Does one of the following apply?

Relationship with Perp?

Relationship with Victim?

D’s Prior Non-Negligent Conduct?

Volunteer?

Privity of Contract?

Duty created by Statute?

(See detailed outline for elements of each)

**Element 1 DUTY**: General Rule is *Heaven v Pender*: Anyone engaged in an affirmative activity has a presumptive duty to exercise reasonable care to minimize the risk of harm to others.

Was this an “affirmative act”?

No. Non-feasance. General Rule: no affirmative act, no duty

Check if a duty exists anyway.

Yes. Malfeasance.

No. None of the exceptions applies.

NO DUTY EXISTS; DUTY ELEMENT IS NOT MET

Yes

No, no exception applies. “Regular” duty applies.

DUTY ELEMENT IS MET.

Yes. One of the exceptions applies. D only owes limited duty to P. P will have to show the elements for the limited duty.

But, DUTY ELEMENT IS MET IN LIMITED FORM.

Does one of the following apply?

Palsgraf (for jurisdictions that have the rule)?

Mental/Emotional harm w/o physical injury?

Pure economic loss?

Owners/Occupiers of land?

Ad hoc no-duty rule?

(See detailed outline for elements of each)

DUTY EXISTS.

Check to see if it is limited in some way

|  |  |
| --- | --- |
| 1st Element: Duty Rule | |
| *Heaven v Pender*: Anyone engaged in an affirmative activity has a presumptive duty to exercise reasonable care to minimize the risk of harm to others. | |
| Nonfeasance: Nonfeasance: does party who has not taken an affirmative act nevertheless have a duty to act? Generally no duty to warn or rescue, unless actor's own behavior created the risk. Ask self: 1) dealing with nonfeasance or misfeasance? 2) if nonfeasance, does an exception apply? | |
|  | **Relationship with the Perpetrator Exception:** Special relationship exists with the D/non-actor where perpetrator had shown himself uniquely dangerous; D/non-actor had practical ability to control the perpetrator; D had ability to distinguish perpetrator and appreciate his unique risk.  Common examples: Parents over dependent children; Custodians over those in custody; Mental Health Professionals over patients; Employer over employees when they perpetrate tort within the scope of their employment or when employment facilitates their tort. (As practical matter, courts much more likely to find liability when there is a professional obligation than a personal/social one) |
|  | **Relationship with the Victim Exception:** Special relationship exists between the non-actor and the victim where D/non-actor has heightened responsibility to protect (triggers a duty to protect).  Common examples: common carriers, innkeepers, landlords (public areas of building), school (over students), employer (when employees in immediate danger/helpless), landholder when land is open to the public, other custodians (if superior ability to protect) |
|  | **Prior Conduct Exception:** If your non-negligent behavior created the risk then you have a duty to warn |
|  | **Volunteer Exception:** No duty to rescue, but if you undertake to rescue, don't screw it up (ie, prevent someone else from doing it well) |
|  | **Privity of Contract:** Only parties of the K are entitled to benefits (some exceptions for identified 3rd parties)  Exceptions: "acceptance" rule for work of contactors; "humanitarian" exception.  Now: acceptance rule is dying, but still stronger for residential than commercial repairs; very strict privity for physicians |
|  | **Various Statutory Exceptions** may exist and apply |
| Malfeasance: check the following to see if any limitation on the duty applies. | |
| *Palsgraf* Rule | (LIRR case with dropped fireworks exploding causing scales to fall which hit Mrs. Palsgraf) The Foreseeable Plaintiff: moves foreseeability to judge. Mrs. Palsgraf was not a foreseeable plaintiff, per Judge Cardozo, therefore she cannot recover. |
| Mental & Emotional Harm | Negligent Infliction of Emotional Distress (NIED): liability where there is emotional injury and NO physical injury   * Trend from **Impact Rule** (any contact allows claims of ED even where ED not related to contact) to * **Zone of Danger** (was in zone of danger, reasonably and honestly feared impact, “near miss” only due to providence or taking evasive action) to * **Bystander Rule** (nearness and newness) (near scene of accident to hear or see it; shock resulted from observing the accident—not learning about it later; P and victim were “closely related”) (many courts require physical manifestation of ED, but not all, may require ED to be severe and of long duration, require ED to be reasonable and honest) to   **General NIED Actions** (doctrine not accepted in most jurisdictions) |
| Economic Loss w/o Physical Injury  Remember that economic loss is not property loss (can always recover for property loss). | Generally no duty to protect against economic loss of another, unless one of the exceptions applies. Different jurisdictions have different perspectives on which should apply. May make rules based on circumstances of the case before them (ex:  *Exxon Valdez*’s egregious facts.)   * **Categorical exception:** Some courts allow certain categories of claimants to collect damages (ex: commercial fishermen); generally out of concern about fairness and foreseeability * **“Impact Rule”—require some physical damage, then allow recovery regardless of causation:** parallel to the “impact rule” of NIED (*Testbank rule)* * **Physical Damage with Related Financial Loss** (this is the trending approach): must be damage to own physical property and then can recover for related financial loss—i.e., related to the injury not just any financial loss. *(Corpus Christi rule)*   Purposes: restrict universe of Ps to manageable and limit recoverable damages; encourage insurance coverage; protect contractual relations |
| Owners-Occupiers of Land | Occupier/ occupier: Person in occupation of land w/ intent to control; Person who was in occupation of land, if no other subsequent occupier; Person entitled to immediate occupation, if no other person in possession  **Injuries OFF the land** (duty of reasonable care for activities/conditions that result in injuries off the land**)**  **Injuries ON the land:**   * **Trespasser** (on property without right/privilege). General rule: duty to refrain from refrain from willful/wanton conduct (exceptions: injured children/attractive nuisance and known/habitual trespassers owed duty of care in owner’s activities, but not natural features)   Attractive nuisance: artificial condition exists where possessor knows/has reason to know that children are likely to trespass; condition involves unreasonable risk of death/serious injury to children (possessor knows/has reason to know and which he realizes or should realize); children b/c of youth do not discover condition/realize risk; utility to possessor of maintaining condition and burden of eliminating danger are slight when compared with risk. Then assess: did possessor act reasonably?   * **Licensee** (on land b/c of owner’s consent—social guests). Same duty as owed to trespassers. Plus reasonable care in conducting activities on premises if danger not apparent to licensee (warn of dangerous conditions if occupier knew or had reason to know of condition that is not known/discoverable by licensee, but own has no duty to discover conditions). * **Invitee** (on property with business/economic purpose (for occupier) or under circumstances implying that occupier has taken reasonable care (public invitee)).Baseline duty plus warn of hidden perils/unsafe conditions that could be discovered by reasonable inspection/supervision; reasonable care as to conditions about which occupier “should have known” (may include duty to find out if reasonable care would require); reasonable care as to activities. * **Some courts combine the Licensee and the Invitee (N. Carolina)**   Misc.: Open and obvious risks: landowner liability absolved (but not in all juris); Recreational use statutes: reduces duty to avoiding willful or wanton; Fireman’s rule – firefighters/police entering premises to assist are licensees, not invitees. |

|  |  |
| --- | --- |
| New/Ad hoc No Duty Rules | |
|  | **Restatement Criteria for creation of new rules by courts:** Judge should acknowledge new rules is being created; New rule should be justified on basis of principle or policy; Something about the lawsuit must be unusual enough to call for special treatment; Rule must be clear, categorical, and bright-line (ie, not dependent on factual inquiries that jury should make) |
|  | **Practical Matters**: New No Duty doctrine could come from D’s motion to dismiss; Could come from P’s articulation of the claim as “novel” or “innovative”, Courts might develop it themselves by changing duty to something P must prove (no longer presumed under Heaven v. Pender), Courts turn legal/proximate cause into duty issue (“dutification”) to remove it from jury to judge |
|  | **Examples**: manufacturers of ammunition have no duty to protect the public when their product functions properly in the hands of a murderer; employers/agents have no duty to submit to unlawful instructions of robbers, even if customers become injured |

Assess all the facts you’ve “caught” in each filter. Either…

BREACH ELEMENT NOT MET

BREACH EXISTS and ELEMENT IS MET

If in a negligence per se jurisdiction and violation meets all the tests, BREACH EXISTS and ELEMENT IS MET

If a mitigation applies, so a different standard of care is applicable, BREACH ELEMENT MAY STILL BE MET, but need to assess how mitigation factors in

Filter 3: B< PL (Learned Hand Formula)

Filter 4: *Res Ipsa Loquitor* (if all else fails)

Filter 1: Negligence *Per Se*

Some jurisdictions say that if D has violated a health or safety law, that establishes a breach.

Other jurisdictions allow evidence of violation of law as evidence D breached standard of care, but it’s not as a matter of law.

Filter 2: Reasonably Prudent Person

THIS IS THE GENERAL RULE

Look at community norms, industry standards, and common sense; standard is what a reasonable person would do or should have known or foreseen

Does a mitigating standard apply? (Infancy, physical disability, etc?)

ELEMENT 2: BREACH

General rule: was there substandard care? What would the reasonably prudent person (RPP) have done in the Ds place?

There are multiple “filters” to assess breach—more than one way to have been unreasonable—go through each filter as part of the analysis. Collect facts as you go. Don’t forget: D can argue that P violated standard of care to self.

|  |  |
| --- | --- |
| 2nd Element: Determine if breach occurred (“negligence”) and D demonstrated substandard care | |
| Violation of Statute (Breach per se) | SOMETIMES the violation of a statute is proof that the element is met (“negligence per se” as a matter of law) and SOMETIMES it isn’t (then courts allow the fact of statute violation to be introduced as evidence of not exercising a reasonable standard of care   1. A statute defines (clear and specific) standards of conduct 2. The defendant violates the statute 3. Plaintiff is in the class of persons sought to be protected by the statute 4. The injury must be of the sort the statute intended to protect against   **Exceptions:** if Reasonable Person would violate the statute in the circumstances (ex: walking on right side of road instead of left when traffic is heavy one way and not the other); contributory negligence of P may be a defense or partial defense; some statutory exceptions may exist. |
| Reasonable Prudent Person (RPP) | A reasonable person is an “average” one who knows what the D knew at the time of the incident; unless an exception applies  Inadvertence: If a reasonable person would have known X, then D should have (objective test)  Emergency Situation: If a reasonable person should have anticipated emergency and taken corrective steps, so should D  **Jury applies a foresight standard to assess**: What did D do? What would a “reasonable person” in D’s position have done? What would a reasonable person have foreseen?  Look to community norms |
|  | **Infancy exception:** minors are held to a lower standard than a reasonable person, they are compared to other minors of about the same age unless they are operating a car or some other licensed activity—“adult activity exception” (where for policy reasons minimum standard must be upheld). Courts agree on cars and planes, but disagreement on whether using guns falls into “adult activity” |
|  | **Physical Disability Exception**: for Ds with physical disabilities, the standard is what a “reasonable blind person” should have done |
|  | **Expert Exception:** for Ds with higher than average abilities, skills or knowledge, the standard of care may be higher |
|  | **NO Exception for Mental Disabilities or Lack of Intelligence**: perhaps b/c doctrines emerged when there was not a lot of knowledge about mental disabilities or b/c people with mental disabilities were in facilities, and courts didn’t want to give their custodians an “out” for not providing adequate oversight |
| Learned Hand formula; B<PL | If **B**urden is less than the **P**robability of injury times the extent of **L**oss, then there was a breach of duty  **Burdens:** Burden can be economic or non-economic (Burden of warning is almost always very low) |
| *Res Ipsa Loquitur* | (Latin for "the thing speaks for itself"): the elements of duty of care and breach can be sometimes inferred from the very nature of an accident or other outcome, even without direct evidence of how any defendant behaved (“permissive inference” if meet the 3 elements). Impact is to shift burden of proof to D.  Does not deal with bad things that happen (all the time, alas) which cannot be linked to anyone’s negligence—if injury is result of something that no reasonably prudent person would have planned for, don’t have res ipsa loquitor |
|  | **Elements:**   1. Inference of negligence due to the odds being against it happening by chance 2. Exclusive control (of D over instrumentality of damage, including through a contractor) 3. Not due to voluntary action of P |

**ELEMENT 3: CAUSE IN FACT**

General Rule: But-For test

Still injured? (Substantially certain; “more probable than not”)

*For multiple causes, make a chart and test each against the others!*

Lost Opportunity (if initial chance of survival was less than 50%)

(when chance of survival was 50% or more, it’s “more probable than not” that you would have survived—would be “YES” after but-for.)

Alternative Liability Theory: 2 (or more) Torts but only 1 injury results; (2 hunters, one shot—Summers v. Tice)

Looming Threat

Acting in CONCERT with other tortfeasors (all of them must be tortfeasors)

Eggshell Plaintiff; if D is cause in fact of injury, deemed to be cause in fact of entire set of injuries UNLESS Looming Threat applies

None of the alternatives applies.

NO CAUSE IN FACT EXISTS; ELEMENT IS NOT MET

CAUSE IN FACT EXISTS (BUT MAY NEED SPECIAL TREATMENT)

Market Share Liability (DES)

Single Indivisible Injury rule

Substantial Factor test: Multiple REDUNDANT causes (Any one of which would have caused the same injury; all causes don’t need to be tortious); (Asbestos cases).

No or Yes, but….

Assess why it’s No or Yes, but….

YES

CAUSE IN FACT ELEMENT IS MET

CAUSE IN FACT EXISTS (BUT MAY NEED SPECIAL TREATMENT)

|  |  |
| --- | --- |
| 3rd Element: Testing for Factual Cause | |
| “But-For” Test:  5 steps  With multiple tortfeasors, make a chart and “test” each one by changing only that D’s breach and keeping all other facts the same! | 1. Identify the injury 2. Identify D’s wrongful conduct/breach 3. Identify minimum action D could have taken to avoid the breach 4. Would injury have occurred anyway? 5. YES… D’s breach is not the cause in fact   NO… D’s breach is the cause in fact  Not sure…. P has not met the burden of proving cause in fact  BUT FOR is the presumptive test. Always start here.  Even if multiple tortfeasors are part of the same causal set, they can still be independent “but for” causes. |
| Limited Alternatives  to “But-For” Test | Most of the time if item 5 above is “Yes”, then that’s it and the inquiry stops. In a few instances, for policy reasons, will allow additional testing for D liability  In any case where the burden of proof is shifted to a group of Ds (or potential Ds), the whole group of Ds have to be sued together. Since the burden is shifted to them (and where joint and several liability applies), the Ds have to be in a group so that they can point the finger to each other in sorting out among themselves who’s responsible for what. (Substantial Factor, Alternative Liability, Concerted Action, Single Indivisible Injury)  How to deal with J&S in comparative fault? Many jurisdictions have abolished or limited it   * 10 keep full J&S liability * 4 allow it for innocent plaintiffs * 10 apply it to Ds that exceed certain fault percentage * 8 apply it based on type of damages * Various maintain it based on certain causation tests |
|  | **Substantial Factor test**: use when there are redundant/additive causes to a single injury  Applies to 2 tortious forces (2 fires reach 1 house) [Ds share the damages]  Applies to 1 tortious force and 1 non-tortious force [Tortious force/D pays all damages]  Test is evolving—can use where multiple causal sets contribute collectively and perhaps redundantly to the injury (must be a finite causal set)—look only at conduct of breachers (non-breaching parties can’t be included)  Some fudging going on…. One of the breachers might not have contributed to the injury at all, but we’re going to include it as a necessary component of the causal set (asbestos cases, or 3 people leaning on a car and it goes over the cliff)  Joint and several liability (in juris that retained J&SL within Comparative Fault—some have both at once) Must sue all Ds at once |
|  | **Alternative Liability:** *Summers v. Tice* is the name case here (two negligent/tortious hunters, 1 bullet wound: P recovers and burden shifts to 2 breachers to sort out who was responsible)  Use where there is one injury caused by one tortious force, but there are multiple breachers who might be it; P has to sue all potential D’s at once  Joint and several liability applies if not abolished(in juris that retained J&SL within Comparative Fault—some have both at once)  (If court won’t allow alternative liability theory, could sue all defendants in the alternative—but that’s not the same thing) |
|  | **Lost Opportunity:** **The injury = the reduction in opportunity to survive (if initial chance of survival was below 50%)**  If P has only a 40% chance of survival to begin with, can bring a claim against someone who lowers chances to 25%  Damages would equal 15% of the total loss (some courts allow recovery of full damages, but many think this is wrong approach)  If P had a greater than 50% chance of recovery, then D is the cause-in-fact of P’s death (“more probable than not” that would have survived) and full damages would apply. (Use regular But-For test then) |
|  | **Eggshell Plaintiff:** If D is the But-For cause in fact of the injury, we deem D to be the cause-in-fact for the entire set of injuries UNLESS there is a looming threat. |
|  | **Looming Threat: This rule is invoked in two ways.**  One, as an exception to the Eggshell Plaintiff rule (above). In other words, if someone is an eggshell plaintiff in a way that is caused by a looming threat (the man with cancer whose pick up was struck by another driver), then the full scope of the eggshell plaintiff rule does not apply.  Two, looming threat assessment can be made directly, for plaintiffs who are not “eggshell.” The healthy young man falling off a bridge, but before he hits the water, he’s struck by an electrical cable and killed by electrocution.  Either way, damages are limited to the extent to which the But-For cause hastened the inevitable looming threat. |
|  | **Single Indivisible Injury Rule:**  When a P has a single indivisible injury and there are multiple Ds, but P is completely unable to prove which one caused the injury, the court may punt and apply this rule. Example: 1 P in multiple, quick-sequence car accidents (where she was not at fault). In that case, court allows shift of burden to group of Ds who can sort it out amongst themselves. (Most analogous to Alternative Liability, but in that case we know there is one and only 1 causing party.)  Sue all Ds at once |
|  | **Market Share Liability**: narrowly used (DES cases, but may be allowed elsewhere).  P can’t identify specific tortious actors (b/c bad recordkeeping or other thing outside P’s control) but can identify list of only possible suspects (sue as many as are still standing)  Several liability only (% as % of market share) |
|  | **Acting in Concert:** Three possibilities   * Does tortious act in concert with the other or pursuant to a common design with the other actor, **or** * Knows the other’s conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other, **or** * Gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the 3rd person   Concerted action may be a cause in fact of an injury, even if the concerted action itself does not directly touch the P.  P must sue all Ds |

|  |  |
| --- | --- |
| 4th Element: Testing for Proximate/Legal Cause  Is the type of harm/type of plaintiff within the range of risks/people reasonable care would have avoided? | |
| Name Cases | Wagon Mound (transition from Direct Cause doctrine to Foreseeability)  Palsgraf (Mrs. P on the LIRR platform—unforeseeable plaintiff per Cardozo. Made foreseeability a legal issue.) |
| Restatement | 3rd Restatement asks: what are the foreseeable risks of the D’s failure to use due care, and are the actual harms that resulted within these types of risks? If yes, the breach is the proximate cause  Actor’s liability is limited to those harms that result from the risks that made the actor’s conduct tortious  Actor is not liable for harm when the tortious aspect of the actor’s conduct was of a type that generally does not increase the risk of that harm |
| Plaintiff must have been foreseeable | Sometimes this is handled as a duty issue (question of law for the judge; “Paslgraf jurisdictions”); otherwise comes to jury here as a factual matter.  **Rescuer rule:** In common law, breacher is responsible both to the injured party and to anyone rescuing them (a rescuer is a foreseeable plaintiff). In many jurisdictions, however, there is a statutory exemption for professional first responders (they can’t sue the breacher). |
| Type of harm must have been foreseeable | The P’s accident must be in the foreseeable array of risks. (This was the Wagon Mound holding.)  Actor’s liability is limited to those harms that result from the risks that made the actor’s conduct tortious |
| Manner of harm doesn’t have to be foreseeable | If possibility of accident is clear, and the type of risk (and plaintiff) are foreseeable, unexpected manner of occurrence doesn’t cut off liability (mechanism rule)  BUT if the mechanism of the injury is just too bizarre, the courts may cut off liability |
| Extent of harm doesn’t need to be foreseeable | Injuries to persons: D takes his victim as he finds him; there is usually not a cut off of liability based on the extent of injury.  BUT: wildly extreme extent of injury can cut off liability. More likely in property claims. |
| PUNCHLIST (Stray items that might apply in some cases, based on the facts) | Check these other matters to see if they align to the fact pattern:   * Superseding cause * Subsequent medical injuries * Suicide |
|  | * **Superseding cause:** A negligent breacher may try to argue that another person’s wanton/reckless/criminal act was a superseding cause of the injury and thereby avoid liability. Ex: ammunition manufacturers. This approach will generally not work (although Courts may create ad hoc no duty rules, as they have done for ammunition manufacturers) UNLESS the injury created was of a different type than the risk created by the original negligent breach. But, if the superseding cause just made worse the type of risk already created by the breach, there’s no traction here. * **Subsequent medical injuries**: Original injurer is responsible for subsequent medical injuries inflicted by medical and rescue personnel as they treat the injury. (But not for missteps by mechanics.) Also: if PLAINTIFF is the original injurer, not responsible for own subsequent medical injuries—medical providers are on the hook * **Suicide**: Generally, no liability for D if P commits suicide (voluntary act), UNLESS P is delirious or insane OR D is a caretaker of P’s mental health with aim of preventing suicide |

|  |
| --- |
| 5th Element: Determining Damages |
| In negligence, damages must be proved. No damages=no cause of action (must be eligible for damages in order to claim this element—ex. Have to be allowed to claim survivor damages) |
| Compensatory and punitive only (no nominal damages in negligence) |

|  |  |
| --- | --- |
| DAMAGES | |
| Intentional Torts | Must prove damages(beyond nominal) for **trespass to chattels**  Nominal damages ok for others to represent protection of interests:   * Boundaries of physical body (battery, assault, false imprisonment) * Property rights (trespass to land, conversion) |
| Negligence | Damages are an element of negligence cause of action  Nominal damages are not adequate |
| 3 types of damages   1. Nominal 2. Compensatory (dominant type) 3. Punitive | 1. Nominal damages: haven’t proved any other type, a trivial sum (Not available for negligence or trespass to chattels) |
| 1. Compensatory Damages (Common law)  * Make the victim whole, restore to pre-injury position * Past and future damages   P pays no taxes on these  D (if corporate) can write off as expense | Economic: Medical and related expenses AND Loss of earning capacity  Non-Economic : physical and mental pain and suffering AND (in most courts) hedonic damages  Economic damages: lost wages/added expenses to date of trial/filing PLUS go-forward values  Allow for inflation, promotions, etc. (expert testimony); lump sum payment (present value of money, discount rate)  Pain and suffering must be directly related to the injury (physical pain, resulting depression)  Hedonic damages are a consequence, not a direct result (loss of enjoyment, hobbies, etc.) (Minority of courts won’t allow if the victim is unaware of loss—coma, etc.)  Collateral source rule: if victim has another source of benefits (health ins., disability, generous relative, etc.) we don’t deduct the value of the benefit from the award (why should tortfeasor get off the hook? Didn’t it cost P money to buy that protection? Might not P have to pay back insurance company under subrogation anyway?). This rule is changing. One court  Set off rule: cross-claims can only be netted out against each other when the parties are paying each other from their own pockets. Insurance companies may not use net out as a means to reduce their out of pocket costs, and thereby deprive each party of the amount of damages they are entitled to/need for their continued well-being.  Non-economic damages very hard to monetize—a lot of deference to the jury—what would be “reasonable and just” but not mathematical precision (some courts allow expert testimony)—some courts combine pain and suffering WITH hedonic damages (one line item, avoid double dipping)  “Economic” aka “special” or “pecuniary”  “Non-Economic” aka “general” or “non-pecuniary” |
| 2. Compensatory Damages (Statute)   * loss of consortium*: common law doctrine* * wrongful death * survival damages | * Loss of **consortium** = personal injury cases, not death; COMMON LAW RULE   + Spouses can recover   + Sometimes, children can recover when parents are injured, and parents can recover when children are injured * Wrongful death = brought on behalf of people other than the deceased (the survivors; classes of eligible survivors will be specified in the statute)   + Allows the survivors to recover for Economic losses (Loss of support – prospective loss of earnings and contribution; Prospective expenses; Loss of services) and Noneconomic losses (Loss of **society**: companionship, comfort and consortium; Mental anguish and grief)   + Who can recover: Spouse and kids – almost always; Parents and siblings – sometimes; Legal heirs - sometimes   + Who can sue: Deceased’s estate; People who can recover - sometimes   Major difference between wrongful death and non-fatal cases = who can recover for loss of consortium/society   * Wrongful death: spouses, parents, kids = broader group * Personal injury: spouses, less often parents/kids * Survival statutes = allow the claim to continue beyond death; allow suit on behalf of the decedent   + Pain & suffering (if dies instantly w/o pain, no recovery)   + Estate’s losses (funeral expenses); medical expenses until death   + Deceased’s lost earnings until death   + General rules     - Survivors only recover what they would have received/not what decedent would have earned     - If decedent dies after injury, only recovers lost earnings from tort until death (generally no future earnings allowed, but some laws allow estate to recover for the wealth the decedent would have likely accumulated |
| 1. Punitive Damages   P pays taxes on these  D cannot write off as an expense | Not available in all jurisdictions; subject to heightened scrutiny  Jury will usually consider: Reprehensibility of D’s conduct; Financial condition; Magnitude of the harm; Mitigating facts  Constitutional issue (due process): No clear mathematical formula, but “few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process”; so is 9:1 is the max? (Not necessarily, but it’s presumed.); If compensatory damages are high, punitives might be lower – maybe 1:1  State damages awards: States will use own standards to assign punitives; Subject to a vague constitutional limit (maybe single-digit award, maybe 1:1), but they don’t always back down |
| If court finds damages too high or too low… three options  More and more statutory damages caps | 1. Remand for new trial on all issues (plaintiff prefers—go into D’s breach again) 2. New trial on damages only (defense prefers—focus on P’s grasping; downplay facts of breach) 3. Judge makes a call and if sides don’t like it they can take chance on a new trial    1. Remittur: lower damages awarded by jury (P needs to accept less)    2. Additur: raise damages awarded by jury (D needs to pay more) |

|  |  |
| --- | --- |
| Other Liability Theories | |
| Strict Liability   * Abnormally dangerous activities * Also: animal trespass or wild animals | Strict liability applies to activities that are abnormal and dangerous OR abnormally dangerous  3rd Restatement.: Activity is abnormally dangerous if it creates a foreseeable and highly significant risk of physical harm even when reasonable care is exercised and it is not a matter of common usage  Factors from case (*Rylands*: fuel carrying semi)   * Whether involves high degree of risk to harm to person, land, chattel of another * Whether gravity of harm is likely to be great * Whether risk cannot be eliminated by exercise of reasonable care * Whether activity is not a matter of common usage * Whether activity is inappropriate to the place where it is carried on * Value of the activity to the community   Strict v. absolute liability   * Strict: need to show type of injury is foreseeable and extends to class of foreseeable persons (Does away with need to show duty and breach elements are met) * Absolute: Does away with proving duty, breach and legal/proximate cause elements |
| Vicarious Liability  This is NOT a duty doctrine: different from a non-feasance/relationship with perp exception (but that’s based on the employer’s knowing of risk and is a different analysis than vicarious liability) | A variety of theories here; we focused on respondeat superior (the master is responsible)—employer responsibility.  Do analysis of the direct actor/D. Then assess if vicarious liability exists for employer (don’t need to do 5 element test). Was the D/tortious actor acting “within the scope of their employment”?  Scope of employment =   1. It is of the kind s/he is employed to perform 2. It occurs substantially within the authorized time and space limits 3. It is actuated, at least in part, by a purpose to serve the master (motive test), OR the servant’s conduct falls within the activities of the enterprise (enterprise test overlaps a bit with the first two elements), and 4. If force is intentionally used by the servant against another, the use of force is not unexpectable by the master and may cut off liability for the employer   Two different approaches to the third prong:   * The “motive test”: Conduct of servant w/in scope of employment only if actuated, at least in part by a purpose to serve the master * The “enterprise test”: focuses on Foreseeability: ER is on the hook for harm likely arise out of and in the course of employment (whether the servant’s conduct falls within the activities of the enterprise)   Commuting usually out, unless special risks/business trip; Frolic and detour cuts off business purpose; Can cover intentional torts if in scope; Can extend to volunteers taking directions.  Generally does not apply to independent contractors unless... contractor is performing “nondelegable duties” (duties imposed on ER that arise out of work itself b/c its performance creates dangers to others, which makes it “inherently dangerous work”:   * Creates particular risk of harm to others unless special precautions are taken * Type of risk = recognizable in advance/inherent in work * Type of danger = special danger calling for special precautions   Also exists where created by statute: Parental liability – with limits; Partnerships; Joint enterprises; Car owners |

|  |  |
| --- | --- |
| Affirmative Defenses to Negligence Claims | |
| Contributory v. Comparative Negligence  These assess differences in negligence btw P and (all) Ds (P v D) | Traditional rule was “contributory negligence”: if plaintiff was in any way negligent, was barred from recovery. Harsh. (Deterred P from risk to self; bright line)  Movement toward “comparative negligence” (all but 5 US states). Some changes from the courts, but mostly by statute.   * “Pure comparative fault”: Everyone assessed a % of negligence, and P can recover for Ds’ % no matter how small it is * Modified 51% scheme: If P’s negligence is greater than Ds’, P cannot recover. (Tie goes to P.) * Modified 50% scheme: If P’s negligence is greater than or equal to Ds’, P cannot recover. (Tie goes to D.) * Wisconsin has unique system where P’s negligence % is compared to each D one at a time to see if it is greater than any one D (if so can’t recover from that D).   Some courts allow non-parties to be ignored in the %s of negligence in the original suit, others include them to keep track of %s of the parties.  With high-blame Plaintiffs courts may make them solely responsible (sole proximate cause) or preclude suit altogether |
| Proportionate Liability  This refers to the distribution of negligence among a variety of Ds | Preferred approach is to apportion liability based on degree of causation; per the Restatement factors are: awareness or indifference with respect to the risks created and any intent with the respect to the harm created, AND, strength of the causal connection between the person’s risk creating conduct and the harm  If that can’t be determined for some reason, the fallback is to apportion based on the degree of breach. Factors include: Inadvertence/awareness; How great the risk; Benefit of the conduct; Capacities of actor; Extenuating circumstances  If there is a tortious cause and a non-tortious cause, tortious actor is responsible for his portion of the damages. Might be special treatment if the non-tortious cause is:   * Eggshell-kind of cause: tortious actor on the hook for 100% * Looming threat: tortious actor on the hook for the portion of the damages he caused in bringing forward the looming threat.   Also applies to **Intentional Torts** when tortfeasors are fighting amongst themselves in a separate action about who should pay what (when Joint & Several Liability applies) |
| Joint and Several Liability | Generally (without consideration of comparative or proportionate liability): Each D is on the hook for the total amount of damages; Ds can sue each other in a separate matter to apportion damages among themselves in a contribution action.  “One satisfaction” rule: P can’t collect more than the total damages award  What has happened to J+SL since comparative liability? 10 juris kept full J+S; 4 allow it for innocent Ps; 10 apply it to Ds that exceed a certain fault %; 8 apply it based on type of damages; various maintain it based on certain causation tests |
| Damages Calcs | When there are multiple D’s, one of whom settles   * Comparative approach: each D pays their % fault of the total damages amount * Pro tanto approach: discount the total damages amount by the P’s settlements from other parties, then the Ds’% is applied just to the remaining damages amount. (In J+SL jurisdictions, this is a major disincentive for Ds to settle)   When a D’s % has been calculated, then it turns out they should not have been included (immune from suit)   1. Assign full damages to remaining D/Ds 2. Assign immune D’s portion to P 3. Reduce the total damages by excluding the amount the immune D “owed” (same result as if remaining Ds just pay their portion) 4. Take out faulty amount and reduce the fraction (“proportionate liability approach”—favored by Restatement and “more and more” courts moving this way   General Rule: When P settles with one D, other D’s get a credit. But how to calculate:   1. Subtract settlement amount from plaintiff’s damages and allow right of contribution against settling D = pro tanto with contribution 2. Subtract settlement amount from plaintiff’s damages and extinguish any claims for contribution against settling D = pro tanto without contribution (Assumes settlement was made in good faith) 3. Settlement diminishes claim against other tortfeasors based on proportionate liability finding (No contribution b/c Ds pay proportionate share)   SUMMARY  Comparative fault + proportionate fault = each party pays own way   * If a party isn’t there to pay, Plaintiff bears the risk   Comparative fault + J&S = each party assigned fault, but one D might be on the hook for all other Ds   * Defendant bears the risk   Comparative fault and allocation with nonparties   * Some parties not considered in assigning the fault * Means Defendant bears the risk, but the fraction method may shift some risk onto the plaintiffs |
| UPSHOT | How does proportionate liability affect substantive tort law?   * Proportionate liability should not change the substantive tests (E.g., burden-shifting rules for single indivisible injury, alternative liability, concerted action) * If Ds not acting in concert and no vicarious liability, then no J&S liability (Each D on hook for its share (juries now required to apportion); If a D insolvent, P will not recover from that D)   In the case of an **intentional tort**:   * Comparative fault (majority rule): Do not compare P’s negligence against D’s intentional tort   + Proportionate fault : Ok to apportion damages between intentional and negligent Ds, BUT Intentional tortfeasors J&S liable (even where negligent ones are not) |
| Contribution and Indemnity | Contribution actions are between Ds regarding dividing up damages they’ve paid (or some of them have paid) to P (less useful in contributory fault juris, where jury has already provided % fault)  Indemnity is a post-litigation action where one D tries to shift entire burden of damages to another D   * Typically a contract matter, but is allowed in J+S juris where one D is the primary cause of the injury and another D is the secondary cause. But with fading of J+S, indemnity actions also fade. (Rather than sue the other D after the first suit, join them as a D to the first suit.) If J+S abolished, Indemnity allowed if:   + Party is liable solely as result of vicarious liability   + Innocent retailer is held liable for manufacturer’s defective product   + Contract in effect |
| Imputed Contributory (Comparative) Fault | This is the reverse of vicarious liability: AKA the “both ways” rule: X is liable for Y’s negligence based on relationship with Y, whether X is acting as defendant or plaintiff  Motor vehicle exception: this is only the case if the owner X is “in control” of the vehicle driven by Y. Can be present or be the employer, who is understood to be in control of their employee through work standards, etc.  General rule: impute fault all the time unless a vehicle is involved, then assess the owner’s degree of control  In a Derivative Claim (where P sues D for injuries to a 3rd Party—such as a loss of consortium claim): 3rd Party’s negligence % is imputed to P. (If suing sort of on 3rd Party’s “side” need to bear weight of 3rd Party’s negligence)   * Except in action under a Survival Statue (where P is the estate; beneficiaries’ negligence is not imputed to P). * If two spouses sue the same D for derivative claims of each other’s injuries, don’t treat them as one unit (total % fault) when assessing if modified comparative scheme bars/allows recovery; but do treat as one unit in calculating damages (their combined % v. D’s %). |
| Assumption of Risk | Three Doctrines   * Express assumption of risk: contract waiver (Trend: waivers ok unless there are public policy reasons not to) * Implied primary presumption of risk: duty issue – not strictly an affirmative defense   + No duty to protect P for risks inherent in an activity where parties voluntarily entered into the relationship in which P assumes well-known incidental risks; P’s subjective knowledge is not important; Consent is implied from participation   + Well-known incidental risks: Rules, customs, mores of the activity; If elimination of risk would chill participation in the sport or alter the fundamental nature of the activity.   + Firefighters’ rule: Those who are injured by perils they are employed to confront have no claim against those who created those perils * Implied secondary assumption of risk: affirmative defense based on P’s conduct   + Applies where D owes duty to P, but P knowingly proceeds to encounter a known risk imposed by D’s breach; Requires subjective knowledge; P knowingly acquiesced in the breach   + P’s conduct usually does not bar recovery altogether (in a few juris it does). But is part of the contributory fault assessment |
| Failure to Avoid Consequences /  Failure to Mitigate Damages | Failure to avoid consequences: P’s failure to take steps pre-accident to protect self from the likely injuries that could result if someone else’s negligence causes an accident   * P’s failure is not a cause of the accident; it is only a cause of the extent of harm   Failure to mitigate damages: P’s behavior that occurs post-accident that may make injuries worse   * Again, P’s failure is not a cause of the accident; only a cause of the extent of harm   How to treat:   * Figure out respective faults of P and D in terms of comparative negligence (exclude failure to avoid/mitigate) * Figure out total damages * Figure out whether P’s failure to avoid/mitigate contributed to damages amount, and by how much * Lower the total damages based on P’s failure to avoid/mitigate * D pays share of this lower damages amount based on failure to avoid/mitigate   Technically, Failure to Avoid Consequences could also applyto **Intentional Torts,** but courts will not want to take that approach  Failure to Mitigate Damages could also apply to **Intentional Torts** |
| Statutes of Limitation and Repose | Statutes of Limitation:   * “Discovery rule” = accrual date of a cause of action is delayed until P is aware of her injury * 3 approaches:  1. Knowledge of injury and factual cause 2. Knowledge of injury and negligent cause: Injury + facts underlying negligence claim = where P needs to actually know facts of the wrongdoing 3. Knowledge of injury and negligent cause: Injury + P suspects/ should suspect that injury was caused by wrongdoing   SOL and latent injuries: Most courts say SOL doesn’t run until manifestation; Also, with minors, SOL doesn’t begin to run (i.e., it’s tolled) until victim becomes an adult.  Continuing tort: where D’s conduct as a continuous whole is the tort, ex.: IIED – where based on related behavior of harassment, abuse, etc. (the repetition of the behavior is in fact part of the claim). SOL begins when injury ends—the last of the series of tortious behavior. (Not a series of separate torts, each  Statues of Repose: all claims extinguish after X (deeply permanent extinguishment of claims  These may also apply to **Intentional Torts** |