[Note: Numbers in brackets refer to the printed pages of Understanding Torts by John L. Diamond, Lawrence Levine, and M. Stuart Madden where the topic is discussed.]

# LexisNexis Capsule Summary
# Torts

**Authors' Note:** Unless otherwise indicated, all references to Restatement sections refer to Restatement (Second) of Torts.

## PART A. INTENTIONAL TORTS AND PRIVILEGES
## Chapter 1
## INTENTIONAL INTERFERENCES WITH PERSONS OR PROPERTY

### § 1.01 Intent [3-7]

#### [A] *Overview and Definition*

Intentional torts share the requirement that the defendant *intentionally* commit the elements that define the tort. Most contemporary courts adhere to the Restatement definition, which defines intent to mean either that the defendant desires or is substantially certain the elements of the tort will occur. [See Restatement § 8A; *Garratt v. Dailey*, 279 P.2d 1091 (Wash. 1955).]

#### [B] *Transferred Intent*

Under the transferred intent doctrine, accepted by many courts, intent can be transferred between five torts (battery, assault, false imprisonment, trespass to chattel, and trespass to land) and different victims within these five torts. For example, if A intends to assault B, but accidentally commits battery against B or another party C, A is liable for the battery. [See, e.g., *Alteiri v. Colasso*, 362 A.2d 798 (Conn. 1975).]

The Restatement does not adopt the doctrine generally, but does endorse transferred intent between assault and battery. [See Restatement §§ 13, 21.]

#### [C] *The Mistake Doctrine*

Under the mistake doctrine, if a defendant intends to do acts which would constitute a tort, it is no defense that the defendant mistakes, even reasonably, the identity of the property or person he acts upon or believes incorrectly there is a privilege. If, for example, A shoots B's dog, reasonably believing it is a wolf, A is liable to B, assuming B has not wrongfully induced the mistake. [See, e.g., *Ranson v. Kitner*, 31 Ill. App. 241 (1888).]

Courts have applied the mistake doctrine to a variety of intentional torts. Nevertheless, in many instances actors benefit from specific privileges, such as self-defense, which

protects the defendant from liability for reasonable mistakes, notwithstanding the mistake doctrine.

### [D] *Insanity and Infancy*

Unlike in criminal law, neither insanity nor infancy is a defense for an intentional tort. [See, e.g., *McGuire v. Almy*, 8 N.E. 2d 760 (Mass. 1937).] However, intent is subjective and requires that the defendant actually desires or be substantially certain the elements of the tort will occur. Consequently, if the defendant is extremely mentally impaired or very young, she may not actually possess the requisite intent.

## **§ 1.02 Battery** [7-10]

### [A] *Overview and Definition*

Battery occurs when the defendant's acts intentionally cause harmful or offensive contact with the victim's person. [See Restatement §§ 13, 16, 18.] Accidental contact, by contrast, must be analyzed under negligence or strict liability.

### [B] *Intent Requirement*

While battery requires intent, the prevailing tort definition does not require an intent to harm. It is only necessary that the defendant intend to cause either harmful or offensive contact. [See, e.g., *Vosburg v. Putney*, 50 N.W. 403 (Wis. 1891).] The transferred intent doctrine is applicable to battery. [See § 1.01 [B], supra.]

### [C] *Harmful or Offensive Contact*

Battery encompasses either harmful or offensive contact. Even trivial offensive contact can constitute a battery.

### [D] *Causation*

The defendant's voluntary action must be the direct or indirect legal cause of the harmful or offensive contact. However, defendant need not herself actually contact the victim.

## **§ 1.03 Assault** [10-15]

### [A] *Overview*

The ancient tort of assault represents the still controversial recognition that pure psychological injury should be compensable. [See *I de S et Ux v. W de S*, Y.B. Lib.Ass., fol. 99, pl. 60 (1348).]

### [B] *Definition*

Assault occurs when the defendant's acts intentionally cause the victim's reasonable apprehension of immediate harmful or offensive contact. The Restatement, unlike many courts, deletes the requirement that apprehension be "reasonable". [See Restatement §§ 21, 27. See also, e.g., *Castro v. Loral 1199, National Health & Human Service Employees Union*, 964 F. Supp. 719 (1997).]

#### [1] Intent Requirement

Assault is an intentional tort. The defendant must desire or be substantially certain that her action will cause the apprehension of immediate harmful or offensive contact. The transferred intent doctrine is applicable to assault. [See § 1.01 [B], supra.]

#### [2] Apprehension

The victim must *perceive* that harmful or offensive contact is about to happen to him. [See, e.g., *Western Union Telegraph Co. v. Hill*, 150 So. 709 (Ala. Ct. App. 1933).]

#### [3] Imminent Harmful or Offensive Contact

For assault to be actionable the victim's apprehension must be of *imminent* harmful or offensive contact. [See, e.g., *Stump v. Wal-Mart Stores, Inc.*, 942 F. Supp. 347 (E.D. Ky. 1996).]

#### [4] Fear versus Apprehension

The Restatement and several court decisions distinguish between "fear" and "apprehension." The requisite apprehension of imminent contact need not produce fear in the victim. [See Restatement § 24 cmt. b.]

#### [5] Conditional Assault

An assault made conditional on the victim's noncompliance with an unlawful demand still constitutes an assault, even if the victim is confident no assault will actually occur if the victim complies with the unlawful request.

## § 1.04 False Imprisonment [15-20]

### [A] *Overview and Definition*

In false imprisonment, the defendant unlawfully acts to intentionally cause confinement or restraint of the victim within a bounded area. Accidental confinement is not included and must be addressed under negligence or strict liability. [See Restatement §§ 35-45A.] The transferred intent doctrine is applicable to false imprisonment. [See § 1.01 [B], supra.]

### [B] *Bounded Area*

The victim must be confined within an area bounded in all directions. The bounded area can be, however, a large area, even an entire city. [See, e.g., *Allen v. Fromme*, 126 N.Y.S. 520 (1910).]

### [C] *Means of Confinement or Restraint*

For false imprisonment to exist, the victim must be confined or restrained. [See, e.g., *Dupler v. Seubert*, 230 N.W. 2d 626 (Wis. 1975).] The confinement may be accomplished by (1) physical barriers; (2) force or threat of immediate force against the victim, the victim's family or others in her immediate presence, or the victim's property; (3) omission where the defendant has a legal duty to act; or (4) improper assertion of legal authority.

The improper assertion of legal authority can unlawfully restrain a victim. This form of false imprisonment constitutes *false arrest*. The victim must submit to the arrest for it to constitute imprisonment. The arrest is improper if the actor imposing confinement is not privileged under the circumstances. [See Restatement § 41.]

### [D] *Consciousness of Confinement*

False imprisonment requires that the victim be conscious of the confinement at the time of imprisonment. [See, e.g., *Parvi v. City of Kingston*, 362 N.E. 2d 960 (N.Y. 1977).] The Restatement § 42 modifies this requirement and would find liability for false imprisonment, even when the victim is not aware of the confinement, if the victim is harmed by the confinement. Contrary to the Restatement, some authorities hold a child can be subject to false imprisonment even if the child was neither aware of the confinement nor harmed. [See *Kajtazi v. Kajtazi*, 488 F. Supp. 15 (E.D. N.Y. 1978).]

## § 1.05 Trespass to Chattel and Conversion [20-24]

### [A] *Overview*

Trespass to chattel and conversion are two separate intentional torts that protect personal property from wrongful interference. The two torts, which overlap in part, are derived from different historical origins. In many, but not all instances, both torts may be applicable.

### [B] *Definition of Trespass to Chattel*

Trespass to chattel is the intentional interference with the right of possession of personal property. The defendant's acts must intentionally damage the chattel, deprive the possessor of its use for a substantial period of time, or totally dispossess the chattel from the victim. [See Restatement §§ 217, 218.]

Trespass to chattel does not require that the defendant act in bad faith or intend to interfere with the rights of others. It is sufficient that the actor intends to damage or possess a chattel which in fact is properly possessed by another. [See, e.g., *Ranson v. Kitner*, 31 Ill. App. 241 (1888).]

Historically, the doctrine of transferred intent has been applied to trespass to chattel (unlike conversion). [See § 1.01 [B], supra.]

### [C] *Definition of Conversion*

The Restatement § 222A defines conversion as "an intentional exercise of dominion and control over a chattel which so seriously interferes with the right of another to control it that the actor may justly be required to pay the other the full value of the chattel." [See, e.g., *Moore v. Regents of the University of California*, 793 P.2d 479 (Cal. 1990).]

Only very serious harm to the property or other serious interference with the right of control constitutes conversion. Damage or interference which is less serious may still constitute trespass to chattel.

Purchasing stolen property, even if the purchaser was acting in good faith and was not aware the seller did not have title, constitutes conversion by both the seller and innocent buyer.

## § 1.06 Intentional Infliction of Mental Distress [24-32]

### [A] *Definition*

Intentional infliction of mental distress exists when the defendant, by extreme and outrageous conduct, intentionally or recklessly causes the victim severe mental distress. Most states no longer require that the victim suffer physical manifestations of the mental distress. [See, e.g., *State Rubbish Collectors Ass'n v. Siliznoff*, 240 P.2d 282 (Cal. 1952).]

The Restatement defines extreme and outrageous conduct as behavior which is "beyond all possible bounds of decency and to be regarded as atrocious, and utterly intolerable in a civilized community." [Restatement § 46 cmt. d.] The vulnerability of the victim and the relationship of the defendant to the victim can be critical.

### [B] *Constitutional Limits*

In *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988), the United States Supreme Court held unconstitutional the determination that a parody "advertisement" in Hustler magazine could result in liability under intentional infliction of emotional distress. The majority held that a *public figure* could not recover without proving such statements were made with *New York Times* malice, i.e., with "knowledge or reckless disregard toward the truth or falsity" of the assertion. [See *New York Times v. Sullivan*, 376 U.S. 254

(1964).] As the parody was never asserted to be truthful, and as it would not reasonably be interpreted as truthful by an ordinary reader, the court found there could be no liability.

### [C] *Intent or Recklessness to Cause Severe Mental Distress*

For recovery under intentional infliction of emotional distress, the plaintiff must prove that the defendant intended to cause severe emotional distress or acted with reckless disregard as to whether the victim would suffer severe distress. Although characterized as an "intentional" tort, recklessness, in addition to intent, generally suffices for liability. [See Restatement § 46 cmt. i.]

### [D] *Third Party Recovery*

Intentional infliction of mental distress is not one of the five historic intentional torts that transfers intent between these torts and between victims. [See § 1.01 [B], supra.]

Courts have usually awarded a third-party victim recovery only if, in addition to proving the elements of the tort, she is (1) a close relative of the primary victim; (2) present at the scene of the outrageous conduct against the primary victim; and (3) the defendant knows the close relative is present. [See *Taylor v. Vallelunga*, 339 P.2d 910 (Cal. Ct. App. 1959).] The Restatement is somewhat less restrictive, requiring only that a primary victim's immediate family members be present and can prove the elements of the tort. Non-relatives who satisfy the elements of the tort can also recover under the Restatement if they are present and suffer physical manifestation of severe distress. [Restatement § 46 cmt. 1.] The Restatement's more permissive requirements have not received general explicit judicial acceptance.

### [E] *Exception for Common Carriers and Innkeepers*

Common carriers and innkeepers are liable for intentional gross insults which cause *patrons* to suffer mental distress. [See, e.g., *Slocum v. Food Fair Stores of Florida*, 100 So. 2d 396 (Fla. 1958).] There is no requirement the defendant behave in an extreme or outrageous manner or that the victim suffer *extreme* distress.

# Chapter 2
# PRIVILEGES TO INTENTIONAL TORTS

## § 2.01 Consent [34-38]

### [A] *Overview*

Consent is a defense to intentional tort liability. If the asserted victim gives permission, what would otherwise be tortious is instead privileged. [See Restatement § 892.]

### [B] *Express and Implied Manifestations of Consent*

An individual can convey consent expressly in words or through pictorial gestures. Alternatively, an individual can imply consent. Consent is implied when, under the circumstances, the conduct of the individual reasonably conveys consent. [See, e.g., *O'Brien v. Cunard S.S. Co.*, 28 N.E. 266 (Mass. 1891).]

### [C] *Consent by Law*

Consent can also be implied by law. Generally courts recognize by law consent to emergency medical treatment by health professionals when a victim is unconscious and unable to provide consent.

### [D] *Invalidating Manifestations of Consent*

#### [1] Incapacity

Both express and implied manifestations can be held invalid. An individual can be held to lack capacity to consent. A child, depending on her age, may consent only to less significant matters.

An individual without sufficient mental capacity due to insanity or retardation may not legally consent. Incapacity can also be the result of drug ingestion (including alcohol). [See, e.g., *Bailey v. Belinfante*, 218 S.E. 2d 289 (Ga. Ct. App. 1975).]

#### [2] Action Beyond Scope of Consent

Consent is also invalidated if the action goes beyond the consent manifested. What constitutes the dimensions of the consent can often be a different issue of fact. [See, e.g., *Hackbart v. Cincinnati Bengals, Inc.*, 601 F.2d 516 (10th Cir. 1979).]

Since medical treatment requires consent, the determination of the effective actual consent is critical in this context. A medical procedure without the patient's consent can constitute a battery. [See, e.g., *Mohr v. Williams*, 104 N.W. 12 (Minn. 1905).] The failure to inform the patient of risks when procuring consent is now, however, usually treated under negligence.

### [3] Fraud

Consent is invalid if it is induced by fraud that misrepresents an essential aspect of the interaction.

### [4] Duress

Consent procured under physical threat is invalid. However, as a general rule, economic pressure, while coercive, does not negate consent.

### [5] Illegality

The traditional majority rule holds that a person *cannot* consent to a criminal act; the consent is always invalid. Taking the minority position, the Restatement holds that a person can consent to a criminal act for purposes of tort liability. The consent is still valid except where the criminal law is specifically designed to protect members of the victim's class. [See Restatement §§ 60, 61.]

## § 2.02 Self-Defense [38-40]

### [A] *Overview and Definition*

Self-defense constitutes a defense which can justify and therefore negate intentional tort liable. In essence, reasonable force can be used where one reasonably believes that such force is necessary to protect oneself from immediate harm. [See Restatement § 63.]

### [B] *The Threat Must be Immediate*

Self-defense must be in response to an immediate threat of harm.

### [C] *The Victim's Response Must be Reasonable*

Self-defense is only justified if the individual reasonably believes that force is necessary to avoid an unlawful attack. [See *Drabek v. Sabley*, 142 N.W.2d 798 (Wis. 1966).] The belief need not be correct, however.

Force intended to inflict death or serious bodily injury is only justified if the individual reasonably believes she would suffer serious bodily injury or death from the attack.

### [D] *The Obligation to Retreat From Deadly Force*

There is general agreement that there is no obligation to retreat from force *not* threatening death or serious bodily injury.

There is disagreement among jurisdictions whether retreat is required where self-defense would require the use of force intended to inflict serious bodily injury or death. The traditional and still majority common law position does not require retreat, assuming the threatened individual has the legal right to be present or to proceed.

The minority position, endorsed by the Restatement § 70, requires retreat where serious bodily injury or death would otherwise be required in self-defense. The minority position would not, however, require retreat from the victim's dwelling.

**§ 2.03 Defense of Others** [40-41]

**[A]** ***Overview***

A person can use reasonable force to protect a third person from immediate unlawful physical harm.

The modern trend and now majority view holds there is a privilege to use reasonable force to protect a third party whenever the actor reasonably believes a third party is entitled to exercise self-defense. [See Restatement § 76.]

**§ 2.04 Defense and Recovery of Property** [41-44]

**[A]** ***Overview***

An individual is privileged to use reasonable force to prevent a tort against her real or personal property. However, unlike self-defense, a reasonable mistake will not excuse force that is directed against an innocent party. [See Restatement § 77.]

**[B]** ***Reasonable Force***

Only reasonable force can be exercised in protection of property. Force intended to inflict death or serious bodily injury is never reasonable to protect merely property.

Even slight force is unreasonable in defense of property if it is excessive. Consequently, if a verbal request would suffice, no force is justified.

**[C]** ***Force Against an Innocent Party***

Force in defense of property is only a defense when it is actually directed at a wrongdoer. A reasonable mistake that an individual has wrongfully interfered with property is not an excuse.

**[D]** ***Defense of Habitation***

The modern view is that the use of deadly force or force likely to cause serious bodily harm is not justified unless the intruder threatens the occupants' safety, by committing or

intending to commit a dangerous felony on the property. [See *Tennessee v. Garner*, 471 U.S. 1 (1985).] Additionally, the homeowner may not eject a non-threatening trespasser or invited guest when doing so would subject that person to serious physical harm.

The traditional common law view, still reflected in the Restatement, but increasingly discredited, would authorize the use of deadly force when needed to prevent mere intrusion into a dwelling. [See Restatement § 143 and caveat.]

### [E] *Mechanical Devices*

Intentional mechanical infliction of deadly force, such as by the use of spring guns, is not privileged unless, in fact, such force was justified to defend oneself or another from deadly force. [See, e.g., *Katko v. Briney*, 183 N.W.2d 657, 659 (Iowa 1971).]

Barbed wire fences and similar deterrents to enter land unlawfully are not generally perceived as intended to inflict death or serious bodily injury but are often designed only to deter entry. Whether liability ensues depends on whether the method of protecting the property under the circumstances was negligent.

### [F] *Recovery of Personal Property*

An individual may use reasonable force to recover property when in "hot pursuit" of the wrongdoer.

The individual acts at her peril, however. If force is directed at an innocent party, privileged to possess the chattel, or against one acting out of a bona fide claim of right, whether or not such right is ultimately vindicated by the courts, the actor is liable even if the mistake was reasonable. [See Restatement §§ 101-104.]

Many states have adopted a merchant's privilege, which allows stores to use reasonable force to detain a person for reasonable periods to investigate possible theft. [See *Bonkowski v. Arlan's Department Store*, 162 N.W.2d 347 (Mich. Ct. App. 1968).] The merchant's privilege generally allows reasonable mistake, so an innocent customer cannot recover against the store, provided the store acted reasonably.

## § 2.05 Necessity [44-46]

### [A] *Overview and Definition*

Necessity is a defense which allows the defendant to interfere with the property interests of an innocent party in order to avoid a greater injury. The defendant is justified in her behavior because the action minimizes the overall loss. The defense is divided into two categories: public and private necessity.

### [B] *Public Necessity*

Public necessity exists when the defendant appropriates or injures a private property interest to protect the community. Public necessity is a complete defense. [See, e.g., *Surocco v. Geary*, 3 Cal. 70 (1853).]

### [C] *Private Necessity*

Private necessity exists when the individual appropriates or injures a private property interest to protect a private interest valued greater than the appropriated or injured property. [See, e.g., *Vincent v. Lake Erie Transportation Co.*, 124 N.W. 221 (Minn. 1910).] Private necessity is an incomplete defense: the defendant is privileged to interfere with another's property, but *is* liable for the damage.

### [D] *Personal Injury or Death*

An unresolved issue is whether necessity should ever justify inflicting intentional injury or even death. Some historical precedents would so authorize. [See, e.g., *United States v. Holmes*, 26 F. Cas. 360 (C.C.E.D. Pa. 1842).] The Restatement takes no position. [See §§ 199 and 262.]

## PART B. NEGLIGENCE
## Chapter 3
## THE NEGLIGENCE CONCEPT AND THE REASONABLE PERSON STANDARD OF CARE

### § 3.01 Overview [49-50]

To recover for negligence, the plaintiff must establish each of the following elements by a preponderance of the evidence (that is, by more than 50%) to establish a prima facie case: duty, standard of care, breach of duty, cause-in-fact, proximate cause (scope of liability) and damages.

### § 3.02 Historical Development [50-51]

Pre-negligence tort liability was based on a rather rigid writ system. The two writs most relevant to tort liability were "trespass" and "trespass on the case" (or "case"). The writ of trespass, for which liability was strict, came to cover direct and immediate harms. Plaintiffs who suffered indirect harms were required to prove some fault on the part of the defendant to recover under the writ of case. Beginning in the mid-1800s, American courts began to reject the writ system, replacing it with an approach focusing on specific torts such as negligence. Negligence has become the predominant basis for torts liability.

### § 3.03 Standard of Care [51]

The standard of care is the level of conduct demanded of a person so as to avoid liability for negligence. Failure to meet this standard is characterized as breach of duty.

### § 3.04 The Reasonable Person [51-64]

The most common standard of care in negligence law commands the defendant to act as would a reasonably prudent person in the same or similar circumstances. If the defendant does so, she is protected from negligence liability. Failure to do so constitutes unreasonable conduct and, hence, breach of duty. The reasonable person standard is an objective standard that compares the defendant's conduct to the external standard of a reasonable person. Thus, the law imposes on each person of society an obligation to conform to the objective reasonableness standard. There is much debate about the fairness of this objective standard.

Debate centers around the extent to which there is flexibility in this objective standard.

#### [A] *The Characteristics of the Reasonable Person*

The reasonable person possesses those attributes that a jury decides represent the community norms. The reasonable person is no real person nor any member of the jury. While the reasonable person's qualities are those the jury determines are the expected attributes of those in the community, the reasonable person cannot be expected to be

infallible. Further, the objective standard assumes that the reasonable person possesses the general experience of the community. It is the knowledge and understanding generally held by members of the community that is relevant.

### [B] *Flexibility in the Reasonable Person Standard*

Using the standard of the reasonable person under the same or similar circumstances, flexibility can be added through the "circumstances" part of the analysis. Ultimately, in most jurisdictions, a jury will be permitted to consider the physical conditions of the defendant and that the defendant was acting under emergency conditions. Most other characteristics, such as mental conditions or inexperience, are not taken into account.

#### [1] Emergency

Nearly all states permit the jury to consider in its determination of the defendant's reasonableness evidence that the defendant was acting under emergency conditions not of the defendant's making. The fact that the defendant was acting in an emergency does not necessarily exculpate the defendant from liability.

#### [2] Physical Conditions

As a general principle, because they are easily measured and perceived as tangible, the defendant's own physical qualities may be taken into account by the jury in the breach determination. Just because the party's physical condition is taken into account does not mean that she will be exonerated, however, as sometimes the physical condition of the party requires the use of greater care.

#### [3] Mental Conditions

Most courts treat mental conditions as wholly irrelevant for purposes of negligence liability. The insane are held to a standard of sanity and people with cognitive disabilities are held to a level of normal intelligence.

#### [4] The Effect of Superior Abilities, Skill or Knowledge

The standard of care does not change for those with superior skills although the defendant's special skills may affect the jury's breach determination. The reasonable person standard sets the minimum of community expectations, and those able to provide more are expected to do so.

### [C] *Gender Bias in the Reasonable Person Standard*

Most courts have replaced the "reasonable man" with a "reasonable person," believing that this word change manages to remedy the male bias of the standard and the exclusion of women from the standard. Many feminist scholars disagree that a simple word change brings about an end to gender bias in the standard. Ultimately, the debate about the

proper standard will continue, with some advocating a gender-inclusive standard and others arguing for a standard that focuses on the unique experiences of women.

**§ 3.05 The Child Standard of Care** [64-66]

Most jurisdictions hold children to a variation of a standard that compares their conduct to other reasonable children of the same age, experience, and intelligence under like circumstances. While it is objective in that it compares the child to an external standard of other children, it is far more subjective than the adult reasonable person standard as it allows the jury to consider the child's specific qualities such as experience and intelligence.

**[A]** ***Adult Activities***

Many jurisdictions have concluded that children should not be entitled to special treatment when they are engaged in adult or inherently dangerous activities, such as driving a car.

**§ 3.06 Degrees of Negligence** [66]

The notion of "highest" degrees of care makes little sense. Such language cannot be justified in light of a standard of care requiring the defendant to act as a reasonable person under the same or similar circumstances. A defendant is negligent because of the failure to exercise reasonable care, and the amount of due care required of a defendant will vary with the circumstances.

## Chapter 4
## THE DETERMINATION OF UNREASONABLENESS: BREACH OF DUTY, CUSTOM AND THE ROLE OF THE JURY

### § 4.01 Overview [67-68]

Breach of duty is the defendant's failure to act as a reasonable person would have under the same or similar circumstances. More simply, breach is unreasonable conduct by the defendant. Where reasonable minds can disagree, the jury is charged with the task of deciding whether the defendant has breached a duty.

### § 4.02 The Risk Calculus [68-74]

Negligence liability is imposed where the defendant engages in *unreasonable* risk creation, situations where the defendant creates risks that a reasonable person would not. This determination of unreasonableness considers the risks that should have been foreseen at the time of the defendant's conduct, not through hindsight after the harm occurred. Justifications for placing legal responsibility only on those at fault include promoting freedom of activity, maximization of innovation and economic efficiency. How is unreasonableness determined? Many adhere to Judge Learned Hand's risk calculus [see § 17.01[B][1], infra] looking at whether the burden of avoiding the harm is less than the probability of that harm occurring multiplied by the likely seriousness of the harm if it does occur. The Hand formula was intended to be flexible. The plaintiff and the defendant often will have different views of probability, magnitude, and burden. It is ultimately for the trier of fact to undertake the balancing of these factors in order to assess the reasonableness of the defendant's conduct.

#### [A] *Probability*

The probability factor seeks to measure the likelihood of the harm-causing occurrence taking place. Although probability must be considered in relation to magnitude and burden, where there is a minuscule likelihood of harm it is doubtful that the defendant breached a duty.

#### [B] *Magnitude of the Loss*

The magnitude of the loss looks at the likely harm flowing from the injury-causing event when it occurs. The proper focus is neither the most severe possible harm nor the least severe; rather, it is what a reasonable person would foresee as the *likely* harm.

#### [C] *Burden of Avoidance*

An analysis of burden requires consideration of such things as the costs associated with avoiding the harm, alternatives and their feasibility, the inconvenience to those involved and the extent to which society values the relevant activity.

### [D] *Value of the Hand Formula*

While the jury is not instructed to consider the Hand formula factors, they reflect the kinds of things that a jury grapples with in determining reasonableness. In addition, the attorneys when arguing the case to the jury surely raise points, such as the ease of avoiding the harm, that fit into a Hand-type analysis. Further, the Hand factors often are expressly used by judges reviewing jury verdicts. Judge Hand did not intend that the formula be quantifiable. Rather, it was to serve as a rough guide in the determination of unreasonableness.

## § 4.03 The Role of Custom [74-76]

Custom typically refers to a well-defined and consistent way of performing a certain activity, often among a particular trade or industry. The plaintiff may try to assert the defendant's deviation from custom as evidence of lack of due care. Conversely, the defendant may try to avoid liability by showing compliance with custom.

### [A] *Deviation from Custom*

If P can persuade the jury that there is a well-established and relevant custom, the jury may consider D's deviation from custom in its determination of breach of duty. Evidence of D's deviation from custom is often powerful evidence of breach although it does not itself establish the defendant's unreasonableness. Nor does the introduction of custom evidence change the standard of care in most negligence cases.

### [B] *Compliance with Custom*

Evidence of D's compliance with custom is usually admissible as evidence of D's lack of breach. Evidence of D's compliance with customary practice does not alter the standard of care nor does it conclusively establish D's lack of unreasonableness. A jury is free to determine that the custom itself is an unreasonable one.

## § 4.04 The Jury Role [76-78]

Where reasonable minds could disagree, the jury decides whether the defendant acted unreasonably. The notion (once favored by Justice Holmes) that courts should create standards of conduct to be used in similar cases has largely been repudiated.

## Chapter 5
## PROOF OF BREACH

### § 5.01 Overview [79-80]

The plaintiff has the burden to prove each element of a negligence cause of action by a preponderance of the evidence. If the plaintiff fails to carry this burden, the case must necessarily be decided for the defendant. It is incumbent upon the plaintiff to put on enough evidence so that a jury can find that more likely than not the defendant failed to act reasonably. The happening of an accident is never enough by itself to permit a jury to find that a defendant has behaved unreasonably.

### § 5.02 Kinds of Evidence [80-81]

There are two key forms of evidence that a plaintiff can use in attempting to establish negligence by the defendant: direct and circumstantial. Direct evidence is evidence that comes from personal knowledge or observation. Circumstantial evidence is proof that requires the drawing of an inference from other facts. So long as the jury can draw a reasonable inference (as opposed to speculate) the circumstantial evidence will be admitted.

### § 5.03 Slip and Fall Cases and the Role of Constructive Notice [81-82]

Where a plaintiff slips and falls on the defendant's property, the plaintiff must show more than the fact that she fell and was injured. Most courts require the plaintiff to show that the condition on which she slipped existed long enough so that the defendant should have discovered it and should have remedied it. Some jurisdictions permit the plaintiff to try to make a case without proof of actual or constructive notice on the part of the defendant. These courts recognize a “mode of operation” basis for liability by which the plaintiff bases the defendant's liability on the methods used by the defendant to run the business.

### § 5.04 Res Ipsa Loquitur [82-92]

Res ipsa loquitur, an important form of circumstantial evidence, may be relevant to a plaintiff's efforts to establish the defendant's unreasonable conduct. In most negligence cases, the plaintiff specifies what the defendant allegedly did unreasonably. Res ipsa loquitur is most important and has its greatest impact in cases where the plaintiff is unable to make specific allegations about what the defendant did wrong.

The conditions traditionally required for the application of res ipsa loquitur are: “an accident that normally does not happen without negligence; exclusive control of the instrumentality by the defendant; and absence of voluntary action or contribution by the plaintiff.” In order for the plaintiff to have the benefit of res ipsa loquitur, she must convince the jury that each of these factors more likely than not exists.

**[A] *Byrne v. Boadle***

The case of *Byrne v. Boadle* [2 H. & C. 722, 159 Eng. Rep. 299 (Exch. 1863)], in which the plaintiff was seriously injured when a barrel of flour fell on him, is credited with adding "res ipsa loquitur" to the legal lexicon. In *Byrne*, neither the plaintiff nor any of the witnesses testified as to anything done by the defendant that could have led to the barrel falling. Yet the court allowed the case to proceed because of the nature of the harm-causing event and the defendant's relationship to it. Since *Byrne*, courts and commentators have refined the doctrine and its proof requirements.

**[B] *Probably Negligence***

A plaintiff must persuade a jury that more likely than not the harm-causing event does not occur in the absence of negligence. The plaintiff does not have to eliminate all other possible causes for the harm, nor does the fact that the defendant raises possible non-negligent causes defeat plaintiff's effort to invoke res ipsa loquitur. The key is that a reasonable jury must be able to find the likely cause was negligence.

**[C] *Probably the Defendant***

A plaintiff seeking to rely on res ipsa loquitur must connect the defendant to the harm. Initially, courts interpreted the control element narrowly, requiring the plaintiff to that the defendant likely had "exclusive control" over the harm-causing instrumentality. This element has been liberalized and it is now enough for a plaintiff to get to a jury on res ipsa loquitur if she can provide evidence showing that the defendant probably was the responsible party even if the defendant did not have exclusive control. Further, most jurisdictions no longer require the plaintiff to prove that the she did not contribute to her harm.

**[D] *The Outer Reaches of Res Ipsa Loquitur – Ybarra v. Spangard* [154 P.2d 687 (1944)]**

In this controversial case, the California Supreme Court provided a very broad interpretation of res ipsa loquitur, permitting the plaintiff to proceed even when he could show neither who was the responsible party nor what was the harm-causing instrumentality. The court applied res ipsa loquitur as a means of "smoking out" evidence from the defendants, shifting to them the burden of proof. The facts of *Ybarra* create a compelling case for judicial creativity: an unconscious patient, probable negligence, an unwillingness on the part of anyone to come forward to claim responsibility perhaps due to a tradition of refusal to testify against other medical professionals, and solvent, well-insured defendants. It is unlikely that the case will be extended much beyond its facts.

**[E] *The Effect and Value of Res Ipsa Loquitur***

In the majority of states, upon proof of res ipsa loquitur by the plaintiff, a jury may elect to infer that the defendant was unreasonable if it so chooses. With res ipsa loquitur, the

case gets to a jury and the jury decides whether the defendant was more likely than not at fault. A defendant has not automatically lost on the issue of breach of duty once a jury finds the res ipsa loquitur elements have been proven. The defendant's evidence of her reasonable conduct may be persuasive enough for a jury to conclude that the defendant was probably not at fault.

### [F] *The Role of the Defendant's Superior Knowledge*

Although the defendant's superior knowledge is a compelling justification for the application of res ipsa loquitur, most courts and the Restatement do not require that the defendant have greater access to the facts than the plaintiff for the doctrine to apply. Indeed, most jurisdictions permit a plaintiff to attempt to prove the defendant's unreasonable conduct with evidence of specific wrongdoing as well as through the use of res ipsa loquitur.

## Chapter 6
## STATUTORY STANDARDS OF CARE – "NEGLIGENCE PER SE"

### § 6.01 Overview [93-95]

The "negligence-per-se" doctrine provides that in certain situations a criminal statute (or administrative regulation or municipal ordinance) may be used to set the standard of care in a negligence case. These statutes make no mention of civil liability but, rather, impose fines or even imprisonment as punishment for those violating their dictates. Where appropriate, a specific legislative standard replaces the more general reasonable person standard.

### § 6.02 Factors Used for Determining the Propriety of Adopting a Statute As the Standard of Care [95-97]

To decide whether a statute should be adopted as the standard of care in a negligence case, a judge must determine that the statute provides the sort of specific guidance that justifies its use by a civil court. Further, a judge must examine the statute in order to determine whether the statute was designed to protect against the type of harm suffered by the plaintiff and whether the class of persons designed to be protected by the statute includes the plaintiff.

#### [A] *Type of Harm*

It is easy to determine the type of harm against which a statute was designed to protect when the statutory purpose can be discerned readily from the language of the statute or from its clear legislative history. Often the statutory purpose is not readily discernible from the statute's language or legislative history, however. Here judges have great discretion.

#### [B] *Plaintiff in Protected Class*

Sometimes it is easy for a judge to determine the class of persons a statute was designed to protect, as where legislation is passed to promote worker safety. Sometimes, however, the scope of the protected class is uncertain.

#### [C] *Licensing Statutes*

Most courts refuse to use licensing statutes as the standard of care because the lack of a license itself does not establish the lack of due care.

## § 6.03 Effects of Non-Adoption and of Adoption of Statute [98-99]

### [A] *Effects of Non-adoption of a Statute*

The judge's determination that the proffered statute should not be adopted as the standard of care does not foreclose P's recovery for negligence. The case proceeds under the usual "reasonably prudent person" standard of care.

### [B] *Effects of Adoption of the Statute and Statutory Violation*

In most jurisdictions, the statute replaces the usual "reasonably prudent person" standard of care. To determine breach, all the jury needs to find is that the statute was violated. The plaintiff does not automatically recover upon a finding of breach of the statutory standard of care because the plaintiff must still establish the other elements of a negligence cause of action. A minority of jurisdictions do not follow the negligence-per-se approach. In these jurisdictions, the standard of care remains that of a reasonably prudent person and the relevant statute is simply admitted for the jury's consideration in determining whether D exercised reasonable care.

## § 6.04 The Role of Excuse

Modern courts have recognized excused statutory violations. Acceptable excuses include: a sudden emergency not of the actor's making; compliance would involve greater danger than violation; the actor neither knows nor should know of the occasion for diligence; the actor has some incapacity rendering the violation reasonable; or, after reasonable efforts to comply, the party is unable to do so. In most states, a judge makes an initial determination that the proffered excuse is appropriate and the jury considers its application. If there is an excused violation, the statute no longer affects the outcome.

## § 6.05 Negligence Per Se and Children [99]

Most jurisdictions have concluded that the child standard of care should apply even where the child has violated a statute. Rather than using the statute as the standard of care, the standard is that of a reasonable child of the same age, maturity, intelligence and experience. The statutory violation may be relevant to breach of duty.

## § 6.06 Compliance with Statute [99-100]

The well-settled rule is that compliance with a statute is merely relevant evidence of reasonableness. Compliance does not establish due care.

## § 6.07 Criticisms of the Negligence Per Se Doctrine [100-102]

Although the negligence-per-se doctrine has been widely accepted, there has been some judicial and scholarly criticism of the doctrine. One key criticism arises from the widely divergent impact the violation of a criminal statute has in a criminal prosecution from that

in a tort case. Additionally, the negligence-per-se doctrine greatly constricts the jury's traditional role of determining breach and often invests the trial judge with broad discretion. Finally, some contend that the negligence-per-se doctrine is an inappropriate judicial encroachment upon the domain of the legislature.

## Chapter 7
## PROFESSIONAL NEGLIGENCE

### § 7.01 Overview [103-104]

Because of the specialized skill and training needed to be a doctor, lawyer, accountant, architect, or engineer, courts defer to the expertise of the profession to determine the appropriate standard of care. In the professional negligence context, custom plays a different role than it does in typical negligence cases. In professional negligence the defendant's compliance with the custom of the profession is determinative, it insulates the defendant from negligence liability. Custom, then, establishes the standard of care. In addition, because of the complexity of the issues involved, expert witnesses are usually necessary for the plaintiff to establish the standard of care and to help determine if the defendant deviated from that standard.

### § 7.02 Medical Malpractice [104-110]

The standard of care to which physicians are held is set by the custom of their profession. The physician must possess and use the knowledge and skill common to members of the profession in good standing. This standard demands of the physician minimal competence. In the medical malpractice context, liability flows from the physician's failure to conform to the profession's customary practice. Conversely, if the defendant doctor adheres to customary practice, she cannot be found to have committed malpractice.

#### [A] *Alternative Approaches to the Practice of Medicine*

As long as one of the accepted approaches is followed, a doctor is protected from malpractice liability. Further, the relative merits of each approach are irrelevant provided there is an established custom supporting the method employed. Sometimes what constitutes an acceptable method is debatable.

#### [B] *Proof Issues in Medical Malpractice*

Plaintiff must show more than an unwanted result. Nor is the coming about of an inherent risk proof of malpractice. Plaintiff must show that the defendant doctor's deviation from customary practice caused plaintiff's injury.

##### [1] Expert Witnesses

Because of the technical nature of most medical malpractice cases, a plaintiff typically will need qualified expert witnesses to help establish the appropriate standard of care and the defendant's breach of duty. The expert must delineate the relevant medical custom of other competent doctors in the relevant medical community. The plaintiff's expert must be familiar with the custom applicable to the defendant's practice although the expert need not practice exactly the same type of medicine as the defendant to testify. The

admissibility of expert testimony also depends upon the community in which the defendant practices medicine. The relevant professional custom may differ depending on whether it is drawn from a local, statewide or national practice. The trend is to hold specialists to a national standard and general practitioners to a same or similar locality standard. This "same or similar locality" standard protects defendants from being required to practice in a manner of which they are incapable due to geographic limitations, while expanding the potential pool of experts. It does, however, generate debate about what constitutes a "similar" locality, and can be criticized on the ground that it perpetuates substandard medical practice if the custom in similar localities is also inadequate. Yet, there has been some concern that a national standard of care fails to account adequately for differences in resources available to rural and urban doctors.

#### [2] The Common Knowledge Exception and Res Ipsa Loquitur

Experts are not required in medical malpractice cases where the negligence of the physician is so egregious that laypersons are able to determine breach themselves. Also, res ipsa loquitur may be used in malpractice cases that do not fall within the "common knowledge" exception. In these cases, the plaintiff will usually need expert testimony to help establish that the harm she suffered does not ordinarily occur in the absence of the lack of due care.

### § 7.03 Informed Consent [110-115]

A second basis for medical malpractice liability is predicated upon a physician's failure to provide information to the patient. Here, liability arises from the defendant's failure to obtain the plaintiff's informed consent.

#### [A] *Battery*

Initially, informed consent actions gave rise to an intentional tort action for battery. Although most informed consent cases now are based on negligence, where a physician performs a substantially different procedure from that to which the plaintiff-patient agreed or where the doctor significantly exceeds the scope of the plaintiff-patient's consent, a battery action will be the likely cause of action.

#### [B] *Negligence*

The typical negligence-based informed consent case occurs where an undisclosed complication with a medical procedure or treatment arises. Many jurisdictions treat a negligence-based informed consent claim as a species of medical malpractice, using the professional standard of care set by custom (the "physician rule"). Other states have determined that the particular interests involved mandate that informed consent cases be treated as distinct from typical medical malpractice treatment, leading to the adoption of a rule requiring the disclosure of all material information (the "patient rule").

### [1] The Professional Rule

Under the professional rule, informed consent cases are treated like other medical malpractice actions. Liability is based on the physician's nondisclosure of a risk of a given procedure or treatment that would customarily be divulged by doctors in good standing in the relevant community.

### [2] The Patient Rule

Many jurisdictions have replaced the "professional rule" with a "patient rule," under which a physician is obligated to disclose to a patient all material risks involved in a given procedure or treatment. Although the standard of materiality is rather imprecise, it depends largely on the gravity and probability of the potential harm. Under the patient rule, the plaintiff can prevail without expert testimony, because lay persons are able to determine what is material. The standard of materiality is primarily an objective one, focusing on what information would be material to a reasonable person deciding whether to undergo a certain procedure. But a patient seemingly has the ability to make a matter material by expressing her concern to her physician. Causation remains a big hurdle for the plaintiff. Depending on the jurisdiction a patient/plaintiff must show either that had there been a proper disclosure, she would have refused to undergo the procedure (a subjective focus) or that a reasonable person would have rejected the procedure had there been a proper disclosure (an objective focus). Even in jurisdictions employing the "patient rule," there are recognized exceptions to the obligation to disclose material risks. A physician will not be liable where the nondisclosure of a material risk was justified due to an emergency or where the patient requests that the doctor not inform her. Many states also recognize a therapeutic privilege under which a physician may justify nondisclosure upon proof that disclosure of information would be harmful to the patient's physical or psychological well-being.

### [C] *Extensions of the Informed Consent Doctrine*

Some courts have expanded the informed consent obligation to require disclosure of risks of forgoing a medical procedure or treatment.

## **§ 7.04 Attorney Malpractice** [115-116]

Like other forms of professional negligence, the custom of the legal profession sets the standard of care in a legal malpractice case and breach of duty is shown by the attorney's failure to meet that standard of care. Further, unless the alleged attorney malpractice is glaringly apparent, the plaintiff can only prevail with expert testimony regarding both the standard of care and breach. Cause-in-fact is a huge hurdle in many attorney malpractice actions as the plaintiff must show that, had there been no malpractice, he would probably have prevailed in the underlying action. In essence, the legal malpractice action requires the resolution of two conflicts: the initial lawsuit and the malpractice action–in essence, a trial within a trial.

## Chapter 8
## DUTY IN NEGLIGENCE CASES

### § 8.01 Overview [118-119]

The element of duty establishes that there is a legally recognized relationship between the defendant and the plaintiff that obligates the defendant to act (or to refrain from acting) in a certain manner toward the plaintiff. Whether a duty exists is often a policy-based determination and, thus, it is left to a judge to make the determination of whether a duty exists. The duty concept has been expanding to the point that now one engaged in risk-creating conduct generally owes a duty to avoid causing foreseeable personal injuries to foreseeable plaintiffs.

### § 8.02 Nonfeasance [119-140]

Typically, there is no duty owed in a nonfeasance context. Nonfeasance is generally the failure to intervene to confer a benefit upon another. Misfeasance often consists of affirmative acts of risk-creating conduct, doing something that a reasonable person would not do. Misfeasance can also be shown by a negligent omission – failing to do something that a reasonable person would have done. Either risk-creating affirmative acts or negligent omissions generally lead to the finding of a duty. A defendant who is sued based on his nonfeasance has not created the risks that ultimately injure the plaintiff; rather, the defendant has failed to prevent harm caused by some other source from occurring.

Typically, nonfeasance-based actions arise where the plaintiff contends that the defendant should have intervened to rescue the plaintiff, or where the claim is that the defendant should have prevented harm to the plaintiff by controlling a third party or by taking measures to protect the plaintiff from injury. Courts will find a duty in these contexts only in limited situations.

#### [A] *Duty to Rescue*

The clear general rule remains that a person does not have a duty to aid another. Courts consistently have refused to require a stranger to render assistance, even where the person could have rendered aid with little risk or effort. There are a variety of reasons given for the law's no-duty-to-rescue rule (e.g., the value of individualism and the unworkability of a rule requiring rescue). The no-duty-to-rescue rule, nonetheless, has been powerfully criticized as devaluing human life and celebrating selfishness. Discomfort with the rule has led courts to fashion various exceptions.

##### [1] Creating the Peril

A well-established exception to the no-duty-to-rescue rule applies when the need for rescue arises because of the defendant's negligence. Also, some jurisdictions have found an exception where a person's fault-free conduct gives rise to the need to rescue. Indeed,

there is movement toward imposing rescue obligations on those who are connected in any way to the need for rescue.

#### [2] Special Relationships

Courts have imposed a duty to rescue when justified by a "special relationship" between the parties such as a common carrier-passenger, innkeeper-guest and ship captain-seaman. There seems to be a movement to find a duty to aid or protect in any relation of dependence or of mutual dependence."

#### [3] Undertaking to Act and Reliance

While people generally have no obligation to intervene, once they do, a duty arises. There are different views about the extent of the obligation: under the traditional view, once a person undertakes to rescue, he must not leave the victim in a worse position; under the more modern view, the rescuer is obligated to act reasonably once he has begun to act. Closely related to the undertaking to act concept is the concept of reliance. Courts have found a duty where the defendant caused the plaintiff to rely on promised aid.

#### [4] Contract

Occasionally, a rescue obligation arises from contract. There is debate about the extent to which a defendant's gratuitous promise, without more, gives rise to a duty.

### [B] *Duty to Control and Protect*

A person typically is not legally obligated to control the conduct of another or to take steps to protect another from harm.

#### [1] Control

While generally a person has no obligation to control another person's conduct to prevent harm to a third person, exceptions arise where there is a special relationship. The relationships giving rise to a duty to control require some relationship between the defendant and the third party, combined with knowledge (actual or constructive) of the need for control. There can be substantial debate about which relationships give rise to a duty to control.

##### [a] *Tarasoff v. Regents of University of California*

Probably the most famous duty-to-control case is *Tarasoff v. Regents of University of California*, [551 P.2d 334 (Cal. 1976)] in which the plaintiffs asserted that the defendant therapist had a duty to warn them or their daughter of threats made by the psychotherapist's patient. Jurisdictions have overwhelmingly adopted the *Tarasoff* rationale with differences about its application. In some jurisdictions, the duty to warn

extends only to “readily identifiable victims,” while in others all foreseeable victims must be warned.

#### [b] Suppliers of Liquor

At common law, neither sellers of liquor nor social hosts were liable to those injured by those to whom they served alcohol. Courts and legislatures have been reconsidering this common law view. Several have imposed liability on commercial suppliers of liquor. A few went further and determined that a social host could be liable to a third party injured by a drunken guest. These decisions are controversial and raise complex policy issues.

#### [c] Negligent Entrustment

Negligent entrustment cases involve misfeasance by the defendant. The defendant's liability is premised on supplying a potentially dangerous instrumentality (such as a car or gun) to a person the defendant knows or should know is not fit to handle it.

### [2] Duty to Protect

As a general principle, there is no obligation to protect another from harm. Where, however, the defendant and plaintiff stand in a relationship in which the latter has ceded the ability for self-protection, the former has a duty to make reasonable efforts to protect the latter.

#### [a] Landlord Duty to Protect

A landlord/tenant relationship may trigger a duty to protect, provided there is enough foreseeability of harm and it is supported by public policy.

#### [b] Business Duty to Protect

Jurisdictions differ on how to treat cases of assault on patrons of a business. The business-patron relationship is rarely enough to itself establish a duty. Courts typically require a high degree of foreseeability to establish a duty. How high is subject to some debate. Some courts require that the plaintiff show evidence of “prior, similar incidents” before a duty to protect can be found. Others look more broadly at the “totality of the circumstances,” while others balance the degree of foreseeability and the burden of protection. Ultimately, whether a duty to protect should be owed is a determination of public policy.

#### [c] Police Duty to Protect and the Public Duty Doctrine

Special duty issues often arise when the plaintiff seeks to recover from a government entity. Under the “public duty doctrine,” a government actor performing improperly is not usually liable to individuals harmed by the misperformance, because any duty owed is limited to the public at large rather than to any specific individual.

### [i] Police Duty

Police departments are typically not liable for failing to protect individual citizens because of separation of power concerns by the courts. Most courts fear that if they recognize a duty of protection, they would inevitably be determining how the limited police resources of the community should be allocated. In order for there to be a duty to protect in a police case, then, the plaintiff must establish that the defendant police undertook to act and created reliance, enlisted the aid of the plaintiff, or increased the risk of harm to the plaintiff. Some courts have created additional narrow exceptions.

### [ii] The Public Duty Doctrine in Other Contexts

The public duty doctrine has been applied to limit duty in contexts other than that of the police, such as to fire departments. Some courts have gone so far as to refuse to find a duty owing from a government-run common carrier sued for its failure to protect passengers from third-party harm or to permit the questioning of a school district's decision about where to place school bus stops. The public duty doctrine has been much criticized as an attempt to resurrect governmental immunity in contexts where it ostensibly has been abolished. It has also been seen as unfairly placing the burden of loss on the few innocent victims of government error, and as creating a disincentive for government to use care in carrying out its functions.

## § 8.03 The Limits of the Misfeasance/Nonfeasance Distinction [140]

The misfeasance/nonfeasance distinction is not the "be all and end all" of duty analysis. Rather, there are cases where the classification of the conduct in issue is secondary to policy concerns. One example is the famous case of *H.R. Moch Co., Inc.v. Rensselaer Water Co.* [159 N.E. 896 (N.Y. 1928)], in which the plaintiff suffered property damage because the defendant water company, who had contracted with the city to supply water to the city's fire hydrants, failed to do so. The decision sought to limit the scope of the defendant's liability, possibly out of the recognition that water, as a necessity, must be kept affordable. Indeed, the *Moch* rationale has been followed in cases of obvious misfeasance where there are concerns about excessive liability.

## § 8.04 The Foreseeable Plaintiff Requirement [140-143]

Absent some other basis for limiting the scope of duty, the defendant owes a duty to foreseeable victims for foreseeable harm. Thus, in order to establish a duty, the plaintiff must show that defendant's negligence created foreseeable risks of harm to persons in her position. The concept that the scope of duty is limited to a foreseeable plaintiff arises out of one of the most famous cases in American law, *Palsgraf v. Long Island Railroad Co.* [162 N.E. 99 (N.Y. 1928)]. The case remains important for the debate it raises about how to place limitations on the scope of liability.

## § 8.05 Conclusion [143-144]

# Chapter 9
# LAND OCCUPIER DUTY

## § 9.01 Overview [145-146]

Under the common law approach, the measure of the duty owed depends on the *status* of the person entering the land – whether the entrant is a "trespasser," a "licensee," or an "invitee." The status of the person entering the land determines the standard of care owed by the land occupier. Some jurisdictions have rejected the status approach to liability, using a generalized duty of ordinary care instead.

## § 9.02 The Common Law Status Approach [146-155]

The common law approach to landowner liability measures the duty owed by a land occupier to persons entering the property by the status of the entrant. Because of the value attached to private land ownership, the law developed in a way that was highly protective of these interests.

### [A] *Trespassers*

A "trespasser" is one who enters or remains on the property in the possession of another without the permission (express or implied) of the land occupier. The duty owed to trespassers was (and in many ways remains) extremely limited. The only obligation initially imposed on land possessors was to refrain from wilfully harming the trespasser. Courts expanded the duty owed to trespassers to include requiring warnings about "traps." At the outset, the concept of "traps" was narrowly defined. More recently, courts have engaged in some creativity, adopting a broader interpretation of "trap."

#### [1] Frequent or Known Trespassers

In most common law jurisdictions, the traditional rule has been altered in the case of known or frequent trespassers. Where a land occupier actually is aware of the presence of a trespasser and knows that the trespasser is approaching a non-evident artificial (human made) condition, the land occupier is obligated to warn the trespasser if there is danger of serious bodily harm or death. Also, if the land occupier is on notice of frequent trespassing, or has reason to know of such, an obligation to warn of hidden dangers known to the land possessor and risking serious injury or death may be imposed. No warning need be given of conditions on the land that a trespasser would be expected to discover or which are inherent in the use of the land. Further, the land occupier who knows of a trespasser's presence must use reasonable care for the protection of the trespasser in carrying on activities.

#### [2] Child Trespassers

The rules barring recovery for the majority of injured trespassing children caused discomfort for the courts. By the 1870s, courts began broadening the land possessor's

duty to trespassing children in limited situations. This more lenient approach has become known as the "attractive nuisance doctrine." Under the Restatement a child trespasser will be owed a duty of *ordinary care* if a judge balances several factors and finds that they support providing the child trespasser special treatment. [See Restatement § 339.]

### [B] *Licensees*

A licensee is someone who enters the land with the express or implied consent of the land possessor, as is the case with social guests. The licensee takes the property in the condition in which the land possessor uses it. A land possessor may be liable to a licensee injured by a condition on the property where the land possessor knows of a dangerous condition on the property, fails to make the condition safe or to warn the licensee about the risk involved, and the licensee does not know about the danger nor would be expected to discover the dangerous condition. Where the presence of a licensee is known or should be known to the defendant, most jurisdictions require land possessors to use reasonable care in carrying out activities on the property.

### [C] *Invitees*

There are two primary types of invitees: business invitees and public invitees. Business invitees are on the premises for the potential financial benefit of the land occupier. Public invitees are on land held open to the public at large. As to invitees, land possessors must use reasonable care in maintaining the premises and in their activities. This often entails taking affirmative steps to discover dangers on the property. The obligation of the land possessor to an invitee then is one of reasonable care.

### [D] *Determining Status*

The determination of the plaintiff's status can be challenging, and has a profound impact on the plaintiff's ability to recover. Where there are disputed facts affecting the plaintiff's status, the jury ultimately decides the appropriate classification. Further, a plaintiff's status can change based on where she is at the time of her injury.

## § 9.03 A Unitary Standard [155-158]

A significant minority of states have rejected the common-law status approach. California was the first state to replace the status approach to land possessor liability with a generalized reasonable person standard. [See *Rowland v. Christian*, 443 P.2d 561 (Cal. 1968).] Under this approach a duty of reasonable care is owed any land entrant regardless of status. Some jurisdictions have elected to take a middle approach of merging the licensee and invitee categories while retaining the trespasser classification. There is a significant litigation difference between the common-law approach and that of the generalized reasonableness standard: the unitary standard permits more cases to get to the jury than the status approach.

**§ 9.04 Land Possessor Duty to Those Outside the Land** [158-159]

The common law rule provides that a land possessor owes no duty to those outside the land for natural conditions on the land. Where harm is occasioned by an artificial condition or the land possessor's activity, however, a duty is recognized. Some jurisdictions have rejected the no-duty rule regarding natural conditions and have replaced it with a generalized duty of reasonable care.

**§ 9.05 Landlord-Tenant Relations** [159-160]

Initially the law of property governed the landlord-tenant relationship and, because the lease was viewed as a complete conveyance of the property investing full control in the tenant during the duration of the leasehold, the lessor owed no tort duty to the lessee. Now, all jurisdictions have come to recognize some or all of the following exceptions: common areas, negligent repairs, undisclosed dangerous conditions known to the lessor, lessor's covenant to repair, premises leased for admission to the public, and dangerous condition to persons outside the leased premises. Most jurisdictions have required a plaintiff to fall within one of these recognized exceptions in order to establish a tort duty owing from the landlord. Some jurisdictions, however, have expanded landlord liability to the point that a landlord owes a duty of reasonable care to all on the land regarding conditions on the leased premises.

# Chapter 10
# DUTY LIMITED BY KIND OF HARM

## § 10.01 Negligent Infliction of Emotional Distress [162-174]

### [A] *Overview*

Historically, tort law provided compensation for a victim's mental distress only when it followed physical injury. Recovery for this emotional upset, parasitic to the plaintiff's claim for physical harm, is typically known as "pain and suffering." Now, in certain limited circumstances, negligently inflicted mental distress that does not follow from physical harm is recognized as a basis for recovery. Traditionally, as a prerequisite to recovery for mental distress, the defendant's negligence must have caused some form of physical *impact* on the plaintiff's person. Most states today only require that the plaintiff have been in risk of physical impact, sometimes referred to as being within the "zone of impact" or the "zone of danger." Most states also require that the victim's mental distress be sufficiently severe to cause physical symptoms of the distress. Some jurisdictions have flirted with a much broader recovery for pure emotional distress – dispensing with a requirement of physical manifestations and broadly defining the class of proper plaintiffs.

A separate development has been the gradual recognition of *bystander* recovery for negligently inflicted emotional distress. A majority of states allow a bystander to recover only if the bystander is also within the zone of physical risk. A significant minority of states now allow recovery for bystanders who are not in risk of physical impact if they (1) are physically near the accident; (2) have contemporaneous sensory perception of the accident; and (3) are closely related to the victim. Most of the states following this approach also continue to require that the bystander-plaintiff suffer some physical manifestation of her distress.

### [B] *Direct Actions*

#### [1] The Impact Rule

A small minority of states retain the once generally held requirement that the victim must suffer physical contact by the defendant's negligence to recover successfully for mental distress. The impact need not itself cause physical injury. The few jurisdictions that continue to require impact on the plaintiff reason that the rule still reflects the clearest and most logical line for determining when mental distress should be compensated. The vast majority of jurisdictions, however, have abandoned the impact requirement, reasoning that its artificiality creates an incentive for overly creative pleading and excessive litigation as plaintiffs try to fashion new exceptions to the impact requirement.

#### [2] Risk of Impact Rule

A clear majority of American states allow recovery for mental distress if the plaintiff was at risk of physical impact and suffered a physical manifestation of the distress. This so-

called “zone of danger” requirement allows the plaintiff to recover for mental distress caused by *near misses*. The majority rule continues to require *physical manifestations* of the mental distress. Classically this physical ailment was characterized as fright, although the term is no longer required. While a heart attack or miscarriage is clearly adequate, such severe physical manifestations are not required, and assertions of stomach trouble have sufficed.

#### [3] Special Cases

In limited situations, courts have been willing to relax the limitations on recovery for negligently inflicted emotional distress. For example, a plaintiff can readily recover for mental distress occasioned by the negligent handling of a close relative's corpse, or the erroneous notification of a close relative's death, situations lacking either impact or a threat of physical danger to the plaintiff.

#### [4] Broadest Direct Recovery

A few jurisdictions moved toward permitting a broader recovery for negligently inflicted emotional distress, employing general notions of foreseeability. In the place of restrictions such as impact or presence in the danger zone, these states permit recovery for mental distress to all foreseeable plaintiffs. Others have something of a middle ground, where a plaintiff suffering mental distress is owed a duty provided she can show the existence of a pre-existing duty. [See *Marlene F. v. Affiliated Psychiatric Medical Clinic*, 770 P.2d 278 (Cal. 1989).]

#### [5] Recovery for Fear of Future Physical Harm

A particularly challenging issue receiving increasing attention is whether emotional distress damages should be recovered for the fear of *future* physical harm. The problem often arises in the toxic tort or defective product context. Most courts are wary of permitting recovery due to the difficulty of measuring damages, potentially crushing liability, and serious proof problems such as the possibility of multiple causes.

### [C] *Bystander Actions*

Recovery for emotional distress suffered from the defendant's negligently inflicted harm to another has been particularly controversial. Courts have asserted various tests in an attempt to strike a balance between allowing the most foreseeable plaintiffs to recover for emotional distress without overly burdening negligent defendants.

#### [1] Zone of Danger

Courts have used the near-impact rule to compensate a bystander for the emotional trauma of witnessing a serious injury to a close relative. Under the zone-of-danger rule, the plaintiff can recover for emotional harm suffered from witnessing negligently

inflicted harm causing death or serious injury to another (generally a close relative) when she is in a position to fear for her own safety.

#### [2] *Dillon v. Legg*: Minority Rule

A large minority of states have extended potential recovery to bystanders of an accident even though they were not at physical risk themselves. The *Dillon v. Legg* decision [441 P.2d 912 (Cal. 1968)], which led the movement away from the zone-of-danger test, articulated three factors needed to establish a duty to the plaintiff: (1) whether plaintiff was located near the scene of the accident . . . ; (2) whether the shock resulted from a direct emotional impact upon plaintiff from the sensory and contemporaneous observance of the accident . . . ; (3) whether plaintiff and the victim were closely related. These "factors" have become subject to claims of arbitrariness, however, as courts have come to differing conclusions under similar fact patterns. Although courts disagree about the proper scope of recovery, there is a general concern that liability to bystanders flowing from a negligent act will create liability disproportionate to the defendant's fault. This concern has prompted some courts to discourage expansive findings of foreseeability. Indeed, there has been some recent movement toward narrowing bystander recovery even on the limited *Dillon* approach. [See, e.g., *Thing v. LaChusa*, 771 P.2d 814 (Cal. 1989), narrowing the reach of *Dillon*.]

#### [3] Restatement Position

The Restatement endorses liability under § 436 if the plaintiff's mental distress results from the risk of impact, or "shock or fright at harm or peril to a member of his immediate family occurring in his presence," and the plaintiff is in the zone of danger. Further, Restatement § 436A requires that the plaintiff suffer "bodily harm or other compensable damage."

### § 10.02 Wrongful Conception, Wrongful Birth and Wrongful Life [174-180]

#### [A] *Overview*

These cases are quite controversial because the plaintiffs are contending, in essence, that the birth of a child is a compensable harm. The defendant's negligence has not rendered a healthy child unhealthy. Had there been no fault, the child would not have been born at all. The terminology courts and commentators use in this area varies although most categorize the claims as follows: the parents' action for the negligently caused birth of a *healthy* child is a "wrongful conception" (or "wrongful pregnancy") claim; the parents' claim for damages due to the negligently caused birth of an *unhealthy* child is a "wrongful birth" claim; and the *child's* own legal claim is one for "wrongful life." Each of these will be examined in turn.

### [B] *Wrongful Conception*

Virtually all courts confronted with a "wrongful conception" claim have permitted some recovery, recognizing that the defendant's breach of the standard of care has led to foreseeable harm. Without much controversy, plaintiffs are typically permitted to recover damages directly associated with the pregnancy and the birth. Some courts also permit the recovery of emotional distress damages too. Most courts have refused to permit the parents to recover the cost of raising the child to majority.

When recovery is permitted, some courts require an offset based on the "benefit rule" embodied in the Restatement [§ 920], under which the jury is asked to reduce the damage award by the emotional gains of having a healthy child. Another torts damages principle that defendants have asserted in wrongful conception cases (as well as in wrongful birth cases discussed below) is the requirement that a plaintiff mitigate damages. Defendants have contended that the plaintiffs' failure to terminate the unwanted pregnancy or to put the child up for adoption constitutes a failure to mitigate damages. Courts, however, have been generally unwilling, in light of the highly personal nature of the decision involved, to permit jury consideration of the impact of the plaintiffs' decision to go to term and to keep the child.

### [C] *Wrongful Birth*

In wrongful birth actions, the plaintiffs are suing because the defendants' negligence deprived them of their ability to make an informed decision about whether to procreate, or whether to carry a potentially impaired child to term. In many instances, the plaintiff must show that "but for" the defendant's negligent failure to diagnose the condition giving rise to the birth defect, the plaintiff would have learned of the potential danger and would have elected to terminate the pregnancy.

The major debate centers around what damages should be recoverable. Most jurisdictions have permitted the wrongful birth plaintiff to recover extraordinary expenses associated with the defect with which the child was born. Some have also permitted recovery of emotional distress damages. The "benefit rule" may apply in the wrongful birth context. Some courts require the jury to reduce the plaintiff's damage recovery by the emotional benefits of having the child. The jury may deem these benefits substantial or minor depending on the condition of the child.

### [D] *Wrongful Life*

A wrongful life action is the action of the infant born in an impaired condition, claiming, in essence, that being born was the injury. The great majority of jurisdictions have refused to recognize such a claim. A central reason for the rejection of a wrongful life claim is the difficulty calculating damages. Courts have found it impossible to apply conventional tort damage principles, by which the injured plaintiff is to be returned to a pre-injury state, in the wrongful life context because the wrongful life plaintiff's pre-injury state would have been *non-existence*. A few courts have permitted limited

wrongful life recovery, allowing the wrongful life plaintiff to recover the extraordinary expenses associated with the impairment. No jurisdiction currently permits the wrongful life plaintiff to recover for pain and suffering.

## § 10.03 Loss of Consortium, Wrongful Death, and Survival [180-188]

### [A] *Overview*

These claims deal with two kinds of compensable harm to certain family members arising from tortiously inflicted injury to another: loss of consortium and wrongful death. Loss of consortium and wrongful death are most appropriately viewed as a *type* of injury. As a duty issue, the debate focuses on *who* should be permitted to recover, as well as *what* should be recoverable.

### [B] *Loss of Consortium*

Nearly all jurisdictions permit one spouse to recover against a person who seriously injures the other spouse, usually calling it as an action for "loss of consortium." The concept of "consortium" gradually expanded to permit recovery for more than the economic loss of the of the injured spouse's household services; now the loss of consortium plantiff is permitted to recoup intangibles such as loss of companionship, comfort, and sexual services. Some jurisdictions, still a minority, permit children to recover for the tortious injury to a parent and parents to recover for tortious harm to a child. Courts expanding consortium rights have noted the inconsistency of permitting a spousal action while denying an action by parents or children.

### [C] *Wrongful Death*

Every state has passed a statute that permits wrongful death recovery though the scope of that recovery varies state to state.

#### [1] Who May Recover

Under any wrongful death statute, the plaintiff is suing for loss suffered due to the tortiously inflicted death of a close relative. Because wrongful death is purely statutory, an action may be brought only by those permitted to do so pursuant to the jurisdiction's wrongful death statute. A surviving spouse, parents and children are typically permitted to bring an action. Some statutes exclude other possible dependents such as siblings or stepchildren who have not been legally adopted.

#### [2] Recoverable Damages

Initially nearly all wrongful death statutes limited wrongful death recovery to *pecuniary* (monetary) losses. Strictly interpreting the limitation to pecuniary losses led to minimal recovery for the death of the elderly, the young and those not working outside the home.

Today, most jurisdictions permit designated dependents to recover lost support and other benefits arising from the tortious death.

#### [3] Proof Problems

Wrongful death recovery is never automatic, even by one clearly permitted to bring the action under a wrongful death statute. The plaintiff must prove with some degree of certainty the losses suffered from the tortious death. Calculating these damages can be extraordinarily challenging, such as when dealing with the death of a minor child.

#### [4] Defenses

The effect of the wrongful death plaintiff's negligence or that of the decedent may affect wrongful death recovery. In most jurisdictions, the action is treated as derivative of the underlying claim; thus, the deceased's fault affects the wrongful death heir's recovery.

### [D] *Survival Actions*

A survival action is the continuation of the *decedent's* action against the tortfeasor. As such it does not give rise to new legal claims; it simply continues a pre-existing one. The action is brought by the administrator, executor or personal representative of the decedent's estate. As the continuation of the decedent's action, the representative can, in most jurisdictions, recover any damages that the decedent would have recovered if she had lived. Some jurisdictions limit what can be recovered in a survival action, however.

Virtually all jurisdictions permit both survival actions and wrongful death actions by statute. Where the tortious conduct contributes to the victim's death, often both actions are brought simultaneously. The survival action typically permits the estate to recover the decedent's medical expenses, lost wages and, perhaps her pain and suffering. The post-death losses are recoverable in the wrongful death action by the appropriate statutory heirs for the losses they suffer from the tortiously caused death.

## § 10.04 Negligently Inflicted Economic Loss [188-200]

### [A] *Overview*

Where a defendant's negligence causes physical injury from which the plaintiff suffers economic loss (such as lost wages) or causes property damage from which flows economic harm (such as lost profits), there is no duty debate about recovery for economic loss. But where the defendant's unreasonable conduct has caused solely economic loss without physical injury or property damage, the overwhelming majority of jurisdictions refuse to find a duty.

### [B] *Pure Economic Loss*

Under the general rule, there is no negligence recovery by those suffering purely economic losses. Courts have suggested several reasons to justify the no-duty rule: a concern about potential liability out of proportion to fault; a difficulty in measuring damages; a lack of deterrence flowing from the imposition of liability due to the unpredictable nature of the harm; the notion that it is preferable for plaintiffs to self-insure to protect themselves from the limited losses they suffer than to require the defendant to insure against potentially vast damage claims; and there is a benefit to litigants and to the tort system to have clearly defined, bright-line rules. While the rule is largely followed, it has been criticized as capricious and outdated. And at least one jurisdiction has adopted a broader rule creating a duty to "particularly foreseeable plaintiffs" who suffer pure economic loss. [See *People Express Airlines v. Consolidated Rail Corp.*, 495 A.2d 107 (N.J. 1985).]

### [C] *Liability of Negligent Information Suppliers*

Much of the litigation in the economic loss arena has arisen in the context of negligent information suppliers, such as accountants. Notwithstanding strict limits on duty in the economic loss context generally, courts have recognized an exception where the plaintiff and defendant have a special relationship. Often this is evidenced by contract. The controversy in this economic loss context is the degree to which *third parties* harmed by the defendant's negligence are owed a duty. All courts recognize that duty in this context may extend beyond privity of contract. Yet there is great divergence beyond this point. Some courts enlarge duty beyond privity only minimally, while others support a far more expansive duty. Most courts have selected among three primary approaches: the narrowest, which extends a duty only to those who are virtually in privity with the defendant ("quasi-privity"); the middle approach, which extends a duty to those the defendant intended to influence [Restatement § 552]; and the broadest, which extends a duty to those who could be foreseeably injured.

### [D] *Attorney Liability*

The debate about the degree that a duty should extend beyond the client has also arisen in the context of legal malpractice. Courts have been reticent in the attorney context to expand a duty beyond privity of contract.

In most jurisdictions the rule remains that "absent fraud or other bad faith an attorney is not liable for negligent conduct to nonclient third parties." Some jurisdictions have permitted a limited expansion of the duty beyond clients in certain particularly compelling circumstances, such as where there has been a negligently drafted will. See *Biakanja v. Irving*, 320 P.2d 16 (Cal. 1958).

## PART C. GENERAL CONCEPTS
## Chapter 11
## CAUSE-IN-FACT

**§ 11.01 Overview** [201-202]

It is generally accepted that tort liability is dependant on proof that the defendant's culpable conduct or activity was the actual cause of the plaintiff's injury.

**§ 11.02 "But For" Analysis** [202-203]

The traditional and still dominant test for actual causation is the "but for" test. For the defendant to be held liable, the plaintiff must establish that but for the defendant's culpable conduct or activity the plaintiff would not have been injured. [See, e.g., *Washington & Georgetown R.R. Co. v. Hickey*, 166 U.S. 521 (1897).]

**§ 11.03 Substantial Factor Test** [203-205]

The "substantial factor" test requires that the defendant materially contributed to the plaintiff's injury. [See *Anderson v. Minneapolis, St. P. & S. St. M. Railroad Co.*, 179 N.W. 45 (Minn. 1920).] The substantial factor test is used by many courts as a supplement to the "but for" test when *redundant multiple* causes would preclude liability under the "but for" analysis. For examples, if A starts a fire on the left side of B's house and C starts a fire on the right side, and both fires merge concurrently and destroy B's house, then neither fire is the "but for" cause of the destruction. In the absence of either fire, B's house would have been destroyed at the same time by the remaining fire. Since both causes are redundant, neither is a "but for" cause, a result that potentially precludes the plaintiff's recovery against either defendant. In order to avoid this inequitable result, the substantial factor test is allowed as an alternative proof of causation for redundant causes.

The Restatement and some jurisdictions utilize the substantial factor test to convey to the jury the requirement of both actual and "legal" causation in all cases. Nevertheless, the Restatement still requires that, except in *redundant* cause cases, "but for" should effectively be established. [See Restatement §§ 431-433.]

**§ 11.04 Proof Problems in Cause-in-Fact** [205-212]

**[A] *Shifting the Burden of Proving Causation***

Where a small number of defendants have engaged in substantially simultaneous *culpable* conduct imposing similar risks on the victim, most courts will shift the burden of proof by requiring defendants to prove they were not the actual cause. [See Restatement § 433B.] The principle is derived from *Summers v. Tice*, 199 P.2d 1 (Cal. 1948), where two hunters negligently fired pellets but only one hit the plaintiff's eye. If the defendants are unable to exculpate themselves, as was the case in *Summers*, both

defendants would be found liable as joint tortfeasors. The plaintiff still has the obligation to establish that both defendants breached a duty of care. Only the burden of proof regarding causation is shifted. Courts have also required that all such wrongdoers be joined as defendants.

### [B] *Market Share Liability*

Several jurisdictions have extended and modified the principle of *Summers v. Tice* to create a theory based on market share liability. This theory pertains to suppliers of defective products where the plaintiff cannot prove which brand of the product she used. In *Sindell v. Abbott Laboratories*, 607 P.2d 924 (Cal. 1980), *cert. denied*, 449 U.S. 912 (1980), daughters of women who had used the drug diethylstilbestrol ("DES") to limit the chance of miscarriage developed various reproductive diseases. The court held that once the plaintiff had established culpability, the defendant manufacturer had the burden of proving it was not a supplier of the DES the plaintiff's mother ingested.

If a defendant manufacturer was unable to disprove causation, that manufacturer would be liable for its percentage of the DES market at the time of the mother's exposure to the product. Thus, under the "market share" approach, each defendant pays each plaintiff the damages its culpable conduct has inflicted proportional to its share of the market.

Significant variations exist among the jurisdictions relaxing causation requirements in DES cases. Unlike in *Sindell*, the New York court in *Hymowitz v. Eli Lilly & Co.*, 539 N.E.2d 1069 (N.Y. 1989), precludes the defendant manufacturers from proving they could not have supplied the drug to a particular plaintiff if the plaintiff is within the defendant's geographic market.

Some states have expressly rejected plaintiffs' efforts to relax causation requirements in DES cases. [See, e.g., *Mulcahy v. Eli Lilly & Co.*, 386 N.W.2d 67 (Iowa 1986).] Furthermore, most courts have been disinclined to extend the market share theory to products other than DES.

### [C] *Medical Uncertainty Cases*

Most courts will only impose liability if the plaintiff can establish that "more likely than not" the defendant's negligence was a "but for" cause of the injury. In medical malpractice cases some courts will make an exception and relax the "but for" requirement. Under this approach, courts will allow the plaintiff to recover for wrongful death from medical malpractice even if the patient probably would have died at the same time anyway, if the doctor's negligence significantly reduced the patient's chance of beating the odds and surviving. The jury has discretion to find the medical malpractice "caused" the death and award full wrongful death damages. [See, e.g., *Herskovitz v. Group Health Cooperative of Puget Sound*, 664 P.2d 474 (Wash. 1983).]

An alternative approach endorsed by other courts is to recognize a new cause of action for "loss of opportunity to survive" in medical malpractice cases. Under this approach

but for causation is not relaxed, but instead loss of a *substantial* chance to survive is perceived as a cognizable damage for which the victim may be compensated. The plaintiff is not awarded the full value of a wrongful death claim, but only an appropriate percentage of the full claim which reflects the decrease in chances the patient would have survived if the physician had not acted negligently. [See, e.g., *Falcon v. Memorial Hospital*, 462 N.W.2d 44 (Mich. 1990).]

## Chapter 12
## PROXIMATE OR LEGAL CAUSE

**§ 12.01 Overview** [213-214]

The plaintiff must prove the defendant's culpable conduct is the proximate cause of the plaintiff's injuries. "Proximate" or "legal" cause adds to the requirement that the defendant's culpable conduct be the actual cause of the plaintiff's injury and will preclude recovery when the causal relationship between the defendant's conduct and the plaintiff's injury does not justify imposing tort responsibility on the defendant.

**§ 12.02 The Problem Proximate Cause Addresses** [214-216]

**§ 12.03 Proximate Cause Tests** [216-226]

**[A] *Foreseeability Test – Definition***

The leading test for proximate cause focuses on whether the defendant should have reasonably foreseen, as a risk of her conduct, the general consequences or type of harm suffered by the plaintiff. In essence, the foreseeable harm test requires (1) a reasonably foreseeable result or type of harm, *and* (2) no *superseding* intervening force. The extent and the precise manner in which the harm occurs need not be foreseeable. [See, e.g., *"Wagon Mound No. 1" (Overseas Tankship (U.K.), Ltd. v. Morts Dock & Engineering Co., Ltd.*, [1961] A.C. 388).]

An intervening force is a new force which joins with the defendant's conduct to cause the plaintiff's injury. It is considered intervening because it has occurred sequentially in time *after* the defendant's conduct. If the intervening force is characterized as *superseding*, proximate cause is not established even though the type of harm is foreseeable. An intervening force is generally characterized as superseding only when its occurrence appears extraordinary under the circumstances. [See, e.g., *Derdiarian v. Felix Contracting Corp.*, 414 N.E.2d 666 (N.Y. 1980).]

**[B] *"Egg-shell" Plaintiff Personal Injury Rule***

While foreseeability of consequences is generally required to find liability, courts make an exception and do not require that the type of personal injury suffered by a victim be foreseeable. [See, e.g., *Keegan v. Minneapolis & St. Louis R.R. Co.*, 78 N.W. 965 (Minn. 1899).] The defendant is liable even if the victim suffers physical injury far more severe (e.g., heart attack) than the ordinary person would be anticipated to have suffered from the accident.

More controversial is whether psychological sensitivity should also be covered under the egg-shell plaintiff rule. Some courts have so held, such as when a minor automobile accident resulted in the plaintiff's suffering a severe psychological breakdown. [See *Steinhauser v. Hertz Corp.*, 421 F.2d 1169 (2d Cir. 1970).]

### [C] *The Direct Test*

The direct test would find proximate cause satisfied whenever the defendant's negligence caused the injury without any intervening force. While once very widely accepted [see *Polemis, Furness, Wilty and Co.*, 3 K.B. 560 (1921)], it is questionable whether the direct test has any viability in contemporary law.

### [D] *"Practical Politics" and "Rough Sense of Justice" Test*

In a famous dissent to Chief Justice Cardozo's opinion in the renowned *Palsgraf v. Long Island R.R.*, 248 N.Y. 339 (N.Y. 1928), decision, Justice Andrews considered the appropriate tests for proximate cause. Ultimately he concluded that proximate cause is a question of public policy, fairness and justice, which cannot be reduced to any mechanical formula.

On occasion, courts have explicitly quoted Justice Andrews' assertion that proximate cause is a matter of public policy and justice and not logic to justify rulings on proximate cause that could not be explained consistently with the application of other standards, such as the foreseeability test. [See, e.g., *Kinsman Transit Co. v. City of Buffalo* ("*Kinsman II*"), 388 F.2d 821 (2d Cir. 1968).]

### [E] *Restatement Test*

The Restatement utilizes the term "legal" rather than "proximate" cause. Restatement § 431 defines an actor's negligent conduct to be a legal cause if "(a) his conduct is a substantial factor in bringing about the harm, and (b) there is no rule of law relieving the actor from liability because of the manner in which his negligence has resulted in harm." The Restatement utilizes the substantial factor requirement to encompass both actual cause-in-fact and causation in "the popular sense, in which there always lurks the idea of responsibility." Section 433 lists considerations important in determining whether conduct is a substantial factor including: the number of other factors which contribute to harm; whether the defendant's conduct has created a continuous and active force; and the lapse of time.

Once the tortfeasor's conduct is established as a substantial factor for the plaintiff's injury, Restatement § 435 indicates that liability will not be restricted merely because the actor could not foresee the extent or the manner in which the harm occurred. The defendant will not be held the legal cause of the harm under § 433, however, if "looking back from the harm to the actor's negligent conduct, it appears to the court highly extraordinary that it should have brought about the harm."

While the Restatement's principle of legal cause may be consistent with many decisions, the articulated comprehensive theory itself, unlike many provisions of the Restatement, has failed to gain general acceptance.

## **§ 12.04 Policy Objectives Addressed By Proximate Cause** [227-228]

## Chapter 13
## JOINT & SEVERAL LIABILITY

**§ 13.01 Overview and Definition** [229-230]

**§ 13.02 Joint Tortfeasors** [230-233]

Joint tortfeasors are two or more individuals who either (1) act in concert to commit a tort, (2) act independently but cause a single indivisible tortious injury, or (3) share responsibility for a tort because of vicarious liability.

Under traditional common law, each joint tortfeasor is "jointly and severally" liable for the plaintiff's total damages. This means that each individual is fully liable to the plaintiff for the entire damage award. If the plaintiff is unable to collect a co-tortfeasor's portion of the liability, the tortfeasor(s) from whom the plaintiff can collect are responsible for the other tortfeasor's (s') share. [See Restatement § 876.]

**[A]** ***Acting in Concert***

"Acting in concert" is the tort equivalent of being a criminal accessory or co-conspirator. If an individual intentionally aids or encourages another to commit a tort, he is as liable as the individual who actually committed the physical acts of the tort. [See, e.g., *Bierczynski v. Rogers*, 239 A.2d 218 (Del. Super. Ct. 1968).]

**[B]** ***Independent Acts Causing a Single Indivisible Injury***

Two or more individuals who act independently but whose acts cause a single indivisible tortious injury are also joint tortfeasors. [See, e.g., *Bartlett v. New Mexico Welding Supply, Inc.*, 646 P.2d 579 (N.M. Ct. App. 1982).]

**[C]** ***Vicarious Liability***

A defendant may be jointly liable for the actions of another through vicarious liability. Vicarious liability automatically imposes tort responsibility on a defendant because of his relationship with the wrongdoer. The most frequent example of vicarious liability is when employers are held liable under a theory of respondeat superior for the actions of employees within the scope of their employment. [See, e.g., *Fruit v. Schreiner*, 502 P.2d 133 (Alaska 1972).]

**§ 13.03 Special Problems After Comparative Fault** [233-240]

**[A]** ***Allocations of Liability Among Joint Tortfeasors***

Traditionally, each liable defendant, if able, paid an equal pro rata share of the damages to the plaintiff based on the number of joint tortfeasors. This traditional approach has

now been replaced in many states by a system of comparative allocations of responsibility among joint tortfeasors.

Under a comparative approach, instead of dividing liability equally by the number of joint tortfeasors, liability is divided by the proportion of responsibility each tortfeasor bears to the plaintiff for his injury.

In the absence of a reform statute, this comparative allocation does not necessarily alter joint liability. Each tortfeasor may still be responsible for insuring the plaintiff is paid the full judgment in the event it is impossible to collect from some tortfeasors. [See, e.g., *American Motorcycle Association v. Superior Ct.*, 578 P.2d 899 (Cal. 1978).]

### [B] *Impact of Settlement on Percentage Shares*

When one or more tortfeasor makes a pretrial agreement to pay off her share of the damages awarded to the plaintiff, such settlements usually precede the court's determination of each tortfeasor's relative liability. Courts must determine how the settlement impacts on the relative share of the liability of the remaining defendants to the plaintiff. States have generally opted for one of two approaches.

Under the approach adopted by a majority of states, the settling defendant's percentage of fault, as determined by the fact-finder, is deducted from the damages awarded the plaintiff regardless of the actual cash payment made by the settling defendant to the plaintiff. [See Restatement (Third) of Torts, Apportionment Liability § 16, which endorses this method of apportionment.] In this case, the plaintiff risks losing part of his ultimate recovery if he accepts too small a payment from a settling defendant.

The minority approach allows the settling defendant's payment to be deducted from the final total damages owed to the plaintiff. This results in the remaining joint tortfeasors paying the full damage amount actually awarded to the plaintiff minus the settling defendant's payment, even if that increases the percentage of the damages for which the remaining defendants were originally liable. Jurisdictions utilizing this approach generally require a “good faith” hearing to confirm that the settlement is not a conspiracy by the plaintiff and the settling defendant to make another defendant pay an excessive share.

### [C] *Contribution*

Under joint and several liability principles, the tortfeasor sued must still bear full responsibility for the injury to the plaintiff. With the exception of tortfeasors liable for intentional torts, a defendant required to pay the plaintiff more than her share of the damage judgment (under either a pro rata or comparative system) can now seek in most states appropriate contribution from her co-tortfeasor. [But see Restatement (Third) of Torts, Apportionment of Liability § 1 cmt. c, endorsing comparative responsibility for both intentional as well as negligent defendants.]

The tortfeasor seeking a contribution must prove the others liable. Normally, procedural rules allow one defendant in an action to "implead" or file a claim against other potential tortfeasors who have not been named as defendants by the initial plaintiff so that their liability for contribution can be determined in the same proceeding. Alternatively, a tortfeasor can also file a separate action for contribution, provided the statute of limitations has not expired.

### [D] *Indemnification*

Historically, courts have allowed a defendant to seek "indemnification" or total reimbursement from another tortfeasor when the defendant was only technically liable, but the other tortfeasor was far more culpable. The more culpable tortfeasor is sometimes characterized as the "active" as opposed to the "passive" tortfeasor. Such indemnification was allowed by courts prior to the general acceptance of contribution discussed above. Unlike contribution, the defendant's liability is always completely shifted to the other tortfeasor.

The trend toward comparative contribution has, in many instances, blurred the distinction between the two actions since there is nothing in theory precluding a finding under comparative contribution that one tortfeasor should be fully responsible. This has prompted some courts to allow only comparative contribution and not indemnification, except when indemnification is based on a contract or the party seeking indemnification was only vicariously liable.

### [D] *Reform Statutes*

Since courts started comparing the relative responsibility of defendants, the concept of "joint and several" liability among defendants has been increasingly attacked. Numerous reform statutes have limited or altered joint and several liability rules in many states. [See, e.g., Cal. Civ. Code § 1431, limiting joint and several liability to economic damages.]

## Chapter 14
## DAMAGES

**§ 14.01 Overview** [241-243]

Damages in torts constitute the "money awarded to the person injured by the tort of another." [See Restatement § 902.] Tort damages include nominal damages, compensatory damages, and punitive damages.

Nominal damages are a symbolic award (often one dollar) given to the plaintiff when liability for a tort is established but no actual harm is proven. [See Restatement § 907.]

Compensatory damages are awarded to a person to indemnify for personal injury, property, and other economic harm sustained by the victim. [See Restatement § 903.] Compensatory damages are awarded for both pecuniary and non-pecuniary losses. Unlike economic loss, pain and suffering, and other forms of mental distress have no obvious monetary equivalent. This valuation problem has generated controversy over the desirability of compensating for pain and suffering at all. [See, e.g., *Seffert v. Los Angeles Transit Lines*, 364 P.2d 337 (Cal. 1961).]

Punitive damages are awarded to punish and deter particularly egregious conduct. [See Restatement § 908.]

**§ 14.02 Property Damages** [243-244]

Damages for permanent deprivation or destruction of property are generally measured by the market value of the property at the time of the tort. If real or personal property is damaged but not destroyed, courts generally compensate the victim for the diminished market value of the property but sometimes award the cost of repairs instead of diminished value.

**§ 14.03 Personal Injury** [244-248]

Personal injury victims under tort law can be compensated for (1) medical expenses; (2) lost wages or impaired earning capacity; (3) other incidental economic consequences caused by the injury; and (4) pain and suffering. [Restatement § 924.]

**§ 14.04 Mitigation or the Doctrine of Avoidable Consequences** [248-249]

Injured victims have a responsibility to act reasonably to limit or "mitigate" losses incurred. If a plaintiff fails to act reasonably to mitigate injuries, the defendant will not be held liable for incremental losses that otherwise could have been avoided. [See Restatement § 918.]

**§ 14.05 Punitive Damages** [249-253]

Punitive damages are discretionary and awarded when a tort is committed with malice. [See Restatement § 908.] The United States Supreme Court has held that punitive damages must bear some relationship to potential harm. [See *BMW of North Dakota, Inc. v. Gore*, 517 U.S. 559 (1996).] Also, many states limit punitive damages awards. [See, e.g., Va. Code Ann. § 8.01-38.1 (Michie 1994).]

**§ 14.06 Collateral Source Rule** [254-256]

Under traditional common law doctrine, the plaintiff's recovery against the defendant is not affected by compensation the plaintiff received for the loss from other sources such as insurance. Such collateral sources for recovery are not disclosed to the jury under the collateral source rule. [See Restatement § 920A; *Helfend v. Southern California Rapid Transit District*, 465 P.2d 61 (Cal. 1970).]

Numerous reform statutes, most notably in the context of medical malpractice, now reject the collateral source rule and allow the jury to consider such insurance payouts and deduct them from the defendant's liability. [See, e.g., Cal. Civ. Code § 3333.1.]

## Chapter 15
## DEFENSES

### § 15.01 Overview [258-259]

Traditionally, there were only two defenses to negligence: contributory negligence and assumption of risk. Both constituted complete defenses and completely barred the plaintiff from recovery. In all but a handful of states, contributory negligence has been converted by statute or judicial ruling into comparative negligence. Unlike contributory negligence, comparative negligence need not be a complete bar to the plaintiff's recovery, but acts only as partial bar resulting in a percentage deduction from otherwise recoverable damages.

### § 15.02 Contributory Negligence [259-263]

#### [A] *Definition*

Contributory negligence is "conduct on the part of the plaintiff which falls below the standard of conduct to which he should conform for his own protection, and which is a legally contributing cause . . . in bringing about the plaintiff's harm." (Restatement § 463.]

Contributory negligence is a complete defense to negligence.

#### [B] *Last Clear Chance Doctrine*

The last clear chance doctrine instructs the court to ignore the plaintiff's contributory negligence if the defendant's negligence occurred *after* the plaintiff's contributory negligence. See *Davies v. Mann*, 10 M&W 546, 152 Eng. Rep. 588 (1842).

Most jurisdictions reject the last clear chance doctrine when replacing contributory negligence with comparative negligence.

### § 15.03 Comparative Negligence [263-267]

In almost all states, contributory negligence has been replaced by some form of comparative negligence, often called comparative fault. [See Restatement (Third) of Torts, Apportionment of Liability § 7, endorsing comparative negligence.]

Under comparative negligence, "the conduct on the part of the plaintiff which falls below the standard of conduct which he should conform to for his own protection and which is a legally contributing cause . . . in bringing about the plaintiff's harm" is only a partial bar to the plaintiff's recovery. Comparative negligence reduces the plaintiff's recovery by the percentage of responsibility for the injury attributable to the plaintiff.

### [A] *Pure Comparative Negligence*

Under pure comparative negligence plaintiffs can recover some percentage from liable defendants regardless of the extent of their own negligence. [See, e.g., *Li v. Yellow Cab Co.*, 532 P.2d 1226 (Cal. 1975).]

### [B] *Modified Comparative Negligence*

Under the modified system, plaintiffs are allowed a partial recovery just as in pure comparative negligence until the plaintiff is either *more* negligent (greater than 50% at fault) than the defendant(s) or in other states equal to the negligence of the defendant(s).

## § 15.04 Assumption of Risk [267-274]

### [A] *Definition*

Along with contributory negligence, assumption of risk has traditionally existed as a complete defense to negligence.

There are thus three basic elements to the assumption of risk. The plaintiff must (1) know a particular risk and (2) voluntarily (3) assume it. [See Restatement § 496C; see also, e.g., *Murphy v. Steeplechase Amusement Co., Inc.*, 166 N.E. 173 (N.Y. 1929).]

### [B] *Classifications of Assumption of Risk*

#### [1] Express Versus Implied Assumption of Risk

Assumption of risk is generally divided into two types: express and implied. Express assumption of risk exists when, by contract or otherwise, a plaintiff explicitly agrees to accept a risk. [See Restatement § 496B.] Implied assumption of risk exists when the plaintiff's voluntary exposure to risk is derived merely from her behavior, and not from explicit assent. [See Restatement § 496C.]

#### [2] Express Assumption of Risk

If an assumption of risk is characterized as express, it can be invalidated if it is found contrary to public policy. Conversely, courts are likely to uphold express assumption of risk when the plaintiff's participation is clearly voluntary, such as the decision to engage in risky recreational pursuits. [See Restatement § 496B; see also, e.g., *Woodall v. Wayne Steffner Productions, Inc.*, 20 Cal. Rptr. 572 (Cal. Ct. App. 1962).]

#### [3] Implied Assumption of Risk

The modern trend is to allow implied assumption of risk to be absorbed into comparative negligence. This allows the jury to treat assumption of risk as a partial defense. [See, e.g., *Knight v. Jewett*, 834 P.2d 696 (Cal. 1992).]

## § 15.05 Immunities [274-278]

### [A] *Overview*

An immunity protects a defendant from tort liability. Unlike a defense, it is not dependent on the plaintiff's behavior, but on the defendant's status or relationship to the plaintiff.

### [B] *Charitable Immunity*

Historically, charitable organizations were immune from tort liability. Increasingly, this immunity has been abrogated. [See Restatement § 895E.]

### [C] *Spousal Immunity*

Historically, spouses could not sue each other. The majority of states have eliminated spousal immunity. [See, e.g., *Klein v. Klein*, 376 P.2d 70 (Ca. 1962); Restatement § 895F.]

### [D] *Parent-Child Immunity*

Parent-child immunity precludes tort actions between parents and their non-adult children. [See *Small v. Morrison*, 118 S.E. 12, 16 (N.C. 1923).] Unlike spousal immunity, which has been eliminated in most states, parent-child immunity still exists in some form in many jurisdictions. [See, e.g., *Gibson v. Gibson*, 479 P.2d 648 (Cal. 1971).]

### [E] *Governmental Immunity*

Governmental immunity protects the government from tort liability. Under the common law, the immunities were complete and prevented any tort suits against the government.

Many states and the federal government have passed detailed statutes modifying the immunities in specific instances. One general provision normally included allows immunity for discretionary functions but not ministerial acts. Discretionary functions are policy-making decisions. Ministerial acts constitute government conduct which implements or executes policy decisions. [See, e.g., *Tarasoff v. Regents of the University of California*, 551 P.2d 334 (Cal. 1976).]

# PART D. LIABILITY WITHOUT FAULT AND PRODUCTS LIABILITY
# Chapter 16
# STRICT LIABILITY

## § 16.01 Overview [281-283]

From early common law onward, there have been recognized discrete subsets of conduct for which the defendant will be responsible in damages, without regard to due care or fault. This is called "strict liability" or "liability without fault." This chapter discusses strict liability for damage or injury caused by animals owned or possessed by the defendant, and also strict liability for abnormally dangerous activities. Strict products liability is discussed in Chapter 17.

## § 16.02 Strict Liability for Injuries Caused By Animals [283-287]

### [A] *Livestock*

The original common law rule provided for owner liability without fault for damage done by trespassing livestock. Restatement § 504 imposes strict liability for the possessor of trespassing livestock unless (1) the harm is not a foreseeable one; (2) the trespass by animals being "driven" (herded) along the highway is confined to abutting land; or (3) state common law or statute requires the complaining landowner to have erected a fence. [*Maguire v. Yanake*, 590 P.2d 85 (Idaho 1978).]

### [B] *Domestic Animals*

Keepers of dogs, cats, horses or other domestic animals are liable for injury caused by the animal only where the possessor knew or should have known of the animal's vicious disposition. Courts have rejected the maxim of '"every dog gets one bite." [*Carrow v. Haney,* 219 S.W. 710 (Mo. Ct. App. 1920).] In many jurisdictions a dog bite statute creates the exclusive remedy for dog bite victims.

### [C] *Wild Animals*

Many jurisdictions have followed the rule of strict liability for owners or keepers of wild animals that cause harm even though the possessor has exercised the utmost care. [See Restatement § 507.]

### [D] *Defenses*

Some courts have held that the plaintiff's mere contributory negligence does not bar the claim. In comparative negligence jurisdictions, however, fault principles may be used to reduce the amount of the plaintiff's award. The plaintiff's assumption of the risk is a defense.

## § 16.03 Strict Liability for Abnormally Dangerous Activities [287-298]

### [A] *Introduction*

Some activities create such grave risks that the defendant may be strictly liable even when he has exercised the utmost care. In such an action, the plaintiff must show that as to the activity (1) the risk of great harm should defendant's safety efforts fail; (2) the impossibility of defendant's elimination of the risk of harm; and (3) injury or harm caused thereby.

Unlike liability for nuisance and trespass, discussed in Chapter 18: (1) the liability described herein does not require a showing that the defendant acted intentionally, negligently or recklessly; and (2) while nuisance and trespass protect an interest in land, abnormally dangerous activities liability is not so confined.

The theory of liability was advanced in British decision in *Rylands v. Fletcher*, L.R. 1 Ex. 265 (1866), an action against defendant mill owners who had built a large reservoir for the collection of water. When the reservoir's barriers failed, the impounded water flooded into the plaintiff's working mine shafts. The Exchequer Chamber found liability, imposing strict liability upon one who introduces a hazardous condition upon his property that, upon its escape, causes harm to another. The House of Lords added the gloss that liability should attach only if the activity was not typical ("non-natural") to the land.

The adoption by United States courts of the tenets of *Rylands v. Fletcher* has moved beyond its original context of impounded water to find application in cases involving activities ranging from the storage of explosives, fumigation, crop dusting, the storage of flammable liquids, pile driving, and the maintenance of a hazardous waste site.

### [B] *Restatement §§ 519–520*

Restatement § 519 states the general principle for liability, and § 520 provides several evaluative factors. Section 519 provides for strict liability for one "who carries on an abnormally dangerous activity" causing harm to persons or property even if he "has exercised the utmost care to prevent the harm." Section 520 suggests evaluative factors to assist in determining if an activity should be termed abnormally dangerous, and includes (1) the degree of risk of harm; (2) the magnitude of that harm; (3) the inevitability of some risk irrespective of precautionary measures that might be taken; (4) the ordinary or unusual nature of the activity; and (5) the activity's value to the community in comparison to the risk of harm created by its presence.

Restatement § 520(d) requires consideration of whether the activity is "a matter of common usage." Comment i thereto suggests that while the use of the automobile is so commonplace as to make its operation one of common usage, the use of a far larger tank might be abnormally dangerous. The locality of the activity is also relevant, and comment j to § 520 points out that the storage of explosives in the middle of the desert might be evaluated differently than would such storage in an urban area.

### [1] Danger Unavoidable Even with the Exercise of Due Care

Liability will not lie unless plaintiff shows that the risk involved cannot be eliminated through defendant's exercise of reasonable care. Illustrative is *Edwards v. Post Transportation Co.*, 279 Cal. Rptr. 231 (Cal. App. Ct. 1991), a suit by an employee against the delivery company that pumped sulfuric acid into the wrong storage tank at the manufacturer's waste treatment facility. The resultant toxic gases injured plaintiff, but his claim was disallowed on the grounds that the risk could have been "eliminated through the exercise of reasonable care."

### [2] Requirement of an Activity Under Defendant's Control

The activity must have been in the control of the defendant at the time of plaintiff's injury. Thus in one suit brought against a manufacturer of chemicals for injuries sustained by a truck driver who inhaled the product when his truck ran over a drum of the product that fell from another truck, liability was denied on the grounds that the manufacturer exercised no control over the independent contractor transporting the drums. [*Hawkins v. Evans Cooperage Co.*, 766 F.2d 904 (5th Cir. 1985).]

Claimants must demonstrate the defendant's engagement in the "activity". In *Heinrich v. Goodyear Tire and Rubber Co.*, 532 F. Supp. 1348 (D. Md. 1982), a tire company's employee an action against a chemical supplier for chemical exposure injuries, court held that action would not lie absent a showing that the defendant had at least "the right or duty to control, if not actual control over, the activity causing the harm."

Many plaintiffs have brought causes of action against product manufacturers. In the majority of these cases no liability has been found, as the manufacturer's "activity" ceased at the time of its initial distribution of the product to intermediaries. [*Cavan v. General Motors Corp.*, 571 P.2d 1249 (Or.1977).]

### [3] Type of Hazard Contemplated

Subpart (2) of Restatement § 519 limits the applicability of the strict liability remedy to injuries involving "the kind of harm, the possibility of which makes the activity abnormally dangerous." [*Foster v. Preston Mill Co.*, 268 P.2d 645, 647 (Wash. 1954).]

## [C] *Application of the Doctrine*

The determination of whether strict liability is justified is explicitly "an adjustment of conflicting interests, which interests include, without limitation, the interest of the person conducting the activity, the interests of the community in which the activity is conducted in the continuation of that activity, and the interests of the injured claimant in receiving compensation for any injury suffered thereby." [*Loe v. Lenhardt*, 362 P.2d 312 (Or. 1961).] Restatement §§ 519-520 provide such a balancing test for the determination of whether an activity is to be viewed as abnormally dangerous.

In representative suits, liability has been for: blasting or dangerous storage of explosives or flammable products [*Yommer v. McKenzie*, 257 A.2d 138 (Md. 1969)]; dangerous release and application [*Langan v. Valicopters, Inc.*, 567 P.2d 218 (Wash. 1977)]; dangerous transportation [*Siegler v. Kuhlman*, 502 P.2d 1181 (Wash. 1972)]; and dangerous transmission [*Ferguson v. Northern States Power Co.*, 239 N.W.2d 190 (Minn. 1976)].

**[D]** ***Defenses***

Under the traditional view accepted by the Restatement in § 523, only the plaintiff's assumption of the risk is a defense to a strict liability action based on an abnormally dangerous activity; the fact that the plaintiff may have failed to use reasonable care for her own protection is irrelevant.

# Chapter 17
# PRODUCTS LIABILITY

## § 17.01 What Is Products Liability? [299-319]

### [A] *Historical Overview*

In *MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (N.Y. 1916), New York's highest court held that the manufacturer of any product capable of serious harm if negligently made owed a duty of care in the design, inspection, and fabrication of the product, a duty owed not only to the immediate purchaser but to all persons who might foreseeably come into contact with the product. Modern products liability law is the direct descendant of *MacPherson*, both in tort and in implied warranty.

In the mid 1960s influential proposals arose to eliminate the privity bar and the requirement of showing fault in a products liability claim, with the gravamen of such "strict" products liability being the condition of the product, not the conduct of the seller. [*Greenman v. Yuba Power Products, Inc.*, 377 P.2d 897 (Cal. 1962); Restatement § 402A.]

The American Law Institute's Restatement (Third) of Torts: Products Liability (1997) proposes a products liability analysis that is freed of doctrinal designations (negligence, warranty, strict tort liability) and instead evaluates claims "functionally", i.e., whether the claim alleges a (1) manufacturing defect; (2) design defect; or a (3) defect by reason of inadequate warnings or instructions.

A buyer's potential remedy in misrepresentation was advanced in *Baxter v. Ford Motor*, 12 P.2d 409 (Wash. 1932), holding that a consumer should have a strict liability cause of action, with no need to show negligence or privity, against a seller that represented its products as possessing "qualities which they, in fact, do not possess . . . ," and the customer suffers damages as a consequence. This misrepresentation remedy is reflected today in Restatement § 402B.

### [B] *A Survey*

The four principal theories that underlie products liability suits are: (1) negligence; (2) breach of one or more warranties; (3) strict products liability; and (4) misrepresentation. Putting aside misrepresentation, in functional terms, almost all claims in products liability arise from defects in manufacturing, defects in design, and inadequate warnings.

#### [1] Negligence

Negligence liability may follow personal injury or property loss due to another's failure to act with due care under the circumstances. In negligence a product seller is liable if he acts or fails to act in such a way as to create an unreasonable risk of harm loss to a foreseeable user using the or affected by the product in a foreseeable manner.

In determining breach of his duty of ordinary care, most courts use the formulation of Judge Learned Hand, or a comparable risk-benefit model. The Hand formulation states that an actor is in breach if the burden of taking measures to avoid the harm would be less than the multiple of the likelihood that the harm will occur times the magnitude of the harm should it occur, or B<PL. [*United States v. Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947).]

### [2] Breach of Warranty

Breach of warranty is a claim that arises under principles of contract in one of three ways. The express warranty is made when the seller makes a material representation, such as regards a product's composition, durability, performance, or safety. The seller's representation may be "puffing" and therefore not material, if it pertains merely to subjective matters such as aesthetics. Comments to UCC § 2-313 provide that reliance will be presumed unless the lack of reliance is proved by the seller.

The implied warranty of merchantability, UCC § 2-314, provides that any seller impliedly warrants that the product sold is fit for its ordinary purposes, and conveys with the sale of the product irrespective of the seller's statements. The implied warranty of fitness for a particular purpose, UCC § 2-315, contemplates the buyer's explicit or implicit request that a seller having specialized knowledge recommend a product suitable for the buyer's specialized goal.

#### [a] Parties

Under UCC § 2-313 and § 2-314, defendant must be a commercial seller of such products. UCC § 2-315 has no such requirement. The proper plaintiffs are decided by reference to which Alternative to UCC § 2-318 a jurisdiction has selected. Alternative A confines the class of plaintiffs to members of the buyer's household and guests therein. Alternatives B and C are progressively more inclusive.

#### [b] Disclaimers and Limitations

As to implied warranties, the seller may disclaim or limit the remedies. [UCC § 2-316.] The implied warranty of merchantability may be disclaimed if the disclaimer mentions "merchantability" and is conspicuous. A § 2-315 implied warranty may be disclaimed where the disclaiming language is "by a writing and conspicuous." Implied warranties may be excluded with language such as "as is" or "with all faults".

A seller may limit warranty remedies. [UCC § 2-719.] Limitations as to consequential damages will not be enforced if the suit involves personal physical injuries.

### [3] Strict Liability in Tort

Restatement § 402A provides for strict liability in tort for anyone "who sells a product in a defective condition unreasonably dangerous to the user or consumer or his property." The defendant must be a seller of such products in the ordinary course, although in many jurisdictions the strict liability cause of action to other businesses, such as lessors.

For determining what is "unreasonably dangerous," comment i to § 402A offers a "consumer expectations" standard: i.e., is the article "dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics"? More particularized risk/utility evaluations for what constitutes a design defect have been adopted by most courts. See § 17.04[B][3][b] infra.

### [4] Misrepresentation

The Restatement § 402B remedy of strict liability for misrepresentation, creates a remedy to any person injured due to reliance on the product seller's misrepresentation of a material fact. Its reach is limited to public representations, i.e., advertisements. The plaintiff must prove actual reliance.

## [B] *Defenses*

### [1] Generally

At common law, a defendant could defend in negligence by showing that the plaintiff was contributorily negligent, or that plaintiff assumed the risk of injury. As to both a warranty or a strict products liability claim, the defendant may defend by showing plaintiff's assumption of risk, but not contributory negligence. Misuse of a substantial and non-foreseeable nature may be a defense against any claim.

### [2] Comparative Fault

Under comparative fault, the trier of fact may reduce the plaintiff's recovery by such proportion of the harm that the latter contributed by his own incautious conduct. Comparative negligence is discussed supra, at § 13.03.

## § 17.02 Negligence [319-327]

## [A] *Basis for Liability*

The maker of a product that is to be used by others and that is capable of harm if not carefully made is under a duty to make it with care commensurate with the risk of harm. The manufacturer of a product is presumed to be an expert in his field. Non-manufacturing sellers are also under certain more confined duties.

The negligence evaluation or equation is often conveniently described as balancing the magnitude of the risk of the seller's conduct against the likelihood of injury should the challenged act be taken, the severity of any such injury should it occur, and the social value or utility of the actor's conduct. See *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947) and *Conway v. O'Brien*, 111 F.2d 611, 612 (2d Cir. 1940), in which Judge Learned Hand proposed that in negligence, an actor would be in breach of duty should the Burden of precautionary measures be less than the multiple of the Probability of the harm occurring times the magnitude of the Liability should the harm occur, or B<PL.

### [B] *Liability as Limited by Foreseeability*

Liability in negligence is limited to settings in which the product was put to a reasonably foreseeable use, including a reasonably foreseeable misuse. The plaintiff must also be a person who might reasonably be foreseen to use, consume or be affected by the product. Foreseeability is limited to what was known or knowable at the time of manufacture.

### [C] *The Duty of Non-Manufacturing Sellers*

Restatement § 401 provides that the non-manufacturing seller has a duty to warn of hazards of which he knows or has reason to know, and of which the buyer is unaware.

### [D] *Proof of Negligence*

Proof of defect does not, without more, prove negligence. The plaintiff must show that the seller's conduct fell below that expected of a reasonable man in similar circumstances.

#### [1] The Accident Itself

Similarly, the occurrence of the accident itself does not make out plaintiff's prima facie case in negligence. However, circumstantial proof, such as recent purchase and ordinary use, that tends to negate the possibility of alternative causes, may advance the plaintiff's proof of both defects and negligence.

#### [2] Other Accidents or Claims

Evidence of other accidents involving defendant's products may be admissible to prove negligence if: (1) the product involved was materially indistinguishable from that at issue in plaintiff's litigation; and (2) the circumstances were similar to those of plaintiff.

#### [3] Subsequent Product Changes

The majority of jurisdictions have adopted the rule of evidence that subsequent product changes, or other post-incident remedial measures, cannot be used by plaintiff to prove defect or antecedent negligence. See Fed. R. Evid. 407.

#### [4] Violation of a Statute, Ordinance or Regulation

Defendant's violation of a regulation pertaining to safety may be considered negligence per se. See discussion supra at §§ 6.01-6.07.

#### [5] Res Ipsa Loquitur

Upon the showing that the product was one over which the defendant had complete control, and that the accident resulting in injury was of such a nature that it ordinarily would not occur in the absence of negligence, the doctrine of res ipsa loquitur permits the plaintiff to shift to the defendant the burden of proof on the issue of negligence. In a products liability action the injury will occur after the product left the defendant's possession. Most courts require only that the plaintiff offer evidence of normal storage, transportation and use. [See also Restatement § 328 comment g.]

### § 17.03 Warranties [327-340]

#### [A] *Introduction*

Warranty law provides several remedies for persons who have purchased or been exposed to products that do not satisfy ordinary expectations, do not conform to the seller's promises, are dangerous, or all of the above.

#### [B] *Express Warranties*

Express warranties are seller representations to the buyer of the quality, performance, construction, or durability of a product. Such warranties may be oral, written, or even pictorial.

#### [1] Representations of Fact

The seller's representations must be of fact, and more than simply the seller's opinion of the product. For example: (1) a tire manufacturer's advertisement, “If it saves your life once, it's a bargain” where plaintiff's decedent was injured fatally following a tire blowout [*Collins v. Uniroyal, Inc.*, 315 A.2d 16 (N.J. 1974)]; (2) a booklet accompanying a steam vaporizer stating the safety of use at night and featuring a picture of the appliance in use near a baby's crib, where a toddler was badly burned when the device overturned [*McCormack v. Hankscraft Co.*, 154 N.W.2d 488 (Minn. 1967)]; or (3) an instruction book statement that a golf training device was “completely safe – ball will not hit player” and a novice golfer suffered severe head injuries when a mis-hit ball flew back at great speed [*Hauter v. Zogarts*, 534 P.2d 377 (Cal. 1975).]

### [2] Basis of the Bargain

Under UCC § 2-313(1), a seller's affirmation of fact can become an express warranty if it "becomes a basis of the bargain." As a general rule, to be considered part of the basis of the bargain of the sale, the seller's statement must precede or accompany the sale. The authority is divided as to the buyer's burden of proof concerning reliance upon the seller's representations. Comment 3 to UCC § 2-313 shifts the burden of proving non-reliance to the seller. Other authority suggests that UCC § 2-313 eliminates the need to show reliance altogether.

## [C] *Implied Warranties*

### [1] Merchantability

The implied warranty of merchantability warrants that are fit for their intended purpose. [UCC § 2-314 (2)(c).]

#### [a] Requirement that the Seller be a Merchant

Under UCC § 2-314, it is necessary that the seller be a "merchant" of such products in the ordinary course of trade. Consistent with this, for example, the seller of a spoiled confection at a church bake sale would not be a proper party defendant under § 2-314.

#### [b] Fit for the Ordinary Purpose

What is or is not "fit for [its] ordinary purpose" within the meaning of UCC § 2-314(2)(a), (c) has proved, in the main, to be an issue of ordinary understanding. For example, shoes will be expected to have their heels firmly attached so as not to disengage in normal use [*Vlases v. Montgomery Ward & Co.*, 377 F.2d 846 (3d Cir. 1967)), and hair lotion should not burn the user's scalp [*Hardman v. Helene Curtis Indus., Inc.*, 198 N.E.2d 681, 691 (Ill. Ct. App. 1964).]

As to the potential idiosyncratic reaction of a purchaser to an over-the-counter pharmaceutical, most courts take the position that plaintiff must show that the product "affect[s] at least some significant number of persons[.]" [*Griggs v. Combe, Inc.*, 456 So. 2d 790 (Ala. 1984).]

### [2] Fitness for a Particular Purpose

Under UCC § 2-315, the buyer must prove that he relied upon the seller's skill or judgment to select or furnish suitable goods, and that seller had reason to know of such reliance. Unlike UCC § 2-314 remedies which require the seller to be a merchant of such goods in the ordinary course, UCC § 2-315 states only that the person be a seller.

The Code's use of the phrase “particular purpose” is deliberate, and intended to distinguish UCC § 2-314. Comment 2 to UCC § 2-315 makes this clear in stating that “particular purpose envisages a specific use by the buyer which is peculiar to the nature of his business. . . .” It follows that when goods are purchased for the ordinary purposes for which such goods are used, there arises no implied warranty of fitness for a particular purpose.

### [D] *To Whom Warranties Run*

Beginning with the 1960 decision in *Henningsen v. Bloomfield Motors*, 161 A.2d 69 (N.J. 1960), the defense of lack of privity is in continuing retreat. To the extent that a privity question exists, a distinction must be drawn between vertical and horizontal privity. “Vertical privity” pertains to the relationship between parties in the chain of distribution of goods, such as manufacturers, distributors, retail dealers, and purchasers.

“Horizontal privity” refers to parties outside of the chain of commercial distribution, such as family members, employees, or bystanders. Horizontal privity is implemented in most jurisdictions by its selection of one of the three alternatives to UCC § 2-318. Alternative A extends warranty protection to “any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty.” Alternative B, incrementally more liberal, describes the reach of a warranty to “any natural person who may reasonably be expected to use, consume or be affected by the goods and who is injured in person by breach of the warranty.” The most liberal provision, Alternative C, provides warranty protection to “any person who may reasonably be expected to use, consume, or be affected by the goods and who is injured by the breach of the warranty.”

### [E] *Warranty Limitations and Disclaimers*

Article 2 of the Code permits the seller to disclaim warranties and limit the remedies available to the buyer. The seller's ability to disclaim warranties is defined in UCC § 2-316, while the provisions for seller's ability to limit remedies available to the buyer may be found at UCC § 2-719.

A disclaimer is an attempt to avoid or eliminate a warranty altogether. As a general rule, under UCC § 2-316(1), once an express warranty has been made it cannot be disclaimed. A limitation of remedies, in contrast, acknowledges the seller's obligations in warranty, but operates to restrict the remedy. A common limitation might, for example, provide that the buyer's remedy will be confined to repair or replacement, with no seller liability for incidental or consequential damages.

#### [1] Disclaimer of Implied Warranties

Implied warranties of merchantability or fitness for a particular purpose can be disclaimed, provided that the seller carefully follows the disclosure and conspicuousness

protocols established in UCC §§ 2-316(2) and (3). Any language purporting to exclude or modify the implied warranty of merchantability "must mention merchantability and in case of a writing must be conspicuous." The language of subsection (2) continues by stating that for the seller to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Lastly, UCC § 2-316(2) suggests that the seller wishing to exclude all implied warranties of fitness use language that states, for example, that "there are no warranties which extend beyond the description on the face hereof."

**[a] Conspicuousness**

Subsection (2) to UCC § 2-316 requires that disclaimers of any implied warranties be conspicuous. "Conspicuous," as defined by UCC § 2-201(10), connotes language "so written that a reasonable person against whom it is to operate ought to have noticed it." That language goes on to state that "A printed heading in capitals . . . is conspicuous" and that "Language in the body of a form is 'conspicuous' if it is in larger or other contrasting type or color."

**[b] "As Is" Disclaimers**

A seller may also effectively disclaim implied warranties of quality by communicating to the buyer that the product must be accepted "as is," or with all faults. While § 2-316(2) gives guidelines for disclaiming both implied warranties of quality, albeit through application of different recommended language, an "as is" disclaimer under UCC § 2-316(3)(a) properly used permits the seller effectively to disclaim both warranties of merchantability and fitness simultaneously. The language "as they stand" is also noted in comment 7 to that section.

**[2] Warranty Limitations**

The Code provides at UCC § 2-719 for the seller's limiting of the buyer's remedies. Comment 1 to UCC § 2-719 states that if, due to circumstances, a facially fair warranty limitation fails in its essential purpose, the limitation will be avoided and the parties' rights will be determined in accordance with general warranty principles. Thus, where under a warranty limitation confining the buyer's remedies to replacement or repairs of defective parts the seller's repeated efforts to remedy the problem fail, the seller will not be relieved of liability.

The most prominent restriction upon the seller's ability to limit warranty remedies is set forth in UCC § 2-719(3), which states plainly that limitations on consequential damages will not be given effect where they are unconscionable. That subsection continues by stating that where the consequential damages sought are associated with injury to a person, any limitation upon consequential damages will be considered prima facie unconscionable. [See *Collins v. Uniroyal, Inc.*, 315 A.2d 16 (N.J. 1974).]

## § 17.04 Strict Liability In Tort [340-354]

### [A] *The Restatement View*

Restatement § 402A provides:

> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
>
> (a) the seller is engaged in the business of selling such a product, and
> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
>
> (2) The rule stated in Subsection (1) applies although
>
> (a) the seller has exercised all possible care in the preparation and sale of his product, and
> (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

#### [1] Necessity of Showing a Sale

The plaintiff in strict liability must identify the supplier of the allegedly defective product and establish a causal relationship between the product and plaintiff's injury. In some jurisdictions, strict liability in tort has been expanded to leases and other transactions. In strict liability the defendant must be a seller in the ordinary course. [See § 17.01[C].]

#### [2] Necessity of Showing a Defect

Plaintiff must establish that the product was defective, and that the defect was a substantial factor in bringing about plaintiff's harm. The focus of § 402A is upon the condition of the product, and only tangentially upon the conduct of the seller, as § 402A states plainly, strict tort liability will apply "although the seller has exercised all possible care[.]" Nonetheless, even under strict tort liability principles, a manufacturer or seller is not an insurer of the safety of the products he sells.

Defendant's violation of a safety statute or regulation may, without more, support a finding that the product is defective. [*Stanton by Brooks v. Astra Pharmaceutical Products, Inc.*, 718 F.2d 553 (3d Cir. 1983).]

By statute in some jurisdictions a product implicated in an injury, a "statute of repose" imposes a conclusive presumption that the product is non-defective should the accident occur more than a certain number of years following initial sale.

### [3] The Meaning of Defect

#### [a] The Consumer Expectations Test

The authors of § 402A comment g explain that the rule applies "only where the product is, at the time it leaves the seller's hands, in a condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him." No consumer can reasonably be held to expect defective brakes in a new automobile, or beetles in beverages. Quare, however, a consumer's expectation that there may be a cherry pit in a cherry pie, or a fish bone in a bowl of fish chowder, or an olive pit in a martini olive? In such cases some courts have applied the "foreign-natural" test to determine defectiveness, and have held that cherry pits are "natural" to cherry pie, and fish bones are "natural" to fish chowder.

The consumer envisioned by the "consumer expectations" test is the ordinary adult consumer. Consider for example, the injuries suffered by a five-year-old child while playing with matches, which ignited his pajamas. Courts have without exception interpreted "expectations" as posing the question as to whether the product was dangerous to an extent beyond that which would be contemplated by the parent purchasing them for a child.

The § 402A comment i test imputes to this hypothetical adult consumer "ordinary knowledge common to the community as to [the product's] characteristics." The special background and experience of an individual plaintiff is of no moment, as the proper evaluation is that of the community familiarity with the risk. Accordingly, the sometimes specialized knowledge of a class of consumers, such as, for example, the particular knowledge members of the farming community might have of agricultural equipment, takes on importance in the evaluation of the seller's duty to warn.

It is generally agreed that the seller may defend the claim that a product was defective and unreasonably dangerous due to inadequate warnings with proof that the user was a member of a presumptively sophisticated class of consumers who could be expected to be aware of the risks product and the means of using the product safely.

#### [b] The Risk/Utility Test

Under the risk/utility test, the product is defective as designed only where the magnitude of the hazards outweighs the individual utility or broader societal benefits of the product. The risk/utility test posits, in effect, that only reasonably safe products should be marketed, and defines reasonably safe products as those whose utility outweighs the inherent risk, "provided that risk has been reduced to the greatest extent possible consistent with the product's continued utility."

A seven-factor evaluation proposed for a risk/utility analysis in determining the defective condition of a product was advanced initially by Dean John Wade, and has been followed, as adapted, by courts in most jurisdictions. As stated by one court: "In

balancing the risks inherent in a product, as designed, against its utility and cost, the jury may consider several factors.. . . Those factors may include the following: (1) the utility of the product to the public as a whole and to the individual user; (2) the nature of the product that is, the likelihood that it will cause injury; (3) the availability of a safer design; (4) the potential for designing and manufacturing the product so that it is safer but remains functional and reasonably priced; (5) the ability of the plaintiff to have avoided injury by careful use of the product; (6) the degree of awareness of the potential danger of the product which reasonably can be attributed to the plaintiff; and (7) the manufacturer's ability to spread any cost related to improving the safety of the design." [*Beshada v. Johns-Manville Products Corp.*, 447 A.2d 539 (1982).]

### [c] The Hybrid *Barker v. Lull Engineering* Test

In *Barker v. Lull Engineering Co.*, 573 P.2d 443, 453 (1978), the California Supreme Court commended a hybrid test in which process whereby the: "trial judge instruct[s] the jury that a product is defective in design (1) if the plaintiff demonstrates that the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner, or (2) if the plaintiff proves that the product's design proximately caused his injury and the defendant fails to prove . . . that on balance the benefits of the challenged design outweighed the risk of danger inherent in such a design."

### [4] Necessity of Showing Unreasonable Danger

Restatement § 402A comments g and i together establish that for strict liability to attach, the product must be "dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics." The requirement of unreasonable danger has been interpreted to mean that the product must be more dangerous than an ordinary consumer would expect when the product is used in its intended or reasonably foreseeable manner.

A manufacturer or seller is not required to warn of every conceivable danger that may result from a use or misuse of his product, however. Comments to the Restatement state that the seller may reasonably assume that those with common allergies, will be aware of them, and the seller is not required to warn about ordinary allergic reactions to ingredients that are properly labeled.

### [a] Showing Alternative Feasible Design

In a majority of jurisdictions, a plaintiff's proof must include a showing that there was at the time of the original manufacture of the product some technologically feasible, safer alternative to the challenged design. [E.g., *Garst v. General Motors Corp.*, 484 P.2d 47 (1971).]

### [5] The Unavoidably Unsafe Product

Particularly in the field of drugs, there are some products which, in the present state of human knowledge, are incapable of being made completely safe for their intended and ordinary use. [Restatement § 402A comment j.] Designation of a product as "unavoidably unsafe" is not a complete defense, for the plaintiff may still prove liability in negligence upon showing that the product, usually a pharmaceutical, was marketed without due care.

### [6] Effect of Changes After Leaving Control of Defendant

In strict products liability, the defect must be proved to have existed at the time the product left defendant's control, as § 402A contemplates that the product is "expected to, and does reach the user or consumer without substantial change in the condition in which it is sold." Where the product is substantially altered after manufacture, the change may defeat a claim based upon strict tort liability, but only if the change was of such a nature as to become itself the change, was the proximate cause of the injury.

As the burden is upon the plaintiff to establish that the defect existed at the time the product left the control of the defendant, courts have held that the plaintiff must show that the defect did not arise from improper intermediate handling. It has been held that evidence of reasonable and proper handling of a product after it left the control of the defendant manufacturer or seller and the time of the occurrence of the injury creates an inference that the defect did not come into being in that interim, but existed prior thereto.

The plaintiff is not required to eliminate all possible causes of the accident other than a defect existing at the time the product left the control of the defendant. Rather, he has sustained his burden if the evidence indicates that, more probably than not, the defect did not arise from subsequent improper handling or misuse of the product.

### [7] Strict Liability for Miscellaneous Transactions

#### [a] Leased Property and Bailments

By its terms, § 402A imposes liability only upon one who sells a product in a defective condition. However, many courts have held that in some circumstances, a sale may not be essential to the application of strict tort liability, and that the rule can be invoked in the case of leased or bailed goods, provided the defendant is in the business of such transactions. Naturally, the growing use of leasing, both as a substitute for purchasing and as a matter of temporary convenience, has bolstered the rationale for applying strict tort liability to the lease as to the sales transaction. [*Crowe v. Public Bldg. Comm'n of Chicago*, 383 N.E.2d 951 (1978).] Bailors and licensors have also been held strictly liable, although the decisions have not been uniform.

### [b] Services

As a general rule, courts have not extended the reach of strict liability to persons providing services. The accepted rationale for not extending strict liability to the ordinary provision of services is that services do not involve "mass production and distribution, nor are there any consumers needing protection from an unknown manufacturer or seller." [*Kaplan v. C Lazy U Ranch*, 615 F. Supp. 234 (D. Colo. 1985).]

Those cases that have extended strict tort liability or warranty recovery to services have thus far limited recovery to transactions that were commercial in character, rather than professional, and to cases in which the injury was caused by a defective product, rather than from a defect in the service itself. [E.g., *Newmark v. Gimbels, Inc.*, 258 A.2d 697 (N.J. 1969).]

### [c] Blood Shield Statutes

Practically all states have enacted statutes that make warranty or strict tort liability principles inapplicable to blood transfusions. The ordinary operation of such statutes is to render a hospital, blood bank or medical personnel liable for damages sustained due to contaminated blood only on a negligence basis.

### [d] Real Estate

Departing from the common law rule of caveat emptor, in *Carpenter v. Donohoe*, 388 P.2d 399 (1964), the Colorado Supreme Court held that the builder of a new house was liable to the initial purchaser on implied warranties that the dwelling conformed to statutory requirements, and that it was built in a workmanlike manner, and fit for habitation. As to applicability of Restatement § 402A, courts in modern decisions have found little difficulty in finding new homes "products" within that doctrine's reach.

### [e] Used Products

The language of Restatement § 402A does not, by its terms, preclude application to the sale of defective used products. Pursuant to "consumer expectations" standards, however, courts have regularly measured such reasonable expectations in the light of the expected level of acceptable performance that may be reasonably expected of a used product.

## § 17.05 The Duty to Warn [354-374]

### [A] *Generally*

Although a product is unerringly designed, manufactured and assembled, a seller may be liable if the product has a potential for injury that is not readily apparent to the user and carries no warnings of the risk, or it lacks appropriate instructions. Liability may be under principles of strict liability, negligence, and warranty.

### [B] *Failure to Warn as Negligence*

In negligence, a seller has a duty to warn of any risk that it, as a reasonable manufacturer, or as a reasonable non-manufacturing seller, should know that, without warnings, would create an unreasonable risk of injury. For the duty to attach, it is not necessary that the manufacturer appreciate the specific nature of the hazard posed.

### [C] *Failure to Warn as Strict Liability*

A generally accepted standard is that a dangerously defective article is one "which a reasonable man would not put into the stream of commerce if he had knowledge of its harmful character." [*Phillips v. Kimwood Mach. Co.*, 525 P.2d 1033 (Or. 1974).] The seller need warn of risks that are known or knowable at the time of sale.

### [D] *Failure to Warn as a Breach of Warranty*

The absence of adequate warnings or instructions on a product may constitute a breach of UCC § 2-314. [*Borel v. Fibreboard Paper Products Corp.*, 493 F.2d 1076 (5th Cir. 1973).]

### [E] *The Effect of Obviousness of Danger*

The majority rule is that there exists no duty to warn of obviously hazardous conditions. Authority consistent therewith has involved slingshots, BB guns, darts, chairs on casters, and the activity of diving from a roof into a four-foot-deep swimming pool.

### [F] *The Effect of Unintended or Unforeseeable Use*

In addition to requiring warnings as to risks in intended uses, a manufacturer may also need to warn of risks arising from reasonably foreseeable misuses. [Restatement § 395.]

### [G] *Causation and Disregard of Warnings*

The successful plaintiff must show that the failure to warn was the proximate cause of the injury. Two presumptions are often applied Comment j to Restatement § 402A provides: "[w]here a warning is given, the seller may reasonably assume that it will be read and heeded . . . ." The reciprocal presumption is that had an adequate warning been given, the plaintiff would have read and heeded it.

### [H] *The Duty of the Non-Manufacturing Seller*

The general rule is that the retailer or distributor has a duty to warn only of risks that are known or readily ascertainable.

The court in *Hall v. E.I. Dupont De Nemours & Co.*, 345 F. Supp. 353, 375 (E.D.N.Y. 1972), stated that the relevant factors include:

(1) the standard of care – itself a function of the foreseeability and gravity of risk and the capacity of avoiding it;
(2) the participants' capabilities of promoting the requisite safety in the risk-creating process;
(3) the need to protect the consumer, both in terms of ascertaining responsible parties and providing compensation; and
(4) the participants' ability to adjust the costs of liability among themselves in a continuing business relationship.

Commercial lessors have been found to be within the class of businesses owing a duty to warn of dangerous conditions in the use of their products, by reason of their regular dealing with the product, and superior position to analyze potential hazards. The repairer or servicer of a product will not generally be found responsible for failure to warn of risks associated with the use of a product.

**[I]** ***Persons to be Warned***

Where the seller can reasonably foresee that the warning conveyed to the immediate vendee will not be adequate to reduce the risk of harm to the likely users of the product, the duty to warn has been interpreted to extend beyond the purchaser to persons who foreseeably will be endangered by use of or exposure to the product. Included are members of the public who might be injured as a result of lack of adequate warning. In some circumstances the class to which the duty is owed and that to which the warning should go are not coextensive. The professional user and the learned intermediary doctrines represent two such situations. The bystander doctrine represents another.

The majority of instances in which the seller's product will be used by those other than the immediate vendee are sales to commercial or industrial buyers whose employees will actually use or be exposed to the products. The seller's duty to warn in this setting is influenced by Restatement § 388, which would impose a seller duty to communicate effective cautionary information to these employees or other ultimate users, unless it has reason to believe that those persons exposed will realize its dangerous condition.

The bulk seller fulfills its duty to warn if it conveys to the immediate purchaser sufficient information concerning any pertinent product risks.

**[1] The Allergic or Idiosyncratic User**

Restatement § 402A comment j provides that the manufacturer should provide a warning when "the product contains an ingredient to which a substantial number of the population are allergic, and the ingredient is one whose danger is not generally known. . . ." When the consequences of an injury are very grave, the manufacturer may in some circumstances have a duty to warn "those few persons who it knows cannot apply its

product without serious injury." [*Wright v. Carter Products, Inc.*, 1244 F.2d 53 (2d Cir. 1957).]

#### [2] The Professional User

As a general rule, there is no duty to give a warning to members of a trade or profession against dangers generally known to that group. [Restatement § 388 subsec. (b).]

### [J] *Adequacy of a Warning*

Evaluation of the adequacy of a warning requires a balancing of considerations that include at least: (1) the dangerousness of the product; (2) the form in which the product is used; (3) the intensity and form of the warnings given; (4) the burdens to be imposed by requiring warnings; and (5) the likelihood that the particular warning will be adequately communicated to those who will foreseeably use the product.

### [K] *The Continuing Duty to Warn*

A post-sale duty to warn may attach even if the product was, at the time of manufacture and sale, reasonably safe for use (or arguably so), but through use or operation, has betrayed hazards not earlier known to the seller, or to other sellers of like products.

The leading and innovative decision of *Comstock v. General Motors Corp.*, 358 Mich. 163, 99 N.W.2d 627 (1959), involved the alleged failure of the automobile manufacturer to take remedial measures after learning, soon after the model was put on the market, of its propensity to lose its brakes. The court therein adopted a rule that a post-sale duty to warn arises "when a latent defect which makes the product hazardous becomes known to the manufacturer shortly after the product has been put on the market."

Particularly with regard to manufacturers of ethical pharmaceuticals, the courts have interpreted the duty to warn as extending to a "continuous duty" to remain apprised of new scientific and medical developments and to inform the medical profession of pertinent developments related to treatment and side effects.

## § 17.06 Strict Products Liability for Misrepresentation [374-382]

### [A] *Restatement § 402B*

The modern rule for liability without fault for misrepresentation is stated at Restatement § 402B:

> One engaged in the business of selling chattels who by advertising, labels, or otherwise, makes to the public a misrepresentation of material fact concerning the character or quality of a chattel sold by him is subject to liability for physical harm to a consumer of the chattel caused by justifiable reliance upon the misrepresentation, even though (a) it is not made fraudulently or negligently, and

(b) the consumer has not bought the chattel from or entered into any contractual relation with the seller.

One decision having an enormous influence upon this rule is *Baxter v. Ford Motor Co.*, 12 P.2d 409 (Wash. 1932), which involved the manufacturer's claim that its windshield glass "will not fly or shatter under the hardest impact."

Under § 402B the action is perfectly straightforward: The plaintiff proves the representation; his reliance on it; its falsity; and his resulting injury. The seller is liable because whatever he sold was not as he represented it to be. If a product is publicly advertised to be "safe" for use, its seller will be liable even to one whose injury from its use was the result of a rare adverse reaction, the injured consumer being as much entitled as anyone else to rely on the advertised assurance.

Comment j to § 402B states a requirement that plaintiff's reliance upon the representation be reasonable.

### [B] *Section 402B and Advertising*

The reach of § 402B extends to the seller who "by advertising, labels, or otherwise, makes to the public a misrepresentation." Advertising in all of its forms was the focus of the provision's concern. "Puffing" or "sales talk" will not form the basis for an action.

## § 17.07 The Restatement (Third) of Torts: Products Liability

### [A] *Introduction*

The Restatement (Third) rejects the distinction between negligence, warranty and strict products liability, and instead promotes one unitary "products liability" theory based on the type of defect alleged. The Restatement (Third) divides liability rules based on whether the product is deemed to have a "design," "manufacturing," or "inadequate instructions or warnings." The products liability rules in Restatement (Third) applies to commercial sellers in the business of selling or distributing products, including the manufacturer, wholesaler, and retailer.

### [B] *Manufacturing Defects*

Under Restatement (Third) § 2(a), "[a] product. . .contains a manufacturing defect when the product departs from its intended design even though all possible care was exercised in the preparation and marketing of the product."

In essence, Restatement (Third) adopts a strict liability approach to aberrational individual products that inadvertently failed to conform to the product's intended design. There is no need for the plaintiff to prove negligence or carelessness. Since negligence is not a prerequisite, liability can be imposed against the retailer even if the manufacturer is at fault for the defect.

### [C] *Design Defects*

Restatement (Third) § 2(b) defines a product as "defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design. . .and the alternative design renders the product not reasonably safe." Thus the Restatement (Third) rejects the Restatement (Second)'s consumer expectation approach for strict liability and utilizes what is effectively a risk versus benefit evaluation of the product's design. The test, as noted above, is intended to replace independent negligence, warranty, and strict liability causes of action. The Restatement (Third)'s design defect test is reminiscent of a negligence risk versus benefit test, but focuses on the product itself, rather than the designers. Once the product is deemed defective and not reasonably safe, all of the commercial sellers in the chain of distribution are liable for injuries caused by the defect.

The requirement of an alternative feasible design has generated controversy.

### [D] *Inadequate Instructions or Warnings*

The Restatement (Third) § 2(b) characterizes a product as "defective because of inadequate instructions or warnings when the foreseeable risk of harm posed by the product could have been reduced or avoided by the provisions of reasonable instructions or warnings[.]"

The Restatement (Third) utilizes a standard based on "reasonableness in the circumstances" and considers various factors including "content and comprehensibility, intensity of expression, and the characteristics of the expected user groups."

### [E] *Prescription Drugs and Medical Devices*

The Restatement (Third) has special provisions for prescription drugs and medical devices. These provisions provide that these medical products are not defective in design as long as the drugs or devices would be sufficiently therapeutic for "any class of patients" to prompt a reasonable health provider, knowing its foreseeable risks and benefits, to prescribe the drug. Special provisions also recognize that in many instances warning to the prescribing health professional or "learned intermediary" is sufficient unless the manufacturer knows or has reason to know the health provider is not in a position to reduce the risk and reasonable warnings should be directed toward the patient.

### [F] *Defenses*

The Restatement (Third) endorses the current majority position that plaintiff's recovery for injury caused by a product defect can be reduced when the plaintiff fails to conform to the appropriate standard of conduct. Consequently, comparative negligence is an affirmative defense.

# PART E. OTHER TORTS
# Chapter 18
# NUISANCE AND TRESPASS

## § 18.01 Nuisance [384-400]

### [A] *Overview*

Nuisance arises from an allegation of injury to person or property. As in other areas of tort, the injury need not be physical, and can include injury to rights or property enjoyment. The law of nuisance recognizes two distinct categories of claims: private nuisance and public nuisance. Defendant's conduct may create an actionable public nuisance when it interferes with the public health, safety or welfare. It may constitute a private nuisance when it interferes with another's current possessory or beneficial interest in the use or quiet enjoyment of land.

The complainant in private nuisance needn't own the property; he need only be a lawful occupant or the holder of one or more other use rights. In contrast, for a suit in public nuisance, the complainant needn't have a property interest in any property affected by defendant's conduct. A defendant may incur liability in both private and public nuisance.

### [B] *Nuisance and Trespass Distinguished*

A claim in trespass ordinarily seeks damages for a physical intrusion onto property. Where the intrusion is permanent, or if it is serious or persistent, the suit sounds in trespass. In contrast, when the defendant's conduct creates conditions of noise, lights, odor or vibration that interfere with the plaintiff's quiet enjoyment of the property, but do not interrupt the plaintiff's possessory interests, the claim is more properly brought in private nuisance.

#### [1] Continuing Nuisance and Trespass; Permanent Nuisance and Trespass

The laws of nuisance and of trespass distinguish between "continuing" and "permanent" nuisance and trespass. A nuisance or trespass is "continuing" (or "temporary") if it could be discontinued or abated at any time, such as an industrial activity that causes airborne pollution. A "permanent" nuisance or trespass is an interference or an intrusion that has no ready means of abatement. For a "permanent" condition, a single statute of limitations will apply, while for a "continuing" condition, the statute of limitations is tolled anew each day the activity continues.

### [C] *Private Nuisance*

#### [1] Elements

##### [a] Unreasonable Interference

A private nuisance is an "unreasonable interference" with the use or enjoyment of the owner or possessor's use or enjoyment of a property interest. It might take a wide range of forms, from the pollution of a residence's well water; or the creation of a sulphurous smell within a downtown financial district.

**[b] Current Possessory Interest**

The private nuisance claim can only be brought by one with a current possessory or beneficial interest in the property.

**[c] Intentional or Unintentional Conduct**

Restatement § 822 establishes liability in private nuisance for an "invasion of another's interest in the private use and enjoyment of land" where the invasion is "(a) intentional and unreasonable, or (b) unintentional and otherwise actionable under the rules controlling liability for negligent or reckless conduct, or for abnormally dangerous conditions or activities." For a defendant's act to be "intentional", he need only have intended the act (*i.e*., discharge of industrial smoke from a facility's smokestack). He need not have intended or desired that the smoke would alight elsewhere. When the act is "unintentional", or accidental, liability only follows a showing that the defendant's conduct was negligent, reckless, or constituted an abnormally dangerous activity. In nuisance actions, the intentional character of a defendant's conduct may be proved circumstantially, for example, by means of the permissible inference that a manufacturer knows that toxins leaving its industrial chimney will necessarily land on another's property. [*Bradley v. American Smelting*, 709 P.2d 782 (Wash. 1985).]

**[2] Nature of the Interest Interfered with**

The particular use to which a property is put, and the sensitivities of the persons using the property, are proper factors in evaluating if defendant's conduct constitutes an unreasonable interference that rises to the level of a nuisance.

Some decisions distinguish nuisance *per se* from nuisance *per accidens*. A nuisance *per se* would be any act that constitutes a nuisance under any circumstances, such as the permanent chronic contamination of plaintiff's property, or the maintenance of a house of ill repute. Nuisance *per accidens* requires the fact finder's evaluation of whether, "under all the surrounding circumstances . . . [the acts] substantially interfer[e] with [plaintiff's] comfortable enjoyment[.]" [*Vickridge v. Catholic Diocese*, 510 P.2d 1296 (Kan. 1976).]

A private nuisance action may not be maintained by a remote vendee against a prior seller of property. [*Philadelphia Electric Company v. Hercules, Inc*., 762 F.2d 303 (3d Cir. 1985).] Diminished property values due to public "stigma" concerning potential contamination will not be the subject of a nuisance action absent a showing of an actual or a factually predictable encroachment upon the property. [*Adkins v. Thomas Solvent Company,* 487 N.W.2d 715 (Mich. 1992).]

### [3] Corrective Justice and Utilitarianism

The tort policies of corrective justice and utilitarianism are in sharp conflict in the law of nuisance. The right to an injunction or to an order of abatement, under the corrective justice approach, holds true no matter how great the economic interest of defendant's conduct. The utilitarian approach, in contrast, invites a comparison of the value of the defendant's conduct with the injury sustained by the plaintiff, and may lead to a conclusion that upon payment of damages, the defendant's activity may continue.

The Restatement attempts to reconcile the corrective justice approach with the utilitarian one. Restatement § 826 provides that an intentional invasion of another's use of land is unreasonable if "the gravity of the harm outweighs the utility of the conduct[.]" Where, in contrast, the utility of defendant's conduct outweighs the burden on plaintiff, and money damages can compensate for plaintiff's harm without causing financial ruin to defendant, money damages, and not an injunction, may be an appropriate response.

While not expressly relying upon Restatement § 826, in *Boomer v. Atlantic Cement Co., Inc.,* 257 N.E.2d 870 (N.Y. 1970), the New York Court of Appeals effectively accepted the Restatement's invitation to permit nuisance-creating but beneficial activities to continue their operations upon the condition that they compensate neighboring landowners for their hardship. *Boomer* recognized that to deny the injunction was to depart from the corrective justice-no balancing approach discussed above, but held nevertheless that it was "fair to both sides to grant permanent damages to plaintiffs which will terminate this private litigation." The grant of permanent damages to the plaintiffs before the court would not be an invitation for further and future litigation as the award would be entered as a servitude on the land of each plaintiff, precluding litigation by future occupiers of the land.

## [D] *Public Nuisance*

### [1] Generally

Public nuisance is defined widely as "an unreasonable interference with a right common to the general public." Restatement § 821B. That section states that "circumstances" for such evaluation include: "(a) whether the conduct involves a substantial interference with the public health, the public safety, the public peace, the public comfort or the public convenience, or (b) whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect and, to the actor's knowledge, has a substantial detrimental effect upon the public right."

### [2] Proper Complainants

A public nuisance suit may be brought by a public official or a public agency, or it may be brought by a private individual or business that has "suffered harm of a kind different from that suffered by other members of the public[.]" Restatement § 821C. For private

party public nuisance claimants, this predicate showing of injury "different in kind" from that suffered by the public generally is known as the "special injury" rule.

For a public nuisance suit seeking an injunction or an order of abatement, plaintiffs may be: (1) a public body or agency bringing suit on behalf of the public; (2) a private party that, as above, has suffered "special injury," *i.e.*, injury "different in kind" from that suffered by other members of the public; or (3) the class representative(s) of a class action; or (4) one with standing to bring a "citizen" suit under state or federal law.

For the most part, the public nuisance remedy is enforced by a government body, such as a town, on behalf of the public. For example, a municipality might lodge a claim in public nuisance against a manufacturing facility discharging chemical effluent that is contaminating a nearby lake, killing aquatic life and precluding recreational sports and swimming.

Defendant's conduct may create a cause of action in public nuisance even where "neither the plaintiff nor the defendant acts in the exercise of private property rights." [*Philadelphia Electric Co. v. Hercules, Inc.*, 762 F.2d 303 (3d Cir. 1985).] For example, in *Burgess v. M/V Tomano*, 370 F. Supp. 247 (D. Me. 1973), commercial clam diggers and fishermen were permitted to pursue a public nuisance claim, premised on an off coast oil spill, even though it was "uncontroverted" that "the right to fish or to harvest clams in Maine's coastal waters is not the private right of any individual, but is a public right held by the State 'in trust for the common benefit of the people.'"

**[3] Special Injury Rule**

While suits in public nuisance are usually brought by public bodies, such as a state or a political subdivision, under certain circumstances a private individual may sue in public nuisance. An individual may sue another in public nuisance where he proves that there is a substantial interference with a right common to the public, and additionally, that he has suffered special harm that differs in type or quality from that burdening the public.

To illustrate, in the lake contamination example above, it would not suffice for a recreational fisherman or a swimming enthusiast to bring an action in public nuisance claiming that the defendant's conduct interfered with those pursuits. Such claims would be mere statements that the complainants suffered the same harm sustained by the community in general, with no claim that they suffered a harm different in type of quality from that of the community. On the other hand, what if our potential plaintiff owned the fishery with the contract to stock the lake with trout fingerlings on a periodic basis, and if his contract with the town was canceled because the water became polluted, his injury could be characterized as "special" as it was qualitatively different from that suffered by the community at large.

Regarding commercial fishing and other maritime harvesting, one court has stated, "in substantially all of those cases in which commercial fishermen using public waters have sought [nuisance] damages for the pollution or other tortuous invasion of those waters,

they have been permitted to recover[,]" in that each can show "he has suffered a damage particular to him – that is, damage different in kind, rather than simply in degree, from that sustained by the public generally." [*Burgess v. M/V Tomano*, 370 F. Supp. 247 (D. Me. 1973).]

Personal physical injury is ordinarily held to be "special injury" under public nuisance doctrine. The rational for so holding was stated by the court in *Anderson v. W.R. Grace & Co.*, 628 F. Supp. 1219, 1233 (D. Mass. 1986), involving a claim by residents that defendant's introduction of toxic chemicals into groundwater caused severe personal injuries, including childhood leukemia. Finding plaintiffs could, as individuals, bring a claim in public nuisance, the court explained: "[W]hen a plaintiff has sustained 'special or peculiar damage,' he or she may maintain an individual action . . . Injuries to a person's health are by their nature 'special and particular,' and cannot properly be said to be common or public[.]" The court held further that the plaintiffs could recover compensatory damages for the special injuries suffered, including "(1) the loss in rental value of their property, if any, (2) compensation for physical injuries, and (3) upon a showing of independent personal injury, damages for emotional distress."

**[4] Environmental Harm**

Public nuisance is a potentially potent claim for governmental bodies seeking to interdict generators and disposers of hazardous waste. Representative is a New York appellate court's decision in *New York v. Schenectady Chemicals, Inc.*, 459 N.Y.S.2d 971 (App. 1983). In that decision, the chemical firm had hired an independent contractor to dispose of waste, which contractor simply dumped raw wastes into lagoons directly above a major aquifer serving thousands of residents. Bringing suit based in part upon public nuisance theories, the State asserted that Schenectady created a public nuisance by the manner in which the wastes were disposed. In holding for the State, the court reasoned that Schenectady had created the public nuisance, and that further it was responsible for the actions of its independent contractor, concluding that "everyone who creates a nuisance or participates in the creation or maintenance of a nuisance are liable jointly and severally for the wrong and injury done thereby[.]"

**[5] Economic Loss**

What of an otherwise actionable nuisance from which plaintiff suffers economic loss, such as lost use or business down time, but no personal physical injury or property damage? The leading decision in *Louisiana ex rel. Guste v. M/V Testbank,* 752 F.2d 1019 (5th Cir. 1985), involved a collision of the M/V Sea Daniel, an inbound bulk carrier, with the outbound M/V Testbank in the Gulf outlet of the Mississippi River. Containers on the Testbank containing PCP's were lost overboard. Over 40 lawsuits were brought by local fisherman, owners of seafood restaurants, marina and boat rentals, tackle and bait shops and the like, claiming loss of business. The defendant moved for summary judgment for all claims based on economic loss unaccompanied by physical damage to property. The trial court granted the defendant's motion as to most of the shore-based businesses, but preserved the claims asserted by commercial oystermen, shrimpers, crabbers and

fishermen who had made commercial use of the waters. The court found that the commercial fishing interests deserved special protection. See also *Pruitt v. Allied*, 523 F. Supp. 975 (E.D. Va. 1981), arising from the damage to marine life following the defendant's discharge of Kepone into James River and Chesapeake Bay.

#### [6] Prospective Nuisance

A court may grant an injunction or an order of abatement to turn away the risk of future harm where the risk of harm is substantial and the harm is imminent. In *Village of Wilsonville v. SCA Services, Inc*., 426 N.E.2d 824 (Ill. 1981), the defendant operated a chemical-waste landfill above an abandoned mine, and evidence indicated that there was a possibility that pillar support failure could occur. The state high court concluded that the plaintiffs had sufficiently established by a preponderance of the evidence that the chemical-waste disposal site was a nuisance both presently and prospectively.

## **§ 18.02 Trespass** [400-404]

### [A] *Overview*

Trespass protects a plaintiff's interest in the surface land itself, the earth or other material beneath the surface, and "the air space above it." [Restatement § 158 cmt. i.] Depending upon the seriousness of the contamination of plaintiff's land or environment, defendant may be liable in trespass where the pollution or contamination interferes with plaintiff's possessory rights in the land, the land beneath it, or the ambient air.

Restatement § 158 provides:

> One is subject to liability to another for trespass, irrespective of whether he thereby causes harm to any legally protected interest of the other, if he intentionally (a) enters land in the possession of the other, or causes a thing or a third person to do so, or (b) remains on the land, or (c) fails to remove from the land a thing which he is under a duty to remove.

In trespass, the interest protected is the right of "exclusive possession and physical condition of land." [Restatement § 157 *et seq*.] Accordingly, a plaintiff pursuing a cause of action based on trespass must satisfy the court that he has a "possessory interest" in the property.

Unlike claims in nuisance that can only be pursued by one with a current possessory or beneficial use interest in a property, a claimant in a trespass suit does not have to be the property's current or immediately prospective occupant. Restatement § 157 defines "possession" in the trespass context in such a way as to include one with a reversionary interest, such as a landlord or other owner not in current possession of the land or premises, if no other person is in current possession.

### [B] *The Requirement of Intent*

Trespass is an intentional tort, and plaintiff must prove that an alleged trespasser had the requisite mental state to commit the tort. Restatement § 8A states that the word "intent" is used in tort law ". . . to denote that the actor desires to cause the consequences of his act, or that he believes that the consequences are substantially certain to result from it." Thus, a hiker's unwitting intrusion onto the land of another may nonetheless be considered "intentional" in the sense that the hiker intended that his feet, step by step, advance his hike, and similarly intended that his steps would take him onto the land. [See generally § 1.01[B], [C], supra.]

An actor's awareness of the high degree of likelihood that a trespass will result from his activities may be proved circumstantially, as it was in *Bradley v. American Smelting,* 709 Wash. 2d 782 (Wash. 1985), in which a smelter's tall smokestack alone evidenced its knowledge that trespassory particulate matter could be dispersed, but not eliminated, through release high above ground. Accordingly, plaintiff need not prove that the defendant subjectively desired to trespass on the property. Plaintiff must only prove that defendant intended the act that resulted in the trespass, *i.e*., that defendant's act was volitional, and done with knowledge to a substantial certainty that the act would result in introduction of the substance onto plaintiff's property. [Restatement § 158 cmt. i.] For this reason defendant may not defend an action in trespass by proving that he acted with even a reasonably mistaken belief that his actions were authorized by plaintiff, or that the property was owned by another who had given apparent consent to the intrusion. [Restatement § 164.]

### [C] *The Requisite Physical Invasion and Harm*

In most jurisdictions, invasions of plaintiff's property that amount to trespass may also, if they interfere with plaintiff's use and enjoyment of the property, be actionable in nuisance. In such circumstances, "plaintiff may have his choice" of a claim in trespass or in nuisance, "or may proceed upon both." [Restatement § 821D cmt. e.]

At common law, an actionable trespass was complete upon the tangible invasion of another's property. Nuisance, in contrast, requires a showing that defendant's conduct, invasory or otherwise, constitutes a "substantial and unreasonable" interference with plaintiff's use and enjoyment. The requirement that a trespass involve invasion by a "thing" was considered and rejected by the Oregon Supreme Court in *Martin v. Reynolds Metals Co*., 342 P.2d 790 (Or. 1959), a claim involving the settling upon plaintiff's property of gaseous and particulate fluorides from defendant's aluminum smelter.

Rejecting defendant's claim that plaintiff's claim should fail for want of any tangible trespassory "object" or "thing," the court answered: "[I]n this atomic age even the uneducated know the great and awful force contained in the atom and what it can do to a man's property if it is released[,]" and found that the entry of invisible gases or

microscopic particles may alone constitute a trespass. Several other courts have declined to follow *Martin* in this regard.

The invasion of plaintiff's property need not be direct, if plaintiff can prove that an intentional act of defendant resulted in the harm. Thus the causal intervention of natural conditions, such as deterioration, wind, or rain, in initiating or exacerbating the trespass will not absolve defendant of liability. [Restatement § 158 (citing examples).]

As in the doctrine of continuing nuisance, a polluter's failure to remove a pollutant or a contaminant from plaintiff's land may represent a "continuing" tort, a finding that can operate to relieve some of the strictures of limitations periods within which the possessor would have to bring a toxic tort claim. [Restatement § 161 cmt. b.]

That the plaintiff may be entitled to an injunction or to nominal damages for a technical or minimal trespass does not resolve the question of what level of harm plaintiff must show to receive compensatory damages. The leading Alabama decision of *Borland v. Sanders Lead Co.*, 369 So. 2d 523, 529 (Ala. 1979), involving the spilling of piled asphalt onto the plaintiff's property phrased the requirement in terms of "substantial" harm to the res.

# Chapter 19
# ECONOMIC TORTS

## § 19.01 Fraudulent Misrepresentation [406-413]

### [A] *Overview and Definition*

The tort of fraudulent misrepresentation or deceit provides for recovery for pure economic loss, unassociated with other injury.

The tort consists of five elements: (1) a material misrepresentation; (2) the defendant acted with the requisite scienter: she knew the statement was false or made it with reckless disregard as to its truth or falsity; (3) the defendant intended to induce reliance; (4) the misrepresentation caused plaintiff's justifiable reliance; (5) pecuniary damages resulted to the plaintiff. [See Restatement § 525; see also *Lesser v. Neosho County Community College*, 741 F. Supp. 854 (D. Kan. 1990).]

### [B] *Past or Present Fact*

As a general rule the misrepresentation by the defendant must be of a past or present material fact. Misrepresentation of a present intention is accepted by a majority of courts as a misrepresentation of a "present" fact. [See Restatement § 530.] Consequently, a fraudulent promise, where the defendant at the time of the promise has no intention of keeping it, satisfies this requirement.

### [C] *Opinions*

Misrepresentations of opinion are usually not actionable. Exceptions include opinions by experts to non-experts, fiduciaries, and defendants who mislead a victim as to their objectivity. [See Restatement § 542; see also, e.g., *Oltmer v. Zamora*, 418 N.E.2d 506 (Ill. 1981).]

### [D] *Duty to Disclose*

Traditional law did not require a duty to disclose. Modern law now requires disclosures under special circumstances, including when the defendant owes a fiduciary duty, where the defendant has concealed material information or misled the victim earlier. [See, e.g., *Ensminger v. Terminix International*, 102 F.3d 1571 (10th Cir. 1996).] Restatement § 551 also imposes a duty to disclose "facts basic to the transaction" when custom or other circumstances would expect disclosure to correct a potential victim's mistake.

### [E] *Third Party Reliance*

The defendant must have intended the victim to rely on the misrepresentation or have "reason to expect" it will influence another in the "type of transaction" involved. [See Restatement § 533 also in caveat expressing no opinion whether liability to others should

go further; see also *New Jersey Carpenters Health Fund v. Philip Morris, Inc.*, 17 F. Supp. 2d 324 (1998).]

**[F] *Justifiable Reliance***

Whether reliance is "justifiable" depends on the "circumstances" of the case and "qualities and characteristics" of the particular plaintiff. [See Restatement § 545A cmt. b; see also *Nader v. Allegheny Airlines, Inc.*, 626 F.2d 1031 (D.C. Cir. 1980).]

**§ 19.02 Intentional Interference with Contract and Intentional Interference with Economic Expectation** [413-419]

**[A] *Overview***

The two torts of intentional interference with contract and intentional interference with economic expectation protect parties from intentional disruptions in economic relationships. While the two torts have similar basic elements, the tort of intentional interference with economic expectation recognizes more circumstances under which the defendant's interference is not deemed improper.

The tort of intentional interference with contract allows recovery when the defendant intentionally interferes with a valid contract between *other* parties. [See Restatement § 744.]

The parallel tort of intentional interference with economic expectations, or prospective contractual relations, allows recovery when the defendant intentionally and unjustifiably disrupts the victim's economic expectations not embodied in an actual contract. [See Restatement § 766B.]

**[B] *Definitions***

The elements of the two torts are parallel. Interference with contract requires a valid contract while interference with economic expectation requires a legitimate economic expectancy. The elements of the two torts are, respectively:

(1) A valid contract or economic expectancy between the plaintiff and a third party.
(2) Knowledge of the valid contract or economic expectancy by the defendant.
(3) Intent by the defendant to interfere with the contract or economic expectancy.
(4) Interference caused by the defendant.
(5) Damages to plaintiff.

This tort is applicable only to the intermeddler who disrupts a contract or other economic relationship between other parties and is not applicable to parties who may breach or disrupt their own contracts or economic relationships. [See, e.g., *Texaco, Inc. v. Pennzoil*, 729 S.W.2d 768 (Tex. App. 1987), *reversed and remanded*, 485 U.S. 994 (1988).]

### [C] *Justifications for Interference*

There are recognized sets of circumstances which justify both interference with a valid contract and interference with valid economic expectations. These include (1) statements of truthful information or honest advice within the scope of a request; (2) interference by a person responsible for the welfare of another while acting to protect that person's welfare; (3) interference with a contract which is illegal or violates public policy; and (4) interference by someone when protecting his or her own legally protected interests in good faith and by appropriate means.

Additional circumstances will justify only interference with economic expectations or contracts which are terminable at will. These justifications include (1) fair and ethical competition or (2) ethical action to protect one's financial interest.

Restatement § 767 authorizes the jury to determine on a case-by-case basis other instances when interference with economic expectancy or contract is not improper.

## § 19.03 Tortious Breach of the Covenant of Good Faith and Fair Dealing

In each contract, there is an implied covenant of good faith and fair dealing. The purpose of the implied covenant is to allow for the terms of contracts to be interpreted fairly. Consequently, what constitutes a breach of the covenant depends on the particular terms of the contract.

While the covenant is in essence an implied contract term, occasionally courts have held that the breach of the implied covenant of good faith and fair dealing can also constitute a tort. [See, e.g., *Crisci v. Security Ins. Co.*, 426 P.2d 173 (Cal. 1967).] This allows for tort damages as well as contract damages.

The tortious breach of the covenant of good faith and fair dealing is generally limited to breaches by insurance companies against the insured.

## Chapter 20
## MISUSE OF LEGAL PROCESSES

**§ 20.01 Overview** [423-424]

Three torts – malicious prosecution, the parallel tort of malicious institution of civil proceedings, and abuse of process – address misuse of the legal system. Malicious prosecution addresses wrongful criminal prosecution of an innocent defendant in bad faith. Malicious institution of civil proceedings addresses wrongful institution of a civil proceeding against a non-liable defendant in bad faith. Abuse of process addresses the misuse of legal processes within the litigation process.

**§ 20.02 Malicious Prosecution and Malicious Institution of Civil Proceedings: Definition** [424-428]

Malicious prosecution [see Restatement § 653] addresses wrongful criminal prosecutions while malicious institutions of civil proceedings addresses wrongful civil proceedings. [See Restatement §§ 677-679.] Otherwise, the elements of the two torts are similar and generally require: (1) institution or continuation of a criminal or civil proceeding against the accused; (2) termination of the proceeding in favor of the accused; (3) absence of probable cause for prosecution or civil proceedings; (4) improper purpose of the accuser; and (5) damages suffered by the accused.

Traditional common law, unlike the Restatement, requires proof of malice instead of improper purpose. [See, e.g., *Maniaci v. Marquette University*, 184 N.W.2d 168 (Wis. 1971).] Although a prosecutor is immune from liability under malicious prosecution, others who wrongfully instigate a prosecution can be held liable.

**§ 20.03 Immunity of Public Officials** [428]

**§ 20.04 Interaction Between False Imprisonment and Malicious Prosecution and Malicious Institution of Civil Proceedings** [428-429]

**§ 20.05 Abuse of Process** [429-430]

Abuse of process constitutes the intentional misuse of either a civil or criminal legal process such as depositions, subpoenas and property attachments for an ulterior purpose resulting in damage to the plaintiff. [See Restatement § 682.] The use can be wrongful regardless of who ultimately wins the litigation within which the particular legal process has been improperly used. [See, e.g., *Board of Ed. of Farmingdale Union Free Sch. District v. Farmingdale Classroom Teachers Ass'n*, 343 N.E.2d 278 (N.Y. 1975).]

# Chapter 21
# DEFAMATION

## § 21.01 Overview [432]

The law of defamation is particularly intricate due to its unique blend of common law and First Amendment principles. The tort of defamation permits recovery for reputational harm, which was considered a grave injury in socially stratified England. Over time, a number of common law privileges have been recognized, making a plaintiff's defamation case more challenging, however.

## § 21.02 Common Law Defamation [432-442]

At common law, defamation was a strict liability tort. As such, a plaintiff could recover without proving any fault on the part of the defendant. Furthermore, the falsity of the allegedly defamatory statement was presumed. Finally, in most instances, damages were presumed. Thus, in most common law defamation actions the plaintiff only had to prove (1) a defamatory statement (2) about the plaintiff (3) that was "published." The defendant then had the opportunity to try to assert a defense, such as the truth of the statement. Thus, at common law, a defendant could quite unwittingly defame another and be responsible for significant damages.

### [A] *Defamatory Statement*

To be defamatory under the general common law rule, a statement must hold the plaintiff up to scorn, ridicule, or contempt. The Restatement provides that a communication is defamatory if it "tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." [Restatement § 559]. A defamatory statement, is one that harms reputation by injuring a person's general character or causing personal disgrace. A court determines as a matter of law whether any interpretation of the communication could be construed as defamatory, while it is for a jury to decide whether the statement in the case before it is actually defamatory.

#### [1] Defamatory to Whom?

The plaintiff must show that a "substantial and respectable minority" or a "right-thinking minority" would comprehend the defamatory nature of the communication. This group can be quite small. If the group that could interpret the communication in a way that injures the plaintiff's reputation is of a blatantly anti-social nature, courts may deny the plaintiff a defamation action.

#### [2] Statements Not Facially Defamatory: Inducement and Innuendo

Some statements are facially defamatory; nothing needs to be added for a reader to fully understand the defamatory nature of the statement. Other times the defamatory impact can only be understood by the addition of extrinsic information. In such situations the

plaintiff is obligated to plead the extra facts needed to make the statement defamatory ("inducement") or to explain the defamatory impact ("innuendo") if it is not obvious.

### [B] *Of and Concerning the Plaintiff*

The plaintiff must show that the defamatory communication was understood as referring to her. If the plaintiff can show this, it is irrelevant that the defendant did not intend for the statement to refer to the plaintiff. Similarly, even if the defendant intended to create a fictional character, a defamation action will lie where recipients of the communication reasonably believe that the character is really the plaintiff. Where the plaintiff is not expressly named in the communication, the plaintiff must plead "colloquium" to connect herself to the defamatory statement.

#### [1] Group Defamation

Sometimes defamatory communications do not specifically name individuals but ascribe discrediting behavior to unnamed members of a group. If the group is small and the defamatory sting may attach to each group member, each member of the group may bring a defamation action. The larger the group, the less likely it is that a court will permit a defamation action by all the affected group members.

#### [2] Corporate Plaintiffs

Corporations and other business entities may be defamation plaintiffs where the communication tends to cast aspersions on their business character, such as trustworthiness, or deters third parties from dealing with them. Where the attack is on a product, the action is typically for product disparagement.

### [C] *Publication and Republication*

A plaintiff must establish that the defamatory communication was published, meaning that it reached one person other than the defamation plaintiff. The plaintiff must show that either the defendant intended to publish the information or was negligent in so doing. Any repetition of a defamation is considered publication, even if the republisher attributes the statement to the initial source.

### [D] *Damages*

In most defamation cases, a plaintiff's reputational injury may be presumed, permitting the plaintiff to recover compensation without any proof beyond the defamatory nature of the communication. In the defamation context, such damages are called "general damages." General damages provide compensation for the emotional trauma and harm suffered by the plaintiff whose reputation was besmirched. There are situations, however, where the plaintiff must plead and prove a specific type of loss, called "special damages," in order to prevail. Special damages are specific economic losses flowing

from the defamation. If the plaintiff proves these special damages, she may then recover general damages. The damages recoverable to a defamation plaintiff depend on whether the defamatory communication is considered libel or slander and, if slander, whether the defamation falls into a category denominated "slander per se."

#### [1] The Libel/Slander Distinction

Slander is an oral utterance while libel is a more permanent expression.

#### [2] Slander and Slander Per Se

Where the defamation is characterized as slander, the plaintiff generally must meet the substantial burden of pleading and proving special damages. Since early common law, however, certain slanderous statements were deemed so horrible that reputational injury to plaintiffs could be presumed even without any proof of special damages. The four traditional slander per se categories that permit presumed reputational damages absent special damage are: (1) communications that directly call into question the plaintiff's competence to perform adequately in her trade or profession; (2) statements claiming the plaintiff has a current, loathsome disease; (3) allegations of serious criminal misbehavior by the plaintiff; (4) and, suggestions of a lack of chastity in a woman.

#### [3] Libel and Libel Per Quod

Under the traditional view, which remains the position of most jurisdictions and of the Restatement, any libel plaintiff may recover general (presumed) damages. Some states have narrowed this approach, however, and have distinguished libel per se (libel on its face) from libel per quod (libel that requires extrinsic evidence such as inducement or innuendo). In these states, the plaintiff may recover general damages for libel per se. For libel per quod, however, the plaintiff must show special damages (as in the slander context) unless the libel falls into one of the slander per se categories.

### [E] *Common Law Defenses*

Because at common law a plaintiff could often establish a prima facie case of defamation quite easily, the defendant often had to look to the available defenses in order to avoid liability.

#### [1] Substantial Truth

At common law, the defamatory communication was presumed false, and it was incumbent upon the defendant to establish truth as a defense. While the defendant had to show the accuracy and truth of the statement in issue, she did not have to show the literal truth of every aspect – substantial truth is the test.

### [2] Absolute Privileges

There are a few contexts that rely so heavily on unfettered discourse that the law provides immunity from defamation liability. These absolute privileges typically arise in governmental proceedings involving judicial, legislative and executive communications. In the judicial context, statements made in court or in official court papers are absolutely privileged as long as relevant to the court proceeding. A similar absolute privilege applies to legislators and high-level executive officers. An absolute privilege protects a defendant even if she knew the statement was false or published it in order to harm the plaintiff's reputation.

### [3] Qualified Privileges

Qualified (or conditional) privileges have developed due to the recognition that there are certain interests which could be seriously impaired by the common law's strict liability approach to defamation. Qualified privileges are based on the social utility of protecting communications made in connection with the speaker's moral, legal or social obligations. These privileges can be lost in several ways: by failing to have an honest belief that the statement was true; by failing to have an objectively reasonable belief that the statement was true; or by disclosing the information to more people than necessary (that is, excessive publication). Another important qualified privilege in many jurisdictions is the "fair and accurate report" privilege. This privilege permits a report of public meetings, and probably information in public records, provided that the report is an accurate and unbiased account.

## § 21.03 Constitutional Constraints [442-450]

Until 1964, defamation law was entirely defined by the law of the states without any constraints imposed by the United States Constitution. Since 1964, however, there has been a "constitutionalization" of defamation law. As the Court's constitutional defamation jurisprudence has developed, an analysis of a defamation case typically requires a consideration of the status of the plaintiff (whether she is a public official, public figure or private person) and of the subject matter of the defamation (whether it is of public or private concern).

### [A] *Public Officials*

The constitutionalization of defamation law began with the Supreme Court's 1964 decision of *New York Times v. Sullivan*, 376 U.S. 254 (1964), in which the Court held that a public official could only prevail in a defamation action where the public official shows that the defendant either knew that the statement was false or recklessly disregarded whether the communication was false, a fault standard known as "actual malice." The Court also required that this actual malice standard be proven by "convincing clarity," which has been interpreted as requiring the plaintiff to establish actual malice by the heightened burden of proof of "clear and convincing evidence." The

*Sullivan* decision only affects defamation actions against public officials, those individuals who are positioned to affect policy.

### [B] *Public Figures*

The constitutionalization of defamation law continued in earnest when a few years after *Sullivan* the Court determined that "public figures," like public officials, should have to prove actual malice in order to prevail in defamation actions. The Court justified this move by noting that public figures generally have access to the media to counteract false communications and because they have assumed the risk of reputational harm by involving themselves in issues of importance. The Court has recognized two general categories of public figures: an all-purpose public figure, who is someone widely known and a limited public figure, who is a person who injects himself into a controversy (or gets drawn into one). The Supreme Court has narrowly circumscribed the public figure category as the Court has been aware that classifying a person as a public figure has a profound impact on that individual's ability to receive compensation for reputational harm.

### [C] *Private Persons*

The current state of the law in the private plaintiff context requires that the subject matter of the defamation be analyzed to discern whether it deals with matters of public concern or matters of private concern.

#### [1] Public Concern

The Supreme Court's decision of *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), lays out the complex rules in the private person/public concern context. The Court determined that states could permit private plaintiffs to recover damages for "actual injury," defined as proven "impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering," under any standard other than strict liability. The Court held that the tougher fault standard of actual malice was appropriate when the plaintiff sought either presumed damages or punitive damages.

#### [2] Private Concern

The exact standard remains uncertain because the Court has yet to clarify its decision in *Dun & Bradstreet v. Greenmoss, Inc.*, 472 U.S. 749 (1985). In *Dun & Bradstreet*, the plurality held that the Constitution does not require that a private plaintiff suing in a case involving a matter of private concern prove actual malice to recover presumed and punitive damages.

### [D] *Actual Malice*

The fault standard of actual malice requires the plaintiff to prove that either the defendant knew of the falsity or was reckless as to truth or falsity. A plaintiff must prove that the

defendant was at least reckless, a standard compelling proof that the defendant had "in fact entertained serious doubts as to the truth of his publication."

**[E]** ***Falsity***

The Supreme Court has determined that in cases involving public officials, public figures, or private figures and public concern, the Constitution mandates that the plaintiff prove falsity as part of her prima facie case.

## Chapter 22
## INVASION OF PRIVACY

**§ 22.01 Overview** [451-452]

The Restatement has defined four separate torts for invasion of privacy: intrusion upon seclusion, appropriation of plaintiff's name or picture, placing the plaintiff in a false light before the public, and public disclosure of private facts. [See generally Restatement § 652A.] All four privacy torts enjoy general judicial acceptance today.

**§ 22.02 Intrusion Upon Seclusion** [452-453]

The Restatement § 652B defines the tort as: "One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person."

The tort addresses acts of intrusion and other interferences with a victim's "zone of privacy." There is no requirement that information be obtained or communicated; it is the intrusion itself that constitutes the interference. While such interference may also constitute trespass, there is no requirement that trespass be committed. [See, e.g., *Pearson v. Dodd*, 410 F.2d 701, 704 (D.C. Cir. 1969), *cert. denied*, 395 U.S. 947 (1969).]

**§ 22.03 Appropriation of Name or Picture and the Right of Publicity** [453-455]

The Restatement § 652C defines the tort as: "One who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy."

The tort applies to an unauthorized endorsement of a product. [See, e.g., *Flake v. Greensboro News Co.*, 195 S.E. 55 (N.C. 1938).] It does not, however, apply to journalistic articles or books about a person.

**§ 22.04 False Light** [455-457]

The privacy tort of false light overlaps in large measure with defamation.

The elements of false light which must be established by all plaintiffs include the defendant's (1) publicizing (2) false facts (3) that a reasonable person would object to. [Restatement § 652E.] In the case of a matter of public interest, all plaintiffs (public or private) must in addition establish that the defendant acted with *New York Times* malice (knowledge of falsity or reckless disregard toward the truth). [See *New York Times v. Sullivan*, 376 U.S. 254 (1964).]

False facts that a reasonable person would object to encompass a broad category that includes, but is not limited to, defamatory statements actionable under defamation. [See, e.g., *Time v. Hill*, 385 U.S. 374 (1967).]

**§ 22.05 Public Disclosure of Private Facts** [457-460]

The tort elements include (1) publicity of (2) private facts (3) highly offensive to a reasonable person which are (4) not of a legitimate public interest. [See Restatement § 652D.]

The requirement that the facts be private has been rigorously enforced by courts. For example, the United States Supreme Court has held in two cases that information even unintentionally placed in the public record and thus subject to inspection cannot be actionable under the First Amendment. [See *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975); *The Florida Star v. B.J.F.*, 491 U.S. 524 (1989).]