I. Intentional Torts

- **Battery**
  - **Ask these questions**
    - Was there contact?
    - What kind of contact was it? (Harmful v. offensive)
    - Was it intentional?
      - Did he have knowledge with substantial certainty of the consequences?
    - Was there a privilege?
    - Was the intent unlawful?

**Intentional Infliction of Harm**
- Damages: nominal (establish a matter of public record D harmed P)
  - Compensatory (reflect the harm actually suffered)
  - Punitive (punish D for wrongdoing, substantial in amount)
  - Most torts are resolved out-of-court, insurance pays settlements

- Law governing liability for battery
  - ELEMENTS: intent, contact or absence of privilege

- **Restatements**
  - §13 BATTERY: Harmful Contact
    - An actor is subject to liability to another for battery if
    - (a) he acts *intending to cause a harmful or offensive contact* with the person of the other or third person, or an *imminent apprehension* of such a contact, and
    - (b) harmful contact with the person of the other directly or indirectly results.

  - §18 BATTERY: Offensive Contact
    - An actor is subject to liability to another for battery if
    - (a) he acts intending to cause a harmful or offensive contact with the person of the other or third person, or an imminent apprehension of such a contact, and
    - (b) offensive contact with the person of the other directly or indirectly results...

  - §7 harm: “the existence of loss or detriment of any kind to a person resulting from any cause.”

  - COMMENT: Harm implies a loss or detriment to a person and not a mere change or alteration in some physical person, object or thing. Physical changes or alterations may be either beneficial, detrimental or of no consequence to a person. Insofar as physical changes have a detrimental effect on a person, that person suffers harm.

  - §15 bodily harm: any physical impairment of the condition of another’s body, or physical pain or illness.
    - If any part of the body is altered, there is harm. A contact which causes no bodily harm may actionable as a violation of the right to freedom from the intentional infliction of offensive bodily contacts.

  - §19 What constitutes offensive contact
A bodily contact is offensive if it offends a reasonable sense of personal dignity.

**Comment**

In order that a contact be offensive to a reasonable sense of personal dignity, it must be one which would offend the **ordinary person** and as such one not unduly sensitive as to his personal dignity. It must, therefore, be a contact which is unwarranted by the social usages prevalent at the time and place at which it is inflicted.

**Prima Facie Case**

**Intent**

- **necessity of intent as an element of battery:**
  - action must be unlawful.
  - D must have INTENDED HARM and D must be AT FAULT
  - intent to harm: motive, reason, desire → why did this person act voluntarily?
  - Foreseeability of harm/contact

- Mental state considerations
  - Individual can be found liable for battery even if there is an express finding that individual did not intend to harm P … intent to cause offensive contact.
  - P must prove that D desired to cause harmful or offensive contact or that D knew with **substantial certainty** such contact would occur as a result of D’s actions
    - Knowledge with substantial certainty constitutes **constructive intent**. (actual intent will be presumed when act leading to the result could have been reasonably expected to cause the result.)
  - if D desired to cause the contact and the contact results, a battery is established
  - **transferred intent**
    - the ill intent that D bore toward a third party is applied to conduct that harmed P (→ D intends to hit P’s husband but accidentally hits P)
  - D fakes intent to cause harmful/offensive contact but such contact results
    - Intention create the imminent apprehension of harmful/offensive contact satisfies battery (→ D acts like he is going to swing at P to scare her and P stumbles out of fear, thus causing an injury)

- Tort liability of minors and their parents
  - Minors are not immune from liability for batteries.
  - Parents may be liable for negligence in failing to supervise children but under common law, parents are not subject to vicarious liability for children’s torts.

**Contact**

- There must be harmful or offensive contact with D’s person.
  - Second restatement of torts: D may now use consent/privilege as a DEFENSE
  - ex: originally, P would have to prove that D was not privileged…now, D has to prove a positive existence of privilege. (shifts burden of proof)
  - Contact results: D has a higher threshold to reach.
- It is sufficient if D strikes something very closely associated with P’s person.
  - See Fisher v. Carrousel
- What if D intends harmful/offensive contact but fails to achieve it?
  - Depends on whether or not P was aware of D’s intent…if not aware, recovery is generally barred.
Vosburg v. Putney
- **Rule**: If the act of kicking is unlawful, then the intention of D is also unlawful.
  - **Implied sense of order** in the classroom (code of conduct)
  - On the playground, there is an **implied license** (freedom to act a certain way)
  - Inside the classroom, P assumes no risk of foul play (kicking) → his expectations are of order and decorum.
  - P must show that there was malice or wantonness → D intended to do it.

Garratt v. Dailey
- **Rule**: see Restatement 2d of Torts → Determine if D acted with **substantial certainty** of the outcome of his actions (level of knowledge). Determine if the act was done with the purpose of causing the contact or (imminent) apprehension or with the knowledge that such contact or apprehension is substantially certain to be produced.

**Dignitary wrongs: Offensive battery**
- See §18, 19 Restatement and mental state considerations
- Offensive contact includes mental state considerations

Fisher v. Carrousel Motor Hotel
- **Rule**: Actual physical contact is not necessary to constitute a battery so long as there is contact with clothing or an object closely identified to the body. (unpermitted and intentional invasion of one’s person) → essence of battery is **personal indignity**
  - **Respondeat superior**: if the agent was employed in a managerial capacity and was acting within the scope of employment then the employers are liable.

Leichtman v. WLW Jacor Communications, Inc.
- **Rule**: battery results from indirect physical contact which is offensive to a reasonable sense of personal dignity. [Glass cage: however, ind cannot erect a glass cage around himself and announce that all contact comes at the expense of liability.]

**Assault**
- **Restatements**
  - §21 Assault
    - (1) An actor is subject to liability to another for assault if
      - (a) he acts intending to cause a harmful or offensive contact with the person of the other or third person, or an imminent apprehension of such a contact, and
      - (b) the other is thereby put in such imminent apprehension.
    - (2) an action which is not done with the intention stated in subsection (1,a) does not make the actor liable to the other for an apprehension caused thereby although the act involves an unreasonable risk of causing it and, therefore, would be negligent or reckless if the risk threatened bodily harm.
  - §29 Apprehension of imminent and future contact
    - (1) to make the actor liable for an assault he must put the other in apprehension of an imminent contact.
(2) an act intended by the actor as a step toward the infliction of a future contact, which is so recognized by the other, does not make the actor liable for an assault under the rule stated in §21.

Read v. Coker
- **Rule**: Assault exists when there is an attempt coupled with a present ability to do personal violence

Beach v. Hancock
- **Rule**: The threat does not have to be genuine – it has to be reasonably perceived.

### False Imprisonment

- **§35: False Imprisonment**
- (1) An actor is subject to liability to another for false imprisonment if
  - (a) he acts intending to confine the other or a third person within the boundaries fixed by the actor, and
  - (b) his act directly or indirectly results in such a confinement of the other, and
  - (c) the other is conscious of the confinement or is harmed by it
- (2) An act which is not done with the intention may involve unreasonable risk and therefore would be negligent or reckless if the risk threatened bodily harm.

Whittaker v. Sanford
- **Rule**: creating a physical impediment to escape qualifies as false imprisonment. *Moral influence* does not qualify as false imprisonment.

Rougeau v. Firestone Tire & Rubber Co.
- **Rule**: If an individual is not totally restrained then he is not the captive of another and thus is not falsely imprisoned.
- **Extra notes**: P never told anyone that he did not want to be there, thus he may have given his implied consent to stay. Was P conscious of the confinement, as per §35?

Sindle v. NY Transit Authority (1973)
- **Rule**: Regardless of justification for false imprisonment, P’s recovery for damages is limited by his own acts of negligence in causing the injury.

Coblyn v. Kennedy’s (1971)
- **Rule**: an imprisonment is justified if the circumstances would lead a prudent and cautious man to reasonably assume such.

### Intentional Infliction of Emotional Distress

- **Insult and outrage (Prosser)**
  - some say the character of the injury does not satisfy cause for liability
    - too speculative to be measured; intangible, peculiar and variable
  - Mental anguish includes:
    - All unpleasant mental reactions (such as fright, horror, grief, shame, humiliation, anger, embarrassment, disappointment, worry, nausea…
    - Courts require some GENUINENESS, such as physical consequences or D’s conduct and the circumstances of the case.
- **Mental and emotional disturbances in torts (Magruder)**
  - It is nearly impossible for courts to police this issue as a policy matter
Recognizing it could result in myriad litigation re “bad manners” → these cases are better dealt with socially then through the law.

**Restatement**

- **§46: Outrageous conduct causing severe emotional distress**
  - (1) One who by **extreme and outrageous conduct** intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.
  - (2) where such conduct is directed at a third person, the actor is subject to liability if he intentionally or recklessly causes severe emotional distress
    - (a) to a member of such person’s immediate family who is present at the time, whether or not such distress results in bodily harm, or
    - (b) to any other person who is present at the time, if such distress results in bodily harm…

- **comment:** extreme and outrageous conduct
  - it is not enough for D to have acted with tortious/criminal intent, or that he intended to inflict emotional distress, or even that he acted with malice → LIABILITY exists only when the conduct is so outrageous in character and so extreme in degree as to go beyond all bounds of decency and to be considered atrocious and utterly intolerable.
  - Liability does not extend to simple insults, indignities, threats, annoyances, petty oppressions or other trivialities.

**New tort**

- Requirements:
  - Absence of privilege
  - Intent (knowledge with substantial certainty)
  - Serious threat to physical well-being
- Stretches what we know of battery (Carrousel) or assault (Siliznoff)
- Assault + threat of serious bodily injury that results in emotional suffering WITHOUT present ability requirement

**State Rubbish Collectors Association v. Siliznoff**

- **Rule:** A cause of action exists when it is shown that one, in the absence of any privilege to use coercive methods, intentionally subjects another to the mental suffering incident to serious threats to his physical well-being, whether or not the threats are made under such circumstances as to constitute a technical assault.
  - Liability for bodily harm if he could have **foreseen** that mental distress might have caused such harm; first time courts have looked at assault that does not involve PRESENT ABILITY to inflict harm → IIED

**Trespass**

**Trespass to land**

- One who intentionally enters another’s land, or causes a thing or third person to enter, is liable in trespass irregardless of whether the actor causes actual harm and irrespective of any mistake, however reasonable, not induced by the possessor.
- Nonconsensual privileges: private necessities (see Ploof v. Putnam)
- (1) interest sought to be protected is P’s interest in **exclusive possession** of the land.
• (2) to constitute a trespass: D must enter in some physical, tangible manner
  o must be unauthorized
  o intended by the defendant
  o or caused by defendant’s recklessness or negligence
  o or the result of D carrying on an ultrahazardous activity
• (3) circumstances in which D is privileged to commit an unauthorized, intentional
  entry are guarded by judicial decisions … no broad-based privilege to enter land of
  another simply b/c social benefits of doing so outweigh the risks of harm to the land.
• (4) P may get nominal damages and injunctive relief if further acts threaten his land.

Affirmative Defenses

Privileges
• consensual: depend on P agreeing to the contact
• nonconsensual: shield D from liability for harmful and offensive contact even if P
  objects to it.
1. Consent
  o Willingness for conduct to occur; need not be communicated to D
  o “actual” or “subjective” consent

O’Brien v. Cunard Steamship Co.
• Rule: If P’s behavior was such as to indicate consent on her part, D was justified in
  his act, whatever her unexpressed feelings may have been. Thus, it was lawful.
• Notes: Judge takes case away from jury when a reasonable person can agree there is
  no disagreement as to facts. ➔ No reasonable person could conclude P did not
  give consent. If there are no factual issues to be resolved, judge takes nothing away.

Barton v. Bee Line, Inc.
• Rule: A female under the age of 18 has no cause of action against a male with whom
  she willingly consorts, if she knows the nature and quality of her act.

Bang v. Charles T. Miller Hospital
• Rule: When entering a non-emergency operation, a patient should be informed of
  foreseeable alternatives and consequences in order for the patient to give consent.

Kennedy v. Parrot
• Rule: When P voluntarily submits herself to D for treatment, in the absence of
  contrary evidence, it will be presumed that what doctor did was reasonable and
  expressly or impliedly authorized to be done.
  o Had P been given the choice, she probably would have consented to cyst
    removal – what she is really objecting to are the by-product consequences.

• Doctor/patient notes: conspiracy of silence ➔ though D was negligent, many
  doctors would not testify against him b/c they are his peers and colleagues.
  o Informed consent doctrine: what contemporary hospitals make P sign.
  o ➔ P consents for D to perform a certain operation and D thereafter extends
    the operation beyond the boundaries of consent given.
  o ➔ D fails to explain to P the risk of side effects of a treatment to which P has
    agreed. (D’s liability would be determined by law of negligence.)
  o difference b/t battery and negligence:
• treatment is unauthorized and performed w/o consent = battery
• D obtains consent but breaches a duty to adequately inform P of risks = negligence (→ D can avoid liability by proving failure to inform did not cause harm, i.e. even knowing risks, P would still have consented.)
  o Life-sustaining treatment may be withheld from incompetent patient if:
    • It is clear patient would have refused the treatment under the circumstances involved;
    • If there is some trustworthy evidence that patient would have refused the treatment, and the decision maker is satisfied that it is clear that the burdens of the patient’s continued life with the treatment outweigh the benefits of that treatment; OR
    • In the absence of proof of probably intent, if the net burdens on the patient’s life with the treatment clearly and markedly outweigh the benefits that the patient derives from life, and the effect of administering painful life-sustaining treatment would be inhumane.

• Restatement
  o §892D Emergency Action w/o consent
    o Conduct that injures another does not make the actor liable to the other, even though the other has not consented to it if
      • (a) an emergency makes it necessary or apparently necessary, in order to prevent harm to the other, to act before there is opportunity to obtain consent from the other or one empowered to consent for him, and
      • (b) the actor has nor reason to believe that the other, if he had the opportunity to consent, would decline.

2. Self-Defense (nonconsensual)
• Restatement
  o §63 Self-defense by force not threatening death or serious bodily harm
    o (1) an actor is privileged to use reasonable force, not intended or likely to cause death or serious bodily harm, to defend himself against unprivileged harmful or offensive contact or other bodily harm which he reasonably believes that another is about to inflict intentionally upon him.
    o (2) Self-defense is privileged under the conditions stated in subsection (1), although the actor correctly or reasonably believes that he can avoid the necessity of so defending himself,
      ▪ (a) by retreating or otherwise giving up a right or privilege, or
      ▪ (b) by complying with a command with which the actor is under no duty to comply or which the other is not privileged to enforce by the means threatened.
  o §65 Self-defense by force threatening death or serious bodily harm
    o (1) Subject to the statement in subsection (3), an actor is privileged to defend himself against another by force intended or likely to cause death or serious bodily harm, when he reasonably believes that
(a) the other is about to inflict upon him an intentional contact or other bodily harm, and that
(b) he is thereby put in peril of death or serious bodily harm, which can be safely prevented only by the immediate use of such force.

(2) The privilege exists although the actor correctly or reasonably believes that he can safely avoid the necessity of so defending himself by

(a) retreating if he is attacked within his dwelling place, which is not also the dwelling place of the other, or (b) permitting the other to intrude upon or dispossess him of his dwelling place, or (c) abandoning an attempt to effect a lawful arrest.

(3) The privilege stated in subsection (1) does not exist if the actor correctly or reasonably believes that he can with complete safety avoid the necessity by

(a) retreating if attacked in any place other than his dwelling place, or in a place which is also the dwelling of the other, or
(b) relinquishing the exercise of any right or privilege other than his privilege to prevent intrusion upon or dispossession of his dwelling place or to effect a lawful arrest.

§70 Character and extent of force permissible

(1) The actor is not privileged to use any means of self-defense which is intended or likely to cause a bodily harm … in excess of that which the actor correctly and reasonably believes is necessary for his protection.

§71: Actor is liable “for only so much of the force as is excessive…”

Courvoisier v. Raymond
• Rule: D must be able to satisfy to the jury that he acted honestly in using force and that his fears were reasonable given the circumstances.
  o “choice of innocents”: an equally innocent plaintiff is harmed by D’s innocent and honest mistake

3. Defense of others
• Restatement §76: intervenor is entitled to use reasonable force to protect a third party as long as the intervenor reasonably believes that intervention is necessary and that the third party would be privileged to use self-defense if able to do so, even if the person to be protected would not be privileged to defend himself.

4. Defense of property
• Restatements §77: Defense of possession by force not threatening death or bodily harm
  o An actor is privileged to use reasonable force, not intended or likely to cause death or serious bodily harm, to prevent or terminate another’s intrusion upon the actor’s land or chattels, if:
    • (a) the intrusion is not privileged…and
    • (b) the actor reasonably believes that the intrusion can be prevented or terminated only by the force used, and
    • (c) the actor has first requested the other to desist and the other has disregarded the request, or the actor reasonably believes that a request will be useless or substantial harm will be done before it can be made.
§79: Defense of possession by force threatening death or serious bodily harm

- use of death or serious bodily harm is privileged if, but only if, the actor reasonably believes that the intruder, unless expelled or excluded, is likely to cause death or serious bodily harm.

Katko v. Briney
- **Rule**: It is unlawful for an individual to protect his property using deadly force. → use of force must be reasonable and necessary.

Ploof v. Putnam
- **Rule**: Entry upon the land of another is justified by necessity (doctrine of necessity = privilege) tempered by individual’s ability to foresee any consequences of his behavior.

Vincent v. Lake Erie Transportation Co. (1910)
- **Rule**: If D is not negligent in his acts and exercises ordinary prudence and care, he may still be liable if he protects his own property at the cost of another’s.

5. Miscellaneous privileges/immunity
- Parents, teachers: harmful contacts as a function of discipline
  - Immunity from liability requires:
    - Punishment was reasonable
    - Consideration of nature of punishment
    - Age and physical condition of pupil
    - Nature of pupil’s misconduct
    - Teacher’s motive/intentions
- **Governmental immunity**: → is this still in existence?
  - Federal Tort Claims Act: assault, battery, defamation and interference claims may not be brought
  - Precludes liability for a claim based on the exercise or performance or failure to exercise or perform a discretionary function or duty
- Charitable immunity: Holding charities liable for torts may have a deterrent effect.

II. Negligence

**Prima Facie Case**
- Negligence: conduct must involve a risk of harm greater than society is willing to accept in light of the benefits to be derived – risk of harm is unreasonable.
- Duty, breach, cause {actual causation, proximate/legal cause}, harm

Brown v. Kendall (1850)
- **Rule**: Injuries received by direct force of another, where the act, legal or illegal, was not willful, wanton or intentional, cannot sustain a cause for battery.
  - A person using ordinary care, as defined by the circumstances, is not liable for the injuries resulting therefrom.

- **General standard**: reasonable care under the circumstances
  - Subjective standard only account for what one individual thinks

United States v. Carroll Towing Co. (1947)
• **Rule:** B < PL
  - D is negligent if the burden of providing adequate precautions against the barge breaking away is less than the probability that the barge will break and the gravity of the resulting injury (loss) (probability of loss)
  - Negligence is not a uniform concept – there are things that are allowable at night which are not okay during the day (such as bargee leaving)
    - Bargee does not have to be there at night because then B>PL: ex, bargee at night costs $300 and the cost of injury which MIGHT be suffered is $250, then it is not negligent for bargee not to be there.
    - Other categories can be populated v. unpopulated, day/night
  - Marginal cost: when the marginal cost of each accident begins to exceed the marginal cost of each precaution, at that point the actor has demonstrated reasonable care and he is no longer negligent. Jury determines this \( \Rightarrow \) did ind exercise due care?
    - §292: **Factors considered in determining utility of actor’s conduct**
      - The utility of the actor’s conduct depends on the social value which we think will be advanced by the conduct, the extent to which that social value is advanced by this actor’s conduct and whether or not that same interest can be advanced by another less dangerous conduct.
    - §293: **Factors considered in determining magnitude of risk**
      - Social value of risks in danger, extent to which actor’s conduct invades social interest and the number of persons likely to be invaded if risk causes harm.

**Washington v. Louisiana Power and Light Co. (1990)**
• **Rule:** When there is a high degree of gravity of loss and a very small probability of occurrence, PL does not outweigh the burden of what it would cost D to relocate or insulate the power line. \( \Rightarrow \) decedent already knew of the dangers
  - B>PL when D attempts to protect everyone in the community is too high, considering the prob of any one of these people coming into contact and resulting in injury.

**Weirum v. RKO General, Inc. (1975)**
• **Rule:** The duty is to be aware of actions that are foreseeable to hurt/affect others and therefore act with reasonable care.
  - Foreseeability gives you perspective to judge, in advance, prob of harm
• **Sudden emergency doctrine:** a person who, through no fault of his or her own, is placed in a sudden emergency, is not chargeable with negligence if the person exercises a degree of care which a reasonably careful person would have exercised under the same or similar circumstances.

1. **Duty**
   - **Invitees**
   - §332: **Invitees Defined**
     - (1) invitee is a public invitee or a business visitor
     - (2) public invitee: person who is invited to enter or remain on land as a member of the public for a purpose for which the land is held open to the public \( \Rightarrow \) ex : customer
(3) business visitor: person who is invited to enter or remain on land for a purpose directly or indirectly connected with business dealings with the possessor of the land. (ex: bread delivery guy at Schnucks)

- **DUTY owed invitees = reasonable care under the circumstances**
- **§343: Dangerous conditions known to or discoverable by possessor**
  - Possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he
  - (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and
  - (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
  - (c) fails to exercise reasonable care to protect them against danger.
- **§330: Licensee defined:**
  - Licensee is a person who is privileged to enter or remain on land only by virtue of possessor’s consent.

- **§342: Duty owed to licensee … dangerous conditions known to possessor**
  - Possessor is subject to liability caused by condition on his land if he
  - (a) knows or has reason to know of the condition and should realize that it involves an unreasonable risk of harm to licensees and should expect that they will not discover or realize the danger, and
  - (b) he fails to exercise reasonable care to make the condition safe, or to warn the licensees of the condition and risk involved, and
  - (c) the licensees do not know or have reason to know of the condition and the risk involved.

- **Trespassers (lowest duty)**
  - **§329: trespasser defined**
    - person who enters or remains upon land in the possession of another w/o privilege created by possessor’s consent
  - duty owed: **§335: artificial conditions highly dangerous to constant trespassers**
    - possessor who knows or should know that trespassers constantly intrude on a limited area of his land is subject to liability for harm if
      - (a) the condition
        - (i) is one which the possessor has created or maintains
        - (ii) is, to his knowledge, likely to cause death or serious injury
        - (iii) is of such a nature that he has reason to believe trespassers will not discover it
      - (b) the possessor has failed to exercise reasonable care to warn trespassers of condition and the risk involved
  - **§337: Artificial conditions highly dangerous to known trespassers**
    - possessor who maintains an artificial condition which poses a serious risk is subject to liability for harm for his failure to exercise reasonable care to warn such trespassers if
      - (a) possessor knows or has reason to know of their presence in dangerous proximity to the condition and
• (b) condition is such that he has reason to believe trespasser will not discover it or realize the risk
• Duty to children: §339: artificial conditions highly dangerous to trespassing children
  o Possessor is subject to liability for harm to children trespassing if
    ▪ (a) the place where the condition exists is one upon which possessor knows or has reason to know children are likely to trespass
    ▪ (b) condition is one which possessor knows (should know) or realizes (or should realize) involves an unreasonable risk to such children, and
    ▪ (c) the children b/c of their youth do not discover it/know the risk, and
    ▪ (d) the utility of maintaining the condition and the burden of eliminating the danger are slight compared to the risk to children and
    ▪ (e) possessor failed to exercise reasonable care to eliminate dangers
• “reason to know”: actor has knowledge of facts from which a reasonable man of ordinary intelligence would infer the existence of the fact in question or would regard its existence as so highly probable that his conduct would be predicated on assumption that the fact did exist.

Rowland v. Christian (1968)
• Rule: breaks down tort distinctions → D should be expected to exercise reasonable care regardless of special relationship he has with P (invitee, licensee or trespasser)

Reasonable care under the circumstances
  o What an ordinary person would do in those circumstances
  o B<PL: societally based
  o B<PL applied to both P and D’s actions; foreseeability of harm
• Common carriers: higher duty is generally required, such as extraordinary care, etc.
  o “one who engages in transportation of persons or things for hire and who holds himself out to the public as ready and willing to serve the public…”

Limitations on liability
• Absence of a general duty to rescue
  o There is only a duty when there is a preexisting relationship b/t the party in peril and the potential rescuer which justifies implication of such a duty

Erie R. Co. v. Stewart (1930)
• Rule: If a practice is known to a traveler and relied upon, the absence of the practice (without any notice to the traveler) is the absence of due care and thus is negligent.
  o If D voluntarily adopts a duty which is not required, he subjects himself to greater liability for negligence in the absence of the duty.

Tubbs v. Argus
• Rule: When an actor has caused bodily harm to another as to make him helpless and in danger of future harm the actor is under a duty to exercise reasonable care and prevent such harm. → if there is a sufficient relationship
  o Doctrine of instrumental harm
• Duty to aid the endangered act (Vermont): person who knows that another is endangered shall help him (if he is not being helped), if do so w/o bringing great danger or peril to himself and w/o interference to duties he owes to others
Minnesota and RI: individuals “at the scene of an emergency” must provide “reasonable assistance” to ind exposed to or who have “grave arm.”

- Efficiency v. moral/humanitarian obligations
  - Analysis of cost/benefits
  - Legal/moral venn diagram

Tarasoff v. Regents of University of California
- Rule: Once D determines, or under professional standards reasonably should have determined, that a patient with whom he has a special relationship poses a serious danger of violence to an identifiable person, D bears a duty to exercise reasonable care to protect the foreseeable victim.
  - Public duty doctrine: a duty to the general public is a duty to no specific person (i.e. police officer) – police officer will not be held tort liable for failing to protect one particular person.

2. Breach
a. violation of criminal statutes
  - prima facie
  - negligence per se
  - evidence of negligence
  - no evidence at all

***interpretation of statutes
  - legislative intent
  - who (what class of people) is being protected
  - standard of care required by statute

Martin v. Herzog
- Rule: If a statute is set out to safeguard society, then violation of the statute is negligence per se. To recover in this case, must determine P’s negligence is contributory to the incident.

Tedla v. Ellman
- Rule: When a statute exists to guide/protect individuals, it should not be followed so rigidly that it puts an individual in danger \( \rightarrow \) ind should exercise good judgment and ordinary care.
  - If there is prima facie negligence in breaking a statute, ind can attempt to show good reason for such. If they show good evidence, no negligence.

Brown v. Shyne
- Rule: Violation of a statute is not always evidence of negligence; violation in this case does not prove lack of due care or skill nor does it evidence a breach of duty to P. Rather, violation of the statute simple means the doctor failed to obtain a license, not that he failed to exercise due care. \( \rightarrow \) no evidence of negligence
  - This case was immediately overturned by NY Statute which made practicing medicine w/o a license prima facie evidence of negligence

Gorris v. Scott
• **Rule:** If the loss caused by the violation of the statute is not one that the legislature intended to prevent then negligence cannot be based on statutory violation. \(\rightarrow\) no evidence of negligence

b. Custom

• **Why we do not want courts to decide customs**
  
  o Legislature is elected and they represent the will of the people
  o Administrative has expertise
  o Judicial resources are limited

• **Why might we want courts to decide customs?**
  
  o Legislature represents the will of the money
  o Administrative may also represent the money; may get too involved with body being regulated
  o Judges are more objective

• Holmes quote: what one ought do should be governed by reasonable care.

**Trimarco v. Klein**

  o **Rule:** When proof of a customary practice is coupled with a showing that it was ignored and that this departure was a proximate cause of the accident, it may serve to establish liability. \(\rightarrow\) Custom does not have to be universal.

**The T.J. Hooper**

  o **Rule:** The general practice of an industry is not always enough to establish reasonable care. \(\rightarrow\) technology should be adopted when the burden of instituting the technology (the cost) is less than the marginal benefit of instituting the technology (i.e. the decrease in probable loss)

**Helling v. Carey**

  o **Rule:** the test should have been administered – see T.J. Hooper
    
    o **Overturned** by Washington statute

c. **Res Ipsa Loquitur**

**Boyer v. Iowa High School Athletic Association**

  • **Rule:** res ipsa loquitur: infer D’s negligence from the accident if (1)the instrumentality is in the exclusive control and management by D and (2) the occurrence is such that in the ordinary course of things it would not happen if reasonable care had been used. the more possibilities there are to explain the accident, the less weight res ipsa application has.

**Shutt v. Kaufmans, Inc.**

  • **Rule:** D must exercise reasonable care to protect visitors against known dangers but he is not an insurer of safety; not a substitute for evidence of direct negligence.

**City of Louisville v. Humphrey**

  • **Rule:** When there is too much speculation about the derivation of injuries or who was in control of the instrumentality, res ipsa does not apply.

**Escola v. Coca Cola Bottling Co.**

  • **Rule:** If manufacturer sells a defective product to the public and that product is to be used w/o inspection and is used lawfully and the defect causes human injury, then the manufacturer should be liable.
3. **Cause**
   - cause-in-fact
     - but-for
     - general cause (mostly probably)
   - proximate cause

a. **Actual Causation**
   - **Specific causation:** did the defendant do it?
   
   **Hoyt v. Jeffers**
   - **Rule:** Evidence of past causation can prove specific present causation if the instrumentality is in the same condition.

   **Smith v. Rapid Transit Inc.**
   - **Rule:** Direct link between D and the cause of the accident must be proven with reasonable certainty. Mathematical prob. alone is not enough to prove liability.

b. **General causation**
   - Whether D’s conduct is of the general sort that is capable of causing injury of the type suffered by P.
   
   **Daubert Test** (re use of statistics)
   - Can the null hypothesis be proven
   - Has the theory been peer-reviewed and not developed for the sole purposes of litigation?
   - What is the known or potential rate for error? (confidence level)
   - Is the theory generally accepted in the relevant scientific community (Fry test also)
   
   - Shift burden to D \( \Rightarrow \) must prove why problem is one he could not have caused
   - Encourages manufactures to do more tests on drugs they want to market

b. **Alternative Liability**
   - Put the burden on each D to prove the other one did it and if neither of them do then they both bear the liability.

   **Summers v. Tice**
   - **Rule:** When two or more persons by their severally negligent acts are the sole cause of a harm and P had introduced evidence that one of the two acts is culpable, then the two are joint tortfeasors (enterprise) and one D has the responsibility proving the other D was the sole cause.
     - “acting in concert” : they are all acting in an enterprise, in which case P is part of it (also joint and severally liable) \( \Rightarrow \) did not argue this side

   **Ybarra v. Spangard**
   - **Rule:** Res ipsa binds all D together and every D in whose custody P was placed for any period was bound to exercise ordinary care to see that no
unnecessary care came to him and each is liable as part of the group in order that the truth might surface.

- D as a group vs. independent contractors
  - Captain-of-the-ship doctrine: if they are all in the operating room together, then the main doctor is in charge and he is vicariously liable for their tortious acts.
- Conspiracy of silence
- Different from Summers b/c not all D were negligent

- Jointly vs. severally liable
  - Where D acted in concert to cause the harm, and where D acted independently but caused indivisible harm
  - Jointly: can be joined in a single suit, although they need not be
  - Severally: each liable in full for P’s damages, although P is only entitled to one total recovery

- Uniform Contribution Among Tortfeasors Act
  - when there is joint or several liability for an injury, there is a right of contribution among them even though judgment has not been recovered against any or all of them.
  - Each individual tortfeasor must contribute his pro-rate share and if one tortfeasor pays too much, he can recover from the other tortfeasors; does not apply to intentional torts.
  - Release or covenant not to sue: if I agree to settle for a certain amount, you absolve me for all but a portion of your injuries.

**Doe v. Cutter Biological**

- **Rule**: alternative theories of liability
  - Alternative liability: see Summers v. Tice
  - Market share theory: when product is inherently dangerous and has no distinguishable characteristics, every company that was competing in the market at the time is liable for the share of the market it holds.
  - Enterprise theory: each member of an industry is held responsible for the defects wrought by the entire industry → in this case, drug industry is closely regulated by the FDA so its standards are the gov’t’s
  - Concert of action theory: application of joint and several liability; all D acted tortiously and pursuant to a particular wrong all are liable

- Idaho statute: limits joint and several liability except when D are acting in concert pursuant to a tortious design, using toxic waste substances or in cases of medical malpractice.
- Blood shield: D’s work constitutes a service, not a pharmaceutical product, and therefore does not fall under the statute for liability.

**Concurrent and successive causation**

**Dillon v. Twin State Gas & Electric Co.**

- **Rule**: D is liable according to P’s probably future:
If P would have fallen and died, D would not be liable except for damages sustained as a result of electrocution.

If D would have fallen and only suffered injuries, D would be liable for loss of life or earning capacity pursuant to electrocution and river maiming.

**Kingston v. Chicago & NWRy**

- **Rule**: With joint tortfeasors, each is responsible for the whole of the damage resulting from their concurrent negligence.
  - If D could prove that the other fire was natural, he cannot be liable for damages b/c G-d’s fire could have caused the whole thing.
  - B/c G-d did not start the fire, there must be some negligence for the condition to occur and D is a joint tortfeasor so he may be held liable for the whole.

**d. but-for, substantial factor and loss-of-chance tests**

**Ford v. Trident Fisheries**

- **Rule**: Even if facts prove D’s negligence, D is not liable unless those acts contributed to P’s death.

**Lyons v. Midnight Sun Transportation Services, Inc.**

- **Rule**: cause-in-fact case: but-for D’s act, would the accident have happened? In this case, accident would have happened regardless. See Trident.

- **§323: Negligent performance of undertaking to render services**
  - (re risk increased due to service rendered)
  - Jury must determine if the service rendered increased the risk to P that the resulting injury would occur; such that D’s service was a substantial factor in producing the harm.

- Loss of chance: determine damages and if D’s services appear to increase the risk of harm by 40%, then D is responsible for .4(damages)

**Weymers v. Khera**

- **Rule**: There is not a cause of action for the loss of an opportunity to avoid physical harm less than death. (misdiagnosis)

- **Lost opportunity**: P can recover when D’s negligence possibly (50%) caused P’s injury
  - **Pure lost chance**: P can recover if it was more likely than not that he would not have suffered the injury if D had not been negligent;
  - **Proportional approach**: P’s recovery is limited to the percent of chance of lost multiplied by the total amount of damages that would ordinarily be recovered in the action.
  - **Substantial possibility approach**: less than 50% → must show that there is a substantial possibility that D’s negligence caused the harm.

- **Hand formula**: works if PL = PD (prob of paying damages)
  - If PD > PL then you are unlikely to take the burden
  - D will not internalize cost if it is <.5

**e. Proximate (Legal) Cause**

- Did D’s negligence legally cause the harm? → link harm logically to D’s negli
  - If D neg injures P, D is liable even if extent of P’s injuries were unforeseeable
• Eggshell skull or thin skull
• Only personal injuries not property
c. Fact-finding issue: determine what a reasonable man would have foreseen
d. Different from negligence in that prox. cause is concerned with whether and to what extent D’s conduct foreseeably, substantially caused specific injury
e. Cardozo: duty stems from foreseeability of the risk; if there is no duty, causation is irrelevant; P was outside the zone of reasonable foreseeability (Palsgraf v. LIRR)
   • Andrews: everyone owes a duty to the world at large and if there is an unreasonable act and some who may be affected, there is negligence whether or not damage results; lack of foreseeability does not cut off change of causation. ➞ question of expediency
   • natural and continuous sequence, substantial factor in prod injury?
f. Rescue Doctrine: one who goes to rescue of another in imminent and serious peril caused by neg of another is not contributorily negligent if rescue attempt is not rash or reckless
   • if reasonable person would have acted the same way in the same circumstances and P carried out attempt reasonably, he is not contributorily neg regardless of actual danger of victim.(Solomon)
      1. does utility of rescue outweigh risk of harm to rescuer? B<PL
   • Rescuers are foreseeable as a class of people
   • Firefighter’s rule: bars recovery by professional rescuers ➞ they have been compensated, ahead of time, for inherent risks
   • Persons within the risk: for P to take advantage of statute which sets a standard of care, P must establish that statute was designed to protect P’s injuries and also that statute is mean to protect P

g. Marshall v. Nugent
   • If two reasonable men cannot agree on causation, it goes to the jury.
   • many consequences, not far-fetched, qualify as reasonable risks
h. Watson v. Kentucky & Ind. Bridge: (man throws match into pool of gas) if the intervening cause is negligent, D is still liable; if the intervening cause is intentional/unforeseeable, D is not liable b/c no way to guard against it.
i. Restatement §431:
   • Actor’s negligent conduct is legal cause if
   • (a) conduct is a substantial factor in bringing about harm
   • (b) actor is not relieved from liability due to manner in which his negligence resulted in harm
j. Restatement §433: considerations imp in determining whether neg conduct is substantial factor in producing harm:
   • (a) # of other factors contributing to producing harm, extent of fact
   • (b) did D’s conduct create a series of forces, continuous and active up to time of harm or has created a situation that will only manifest itself if other forces come into play
   • (c) lapse of time
k. Criticism of foreseeability: (1) not workable and (2) wrong in policy
Kinsman transit: foreseeing exact risk is not necessary; actor must foresee some risk from his conduct; standard is very close to strict liability
  • Dissent: link b/t act and injury is too tenuous

Causes of Action

Nonliability for foreseeable consequences: Mental and Emotional harm

a. Thing v. La Chusa: bystander can recover damages for emotional distress if P is (1) closely related to victim, (2) was present at scene of injury-producing event at time of injury and (3) P suffers emotional distress as a result
  • Waube: P must be in the zone of danger (Thing overrides it)

b. Burgess v. Superior Court (child born with injuries, mother upset): difference b/t bystander and direct victim is duty of care owed → there is a preexisting duty to the mother, making her a direct victim and the breach is determinative rather than derivative

Loss of consortium

a. If you have not accepted the responsibilities of marriage, you cannot collect on loss of consortium (Feliciano v. Rosemar Silver Co).

b. Cause of action does not exist for parents/children because (a) monetary compensation cannot alleviate tragedy, (b) difficulty measuring damages and (c) danger of extended/disproportionate liability (Borer v. American Airlines)

Wrongful death

a. Rule: at some point during gestation, the viable life is owed the same duty of care as any person; varies from case to case (Werling v. Sandy)
  • Concurring opinion: viability is too vague, too many possible cases

b. Some jurisdictions consider live birth as rule of viability (Todd v. Sandlidge)

Wrongful birth

a. Only extraordinary costs can be awarded – cannot award ordinary rearing expenses for healthy or defective children (Fassoulas v. Ramey)
  • Parents get benefits of raising children, must bear costs (terrible!)

Affirmative defenses to Negligence

• Contributory negligence: If P did not use common and ordinary caution and put himself in the middle of a dangerous situation, his behavior bars recovery.
  o Last clear chance doctrine: P does something negligent but if D does not exhibit ordinary care to avoid harm, P can still recover.
    • §479: Helpless plaintiff
      • P is unable to avoid situation by reasonable care and D realizes or should realize and is negligent in reasonably avoiding harm
    • §480: Inattentive Plaintiff
      • D knows of P’s situation, knows P is unlikely to discover danger to inattention and is negligent in reasonably avoiding the harm.

• Assumption of the risk: same as knowing contrib. neg – P knew the risk and still did it. → §496 knowing, unreasonable assumption of risk bars recovery:
  • Fully understands risk of harm, voluntarily chooses to enter, under circumstances manifests willingness to accept risk, no recovery

• Comparative negligence: P’s negligence off-sets his recovery, compare neg of parties
  o reasonable assumption of the risk will not affect P’s recovery
o Pure comparative neg states: even the more negligent party can recover
o Modified comparative fault:
  ▪ P greater than or equal to cannot recover; OR
  ▪ P = to D’s negligence, cannot recover
o Joint and several liability: you’re both tortfeasors and each of you is responsible for 100% of the injury, must prove that each other did it.
  ▪ Out-dated, comparative fault does not force one tortfeasor who was only mildly responsible to be 100% liable
o Contribution: joint and severally liable tortfeasors must prove fault of the other one to collect back what they have overpaid
o Uniform Comparative Fault Act:
  ▪ (1) reduce amount of recovery proportional to P’s fault
  ▪ (2) fact-finder determines proportion of fault and damages and judge allocates according to ability to pay
  ▪ (3) no set-off b/c of insurance
  ▪ (4) each D has a right of contribution such that each will not pay more than his equitable share
  ▪ (5) release in settlement indemnifies one person although he will still be considered in allocating fault; if he is found to be less liable than that which he settled for, he cannot renege on his settlement. He will not be tied to contribution for others.

III. Strict Liability

• Animals
  o Domestic: one bite rule; some statutes modified to eliminate one-bite rule
  o Wild animals: strictly liable

• Abnormally dangerous activities
  o If D chooses to gather anything on her land and it escapes, she is strictly liable.
    ▪ If D is using land in its natural capacity, in its lawful and ordinary use, then there is negligence, not strict liability. If D is not using land for its natural purpose, there is strict liability.
  o §519: one who carries on an abnormally dangerous activity is subject to liability for harm to the person, land or chattels of another resulting from the activity, although he has exercised utmost care to prevent such harm so long as that harm is the kind which makes activity abnormally dangerous.
    ▪ Absolute liability: liable for every single activity resulting
    ▪ Strict liability: liable only if harms are of the type which make the act abnormally dangerous; harm must result from ultrahazardous activity
  o §520: factors to consider in determining if activity is abnormally dangerous:
    ▪ high degree of risk in activity, whether gravity of resulting harm is great, whether risk can be eliminated by reasonable care, whether activity is not a matter of common usage, whether activity is inappropriate to place where it is carried on and value of the activity to the community
  o amount of prevention expenditures will theoretically be equal to expenditures under the negligence doctrine (total social costs should be equal)
Vicarious liability
Respondeat Superior
- Masters are vicariously liable for the torts of their servants committed while servant is acting within the scope of his employment. “let the master answer.”
- Requires a master-servant relationship
  - Consensual relationship in which one person, the servant, performs services on behalf of another person, the master, in which the master has control or has the right to control the conduct of the servant.
- Servants vs. independent contractors:
  - Ind contractors are persons hired to do jobs under circumstances, and not subject to respondeat superior.
  - Contracts to do something for another person but is not under his control.
  - Employer is not legally responsible for ind contractor’s actions
- Restatement
  - §220: Definition of a Servant
  - (2) In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered:
    - (a) the extent of control which, by the agreement, the master may exercise over the details of the work;
    - (b) whether or not the one employed is engaged in a distinct occupation or business;
    - (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
    - (d) the skill required in the particular occupation;
    - (e) whether the employer or the workman supplies the instrumentalities, tool, and the place of work for the person doing the work;
    - (f) the length of time for which the person is employed;
    - (g) the method of payment, whether by the time or by the job;
    - (h) whether or not the work is a part of the regular business of the employer;
    - (i) whether or not the parties believe they are creating the relation of master and servant; and
    - (j) whether the principal is or is not in the business.
- Relationship b/t servant’s conduct and scope of employment
  - Restatement
  - §229: Kind of conduct within scope of employment
  - (1) To be within the scope of employment, conduct must be of the same general nature as that authorized, or incidental to the conduct authorized.
  - (2) In determining whether or not the conduct, although not authorized, is nevertheless so similar to or incidental to the conduct authorized as to be
within the scope of employment, the following matters of fact as to be considered:

- (a) whether or not the act is one commonly done by such servants;
- (b) the time, place or purpose of the act;
- (c) the previous relations between the master and the servant;
- (d) the extent to which the business of the master is apportioned between different servants;
- (e) whether or not the act is outside the enterprise of the master or, if within the enterprise, has not been entrusted to any servant;
- (f) whether or not that master has reason to expect that such an act will be done;
- (g) the similarity in quality of the act done to the act authorized;
- (h) whether or not the instrumentality by which the harm is done has been furnished by the master or the servant;
- (i) the extent of departure from the normal method of accomplishing an authorized result; and
- (j) whether or not the act is seriously criminal.

Factors affecting this relationship

- Whether the misconduct occurred within the time and space of employment
- Whether the employee was motivated, at least in part, by a concern for the employer’s interests
- Whether the potential for wrongdoing was foreseeable to the employer

“frolic and detour”: servant is sent out to accomplish an objective of the employer and along the way the servant also runs an errand that is personal

- exceptions to general rule of nonliability of ind contractors
  - (1) employer is negligent in seeking, instructing or supervising ind contractor
    - \(\Rightarrow\) employer is not held liable vicariously, but for his own acts of negligence (this also applies to the master-servant relationship)
  - (2) duty of the employer, arising out of some relation to the public or to the particular plaintiff, is non-delegable
  - (3) the work is specifically, peculiarly or inherently dangerous
  - 2 and 3 invoked by courts with D engaged in activities which expose the public to significant risks under circumstances where it seems appropriate to make D bear the costs his activities generate

- master’s right of indemnity against servant
  - master enjoys a full right of indemnification against the servant when the master is held vicariously liable for what servant does \(\Rightarrow\) this how the liability is shared b/t master and servant.

- Why are masters held vicariously liable?
  - Masters tend to be wealthier than servant
  - Allocate to businesses the costs of accidents caused by businesses \(\Rightarrow\) loss-spreading
  - Masters are held liable so that they are extremely careful in selecting and supervising their employees
• Pressures master to optimize not only how servants act but also whether and to what extent they act.

• **Joint enterprise**
  - The negligent conduct of each participant is put on to everyone, assuming the negligent acts to have been committed in the course of the enterprise.
  - Elements of a joint enterprise
    - A contract, express or implied, in which the parties enter into an undertaking with
    - A common purpose
    - A community of interest
    - An equal right of control over the agencies employed

• **Family purpose doctrine**
  - Imposes liability on the owner of a family car for harm negligently caused by other family members in the operation of the care for a family purpose.
  - Elements of family doctrine
    - Ownership of the automobile by D sought to be held liable vicariously
    - Designation of the automobile as a family car
    - Status of the driver as a family member
    - Use of the automobile for a family purpose
    - Use of the automobile with the owner’s permission
  - Family need not own the automobile so long as he controls its use or supplies it to his family. (Gray v. Holden)

• Fisher v. Carrousel: master is liable for punitive damages if agent was employed in a managerial capacity and was acting w/in the **scope of employment**; also, if agent was enforcing “corporate policy” then master is liable for compensatory damages.

• Barton v. Bee Line: Bee Line (employer) would be vicariously liable b/c D was an employee at the time of the alleged rape – it is failure of the driver’s duty as a **common carrier** to his passengers (passengers are relatively powerless) and conductors are held to a **higher standard of conduct**, if D had been found liable.

### Damages

• **Nominal**: given by the court just to recognize that some wrong had been committed, very small (ex: $1)

• **Compensatory**: amount of money necessary to restore P to preinjury condition
  - **Personal injury**: (medical expense) must be reasonably necessitated by the invasion of P’s person and reasonable in amount
    - “**avoidable consequences**” rule: P generally cannot recover for the consequences of D’s wrong that P could have reasonably avoided
    - P must take steps to mitigate the injuries
    - If P has refused medical care, damages = what would have happened had the reasonable care been followed, no eggshell skull rule
    - Future medical costs recoverable but must be proven w/ some certainty
  - Existing physical injury not necessary to get medical monitoring expenses if
    - P has been exposed to greater than normal levels to a hazardous substance caused by D’s negligence and as a proximate result of the
exposure, P has a significantly increased risk of contracting a serious
disease; a monitoring procedure exists that can detect it that is
different from a normally recommended regime in the absence of
exposure and the prescribed regime is reasonably necessary.
- Has P undergone an expense?
- **Collateral source rule**: damages may not be mitigated on account of
  payments received by the P from
  - Subrogation: collateral source provider can sue D instead
  - Some states allow double recovery
- Lost earnings recoverable as well as diminution of future earnings value
- Present earnings capacity, percentage diminution, duration of
disability, life expectancy of plaintiff
- Homemakers: various views, look at public policy

### Punitive
- **Standard of proof for punitive damages**
  - Substantial certainty
  - Preponderance of evidence
  - Clear and convincing evidence
  - Beyond a reasonable doubt (criminal)
- **Gore v. BMW**: Supreme Court examines:
  - reprehensibility of act
  - relationship between punitive damages awarded and act committed
  - profitability to D of wrongful conduct and desireability of removing that profit
    and having D also sustain a loss.
  - “financial position” of D
  - imposition of criminal sanctions on D for his conduct
  - existence of other civil awards against D for the same conduct as mitigating
- **Ellis**, on punitive damages
  - Retribution (fairness) and deterrence (makes the world a better place)
  - Vicarious liability and insurability: force innocent people on innocent people
  - Punitive damages promote deterrence only where compensatory damages to not
    account for total harm to society or satisfaction obtained by the actor is “illicit”
- using a higher standard for awarding damages results in few cases

### Owen-Illinois, Inc. v. Zenobia (asbestos)
- **Issue**: What basic standard of wrongful conduct should be used for the allowance of
  punitive damages in negligence actions and in product liability actions based on either
  negligence or strict liability?
- **Rule**: Correct standard should not be based on gross negligence. **Actual malice**
  (intent to injure, ill will or fraud) must be proven.

### Beach v. Hancock
- **Rule**: For the purposes of **maintaining order and peace**, jury may award damages
  that **deter the “ill-disposed”** from committing a crime. ➔ allow people to live in
  security so that violence does not build up and ruin society.
**Miscellaneous damages**
- Nominal
- Compensatory
- Punitive
- Wrongful death: brought by the estate of the decedent victim; based on expected life earnings minus expected life expenses

**Replacing the tort system: alternatives (New Zealand)**
- No fault system for accidental injuries—no common law rights to sue for torts
  - No benefits for emotional (intangible) harm unconnected with physical injury