· T · O · R · T · S ·
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Generally

- A prima facie case offers sufficient evidence to withstand a motion to dismiss once the evidence has been submitted.
- Negative defenses attempt to undermine one or more of the elements of the plaintiff's prima facie case.
- Positive defenses do not challenge the prima facie case but attempt to establish that the conduct was permitted or excused.
- Basic Statutory Construction
    - Basic purpose: give effect to legislative intent
    - 1. Plain-language interpretation
    - 2. Examine legislative history
    - 3. Look to parallel legislation

Battery

- Prima Facie Case *(p. 11)*
    - 1. Intent to
        - Vosberg v. Putney *(p. 13)* – 'eggshell skull'
        - Garratt v. Dailey *(p. 19)* – mental states
        - The only requisite intent is to contact, not to cause harm.
    - 2. Contact offensively or harmfully with
        - Fisher v. Carrousel Motor Hotel *(p. 30)* – no direct contact to **π**
        - Liechtman v. WLW Jacor Comm. Inc. *(p. 32)* – battery by smoke
    - 3. Resultant contact that
    - 4. Proximately causes
    - 5. Harm.
        - Bodily harm is any physical impairment of the condition of another's body, or physical pain or illness. Rest. 2d of Torts § 15 *(p. 29)*
- Positive defenses
    - Consent
        - "Consent is willingness in fact for conduct to occur. It . . . need not be communicated to the [**Δ**]." Rest. 2d of Torts § 892(1) *(p. 38)*
        - O'Brien v. Cunard Steamship Co. *(p. 38)* – objective manifestation
        - Barton v. Bee Line, Inc. *(p. 43)* – consent defeats civil recovery
        - Bang v. Charles T. Miller Hosp. *(p. 49)* – Explicit consent to a given medical procedure is required when there are alternative courses of treatment known ahead of time to be available.
        - Kennedy v. Parrot *(p. 51)* – Surgeons have implicit consent from their patients to perform such operations as good surgery requires, even when that means an extension of the operation beyond what was originally contemplated.
        - Rest. 2d of Torts § 892D, Emergency Action Without Consent *(p. 56)*
    - Self-defense
        - Rest. 2d of Torts §§ 63, 65, 70 *(pp. 65–66)*

        - Courvoisier v. Raymond *(p. 70)* – Self-defense prevails if the **π**'s fear for his personal safety was reasonable; if his means of defense were reasonable; and if he acted honestly in using force. These are questions of fact for the jury.
    - Defense of others *(p. 78)*
    - Defense of Property
        - Rest. 2d of Torts §§ 77, 79 *(pp. 79–80)*
        - Katko v. Briney *(p. 80)* – Means of defense must be proportionate to the offense committed.
    - Necessity
        - Ploof v. Putnam *(p. 88)* – Necessity overrules a claim against trespass; a trespassing **π** can sue **Δ** for damages incurred when **Δ** does not allow **π** trespass under circumstances of necessity.
        - Vincent v. Lake Erie Transportation *(p. 90)* – When **Δ** chooses to mitigate his own risks at the expense of another, he is liable for damages.

Causation

- Generally
    - General causation refers to a particular activity being generally capable of causing the type of harm claimed.
    - Specific causation refers to a particular instance of an activity actually causing the exact harm claimed.
    - Part of **π**'s prima facie case; issue of fact for the jury.
    - Traditional cause-in-fact
        - "but-for" test; personal responsibility; no statistics; specific causation.
        - Joint and several liability
            - Concert theory (e.g., **Δ**s in a car race; harm would not have occurred without both **Δ**s' participation, even if only one **Δ** was the most direct cause of **π**'s injury)
            - Indivisible harm (e.g., an automotive accident; harm caused by one party is inseparable from harm caused by another party)
    - Burden-shifting stages (1940s)
    - Alternate liability
        - Market share theory (Sindell)
- Cause in Fact
    - Hoyt v. Jeffers *(p. 103)* – Circumstantial evidence is admissible in court; its relevance (or persuasiveness) is a matter of fact for the jury. *But for* **Δ**'s activity the ensuing injury would not have occurred.
    - Smith v. Rapid Transit, Inc. *(p. 105)* – Mathematical probability, however great, is not enough by itself to establish liability sufficient to justify causation. **Δ**'s activity was not a *necessary* cause of **π**'s injury (alternative explanations were available).
    - Summers v. Tice *(p. 116)* – When more than one **Δ** act independently to produce divisible harm that **π** cannot apportion, the burden of proof shifts to the **Δ**s to prove that they were not responsible for the harm. *Policy.* (1) **Δ**s

generally have better access to evidence of responsibility. (2) **π** should not be deprived of right to redress.

- Ybarra v. Spangard *(p. 117)* – When multiple **Δ**s act together in a complex (medical operation) and some one or several **Δ** actors cause harm to **π**, in the absence of an admission of guilt or testimony pointing to responsible parties, all **Δ**s will be held equally liable for **π**'s injury.
- Sindell v. Abbott Laboratories *(TWEN)* – "Market share liability" is imposed for defective or dangerous products that caused delayed harm if the **Δ**s together command(ed) a substantial percentage of the relevant market.

- Proximate Cause
  - Generally
    - Weakens individual responsibility
      - No longer enough to show duty, breach, cause in fact, and harm.
      - See, e.g., *J'aire· People Express· Vosberg· TJ Hooper· Weirum· Trimarcho· Tarasoff· Brown· Foster* for issues of proximate causation
    - Proximate cause was originally joined with cause in fact as "legal cause" – a distinction between them arose in the 1950s as a limit to liability.
      - Actual cause is essentially factual; proximate cause is essentially policy-based.
  - But for the Wrongful Quality of **Δ**'s Conduct, Would **π** Have Suffered the Same Harm?
    - Ford v. Trident Fisheries *(p. 259)* – Following a failed rescue operation, negligent storage of rescue equipment will only incur liability if it can be shown that proper storage of the equipment would have enabled a successful rescue.
    - Lyons v. Midnight Sun *(p. 260)* – **Δ**'s negligence will not incur liability if it did not proximately cause the injury complained of.
    - Cahoon v. Cummings *(p. 261)* – Under the "loss of chance" doctrine, a **Δ** is liable proportionate to the increased risk of injury or death attributable to the **Δ**'s negligent act or omission.
      - Loss of Chance doctrine rejected by "perhaps a majority" of other courts
  - Harm to **π** Foreseeable?
    - Palsgraf v. Long Island *(p.264)* – Cardozo treated the case in terms of negligence, i.e., whether **Δ** owed a duty to **π**. (1) Duty is *relational;* duty is determined by the relationships between parties. (2) **π** cannot *derive* a cause of action from the duty owed by the **Δ** to a third party. (3) People have a duty to avoid conduct which could cause reasonably foreseeable harm.
    - Solomon v. Shuell *(p. 270)* – a negligent **Δ** may be liable to one who is injured in a effort to rescue another put at risk by the **Δ**'s negligence.
  - Nature and Circumstances of **π**'s Harm Foreseeable?
    - Marshall v. Nugent *(p. 273)* – Idea of *superceding cause.* "In a traffic mix-up due to negligence, before the disturbed waters have become placid and normal again, the unfolding of events between the culpable act and the plaintiff's eventual injury may be bizarre indeed; yet the defendant may be liable for the result." If the "particular act

of negligence" is over yet "the consequences of such past negligence [are] in the bosom of time," liability may follow.
        - Watson v. Kentucky *(p. 277)* – A **Δ** is liable for a third party's negligent acts causing harm from a hazardous situation created by **Δ**, but not liable for third parties' deliberate or criminal acts *(intervening causes)*.

Negligence

- Prima Facie Case
    - 1. Duty
    - 2. Breach
    - 3. Cause
    - 4. Harm
- General Standards
    - "Reasonable Man" standard
        - Brown v. Kendall *(p. 148)* – **Δ** is not liable for injuries he unintentionally causes to **π** unless **π** proves a lack of ordinary care.
    - The Economic Standard
        - U.S. v. Carroll Towing *(p. 158)* – B < PL (burden; probability; gravity of loss)
    - The Duty Standard
        - Washington v. Louisiana Power *(p. 163)* – Economic 'balancing approach' can be used to determine duty.
        - Weirum v. RKO General *(p. 166)* – Balancing approach can be used to determine reasonableness of taking burden of precaution. Liability for third-party damages occurs when risk (and any intervention from 3rd parties) is foreseeable, burden of precaution is reasonable, duty owed to **π**.
- Special Standards (negligence *per se*)
    - Martin v. Herzog *(p. 176)* – **π**'s breach of a statutory duty can preclude complete recovery on a negligence claim.
    - Tedla v. Elman *(p. 177)* – A violation of a statute carrying a standard of care may be excused by reason of necessity, impossibility, or safety concerns.
    - Brown v. Shyne *(p. 181)* – If violation of the statute has no bearing on the injury suffered, the statute's violation does not by itself establish negligence.
- Custom
    - Trimarco v. Klein *(p 187)* – Custom can be used to show negligence if the custom is reasonable, its cost is modest, and it is readily available.
    - T.J. Hooper *(p. 189)* – It is negligent to adhere to a custom when there is a widely available, cost-effective safety measure on the market.
    - Helling v. Carey *(p. 198)* – When a medical test is simple and inexpensive, and the injury to be prevented is severe, if rare, it is negligent to fail to administer the test.
- Res Ipsa Loquitur – "The Hidden Standard"
    - Allows an inference of negligence – duty, implied breach, cause, harm
    - Boyer v. Iowa *(p. 205)* – If there is apparent negligence and **π** has no access to information regarding the cause of the injury, res ipsa loquitur is a valid claim. **Δ** must have exclusive control of the instrumentality of the injury.

- Shutt v. Kauffman *(p. 208)* – If **π** has the opportunity to make a specific claim of negligence but fails to do so, **π** may not rely on res ipsa loquitur.
- City of Louisville v. Humphrey *(p. 211)* – Res ipsa loquitur is not a valid claim when there are multiple possibly responsible parties.
- Escola v. Coca Cola *(p. 214)* – Res ipsa applies if **π** can prove that the condition of the instrumentality has not changed—i.e., it has been handled with due care—after leaving **Δ**'s possession.

- Special Relationships
  - Rowland v. Christian *(p. 223)* – A licensor has a duty to a licensee to use due care in warning the licensee of dangerous and otherwise undiscoverable conditions. "concealed traps." *See also policy issues, p. 224.*
  - Responsibility of Common Carries for the Safety of Their Passengers *(p. 229)*
    - Usually higher than reasonable care
    - "Highest" degree of care, "utmost care," "great caution," "extraordinary care"
  - Responsibility of Operators of Motor Vehicles for the Safety of Their Passengers *(p. 230)*
    - "General duty of care," though some states have lower standards, e.g., Alabama, "willful or wanton misconduct" standard
- Limitations on Liability (positive defenses)
  - Absence of a General Duty to Rescue
    - Erie R. Co. v. Stewart *(p. 231)* – Leading the public into reliance on a safety measure creates a duty, the breach of which is negligence, though the duty be self-imposed. The duty may be discharged by giving warning beforehand.
    - Tubbs v. Argus *(p. 233)* – A **π** who causes injury to a **Δ** with an instrumentality under **π**'s control is in a "special relationship" with **Δ** that creates a duty to render reasonable aid and assistance.
    - Tarasoff v. Regents *(p. 241)* – When the **Δ** is in a "special relationship" with either a party likely to be dangerous or his reasonably foreseeable victim, the **Δ** has a duty to warn the affected parties.
  - Purely Consequential Economic Loss
    - Barber Lines v. Donau Maru *(p. 338)* – With certain exceptions by class of cases, purely economic loss, even if foreseeable by **Δ**, is not recoverable.
    - J'aire Corp. v. Gregory *(p. 343)* – (1) Where negligent conduct causes injury to real or personal property, **π** may recover damages for profits lost during the time necessary to repair or replace the property. (2) Recovery for negligent interference with prospective economic advantage will be limited to instances where the risk of harm is foreseeable and is closely connected with **Δ**'s conduct, where damages are not wholly speculative and the injury is not part of the **π**'s ordinary business risk (viz., the injury is not covered by standard insurance).
    - People Express v. Consolidated Rail *(p. 346)* – A **Δ** who has breach his duty to avoid the risk of purely consequential economic loss to

particularly foreseeable **π**s may be held liable for actual economic losses that are proximately caused by its breach of duty.

- Contributory Negligence
  - Butterfield v. Forrester *(p. 353)* – A risk of injury negligently created by **Δ** does not excuse **π**'s duty to take reasonable care to avoid injury.
  - Davies v. Mann *(p. 354)* – applying *Butterfield*
  - Last Clear Chance
    - Rest. 2d of Torts §§ 479, 480 *(p. 355)*
  - Meistrich v. Casino Area Attractions *(p. 356)* – Primary assumption of risk claims there was no duty to the **π** – "assumption of risk may be found if **π** knew or reasonably should have known of the risk, not withstanding that a reasonably prudent man would have continued in the face of the risk." Secondary assumption of risk is a claim of contributory negligence on the part of **π**. Dogs.
  - Comparative Negligence
    - Replaced the contributory negligence doctrine
    - Some jurisdictions bar recovery if **π** is more than 50% contributorily negligent. Others do not bar recovery but reduce it proportiately. *(p. 362–363)*
    - Intentional Wrongdoing of Third Persons
      - Rest. 3d of Torts § 24 *(p. 361)*
      - Uniform Comparative Fault Act *(p. 366)*
    - Knight v. Jewett *(p. 368)* – "A participant in an active sport breaches a legal duty of care to other participants . . . only if the participant intentially injures another player or engages in conduct that is so reckless as to be totally outside the range of the ordinary activity involved in the sport . . . "

Strict Liability

- Liability without fault; strict liability requires **π** to make no proof of **Δ**'s wrongdoing.
- Fletcher v. Rylands *(p. 417)* – (Comes from cattle law.) If "mischief" could not have occurred but for **Δ**'s acts or his keeping of a thing, liability follows.
- Rylands v. Fletcher *(p. 418)* – Strict liability arises from daamges caused by "nonnatural" activities.
- Turner v. Big Lake Oil *(p. 420)* – "Necessary" activities or activities of "common usage," contemplated within the original grant of the land, do not impose strict liability upon the **Δ** for damages that result from such activities.
- Siegler v. Kuhlman *(p. 424)* – Strict liability obtains for abnormally dangerous activities because of "the likely destruction of cogent evidence from which negligence . . . may be proved" (viz., everything explodes in a huge fireball).
  - See Rest. 2d of Torts § 519 (strict liability for abnormally dangerous activities) and § 520 (what constitutes an abnormally dangerous activity, with specific reference to (c)) *(p. 425)*
- Foster v. Preston Mill *(p. 431)* – Abnormally dangerous activities only impose strict liability when the harm results from the risk that makes the activity abnormally dangerous.

Products Liability

- Prima Facie Case
  - 1. The product is defective
  - 2. It is unreasonably dangerous to the consumer in normal use
  - 3. It reached the consumer without undergoing any substantial change in condition
  - 4. It caused injury to the consumer because of its defective design
- Types of defects
  - Manufacturing defects – present in a few product units; renders those units different from and inferior to most in the same product line
  - Design defects – shared by all units in the product line
  - Marketing defects – failure to instruct regarding proper product use or failure to warn of hidden danger
- Negligence
  - MacPherson v. Buick Motor *(p. 439)* – If something causes danger to life and limb when negligently made, the manufacturer will be held strictly liable for injuries to *contemplated users* caused by these defects. *Eliminated privity requirement in products liability claims.*
- Breach of Warranty
  - UCC § 2-314: Implied warranty; merchantability; usage of trade *(p. 442)*
  - Henningson v. Bloomfield Motors *(p. 443)* – (1) A disclaimer inimical to the public good is invalid. (2) Marketing a new product to the public creates a nonwaivable implied warranty for suitability of use.
  - Greenman v. Yuba Power *(TWEN, p. 451)* – A manufacturer who places a product on the market, knowing it will be used without inspection for defect, will be held liable if there proves to be a defect.
- Strict Liability in Tort
  - Vandermark v. Ford Motor Co. *(p. 451)* – Manufacturers are liable for product defects even in subcontracted parts uninspected by the manufacturer; delegated aspects of manufacturing are integral to the enterprise. Plaintiffs have the right to establish defects through circumstantial evidence.
  - See Rest. 2d of Torts §§ 402A *et. al.,* strict products liability rule *(p. 454)*
  - Joint and several liability up the chain of sellers to the manufacturer *(p. 457)*
  - Policy *(p. 460)*
  - Definition of product, Rest. 2d of Torts § 19; A dog is not a product *(p. 463)*

Trespass and Nuisance

- Trespass
  - The interest sought to be protected by trespass actions for intentional entries is the plaintiff's interest in the exclusive possession of land.
  - To constitute a trespass, the **Δ** must accomplish an entry on the **π**'s land by means of some physical, tangible agency.
  - Prima facie case
    - (a) the entry must be unauthorized; and
    - (b) intended by the defendant, or
    - (c) caused by the defendant's recklessness or negligence, or
    - (d) the result of **Δ**'s carrying on an ultrahazardous activity.

        - There is no broadly-based privilege to enter another's land.
        - Once **Δ** is found to have committed an intentional trespass, **π** is entitled to at least nominal damages and to injunctive relief if **Δ**'s conduct threatens similar entries upon **π**'s land.
- Nuisance
    - Public nuisance – Rest. 2d of Torts § 821B – "an unreasonable interference with a right common to the general public."
        - Typically will not give rise to private causes of action, absent a showing of particular or unusual harm.
        - See Rest. 2d of Torts §§ 821B, C, 822 *(pp. 382–383)*
    - Private nuisance – § 821D – "a nontrespassory invasion of another's interest in the private use and enjoyment of land."
    - Differences from trespass
        - Requires a showing of harm
        - Includes consideration of utility
        - Nuisance may be considered reasonable
    - See Rest. 2d of Torts §§ 826, 827, 828, 829A *(pp. 384-385)*
- Peters v. Archambault *(p. 387)* – (1) An injunction's true value is in the bargaining power it gives the holder. (2) A landowner is ordinarily entitled to mandatory equitable relief to compel removal of a structure significantly encroaching on his land. *(trespass)*
- Adams v. Cleveland-Cliffs Iron Co. *(p. 390)* – Damages in nuisance can be nominal or actual; to prevail in nuisance a possessor of land must prove significant harm resulting from **Δ**'s unreasonable interference with use or enjoyment of his property.
- Davis v. Georgia Pacific *(p. 395)* – Airborne particulates can constitute a trespass giving rise to compensatory but not necessarily punitive damages.
- Waschak v. Moffatt *(p. 397)* – Freely assuming exposure to a nuisance mitigates liability for the effects of the nuisance.
- Jost v. Dairyland *(p. 401)* – Continued invasion of **π**'s interest by non-negligent conduct, when **Δ** knows the nature of the injury inflicted, is an intentional tort. Under such circumstances (1) due care is not a defense to nuisance; (2) infliction of harm is not mitigated by social utility.
- Boomer v. Atlantic Cement *(p. 403)* – In lieu of an injunction, a **Δ** creating an ongoing nuisance may be required to pay permanent damages to **π**s suffering injury, which would preclude all future recovery for such injury.
- Spur Industries v. Del E. Webb Dev. Co. *(p. 408)* – a **π** who successfully enjoins a **Δ** from continuing a nuisance in the course of its lawful business, when **π** has brought people to the nuisance to the foreseeable detriment of **Δ**, must indemnify **Δ** for a reasonable amount of the cost of moving or shutting down.
- Rest. 2d of Torts § 840D, "coming to the nuisance" *(p. 411)*

Harm

- Harms must be *cognizable;* damages must be *ascertainable.*
- Harms must be listed in a claim; these harms *may* give rise to damages.
- Wrongful death
    - Statutory (see 'statutory construction,' *supra*)
    - 1. A wrong to the person who died (survivorship theory)
    - 2. A wrong to the survivors (emotional distress, etc.)

- *page 597*
- Prenatal harm
  - Werling v. Sandy *(p. 322)* – (1) A viable fetus negligently injured *in utero*, and subsequently stillborn, may be the basis for a wrongful death action. (2) Fetuses considered persons for the purpose of wrongful death actions.
- Wrongful birth(?)
  - Fassoulas v. Ramey *(p. 327)* – As a matter of law, the "benefits to the parents outweigh their economic loss in rearing and educating a healthy, normal child," though a birth of a deformed child that follows a negligently-performed sterilization will render the doctor liable for the special upbringing costs associated with a deformed child.
  - Turpin v. Sortini *(p. 332)* – The harm that a child suffers by being born with an hereditary defect is not a legally cognizable harm, and does not give rise to a cause of action that the child might bring.
    - The basic claim of "injury" in wrongful life cases is that never having been born would have been a lesser harm than the life that they were given.
- Mental and Emotional Upset
  - Intentional Infliction of Emotional Distress
    - Prima Facie Case
      - That **Δ** intended to inflict emotional distress, or should have known that emotional distress would result
      - Conduct was extreme and outrageous, and intolerable in a civilized society
        - considerations of the conduct at issue
        - duration
        - relationship of the parties
        - any special knowledge of **π**'s vulnerability
      - **Δ**'s conduct was the cause of **π**'s distress
      - **π**'s emotional distress was so severe that no reasonable person could be expected to take it.
    - Jones v. Clinton *(p. 690)*
  - Unintentional (Negligent) Infliction of Emotional Distress
    - Considerations
      - Physical impact rule
      - Zone of Danger
      - policy (*from Bowen v. Lumbermens (squib), p. 307*)
        - proximity of injury to negligence
        - proportionality of injury to culpability of tortfeasor
        - whether it was "too extraordinary" that the negligence should have brought about the harm
        - whether allowing recovery would:
          - put an unreasonable burden on the negligent tortfeasor
          - be too likely to invite future fraudulent claims
          - enter a field that has no sensible or just stopping point
    - Factors in determining recovery *(Waube)*

        - (1) Whether π was located near the scene (zone of danger)
        - (2) Whether the shock resulted from a direct emotional impact on the π from the sensory and contemporaneous observance of the accident, as contrasted with learning of the accident from others after its occurrence.
        - (3) Whether π and victim were closely related vs. no relationship or a distant relationship.
        - These factors indicate the *degree* of foreseeability.
    - Waube v. Warrington (*p. 294)* – Liability for NIED is determined by duty, not proximate cause; a mother who witnesses the death of her child cannot recover for emotional trauma.
    - Dillon v. Legg *(p. 298)* – A negligent driver who causes the death of a young driver may reasonably expect that the mother will not be far distant and will upon witnessing the accident suffer emotional trauma, giving rise to a cause of action for damages.
    - Thing v. La Chusa *(p. 301)* – NIED recovery if:
        - (1) π is closely related to victim
        - (2) π is present at the scene of injury and is aware of the injury occuring
        - (3) resultant emotional distress that is
            - (a) beyond what would be expected from a disinterested witness and
            - (b) not an abnormal response to the circumstances
    - Burgess v. Superior Court *(p. 309)* – Physical injury negates other barriers to recovery under NIED.
- Injury to Personal Relationships
    - Feliciano v. Rosemar *(p. 314)* – A claim for loss of consortium will only suceed if (1) π and the physically injured party are married; (2) the physically injured party is not the π; (3) a close and usually sexual relationship between the π and the physically injured party has been disturbed as a result of the injury.
    - Borer v. American Airlines *(p. 315)* – (1) loss of "consortium" is defined as the "loss of conjugal fellowship and sexual relations;" (2) children of the deceased cannot succeed on a claim of loss of consortium.