

## Torts Outline – Kalt – Fall 2021

- I. Intentional Torts
  1. Compensate victims
  2. Allocate liability
  3. Minimize costs of accidents, administering tort systems
- B. Intent – Required element of intentional torts.
  1. Requirement
    - a. Purpose is to bring about the consequence
    - b. OR, Knowledge with Substantial Certainty (**KSC**) that consequence **will** result
  2. Minority of states: minors incapable of having intent until a certain age
  3. Mistakes will not vitiate intent, Dog killed by accident when hunting wolves, still intent
  4. Insanity does not vitiate intent, ex/ crazy person hits someone thinking they are demon
  5. Transferred Intent to commit tort against A, but happens to B by accident
    - a. Transferability through only intentional torts (does not include IIED or conversion)
  6. Transferred intent from type of tort. Intended to commit assault but committed battery
- C. Battery
  1. Intent
  2. Harmful or offensive touching
    - a. Touching can be something plaintiff is holding or wearing
- D. Assault
  1. Intent
  2. Reasonable apprehension of imminent battery
    - a. Even if a battery was impossible, it may be reasonable to think it imminent
    - b. Apprehension means plaintiff expected the imminent battery, fear not required
    - c. Imminent means imminent, not a threat of a future battery
- E. False Imprisonment
  1. Intent
  2. Plaintiff knowingly confined or restrained in a bounded area
    - a. Could be physical barriers, by force or threat of force, threats to reputation or property
    - b. Volunteering to stay in a location from persuasion of defendant will generally not be considered confinement
    - c. A plaintiff must know they are confined at the time
    - d. some states allow actual injury to substitute for knowledge, no majority rule
  3. Defendant lacked legal authority to detain
  4. False Arrest- subset of FI
    - a. Arrest is proper if Defendant has proper authority AND
      - i. Plaintiff is convicted of what they were arrested for, OR
      - ii. Defendant had a warrant, OR
      - iii. Defendant had probable cause
- F. Intentional Infliction of Emotional Distress - Courts set the bar high to meet these elements
  1. Intent to cause severe emotional distress
    - a. No transferred intent here, defendant must intent to commit THIS tort to THIS defendant
    - b. Some jurisdictions will substitute recklessness for IIED intent. No majority rule.
  2. Extreme and outrageous conduct by defendant
  3. Causes plaintiff severe emotional distress
  4. Damages are required for IIED (unlike other intentional torts).
- G. Trespass to Land

1. Intent
  2. Invasion of real property
    - a. Invasion can be by defendant or any thing or person caused by plaintiff to invade
    - b. small areas above and below the ground will also count
      - i. distance above or below determined by interference with plaintiff's use of land
  3. Property is possessed by plaintiff (if there is no possessor than P must be owner)
  4. There is no authorization from plaintiff
- H. Trespass to Chattels
1. Intent to use or intermeddle with a chattel
  2. Chattel was in plaintiff's possession
  3. Results in:
    - a. Impairing the chattel's condition, quality or value
    - b. Deprives plaintiff of the use of the chattel for a substantial period of time
      - i. If destroyed this would deprive use forever, so it would fit
    - c. Harm to plaintiff or a legally protected interest of plaintiff
- I. Conversion
1. Intentional exercise of dominion over a chattel that so seriously interferes with the right of the owner to control it that the defendant may justly be required to pay the plaintiff the full value of the chattel
  2. Distinct from Trespass to chattel because of remedy and no transferred intent
    - a. Forced sale instead of recovering amount of diminution in value and/or other damages.
  3. Defenses
    - a. If D purchases chattel in good faith from a merchant who sells chattel of that type
    - b. D acquired chattel in good faith and P lost the chattel by means other than theft
- II. Privileges – defenses to Intentional Torts
- A. Consent – defendant reasonable thought plaintiff consented to “tort”
    1. Could be spoken, written, or implied through action or inaction
    2. Consent by mistake is valid unless induced through misrepresentation, fraud, or duress
    3. Most states say plaintiff Cannot consent to a criminal act
      - a. Even in states where plaintiff can consent to criminal act, exceptions exist for laws to protect people in plaintiff's position from defendants' position (ex. Statutory rape)
  - B. Self Defense (usually for battery and assault)
    1. Reasonable belief by defendant that he or she is being attacked or about to be
      - a. A reasonable mistake will not vitiate this privilege. (not actually under attack but believed to be so)
    2. It constituted reasonable force
      - a. Reasonable to use force
      - b. Amount of force used was reasonable
    3. Minority of states require retreat when reasonable safe to do so, usually not required to retreat from your home (castle doctrine)
  - C. Defense of Others (usually for battery and assault)
    1. If a third party would have been able to use self-defense, then defendant can on their behalf
  - D. Defense of Property (usually for trespass to land or trespass to chattel)
    1. Use of reasonable force to prevent damage or theft of property
    2. Reasonable force less for property than people
  - E. Recovery of Property (usually for trespass to chattel or false imprisonment)
    1. Reasonable force to recover chattel
    2. Defendant must be in fresh uninterrupted “fresh pursuit” of plaintiff

3. Mistake do vitiate the privilege, except for shopkeepers as long as they reasonably suspect shoplifting (shopkeepers may temporarily detain customers who may have stolen)
- F. Necessity (for trespass to chattel or land)
1. Reasonably necessary to avoid injury or damage
    - a. Damage must be natural/external
    - b. Substantially more serious than the interference with plaintiff's interests
    - c. Sudden, unexpected, and temporary
  2. Public vs. Private
    - a. Public necessity is absolute, D need not pay for damages to P's property
    - b. Private necessity will require compensation to plaintiff for actual damages
- G. Authority
1. Legal authority to perform a tortious act may be considered non-tortious
  2. Police or Wardens may use reasonable force in their duties
  3. Parents and teachers can use reasonable force to discipline children
- III. Negligence
- A. Overview
1. Duty to plaintiff to exercise some level of care
  2. Breached that duty by exercising less care than required
  3. Defendant action or inaction was the cause of
  4. Damage to plaintiff
- B. Reasonably Prudent Person (RPP) = Duty of ordinary Care = duty of reasonable care
1. Learned Hand Test
    - a.  $B < PL$ , if the burden for the party of avoiding a risk is less than the risk itself then a party is negligent for not undertaking that burden.
      - i. B = Burden of taking steps to avoid risk
      - ii. P = Probability an event will take place
      - iii. L = Loss, magnitude of harm if it occurs.
  2. RPP – a person of ordinary intelligence, perception, and memory with the physical characteristics, abilities, and disabilities of the actor, and any relevant additional specialized knowledge, skills, or experience that the actor has.
  3. Customary Practice can be used as evidence of care (or lack thereof) by a RPP.
    - a. It is not an absolute as a matter of law, but it is often persuasive evidence
    - b. if the whole town is earthquake proofing their buildings and you are not it is likely that the court will find a reasonable person would have earthquake proofed.
    - c. The question remains, "what would a reasonably prudent person have done?" NOT: "was the custom followed?"
  4. Children held to a mostly subjective standard, slightly different than normal RPP
    - a. Instead consider reasonable child of similar age, intelligence, maturity, and experience.
    - b. In some states children under a certain age cannot be considered negligent at all
    - c. Children in certain adult activities will be held to the higher standard (ex. driving ATV)
  5. Insane people also held to the same RPP standard. Mental capacity is not considered for RPP
- C. Professional Standards (doctors, lawyers, accountants, pilots, and other jobs that requires lots of training, education, and are governed by detailed and coherent internal standards.)
1. Professionals when acting within their role are held to the standard of the ordinary member of that profession
  2. Customs in professions are generally proof of negligence or lack there of (unlike RPP)
  3. Medical Malpractice defines standard as that which doctors in the same locality do

- a. This lowers standards in areas with fewer resources so some states use national standard instead.
  - b. Informed Consent- if patient is not told of a risk of injury from a medical procedure, then that risk occurs from the procedure, and patient would have changed their mind about procedure had they known (2 types) no majority rule
    - i. Professional Care – what would an ordinary doctor disclose
    - ii. *Canterbury Standard*- what would a reasonable patient want to know
      - Causation: P must make objective showing that a reasonable patient, in P's position would have changed their mind about procedure had they been informed
  - c. Doctor's also have a duty to disclose any profit or research interests they may have in a treatment
- D. Negligence Per Se (NPS)-violation of statute may satisfy duty and breach elements of negligence
1. NPS is alternative to establishing negligence, not an exclusive one (address both)
  2. Injury at issue is the sort that statute is meant to prevent, and victim is the sort statute is meant to protect
  3. Is the statute appropriate for translation into a civil duty? Factors
    - a. Whether it creates inherent difficulty in proving causation
      - i. Example if Bar Brawl cause injury
    - b. Whether it creates a new duty
      - i. As opposed to specifying or clarifying an existing duty such as a speed limit
      - ii. Look at *Perry Case* – no duty to protect people from third parties
    - c. Whether it provides liability that is too strict
      - i. Example, tail light out causes an accident
    - d. Whether it proves for disproportionate liability
      - i. Small crime, large civil liability
    - e. Whether it represents too vague of a duty
  4. Once established, Duty and breach are established for unexcused violations
    - a. Defendant possible excuses
      - i. Incapacity or reasonable inability to comply
      - ii. Reasonable lack of knowledge of violation (ignorance of facts, not of the law)
      - iii. Emergency or greater harm from compliance than violation
    - b. Minority of states, burden shifts to defendant to show generally that they exercised reasonable care rather than come up with an excuse
    - c. Even smaller minority hold NPS is just evidence of unreasonableness
  5. Compliance with a statute may be evidence of reasonable care, but will not guarantee it
- E. Proof of Negligence
1. Direct evidence is not required, circumstantial evidence is ok if jury can inference
    - a. Puddle on a floor is evidence that someone has not cleaned it in some time
  2. Res Ipsa Loquitur – Usually used to survive a motion to dismiss until more facts are obtained
    - a. Accident is of a type that would not occur unless someone was negligent
    - b. Defendant exercised substantial control over whatever caused the injury
    - c. Accident more likely than not was caused by defendant's negligence

#### IV. Causation in Fact

- A. **But for** test, but for party's tort, damage would not have occurred
  1. The converse is that, the damages would have occurred regardless of defendant's actions
  2. P must show evidence that D more likely than not caused the injury
- B. **Substantial Factor**, when two or more causes are equally sufficient (converging fires)

1. Neither act is a but for cause
2. *Summers v. Tice* – multiple shooters negligently fire, unable to determine which shot caused injury, court will shift burden of proof of causation to the multiple negligent defendants
- C. **Concurrent Causes Test**- If separate acts of negligence combine to directly produce a single harm then each negligent actor is liable for the entire harm, even though each act alone may not have caused it.
  1. Both acts are a but for cause
- D. **Market Share liability** from *Sindell v. Abbot laboratories*
  1. Ex. Where the cause cannot be determined because of multiple manufacturers of pill, liability will be assigned by percentage of market share
- V. **Proximate Cause** – how much will a court hold a defend responsible for damages
  - A. Was the injury a foreseeable result of negligence, was it within the scope of the risk
    1. Eggshell Skull – Extent of injury does not need to be foreseeable, only an injury
    2. Ex. Negligently spilling gasoline, it is foreseeable it could catch fire, maybe not foreseeable for someone to drown in a puddle
    3. From *Palsgraf*, was plaintiff positionally nearby, car accident might clearly affect nearby pedestrians who get injured, but someone 3 blocks away startled from the noise drops something heavy on their foot. Not likely foreseeable.
  - B. Intervening causes – causes that occur **after** defendants negligence.
    1. If an intervening cause is such that it cuts off defendants responsibility, it will be a superseding cause.
    2. In that case a defendant's negligence will not be a proximate cause
    3. Intervening causes are more likely to be superseding if they are unforeseeable
      - a. Foreseeability only need be general
        - i. Case where gasoline soaked rat caught on fire seems not foreseeable, but something catching on fire from negligent spilled gasoline is foreseeable
    4. Intervening causes is more likely to be superseding if it is independent of defendant's negligence as opposed to flowing from it.
    5. Criminal acts or intentional tortious acts by a third party are not necessarily superseding causes, but they are likely to be.
      - a. Crimes of opportunity may be exception, not locking a door for example has the purpose of keeping out criminals, therefore a theft being committed would not supersede as a proximate cause of the damages
    6. Reasonable rescuer will attempt to save a victim
      - a. A rescuer getting injured in the act will not be a superseding cause to their injury
    7. Victims will attempt to escape
      - a. If they injure themselves while trying to escape that will not be a superseding cause
    8. Malpractice usually not superseding cause (reasonable people seek treatment)
    9. Subsequent injury made worse by original injury will usually not be a superseding cause to the first
  - C. Public Policy – exceptions where it would normally be considered proximate cause, but as a matter of public policy courts have decided it is not.
    1. Social Hosts – not proximate cause to victims of drunk drivers
    2. Defendants cannot be proximate cause of injury to not yet conceived children
- VI. Defenses
  - A. Contributory Negligence – minority view
    1. Plaintiff cannot recover if they were also negligent in causing their injury

2. Last clear chance exception, if defendant had the “last clear chance” to stop the injury plaintiff can still recover
  3. Remote contributory negligence – treats plaintiff more forgivingly when determining proximate cause if their own negligence was minor
- B. Comparative Negligence – majority rule
1. Plaintiff may still recover if they are negligent, but reduced by percentage of his fault
  2. Some states - Pure comparative negligence – even if plaintiff is 99% responsible, they can recover the 1%
  3. Most State - Modified comparative negligence – if P is 50% or more responsible, no recovery
    - a. 50 or more OR more than 50. (States differ in what do you do at exactly half)
- C. Plaintiff’s usually must reasonably mitigate damages. May not recover for excessive damages they failed to stop.
- D. Express assumption of risk
1. If plaintiff contracted not to hold defendant responsible, contract will be enforced over tort
  2. Unless
    - a. Contract contravenes public policy, such as contract for essential service where P had no real bargaining power, or D’s negligence was intentional or wanton
    - b. Injury was medical malpractice
    - c. Contract waived application of a safety statute
- E. Implied assumption of risk – minority view
1. Plaintiff must have Actual knowledge of risk
  2. Appreciation of the magnitude
  3. Must voluntary encounter the risk
    - a. Encountering a risk pursuant to reasonable necessity will not constitute voluntary.
  4. Most states have subsumed this topic within comparative negligence analysis, so it is mostly held up in contributory negligence states
- F. Statute of limitations – procedural rules limiting the time P has to file lawsuit
1. Time usually starts when P has constructive knowledge of damage
  2. Continuing tort doctrine may treat a repetitive action as one long tort, therefore no SOL.
- G. Statute of repose – firm outer bound for the timing of suits. Clock starts when tortious act occurs, does not consider when damages are discovered
- H. Spousal immunity- has mostly been eliminated, where it exists exceptions for intentional torts, car accidents, and obvious exceptions where the beneficial relationship that the immunity purports to protect is absent.
- I. Parent/child immunity
- J. Governmental Immunity – usually waived by the government.
1. When the government waives its immunity, it usually grants immunity to the tortfeasor
    - a. If you can sue the state, the employee is likely immune
  2. Proprietary actions
  3. Discretionary duties usually maintain immunity (city cannot be sued for how they decide to make their budget)
  4. Ministerial duties usually not immune (employees expected to follow a SOP, but do so negligently may be liable)
  5. Legislators, judges, and prosecutors typically get absolute immunity for torts committed in the scope of their positions.
  6. Qualified immunity or “good faith” immunity for certain officials
  7. No duty to protect every single citizen who feels unsafe
    - a. However if government undertakes a duty, it must do so non-negligently (like 911 calls)

## VII. Joint Tortfeasors

- A. Joint and several liability means that each defendant is liable for all the damages.
- B. Applies to:
  - 1. Defendants acting in concert
  - 2. Vicarious liability
  - 3. If the jurisdiction has not decreed otherwise, an indivisible harm
- C. Moves risk of an insolvent defendant onto others involved in tort
- D. J&S liability has been kept for defendants acting in concert and for vicarious liability
  - 1. No majority rule as to whether J&S is kept for indivisible harms.
- E. If plaintiff has received money from a collateral source (such as life insurance), in most states this is NOT subtracted from a judgement as a partial satisfaction would be.
- F. Full Satisfaction means plaintiff has collected full payment from at least one joint tortfeasor through judgement or settlement. Plaintiff cannot try to collect from other tortfeasors
- G. Partial satisfaction will not preclude a plaintiff's suit but will lower collection amount
  - 1. Pro Tanto – Whatever dollars Plaintiff received are subtracted from entire amount, risk on defendant
  - 2. Pro Rata – subtract percentage, risk on plaintiff
- H. Contribution - A defendant who is J&S liable and who paid more than his fair share can seek contribution against other joint tortfeasors who paid less than their fair share.
  - 1. Not required that plaintiff have sued these other joint tortfeasors
  - 2. IS required that plaintiff COULD HAVE sued other tortfeasors
  - 3. Intentional tortfeasors cannot seek contribution from each other
  - 4. In most states a good faith settlement renders the settler immune from contribution
- I. Immunity from other joint tortfeasor's contribution actions after a good faith settlement.

## VIII. Duty of Care

- A. Contracts
  - 1. A breached contractual duty is owed to those who might foreseeably be injured by negligent affirmative acts
    - a. Majority Exception for lawyers who owe a duty only to their clients
  - 2. Nonfeasance – not performing the contract- can only sue under contract law
  - 3. Misfeasance – performing a contract improperly or fraud – can be addressed in torts as well
- B. No general duty to rescue
  - 1. Exceptions
    - a. business toward their customers
    - b. Business toward their helpless employees,
    - c. The person creating the harm
    - d. Person controlling the instrumentality of the harm
    - e. A person who has undertaken a rescue (once a rescue has begun must be performed non negligently, can't make them worse than they were before).
- C. No general duty to protect people from others.
  - 1. Exceptions from special relationships between defendant and plaintiff
    - a. parent-child, employer -employees (duty of first to protect second from others)
    - b. Psychiatrist-patient, boss and their workers. (duty of first to protect others from second)
- D. Negligent infliction of emotional distress
  - 1. emotional reaction must manifest itself with DOPE (definite objective physical effects)
  - 2. Must show a normal person would also have DOPE
  - 3. IF from witnessing an injury to another, two options, no majority
    - a. Zone of danger Rule

- b. Close family Member Rule
  - i. Witness Contemporaneously the actual impact
  - ii. Close family member of the victim,
  - iii. And suffer more distress than a typical person
- E. Unborn Children
  - 1. Injuries in utero
    - a. A viable fetus can recover for injuries suffered in utero if it is born alive.
    - b. Can recover if not born alive for post viability injuries or if substantial proof of causation
    - c. Parents can recover for their own damages in either case.
  - 2. Wrongful Birth
    - a. Child born but for D's negligence, parents would have aborted
    - b. Damages include: emotional injury, extra cost of child-rearing from defect, some times entire cost of child rearing.
    - c. Subtract from damages the plusses of parenting
  - 3. Wrongful life – wrong birth suit from perspective of the child
    - a. Damages limited to medical expenses from defect, non-existence considered worse
  - 4. Wrongful pregnancy- from informed consent violation or botched sterilization
    - a. Damages include cost of pain and suffering pregnancy and labor or cost of abortion
    - b. Some states allow damage for child rearing costs but only when the reason for not wanting a child was economic

#### IX. Damages – lump-sum

- A. Compensatory damages – attempt to make the plaintiff whole again
  - 1. Economic Damages (medical expenses, lost wages, loss of services, loss of consortium)
    - a. Medical expenses may be recovered even if actual value was free, fair market value will be assessed
    - b. Property
      - i. damages to property usually valued at difference in before and after value,
      - ii. potential profit often not considered (if would have sold the good)
      - iii. Sentimental value may be considered (may be somewhat arbitrary)
  - 2. Non-economic Damages (pain, suffering, emotional distress, disfigurement)
  - 3. Future damages – usually requires expert testimony on likely future needs, medical or differing career path etc.
    - a. Usually discounted by some percent from 0-3% year over year
    - b. Example lost wages for 10 years, Normal wages 10K, 2% discount for 10th year will be  $(10K \cdot .98^{10}) = 8.17 K$
    - c. Non-economic damages usually not discounted, the value is already somewhat arbitrary
  - 4. Personal Injury damages generally not taxable, but other compensatory damages and punitive damages generally are taxable.
- B. Punitive Damages – usually a higher burden of proof
  - 1. Plaintiff are not ever entitled to punitive damages, they are discretionary
    - a. Usually more likely from intentional torts
    - b. For negligence acts usually have to be wonton and willful
    - c. If there are no compensatory damages, punitive damages will NOT be awarded
  - 2. purpose is to punish defendant and deter defendant and others from similar actions.
  - 3. Majority require plaintiff to prove wanton and willful conduct by defendant by clear and convincing evidence.
  - 4. Punitive damages should be proportional to compensatory damages, usually somewhere around 5X to 10X greater is too much



5. While defendant's wealth is not relevant in compensatory damages, wealth IS RELEVANT in punitive damages.
  6. Many states do not allow insurance coverage of punitive damages – no majority rule
- C. Remittitur
1. Instead of a new trial, allows for a reduction of damages
  2. Used when there is not much question of fault, only the damages seem unreasonable
  3. Given the facts could a reasonable jury have granted this amount of damages?
  4. Accept a lower reasonable award or reject and opt for a new trial
- X. Wrongful Death
- A. Depending on the jurisdiction either the personal representative of the estate or the next of kin brings the suit (damages measure from decedent's perspective or from survivors.
    1. Damages – funeral expenses, lost wages
    2. Damages for next of kin- funeral expenses, lost support and services, loss of consortium/emotional damages,
  - B. Wrongful death must be based on an underlying tort, it is not an independent cause
  - C. Survival
    1. Allows plaintiff to sue on anything they could have sued on if they were alive
    2. Some states combine survival with wrongful death to allow recovery in single claim
- XI. Owners or Occupiers of Land
- A. No duty to protect plaintiff's off of the premises
    1. Exception from trees if D has actual or constructive knowledge tree may cause damage
  - B. Invitee
    1. Usually business related, such as customers, someone hired like a landscaper or plumber
    2. Owed a duty of reasonable care
  - C. Licensee
    1. Someone on D's property for their own purpose, not including business customers
      - a. Social guests, solicitors, anyone who is not an invitee
    2. Duty to not be willful or wanton, to warn of hidden dangers that are unknown to licensee but actually known to defendant.
    3. When conducting active operation on his property owes a duty of reasonable care
  - D. Trespasser
    1. Duty to known or anticipated trespassers
      - a. Duty varies from reasonable care to not wantonly injure
      - b. Duty of ordinary care for active operation to actually known trespassers
    2. Attractive Nuisance
      - a. Artificial Danger
      - b. Defendant has actual or constructive knowledge
        - i. Children are likely to be attracted
        - ii. Involves unreasonable risk of death or serious bodily harm to children
      - c. The child must be unaware of the hazard or the level of risk it presents because of his or her youth
      - d. Utility to the possessor of maintaining the condition and the burden of eliminating the danger are slight as compared with the risk to children involved
      - e. Possessor fails to exercise reasonable care to eliminate the danger of otherwise to protect the children
  - E. Landlord Lessee
    1. Undisclosed dangerous conditions known to lessor and unknown to the lessee.
    2. Conditions dangerous to person outside of the premises

3. Premises leased for admission of the public
4. Parts of land retained in lessor's control which lessee is entitled to use.
5. Where lessor contracts to repair
6. Negligence by lessor in making repairs

F. Coase Theorem

1. Assuming no transaction costs the same final result in a system will occur regardless of the initial allocation of rights/duties/liabilities
2. Considering transaction costs it makes sense to impose liability on the side that has the lower transaction costs

XII. Vicarious Liability

A. Respondeat superior – employer is liable for the tort of its employees committed in the scope of employment

1. Employer may be independently liable as well such as through negligent hiring practice or supervision
2. Frolic – During work hours but outside the scope of employment, employer is not liable
3. Detour – minor detour expected within the scope of employment (stopping at a gas station)
4. Only applies to intentional torts when the tort is related to employment, such as a bouncer at a bar
5. Employers not liable for torts from independent contractors UNLESS it is a non-delegable duty
  - a. Construction, repair, inherently dangerous activities, crimes

B. Joint Enterprise

1. Vicarious liability for torts of other partners if they acted within the scope of the business
2. Generally, does not apply to a passive investors
3. Enterprise must be a personal one

C. Cars – owner of a car is vicariously liable for the torts committed by someone to whom they lent it in the scope of the lending

D. Imputed comparative negligence- Apply vicarious liability to comparative negligence analysis

XIII. Strict Liability

A. Animals

1. Wild Animals
  - a. Owners of wild animals are strictly liable for the damage they do
  - b. Damage must be related to the inherent dangerousness of the wild animal (can't trip over)
2. Domesticated Animals
  - a. Only if known or constructively known for destructive tendencies related to their animalness

B. Abnormally Dangerous Activities §520 When benefits are significant but the costs are great and hard to avoid

1. Risk and magnitude of harm, location, commonness, value to the community, whether there would be serious risk of harm even after the exercise of reasonable care.
  - a. High degree of risk
  - b. Likelihood harm will be great
  - c. Inability to eliminate risk
  - d. Not common
  - e. Location of activity
  - f. Extent value is outweighed by dangerous attributes

2. Policy- If serious damage would occur even with the exercise of reasonable care then the negligence standard is not adequate.
    - a. Two options:
      - i. Ban the activity (makes it criminal or NPS)
      - ii. Impose strict liability which guarantees all victims are compensated
    - b. Strict liability here allows D to decide if the activity is “worth it”
  3. Even under strict liability P must establish causation in fact, proximate cause, and damages before liability. Proximate cause is harder to establish for strict liability than Negligence which is harder than intentional torts.
  4. Defenses in comparative negligence and implied assumption of risk (where it still exists)
- C. Products Liabilities
1. Overall Requirements
    - a. D is a commercial supplier
    - b. Product was defective when left suppliers hands
    - c. Must fit under negligence, strict liability, warranty (most states have discarded implied warranty)
  2. Manufacturing
    - a. Strict Liability
      - i. Defective condition unreasonably dangerous to defendant
      - ii. Product expected to and did reach consumer without substantial change
    - b. May also use negligence!
  3. Warning Defects
    - a. May only use Negligence
    - b. When a warning is required
      - i. foreseeable risk of harm that would be avoided by adequate warning
      - ii. Manufacture knew or show know have known of risks that injured plaintiff
      - iii. Not required when obvious dangerous
    - c. What makes an adequate warning (catered to the lowest level of people)
      - i. Explain Harm
      - ii. How to avoid harm
      - iii. Conspicuous
    - d. Causation must show that injury would have been avoided if there was an adequate warning
      - i. Defendant can counter that P would not have heeded warning even if it was there
  4. Design (arise from manufacturing specifications)
    - a. May only use Negligence
    - b. Risk Utility Analysis AND (A learned hand analysis of the product)
      - i. Usefulness
      - ii. Safety Features
      - iii. Substitute Product
      - iv. Able to eliminate risk for not too much money
      - v. User’s ability to avoid the risk
      - vi. Public knowledge or warnings available
      - vii. Can manufacture absorb liability
    - c. Consumer expectation test
      - i. Consumer has a reasonable expectation about the product that the product fails to meet

- d. Most states require that there be a practically and economically reasonable alternative design that would avoid the injury (and not create a different injury)
- 5. Misuse can vitiate aspects of a products liability claim.
  - a. No defect if misuse is not reasonably foreseeable (they were using the product in an obscure way)
  - b. Misuse operates as a superseding cause
  - c. Misuse could be used to show comparative fault (manufacturer is liable but so is plaintiff)
- 6. Commercial wholesalers and retailers
  - a. Equally liable for products they sell, can generally seek indemnity from those higher up the chain
  - b. Some jurisdictions exclude sellers of used goods from strict liability regardless of whether the manufacturer is strictly liable
  - c. No strict liability for defective products for providers of services (including those who sold a defective product, but only incidentally to selling the service). Negligence would still be available.
    - i. Example from items used in a surgery, or parts installed by a plumber/electrician