. P claimed that there was another test known about and available which was more efficient. Question left open.

Bank used ordinary check paper - not protectograph (anti-forgable) paper. All banks in community used ordinary paper. Suppose all other banks use protectograph paper.

Custom not
conclusive of
reasonableness

The matter of custom is not necessarily conclusive.

"Unbending test" of negligence - Penn. courts - D is always required to do what is customarily done. But this test has been completely reprobated. Every situation has to be judged on its own facts - peculiar circumstances make the ordinary ^{custom} thing un-reasonable.

Maynard v. Buck, Mass. 1868, p. 157

Maynard v. Buck, Mass., 1868, p. 157

D drove 100 cattle from one town to another, on the way they stampeded. When he rounded them up, there were 9 missing. He drove them on and did not return to look for the missing ones for 3 days. Paves for value of 2 steers lost. Verdict for P on instruction that "D was bound to use the same care that man of ordinary prudence would exercise ^{over} ~~under~~ ^{his} own property under the same circumstances.

Held: affirmed. Instruction correct. Instruction asked for was incorrect - that what ~~drivers~~ engaged in the business ordinarily do should be the standard - and also that D was ^{not} obliged to lay out more than the compensation to be received, to attempt to recover the cattle - which was more expensive.

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"Unbending test" of negligence - Penn. courts. D is always required to do what is customarily done. But this test has been completely reprobated. ^① Every situation has to be judged on its own facts - peculiar ^{custom} circumstances make the ordinary thing un-reasonable.

② The custom may be itself un-
reasonable, foolish, and negligent.
The fact that we all do it - does not
make it reasonable.

Ex: first electric wires were
not insulated. ~~if~~ If custom were
allowed as criterion we would never
progress.

Custom bears on the question of
reasonableness - but it is not
conclusive all the time - it may be
sometimes.

It is important, though, whether
the other party is expecting D to conform
to custom.

Assessment 158 159 161 162 163 165 167

Ferrell v. Ellis, Iowa, 1906, p. 158

What standard of conduct is
to be held to?

↓ What about an engineer?

128 Minn. 452 Cowles v. Mpls.

accountant

121 Minn. 296 F. G. Forks v. Steele

pilot

Jan. 20

Bill Ellis
control of
interstate & sea
What something
unusual & aside for
which principles
and that happen
to be
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my missingly put

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Assessment 158 159 161 162 163 165 167

Ferrell & Ellis, Iowa, 1906, p. 158 *skill*

Ferrell & Ellis, Iowa, 1906, p. 158

D, a doctor in a town of very small population,
set a dislocated arm unskillfully. Appeal from
judgment for P. Instruction had been "the standard
of skill & learning required is that reasonable degree
ordinarily exercised by doctors at the time, giving
regard to the advanced state of the profession."

Held: Reversed. The degree of skill and learning
should have been limited to that ordinarily possessed
by physicians practicing in similar localities (little towns)

Jan. 20

*skill and
learning*

Ault v Hall, Ohio, 1928, p. 159

24 Cal L.R. 39 Leasco "Liability of Lawyers
for Bad Advice"

41 W.V. L.R. 35 "Medical Malpractice"

any person who undertakes to perform a service requiring a certain amount of skill and knowledge, is held to a minimum standard.

- ① Skill - knowledge - ability - capacity.
- ② Care - caution - method of operation.

Staloch v Hole 100 Minn. 276 recognizes distinction between "skill" and "care"

What is minimum standard of skill?

Suppose Does it make any difference ^{represented himself as} what kind of an expert he holds him-
self up to be? yes - If he claims to have special skill - he must fulfill the standard he sets up for himself.

If a man does not hold himself out as having anything special, then he is held to the standard which the community would reasonably be justified in expecting from him - which can usually be

Ault v Hall, Ohio, 1928, p. 159

Ault v Hall, Ohio, 1928, p. 159

Care and
diligence.

a sponge was left in P when D operated on brain.
D claims he left counting of sponges to a special nurse
provided by the hospital for that purpose. instruction: "if
docs in this vicinity are accustomed to rely on counting
of sponges by a nurse, there should be verdict for D.

Held: instruction incorrect. Customary methods
or conduct do not furnish a conclusive test or fix a
standard. This is only one element which the jury should
have power to consider in deciding whether the doctor used
the proper degree of care that would be exercised by a
prudent, reasonable man, under the circumstances.
having his skill

⑦ Care - caution - method of operation.

Malach v Hole 100 W. Minn. 276 recognizes
distinction between "skill" and "care"

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having anything special, then he is held
to the standard which the community
would reasonably be justified in expecting
from him - which can usually be

ascertained by observing what degree
of skill is found in doctors in the
same locality - in localities which
are similar in size, economic conditions,
etc. Waterbury 132 Mass. 128

Ross v Twitchell 82 Vermont 79

A specialist must adhere to standard
of similar specialists in similar localities.

Where there are two schools of
medical thought, D is entitled
to be judged by the standard of the school to which he adheres
Martin v Courtney 75 Mass. 255

States have almost all set up
minimum standards of skill & knowledge and
examining boards.

Monsieur - 229 N.Y. 59 60

Whipple - 261 Mass. 40

These cases hold that anyone who
purports to give medical treatment
must keep above these standards.

Held in Wisconsin that a
christian science faith healer does not
purport to practice medicine.

Wis. holds any medical man to a minimum standard of diagnosis - but as to the ability to treat it, a different standard is set-up.

Custom among other docs is usually conclusive on the issue of skill, but on issue of care, custom is not conclusive, although it is important.

Walker - 130 Minn. 106 identical with ault case

Jan. 21

B. & O. R. R. v. Goodman, U. S., 1927, p. 160

Question: Was P negligent?

Held: yes, and verdict should have been directed for D. Driving onto r.r. track without stopping, looking, & listening is negligence as a matter of law. But this rule does not always apply.

① suppose a heavy fog - even if he stops - he can't see ② suppose reliance on a watchman

Rule that speed should be adjusted to range of assumed vision cannot be absolutely applied ^{in this} _{x run into a house}
 141 Wash 399 Warehouse - being moved
 126 Oregon 363 - x blinded by coming car, hit at truck parked in road.

Standard of care
depends on circumstances

Negligence is always relative
There are no absolute rules in
negligence cases. The circumstances
make a terrific difference.

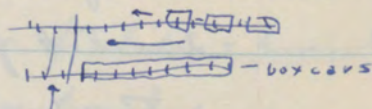
still holds: This case holds: that if driver's
vision is obstructed he must ^{a bit} slow down
He must stop.
17 M.L.R. 771

Rintallan — 159 Minn. 499

Driver is negligent for driving
across tracks

292 U.S. 98 Hokora - Wabash R.R.

Cardozo overrules Goodman case -
says that a reasonable man under the
circumstances, would not stop ^{right out}



Austin v Mass. R.R., 1929, p. 484

What happens afterwards is
of no consequences in determining
what a reasonable man would
have done at the time. There was
an emergency. Any car find he was not negligent.
Suppose A driving with B beside him.
A hits tree in attempting to dodge a child.
It is later shown that he could have
avoided child by putting on brakes ^{any car find him} not negligent.

210 Penn. 238

In an emergency, the reasonable man may make an error in choosing a course of action and still not be negligent.

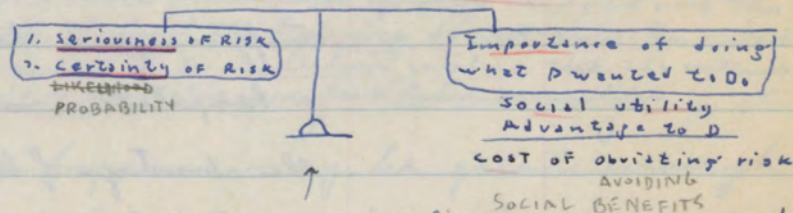
If D was negligent in getting into the emergency, his later actions do not excuse him.

Bratty v Lawa R.P., 1882, p. 163

Risk is slight compared with cost to D of obviating risk.

assuming the risk of harm ^{away} running is foreseeable - A is not negligent.

The criterion is that a reasonable man will take some foreseeable risks to conduct reasonable in the light of the risk? weigh the balance



What the reasonable man will do!

Jan. 24

Chicago, B. & O. v. Krugenbuhl, Nebr., 1902, p. 165

In Merin; the offering by the judge of his ideas on the facts is not reversible error as it was in Nebr., but, in practice, our judges seldom comment on the facts.

The court balances the ^{social utility benefits} advantages of the use of the turntable against the ^{risk} dangers anticipated from its being there. But the cost and inconvenience of keeping the turntable locked does not outweigh the dangers to be anticipated from its not being locked - thus D did not act reasonably in view of the risk.

Suppose a man driving through a traffic signal taking an injured man to a hospital - ~~now~~ the court may find that the advantage of his hurry may outweigh the additional risk he assumes, depending on the facts.

The City of Mpls negligent in allowing ^{bridge} Wash. Ave. to be used, although there is a remote possibility that it will cave in or that rail is not good enough to keep cars go over edge.

Jan. 24

Chicago, B. & O. v. Kravenbuhl. N. H. 1902, p. 115
Chicago B. & O. R.R. v. Kravenbuhl, Neb. 1902, p. 165 91 NW 840

Sufficient evidence was given to justify the jury in finding that D had left a turntable unlocked and unguarded. P, a child of 4, had his foot cut off when other children with whom he was playing set it in motion. Lower court found D guilty of negligence on charge that D would be liable if he did not take such precautions as a man of ordinary prudence, under the circumstances, would have taken.

Held: judgment reversed on a technical point in the charge. But the upper court says. where the danger to be anticipated from the machinery outweighs the slight expense or inconvenience that would be entailed in making it safe, D is liable for injuries to trespassing children caused by the machinery. This is the standard of care - the weighing in the balance of risk and inconvenience that the reasonable man would use.

traffic signal taking an injured man to a hospital - ~~no~~ the court may find that the advantage of his hurry may outweigh the additional risk he assumes, depending on the facts

the City of Mpls negligent in allowing ^{bridge} Wash. Ave. to be used, although there is a remote possibility that it will cave in or that rail is not good enough to keep cars go over edge.

Danion v County 149 Wash 109

Tracy Mpls 185 Minn. 380

6th ave. S.E. bridge - Held: risk of car going over the edge is so remote that city is not negligent in ^{not} building a new bridge (which would be necessary to adequately keep cars from going through the rail)

Tullgren v Amoskeag Co., N.H., 1926, p. 166

The court held voluntarily grants and rehearing on its previous holding. Issue: Was there enough evidence to justify the jury in deciding as they did?

Negligence does not depend upon a better than even chance of injury. The injury may be relatively unlikely to occur, but the seriousness of the injury if it does happen may be great enough to make the risk outweigh the advantage to D and ^{to} society, and thus that a reasonable man under the circumstances would have taken precautions.

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Tullgren v Amoskeag Co., N.H., 1926, p. 166

Tullgren v Amoskeag Mfg. Co., N.H., 1926, p. 166 ^{133 A.4}

P's intestate became sick at work and employer insisted on her going home, sending her home in a company car. Because of water on the street, the driver let her out a few hundred feet from her house with what appeared to be only a sick headache. She died, allegedly from the over-exertion of the walk to her house. P brings negligence - verdict for P. P brings exception to granting of directed verdict for D.

Held: First verdict affirmed. It could reasonably be found that D did not use proper care in failing to take P's intestate all the way home. D was under a duty ^{to see} to have someone assume the task. D is under a duty to anticipate harm and take precaution against it - and ~~and~~ the changes in favor of the happening do not have to spread those against it to make him careless. ~~that the criterion is:~~ would a reasonable man have taken precautions.

does happen may be great enough to make the risk outweigh the advantage to D and ^{to} society, and thus that a reasonable man under the circumstances would have taken precautions.

Duties Created by Statutesnegligence per seBott v Pratt, Minn., 1885, p. 187Violation of the ^{city} ordinance
is negligence. - ^{per se} Hitching boxes. Why? -Osborne v Mc Masters, 1889, p. 192

Ditto. Sale of poison without label.

alternatives - on violation of a statute.

- above case →
- ① Court may rule that it is negligence per se and jury cannot find to the contrary.
 - ② Court may say that it is evidence of negligence and it is up to jury.
 - ③ Court may rule that it is not even any evidence of negligence.

Suppose D runs train on Sunday
in violation of statute and, with out other
negligence, kills P's cow;

Tringle ^{Burke} v - 60 Iowa 333

129 Minn 34 Armstrong

Suppose D drives car without a
license (which is required by statute) and
injures someone without other negligence.

Court construes statute as a tax
measure - not intended to protect
safety of drivers - ∴ violation of statute
is not negligence.

Jan. 27

→ Kelly v Henry Mueh Co., N. J., 1904, p. 197Legislative intent

Statute makes it ^{a crime} ~~negligent~~ for leaving an elevator shaft in a factory unguarded. Purpose of the statute was to protect ^{factory} workmen. P was a visiting fireman and statute was ^{not} intended to give rise to tort liability for injuries to non-workmen.

Same problem here as with statutes on age of consent.

Where do you look for the purpose?

Hamilton v Mpls Co. 78 Minn. 3

Same situation & rule as Kelly case
Akers v R.R. 58 Minn. 540

Statute required blocking of frogs. P got caught in frog while trespassing and was killed. Held: Statute ^{not} intended for protection of trespassers - only those rightfully there.
Eventh v R.R. 100 Minn. 309

Statute required whistle at crossings. P's horse was scared when train came along parallel with him from behind. Held: Statute was intended for protection of drivers.

on roads crossing the tracks - not
on roads parallel with tracks.

Parker v Barnard, Mass., 1883, p. 203

Purpose of the statute is to
protect life in general - not just
workers in factories - but the
tort liability is usually not
extended to injuries to trespassers.

Bronkay v Robinson, N.Y., 1928, p. 199.

Did parking on left side of the
street ^{But for rule} cause the injury? If he had
been faced the other way, the injury
would be just as likely to occur.
D's act of parking evidently did not
have anything to do with the cause of
the injury. But court does not have
to decide it, because the statute
was aimed to protect only cars
in the street -

Weatherhead v _____ 154 Minn. 52

D, driving on left hand of highway,
lost a wheel which rolled up on left
sidewalk and hit P. The driving on

the left has played ^{a cause} a part in the injury. The question is: was driving on left negligence as to P? Held: No. statute intended for protection of other cars - not of walkers on the sidewalk.

No liability for a violation of a statute unless P is included in the class of persons which it is the ^{purpose} intent of the statute to protect.

The court reads into a statute, the purpose or intent of the legislature. The court will look into the ^{context} wording and the title of the statute, but the court really decides what the legislative policy was. and imposes civil liability on it.

Townes.

16 Minn. L. R. 361

"Civil liability created by criminal statutes".

These cases are used in support of Cardozo's position in Paley case. andrews says - no such restriction on common law.

Jan. 28

Harris v Scott, Exchequer, 1874, p. 201

If P's sheep had contracted disease because of D's violation of the statute, P could have recovered. a question of legislative intent. How can you tell that?

1. Look at title of act.
2. Acts that it is classified with.
3. The wording of the act.
4. Evidence in debates, etc., as to the intent of legislature in passing act.

Statute intended to protect only against a certain risk.

295 Mo. 127 Statute provides R.R. shall fence its tracks. D failed to do so. P's cow wandered onto right of way and ate so much it died. Held: D not liable because statute was intended to prevent collisions. If train had hit cow and passenger was injured because of derailling of car, the R.R. would be liable.

Suppose a child had wandered onto track and was hit. If statute is not confined to animals only, R.R. is liable.

R.R. fencing
statute

Jan. 28

Horris v Scott, Exchequer, 1874, p. 201Horris v Scott, Exchequer, 1874, p. 201

D's sheep being carried on P's ships were washed overboard, allegedly because of the negligence of P in not providing pens of certain dimensions and footholds within the pens as was required by statute.

Held: judgment for D. The statute was intended for the prevention of the spread of contagious disease among the sheep, and the statutory requirements had no relation at all to the danger of loss by the perils of the seas. When the damage is of such a nature as was not contemplated by the statute and as to which it was not intended to confer any benefit on P, they cannot maintain an action founded on the neglect.

only against a certain risk.

295 M.S. 187 Statute provides

R.R. shall fence its tracks. D failed to do so. P's cow wandered onto right of way and ate so much it died. Held: D not liable because statute was intended to prevent collisions. If train had hit cow and passenger was injured because of derailing of car, the R.R. would be liable.

Suppose a child had wandered onto track and was hit. If statute is not confined to animals only, R.R. is liable.

R.R. fencing
statute

No parking by
fire hydrant statute

^{fencing} Minn. Statute originally construed
as to protect animals only. Later
construed so as to protect small children.

Ordinance preventing parking in
front of hydrant, is not aimed at
protecting cars in street from collisions.

125 Kansas 476

Ordinance prevents streetcars
stopping in middle of block. D did so. P
walked around end of streetcar in trying to
cross the street in the middle of the block
and was hit by car on other side. Not liable.

Statute is not negligence per se
unless ^① statute was intended to protect
a particular class of persons of which
P is a member and unless statute was
^② aimed at a certain risk in which
the accident is included.

294 Mo. 235

Statute required every emery wheel
to have a guard on it. Guard flew off and
hit P in eye. Held: statute held to
protect only against such. Too narrow

Intention as to
1. class of persons
2. nature of risk

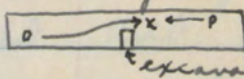
179 N.W. 764

Statute required elevator shaft in factory to be guarded. D closed radiator over edge and hit P at bottom. Held: the statute was aimed at all risks which are reasonably foreseeable as result of a violation.

19 Minn. L.R. 666 excellent note on Minn. Statutes.

Martin v Herzog, N.Y. 1920, p. 194. Cardozo.

Statute intended to protect DR against the risk of the injury which happened. Cardozo says there is violation thereof is negligence per se.

Suppose statute says drive on right side of street . Held: driving on left side is not negligence per se.

Suppose child runs out - forcing D to go to left side of street. Emergency case.

34 Fed. II 723 Dugan v Fry - "excavation"

127 Minn. 401 Chase v Kingdale Bros. - "child"

Statute says no drive without lights. But lights go out on D, and he has

179 N.W.

764

Statute required elevator shaft in factory to be guarded. D shoved radiator over edge and hit P at bottom. Held: the statute was aimed at all risks which are reasonably foreseeable as result of a violation.

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Martin v Herzog, N.Y. 1920, p. 194. Cardozo.

Martin v Herzog, N.Y., 1920, p. 194

D ran into P's buggy. D was violating a statute by driving on the wrong side of the road. P was violating a statute by driving his buggy without lights. Instruction that driving without lights is negligence refused. Instruction that driving without lights is not negligence in itself, but is only some evidence of it - given - judgment for P on verdict. Reversed on appeal to intermediate court.

Held: Reversal upheld. Judgment directed for D. Driving without lights was negligence per se. ^{as to D.} Statute was intended for protection of travelers on highway, of whom D was one. Driving without lights was contributory negligence because it is at least a contributing cause of the disaster.

Statute says no drive without lights. But lights go out on D, and he has

192 Wash 362 -

no other lights and is 10 miles from where he can get some. Driving on is not negligence per se.

Suppose blizzard drifted snow over R.R. fence. Cattle strayed over and were killed. Held: not negligence of R.R.

"Violation of the statute will be negligence unless excused." Cardozo.

Court will consider ⁱⁿ situations where a reasonable man will violate the law.

① emergency ② impossibility

It may even be negligence to obey the law.

What about a "fool" statute - such as: 6 miles a hour speed limit? Suppose D drive 12 m.p.h. Is his violation of that statute negligence?

Stevens v Luther 105 Neb. 184

The court will not follow a statute that a reasonable man would not obey.

no excuse - absolutely liable.

There are some ^{exceptional} statutes which
the court says make D insurer.
Delt. v. St. Louis R.R. 220 U.S. 580

safety

Fed. act requires automatic couplers.
One did not work. P was injured. Held:
R.R. was liable regardless of care used.
102 Minn. 104

pure food

Statute: impure food cannot be
sold as pure food. Held: Law imposes
an absolute liability on manufacturer
(probably on retailer) for purity of food.
Beacham 250 Ill. 303

child labor.

Statute prevents child labor. Child
died about age when he was under age.
Held: employer is absolutely responsible.
Intent of statute was to protect the
child from his own folly.

Minn. court has held from & that
violation of statute by D was negligence
per se. They had also held that
P's violation was only evidence of negligence.
Henderson v. — 154 Minn. 102
Doherty v. — 165 Minn. 193

Meebler v MacMahan 184 Meir. 476

D stopped unlighted truck on highway. P, driving at excessive speed, hit him. P brought suit and D counterclaimed. The court on the horns of a dilemma. Court held: violation of statute by P is negligence per se, unless excused, if it contributed to cause of injury.

Meir Rule

Jan. 31

The Breach - the failure to conform to standard usually left to the jury. - what would a reasonable man have done; and did D do it?

The Things Speaks

Res Ipsa Loquitur

doctrine

These alternatives after P has presented its witnesses and rests.

- ① Dismissal - non-suit - no reasonable man could find D liable.
- ② Continue with trial - mine still doubtful.
- ③ " " " - P's case may be conclusive.

Motion for dismissal raises question whether P has presented enough evidence to make you allow case to go on.

Meekler v MacMahon 184 Mem. 476

D stopped unlighted truck on highway. P, driving at excessive speed, hit him. P brought suit and D counterclaimed. The court on the horns of a dilemma. Court held: violation of statute by P is negligence per se, unless excused, if it contributed to cause of injury.

Mem. Rule

Jan. 31

The Breach - the failure to conform to standard usually left to the jury. - what would a reasonable man have done; and did D do it?

The Things Speaks

Res Ipsa Loquitur doctrine

for itself

Res Ipsa Loquitur

"There must be reasonable evidence of negligence, but when a thing causing the injury is shown to be under the control of D, and the accident is such as, in the ordinary course of business, does not happen if reasonable care is used, it does, in the absence of explanation by D, afford sufficient evidence that the action arose from want of care on its part." Brown v NY Central 109 N.Y. 297

To make you allow case in point.

after D has presented his case.

① direct verdict for either P or D.

② leave it to jury.

Byrne v Boodle, Exchequer, 1863, p. 205

Suppose P and D had auto race-up with no witnesses. P is dead. D goes fishing when action is brought against him by P's wife.

① nobody negligent - pure accident.

② D was negligent - P was not. = only here has P a cause of action.

③ P " " - D " "

④ both parties negligent

Suppose P was found in wrecked car by R.R. crossing. No witnesses. D takes up no defence. Says for P to prove it.

Suppose P was shot and D owned the gun. No other evidence.

Suppose that in Byrne case, D proved that P knew how the accident happened.

What is
the legal situation?

after D has presented his case.

① direct verdict for either P or D.

② leave it to jury.

Byrne v Boadle, Eschequer, 1863, p. 205

Byrne v Boadle, Eschequer, 1863, p. 205

a barrel of flour rolled out of a 2nd floor window in D's warehouse and fell on P, walking by. P was nonsuited because there was no evidence of negligence. Rule nisi

Held: Rule absolute. the rolling of barrels out of 2nd floor windows is prima facie evidence of negligence - it is an act which speaks for itself - res ipsa loquitur - that there is very probably negligence behind it, and P does not have to prove that negligence; it is up to D to rebut the presumption.

to railing up
D goes
against

only have has
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action.

Suppose P was found in wrecked car by R.R. crossing. No witnesses. D does not put up a defence. Says for P to prove it.

Suppose P was shot and D owned the gun. No other evidence.

Suppose that in Byrne case, D proved that P knew how the accident happened.

First
one million

What is
res ipsa loquitur?

Circumstantial evidence is often stronger than testimonial evidence.

Circumstantial evidence is the proof of Fact A, from which, by logic or reasoning, we ^{infer} conclude Fact B.

Testimonial evidence is what someone says he saw.

Example: dog tracks in snow.

In instant case: Fact A is the rolling off of the barrel. Fact B is that D was negligent. Note that the element of P's possible negligence is removed.

- ① Ordinarily, Fact A does not happen without (someone being negligent)
- ② fact B. D was in control of the situation.

∴ the presumption is that D was negligent

Griffin v. Manice, N.Y., 1901, p. 207

Suppose the only employer of D who could have known anything about the care of the elevator was killed.

Where the accident is such as
that the accident would not

ordinarily have occurred without negligence and the ^{exclusive} control of the cause of the accident

Griffin v Manice, N.Y. 1901, p. 207

The elevator in D's building fell to the bottom of the shaft and the heavy iron counterbalance weights fell through the top of the car and killed P.E. Trial court charged on basis of "res ipsa loquitur" - verdict for P. upheld on appeal to intermediate court.

Held: "res ipsa loquitur" charge upheld although the judgment was reversed for an error of trial court judge on another charge. Presumption of negligence is not confined to cases where there is contractual relation of carrier or bailee or where P is injured on public highway. The circumstances of such an accident are themselves of such a character as to justify a jury in inferring negligence as a cause of that accident. D was under a ^{control} duty to see that premises were safe, and no such accident could ordinarily have occurred if the machinery had been properly cared for and operated.

∴ the presumption is that D was negligent

Griffin v Manice, N.Y., 1901, p. 207

Suppose the only employer of D who could have known anything about the care of the elevator ~~was killed~~.

Where the accident is such as that the accident would not ordinarily have occurred without negligence and the ^{electronic} control of the _{cause of the accident}

situation was in D, it affords
reasonable evidence, in absence of
any explanation to contrary that
accident was caused by D's negligence.

It gets P by a non-suit and it
gets it him to pay unless D puts
up a very strong explanation. The
pay favors plaintiffs 77%.

211, 212, 217, 218, 220, 221, 223, 225 ^{enough}

Merrin. Respirator case

Waller v Ross 100 Merrin. 7

an awning fell off building. hit P

Dallen v Insurance Co. 109 Merrin. 337

an elevator fell.

Maule v Gas Co. 100 Merrin 258

Leak in gas main under street.

Holt v Tenbroke 134 Merrin. 458

P was burned while D was administering

^{orible but.}

X very treatments. Respirator logiters does not
apply to all surgical accidents.

Kleinman v Laundry. 150 Merrin. 515

Best decision. Explosion of steam boiler
in D's laundry. D

Babeau v Price Co. 173 Merrin. 331

P injured by a violent jerk of roller
coaster.

Nelson v Zamboni, 164 Minn. 314

Filling station blew up while P's car was waiting for service. ^{complete mystery.} Many possibilities as causes, but better than 50% chance that D did not use care.

Borg Co v Clark, 194 Minn. 305

D parked car on side of hill. Car ran away. ^① Inference: it was D's act that caused the running away. and ② that act was negligent.

Commonly applied to:

- ① Defects in food where food comes in sealed container.
- ② Railroad derailment.

C. J. Cook. Phillens v P. J. Reynolds 117 Minn. 490

"With & if ⁱⁿ tars are found, chewing tobacco it is evidence that someone was careless."

But no pia does not apply for.

- ① Bursting of a fly-wheel
- ② Presence of minute particles in food.
- ③ Where exclusive control was not necessarily in D:

Ulrich v Lumber Co, 97 Minn. 178

D dropped one end of plank.

Harbome v Stamer, 121 Minn. 305

Water leaking through ceiling does not show negligence of landlord.

Mathews Case 162 Minn. 313

Engineer killed when locomotive boiler blew up. Held: No res ipsa against the railroad - exclusive control missing. But if outside person was injured, the railroad would probably be liable.

Some courts hold narrow view that the ^{object} thing that caused injury ^{must} ~~was~~ be under D's control at the time. It is more reasonable that the cause of the injury was in D's control. It is a matter of common sense. Can you say there was a better than even chance that D was negligent?

Edgerton v N.Y. R.R., N.Y., 1868, p. 211

Manning v, 135 Minn. 229

A typical derailment case.

Shine v R.R. 236 Mass. 419

Rock came through R.R. window - No res ipsa case.

McKilroy v R.R. 738 Minn. 288

Train derailed at a crossing - P was a passenger. But P proved himself out ~~of~~ of court, by showing that a pile of sand at the crossing caused the derailment, res ipsa otherwise.

Mathews Case 162 Minn. 313

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Edgerton v N.Y. R.R., N.Y. 1868, p. 211

D's R.R. car, in which P was riding ran off the track, injuring P. Lower court charged: ① There was prima facie evidence of negligence of D; ② D had control of the vehicle; ③ D had a duty to keep cars and tracks in safe condition. When car leaves track, it shows that D has violated this duty, unless D rebuts this presumption. Judgment for P affirmed. Such an accident does not ordinarily happen if reasonable care is used. ∴ presumption is that reasonable care was not used.

Edgerton v N.Y. R.R., N.Y., 1868, p. 211

Manning v _____, 135 Minn. 229

A typical derailment case.

Shine v R.R. 236 Mass. 419

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Train derailed at a crossing - P was a passenger. But P proved himself out of court, by showing that a pile of sand at the crossing caused the derailment, res ipsa otherwise.

auto accidents

Driver runs off road. Passenger injured
Heath v Vlesky. 181 Minn. 492
Nichols v Diter 247 N. W. 8

PI went for a ride with D's son. Car
 found in ditch. D's son never found. PI could
 not drive. Held: D liable. no ipia.

Whitwell - 127 Minn. 529

When car skidded into horse, no
 ipia applied.

But P may go too far in his proof
 and show P was not liable.

No no ipia where blowout of tire
 caused accident.

airplanes

In early days and probably still now
 the fact of an airplane crash is not evidence
 of negligence. This is changing in certain
 types of cases.

Plumb v Richmond Trolley Co., N.Y., 1922, p. 212

Suppose P had used the truck driver. Presumption of negligence against truck driver? No.

Suppose the 2 vehicles had collided and a person in the truck had been injured. No.

Suppose two carriers collide. a passenger in each injured.

Weight of authority is contra to the Plumb case.

Hullman v St. R.R. 161 Minn. 45

Motorman stopped car suddenly in emergency. P thrown to floor and injured.
Held: No res ipsa, because situation was not exclusively under control of D.
thus Minn. seems to follow majority.

Explanation of minority cases:

D carrier contracts to carry ^(carefully) safely - but carrier has always been liable only for negligence and P has made out no breach of contract till he shows negligence.

Plumb v Richmond Trolley Co., N.Y., 1922, p. 212

Plumb v Richmond Trolley Co., N.Y., 1922, p. 212

P was injured while riding on D's trolley car when it collided with a truck.

appeal from an affirmance of a judgment for P.

Issue: Is this a res ipsa loquens case?; that is, is there a presumption from the fact that the accident occurred, that D did not use due care, and that D must offer some explanation?

Held: yes. B.S.

passenger in each injured.

Weight of authority is contra to the Plumb case.

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Held: No res ipsa, because situation was not exclusively under control of D. thus Minn. seems to follow majority.

Explanation of minority cases:

① carrier contracts to carry ^(carefully) safely - but carrier has always been liable only for negligence and P has made out no breach of contract till he shows negligence.

② passenger probably doesn't know what caused the accident and carrier does.
But ignorance on part of P never builds up a case for him.

③ the best explanation is that the courts are laying down a substantive responsibility obligation on carriers to prove their ^{duty} lack of negligence. a special responsibility on basis of policy - but has it got anything to do with res ipsa? No! because ① there was not a better than 50-50 chance that D was negligent and ② motorman was not under exclusive control of the situation

30 Ill. L. R. 980 Prosser's article on it.

He proposes that maybe P should have res ipsa case against both drivers, because there is better than 50-50 chance that both were liable.

effect of res ipsa

assuming you have res ipsa language, what effect does it have? Does it merely get P to the jury or does it get him a directed verdict if D puts in no evidence.

Courts are split on it.

H. & H.	22	Ill. L.R.	724
Carp.	1	Chic. L.R.	519
Prosser	20	Minn. L.R.	241
Rosenthal	22	Cornell L. 2.	39
Carp.	10	S.C. L.R.	1066
Prosser	10	"	459
Carp.	10	"	467

but majority 2 to 1 hold that res ipsa merely gets P to the jury and does not entitle him to directed verdict. Minn. takes that position.

133 Minn. 36 Keithley.

though minority, including N.Y., holds the verdict must be directed for P unless D puts up a case.

- ① D has more knowledge - but does not always ^{hold} _{matter}
- ② balance of probability against D.
- ③ exclusive control imposes special responsibility on D to speak.

but homer says it most res ipsa cases the court is in position positively to say who was negligent. reasonable men may differ.

There are some res ipsa cases where it is obvious that D was negligent that a directed verdict is proper. It depends on what evidence shows. Winn takes this position.

Feb. 7

Buckland v. N.Y. R.R.

If P introduces specific evidence of D's negligence, does he lose the benefit of res ipsa loquens?

A decided minority holds that he loses this benefit, because res ipsa is based on ignorance of P.

202 Mass 491 Mac Namara overrules the Buckland case

A strong majority holds that introduction of evidence of D's negligence does not deprive P of benefit of res ipsa - that there is still the inference of negligence arising from the circumstances, unless the evidence has contradicted the inference.

Suppose P's complaint alleges a specific act of negligence and then fails to prove that specific allegation, and he attempts to fall back on res ipsa.

Bad split: 4 alternatives

There are some res ipsa cases where it is obvious that P was negligent that a directed verdict is proper. It depends on what evidence shows Winn takes this position.

Feb. 7

Buckland v. N.Y. R.R.

Buckland v. N.Y. R.R., Mass, 1902, p. 217

P was injured while riding in a car, which was derailed. Instead of resting his case on res ipsa loquitur, P attempted ~~to~~ to show by his own witnesses just how the accident happened. Unless his evidence showed negligence, he was not entitled to go to the jury.

a strong majority holds that introduction of evidence of P's negligence does not deprive P of benefit of res ipsa - that there is still the inference of negligence arising from the circumstances, unless the evidence has contradicted the inference.

Suppose P's complaint alleges a specific act of negligence and then fails to prove that specific allegation, and he attempts to fall back on res ipsa.

Bad split: 4 alternatives

great evidence of care used. Court deviated
verdict for D. This case stands alone. Ordinarily
it would go to jury.

PROXIMATE CAUSE

Whether the connection between
P's negligence and P's damage is
sufficient to make D liable.

The courts talk about causation
when they mean duty, foreseeability,
standards of conduct, and policy as
to liability.

52 Minn. 242 North - Johnson

P. Mitchell - Every wrongful act
should not be made responsible for all
consequences - it would cause endless litigation

What consequences or causes are
proximate? or near enough to make liable.

Read one:

Green - The Rationale of Proximate Cause.

Carpenter - Workable Rules 20 Cal. L.R. 229 396 471

Edgerton - Legal Cause - 72 P. L.R. 211 343

Beale - Proximate Consequences. 33 H.L.R. 633 but poor

McLaughlin - Proximate Cause 39 H.L.R. 339

Crosser, Minn. Prox Cause 21 M. L.R. 219

great evidence of care used. Court directed verdict for D. This case stands alone. Ordinarily it would go to jury.

PROXIMATE CAUSE

Edgerton, Legal Cause, 72 P.S. L.R. 211

1. It is not possible to ascertain rules which are certain and definite enough to solve cases.
2. Question in each case should be: is it reasonable or just to treat the act as the cause of the harm? This question is answered by balancing the individual and social interests.
3. The word "proximate" is ambiguous and should be abandoned.
4. Directness is a matter of degree.
5. The courts often hold D for injuries indirectly caused by their wrongful acts.
6. Beale says, "the direct result" of an "active force" is legal cause a passive "is not necessarily so."
7. What are "active" and "passive" forces? Is the distinction in continuity of change produced by them? No.
8. You must have foreseeability in addition to directness in order to have legal cause.

Read me:

Green - The Rationale of Proximate Cause.

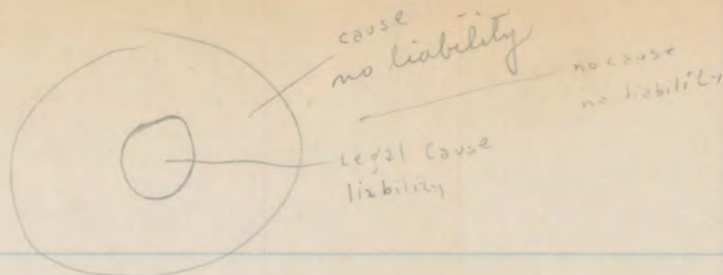
Carpenter - Workable Rules 20 Cal. L.R. 229 396 471

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Prosser. Minn. Prox Cause 21 M. L.R. 219



Hugony - Proximate Cause - Dec., 1938 Chic. L.R.

Was D's conduct to be regarded as cause of P's injury? Let me go to responsible & legal cause

Stacy v Knickerbocker Ice Co., Wis. 1893, p. 218

"But for rule"

The cause of an injury ^{but for} must be an act or omission ^{but for} without which the injury would not have occurred.

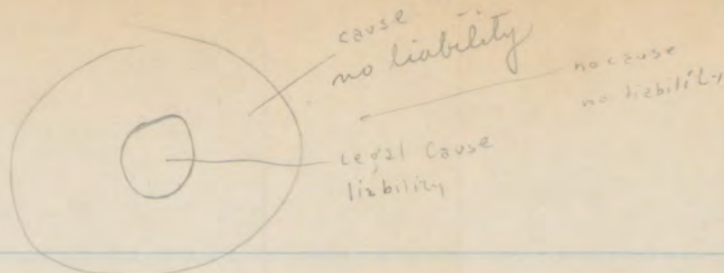
This is just a rule of exclusion.

Note exception in case of 2 concurrent forces, either of which would have caused the result. substantial factor test.

B. & O. R.R. v School District, Pa., 1880, p. 220

If P's injury would have happened without D's negligence, that negligence is not a cause, and D is not liable.

Suppose cow is hit by train. Train did not blow whistle. Held: Whistle means nothing to a cow. Failure to blow is not cause of injury.



Gregory - Proximate Cause - Dec., 1938 Chi. L.R.

Was D's conduct to be regarded as cause of P's injury? the me go to negligible & legal cause

Stacy v. Knickerbocker Ice Co., Wis. 1893 D. 218

Stacy v. Knickerbocker Ice Co., Wis., 1893, p. 218

D hired horses from P to scrape ice. Horses ran wild and broke through thin ice and were drowned. Claimed: D was negligent in ① not putting up fence, ② not warning driver of thin ice, ③ not having ropes around to haul horses out.

Held: Directed verdict for D upheld.

Even if all these precautions had been taken, they would not have saved the horses. D's negligence, if any, did not cause or contribute to the loss of the horses.

B. & O. R.R. v. School District, Pa., 1880, p. 220

B. & O. Ry. v. School District, Pa., 1880, p. 220

P's schoolhouse was flooded away when, after a cloudburst, a brook became swollen and was dammed up by D's embankment. P alleges D is liable for not having more than 3 culverts in the embankment and for not keeping these cleaned out. appeal from verdict for P.

Held: Reversed. Charge: "If D's negligence concurred with an act of God, D is liable, regardless of whether P would have been injured even if D had been negligent" was incorrect. Concurring negligence must be a real producing cause of the injury. If the act of God would have caused the injury without D's negligence, D is not liable

232 Mass. 400

PI fell overboard on D's steamer.
D's lifeboat was sloppily lowered with only one oar. But PI went straight down and never came up again, so D's negligence was not cause.

Laidlaw v. Luge 158 N.Y. 73

D moved P in front of him when X dropped bag of dynamite on a threat.
Held: Verdict directed for D, because D moved P no nearer the man with the dynamite and did not cause his injury.

Suppose D drives 60 m.p.h. ^{in St. Paul.} to get to Mpls. When in Mpls. he is injured without fault. "But for" his fast driving in St. Paul he wouldn't have been in Mpls. to have the accident. His negligent driving is cause of the accident, but D is not liable for it.

Causation is merely a matter of fact. not of liability

X buys ropes from A + B. ^{X buys skin.}
self with B's rope. If B hadn't sold him the rope, he would have used A's rope and the injury would have happened anyway. The selling of the rope was cause

Prosser 21 M L R 12 - Proximate Cause in Minn.

I Causation

- A. "But for" rule.
 B. substantial factor (concurring cause)
^{was he negligent to P}
 Should liability be imposed? assuming direct causation.

II Unforeseeable consequences.

- A. If D has been negligent to somebody, he is liable for all consequences to him, whether foreseeable or not - if there are no intervening causes
 B. N.Y. limitation on time & space
 C. Restatement limitation "highly extraordinary".

III Unforeseeable P.

- A. Cardozo - negligence a relation between persons
 B. Andrews - traditional approach. D negligent
 direct result
 D liable.
 C. Restatement - must be foreseeing of harm to the particular interest of foreseeable P which was involved.

IV Intervening forces. - (after D's negligence) - D liable

- A. foreseeable forces. - construed broadly.
 negligence of others may be foreseeable.
 B. unforeseeable forces. - not liable
 Bills Bros Co - to contrary
 C. Unforeseeable force - foreseeable result - D liable
 Has substantial factor test any relevance here? usually.

V Damages - D liable for all damages - even with joint tortfeasor - but damages apportioned between independent successive injuries where possible.

VI Shifting responsibility.

The injury would have happened anyway. The selling of the rope was cause

Reynolds v Texas R.R. Co., 1885, p. 221

50 Mich 163 Branchamp

P was hit on head due to D's negligent blasting. P laid up for 6 months; at the end of that time, he got pneumonia and died. His death was due to many causes, of which the blow on the head may have been one.

The court throws into the scale the likelihood that the injury would result where D's act existed - on the basis of experience - and if D's act would naturally result in P's injury - the mere possibility that it would have happened without D's act does not excuse D.

Reynolds v Texas R.R. La., 1885, p. 221

Reynolds v Texas R.R., La., 1885, p. 221

P fell down some dimly lighted stairs between D's station and the R.R. platform. P weighed 250 lbs.

Held: D is liable. D was negligent in not having the stairs lighted well enough. This poor lighting greatly multiplied the chances of accident, and even if it is true that, being so corpulent, she might have fallen anyway, this does not break the chain of cause and effect between the negligence & the injury.

The court throws into the scale the likelihood that the injury would result where D's act existed - on the basis of experience - and if D's act would naturally result ~~for~~ in P's injury - the mere possibility that it would have happened without D's act does not excuse D.

Washington Ry. v. Heidey, U.S.S.C., 1897, p. 223

Two or more things may be concurring or cooperating causes - which are responsible causes of an injury. For how much of the damages would each be liable for? The full damage. The plaintiff may collect the full amount from one D, or he can some them jointly and satisfy his judgment from any one, but he cannot collect more than the full damage. - Cony use last line - p. 271 S&T

This doctrine has its basis in history.

25 Cal. L.R. 413 Process - joint & several responsibility joint enterprise.

A, B, & C, working together, beat up P.

There is a mutual agency between them;

that is, the act of one was the act of all.

They were called "joint tortfeasors" - and P could collect from any one of them or part from each.

Robert 145 Mein. 468 - several D's beat up P in saloon - any one of them liable.

Reader 147 Mein. 335 - Two D's were racing their cars. Through negligence of one, P was injured. Both D's held liable.

Liability of joint
tort-feasors

Washington Ry. v Heick, U.S.S.C., 1897, p. 223

Washington Ry. v Heick, U.S.S.C., 1897, p. 223

A, driver of a horse-drawn street-car, started to cross a railroad's tracks, seeing the train rapidly approaching. This was negligent, since any delay in getting across would cause great danger of injury. B, employee of Ry, lowered the gates, catching the horse car between the gates, on the Ry. tracks. This, obviously, was negligent, too. In the rush to get out of the horse car, P was injured. Verdict for P.

Held: Affirmed. These two negligent acts were concurrent causes of the commotion which caused the injury. The fact that A's negligence should not have caused the injury were it not for B's negligent act does not excuse A.

25 Cal. L.R. 413 Prosser - joint & several responsibility joint enterprise.

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Liability of joint
tortfeasors

The English courts apply this rule strictly and definitely.

But in the code states in U.S., (over half) all parties who were necessary to a complete determination of the action can be joined as tortfeasors, and each is liable for all damages. joint tortfeasors may mean:

- ① they can be joined in one suit.
- ② each is liable for entire damages.

the second does not necessarily follow from the first.

- ① Concerted action - ^{joint} jointer + entirely liable.
- ② Vicarious liability - " " "
- ③ Common duty on D " " "

Johnson 43 W.V. 639 - A & B were adjoining land owners with a common wall between, which fell and injured P. Both A & B were under duty to inspect ^{common} wall and so entire liability is put on them.

- ④ single indivisible result - of which so many D's were a cause - they can be joined - and each is liable. common illustration is a collision that injures TP.

Flaherty 39 Minn. 328 - 2 R.R. trains collided.
Washington 11 R p. 271

Cory v Howe p. 270

see last page
agency

jointer but no entire liability

⑤ separate and divisible injury - where it is logically and practically possible to apportion the damages that each caused.

a. Time - successive inflictions of injuries.
Albrecht 205 Mich 395

McSammon 160 Minn. 143 - workman worked on a certain defective instrument for a certain period for each D. He got sand on the lungs.

b. Character - simultaneous infliction of 2 separate injuries.

LeLauren 75 Ark 232 - simultaneous assaults

Nohre 98 Minn. 477 - 2 dogs owned by 2 D's killed sheep. Held: Each D is liable for damage done by his dog. If no evidence, if there is presumption there it was about even.

Johnson 188 Minn. 451 - 2 D's polluted stream simultaneously. P's cattle can't drink it.

Held: ^{have the jury} the court will try to apportion it whenever at all possible.

flooded land, smoke nuisance

suppose 2 D's struggling for a gun shoot P.

Both fully liable.

2 D's with 2 guns injure P.

split it

2 D's with 2 guns kill P. no split

apportionment

Fairly

Consequences

action of one tortfeasor
against others

- ① In action where D's are joined, if you release one of the tortfeasors, you release the others, under the common law. The courts usually get around this in case ④ by saying that a release is only a covenant not to sue.
- ② If P recovers from one tortfeasor, that D has no action against the others.

^{Pa, Wis, Ore, Minn}
This is c.v. rule in all states but 4
statutes change it in 6 or 7 other states.

^{Uniform Act vol. 9}

In Minn. one wrongdoer has come-

Lloyd's. 166 Minn. 388

back against fellow wrongdoers, except
where he is a ^{intentional} willful wrongdoer.

Four Canadian provinces require
P to collect from all tortfeasors in their
share.

Fidelity 183 Minn. 182. The only case
on it as far. poor decision in fact. - no intentional
wrongdoer can recover from negligent wrongdoer
at least.

Reading's Reference
on joint torts, p. 159

Feb. 14.

Anderson v Mpls. R.R., Minn., 1920, p. 225

all of the damage would have been ~~also~~ resulted, even without the bog fire, because of the Kettle River fire. & vice versa.
 182 Mass. 250 - A & B passed P's horse & buggy on motorcycles - scaring horse injuring P.
 In absence of either motorcycle, P would have been injured.

Two wounds inflicted simultaneously on P by two people - either would have killed him. He died. Who is liable?

Two D's shipped explosives without labels. Bumping of cars set off explosives. P's goods were injured. Either package would have caused injury independent of the other.

The "but-for" rule cannot be applied.
 "Material element or substantial factor doctrine" introduced. What does this mean? D's act does not have to be 50% or more of the cause; just as it is not insignificant - not a trifle ^{contribute to} to situations where 2 causes cause an injury - and either would have done it without the other.

Doctrines of material element or substantial factor

where but-for rule cannot apply to concurrent causes, either of which would have caused the injury

Feb. 14.

Anderson v Mpls. R.R., Minn., 1920, p. 225Anderson v Mpls. R.R., Minn., 1920, p. 225

P's property was damaged by fire. Plaintiff that a spark from D's engine started the fire. Verdict for P. Held: affirmed. D cannot escape liability for a fire started by one of its engines by showing that the fire united with another of no responsible origin and that P's property was destroyed by the combined fires, if it appears that the railroad fire was a material element entering into the destruction of the property. D wanted instruction that if the fire of unknown origin would have caused the injury without the concurrence of D's fire, D should not be liable. Denied.

but for
rule does so

Doctrine of
material element
or substantial factor

Two wounds inflicted simultaneously on P by two people - either would have killed him. He died. Who is liable?

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to situations where 2 causes ^{contribute to} cause an injury - and either would have done it without the other.

where but-for rule cannot apply to concurrent causes, either of which would have caused the injury

Sec. 431 Restatement has adopted the substantial factor rule, but there are not many situations where D's negligence would be a substantial factor, without it also being true that the injury would have occurred ^{not} ~~without it~~ anyway.

Sec. 432. Except as stated hereafter, ^DD's negligent conduct is not a substantial factor, if the harm would have been sustained without D's negligence.

① If two forces operate - 1 caused by D's negligence, and either would cause the injury without the other, the jury may find D's negligence a substantial factor.

Golden v. Murch Bros. Dec. 1938 - Minn.

D worked 10 yrs. for A. inhaled dust plenty.

6 mos. for B - inhaled dust 2 or 3 times.

3 years later he got sand dust tuberculosis.

Held: single indivisible result - full recovery from either

Held on rehearing: The 6 mos. employment was not a substantial element in causing the injury.

Two questions: ① Was D's conduct a cause?
Substantial factor applies only here.

② Was it a legal cause? Should D be liable?

192 Minor 360 Peterson v. Fulton

you can't
Tried to apply the substantial factor
doctrine to the question of legal cause.

Prosser's article against it in 21 M.L.R.

But courts continue to apply it there.

Realer

47 H.L.R. 1127 Causation: Multiple Damages

criticized

Dillon v. Has Co. 86 N.H. 449

PI fell off a bridge - hit a high-power wire, ^{not insulated properly}
and was electrocuted - he was on way to certain
death and he can collect the value of his life
which was nothing.

What is value of a man's life who has
only one year to life?

What is value of a house in path of
a fire which would certainly destroy it?

Potential injury - definitely threatened -
may lower value of the thing injured and
the thing that actually causes destruction
should be liable for only the reduced value.

Feb. 17

Suppose A gives P a slow poison certain death in 3 days. B shoots P. Before B intervened, P had potential action against A for full life expectancy. Therefore, it is arguable that B should be liable for full life expectancy.

Prosser's rule would thus seem to apply only where force A is an innocent cause and not where ~~A~~ A+B are both wrongdoers.

From here on we assume that D's conduct has been a cause; the question ^{is} should he be legally responsible? This question has nothing to do with causation (it is a matter of policy). It is a question of whether D had a duty or obligation to protect P from the particular consequences.

D's act is a cause - should he be held liable for injury?

Smith v London Ry. Exchequer, 1870, p. 227

D's act was the cause.

D was negligent.

But is D liable for unforeseeable consequences? yes. This is the leading English case - still the law. there

Hill v Windsor, Mass., 1875, p. 231

Once you are negligent, it doesn't matter that you can't foresee the result.

139 Pa 363 Bunting. p. 267 text - both engineers in a train collision were negligent and the fact that the injury to P happened in a seemingly way does not excuse D.

D's act is a cause - should he be held liable for injury?

Smith v London Ry. Exchequer, 1870, p. 227

Smith v London Ry., Exchequer, 1870, p. 227

D cut grass along right of way and left it in piles - which caught fire, allegedly from sparks from an engine, and which spread across a field and across a road and destroyed P's cottage. D's motion for a non-suit denied.

Held: Affirmed. There was sufficient question to go to a jury. Knowing the dry conditions and the probability of sparks falling on the piles of dry grass, D was negligent in not removing them. D thus became responsible for all the consequences of its conduct. Foreseeability is important in determining negligence - but once it is determined the D was negligent, he is responsible for all consequences whether foreseeable or not.

Hill v Windsor, Mass., 1875, p. 231

Hill v Windsor, Mass., 1875, p. 231

P was working on a fender of a bridge when D's tugboat bumped the fender, loosening a brace and allowing two piles to snap together seriously injuring P. Judgment for P.

Held: Affirmed. The jury might properly find that it was obviously probable that injury in some form would be caused to those at work on the fender if D ran into it. This constitutes negligence, and it is not necessary that injury in the precise form that it happened should have been foreseen. It is enough that it now appears a natural and probable consequence.

THE ENGLISH
RULE

In re Polemis, K.B., 1921, p. 233

D is liable for unforeseeable
direct results of negligent act.

Same question and same holding in
Vosburg - Putney - child kicked chunk in shin.
Christenson - Ry. 67 Minn. 94 leading case

"the 3 telegraph poles case". P was
riding on trolley. D's employees were
running another trolley closer than
the company rules said. D's employees
were thus negligent. P fell off of the
front one and was run over by the 2nd
one. D argued that it was unforeseeable.
Mitchell said D was liable anyway.

In determining negligence, you have
to look at the risk - what you can anticipate
a force - and see if D used due care in
view of that risk. But if D was negligent,
he may be liable even though he could
not anticipate the ^{part} injury which results.
But once you eliminate risk as a limit,
what limit have you got on liability? 7

1. direct results only
2. foreseeable Plaintiff only

In re Polemis, K.B., 1921, p. 233

In re Polemis, K.B., 1921, p. 233

P chartered ship to D. D's servant carelessly dropped a heavy plank into the hold, which struck a spark, which caused an explosion, which destroyed the ship. Judgment for P for the value of the ship. D claims the damages were too remote.

Held: Affirmed. The presence of or absence of reasonable anticipation of some damage determines the legal quality of the act as negligent or innocent. If it is thus found to be negligent, then the question whether particular damages are recoverable depends only on the answer to the question whether they are the direct consequence of the act. Some damage was foreseeable from dropping the plank. ∴ D was negligent. The destruction of the ship was a direct consequence of the dropping of the plank. ∴ P can get full damages.

To look at the risk - what you can anticipate or foresee - and see if D used due care in view of that risk. But if D was negligent, he may be liable even though he could not anticipate the ^{part} injury which results. But once you eliminate risk as a limit, what limit have you got on liability? ⁷

1. direct results only
2. foreseeable Plaintiff only

Feb. 18

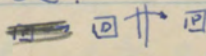
Hoag v Lake Shore Ry, Pa., 1877, p. 236

32 N.J. Eq. 637 Kuhn ^{contra} - same facts - only
D is liable, despite the fact that the
injury was not foreseeable.

Ryan v N. Y. Central, N.Y., 1866, p. 243N.Y. rule

If D sets a fire; the fire is
communicated to 1 building, the owner
can collect; but if the fire spreads
to other houses all the other house
owners can't collect.

Byrd. 220 N.E. 86 - Carbo's defends above rule
Davis 215 N.Y. 181 - where P owns 1st & 2nd houses
he collects for both.

Howe 258 N.Y. 462 -  - P collects.

Feb. 18

Hoag v Lake Shore Ry., Pa., 1877, p. 236Hoag v Lake Shore Ry., Pa., 1877, p. 236

A rainstorm caused a landslide onto a railroad track. D's servant negligently failed to stop his train and the train was derailed, causing 2 oil cars to burst and catch fire; the swollen creek carried the burning oil to P's property which was damaged by the fire. The engineer's negligence is not questioned. But is D liable? No. Direct verdict.

Held: affirmed. Once the facts are agreed on, the question of directness of cause and consequences is a question for the court. To be a cause for which D is liable, the act must be such that the injury followed as a natural and probable consequence and D would be able to foresee it.

Ryan v N. Y. Central, N. Y., 1866, p. 243Ryan v N. Y. Central, N. Y., 1866, p. 243

D negligently set fire to its woodshed. The fire spread to P's house, 130 ft. away, and destroyed it. P non-suited.

Held: affirmed. D was negligent, and his negligence caused the damage. But he is not held liable because of the remoteness of the damage and because the result was not foreseeable or anticipated.

✱ D would be held liable if sparks from its engine hit on P's house, because the result is foreseeable at the time of the negligent act. It would be contrary to modern urban public policy to hold D liable in this case for all the remote damages caused by his negligent act.

Every other jurisdiction but N.Y. has repudiated the rule restricting liability to the first or second house to catch fire. Most cases follow Smith - London Ry., which says that once D is negligent, he is liable for all direct consequences.

Remoteness - As to space and time is pretty fictitious - hard to justify - the thing they are talking about is foreseeability.

Do you have to foresee injury to the particular injured plaintiff?

	Foreseeable injury To	Result (unforeseeable)
Paleyoff	A	B
Smith	A	B
Hoag	A	B
Ryan	A	B
Polennis	A	<u>A</u>
Hill	A	<u>A</u>

D not liable
to unforeseeable
plaintiff.

but most courts
have ignored the
unforeseeable P.

- ① Palagrof - Unforeseeable Plaintiff - majority
holds no duty to?

But a larger majority has never seen
the problem of the unforeseeable plaintiff-duty
and have held D liable.

Hog v. Ryan N.Y. B.

- ② Polemia - Plaintiff foreseeable-consequences not
Majority holds D liable for all consequences
a minority has ^{tried to} limited liability
to the extent of the risk - that is, those
consequences which can be foreseen.

Both of these holdings are not good.
Attempts have been made to compromise
these positions. e.g. ^① N.Y. rule of limitations
of time and space (1 hour to burn rule) This
is arbitrary, inflexible, and likely not to con-
form to common sense.

- ③ Hogens - "If the consequences are similar
in nature to, not too far removed from the risk, then
D should be held liable. No court has
done much with this theory."

Suppose A drops B's clock on B's floor.
The risk is to the clock. If the floor is in-
stead injured, why shouldn't B collect?

③ Restatement. "D is liable for those consequences, which, looking back at the event with full knowledge of the circumstances, appear not highly extraordinary. No court has followed ^{scale.}

④ direct causation and intervening
^{matter of time}
cause - this has been adopted by most courts - 98%.

Direct causation is that which the D's act operates on conditions then existing and forces them to operate to bring about the result without the intervention of any external force.

D acts on a set stage and he is responsible for his own act on that situation.

1. D hits a man with weak heart. Kills him.
2. D sets a fire in wind and fire spreads.
3. D injures man with TB germs latent in system.

In most cases of direct causation the courts have held D liable for all consequences regardless of unforeseeability. Most common cases are those of consequences after personal injury impact.

This rule seems reasonable

D liable to foreseeable plaintiff for unforeseeable direct results

Howery v R.R., Pa., 1890, p. 246

a typical intervening force case
 then, is the result foreseeable? Yes.
 That which happened was part of the risk
 when he set the fire.

Intervening force within the
risk does not relieve D of liability.

Howery v R.R., Pa., 1890, p. 246

Howery v R.R., Pa., 1890, p. 246

A spark from one of D's engines set on fire a stump on the right of way. P was lumbering a tract adjoining the right of way and sent his employees 2 times to put out the fire which they apparently did. The next day a high wind whipped up the fire and it spread and destroyed P's lumber. Lower court refused to direct verdict for D and the jury returned verdict for P.

Held: Affirmed. D was negligent and his negligence caused the injury but was it the proximate cause? The injury must be the natural and probable consequence of the negligence; such as consequence as might and ought to be foreseen. Here the break in the chain of events was only a gap in time and not a real break in the actual connection. The questions of remoteness of cause and injury and the question of contributory negligence (whether D used reasonable care to protect himself, knowing of the fire) were properly left to the jury.

Feb. 24

1. Causation in fact
2. Unforeseeable plaintiff . Polyzoff
3. consequences . Polyzoff

a. Direct causation - O liable for unforeseeable consequences

b. Intervening force - O liable for foreseeable consequences

The next group of cases illustrates the confining of liability to the area of risk - to the foreseeability of the intervening causes.

Cases of direct causation seldom have unforeseeable consequences - only in freak cases - and the consequences are usually immediate.

Beck Lumber Co. v Bayfield Transfer, Wis., 1919, p. 255

A carrier which delays transportation is liable for all injuries from foreseeable intervening causes.

44 19 N.E. 222 - Because on delayed transportation, excessive cold or heat, ordinary storms,

O liable only for
for foreseeable consequences
when there are inter-
vening causes.

Feb. 24

1. Causation in fact
2. Unforeseeable plaintiff . Palagoff
3. " consequences . Polonius

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Beal Lumber Co. v Bayfield Transfer, Wis., 1919, p. 255

Beal Lumber Co. v Bayfield Transfer, Wis., 1919, p. 255

P's lumber was burned up, allegedly because of D's negligence in not supplying means of transporting it out, D being a common carrier. Judgment for P.

Held: affirmed. ^{by first fire} But for the negligence of D, the injury would not have resulted. The hazard of forest fires is so great that the injury was reasonably to be foreseen. Thus the negligence was the proximate cause of the injury. When it is reasonably probable that an injury from an anticipated source may result to another from a failure to perform a duty owing to him, then that failure is the proximate cause of the injury.

D liable only for foreseeable consequences when there are intervening causes.

Greerby v Lancashire R.R., 2. B., 1874, p. 256

Quill Case

Scott v Shepherd, Common Pleas, 1772, p. 258

Here you have intervening human
forces, but they are defensive actions
and those actions are not foreseeable.

Greasy v Lancashire R.R., 2. B., 1874, p. 256

Quilt Case

Scott v Shepherd, Common Pleas, 1772, p. 258

Scott v Shepherd, Common Pleas, 1772, p. 258 Squib case

A threw a lighted squib into a crowded market place; B tossed it away from him; C did likewise, and it ~~q~~ went off, injuring P who was A in trespass.

Held: Judgment for P. Trespass will lie. The injury was the direct consequence of P's negligent act; the intervening acts of B & C were not free agents; the force started by A continued to cause the injury. Blackstone dissenting, claiming the injury is only ^{the} indirectly and consequential result of A's act and that the action if any is case.

human
tortious
feasible

foreseeable
intervening

Little - Atlantic City R.R., N.J., 1901, p. 261

P's running away is a defensive act, and P can foresee some injury which may result from her running away. p. 129

Similar situation in Washington R.R. v. Healy
the commotion of passengers in street car was foreseeable.

Normal and reasonable defensive acts will not relieve liability.

Suppose A's negligence causes B's house to catch fire. B gets all his stuff out of the house and then, when house is about to fall in, he remembers he left his hat inside and he goes to get it and the roof falls in. This is unreasonable defensive act.

foreseeable
intervening
forces

Tuttle v Atlantic City R.R., N.J., 1901, p. 261

Tuttle v Atlantic City R.R., N.J., 1901, p. 261

D negligently allowed a R.R. car to be derailed and back into a street. P seeing the car approaching attempted to run away and when out of the zone of danger, fell and was injured. Verdict for P.

Held: Affirmed. When one is placed, through the negligence of another, in a position of grave and apparent peril, between 2 hazards, and he makes such a choice as a reasonable man placed in such a position might make, the fact that if he had chosen the other hazard he would have escaped injury is of no importance. If D by negligence puts P under a reasonable apprehension of personal physical injury, and P, in a reasonable effort to escape such physical injury, a right of action arises to recover for the physical injury and the accompanying mental disorder.

Illinois Central v Hiler, Ill., 1907, p. 263

D negligently set a fire which was burning in dry grass near P's house. P attempted to make away the dry grass between her house and the fire and was burned. Judgment for P.

Held: Affirmed. One who has negligently set fire to P's premises can be held liable for damages caused by burning the owner while engaged in trying, with reasonable prudence and care, to extinguish such fire. P is under a duty to protect his premises and D must anticipate acts in furtherance of that duty.

Turner v Page, Mass, 1904, p. 265

D must foresee ^{some} unreasonable
acts by bystanders when he lets a
runaway loose by his negligence.
It is part of the risk he created.

Rescuers as intervening causes

↑

must be foreseen

Eckert v L.S. R.R. 43 N.Y. 502

R.R. was negligent in endangering a
child on the track. P tried to save him
and was injured.

Reasonable attempts at rescue
are always part of the risk created
by D's negligence.

Bohlen says "foreseeable" is the
wrong word - we should say "normal"
which means "not highly extraordinary."
But we can use foreseeable to mean that.

minority case

Bibb Broom Corn Co v R.R. 94 Minn. 269, 1905, p. 250

P shipped broom corn over D's R.R., to Kansas City, where the corn was to be transferred to another R.R. and shipped to Mpls. But D left the carload in yards in K.C., and failed to turn it over to the other R.R. for 10 days. A flood, greater than any ever experienced, and assumed to be unforeseeable, destroyed the carload of corn.

Held: Judgment for P. D's negligence "concurrent and mingled" with act of God. There is a minority view. About $\frac{3}{4}$ of states, hold that the unforeseeable intervening force does not make liable relieves D from liability. It is not part of the risk he creates.

Complication in Minn. as result of Bibb case. Fed. rule is that R.R. is not liable for delay in transportation where an unforeseeable act of God causes injury, but this applies only to inter-state commerce. This Bibb case rule applies only to intra-state commerce.

N.W. Milling Co v R.R. 135 Minn. 363
1912

Held: Minn. follows Fed. law on F.S. shipment no cases since.

D not liable for injuries caused by unforeseeable intervening forces

Feb. 25

The Bibb case might be justified as a special liability on carrier ^{without fault} for the loss or destruction of goods, unless such loss is due to act of God, fault of shipper, or public enemy. If carrier deviated from route, departed from instructions, it became absolutely liable for injuries to goods, even though acts of God. It has been argued that this rule should be extended to delays in time - but the common law never did it.

But Minn. court has extended doctrine to cases on other than carriers.

Van Weeghin 176 Minn. 339 (

Nat'l Warehouse 183 Minn. 150

Anderson v. Co. (fired dynamite)

Strobel v. Bremer 93 Minn. 428

| P. | D. |

D negligently left fence open to R. L. An unforeseeable storm opened fence between P & D's land. P's cattle wandered through and were killed by train. Held: (by judge who wrote Bibb case) D is not liable.

If D's negligence merges and
concurs with an unforeseeable
act of God to cause injury, D is
liable in Merin.

This is the only group of cases
 where D has been held beyond the
risk, for unforeseeable forces, where
there is an intervening force.

The general rule is that
unforeseeable intervening forces
relieve D of liability.

Lane v. Atlantic Works, Mass., 1872, p. 271

This case holds that the jury
 could find that D could foresee the
intervening force.

Lane v Atlantic Works, Mass., 1872, p. 271

D left his truck parked in the street loaded with iron so that it would easily fall off. X, a boy of 12, moved the tongue of the wagon to show P, a boy of 7, that he could move the wagon, and a hunk of iron fell on P, who was standing next to the wagon. Verdict for P.

Held: affirmed. Where D is negligent and where his negligent act is a cause of the injury, D is liable when a foreseeable force intervenes and P is injured. If D does that from which injury might reasonably have been expected, is it necessary that the particular ~~is~~ force which intervenes could have been foreseen? If X had been hurt, could he sue D? This case holds that ^{jury could find} D had to foresee little boys coming along and moving the truck, and it made no difference whether such moving was an unlawful trespass.

Lane v Atlantic Works, Mass., 1872, p. 271

This case holds that the jury could find that D could foresee the intervening force.

Trasdale v. Beacon Oil Co., Mass., 1929, p. 272

R.R. spilt gasoline all over the street. X, a bystander, negligently lighted a cigar, burning up P's house. R.R. held liable because they could have foreseen X's negligence.

119 Minn. 277 - D left dynamite caps in locked tool house only there was a large hole in foundation. Boys snuck in and took out caps. 6 year old boy founded one. Held: D is liable. The intervening acts were foreseeable.

Holmberg 158 Minn. 442

A's car crashed up with B's. C's car came along and seeing A's car at last minute, hit P's side of road. Held: A liable. He could foresee ^{to P} injury.

190 Minn. 81

A's truck left insufficient statutory clearance. P's negligently driven car hit A's truck. Held: A is liable, because he should have foreseen a negligently driven car hitting him.

Hatch. Me. 171 A. 387. D left truck without wheels turned in. Boys started car down hill. P jumped in to stop it and

How about contributory negligence

Teardale v Beacon Oil Co., Mass., 1929, p. 272

Teardale v Beacon Oil Co., Mass., 1929, p. 272

D negligently spilled gasoline all over the inside of a car and on P who was riding in the car. X negligently left the top off the coil box in his car and when started to crank the car, a spark set the gasoline afire in the car and P was burned. Judgment for P.

Held: affirmed. An intervening act of TP, contributing a condition necessary to the injurious effect of the original negligence, will not excuse the original wrongdoer, if such act ought to have been foreseen, and the exact act of TP does not have to be foreseeable, if injury can be foreseen from an act of the same general character.

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Hatch. Me. 171 At. 387. D left truck without wheels turned in. Boy started car down hill. P jumped in to stop it and

How about
contributory
negligence?

was injured. Held: Jury finding affirmed that D was liable and could have foreseen the intervening forces.

Sullivan v Creed, K.B., 1903, p. 169.

Leaving deadly poison around on open shelves in high school chemistry class, is probably negligent.

M. Donnell v R.R., K.B., 1903, p. 174

Holman 99 Mass 170 - D left R.R. car on grade with brakes set. Kids released brakes and injury resulted.

Held: Not negligence. But where it is a new auto - it is within the risk that kids will start it off. It is a question for the jury, though, on the particular circumstances. Element of the possible alternatives enter in.

Feb. 28

Frightmaster v. Mode, Ohio, 1929, p. 177

Where children are involved,
D may be expected to take precautions
against the negligence of those children.

D is under obligation to foresee
intervening negligence which is within
the risk.

Mc Kenna v. Stephens, Ireland, 1923, p. 177

Why make D responsible for the
intervening negligence of TP, not
a child? It could be foreseen.

Feb. 28

Frightmaster - Mode, Ohio, 1929, p. 177

Frightmaster - Mode, Ohio, 1929, p. 177

P, a small boy, was clinging to the back of an ice truck and jumped or fell off, and was run over by a car driven too closely behind the truck by D. Judgment for D.

Held: Judgment for P. D did not use due care in the light of the circumstances. He should have seen the boy and taken precautions to not be a position to hit him if he jumped off.

McKenna - Stephens, Ireland, 1923, p. 177

D, a contractor, was repairing a building and erected a boarding which forced pedestrians to walk out in the street. P was hit by a vehicle negligently driven. Judgment for P.

Held: Affirmed. If an injury would not have happened but for D's negligent act, and D could have reasonably foreseen the injury, D is liable, even though the act of X which directly injured P, was also negligent. If you make people walk in the street, you must foresee injury to them.

olved,
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77

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D must foresee some
criminal intervention.

Eston v R.R., N.J., 1899, p.179

Issue: Was the evidence that D knew of the previous scuffling properly allowed to be introduced? yes.

If D can foresee injury to P by an intervening force, when is he under duty obligated to take steps to protect P?
 1. When his negligence has put P in the dangerous position.

2.

Marshall v Caledonian R.R., Scotland, 1899, p.188

Harris 169 Maxim. 62

P & D occupied same store. D left key in door. X entered - cleaned out P's goods. D held liable.
a reasonable man must foresee some crimes.

Andrews 114 Ma. 390 - D, a carpenter, left windows open in P's house. X broke in & stole.
Held: Not liable.

U.S.

251 Louise 715: Held: Cunard line not liable for sinking its ship into area where humans had warned.

D must foresee some
criminal interventions.

Eston v R.R., N.J., 1899, p. 179

Eston v R.R., N.J., 1899, p. 179

Two lockmen, scuffling in a passageway
in D's station, bumped into P and injured him.

Notice of such scufflings had been previously given
to D's passenger agent. Verdict for P.

Held: Affirmed. It was proper to submit
to the jury the question whether D had used due
care in keeping his public passageways safe, whether
P did not know of the impending scuffling, and whether
D knew about its previous occurrence and had
failed to take steps to keep the corridors clear.

Marshall v Caledonian R.R., Scotland, 1899, p. 188

Marshall v Caledonian R.R., Scotland, 1899, p. 180

D in running a railroad under a
street had to underpin P's premises and had
to tear down an area wall. In rebuilding
it, D left a hole in it, through which X stole
some of P's goods. Findings for P.

Held: Affirmed. D was negligent,
and his act was a cause of the injury; that
is, the injury would not have happened with-
out it, and he should have foreseen some-
one sneaking through the hole. It was
part of the risk.

100 Mo. 568 Henderson - D assumed
 charge of a convict or hired out convict labor.
 D escaped and raped P. P sues D for rape.
 are you going to hold D for all the crimes
 he committed? Held: D not liable. Not
 a proximate cause. Intervening responsible force
Pres Co 122 Me 214. D negligently let
 lunatic out and he burned down a
 building. Held: D is liable, lunatic
 being a pyromaniac.

Mitchell & Churches, Wash, 1922, p. 183

Suppose D sells the drunk the car.
He may be liable.

but M
 a
 going now
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100 Ga. 568 Henderson - D assumed charge of a convict or hired out convict labor. D escaped and raped P. P sues D for rape. Are you going to hold D for all the crimes he commits? Held: D not liable. Not a proximate cause. Intervening responsible force. Jones Co 122 Me 214. D negligently let lunatic out and he burned down a building. Held: D is liable, lunatic being a pyromaniac.

Mitchell - Churches, Wash., 1922, p. 183

Mitchell - Churches, Wash., 1922, p. 183

D let X use his car when he knew X was going on a drinking party and when he knew X would probably not be in a condition to drive it carefully. X injured P. Question of D's negligence submitted to jury. Verdict for P.

Held: affirmed. Proper question for the jury. The owner was negligent in entrusting his car to an incompetent person.

The car.

March

Broun v R.R. N.J., 1918, p. 275

Eldridge 86 Pa L.R. 121 - poor

D may be liable for the negligent or criminal intervening act of another.302 Restatement - classes ^{some} situations where D is liable - "Duty to anticipate and guard against the intervening negligence and criminal acts of others."A. Negligence of others

common

O'Neil 323

1. Ordinary - every-day - foreseeable negligence.... M. Kenna v. Hyblus p. 154 - making people walk in street, one must anticipate negligent car drivers.2. Unusual kind of negligence which D has special reason to anticipatea. Children involved - other irresponsible peopleSlater v Baker Co. Mass., 1927, p. 277b. Post-offense - Exton v R.R. - cab drivers3. Would a reasonable man recognize the risk as calling for precaution on his part.B. Intentional, criminal ^{intervening} acts where D is liable.1. Where D has assumed charge or obligation to protect the person & property of P.

March v

Brower v R.R. N.J., 1918, p. 275Brower v R.R., N.J., 1918, p. 275

D's train hit P's wagon due to D's negligence. The collision scattered barrels of cider all over the street, and, while the driver was not in condition to protect them due to the crashup, some thieves stole them. Is D liable for the loss of the barrels? Yes.

Held: Affirmed. D was negligent and his act was a cause of the loss of the barrels; that is, they would not have been lost but for his act. Where another force intervenes to bring injury to P, D is liable if he could have foreseen the injury coming from the intervening force. Held in this case, that D could foresee someone stealing the barrels, once D had knocked them all over the street and rendered P incapable of guarding them. The dissent claims that D should not have to foresee a criminal intervention for this implies that crime is to be presumed which is wrong.

Slater v Baker Co. Mass., 1927, p. 277Slater v Baker Co., Mass., 1927, p. 277

D left his car parked unlocked on the street with the key in the ignition. A motor vehicle statute required that cars be provided with lock and key, to prevent the car from being set in motion by unauthorized persons. Lower court held that granting D was negligent, he was not liable for injuries to P which occurred when X swiped the car and negligently hit P, because D was not bound to anticipate and guard against the intervening acts of the thief.

carrier, theater etc.

Hotel keeper permits one guest to sock another where its employees could have intervened.

②. Whereby contract or agreement, D has undertaken expressly to care for P.

③. Where D's act defeats a protection which P has placed around his person or property.

334 — Marshall - Calumet R.R. - hole in wall
Brower v R.R. - Knocked Post

337 Where D's act has interfered with P's ability to protect himself from intentional injury.

④. Where D has brought into contact with P, a person who D should know to be peculiarly likely to commit intentional misconduct under circumstances which afford peculiar opportunity to do so

Hall v. Smith 240 N. Y. 485

D is landlord - employs violent fireman -
B kicks about heat. A beats B up. D held liable for negligence in employing such a servant.

Harris v. Garret, 101 Va. 125

P, 18, passenger, fell asleep on R.R. and rode

part her station. Con. put her off by a
tramp's pinger - she was raped. D held liable
for exposing her to risk.

③ where D entrusts an instrumentality
capable of doing harm if misused,
to a person whom he should know
^{intend to} to be likely to misuse it.

Watchell - Churches - giving car to drunk.

④ where D has taken charge and assumed
control of TP whom, unless controlled, he knows
to be likely to inflict injury on others.
for the state - pyromaniac.

⑤ where D knows of peculiar conditions which
makes injury to TP ^{strongly} likely, and where D is ^{protect TP} under duty to

D leaves large wheel of iron cable at
top of hill on Halloween night. D held
liable for injuries to people caused by
kids setting the wheel rolling.

1. Foreseeability of intervening misconduct.
2. Character of person with whom you are dealing.
3. seriousness of the danger - as of people affected.
4. relations between the parties.

Restatement has the best summary
of criminal intervention and proximate cause.

Leaving Carbooks
p. 186

332

in one of Prosser's
Restatements

March. 3

Miller - Bahnmüller, N.Y., 1908, p 274.Intervening causes:

1. Foreseeable.
2. Unforeseeable force-unforeseeable result.
3. But suppose a foresee result comes from an unforeseeable intervening force.

Johnson - Cosmos Cement Co. 64 Fed. 2nd 193

D left oil barge moored at dock; failed to clean out the bottom. The petroleum residue created gases. Risk: fire or explosion which would injure the vicinity. Lightning struck barge; killed 2 employees of dock co. Trial went: D was negligent but the intervening force was unforeseeable. Reversed: Lightning is foreseeable, but even if it weren't, D has created the risk of what happened.

Moore 76 Minn. 64 - D left ladder leaning on building on sidewalk. Ladder blew over by unusual blast of wind. The blast of wind was unforeseeable but the risk was of what happened.

Village 104 Minn. 263

D put obstruction in street. -

D liable for foreseeable result from unforeseeable intervening force, except where latter is intentional.

P 299

P's horse ran wild due to another cause and ran into the obstruction. Runaway horses are not foreseeable, but it was foreseeable that somebody might run into it.

Suppose D runs down P in road. If a second vehicle hits the helpless P, D is liable. But what if X, in second vehicle intentionally ~~runs over~~ ^{runs over} P.

Instant case: open cellerway. X shoves P into it. D not liable.

Klaman 181 Mein 109 D left

chair on balcony rail in theatre.

Playful boy threw the chair down

Held: D not liable - intervening force not foreseeable, old

les. 461 Reich Reich.

D will be liable where the foreseeable insequence is brought about by an unforeseeable intervening force of nature ^① or by the merely negligence ^② of another person, but D is not liable where the foreseen result is brought about by the intentional intervening act ^③ of another.

Elder v. Tykens Valley Coal Co., Penn., 1893, p. 249

D leaves refuse from its coal mine in creek, which, during an unforeseeable flood, carries refuse onto P's land. But it could have been foreseen that some refuse would be carried there, but not in such great degree. Held: D liable for whole thing. D ought to pay for something, since he has created the risk, and it's too ^{opportunit} hard to split the damages. Minority ^{3 of 10} rule

New Mexico made jury decide how much of injury could have been anticipated and made D liable ^{thereby created} for that part. 7 of 10 are in accord with this.

Restatement follows Penn. ^{minority} without noticing the other cases.

Larson v. Boston Elevated, Mass., 1912, p. 240

assume that D's act was a substantial factor in the T.B. death.

① Latent existing infection stirred up by D's act - see Joskey v. Putney.

2461
me. v.

also
 ✓ 244 Kenny

P's act is direct causation - that is, the stage is set - and so P is liable for the consequences - even though they are unforeseeable. All courts agree & suppose P is healthy, but the injury exposes P ^{with of} to a particular kind of infection.

(2)

Blood poisoning in open wound is ruled. 123 Amstrong 223 - P is liable for damages from a wound becoming infected. 3. P's act produces merely a weakened physical condition, and P catches a disease to which his weakened condition makes him susceptible.

R. 458

D gets pneumonia - TB etc. - The few cases which have passed on this question, have held D liable, if it was foreseeable.

50 Mich. 163

96 Ind. 349

and numerous workmen's compensation cases.

4. The injury produces weakened condition and P catches a disease which he would be just as likely to get if he were healthy, but the disease has more serious consequences.

also
P. 294
Kenny

P's act is direct causation - that is,
the stage is set - and so P is liable

Watson v. Kinderhook, Minn., 1901, p. 279

D assaulted P. Lower court refused to admit evidence which would show P's physical condition before and after the assault so as to show the effect of D's act on him. P got only nominal damages.
Held: Reversed.

When D commits a tort upon B, he is liable for all the damages that follow as a direct consequence of his act, regardless of whether P was unusually susceptible to injury or whether the extent of the injuries sustained could ^{not} have been foreseen by D.

R. 47

disease so when one weakened condition makes him susceptible.

Larson v. "L", Mass., 1912, p. 280

P got her hand caught in the "L" door due to D's negligence; she had a miscarriage; lost much weight; 6 months later discovered she had tuberculosis. Judge refused rule that TB was due to a new and independent cause. Jury found damages for P for TP.

Held: affirmed. The jury could find on the evidence that the TB was a direct and immediate result of her injuries. It could also find the other way. D asked that evidence as to TB not even be allowed, and this is not correct.

but the disease has more serious consequences

before case
 P. 322
 gives relief in
 W.C. cases.

than it otherwise would.

Ex. smallpox or typhoid. anybody
 will catch it if exposed to impure water
 etc. Courts have drawn the line

here. Not liable

Sec. 458 Restatement agrees. Says
 the intervening cause is unforeseeable
 and the difficulty of proof of more
serious consequences is too tough.

March 7

Purchase v. Seely, Mass., 1918, p. 282

Release to one of two tortfeasors is a bar to action against the other.
 Question here: Is R.R. Co. is a joint-
 factor with the Dr? ^{or} Is R.R. liable
 for his negligence?

The general rule is that if D employs
P, he is liable for aggravation of the
injury due to doctor's ^{ordinary} negligence. This
intervening force is held foreseeable
a part of the risk. & P must use
reasonable care in selecting the doctor
and in getting adequate treatment.
Goss v. Goss 102 Minn. 346

There are some kinds of medical
negligence which are not foreseeable
 and D is not liable for it.

& D not liable where doctor commu-
 nicated scarlet fever to P. This is
 distinguished from such things as
 improperly setting broken leg - poorly
 sterilized wounds etc.

There have been only 2 cases where
 the doctor's negligence is held to be
not foreseeable.

March 7

Purchase v. Seely, Mass., 1918, p. 282Purchase v. Seely, Mass., 1918, p. 282

P was ruptured in right groin while in employ of railroad, A. D operated on the wrong side of P, first, thinking he was another patient, and then he operated on the right side. P made a settlement with A and released all claims to it arising out of his injury. Would A have been liable for injuries resulting from D's ^{negligence} ~~operation~~ in operating on the wrong side? If so, then P's release to A bars his action against D.

Held: No. a wrongdoer is usually held liable for the negligence of a physician whose unskillful treatment aggravates an injury because that is an intervening force which ought to have been foreseen by him. But A would not be obligated to foresee a physician mistaking a person's identity and making an entirely different operation. Therefore, A would not be liable; therefore P's release to A cannot bar P's action against D.

negligence
and D is not liable for it.

D not liable where doctor communicated scarlet fever to P. This is distinguished from such things as improperly setting broken leg - poorly sterilized wounds etc.

There have been only 2 cases where the doctor's negligence is held to be not foreseeable.

Where A injures B, and the injury causes such insanity or delirium that B does not know what he is doing or his reason does not enable him to control his actions, A is liable for his death ^{by suicide}. Treated either as direct causation or as a foreseeable intervening force - part of the risk.

^{Under Fed. Cases to contrary}
Restatement 455 - approves this view

Where A injures B, and the injury makes life a burden to B, but does not render him unable to control the situation - or when it causes fits of insanity and he kills himself between fits because life has become unendurable to him, A is not liable. His suicide is here regarded as his voluntary choice, and it is regarded either as contributory unreasonable conduct or as unforeseeable intervening force.

Restatement agrees with all courts on this.

Where A injures B, and the
Daniels v N.Y. R.R., Mass. 1903, p. 285

A was injured in a railroad collision in August and in October he strangled himself. Lower court instructed that if he was insane when he strangled himself and if the collision caused the insanity, ^{he was then directly} A was liable for his death.

Held: Verdict ^{for D.} Evidence must be shown that death was the result of an uncontrollable impulse, or was accomplished in a delirium or frenzy caused by the collision in order for A to be liable. Otherwise, if there is conscious volition to produce death, with knowledge of the physical consequences of the act, this is an independent intervening force which D is not responsible.

Restatement 455 - ^{they} approve this view

Where A injures B, and the injury make life a burden to B, but does not render him unable to control the situation - or when it causes fits of insanity and he kills himself between fits because life has become unendurable to him, A is not liable. His suicide is here regarded as his voluntary choice, and it is regarded either as contributory unreasonable conduct or as unforeseeable intervening force.

Restatement agrees with all courts on this

The difficulty comes in trying to get psychiatrists to testify whether B had ^{no} control of his actions or whether it was his voluntary action. The psychiatrists say you can't classify insanity that way.

Houth v. Preston Mills, Wash., 1908, p. 287

~~The~~ P, being in exercise of due care, and the fall being contributed to by the injury, D is liable for that injury.

Restatement. 460

103 Merin. 331 - B's leg broken in D's mine. On crutches going from home to hospital, he fell and broke it again. Verdict for P. Second fall is a part of the risk from the original injury.

184 Merin. 89 - P had both legs broken in June. Next January, he was killed going down steep cellar stairs - Held, D not liable.

① He was contributorily negligent.

② His conduct was not foreseeable - not a part of the risk.

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Hoseth v Preston Mills, Wash., 1908, p. 287

Hoseth v Preston Mills, Wash., 1908, p. 287

A broke his leg, due to B's negligence. Three months later, on crutches in the hospital with permission of physician, he slipped and fell, breaking it again.

Held: If A uses reasonable care to effect a cure, both in selection of a physician and as to his own conduct, he may collect for all damages flowing naturally and proximately from the original injury. Is B liable for negligence of physician? Is B liable for A's own negligence in falling? ^{No}

see note from original injury.
184 Meritt. 89 - P had both legs broken in June. Next January, he was killed going down steep cellar stairs - Held. D not liable.
① He was contributorily negligent.
② His conduct was not foreseeable - not a part of the risk.

Important

Summary:

you never can tell what is in the mind of a court when they talk about proximate cause.

Problems:

- ① Causation in fact - answer: was D a substantial factor in the injury? Usually this means - would the injury have happened, but for D's negligence?
Unforeseeable Plaintiff
- ② Duty to P - ~~was~~ P vs D, who has threatened harm to A, liable for injury to B? split. ^{unpredictable} Majority of courts which have talked about duty, say D is not liable. But most courts have not seen the matter of duty - and a majority of them hold D liable.
- ③ Unforeseeable consequences
a number of different views.
Polemia - D liable for all consequences.
Ryson - D only liable for foreseeable consequences and various compromises between the two extremes.

March 11

Liability for mental disturbance.

Courts are reluctant to allow recovery for mental disturbances where D was only careless and not an intentional inflicter of harm.

an intentional trespasser is generally held for accidental unforeseeable consequences. Not so where D is merely negligent.

Where moral guilt is less, the tendency is to hold D for less consequences.

Purcell v. St. Paul R.R., Minn., 1892, p 283

March 11

Liability, for mental disturbance.Purcell v. St. Paul R.R., Minn., 1892, p. 293

D drove his streetcar negligently across in front of an approaching cable car. The clanging of bells and rushing of passengers to get out of the car frightened P, a passenger, which caused her to have a miscarriage with consequent physical injuries. Damages to complaint awarded.

Held: Affirmed. Conceding that the effect of a negligent act on the mind alone will not furnish ground of action, D is liable for physical consequences of mental strains put on P. If D is negligent as to an ordinary passenger, P can recover the full extent of her injuries, without regard to whether she was more liable to injury than most passengers.

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Mitchell - Rochester, N. Y., 1896, p. 294

Reasons for no liability:

- ① danger of opening up innumerable cases and litigation - (this reason has fallen into disrepute).
 - a. where there is a wrong, there should be remedy
 - b. in practice, there have not been too many cases.
 - ② danger of fraud, fiction, trumped-up charges - a real danger
 - ③ the result ~~is~~ came from a set of circumstances which could not be foreseen.
 - a. the consequences are usually foreseeable
 - b. even if unforeseeable, it is direct causation, and D should be liable anyway.
- not a really good argument.

Honans - Boston "L", Mass., 1902, p. 286

^{Impact.}
D negligent - physical blow - nervous shock-consequences. The physical blow gives ^{against fake claim} some degree of guarantee of genuineness of shock.

168 Mass 285 Spoke - D put drunk off car. Disturbance frightened P - shock & miscarriage resulted. Held: No recovery - no impact.

^{Ky.}
Impact ^{has} argument - slight blow, burn from electric wire, trivial fall in car, knock off seat,

Mitchell v Rochester, N. Y., 1896, p. 294

Mitchell v Rochester R.R., New York, 1896, p. 294

While P was waiting to board a horse-car, a negligently driven horse-car approached ~~from the other way~~ dangerously close to her. She fainted, and subsequently had a miscarriage and illness.

Held: Non-suit affirmed. Since D is not liable for fight caused by his negligence, he is not liable for the later physical consequences of that fight.

stances which could not be foreseen.

a. The consequences are usually foreseeable

b. even if unforeseeable, it is direct causation, and D should be liable anyway.

- not a really good argument.

Homans v Boston "L", Mass., 1902, p. 296

Homans v Boston "L", Mass., 1902, p. 296

P was thrown against the seat in front of her by a collision due to D's negligence. She was bruised, ^{and} nervously shocked which was later followed by paralysis. Lower court allowed recovery for shock ending in paralysis if it resulted from a jar to her nervous system which accompanied the blow to ~~to~~ her person.

Held: affirmed. Where nervous shock results from the same wrongful mismanagement as a physical blow, D is liable.

duct in eye, intake smoke,

38 Mass. Appeals 581 - circus horse hit on P.

12 N.E. 2d 739 - something broke window
on streetcar. P was frightened; twisted
shoulder in pinning up. Pains for fight
and miscarriage. Held: the recovery.

No recovery ^{solely} simply from fright; but
rather only where "injury comes from without."
This apparently rejects impact theory in Mass.

The tendency is away from the
impact theory. Now - a bare
majority of courts allowing recovery
for fright and its consequences
without impact. (including Whelan)

A substantial minority (N.Y.)
refuse recovery where there is no impact

The impact is simply a guarantee
of genuineness of the fright claim.

Impact has some value as protection
to D, he at least will know about impact.

① All courts agree that physical pain and inconvenience are compensable. Purely subjective testimony will not support a substantial verdict.

② Where there is physical impact, however trivial, producing a visible physical injury, it is the overwhelming weight of authority that mental suffering, fright, and consequences thereof may be compensated.

112 Minn. 496 Jensen v. R.R.

③ Where there is a direct physical impact but no visible injury except the mental disturbance - the majority of courts will allow recovery for mental shock or fright.

④ Where there is no impact, but there is shock, fright, or mental disturbance and physical consequences (miscarriage), some courts (N.Y. and Mass) will not allow recovery. Others (Illinois) allow recovery - this is a bare majority and the tendency ^{is} this way.

all writers agree that impact should not be decisive as guarantee of genuineness. (continued)

③ Where there is no impact and no consequences, but only shock or fright, nearly all courts refuse recovery in negligence case. They do allow recovery where shock is produced by intentionally outrageous conduct. (new tort)

This is a rule of expediency. Danger of fraudulent cases is too great to allow recovery.

But Iowa & Texas hold that where telegraph^{co.} is negligent in delivering death messages, etc., P may collect for purely mental suffering. But most states and the Fed. rule deny recovery.

A few courts allow recovery for the negligent handling of dead bodies and resulting mental suffering.

Hambrook - Stokes Bros., Eng., 1924, p. 301

Can P recover for physical consequences from mental shock from seeing another person put in danger?

- ① The courts which require impact would not be able to give recovery.
- ② This court gives recovery - but because P was in the zone of risk of injury, even though the injury came in a manner not foreseen. One judge seems to say that recovery would be allowed, regardless of where P was.

This is the Polegraf case question again.

Suppose P is not the child's mother, but is a relative or even a stranger.

Suppose is not told about ^{it} for a week and she then suffers mental anguish.

Once you get beyond the zone of danger doctrine, where are you going to stop.

216 Wis. 603 Wauke

19 Minn. L.R. 806

↑ P, a mother on sidewalk, saw child run down on street. Held: No recovery for fright at the peril of another person where

Hambrook v Stokes Bros., Eng., 1924, p. 301

Hambrook v Stokes Bros., Eng., 1924, p. 301

Due to D's negligence a lorry ran wild and finally ran into a house near P. P's little girl had been run over and injured by the lorry, and because of the ~~the~~ nervous shock to P, she suffered a miscarriage and died. Lower court held she can recover only if her shock resulted from fear of immediate injury to herself and not from fear of injury to her child.

Held: Reversed. D is liable for physical consequences of nervous shock to P, due to a reasonable fear of injury to either herself or her children from D's negligent act or omission.

say that recovery would be allowed, regardless of where P was.

This is the Polsgrof case question again.

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Once you get beyond the zone of danger doctrine, where are you going to stop.

216 Wis. 603 Wauke

19 Minn. L.R. 806 P, a mother on sidewalk saw child run down on street. Held: No recovery for fright at the peril of another person where

P is not in danger herself.

But at least 3 inferior courts have abrogated the rule that P must be in danger herself, if she sees her child imperiled by D's negligence and suffers mental suffering.

Macomber 49 Harv. L. R. 1033

says as matter of expediency, you must draw the line somewhere, and that it should be limited to near relatives; that the fright must be substantially contemporaneous with the act; and that there must be serious physical consequences from the mental shock to give it genuineness.

Maybe a mother's fright can be foreseen.

DUTY OF OCCUPIERS + OWNERS OF LAND

March 16

1. persons outside
 2. property

nuisance - the ^{most} undefined term in law. It is some kind of interference with rights of P.

2 kinds: public; private

① public nuisance - an interference with a public right. The state or city can maintain action. Only individuals who have suffered special damage can sue. Does special damage mean damage different in kind or merely in degree from the damage that the public as a whole suffers? Most authority says it must be a difference in kind - although they find that difference in questionable situations. No problem of land is involved.

② a private nuisance - is something that interferes with landowner's enjoyment of his ^{land} property. Trespass is infringement of P's possession. Nuisance interferes with P's enjoyment of his property without disturbing P's possession. Nuisance - smoke, smell, noise.

houses of prostitution, undesirable businesses.
But D has a right to reasonable use
of his own property. The nuisance
may be ① intended ② negligent (con-
tributory negligence may be defenses,
③ liability without fault (highly
dangerous things) Rylands v Fletcher

We shall talk only of negligence
and not use the term nuisance.

Hiles v Walker, 2 B., 1890, p. 345

Suppose D has a lot in urban
^{natural} area with a swamp on it - horrible
smell. Is D under duty to do some-
thing about it? Probably not.

There is no liability for
the natural condition of land.

No other rule would be workable
in a pioneer community. Then
when you get urban communities, the
law is already settled, and is only
^{got around} changed by statute, ordinance, and
city taking over such land for parks.

Modifications:

① D must cut poisonous trees down.

② D must cut trees that endanger

P 513

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①

natural conditions

no liability

(with some modifications)

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Giles v Walker, 2. B., 1890, p. 345

Duties of real estate occupiers to others

Giles v Walker, 2. B., 1890, p. 345

Diponderson put land under cultivation
 as result of which thistles grew all over it.
 D neglected to mow the thistles and they blew
 over onto P's adjoining land and seeded. Question
 of D's negligence left to jury. Verdict for P.

Held: Reversed. There is no duty as
 between adjoining occupiers to cut the thistles
 which are the natural growth of the soil.

①

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highways by getting rotten and threatening to fall on highway.

③. strike "Paradise" tree must be cut.

These modifications are exceptional.

Domina v. Wattle, 2. B., 1703, p. 346

Occupier of land has duty to take reasonable care of artificial structures and prevent threatening danger to public.

House is not especially dangerous - therefore, liability only for negligent failure to keep up. Hill 14 Minn. 43 - fire burned D's building - left wall standing. D had responsible officials inspect it. They told him it was safe. Wind blew it down on D. Hill:

No negligence. D used reasonable care.

Wolf - Des Moines Elevator, Iowa, 1905, p. 347

As to all active operations, the occupier is under duty to use reasonable care to protect others off the property.

all these things have been called nuisances.

highways by getting rotten and threatening to fall on highway.

③. strike "Paradise" trees must be cut.

These modifications are exceptional.

Domina v Watts, 2. B., 1703, p. 346

②

artificial conditions-

Duty to use care only,

except for liability

without fault for

highly dangerous conditions what relate the occupier had in the premises liable.

Domina v Watts, 2. B., 1703, p. 346

Indictment of occupier for not repairing

a house standing upon the highway, likely to fall down. He was only a tenant at will.

Held: The public looks to the occupier to prevent danger to the public. It is not material

③

active operations

duty to use care

reasons ②.

Wolf v Des Moines Elevator Co., Iowa, 1905, p. 347

D had a grain elevator near the r.r. station. about 40 feet from a traveled way, D had an exhaust pipe, poorly muffled, the puffing from which scared P's horse causing injury. Directed verdict for D.

Held: Reversed. Question: Was the use being made of the adjacent property such in character as to be an unnecessary interference with or unnecessarily dangerous to persons making lawful use of the highway? The elevator was located where it might properly be; the use of a gasoline engine was proper; but the question whether there was negligence in the manner of the use and operation of the engine should have been left to the jury.

March 18

Duty to persons who
come on land

① Trespassers

a. Adults

b. Children

— Tolerated intruders

② Licenses

③ Invitees (Business visitors) - Those
who are on D's land for the economic benefit
of D.

as P's position improves, D's
duty to him increases.

Duty is a matter of balancing
the rights of D to use his own land
as he sees fit against the desirability
of protecting individuals in society from
harm.

adult trespassers.

Union Stock Yards v. Rourke, 111 Ill., 1881, p. 358

^{existing}
An condition of the premises as
distinguished from active operations.
assuming it to be trespasser.

Suppose D sees P approaching
the ~~not~~ hole where he fell in. Is he
under a duty to warn him? No,
not if he had not no duty to put
up a sign.

as to existing condition
of premises.

March 18

Duty to persons who
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who are on D's land for the economic benefit
of D.

Union Stock Yards v Bourke, Ill., 1881, p. 358

D owned a plot of land adjoining the river,
the water being some places covered with several
inches of sludge. The fence around the plot was
broken down and people were in the habit of cutting
across the plot. P, not familiar around there, cut
across, slipped on the crust on water and was
drowned. P sues D. Judgment for P.

Held: Judgment for D. General rule: owners
of private grounds are under no obligation to keep
them safe for trespassers or licencees who come
on land under no invitation. Qualifications:

- ① D is liable for injury caused by instrumentality of
disturbance etc. there by D without notice to P.
- ② D is liable for injuries from pitfalls & obstructions
too near a highway.
- ③ D is liable when children are injured on D's premises
when D could have foreseen from the condition of the
premises that they might be injured.

But here P was an adult; the plot was not near
a public way; D did not cause the dangerous crust;
it came from other packing houses; D was under no
duty to change existing conditions or protect from
trespassers or bare licencees.

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of premises.

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The owner of land is under no
obligation to keep it in safe
condition for the benefit of tres-
passers.

Ratliff v Dawson 50 Minn. 450

adult brought 3-year-old to play on vacant lot. They were trespassers. Landbank came in on bid and killed it. Held: action dismissed. Since adult brought child on land, it is considered as an adult trespass case.

duty to discovered trespassers as to active operations

Palmer & Gordon, Mass., 1899, p. 362

It is comparatively slight burden on D to require him to use reasonable care not to injure a known trespasser by D's affirmative act. Note short time element. local policy makes D liable.

The owner of land is under no obligation to keep it in safe condition for the benefit of trespassers.

Rattle v Dawson 50 Minn. 450

adult brought 3-year-old to play on vacant lot. They were trespassers. Landowner came in on kid and killed it. Held: action dismissed. Since adult brought child on land, it is considered as an adult trespass case.

duty to discovered trespassers as to active operations.

Palmer v Gordon, Mass., 1899, p. 362

Palmer v Gordon, Mass., 1899, p. 362

P and another boy of 15 went into the kitchen of D's restaurant. D told them to get out. Then he jiggled a pan of water on stove to make it rattle and scare the boys out but the scalding water spilled off P's legs. Verdict for P.

Held: affirmed. Where D does an act directed against a trespasser, specifically contemplating P's presence, D may be liable if that act sufficiently threatened the danger which occurred. This question was properly submitted to jury.

Herrick & Wixon, Mich., 1899, p. 363

P's presence is known

D is conducting active operations and owes D to use care to any person in the audience, even though he is a trespasser.

Castonguay & Needle Co., N.H., 1927, p. 364

This raises question of difference between condition of promisee and active operation. It is hard to draw the line. Held here to be active operation, because person running machine was controlling it all the time. Duty is only to use reasonable care and D used that.

No cases on a machine left running without immediate control.

Herrick v. Wixon, Mich., 1899, p. 362
Herrick v. Wixon, Mich., 1899, p. 363

for a a virus owner invited P, small boy, into tent without authority. P was then trespasser. Instruction: if P was a ^{which would} mere trespasser, D owed him no duty ~~to~~ allow him to recover for eye put out by explosion of giant firecracker. Judgment for D.

Held: Reversed. A trespasser who suffers injury because of the dangerous condition of premises is without remedy. But, if after being discovered on the premises, P is injured by the negligent affirmative act of D, he can collect.

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Castonguay v. Needle Co., N.H., 1927, p. 364

Castonguay v. Needle Co., N.H., 1927, p. 364

P was injured by the breaking of a needle and a piece of it flying in her eye. She was in mill on a visit, invited by manager who had no authority to so invite, so she was a trespasser. Verdict for P.

Held: ~~affirmed~~ ^{Reversed}. While there was no duty to provide safe conditions for her, there was a duty to refrain from negligent conduct towards her as a known trespasser. Required to take account of a known trespasser's presence, one may not carelessly cause force to be exerted against him either by active or passive conduct. But it is held here that D was not negligent since the thing that happened was not sufficiently foreseeable so that any ordinary reasonable man would guard against it.

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Other problems as to active operations:

1. Undiscovered trespassers

a. un-anticipated - no duty to discover

b. anticipated - no duty ordinarily
except heavily frequented places.

March 21 Campbell v R.R., Kansas, 1895, p. 366

D is under no duty to discover
trespasser. But once trespasser is
discovered, D must use reasonable care
to avoid injury to him ^{from} P's active
operations. How can you tell a
condition of the premises from an
active operations?

115 Mass. 458 Maynard Case - bad case
says D owes no duty even to dis-
covered trespasser except as not to
inflict willful or wanton injury on
him.

46 Minn. 345 Johnson v Treadwell

D not liable because he was not
willfully or wantonly negligent.

This view has been almost universally
discredited.

Rest. 206 in accord.

Minn. court later tried to get out

Other problems as to active operation:

1. Undiscovered trespassers

a. un-anticipated - no duty to discover

b. anticipated - no duty ordinarily
except heavily frequented places.

March 21 Campbell v. R.R., Kansas, 1895, p. 366

Campbell v. R.R., Kansas, 1895, p. 366

P was run over by D's train. D blew danger signals but did not attempt to stop train to avoid hitting P, a trespasser. Judgment for D.

Held: Affirmed. Where appearances indicate that person on the track is in such condition as to be either insensible of danger or unable to avoid it, D must try to stop. Same rule for young child, unable to understand the danger. But where P is apparently able to take care of himself, warning signals are enough.

a problem of standard of care

46 Person person

P not liable because he was not willfully & wantonly negligent.

This view has been almost universally discredited.

But, 206 in accord.

Minor court later tried to get out

of their first rule by saying that willful
and wanton negligence is lack of ordinary care to know trespassers.

Monahan v. N. W. R.R. 76 Minn. 306

Eastern Ky. R.R. v. Powell, Ky., 1895, p. 368

Train without headlight - inquiry
to a number of persons ^(even) can be fore-
seen - but it is held here that D
had no duty to discover a trespasser.

One way to explain this is that
trespasser assumes risk.

People always trespass on R.R. tracks
and R.R. knows it - anticipates it.

But should we then put obligation
on train to watch out for trespassers?

Ordinarily, no. But there are exceptions.

① trespassers - in large numbers, habitually
come on tracks at a certain point. ~~and~~

Hanks v. N. W. R.R. 131 Minn. 281. no general

duty to look out for trespassers.

Edwards v. R.R. 115 Minn. 392

of their first rule by saying that willful
 & wanton negligence is lack of ordinary care to know the person

Monahan v. N. Y. R.R. 76 Minn. 306

Eastern Ky. R.R. v. Powell, Ky., 1895, p. 368

Eastern Ky. R.R. v. Powell, Ky., 1895, p. 368

P, a trespasser, ^{on track} injured by D's train.
 D did not see him. Judgment for P.

Held: Reversed. P claims D had no
 headlight and no bell or whistle. But D is
 not required to use care to anticipate and
 discover a trespasser; it is not required
 to make conditions safe for him. The only
 duty that D has is to use all reasonable
care to avoid his injury, after becoming
aware of his danger. There was no evidence
 that D could have avoided the injury after
 P's presence was discovered.

injury
 be fore-
 that D
 trespasser.
 that

R.R. tracks
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duty to look out for trespassers.

Edwards v. R.R. 115 Minn. 392

Duty as to warn discovered trespassers as to condition of premises. - answer still open.

Humphrey v. Electric Co., Vt., 1927, p. 370

The immunity ^{a landowner's privilege.} that A has from duty to keep conditions safe for benefit of trespassers does not extend to others who are on A's land. ^{They} ~~He~~ is under duty not to create any risk as to trespassers.

Duty ~~not~~ to warn discovered trespassers as to
condition of premises - answer still open.

Humphrey v Electric Co., Vt., 1927, p. 370
 - a landowner's privilege.

Humphrey v Electric Co., Vt., 1927, p. 370

P was electrified by coming in contact with a wire fence onto which D's live wire had sagged, due to fact that a tie wire broke on a temporary stringing after a storm. P was hunting - trespassing on X's land. Verdict for D reversed. New trial

Held: P could recover nothing from X for injuries ~~to~~ sustained because of the condition of premises on which he was trespassing. But the mere fact that P was a trespasser on X's land does not, ipso facto, preclude him from a recovery in this action. The question of D's negligence, foreseeability, and proximate cause have still ^{to} be settled by the lower court.

April 4

Winter Exam:

Weakest point is in seeing the problems

① (a) grocer

1. statute against chipped bottles - leg. intent

1. class to be protected = consumers

2. risk aimed at = getting cut

(a res ipsa case even without ordinance.)

1. bottles under grocer's exclusive care

violation of ordinance is negligence per se.

and court should direct a verdict for P.

2. How much damages?

for the cut - for the infection - possibility of contributory negligence - for results of doctor's negligence? question for jury.

(b) Milk Co.

1. common law duty on manufacturers

2. duty imposed by statute

D is liable if it can be proved that bottle was chipped when D had it - no proof of this.

burden on P - no res ipsa case.

direct verdict for D.

② always ascertain what the question is!
question here: Can jury reasonably disagree on all things left to them? If error was prejudicial - reverse

① D is liable if driver was negligent. Driver ^{could be} was probably not negligent - might be directed. But D was probably negligent in not informing driver. might be directed - might go to jury.

② proximate cause. 4 intervening causes.

a. driver dropping ice. - foreseeable.

b. strong wind

c. children's acts

d. rescuer

all issues properly left to jury.

April 7

Duties to trespassing children - [attractive nuisances]

Why give children more protection than adult? Ordinarily, trespasser must take risks of injury when he goes on D's land, but this is putting too much of burden on child.

Lynch v. Nurdin, L.B., 1841, p. 373

This is first case holding D liable for injury to trespassing child. D had held out a temptation to the child, and should be liable when he yields.

① D is liable if driver was negligent. Driver ^{could be} was probably not negligent - might be directed. But D was probably negligent in not informing driver. might be directed - might go to jury.

② proximate cause. 4 intervening causes.

a. driver dropping ice. - foreseeable.

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all issues properly left to jury.

April 7

Duties to trespassing children [attractive nuisance]

When give children more protection

Duty to infant trespassers

Lynck v Nordin, 2 B, 1841, p. 323

D left horse & cart in street for half hour. P, ^{a child,} climbing on the cart was injured when another child made horse go. Left to jury.

Held: Affirmed. If D has been deficient in ordinary care (question for jury) in leaving a thing dangerous in a place where it is extremely probable that TP will unjustifiably set it in motion to the injury of P, D is liable to P, even if P had himself been a trespasser, providing P used the degree of care which could reasonably be expected of a child his age.

D liable

D had

child,

childs.

Kremer - Strasbomuller, Pa., 1906. p. 375

D required to use reasonable care
to protect children in the light
of the foreseeable risk.

Foreseeability.

- | | |
|-------------------------------|---|
| ① <u>presence</u> of children | } [attractive
nuisance]
[bodily misnomer] |
| ② <u>harm</u> to them | |

The adult can be expected to
look out for himself - the child
cannot. But why not put the
obligation on the parents - not on
the land owner? D can take ^{diligent} precautions
to protect children from specific ^{dangerous} injury -
mentality by taking reasonable care.

see the turntable case - Braymull Case
if weigh the ^{burden} of supplying protection
against the risk of harm - to find whether
D used reasonable care.

L.C. v. Stout 17 Wallace 456. 657 } ^{early} turntable
cases
Heffey v. R.R. 21 Minn 207

A Minn Cases decision for P

Zwickers v. Utility Co. 155 Minn. 203
like McKitty Case.

Dexter v. State Paper Co. 111 Minn. 439
ungrounded elevator

criterion for
reasonable care

Kreiner - Straubmuller, Pa., 1906, p. 375

Kreiner - Straubmuller, Pa., 1906, p. 375

D left pile of empty beer barrels adjoining his brewery and a sidewalk. P, a child was injured climbing on them.

Held: If D left his property in a dangerous position, where he could reasonably foresee that children might be injured thereon, D is liable, provided P, a child, used that degree of care which could be reasonably expected of a child of his age.

cannot. But why not put the obligation on the parents - not on the land owner? D can take precautions to protect children from specific ^{dangerous} injury by taking reasonable care.

see the "turntable" case - Krayenbuhl Case
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like McKiddy Case.

Darby v. Stone Paper Co. 111 Minn. 439
unmarked elevator

criterion for
reasonable care

Mc Kiddy v Des Moines Elec Co., 1926, p. 377

any at belief D
- drop withing 5000 ft
- 50 ft from 50 - but not
instructed; child
- children at 5000 ft
of interval, instructed ①
child for 5000 ft
for 5000 ft
of 5000 ft ②

Berg v Fuel Co 122 Minn. 323

unguarded endless chain - children common there

Mattson v R.R. 95 Minn. 477

dynamite caps left exposed on R.R. right of way and children known to be

B Minn. Cases - decision for D:

Enck v R.R. 82 Minn. 60

fire of rubbish on R.R. right of way - child burned.

Stendal v Bogd 73 Minn. 53

child fell in artificial pond.

Twitt v R.R. 39 Minn. 164

boy hurt on R.R. Turntable - son of R.R. man - specifically
warned - understood danger.

Brown v Mpls 136 Minn. 177

no real risk. harmless
D left red lantern on pile of sand - child burned on it

Dahl v Dredging Co 125 Minn. 90

D left coffee pot of naphtha (inflammable) on shelf in
engine room of steam shovel. child put coffee pot on
stove - explosion - doubtful case - no very serious
injury. he expected to

any child must understand danger of fire
and water - except real small ones.

239 Rest. of torts - law good.

a possessor of land or chattels is
subject to liability for bodily

McKiddy v Des Moines Elec. Co., 1926, p. 377

McKiddy v Des Moines Elec. Co., 1926, p. 377

D failed to put danger sign on a high-line pole near a public park, contrary to ordinance. P was electrocuted - a boy of 12.

Held: Question was properly left to jury elements to consider:

- ① character, location of the instrumentality.
- ② foreseeability of children climbing on it.
- ③ age and intelligence of child.
- ④ negligence of D.

Stendal v Bogel 73 Minn. 53

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a possessor of land or chattels is
subject to liability for bodily

excellent summary
on duty to trespassing
children

children

risk

non-appreciation
of danger by child.

small utility

harm to young children tres-
passing thereon, caused by
an artificial condition which
he maintains of the land if:

- ① the place is one where D knows or should know that such children are likely to be trespassing - foreseeability.
- ② the condition is one of which D knows or should know to be dangerous and which involves an unreasonable risk ^{death or} of bodily injury to children if there.
- ③ children, because of inexperience, do not discover the condition or realize the risk involved.
- ④ The utility ^{or ease of safeguarding} to D of maintaining the condition is slight as compared to the risk to young children involved.

Ryan v. Tower, Mich., 1901, p. 380

Children tore out a wall in an old unused pump-house. One got caught monkeying with a water-wheel therein, and P, another child, was injured rescuing her. P sues corp. and directors. Directed verdict for directors appealed from. Verdict for P against corp.

Held: affirmed. and no right of action exists against corp. either. Court condemns "attractive nuisance" doctrine; says landowner should not be under duty to keep premises safe for benefit of trespassers, children or adults.

Zinc Co. v. Britt, V55C, 1921, p. 387

D tore down its zinc plant leaving the cellar open which filled with water. Children from a highway 100 ft. away went swimming therein and were poisoned to death. Verdict for P affirmed.

Held: Reversed. attractive nuisance doctrine is often substituted for license to children. But the water here did not induce or allure children to trespass - they were already trespassing. The attractive nuisance doctrine must be strictly confined. There is no general duty of landowner to keep land safe for children trespassers.

Louery v. Walker, H. of L., 1910, p. 390

D put a horse which he knew to be dangerous in a field through which the public habitually passed for 15 years without D having taken proceeding against them for so doing. D had put up a "Keep off" notice and complained to cops, but refrained to prosecute because they were his customers.

Held: D is liable for injury to tolerated intruder - there without right, but with D's acquiescence - from dangerous horse put there by D.

Mere
licensees

Fitzpatrick v Glass Co., N.J., 1898, p. 392

D permitted P, a boy of 12, to bring his father's lunch to the glass works. A gate out of repair fell on him. Verdict for P.

Held: Reversed. Mere permission to come on land creates no duty on owner to keep premises safe for such licensees - only duty is to refrain from acts willfully injurious.

P was not there by invitation - only by permission. He was there on business of no concern to D.

no duty to keep
conditions of premises
safe.

Kallogher v Humphrey, L.B., 1862, p. 393.

D had permitted P to use its walk to take P's father's lunch to him. D was negligent in running crane over the walk and P was injured as a result thereof. Verdict for P.

Held: affirmed. Owner of land is under no duty to keep conditions of the premises safe for licensees - but he is under duty not to do any further affirmative negligent act to endanger the licensee.

But there is a
duty to use care
in active operations

Barry v R.R., N.Y., 1883, p. 396

D backed up its train in a populous place where people had, with D's acquiescence, crossed the tracks for a long time. P was run down & killed.

Held: Judgment for P affirmed. Whether P was on tracks by right, or as mere licensee, D is under duty to use reasonable care in the operations of moving his train thereon so as not to injure P by his negligence. Same rule as to anticipated but undiscovered trespassers.

Corby v Hill, Common Pleas, 1858, p. 401

P used private road as licensee and his horse ran into stakes left negligently on road by D - ^{with others permission} not the owner. Directed verdict for P.

Held: Affirmed. Having held the road out as a safe driveway - the owner - and thus those who claim under his permission - is under a duty not to put obstructions in the road that will make it dangerous.

Don't they really think of P as invitee?

This is a condition of premises. Must they be kept safe for licensees?

Meiers v Brewery, N. Y. 1920, p. 403

Fireman fell in a coal hole in D's driveway when he was coming to put out a fire.

Held: [Judgment for P affirmed. One not a mere licensee entering business property as of right over a way prepared as means of access for those entitled to enter who is injured by the negligence of the owner in failing to keep that way in a reasonably safe condition for those using it as it was intended to be used may recover from the negligent owner.]

Duty to keep
condition of premises
safe for business
visitor.

Local history

There is a small lake in the center of the town, and it is the only one of its kind in the area. The lake is surrounded by a dense forest of tall trees, and the water is very clear. The lake is a popular spot for fishing and swimming, and it is also a good place to see the local wildlife. The lake is a beautiful sight, and it is a great place to spend a day. The lake is a very important part of the town, and it is a great place to see the local history.

Local history

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April 15

Social Guests

These categories have no intrinsic validity in themselves.

Louthcoat v Stanley p. 406

Social guest treated merely as licensee. Weight of authority is with this rule. You must ^{only} warn them of hidden dangers of which you know.

Conner Mass 189 N.E. 588

Minor. in accord.

Business Visitor invitee - has technical meaning - one who is on premises for economic advantage to D. Business visitors.

Undermann v Davies, Common Pleas, 1860, p 408

Occupier under duty to warn against ^{and know} unknown concealed dangers - and also to inspect premises and keep them in repair (using reasonable care) to avoid injury to P.

There is no duty as to obvious dangers - at least where D should look out for himself. What is obvious is a jury question - peculiar facts.

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Business Visitor invitee - has technical meaning - one who is on premises for economic advantage to D. Business visitors.

Underman v Dames, Common Pleas, 1866, p. 408

Duty to warn against

concealed dangers (not obvious ones)

Underman v Dames, Common Pleas, 1866, p. 408

P fell down an open shaft in D's sugar refinery when he was there on business to test a gas regulator. Rule nisi from verdict for P.

Duty to inspect and keep premises in repair, using reasonable care

Held: affirmed. P was a business guest - there upon business which concerned the occupier and upon the occupier's express or implied invitation. There was evidence, by reason of the unfenced and unlighted shaft, of unusual danger, known to D and unknown to P, which D did not use reasonable care to warn P. No usage could establish that what was in fact unnecessarily dangerous was in law reasonably safe, as against persons towards whom there was a duty to be careful.

A Bohlen - Basis of duty to business visitor is the economic advantage to D.

Suppose church gives free concert invites the public.

B another theory - a business visitor is one for whom the premises are thrown open.

Dobbie v. Kase Co., Cal., 1928, p. 414

P was on D's premises for D's business benefit, even though D had not dealt directly with him.

Department store.

- ① customer - buys something -
- ② shopper - prospective customer -
- ③ looker -
- ④ person accompanying customer

children with mother are business visitors.

counts are split on skulls.

- ⑤ utter through
- ⑥ own purpose

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Suppose church gives free concert invites the public.

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Dobbie v. Mac Co. Cal., 1928, p. 414

Dobbie v. Mac Co. Cal., 1928, p. 414

D hired independent contractor, X, to fix his roof, warning him of the presence of a skylight thereon. P, one of X's employees fell through the skylight, not knowing it was there, it being covered with soot to make it look like the roof. appeal from judgment for P.

Held: affirmed. servants of X are deemed to be on premises on business which concerns occupier and at his invitation. D owes them the duty to warn them of any dangers of which he knows and they do not. The duty arises from the invitation - not out of the contract; and the duty to warn X's employees cannot be delegated to X.

D's
ugh
to him.

visitors.

D owes business visitor a
an affirmative duty to protect him.
43 Minn 40 - D

169 Minn. 443 - P slipped on wood
floor at ^{only} entertainment where he paid.

Duty is ^{only} to use reasonable care.
Albuckley v. Golden Rule 135 Minn. 381

D tripped over small stair at
interesting hallways - brightly lighted.
Directed verdict for D.

April 21

Frank v. Shotwell, Minn., 1889, p. 416

area of invitation is confined to
place where business visitors are ex-
pected to go. When he goes farther, he
then becomes a licensee or a trespasser,
depending on whether he went with
permission or not. Here - not - and
he is trespasser.

170 Minn. 322 - fellow using toilet
in a restaurant not open - he was licensee.

P may go into an unusual part of
the premises with D's permission on
a business purpose.

169 Minn. 136 - still a business visitor

D was business visitor on
an affirmative duty to protect him.
43 Minn 40 - D

169 Minn. 443 - P slipped on wood
floor at entertainment where he paid.

Duty is ^{only} to use reasonable care.
Albrecht v. Golden Rule 135 Minn. 381

D tripped over small stair at
interesting hallways - brightly lighted.
Directed verdict for D.

April 21

Trask v. Shotwell, Minn., 1889, p. 416

Trask v. Shotwell, Minn., 1889, p. 416

PI was told by warehouse house clerk to
go to door of shipping room and get package. Clerk
there told him to wait outside, but he went
in shipping room and fell down elevator shaft.
Verdict directed for D.

Held: affirmed. Going into a place
not prepared for visitors & customers, intended
for those only who were employed about and
were familiar with it and its dangers taken
PI out of the area of invitation and makes
him assume the risk and peril of his act.
How is he then classified?

the premises with D's permission on
a business purpose.

169 Minn. 136 - still a business visitor

when he went back into storeroom at D's suggestion or request.

De Lee v. Parby Construction Co., N.Y., 1928 p 428

Occupier must use reasonable care to protect business visitors from injury from risks created by others.

Corrigan v. Elinor 81 Minn. 42

P injured while shopping in dept. store by workmen of manufacturer delivering new counter. D had duty to protect shoppers - either D was negligent or was liable for negligence of independent contractor. This duty is non-delegable.

Summary of duty to persons on land.

These categories have no nobility in themselves.

I Condition of premises.

A. Trespassers.

1. Adults - No duty

a. Exceptions:

few cases - Rest. in accord

1. Tolerated intruders known to trespass

frequently at a dangerous spot

- no cases

2. Discovered trespassers known to be approaching serious danger - duty to warn

2. Children - Yes

a. Minority - industrial states - No duty.

b. Growing majority - attractive nuisance

Rest. opposes - cites 4 conditions.

1. Attraction really is not useful.

B. Licensees - no duty except to protect from:

1. ~~Has~~ Concealed dangers known to D.

2. Changes in premises which involve unreasonable risk

C. Business visitors,

1. Duty of affirmative ^{reasonable} care to ^{inspect} and keep them safe.

II Active operations

A. Trespassers.

1. Undiscovered - no duty
 - a. Except to trespassers who may be anticipated at a particular point R.R.
2. Discovered - duty of reasonable care
3. No distinction as to children except as to degree of reasonable care.

B. Licenses.

C. Business visitors

} duty to use reasonable care

How heavy a burden ^{W. RISK} is it on D to protect P? Strike a balance between this and social desirability of having things as they are.

A child is usually not more than 13 or 14 - except in very serious danger.

DUTY OF EMPLOYER TO EMPLOYEES

A servant is at least a business visitor. At common law, master was under duty to use care to avoid injury to employees by:

Common law duties

- ① furnishing safe place in which to work
- ② furnishing safe tools, machinery, equipment
- ③ provide sufficient number of competent fellow employees.
- ④ to make or enforce rules of safety.
- ⑤ to warn employees of any danger which they couldn't reasonably be expected to look out for.

There were others.

He must either have known of the danger or have been able to discover it by reasonable care.

4 defences

(1A) Employee had to prove negligence - very hard to prove.

3 notorious common law defences.

- ① contributory negligence.
- ② assumption of risk - consent to take the chance of injury from all risks ordinarily incident to the work. Also unusual risks that P knew about.

Thomas v. Quartermaine p. 421

P fell in open hole in floor which he knew about.

If P called D's attention to risk and D consented to fix it, P did not assume risk for a reasonable time.

31 Minn. 248 Green

But if it was clear that D was not going to fix it, P has assumed the risk.

③ fellow servant rule

1700 - rule evolved that workmen could not recover from employer for injury due to negligence of a fellow worker.

If employee A injured T P in course of employment, P not liable in resp. superior.

But if employee A injured employee B in course of employment, P not liable.

With development of industry, it began to be whittled away. If servant was a vice principal - his negligence was charged against master - vice principal - one who is charged with a duty which master owed to injured servant.

Courts began to confine the term -
"fellow servants"

80% of cases denied recovery.
This fact, added to the terrible
industrial conditions, lay the ground
for remedial legislation.

Remedial legislation

- ① factory statutes - setting standards for
working conditions - criminally punishable.
- ② 1897 English Workmen's Compensation Act.
amended 1900 and 1906
- ③ 1912-1915 all states passed Workmen's
Compensation Acts. Minn. 1912
Ch. 23 A - Minn. Gen'l Stat.

The idea originated in Germany under
Bismarck as a scheme of industrial
insurance. Burden of industrial
accidents should be put on employers
who take out insurance, the cost of
which is passed on to all consumers.

Minn. Statute

(not domestic, farm labor, v. r. employees)

- ① insurance is now compulsory (1937)

N.Y. did this early but was declared unconstitutional.

U.S.S.C. declared state compulsory acts were O.K.

- ② workman is compensated by all injuries

caused by accidents arising out of or during course of employment, regardless of ^{employer's} negligence. Certain occupational diseases are included. The 3 common law defenses are wiped out. If injury is caused by servant's intentional act or intoxication.

3 questions to be answered:

- ① was he a servant within the act?
^{act}
 (does not apply to ind. contractors)
- ② was the injury caused by an accident?
 (something sudden & unexpected - not dis-eases caused by working conditions unless specially mentioned - and common law defenses are still good there.)
- ③ did injury arise out of and in course of employment? 15 M.L.R. 792
- ④ employer required to carry insurance to cover
- ⑤ a schedule of compensation provided.
 (less than usual jury verdict)
- ⑥ cases are heard by Industrial Commission or their appointees. No jury. There is agitation for a similar scheme for all auto accidents. Appeal to Commission -

Anteriori to state by. ct. Commission
decisions are published - Minn. W. C. D.
R.R. employees. Usually in interstate commerce.

A Fed. act covers. - both the R.R. and the
workman must be in interstate commerce
12 M. L. R. 492-499

Workman's Comp. is an insurance scheme.
It has nothing to do with negligence.
But R.R. act is concerned with negli-
gence. - R.R. must be negligent.

- ① contributory negligence is not a complete
defense - reduces damage.
- ② fellow servant rule abolished.
- ③ assumption of risk still stands
a. but not of risk of violation of safety
statutes.

P may sue in either Fed. or state court
and it can't be transferred to Fed. ct.

B Minn. State by. act - covers intra-state
commerce employees sec. 4933 Ken'l Stat.
almost identical with Fed Stat.

439, 440, 442, 445, 446

462, 492, 493, 495, 497

513, 562, 529, 538, 520, 523,

Case where the owner is not in occupation and someone else is.

If the other is merely a licensee, then the owner is under duty to use care to keep premises safe.

But suppose a landlord-tenant relation. A leases to B.

① premises in good condition when leased.

If premises later become unsafe, the tenant - not the owner - is responsible. Why? The tenant is in control. The landlord cannot even come on the premises without tenant's permission.

② Suppose landlord covenants to keep the premises in repair. The landlord is liable to the tenant for the breach of the contract to repair - this is not a less not a personal liability. Tort liability. Baron & Alderson holds

that landlord is liable in tort to TP where he covenants to keep the premises in repair and doesn't. Why? ① he has power to enter and make repairs ② he has affirmatively undertaken to keep the premises in repair - and inducing tenant not to make repairs.

Duty on lessor

Where lessor covenants to repair and someone on the premises in lessee's right is injured because of lessor's failure to use care in keeping the premises in repair, majority say that lessor is not liable but a

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② Suppose landlord covenants to keep the

Schick - Fleischauer, N.Y., 1898, p. 439

D leased apartment to P, promising to fix ceiling and put the apartment in a safe condition. The ceiling fell on P. P sued for damages due to D's negligence.

Held: ^{interlocutory} judgment for D. No duty arises out of the landlord-tenant relation or a lease on landlord to repair the premises. If the landlord so promises on special agreement, the tenant may sue for breach of contract after having the work done himself or he may move out and have a defense against action for the rent. But he cannot remain in unsafe premises and then collect from D for his injuries. This is the weight of authority.

growing minority including Restatement Minor.

say he is liable.

landlord is a breach of is not a off holds P where in repair enter and undertaken inducing

Barron v. Liedloff, Minn., 1905, p. 440

262 N. Y. 278 Appel

18 M.L.R. 229

Landlord did not covenant to make repairs but there was a provision in the lease that he had the privilege to come in and make repairs. Having notice of a dangerous condition, the landlord did nothing and P was injured.

A bare majority holds that landlord is not liable in tort to either tenant or T.P.

majority half.

A minority (including Minn.) holds landlord responsible ^{or} whether he covenants to repair - both to tenant and those T.P. on the premises in tenant's right. This is in tort. Two rationalizations: ① landlord these gains control - this is not good ② the undertaking to repair has induced tenant to rely on it. Of course the tenant is not relieved - he is still the occupant. ③ the landlord

Barron v Liedloff, Minn., 1905, p. 440

Barron v Liedloff, Minn., 1905, p. 440

D covenanted in a lease to X to keep premises in 1st-class condition and to make all ordinary repairs. X sublet to P who was injured when a board of the floor of the porch broke through and P sued D for negligence. Verdict for P. Held: Affirmed. D has no duty of repair as lessor. But he contracted to keep the premises in repair, from which arises his tort duty to exercise care as the condition of the leased premises. D is liable for injuries due to faulty condition, even if he did not know of them, if he reasonably should have known of them.

¹ ^f
is not liable in tort to either tenant or T.P. ^{mostly half.}

A minority (including Minn.) held landlord responsible whether he covenants to repair - both to tenant and those T.P. on the premises in tenant's right. This is in tort. Two rational justifications: ① landlord thrusts gains control - this is not good ② the undertaking to repair has induced tenant to rely on it. Of course the tenant is not relieved - he is still the occupant. ③ the landlord

is probably more able to pay - and is in better position to distribute the loss.

Minor. rule: Keegan 129 Minor. 496

"The obligation of landlord to tenant ^(if any) goes to tenant's family, guests, employees, subtenants - all those on the premises in the right of the tenant." This is the minority view - but growing.

227 Rest. is with the minority.

"Lat Liability of Landlord" 26 Mich. L.R. 313

Eldridge " " 84 Penn. L.R. 467

"Common passageways" doctrine.

Landlord liable to keep up parts of a building used in common by several tenants - for benefit of all but trespassers.

Where there is a portion of a building used in common by several tenants, the landlord is considered to have reserved ownership and is treated as the occupier and is charged with an affirmative duty to inspect and keep it up for benefit of tenants and persons there in their right - anyone but trespassers. even ~~the~~ solicitors.

Williams 122 Minor. 49 - social guest of tenant fell down common stairway.

McNabb 133 Miner, 370 - Common basement condition of premises caused injury - landlord liable.

Conditions bad when leased @ Suppose premises are in bad condition when leased.

Landlord not liable for obvious conditions

@ Suppose the danger is an obvious one - not concealed. Landlord not liable.

Hargel 63 Miner, 520 - Landlord leased house with hole in porch floor. Sublease fell through. Held: Landlord not liable.

Landlord liable for concealed conditions which he knows of and which he does not disclose.

@ Suppose there is a concealed condition known to lessor which lessor fails to disclose. Analogy to lease cases, of fraud, deceit, misrepresentation being implied. Tenant relies that premises are in as good condition as they seem to be. Landlord is liable. Reasonable care would be disclosure of the condition.

114 Miner, 521 Ames - Concealed rotten timbers in floor of outhouse - known to landlord - not to tenant. Landlord liable to tenant or his licensee.

Landlord not liable for
concealed conditions which he
does not know of.

② Suppose concealed dangerous
conditions which landlord did
not know about. Landlord
not liable. The most a tenant
can expect is disclosure of known
dangers, unless he puts clauses
in the lease.

General Rule:

Tenant takes the premises as he
finds them and the landlord is
not responsible.

Exception: public purpose cases.

Conditions which will be dangerous
to the public - a nuisance

Two parts:

① conditions dangerous to public off the premises
Shannon 89 Minn. 397 - spout from roof
discharged water on sidewalk. Water froze. P
slipped on ice. Primes landlord - Held: D liable.
unordinary care.
He was under duty to inspect premises before
turning premises over to tenant to use if there
is any danger to public outside. This is
the general rule. Of course the tenant would be
liable.

April 28

Exception:

Landlord not liable for
concealed conditions which he
does not know of.

McKenzie - Cheatham, Maine, 1891, p. 442

D leased to X. P, a social guest of X
sues D for injuries received when he fell because
of a defective landing on a stairway. Judgment for P.

Held: Reversed. Landlord is not liable
for injuries to lessee or his guests from
unsafe conditions of the premises unless:

- ① there has been fraud or concealment on his
part in leasing the premises.
- ② he is said to have authorized the continuance
of a nuisance (dangerous to the public) by leasing
premises with the nuisance thereon. P was
there by the invitation of X. Would X be
liable? No. no duty to mere licensees unless
X knew of the danger.

April 28

Exception:

Conditions which will be dangerous
to the public - a nuisance

Orford v. Lattle, Mass., 1896, p. 445

D leased a hall to X for several
nights to give an entertainment in. P sues
for injuries caused by platform at the entrance
caving in. Judgment for P.

Held: affirmed. The use actually made
of the platform, must have been contemplated
by D and he is liable for neglect of precautions
to make it safe, whether X is also to blame
or not, just as in the case of premises let
with a nuisance on them.

What is the difference between a lease
and a license?

Would X be liable?

① Nuisances:

Dangerous to
public off the
premises.

off the premises

from roof

ledge. P

liable.

before

if there

this is

would be

② conditions dangerous to members of the general public who come on the premises.

"Where premises are leased for a public purpose, the landlord is under duty to ^{inspect & repair & disclose} use care as to conditions present when the lease is made." (EX: Theatres, halls, stores, amusement parks, beaches, hotels - not a private dwelling).

Penhman 213 N.Y. 404 (Cardozo) tries to explain.

What can landlord do to relieve himself from liability? Not much. Where disclosure to tenant is not enough, - it will make tenant liable but does not relieve him. This duty to the public cannot be delegated.

A covenant by the tenant that he will inspect and repair the premises will not relieve the landlord. (Salem case)

③ a few cases hold: landlord may protect himself by getting covenant from tenant to ^{inspect & repair} keep the public off till the dangerous condition is removed.

Nichelsen 168 Minn. 118. R.R. leased hwy bridge to county with that clause. R.R. not liable.

Attempts of landlord
to relieve self of
liability

N.G.
N.G.

OK.

②

PUBLIC

PURPOSE

Barnett v Lake Ontario Beach Co, N.Y., 1903, p. 446

D leased a water toboggan slide to X for the summer. There wasn't sufficient railing on the platform and P fell from it. Verdict for P. New trial granted. Appeal.

Held: Verdict for P affirmed. General rule is that lessor is not liable to lessee for the condition of the premises leased.

Exceptions:

- ① dangerous conditions - amounting to a nuisance at the time of letting - both D and L may be liable.
- ② if premises are rented for a public use for which D knows they are unfit and dangerous, D is guilty of negligence and is liable if someone rightfully using them is injured. Contributory negligence and the unreasonableness of the premises are going questions. D is liable here because the platform had not been constructed with due care, in view of the purpose for which it was to be used.

Attempts of landlord

to relieve self of

liability

N.Y.
N.G.

OK.

A covenant by the tenant that he will inspect and repair the premises will not relieve the landlord. (Salem case)

③

A few cases hold: landlord may protect himself by getting covenant from tenant to inspect and to keep the public off till the dangerous condition is removed.

Nicholson 168 Minn. 118. R.R. leased large bridge to county with that clause. R.R. not liable.

When landlord and tenant are both liable singly they may be joined.

Turning over chattels

- ① giving away - ^{or loaned gratuitously} the receiver is analogous to a (buccine). he is a gratuitous bailee.
- ② leased or rented - lessee is analogous to a (business visitor).
- ③ outright sale - ^{McPherson case.} buyer is analogous to (business visitor), but there is more room to allow vendor to shift responsibility.

Liability of giver or gratuitous lender same as owner of land

- ① Suppose A lends B his car. A knows of a concealed defect which B does not. A is liable - (analogy to buccine cases).

Suppose TP was injured. A liable ^{as to defect}. Suppose the defect was obvious or unknown to owner. By analogy to real property cases, A is not liable.

- ② Suppose A rents car to B.

A must use care to find out defects.

D'Almeida case. Obligation lasts while car is used for the purpose for which it was leased - it applies to injuries to lessee and TP.

When landlord and tenant are both liable singly they may be joined.

Turning over chattels

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- ② leased or rented - lessee is analogous to a (business visitor).
- ③ outright sale - buyer is analogous to ^{McPherson case.} a (business visitor), but there is no reason to allow vendor to shift responsibility.

Liability of giver or gratuitous lender same as owner of land to licensee.

- ① Suppose A lends B his car. A knows of a concealed defect which B does not. A is liable - (analogy to licensee cases).

D'Almeida v. Boston R.R., Mass. 1911, p. 462

D supplied car full of coal to X, a mill by a spur track. X's employees then pulled the car to a coal pocket by horses where the coal was dumped. P I an employee of X was killed while the car was being pulled to the coal pocket, the injury causally being caused by the defective condition of the car, which condition could have been discovered by proper inspection by D. Both the mill and the R.R. held liable for concurrent negligence.

Held: affirmed. D was bound to furnish a car which was not defective, even though the injury occurred when the control had passed from D to the mill.

defect
liable

give or
analogy
liable.

defects.

to while

it was
lessee and DTP.

Liability of renter
of a chattel - he must
use due care to find out
defects - like land owner
to business visitor.

Peniff 164 Minn. 6 - X started off car with
defective brakes. The R.R. co. held liable to ^{injured} employee.

Moon v N.P. 46 Minn. 106 - Carrier A who
furnishes car to Carrier B is liable for injuries
occurring while B runs car - due to defects.

175 Mass. 510 contra - B is responsible.

No federal rule. - 196 U.S. 217 Court ducked it.

Lawyer 38 Minn. 103.

X A carrier | B carrier | C carrier Z
Employee injured.

Held: A not liable, even though A is getting a
rental. The line must be drawn - practical.
Line drawn at the end of the particular shipment.

April 29

149 A.C. 717 Trusty

265 N.W. 89 Ferrero - Drive yourself Co - defective
machine - Held liable.

③ Seller

59 Pac. 1100 - seller sold defective plank to B.

But Defect was obvious - B discovered it - C,
a workman was injured - 5 reversal of responsibility

139 Wash. 241 Forster v Ford - Ford Co. sold

tractor to dealer with notice on it. not to put on brakes & gas at same time. Dealer didn't tell P who was injured. Ford Co. relieved of responsibility by his notice to dealer of his discovery.
Ky. Oil Co. 271 S.W. 570 - A sells gasoline in kerosene can - telling buyer what it was. Buyer used without notice. A held liable -
Clummet 148 Mich 283 - A sells inflammable stove polish with notice. Buyer failed to notify new buyer. A held liable. lesser danger - you can't shift the responsibility.

Shifting
 Responsibility
 from
 seller

OR

Non-delegable
 Duties

Factors in deciding whether responsibility should be shifted
no general rule

- ① extent of the danger - if danger is great & the probability of danger is great, there is more reason for not shifting resp.
- ② character of person ^{but} add to - you can't shift responsibility to a habitual drunk.
- ③ agreement that other party will take responsibility
- ④ lapse of time - a reasonable period.
- ⑤ relation between the parties.

Much the same problem in agency cases or independent contractor - work inherently dangerous.

So much for negligence

DEFENSES

- ① Assumption of risk
- ② Contributory negligence

They have been hopelessly confused.
The following distinctions may be academic.

I Assumption of risk, in proper senses, means that P has consented to release D of some duty toward P, and takes his chances ^{on} from injury from a known risk. The essence is consent.

Ex: no injury to me who consented to Woman who held up arm to be vaccinated.

P, with full knowledge of risk, voluntarily enters into some dangerous relation with D.

Ex: Man in box near foul line at ball game assumes risk of being hit by line drive. He consents to assume risk: No negligence by him ^{or} involved.

II Contributory negligence. P's own conduct has been unreasonable in view of the foreseeable risk. No consent to release D of any liability involved. P barred from recovery because of his own negligence. Ex: Two cars crash at intersection - both going too fast. Both barred.

There will be situations where both elements will be present.

- ① Consent to assume risk where it is unreasonable to take the chance.
- ② Failure to use reasonable care to guard against the risk assumed.

Thus both defenses will be available.
Distinction is important in injury to railroad workman.

Fed. Emp. Liability Act & state acts have provided that contributory negligence shall not defeat workman's recovery, but only reduce his damages.

But the defense of assumption of risk has been left intact by court interpretation.
Assumption of risk: P must know the risk and acquiesce intelligently to take the chance.

Contrib. neg. is some fault - some departure from standard of conduct regardless of consent.

Hartwick 286 Fed. 672 -- A negligent failure to discover risk means contributory neg.
 236 Fed. 1. RR workman on track. If he sees

the train or the court concludes he must have seen it and stayed on track - it is assumption of risk. If he did ^{not} perceive the track, it is contributory negligence.

241 U.S. 310

If you have both, the assumption of risk will bar recovery.

Assumption of risk

Express agreement to assume risk.

It is possible for parties to agree that P assumes the risks.

R.R. leases land to P who builds elevator ^{near} tracks. An agreement is OK that D not liable for fire for sparks.

U.S. 175 ~~444~~ 91 Hartford Co. v. RR

Courts refuse to uphold: ^{agreements}

agreements that courts will not hold valid

① where one party is at great disadvantage in making the contract. Ex: Contract exempting employer from all liability to employee. ^{telegraph, insurance, carriers}

② where public servants attempt to escape liability for its negligence - (carriers).

Void as against public policy.

③ where it is a blanket provision absolving D of all responsibility.

④ does not cover aggravated forms of neg.

A limited specific risk may be ^{contracted against} agreed on to ^{insurance} Ex: trees blowing out, injuries from driver's experience.

"Implied" agreement - Under certain circumstances P will be assumed to have assumed the risk himself

assumption of obvious risks is implied.

Ex. ball game, golf balls, hockey pucks, roller coaster rider assumes risk of falling, throwing around - not a crash, weather in legs, a rider assumes risk for obvious defects in car, obvious incompetence of driver. One who enters on land assumes obvious risks. Employee assumes risk of all ordinary risks, or all extraordinary risks which P could anticipate.

[Simple tool] doctrine

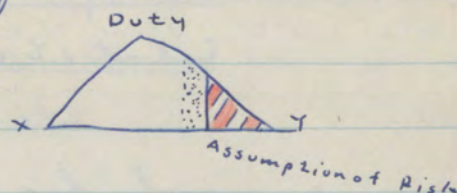
18 M.L.R. 435 - Workman assumes risk of defects in simple tools such as hammer or shovel.

Knowledge - P must know what ^{is} getting into. He must appreciate and understand the risk, substantially. This is important in cases involving children.

Everyone must appreciate certain obvious falling through holes, slipping on ice, unguarded

comes, getting squeezed in tight places.

Normally, knowledge of the danger is a
 a gray question, with some limits as a
 matter of law.



D's duty may be less than P's assumption
 of risk - what D thinks (reasonably) that P has assumed.

Lynskey 281 N.Y. Supp. 505 - Oldmaid at hockey
 game. D not negligent in not warning her
 what it was about - he could assume that
 people coming to game would know risk.

II Voluntary - P's assumption of risk must be
 voluntary and free. If D assures safety,
 P may not have assumed risk. Employer
 does not assume risk of injury from a
 source that P had promised to fix up, till
 it is obvious that D is not going to fix it.

If P is confronted with 2 unreasonable
alternatives - he does not assume risk in
choosing one.

Defective car to ship cabbages - alternative
 was leaving cabbages to spoil.

cases, getting squeezed in tight places.

Normally, knowledge of the danger is a
 going question, with some limits as a

Voluntary assumption of a known risk, bar to recovery
Cruden v Lenthorn, K.B., 1799, p. 492

D was driving on the wrong side of the road. P, on horseback, crossed ~~to~~ to that side, asserting his right to that part of the road although he could easily have stayed out of the way of the carriage. ^{P's} The horse was killed. Instruction: if P crossed out of the way in order to assert what he termed the right of the road, he voluntarily assumed the risk of being injured and cannot collect. But the jury found for P.

Held: affirmed. It was a question of public convenience. Let the verdict rest.

proper - many to game would know best.

II Voluntary. P's assumption of risk must be voluntary and free. If D assures safety,

Clayards v Dethick, 2.B., 1848, p. 493

D dug trench, with authority, along a street almost cutting off the only entrance to P's stable. P attempted to lead a horse over a 4 foot pile of dirt to get out, and the horse fell into the trench and was injured. Instruction: if the danger was so obvious that P with reasonable prudence could not have made the attempt, he cannot recover because his assumption of an unwarranted risk will bar recovery. But jury gave verdict for P.

Held: affirmed. The instruction was correct.

all - parents
 son is
 is his sister
 of family they
 is a girl teacher
 make: without
 bill
 family 9 total
 is his sister
 after will find
 him as his
 is - no find
 at town
 myself
 her as
 through
 down

By putting P in a dilemma, D robs
 him of his voluntary assumption of risk.
Clayards v. Detrick.

Pomeroy v. Westfield.

Eckert v. L. S. Ry.

The criticism of assumption of
 risk has been caused by the refusal
 of the court to recognize the economic
pressure on a workman to assume risk
 or quit. He does not have much of a choice.

In England, assumption of risk
 amounts only where a workman chooses the
dangerous way of doing a thing when there
is a safe way.

Sat. 6	Agony	2 hrs.
Tues. 9	Agony	
Fri. 12	Tort	
Sat. 13	Tort	2 hours

Eckert v. L.S. Ry., N.Y., 1871, p. 497

P ran onto a track in an attempt to rescue a child from the path of an oncoming train, negligently driven. Verdict for P. Rule nisi on claim that there should have been a nonsuit because P voluntarily assumed the risk of injury.

Held: judgment affirmed. The law has such a high regard for human life that it will not hold an attempt to presume it to be negligence, unless that attempt is shown to be rash, reckless, and wanton. If it had been property, his assumption of the risk of injury would have precluded recovery.

amounts only where a workman chooses the dangerous way of doing a thing when there is a safe way.

Sat. 6	Agony	2 hrs.
Tues. 9	Agony	
Fri. 12	Tort	
Sat. 13	Tort	24 hrs.

Pomeroy v. Westfield, Mass., 1891, p. 495

A road which D was responsible to maintain had a deep mud hole in it, and P, in order to get through went to one side of the road and was upset by a ditch within the limits of the way.

Question: should P be allowed to recover? yes.

Held: Affirmed. Even where it can be shown that P attempted to run a risk which was greater than he could ordinarily have assumed prudently without losing his right to recover if he was hurt, it cannot be said, as a matter of law, that he was unwarranted in doing so. It is a matter for the jury on the particular facts.

D not
of fault.

The criticism of assumption of risk has been caused by the refusal of the court to recognize the economic pressure on a workman to assume risk or quit. He does not have much of a choice.

In England, assumption of risk amounts only where a workman chooses the dangerous way of doing a thing when there is a safe way.

Sat. 6	Agony	2 hrs.
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Sat. 13	Tort	24 hrs.

CONTRIBUTORY NEGLIGENCE

Contributory negligence
bars recovery.

When A and B are both negligent,
why are they barred from recovering from
each other? ^① The law will not step
to apportion damages "clean hands"
in between two wrong doers. A man
should not be allowed to recover for
injury caused by his own wrong.

But the difficulty is that someone has
to pay the damages and they may be
very unequally divided. Why not split
it between the two guilty parties?

② Another explanation is proximate cause.

Suppose A drives negligently. B also
drives negligently and they collide. If
C, a passenger in B's car is injured, he
can collect from both A & B. If B is in-
jured, they say A's negligence was not the
proximate cause because of B's inter-
vening negligence.

③ Best explanation is historical. About
1800, when the tort of negligence and the
defence of contrib. neg. developed, the law
took a very hard-boiled, individualistic
approach. P cannot recover from B's

Two causes.

CONTRIBUTORY NEGLIGENCE

Contributory negligence
bars recovery.

When A and B are both negligent,
why are they barred from suing from
each other? ^① The law will not step
^{to apportion damages} in between two wrong doers. ^{"clean hands"} A man
should not be allowed to recover for
injury caused by his own wrong.

May 2

Butterfield v. Forester, K.B., 1809, p. 513 (first case)

D left a pole obstructing part of the street. P, riding his horse as fast as it would go through the streets of the town, ran into it and sued for his injuries.

Held: judgment for D affirmed. A person riding with reasonable and ordinary care could have seen and avoided the obstruction. Thus, although D was at fault in leaving the obstruction there, he is not liable because P failed to use ordinary care to avoid it.

Coyper v. Carron Co., N. of L. 1884, p. 562

If there is blame causing the accident on both sides, at common law the loss lies where it falls - but in admiralty the parties divide the loss equally.

Admiralty rules -
the loss is split
between the
two causes.

any one wrong, individualistic
approach. P cannot recover from for D's

negligence when he was not careful himself. The rule is firmly imbedded in the common law - but it results in unjustice often - where P was only slightly negligent and he got all the damage; he can't collect anything.

Attempts to modify

attempts to modify the harshness of it:

① court almost always leaves contributory negligence to the jury - and you know how they like the plaintiff.

② degrees of negligence - mostly abandoned

① slight neg. - failure to use great care

② ordinary - " " " " ordinary

③ gross - " " " " slight care

If P was only slightly neg. and D was grossly neg. P was not barred. True in Ill., La, Wis, Mass, Va.

but many difficulties. ① many appeals - split hair. It has been repudiated but it survives.

① in bailment - a gratuitous bailee is liable only for gross negligence.

② auto guest - ^{statute not in Minn.} statutes say the owner is liable for only gross negligence - hard to administer.

③ r.o. crossing statutes - if P is slightly neg and D is gross. P can collect.

→ ③ attempts to apportion the damages. ^{the ultimate solution.}

In theory it is easy and desirable.

① Continental law never has had cont. neg. rule.
They split the damages - Swiss - Prussia - Russia - Philippines.^{too}

② Admissibly split damages equally. English
admissibly counts apportion on basis of guilt.

③ Statutes. cont. neg. go only to reduce damages
by Labour Acts. - an example.

④ Statutes - add damages - divide in apportion
to the fault. (Neb., Miss., Wis.) have them.
(4 Canadian provinces) have it.

Wis. statute provides for a special verdict.

Damages	Fault	P pays \$
P \$10,000	40%	0 " \$7,200
D \$2,000	60%	P gets judgment for \$5,200
\$12,000	It applies <u>only</u> if <u>P's fault</u> is <u>less</u> than <u>50%</u> .	

It works all right for 2 parties, but
when there are more, it gets complicated.

Ontario provides for some adaptation for
several parties - much study needed.

Legislative Loss Distribution } urgery.
Loss Distribution: 21 M.L.R. 1

557, 561, 563, 571, 574, 576, 578

May 6.

W. v. Davis
 street
 the house at
 highway was
 19
 at junction
 the highway
 was here
 to the highway
 the house at
 the house at

wholly at a
 matter of time
 sequence

- ④ The last clear chance doctrine, mis-called, in Minn., - the willful or wanton negligence rule. Originated in Davis v. Mann

P parked his car in the highway and D came along and hit it.

If, after P's negligence had ceased, D had a clear chance to avoid the injury by using reasonable care, and he did ^{not} take it, D is liable. Why?

- NG ⑤ P's negligence is not the proximate cause of the injury, D's negligence being an intervening cause. But is it not part of the risk - is it not foreseeable? Yes

Suppose a passenger in D's car is injured. He has action against both P & D. How can P's negligence then be any less a proximate cause of his own injury.

- NG ⑥ Where P is negligent first, D's fault is greater. This is contrary to fact in many situations.

- ③ Just an excuse to break away from the contributory negligence rule where obvious

May 5.

④ The last clear chance doctrine,Daniel v. Mann, 1842, Eng., p. 529

Last clear chance doctrine - the D's ability to avoid causing to P an injury to which P's own negligence has exposed him.

P turned a fettered ass onto a public highway to graze, an act which may have been negligent. D drove carelessly down the highway and ran over the ass.

Held: judgment for P. The negligence which is to preclude P from recovering, must be such as that he could, by reasonable care have avoided the consequences of D's negligence.

Why:

① P's negligence is not the proximate cause of the injury, D's negligence being an intervening cause. But is it not part of the risk - is it not foreseeable? Yes

Suppose a passenger in D's car is injured. He has action against both P & D. How can P's negligence then be any less a proximate cause of his own injury.

② Where P is negligent first, D's fault is greater. This is contrary to fact in many situations.

③ Just an excuse to break away from the contributory negligence rule where drivers

injustice would result. But this rule may be just as bad. The fair thing to do is to apportion the damages if you can do it.

Every court has adopted some form of the last clear chance doctrine. 4 or 5 states (Ill) have repudiated it by name and then applied it as proximate cause.

There is no agreement as to what situations you will apply it in.

① Where P is helpless. (Davies - Munn)

- ex. { (a) P gets dead drunk in a position of danger.
(b) P gets foot caught in rr. railfrog.

② Where D discovers him. He has a later opportunity to do something. He is probably more negligent than P if he does nothing. Most courts apply it here. Munn. applies it and miscalls it willful & wanton negligence.
"Conscious last clear chance"

③ Where D does not discover P but might have by using ordinary care

"Unconscious last clear chance"

Bad split - much confusion - Munn says

P cannot collect

table case

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Every court has adopted some form of the last clear chance doctrine. 4 or 5 states (all) have repudiated it by name and then applied it as proximate cause.

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ex. { ② P gets dead drunk in a position of danger.
 (b) P's foot caught in rr. railfrog.

Leahy Ry, Utah, 1907, p. 538

P was negligent in crossing a R.R. track without looking. He was on implied license - the Ry. was negligent in the fact that the engineer was not looking for the brakeman's signals which told him to stop the train, even though the brakeman had called out to warn P. P went under the train but was not seriously hurt till 180 feet of train had gone over him.

Held: ~~for~~ Lower court reversed for not allowing evidence that the train could be stopped after hitting P. If, after P has been contributorily negligent, D fails to use reasonable care to avoid injury to P, D is liable, where reasonable care on his part would have avoided injury.

⁴⁷⁴
Rest. says that P should recover
 where he is helpless - whether D
 is conscious or unconscious of his last
 clear chance of the ability to look out for P.

② Where P is inattentive - where he
continued to be negligent up to the last
possible moment

③ Punitive of his chance - D is conscious
 of his chance to avert P's peril. 80% of
 courts say "P may recover". Minor. says "Yes"
D must discover that P is inattentive -
 not looking out for himself.

④ D fails to discover P, although he
could have done so by using care. all
courts but Mo. say "P cannot recover"
Mo. has an "humanitarian doctrine" which
 puts more obligation of care on one who
 drives the more dangerous machine. This
 has no significance outside of Mo.

British Col. R.R. v. Loach (in casebook) P stuck
helpless in R.R. track - D discovered P but couldn't
stop because he had poor brakes. D's previous
 negligence kept him from having the last
 clear chance - and D is liable. Prosser says
 it's crazy. It is followed in 6 states. Hyphated clause.

Every possible holding can be found
in various jurisdictions in various
situations. It is a hell of a mess.

In Marin. -

May. 12

- 3 H. L. B. 263 Schofield.
21 H. L. R. 233 Bohlen "Contrib. 44".
22 ^{Form} Geary, L. J. Lounds
47 Yale L. J. 704 James East Clear Chance
8 Min. L. R. 329 - lays out Marin rule
32 Col. L. R. 493
21 Calif. L. R. 257
6 N. C. L. R. 3 Green - explains proximate cause

In Marin. the courts have
gone off on a so-called willful
or wanton negligence. ^{origin:} Contributory
negligence is no defense to an
intentional tort. (Steenimetz & Kelly)

but, filled & determined
- voided & a
of elderman's time
at transfer intra act
at elderman's time
diffs: but
diffs are not recognized
intentional tort - not that law

540, 547, 544, 552, 555 } we covered these today
look over.

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in various jurisdictions in various
situations. It is a hell of a mess.

In Marion:-

May. 12

- 3 H. L. B. 263 Belofield
21 H. L. R. 233 Bollen "Contrib. Neg."
22 ^{Turn} Gray. L. J. Lounds
47 Yale L. J. 704 James East Clear Chance
8 Minn. L. R. 329 - lays out Minn. rule
32 Col. L. R. 493
21 Calif. L. R. 257
6 N. C. L. R. 3 Green - explores proximate cause

In Marion. The courts have

Stearns v Kelly, Ind., 1880, p. 520

D a saloon-keeper threw P, a drunk, out
with unreasonable force. Judgment for P. D appeals.
The court's refusal to instruct that contributory
negligence would bar P's recovery.

Held: affirmed. The doctrine of contributory
negligence has no application in an action for assault
and battery - an intentional tort.

540, 547, 544, 552, 555 } we covered these today
look over.

Bases of Tort liability

① intent

② consequences substantially certain to follow are regarded as intended.

③ high degree of risk but not a certainty, usually accompanied by a state of mind described as "willful or wanton negligence".

1. Has some elements of intent. Courts are apt to tack on punitive damage.

2. Contributory negligence is no defense because D's wanton negligence is not imputable against P's mere negligence (Atchison Ry. v. Barber, Kansas case)

The problem how to define willful and wanton negligence.

Minnesota cases seized on this rule.

D held liable for willful and wanton negligence, where train engineer saw P on track and did nothing.

71 Minn. 438 Tonda

76 Minn. 306 Blaker. - D discovered P (slow in getting on brakes) and failed to use ordinary care - this was held to be willful & wanton negligence even though there was ^{no} evidence of indifferent recklessness, (real wantonness)

Bases of Tort liability

D intent

Atchison Ry. v Barker, Kansas, 1908, p. 523

P was killed by a train going 15 m.p.h. down a street in a small town. The view was obstructed for $\frac{3}{4}$ miles. There was ainder path between the 2 tracks, which people were accustomed to walk on. Judgment for P.

Held: Reversed. Contributory negligence is no defense to an action for reckless and wanton misconduct. An intentional wrong does ^{intend} mislead to injure another; a reckless and wanton person is indifferent whether his conduct injures someone. Granting that it was a jury question whether the operators of the train were wantonly and recklessly negligent in not looking out for P and driving so fast, the jury was not correctly instructed on the application of these terms. Where D does not even see P, the definition of wantonness must include a statement of what conditions will replace an actual knowledge.

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certain
intended.
to a certainty,
the of mind
negligence
intent. Court
damage.
no defense to
is not
negligence
(care)
willful

Manin. court defined willful and wanton negligence as failure to use ordinary care after discovery of P's peril in other words - a conscious last clear chance. ~~this has~~. We are the only state with any such idea.

Manin. rule: If D discovers P in time to avoid injury by ordinary care and fails to exercise ordinary care, D is liable notwithstanding P's negligence.

conscience last clear chance
D liable

But if D is negligent in not discovering P's peril, D is not liable, P's negligence being ^a defense

Kaiser 147 Manin. 278 - D ran over P who was lying on streetcar track without seeing him. Held: D not liable for failing to discover P.

93 Manin. 84 } D came up behind P riding bicycle on track reading newspaper.
98 Manin. 294 } D failed to see that P was inattentive. Held: D must have seen him. Hill

Hill 112 Manin. 112 - Both P & D discovered each other. Held: No recovery - both guilty of willful & wanton negligence.

103 Manin. 224 Anderson - descent attacks the misnomer and confusion of rule in the Manin. rule

Minor judges say that the reasoning on the rule is poor but that it too well established to change, except by the legislature.

Prosser says "last clear chance" is just a makeshift - an unsatisfactory attempt to mitigate the rigors of contributory negligence but it puts an equally hard burden on D.

Minor v. Ross Motor, Wis., 1914, p. 557

Standard of Care to be required of children

A variable standard on the basis of intelligence and experience. The ~~same~~ common law rule in criminal cases was that child under 7 - incapable of crime; over 14 - as capable as an adult; in between 7 and 14 a question for jury.

A number of jurisdictions, headed by Illinois, have applied this rule to negligence.

A majority, headed by Mass. have refused to establish any such definite rule.

Others (Pa.) say the age limits are only presumptions.

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Marion v. Ross Motor, Wis., 1914, p. 557

Standard of Care to be required of children

Marion v. Ross Motor, Wis., 1914, p. 557

D's servant ran over a 13 year old boy, P. In question of contributory negligence. The instruction was that P must conform to the standard of ordinary care that the great mass of mankind usually exercise in similar circumstances. Judgment for D.

Held: Reversed. Ordinary care in the case of a child is only such care as the great mass of children his age, intelligence and experience usually exercise under similar circumstances.

One view:

under 7 - conclusive presumption of incapability of negligence.

7-14 - presumption (rebuttable) of incapacity for care

14-21 - presumption for capacity

e basis

. The
involuntary
incapable
an adult;
for pay
loaded by
able to

have refused
rule.

to are

only presumptions.

It is all a question of facts in the individual case in Minors. Child is held responsible for what he should know.
Hammula, 130 Minn. 3 - 5-year-old riding on footboard of engine - negligence left to jury.
 153 Minn. 305 - 4½ year old declared not negligent as matter of law.
Colbart 264 N.W. 776 - revives law over country and recommitting itself to the Mass. position.

Standard of Care required of a drunk.

Even though a party is intoxicated he is held to the same standard of care as if he were sober.

Wise 183 Ind. 484

If D knows P is drunk, he may be required to use special care.

- | | |
|--|---|
| ① <u>last clear chance</u> | } where D <u>dis-</u>
<u>covers</u> P. |
| ② <u>Minn. willful negligence rule</u> | |

Intoxication is not necessarily negligence.

(famous)
 135, 136, 138, 610, 623, 635, 636, 643.

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Standard of Care required of a drunk.

Woods v Commissioners, Ind., 1890, p. 561

P was drunk. He drove his buggy up to a bridge approach where there was a washout. The horse stopped but P urged it on till it jumped the down but threw P out and injured him. He sued the county commissioners. Judgment for D.

Held: Affirmed. When a voluntary drunk exposes himself to injuries which he could, and by the exercise of ordinary prudence would have avoided if sober, he is guilty of contributory negligence and cannot recover for such injuries. Drunkenness does not relieve one from the degree of care required of a sober man in the same circumstances.

135, 136, 138, 610, 623, 635, 636, 643.

Imputed Negligence

A - plaintiff - is himself careful

B - associated with A - contributes to A's injury
defendant.

C - also negligent

A ordinarily would have an action against both B & C as joint tortfeasors

Doctrine of imputed negligence says that B's negligence bars A from recovery from C.

Relationship

① ^A Passenger - ^B Driver
Thoroughgood

English case - Negligence of driver of omnibus barred passenger from suing C, because B was supposed to be a servant. But they wouldn't apply the doctrine of respondent superior to make A liable to C.

Muller v Armstrong, 1848

Driver's negligence does not bar passenger from suing other vehicle in collision -

Overruled Thoroughgood case. In the meantime, American courts had adopted the Thoroughgood rule and it took 50 years to wipe it out. Imputed negligence is now repudiated everywhere except in Utah. There, the negligence of driver bars recovery by passenger, unless P was a paying passenger in a private or public conveyance.

see Lockhart v. Kuminich T.S. 567
repudiated as to
paying passengers
Holsapple p. 570

Imputed Negligence

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 B - associated with A - contributes to A's injury
 C - also negligent

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 against both B & C as joint tortfeasors

A + B + C = negligence
bars A from

Mills v. Armstrong, H. of L., 1888, p. 563

P was injured or killed in a collision
 of two vessels. The operators of both the vessel
 in which P was riding and the other vessel were
 negligent. P was the owner of the other vessel.

Defence: the operators of the vessel in which P was
 riding were contributorily negligent. Judgment for P.

Held: affirmed. Actions by passengers
in steamships, railroads, busses, streetcars etc.
cannot be defeated on the ground that the operators
of the conveyance on which they were riding were
negligent as well as the other party to the collision (D).

owner of omnibus
 because B
 But they
 of reparation
 to C.

Mills v. Armstrong, 1888

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see Lockhart v. Kuminich T.S. 567
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 paying passengers
 Holdrege p 570

Minor. never adopted the rule

Fellman 35 Minor 522

It makes no difference whether driver is of a public carrier.

② a vehicle for hire.

③ a private vehicle.

The 2 drivers are joint tortfeasors and A can recover from either.

unless passenger is negligent himself

(A) But the passenger may be negligent himself. ① in riding with a driver whom he knows to be incompetent or drunk ② in riding in a car which he knows to be unsafe ③ in failing to protect against driver's negligence or to warn driver of danger ④ usually the passenger is not under duty to watch the road. Longino - TNS p. 570

unless passenger controls driver so that driver is his servant.

(respondent superior)
owner present
Prosser p. 498

(B) The passenger may be in such control of the driver, as to create the master-servant relation. A would then be liable to C; likewise A would be barred by B's contributory negligence from recovering from C. Locher p. 570 Roys but control

unless →

(C) Family purpose car drivers doctrine.

Prosser 500

Smith v. Jordan p. 567

unless statute makes owner
liable for negligence of person
driving his car without consent.

unless there is a joint enterprise

Prosser
491

① statute (like Minn) make owner
liable for negligence of a person
driving his car with his consent.

This applies to contributory negligence also
^{miles 567 continues}

② joint enterprise - strictly an American
affair - applied only to autos - anomalous
it is like a partnership - a business
venture, each party becoming the agent
of the other - each liable for the acts
of the other within the scope of the enter-
prise. A is liable to C and B's
negligence bars A. ^W

Now recognized in every state.

B's negligence becomes A's negligence

When is a joint enterprise? Confusion

① Some courts find it in common purpose; (going
fishy) this is a minority ^{W. Mayers p. 571 majority}

② Most courts require a mutual right
of control in running car. It is not
what A does but the right to A has
to do it, if he wants to, in addition
to common purpose. This is a
consensual relation implied from the
circumstances

test: mutual right of
control
Kopitz v. City of
St. Paul 1891

Criteria

16 Cornell L. 2. 416

(a) joint ownership of car - usually conclusive

(b) Car hired together or borrowed by

them together. Crescent p. 572
Financial.

(c) Business common purpose - 2 salesmen

^{Wash.}
Robeson p. 544 - you can't have a joint enter-
prise without business common purpose. This

a minority view
sometimes show mutual right to control

(d) Agreement to share expense. - this is
not conclusive.

Prosser 496

(e) Fact that passenger does exercise control

NOT SLOWICK p. 572

as between two members of a joint
enterprise, each is liable to the other.

183 Whinn. 278 Berlin

Ottman p. 572

a master can recover from servant
for his negligence.

Ring 173 Whinn. 265 - fellow workman
on same job - going to work - not a joint
enterprise.

(2) Husband-Wife Relations.

at common law, wife was the
same legal person as her husband. This
is now everywhere repudiated. Most
^(Whinn)
states have repudiated the imputed

negligence rule on the husband-
wife relation

③ Parent-Child relation

Child - A

Parent - B - negligent

Defendant - C - negligent

[N.Y., Mass., Calif.] still enjoin

the negligence of the parent to the child.

It was an old common law rule.

Even those jurisdictions ^{modify the old rule to} hold that B's
negligence must be negligence in the
custody of the child.

It is only a question of time till
this doctrine is wiped out. The great
weight of authority does not enjoin
parent's negligence to the child

Mattoon 95 Minn. 477 - Held: Parent
and C are joint ^{spouse} tortfeasors toward the
child, but a child cannot sue his
own parent in tort

Minn. once held the old common
rule but abandoned it.

May 13

action for loss of services.

A - child. wife

B - parent - husband (P)

C - defendant.

Common law theory - parent and husband has a right to the services of children and wife. This has survived in the action which the parent and husband has for deprivation of the services and the sums he must spend on the injured wife or child.

If B himself is negligent, he has contributed to his loss, and his negligence will bar his action. Will A's negligence bar B's recovery?

Hayes v Chicago L.R. 173 - says No.

But most courts hold that A's negligence bars B, because B's action is only a derivative action - recovery by B depends on recovery by A.

Callies
p. 575

action for wrongful death

A is dead. Bues for beneficiaries X, Y, Z at common law when C killed A, no one could sue. If A was not quite

killed, he could collect lots, but ~~now~~ when he died, the action died with him.

Statutes ~~has~~ now given a right of action to somebody for A's death in all jurisdictions. The original wrongful death statute is Lord Campbell's Act. The statutes vary:

- ① some say - the action must be brought by someone designated by the court - an ^{executive} administrator - he must distribute to the proper beneficiaries - (Minn.)
- ② some say - action must be brought by a particular beneficiary.

If A had been negligent (contributory) all jurisdictions agree that B's action is barred by negligence of A. The original Lord Campbell's Act said that B could recover only if A could have brought of action wholly derivative.

Minn. act also contains the same wording.

But suppose the beneficiary had been negligent. Confusion here.

a few statutes have been continued

as intending to give a survival of A's action letting a dead man recover. Here (R.I.) the fact that beneficiary does was negligent does not bar the action if A had not been negligent.

Most jurisdictions (Minn.) hold that the statute creates a new right of action in B for benefit of X Y and Z. They are split. Majority (Minn.) hold: ① if X is sole beneficiary and X has been negligent, the action is defeated. ② but if there are innocent beneficiaries in addition, the action will not be defeated, but the damages are reduced and the negligent beneficiary will get nothing.

Anderson 188 Minn. 602

Decker 111 Minn. 439

Walters 98 Minn. 296 (good)

a few jurisdictions let B recover the whole damages, and then overcompensate Y and Z, cutting out the negligent X.

Damages for death -

Usually the financial loss of beneficiaries measured by:

O'Connor
p. 577

- ① life expectancy.
- ② amount he was earning.
- ③ support he would have given beneficiaries.

Maximum is \$10,000 by statute.

It was \$7,500 till 1935.

Recoveries seldom go this high.

You are not compensating death;
you compensate for financial loss
suffered by the death.

The allowed beneficiaries are named
in the statute. See Minn. only wife
and children and parents.

Suppose A is injured; starts an
action; A dies. B brings action for
his death. Minn. holds that any
action started by A before his death
may be continued by an administrator
named for that purpose. Thus recovery
may be the financial ^① loss to beneficiary
plus the usual damages ^② for pain & suffering,
expenses, etc. which goes to B; estate.

LIABILITY WITHOUT FAULT

(strict liability)

Liability where there is no intent ^①
 a negligence ^②.

The original common law rule was that he who injures pays. The courts broke away from this - and in Brown v Kendall - court said no liability unless there was wrongful intent or negligence conduct.

We go now to the survivals of the old rule. Some are merely historical ^① remnants. Justifications ^② have been found for some others, starting with Fletcher v Rylands 1868, stimulated around 1880 by writers like Pound. England recognizes liability without fault more than we do.

IA Trespass to real property.OLD RULE

Early rule: if I unintentionally and without negligence entered P's land he is liable for abridgment. (Meunier - Anderson) ~~Technical trespass~~

Rights of landowners were jealously guarded.

threat p. 24

Holdsworth v 8

p. 467

and crystallized.

} reason for survival - trespass actions were usually to settle boundary and action became set

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We go now to the survivals of the

Newson - Anderson, N.C., 1841, p. 135

D cut down a tree on his land and part of it fell on P's land. P sued in trespass. Judgment for D on charge that D is not liable unless he willfully or carelessly made the tree fall on P's land and unless there was some injury to person or plants.

Held: Reversed. If P is injured as the immediate result of force applied by D, D is liable in trespass, whether the injury be willful or not. ^{and D used reasonable care}

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old
Majority still
enforce strict
liability on
injuries to land.

(?)

If D invades P's land, he is
liable though the injury was pure
accident. (This is still majority rule.)

157 Ky. 620 ¹⁹¹⁴ Linney - D's structure hit pole
which hit a gate which hit P in his own
yard. Held: D liable ^{in trespass to land} without any proof
of negligence - Prohibits for consequential damages to person.

¹⁹²⁹
Happell Coal Co. 229 Ky. 716 - D left reel of wire at top
of hill - ran through P's house. Held: D liable
for trespass with no proof of negligence.

Where there is no trespass
to land, P could not recover without
showing D's negligence. Why should
land be so specially protected? No
reason.

Booth 140 N.Y. 267 - Where the injury
was indirect the action is on the case
and negligence must be proved. If
the injury was direct no negligence
need be proved. Hayes v. Cohoes

100 Minn. 258 - old dictum - strict
liability for direct invasions to land;
negligence must be proved where
injury is indirect.

old
Majority still
enforce strict
liability on
injurers to land. (?)

If D invades P's land, he is
liable though the injury was pure
accident. (This is still majority rule)

157 Ky. 620 ¹⁹¹⁴ Lucas - D's structure hit pole
which hit a gate which hit P in his own
yard. Held: D liable ^{in trespass to land} without any proof
of negligence - P collects for consequential damages to person.

¹⁹²⁹ Supply Coal Co. 229 Ky. 716 - D left reel of wire at top
of hill - ran through P's house. Held: D liable
for trespass with no proof of negligence.

Where there is no trespass
to land P must show negligence without

Hay v. Cohoes Co. N.Y., 1849, p. 136

D dug a canal on his land, throwing earth on
P's land and house. P was in case, not overruling neg-
ligence, unskillfulness, wantonness. Held: New
Trial. appeal.

Held: New Trial affirmed. If a person's
absolute right of to undisturbed possession of his
own property is infringed upon by another's particular
use of his property - the latter must give way to
the former, even if B has not injured A's property will-
fully or negligently.

100 Minn. 258 - old dictum - strict
liability for direct invasions to land;
negligence must be proved where
injury is indirect.

Majority of courts have held that injuries caused by blasting are direct and the distinction between direct & indirect is N.G.

London . 90 Ohio State 144 } to this effect.
Watson 174 Iowa 23

The Nitro-Glycerine Case, U.S.S.C., 1872, p. 134

This was a trespass to land.

How about absolute liability?

The Supreme Court here picks out the distinction between liability for direct invasion and for an indirect invasion. This case came from a Code state.

Held: Throws overboard strict liability for trespass to land. D is liable only if there has been a wrongful intent or negligence

injuries to land and to persons are to be treated alike. Four cases since.

1932 Restatement Sec. 165, 166 - approves

Nitroglycerin Case - no liability for trespass to land unless:

① intended-

② result of reckless ~~and~~ negligent conduct plus damages

③ in course of an extra hazardous activity plus damages

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The Nitro - glycerine Case, U.S.S.C., 1872, p. 138

D exploded some nitro-glycerine without any fault in the premises which they leased from P. P sues ^{in trespass} for injuries to other parts of his buildings than those leased by D.

Held: judgment for D. No one is responsible for injuries from unavoidable accidents, while engaged in a lawful business. P must prove D's negligence. An exception is in case of carriers where D has contracted to carry safely and when injury occurs, the presumption is that D was negligent.

U.S.S.C.

throws it out

wrongful intent or negligence

Injuries to land and to person
 are to be deemed alike. Four cases since.

1932 Restatement Sec. 165, 166 - approves

Restatement in accord

Nitroglycerin Case - no liability for trespass to land unless:

① intended -

② result of reckless ~~and~~ ^{and negligent conduct} plus damages

③ in course of an extra hazardous activity
 plus damages

Rochester Gas 266 N.Y. Sup. 469 (1933)

D made forced landing; hit P's ^{electric} transmission tower on P's land. P sued D.

Held: ① N. sufficient proof of negligence.

② N. res ipsa loquitur - motor frequently stops without negligence.

③ D liable without proof of negligence because it was trespass on land.

This decision can be reconciled with Restatement because aviation is an extra-hazardous activity, although the opinion does not rely on this.

Prosser predicts that the strict liability for trespass to land is on the way out.

④ Animals

① Trespasses by animals on land.

Common law rule: D is liable regardless of care. He trespasses with the animal, and since trespass to land needed no negligence, D is liable.

The modern justification: if D keeps a thing which is constantly threatening to escape and is likely

Prosser
p. 432

Moyses v. Colby p 580
 v. Hayer p 581
 Adams p 588
 R. 504 "Linnestock"
 but not dogs & cats

to do damage if it does escape, D must
 keep it at his peril.

May 15

Exceptions:

- (a) Doesn't apply where animals ^{R 505} were being
driven along a public road and they
^{Tillitt v. Ward p. 582} ran off without D's fault and trespassed
 on adjoining land. Based on public necessity.
- (b) Doesn't apply to animals which could
not reasonably be expected to do
damage if they escaped.

1 Dogs, cats, ^{Burde v. Holmes p 589} canary birds, guinea pigs.

- (c) Early American cases said the English
^{Wagner p 584} rule was not applicable to this country
^{Kimple p 587} ① Then statutes restored the English
 rule to varying degrees.
- ② Restoration of common law by court decision
- ③ There are no decisions in Union.

^{p. 436} Liability limited to damages (We would probably apply the common law rule)

which were part of the normal
 risk, give ^{Hopkins v. Brooke}
^{130 W 5511} ④ We have statutes requiring some
^{imposing strict liability for dogs} kind of animals to be fenced in.

(
 last 3 excerpts p. 582
 includes personal injuries

- ② Injuries to person or personal property by animals
 there are 3 classes of animals.

R 506 (1)
 Wild
 animal

- (a) Naturally ferocious - bear, wolves, lions
 1. strict liability. Owner must know
 that he is creating great risk by keeping animals

R.506 (v) domestic - by custom devoted to service for mankind

② Not normally savage - dogs, horses, bulls
 1. strict liability, if D has knowledge
 (scienter) that the particular individual
 animal is dangerous.

a. "Mofeni" - "Every dog is entitled to
 one bite" is not accurate; it is
 enough that ^{he} has shown inclination
to hurt - to give owner scienter.

2. Of course, negligence will always
make D liable.

③ Weak creatures - scienter practically impossible

1. Bees cause trouble: they are usually put
 in loss ② because of their great social
 utility.

Exceptions to applying strict liability.

1. Courts will absolve D when the injury
 was far beyond the risk or where there has
 been an unforeseen intervening cause.

Liability is strict but not absolute.

Ex: dog scares auto driver who cracks up.

Ex: where TP releases dog who bites X.

2. D is not liable where P sterried up
the animal himself.

a. He assumes the risk voluntarily.

635, 638, 643, 677, 688, 693, 695 - famous

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R.506 (v) domestic - by custom devoted to service for mankind

Burton v Moorhead, Scotland, 1881, p. 610

D's dog, known to be ferocious, broke his chain and bit P who was where he was entitled to be. judgment for P.

Held: affirmed. If a man keeps a wild animal or a domestic animal known to be dangerous he is liable for all injuries caused by the animal whether D used reasonable care in taking ineffectual precautions or not.

1. Of course, negligence will always make D liable.

② Weak creatures - scienter practically impossible

1. Bees cause trouble: they are usually put in loss because of their great social utility.

Exception to applying strict liability.

1. Courts will absolve D when the injury was far beyond the risk or where there has been an unforeseen intervening cause.

Liability is strict but not absolute.

Ex: dog scares auto driver who cracks up.

Ex: where TP releases dog who bites X.

2. D is not liable where P stirred up the animal himself.

2. He assumes the risk voluntarily.

1. 635, 638, 643, 677, 688, 693, 695 - famous

see Benson & Fryer
Legal Method
PP. 633-660

b. But mere contributory negligence will not relieve D.

Fake 45th Mer. 37 - Accidentally stepped back into a savage dog in D's yard. D not liable!

© Extra-hazardous things and activities

The thing which, even though used or done carefully, will be dangerous.

1. Explosives - stored. Hestry
2. Dangerous chemicals
3. High-voltage electricity
4. Inflammable fluids (at least in large containers)
aviation Brennan p. 603 D.C. case
5. Sewage reservoirs
6. Piles of rubbish apt to slide on P's land.
7. Oilwell drillings 205 Calif. 328

English case - 1933 - 1 Chancery Div. 89

D allowed gypsies to camp on his land.
Held liable for injuries they did to adjoining land.
This rule started in Bylands v Fletcher

not a trespass - because indirect

not a nuisance - had to be continuous or repeated

not negligence

not intent

but D was held liable on precedent of the animal rule and an old fire rule.

b. But mere contributory negligence will not relieve D.

Fake 45 Mein. 37 - Par accidentally stepped back onto a savage dog in D's yard. Not liable!

© Extra-hazardous things and activities

The thing which, even though used or done carefully, will be dangerous.

1. Explosives - stored. blasting
2. Dangerous chemicals

Etcher v Rylands, 14 Q.B., 1868, p. 623

D and P both leased nearby land from X. P worked a coal mine on his land and D had some competent engineers make a reservoir on his. The engineers came across some filled-in old mine shafts, but they went ahead, and when the water was put in the reservoir it burst down through the old mine shafts into P's mine and flooded it. Exchequer judgment for D

" Chamber- " " P
Held: House of Lords " " "

If a person brings anything which is likely to do mischief if it escapes - onto his land for his own purposes, he must keep it at his own peril. This goes for animals, water, filth, stench etc.

of the animals rule and an old fire rule.

Rule of Rylands v Fletcher:

[Where D keeps something on his land which will escape if not restrained and which will do serious damage if it escapes, D is liable if it escapes and does damage, even without his fault]

This rule was soon extended to places beyond one's own land (see list on p. 251)

May 16

The rule of Rylands v Fletcher is well accepted in England.

In U.S. it has had a stormy time. N.H., N.Y., and N.J. ^{rejected} repudiated it.

Earlier cases of mill dam collapses held owners not liable for persons downstream without negligence.

Thus, most courts early rejected Rylands v Fletcher. But the trend is now towards adopting it. More than half of the states reject it by name. But they apply it by calling D's enterprise a nuisance.

These things have been held to be
nuisances - see list on p. 251

Nuisance may mean almost any-
thing.

A small group of jurisdictions
have adopted it by names.

Where D does things which involve
a very high degree of risk, he is liable
without fault.
without risk.

Restatement approves it.

Meun 205 Calif. 328 - oil well bursting

Meun. accepted the doctrine from
the start.

Cabell Eastman 18 Meun. 324

Water tunnel collapsed. Liable without neg.
Wiltari 99 Meun. 255 } bursting of
Bridgman-Russell 158 Meun 509 } reservoir.

Burger 60 Meun. 296 - petroleum tank burst

Hannum 40 Meun 127 - snow fell off D's roof
Charlesworth - Law of Negligence - Dangerous things.
good summary of English cases.

assuming that you are going to
accept the doctrine, ~~and~~ what are
its limits. ~ limitations in Rylands v Fletcher

D not liable where the escape was caused by:
unforeseeable

① Acts of God or of third person

note that in the negligence cases
on proximate cause
the courts have held D liable where
he could foresee a injury even though
he could not foresee the particular
intervening force. This does not go so far.

Nichols v Esch. Div. 1 - Unforeseeable land burst
made reservoir give way - D not liable.

Carstairs v Taylor, p. 635 Text - Rat gnawed
hole in gutter box used for storing water.

Box v Esch. Div. 76 - TP opened up his reservoir
which made D's reservoir burst. Held: Not liable.

No American cases but dictum
shows that this limitation is accepted.

→ ② D not liable if he is making a "natural"
use of his land.

③ D not liable for use of land in its
primitive condition.

City of Merion v. 33. D dammed up a
natural bed of a stream - dam gave way -
Held: not liable - because this was
a natural use.

interpretations
of
Natural

④ natural means ordinary or customary
examples: "fire, dangerous - but common
(some statutes [Merion] make L.R. strictly

liable for your fires)

2. steam boilers

3. small quantities of cleaning fluid.

^{4. coal mining}

The general social utility is considered but the exception is usually based on social sanction - custom - "everybody does it"

③ legal sanction

Hould 100 Winn 258 . D laid gas pipes under franchise. Without D's negligence the gas escaped. Held: D not liable because he was expressly authorized by law to do what he did, unless he did it negligently. But franchise may imply that D takes the risk.

④ D not liable if P has consented to what D did.

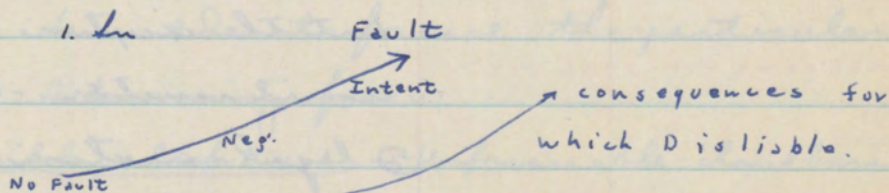
Ex: where Gas Co. puts pipes in your house with your authorization. P has assumed the risk.

Where D carries on an activity or a thing, which is threatening to escape & do damage, which not authorized by legal sanction, to which P has not consented, which is not

Summary

an ordinary thing to do, where the injury was not caused by act of God or T.P.

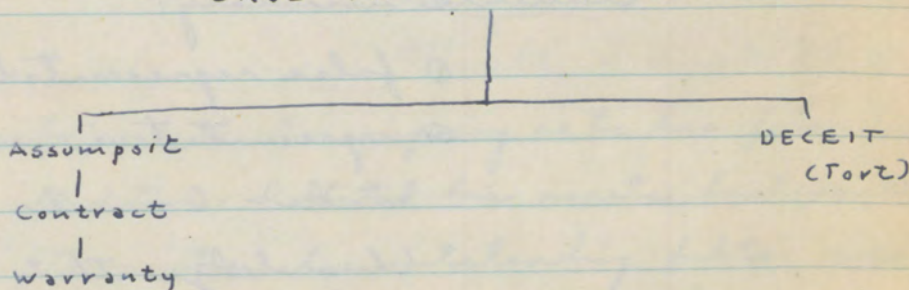
strict liability is limited to foreseeable risk. - no decisions on it.



DECEIT

History

It grew out of an action on the case for a misrepresentation by which P suffered damage. Originally, it was applied only where D was under some duty ^(like contract) which he breached. (Assumpsit grew out of it for breach of ^{warranty} contract - misrepresentation was necessary.)

CASE FOR MISREPRESENTATION

For contractual liability, you must find a promise - a contract, and the damages recovered were for the ^{breach of warranty} loss of the bargain. \$50 below

In deceit, P recovers only his actual out-of-pocket loss. \$25 below.

Ex. Price \$100 } sale of a tree
 Represented \$125 }
 Value \$75 }

P has his choice of action.

You had to have fault for deceit

Parley v Freeman, 1789

Tort action of deceit not limited to dealing between parties. You don't need any contractual relation or any assumption of duty by D.

All you need is a misrepresentation on which P relied to his damage.

Elements necessary: (like intention)

- ① false representation of a fact
- ② representation must be fraudulently made - D must have had scienter - (knowledge that the representation was not true)
- ③ statement must be intended to induce P to act to take some action in reliance on it. (intent includes situation where action was reasonably certain to follow)
- ④ there must be action in reliance in good faith.
- ⑤ there must be resulting damage to P.

You had to have fault for deceit

Pasley v Freeman, 1789

Pasley v Freeman, 1789, p. 677

P asked D about X's credit. D said it was good, knowing his statement to be false.

Held: judgment for P. This is the first case where an action of deceit was allowed against anyone not a party to the contract which P was induced to enter by the deceit or false affirmation.

to not

in parties.
actual relation

by D.

misrepresentation
damage.

fact

- ② representation must be fraudulently made - D must have had scienter (knowledge that the representation was not true)
- ③ statement must be intended to induce P to act to take some action in reliance on it. (intent includes situations where action was reasonably certain to follow)
- ④ there must be action in reliance in good faith.
- ⑤ there must be resulting damage to P.

(A) False representation of fact. ⁽¹⁾ active representation

1. usually by words but it may be by an act.
2. mere silence is normally not a basis for

liability.

exceptions:

- (a) Where factious D speaks but tells only parts of the facts, he may be liable for misrepresentation if P reasonably believed he was getting the whole truth.

32 Wheeler - 171 Newall. - D applied to P for credit. On inquiry as to his financial condition, D stated his assets but omitted to mention his outstanding debts. Held: fraud - justifying rescission.

- (b) ambiguous statement, capable of 2 meanings - one true - one false. He must elaborate if he ^{can} reasonably see that P is getting the wrong impression.

(c) Where law imposes a duty to speak.

Ex: D, owner of horse, allows X, in his presence, to say "this horse is mine" in selling to T.P.

(Where D has peculiar knowledge of the facts) ^{no one knows but him.}

13 Mumia 109 March. D sold ship to P. They were diseased; D knew it; P did not. Held: Good basis for deceit. Implied representation that ship was sound. Monadegs - the action would be in contract for breach of warranty.

In estoppel, D is held to his false statement and its consequences to keep him from obtaining a benefit.

In deceit, D is held liable for damages caused by his falsity.

The elements are similar, however.

3. The misrepresentation must be one of fact.
 - a. Predictions are not statements of fact.
 - b. A mere promise of something to be done in the future is not a basis of deceit.
 - c. qualification: a prediction may necessarily carry with it an assurance of existing facts.
 Ex: "house will be done in 2 weeks" - implies that work has been ^{started} done.
 - d. qualification - Edginton v Fitzmaurice, 1882
 if D states his own intentions knowing that he has no such intentions, it is a basis for deceit - it is a misrepresentation of the fact of the state of his mind.

F v not going
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 I believe said
 to be wrong
 but in a higher
 level
 and that
 is not
 admitted and
 of administration

13 Merrin, 109 March. D sold sheep to P. They were diseased; D knew it; P did not. Held: Good basis for deceit. Implied representation that sheep were sound. Nonadage - the action would be in contract for breach of warranty.

In estoppel, D is held to his false statement and its consequences to keep him from obtaining benefit.

In deceit, D is held liable for damages caused by his falsity.

The elements are similar, however.

3. The misrepresentation must be one of fact

Edginton v Fitzmaurice, 1882, p. 188

P lent money to D, relying on a prospectus which stated the objects for which the money was to be used. It was proved that the stated objects were not the objects for which D intended to use the money.

Held: Judgment for P. The state of a man's mind is a fact. A misstatement of intention, on which D relies to his detriment, if made recklessly or knowingly is an actionable fraud and a deceit.

is of fact.

to be done of deceit

may necessarily of existing facts as - inferred

① qualification - Edginton v Fitzmaurice, 1882 if D states his own intention knowing that he has no such intention, it is a basis for deceit - it is a misrepresentation of the fact of the state of his mind.

If D makes promise for the future intending to keep it, and later changes his mind, he may be liable in contract but not in tort of deceit.

But, if D make statement of his intentions ~~not~~ with no intent to follow through - there is a misrepresentation of fact.

The question is - what was in

D's mind when he spoke

Swift v. Saunders

When D buys something - promises ^{at the time} to pay for it - and doesn't intend to pay for it - he is liable in deceit.

Fraud is the special province of equity - as equity would here give credit back his goods.

This was a willful tort - not dis- charged by bankruptcy.

Statute of Limitations does not run against this tort remedy till the deceit is discovered.

as per formula

MacCheth 114 Minn. 258 - D induced P to lease property to them by representing that that they intended to make a R.R. to the property. They had no such intent. Held: liable for deceit.

If D makes promise for the future intending to keep it, and later changes his mind, he may be liable in contract but not in tort of deceit.

But, if D make statement of his intentions ~~as~~ with no intent to follow through - there is a misrepresentation of fact.

The question is - what was in

D's mind when he spoke

Knight v. Richards

May 18

Knight v. Richards, R.I., 1896, p. 693

D held liable in tort action of deceit for implicitly representing by his act of buying goods on credit that he intended to pay for them, when he had no such intent.

Statute of Limitations does not run against this tort remedy till the deceit is discovered.

as per example

Macketh 114 Minn. 258 - D induced P to lease property to them by representing that that they intended to make a R.R. to the property. They had no such intent. Held: liable for deceit.

167 Merin. 327 D sold P some stock and promised to give P a job if he bought the stock. Held: Promise made with no intent to perform. D liable in deceit.

Bisbee 159 Merin. 238 - P had mechanic's lien on D's property. D got P to sign waiver of lien on promise that the lien would be paid.

Held: Where the period of time is short between the making of a promise and its repudiation and where the circumstances are not changed, they the jury may infer that the D had no intention to keep the promise in the first place.

This is a well established important weapon. Opportunity to sue in tort has some advantages over contract action (see last page)

⑧ Scienter - guilty knowledge

Puck v. Perry, (The leading case) 1889

The D had no intent to deceive anybody.
D cannot be held liable ^{in deceit} where he
honestly believed his statement to be
true.

Possibility of remedies for "fraud" (a loose term),
 meaningless unless stated in terms of
 available remedies. There are three:

① Rescission - calling the deal off - give
P back restore the original situation.

Here P would get his money back
 P " " " stock back.

This was an equitable action, hedged
 about with restrictions on P. (time, clean hands etc)

Rescission was permitted not only for
 fraud but for mutual mistake as to
 a material fact. thus no fraudulent
intention was necessary. Thus in Puck v. Perry
 P would have got rescission.

② Defence of fraud.

If D sued P for the money for the stock
 P could set up defence, at law, of
 false representation - since he could have
 got rescission in equity. This was still

Peck v. Derry, (The landing case) 1889

Peck v. Derry, H. of L., 1889, p. 295

D's prospectus stated "incorporated by special act of Parliament, authorizing use of steam or mechanical power", when such authorization was subject to the consent of the Board of Trade and two municipalities which was never given. P bought stock relying on the assertion and when the corp. had to disband, he sued D, its directors, for deceit. D pleaded that the statements were made in good faith and without intent to deceive and that they had reasonable grounds to believe their statements were true.

Held: Action dismissed.

① Fraud must be proved and is proved when —

② A false representation has been made

② knowingly or

④ Without belief in the truth

⑤ recklessly, careless whether it be true or false.

③ If fraud is proved the motive of D is immaterial

The question whether D had reasonable grounds for believing his assertion to be true is material only as it casts light on whether he had an honest belief in his assertion's truth.

② Defense of fraud.

If D sued P for the money for the stock, P could set up defense, at law, of false representation & vice he could have got rescission in equity. This was still

more or less an equitable defense - as
no fraudulent intent was necessary
here either. Mutual mistake was
 enough

③ Tort action of deceit.

P wants affirmative damages - not
 just restoration of the old situation.
 This was entirely a remedy at law.
 A mere mistake on part of D is not
 enough; you need something more.
 Call it scienter - guilty knowledge - but
 what is it?

Ⓐ Desire and intent to swindle by
 making false statement.

Ⓑ D may know his statement to be false.

Ⓒ D may believe it to be false

Ⓓ D may know that he doesn't know
 whether it is true or not.

Ⓔ D may believe it to be true - but
 he knows that he does not know for sure

Ⓕ D may believe it to be true - and think
 he knows for sure.

Clearly D is liable in deceit in situations
 (a), (b), and (c) ⁽¹⁾ - beyond that, there is confusion.

14	H.L.R.	184	Smith
24	H.L.R.	415	Wilbitt
42	H.L.R.	773	Bohlen
24	Ill.L.R.	749	Carpenter
16	Vir. L.R.	750	Green
18	Vir. L.R.	703	Bohlen (deity)
19	Vir. L.R.	742	Green (nasty)

Situation (No. c) Rules of Park-Derry soon modified.
 so that if D makes a statement that he
 knows something to be true or as of his
 own knowledge, and he hasn't such
 knowledge, ^{frankly} and he knows it, he is
 liable in deceit.

D is ~~mis~~misrepresenting the state of
 his mind.

Bullet vs Main 8 - adopts this rule - if a
 man asserts something to be true - and
 he reasonably gave the impression that
 he knew for sure from his own knowledge,
 he is liable in deceit if his statement
 was false

④ Where D believes something to be true, and he believes he knows for sure.

1. Unreasonable belief.

2. Reasonable belief.

Blunden 283 N.Y. 236 - D was weighmaster who certified a weight of vegetables and got it wrong.

Held: D liable for negligence - careless in weighing. Mainly puts liability on the basis of a public duty, to be careful (notary public, city clerk, weighmaster). But

Butler - 155 NE 662 - D ny. had instructions to store P's goods. D negligently informed P the wrong place where the stuff was stored, so that P's insurance did not cover. Held:

D guilty of negligence. Duty in bailor relation.

253 N.Y. 369 - D, trustee, negligently certified erroneous information. Held: liable for negligence. Imposed by relation.

Isbit 235 N.Y. 511

D ran ticket-tape service. Sent out wrong court decision news. P was a casual customer in broker's office - sold stock in reliance. Held: D not liable. No duty to casual bystander. If broker had been injured he could collect.

C. 1000.

Ultra-Mares Corp. - Lanes 255 N.Y. 170

D were C.P.A.s - asked to certify a balance sheet for a corp. which was in fact insolvent. By proper care they could easily have discovered the facts. D knew that the balance sheet which they certified might be exhibited to others. They certified an erroneous balance sheet. P relied on certificate and made loans to corp. and now sues C.P.A. for erroneously certifying the balance sheet on 2 counts D negligence.

On negligence Held: no liability because D owed no duty to P to use care in certifying balance sheets. Glander case distinguished because the certificate of membership was furnished to be shown to a particular person, P.

For negligence, there must be a particular person, to whom D knows ^{unmistakable} the certificate will be shown, to create a duty, for the breach of which D will be liable.

The second count was D deceit.

D held liable in deceit. There
^{lack of good faith}
 was scienter in that D knew that
 he didn't know whether the balance
 sheet was correct and asserted that
 he did know that it was correct.

Broad
 Basis (May) Plaintiffs

Narrow
 Basis Deceit Possible
 Plaintiffs

N.Y. rule: action for deceit does not
 extend to a case where D honestly
 believes, however unreasonably, that
 he is speaking the truth. Beyond that,
 the action must be for negligence, and
 this action can only be brought by
^{to whom}
 persons that D could expect his statement
 to be shown.

Prosser thinks this may be
 artificial hairsplitting.

For negligence for misstatement
 you must have a specific foreseeability
 that is, foreseeability of harm to a particular
 person.

N.Y. and 3 or 4 other states and Restatement
 approve this case.

Another point of view:

Where D believes his statement to be true and thinks he knows, he may be liable even if he honestly and reasonably believed his misrepresentation to be true.
Clatton, Mass. p. 709

Where D states a fact as of his knowledge, which is capable of being known, he will be liable for not knowing it, even where he reasonably thinks he knows - no bad intent.

Schlichter 134 Minn 143 - 41

Where D has made ~~on~~ a misrepresentation as of his own knowledge he cannot be heard to say that he honestly believed that his statement was true.

Reicher 155 Minn. 361

D bought a car from X who stored it in D's garage. D got a commission, though he was not an agent. D told P that he knew X and that X owned the car. As a matter of fact X had stolen the car, and the rightful owner got the car back from P. X shipped. P sued D. The court ruled out any evidence of good faith on part of D. He was bound to know whereof he spoke or keep silent.

Note the emphasis that Minn. court puts on the fact that D was making the statement for his own financial benefit - when they apply this strict standard.

144 Minn. 228 ^{lowest belief.} Kneeland

a casual stranger volunteered that a seller was reputable Held: Not liable - because D had no interest in the deal.

This strict liability doctrine has been rarely applied - the authorities quip it. It goes further than any other jurisdiction.

[C] P must reasonably rely.

① No liability for deceit for misrepresenting what the law is - because P cannot reasonably rely on another layman's statement of the law.

Maier 154 Minn. 495 D represented that a foreign insurance company had authority to do business here Held: a misrepresentation of fact.

170 Minn. 29 - statement - you could buy

- ② Where there is a confidential or fiduciary relation between the parties, a misrepresentation of law may be actionable.

57 Minn. 510. Insurance Co. made false statement to its policy holder Held: liable.

- ③ P is not justified in relying on D's statement of opinion. But if the facts are known to be peculiarly within D's knowledge, a statement of opinion may infer a statement of fact.

Ex.: a doctor assures a patient that he can be cured. 62 Minn. 146. D held liable.

Ex.: a barber college assures that you can
82 Minn. 12 learn to be a barber in 6 weeks.

- ④ ~~that~~ general statements about the high quality ^{and value} of goods are considered to be mere statements of opinion. Buyer should not reasonably rely on them.

If buyer is entirely ignorant, and the seller knows it, the buyer was, in some cases, rely on seller.

116 Minn. 174 - D sold P a roadhouse for \$35,000 asserting that was its value. P was an ignorant boy.
Held: D liable.

This limitation applies only in a few cases.

May 23

Individual standard of
care - not strict reasonable
man standard.

Ellis G.N.M. 181

P joined peak religious cult on
basis of crazy statements.

If P has confidence in D, and
is sucked in by a statement, he
should not be held to a strict standard of ^{care} reasonable

Judd 215 M.D. 312 "Due diligence does
not require that P suspect D of
lying and go out and check up on
his statements."

Control R. p. 741

Enigma 51 Memor. 30 "Deceiver may
not be held to say - he should not
have believed me."

The ignorant and innocent are
not held to standard of ordinary men.

Hemp 132 Memor. 64

Hance 140 Memor. 108

General Rule

"Reasonable reliance under
the circumstances, - in good faith
is all that is required."

"The statement must be a
substantial part in affecting his
decision."

Addington p. 744 - 2 persons may be liable for deceit if their false representations were substantial factors in affecting P's decision.

Hague p. 745 - if P goes out to look up on D's statements, it is evidence that he did not rely.

Schmidt 140 Minn 180 But D may still be liable, even if P did make some investigation. It is a jury question.

Limitation

The statement must be a material one - one which a reasonable man would attach some importance to.

⑤ Plaintiff must have suffered damage.

The damage must have been such as might have been expected to result from the misstatement.

Ex: P buys stock under misrepresentation.

The whole stock market falls - and P loses.

Held: The misrepresentation is not the proximate cause - an unforeseeable intervening cause.

- words may be defamatory in themselves. if not: P must plead & prove:
1. inducement - additional facts from which defamatory meaning arises. (P had been insured)
 2. innuendo - must establish the defamatory sense re those facts (P was defrauding the ins. co.)
 3. colloquium - " " that defamatory meaning attaches to him.
(Ex: son of bitch - next page)

OK for small group
not for large group. ?
not going to
that may be
innuendo or
colloquium
must be
defamatory

DEFAMATION

A statement made to TP

tend to expose him to
(~~some~~ hatred, contempt, or ridicule - a course he is to be shunned or avoided)

which tends to incite adverse
opinions against P.
BURTON p. 773 - indirect & exposed allusion

Ch. Prosser p. 780-2

interest in reputation

not of temporal
damage requirement
in slander cases

The law is unreasonable - full
of historical survivals.

Conflict of jurisdiction. Originally
defamation was dealt with by ecclesiastical
courts. in 1500's About 1600, the King's Courts
began to give relief to keep the peace.
Only the most serious kinds were
held actionable. response to flood of litigation

Unreasonable distinctions

① There are two ^{categories} kinds of defamation:

② slander - oral - spoken - communicated
by sense of hearing.

immense of from
greater potentiality of harm
under distribution
reference for written word.
more deliberate & malice

③ libel - written - communicated by
sense of sight. a statue or a picture
may be libel; also burning in effigy;
legitimate

BURTON, 773

1 NE II 41 Prohibits actress' picture of
in front of burlesque house. Held: libel.

You can sue on libel ^① without
proof that P has suffered ^{actual} damage
because of the statement.

(written)
libel - no damage
need be proved

Libel or slander? movies - libel - including sound track
 phonograph record - open question
 radio - split - wide distribution but no permanence of form.
 - script or ad lib?
 MELDRUM p. 784

(oral)
 slander - damage must
 be proved sometimes.

Forms of slander per se
 especially likely to
 cause pecuniary or
 temporal damage

Some ^② kinds of slander are actionable
 without special damage. Some ^③ kinds
 require it.

p. 776 Lord Mansfield laments the distinction,
 but says that it is too well established
 in the law to be changed. Courts have
 said this ever since.

Three kinds of slander were actionable
 without proof of damage.

① words charging P with a crime.

HUGHES v. BARRICK p. 790

a. In England, limited to offenses
 (on body)
cognitively punishable - not fines.

b. Minnis - the crime must involve
moral turpitude - shocking to moral
 sense of community (theft, assault, fornication)
 even though punishment is only a fine.

and vice versa.

basis: cover social ostracism.

c. Words must charge a crime.

186 Minnis. 96 - "If I had not been so crooked, the
 bank would not have failed" Held: no slander
 without proof of special damage.

② words imputing a loathsome disease.

Taylor v. Perkins p. 794

a. leprosy - plague - venereal diseases.

b. insanity not included;

must not be allegation of a past disease.

statement that P has had the disease - is not a defamation per se
 ③ Words calculated to interfere with ^{discredit} P's trade, calling, business, or profession.
~~The statements must be maliciously~~

Prosser 802-3

^{PP 796}
Lundberg v. Allday 1831

p. 767 Held: "It is slander per se. to say of a man that he is in the custom of a club - you are not fit to hold your job because you associate with ^{prostitutes} ~~whores~~."

p. 770 - words that brewer is bankrupt. Held yes
 - bank statement - Point of funds - Held yes.
 Physician a butcher

349 Meris 342 - calling a lawyer a slyster. Held: yes
 but not a "bum in a gin mill" 10 N.Y.S. 2d

④ Words imputing unchastity to a woman ^{not a man}
^{Buggisteff p. 796}
 In northern states, adultery & fornication are crimes of moral turpitude - thus come under exception ①

some southern states

Extreme technicality

Blaser 99 Ore 392 195 Pac 359

P, one of 8, in lobby of small hotel.
 Someone in this room stole my ^{quint} - and I know the
 Landlady's son - a bitch had stolen my
 son - of a bitch.
 quint - he is here in this room. I'll give
 him 2 minutes to bring me back.

Held: P must not only prove that he was one of the 8 but he must also show that he was the male of the female of the same species.

TERWILLIGER V. WANDS p. 799

any other slander requires proof of
special damage, pecuniary in nature (loss of business, marriage, etc.)
~~libel~~ ~~Everybody there does not~~ It is enough
^{noting out}
Prosser p. 785 that a considerable, respectable part of the
community will regard P with contempt etc.
Does not have to be community in gen. or reasonable man.
Puck. p. 778 -

suggested reforms
Prosser p. 804
May 26

Publication - The defamatory words must be
p. 810 communicated to someone other than P.
to give slander or libel. This communica-
tion is given the technical term -
publication - it goes for both written
and oral words.

Sheffield p. 804

TP must understand the defamatory
meaning of the words. (Foreign language)

Where D sends the defamatory words
in a sealed envelope to P, D is not liable
if TP unfreezably opens & reads it.

Oleon 181 Minn. 364

Kumby p. 794 - D knew that TP opened
P's mail. Held: D liable under these
circumstances.

D can expect that TP will read
what he sends on a postcard and he is
liable if someone does read it.

Prosser p. 811 note 58 - case says no publication

Where P shows the letter to TP him-
self - it is no publication.

Exception: letters to blind man

Exception: letters to children. It must
be expected that they would show letters
to parents.

A telegraph company is liable for
sending a defamatory message.

Petersen 65 Minn. 18

Dictation to a stenographer is
publication ^{outcome of libel p. 767} (weight of authority)

(The same is true of communication)
from one branch of corp. to another. ship

10 Minn. L. R. 69

12 " " " 188

D ~~as~~ does not have to have
originated the words. Every repetition
is a new publication; it is no defense
if D gives source or says "it is ^{alleged} said or
removed", ~~as~~ gives source or says, I don't believe it.

The fact that P's reputation was
already gone by current opinion may
be considered in determining damages.

A newspaper or book which repeats

a defamatory statement is publication.
is a libel.

Boltomley p. 829

But newspaper sellers etc. are not liable unless they can be shown to have been negligent in not discovering defamatory statement
Ugitalli p. 787 test

Publishers are held strictly liable for publication:

No intent or malice needed.
Fault.

except for

The publication must be intentional.
intent to publish

that is D must see that the statement will reach TP and that D will be defamed.

there is strict liability

except for qualified privilege.

But, at common law, D is liable even though he didn't realize that statement was defamatory.

Jones p. 799 test: D made up a fictitious name in a questionable news story. but the name turned out to be a real person. Held: D liable though no bad faith.
artificial person

but tendency is toward requiring negligence at least

p. 820

Morrison p. 795 - news story came in that P had twin. D published it. P had been married one month. Held: D liable without fault, (intent or negligence)

BROMAGE p. 601

CORRIGAN p. 811

no malice - compensatory damages
malice - punitive

Typesetter Upton 104 La. 141 D intended to say "cultured gentlemen"; Typesetter made it "colored gentlemen". Held: D liable.

D uses fictitious names in defamatory

Coffey p. 821 } strict liability for defamation
 Summary p. 822 } no "

situations, he does so at his risk, if a substantial number of the readers might reasonably believe he referred to a certain person.

Prosser p. 854-6

BURTON p. 774X-

Defences.

Complete: 1. Truth

2. Privilege

Partial: go to reduce damages

1. retraction

2. P's bad reputation

3. honest belief & proper motive of D.

① Truth of a statement is a defence.

At criminal law - libel - truth was no defence - because the purpose of making it a crime to prevent breach of the peace. This was common law. ^{now changed by statutes.}

a. But the charge must coincide pretty

exactly with the facts. Much ^{D has burden of proving truth} hairsplitting here. ^{Do not distinguish apart from statute.}

16 M. & N. L.R. 43 Ray "Truth as Defence"

See 9397

② it is a statutory defence in Minnesota that a newspaper which has published a defamatory statement may make a retraction within a week in the same position as the statement. This only cuts down the damages to special damages.

③ Privilege - (as to risk of giving out false info.)

a. absolutely privileged - no liability regardless of content or motive.

b. qualifiedly privileged - where D is free from liability only when he speaks from

his good motives and has ~~of~~ acted reasonably in his publication.

A Absolute privilege - greatly confined.

① judicial proceedings.

a. judge can say anything.

Scott p. 875.

b. witnesses, counsel, parties, jurymen are privileged absolutely, provided that the statements made ^{were} pertinent or relevant to the matter in litigation.

② legislative proceedings - including witnesses ^{at} hearings.

③ official reports made by one governmental officer to another.

Qualling 161 U.S. 483. P.O. General to President.

B Qualified privilege.

1. good faith.

2. good motive.

3. reasonably done.

like self defence or defence of property.

P. p. 832

① statements made to protect his own interests.

a. One may report to police that he believes A stole goods.

Mc 149 Marin 311

b. One officer of corp. to another as to conduct of employee.

Putnam 142 Marin 147

P. p. 833

② statements made to protect interests of other people.

a. the communication must be made to the person to be protected or to someone reasonably in position to protect him. and it must be reasonably made.

Frasley. 131 Minn. 435

Hubbs p. 831

③ common interests of speaker and listener

⑤ reports of leg. or jud. proceeding made by newspaper, etc. if made in good faith.

Moore 87 Minn. Paper added in ~~minn~~ note

justified

Fair

⑥ ~~Base~~ ^{criticism} comments - in good faith; look review criticism of public officers; candidates for public office.

usually confined to statements of opinion as distinguished from statement of fact, & no privilege.

140 Minn. 171 "D is not a citizen"

4. If there is malice - intent to injure - the qualified privilege is defeated. Can be shown by evidence of ① exaggeration ② over-publicizing ③ ill-feeling between parties - A matter for the jury.
5. not a conscious lie - Partial Privilege - where damage p. 250

abuse of privilege

1. to wrong people.
2. for unrelated purpose
3. in unrelated manner

P. p. 846

839 ⑤ protect public interest
⑥ report to authorities
⑦ to gen. public
split p. 837

