

## TORTS II: OUTLINE

### §1: AFFIRMATIVE DUTIES

#### **§1.1: Overview**

##### I. Overview

A. Generally: the law of affirmative duties deals with circumstances under which the defendant may owe a special duty of care to the plaintiff. Usually, this will be a duty owed *in addition* to the general duty to due care the defendant owes under the “reasonable person” standard. In other words, the defendant may be liable for nonfeasance and well as misfeasance in certain situations.

B. **G/R**: Misfeasance: harms that the defendant has inflicted upon the plaintiff by positive acts (i.e. hitting, beating, creating traps, and/or other dangerous situations).

C. **G/R**: Nonfeasance: liability may be imposed on the defendant for his failure to act because he is under some affirmative duty to aid, assist, or protect the plaintiff from harms the defendant did not cause or bring about.

D. Categories: there are four main types of categories of affirmative duties:

1. The duty to rescue;
2. Duties of owners and occupiers;
3. Gratuitous undertakings; and
4. Special relationships.

#### **§1.2: The Duty to Rescue**

##### I. Duty to Rescue

A. Cases: (1) *Buch v. Amory Manufacturing Co.*: P, an eight year old kid trespassed onto D’s land where a milling operation was going on. D warned P to leave but he didn’t and was subsequently crushed in a machine. The court held that D was not liable for another person’s trespass. (2) *Montgomery v. National Convoy & Trucking Co.*: P ran into the back of D’s truck after it had stalled on an icy highway; the court held P liable because he failed to warn of the danger.

B. **G/R**: Classical Rule: at common law, a defendant owed no duty to go to the aid of a stranger in an emergency; at least where the defendant was in no way responsible for that person’s injury or predicament.

1. **Policy**: tort law is not concerned with purely moral obligations.

C. **G/R**: Duty to Rescue Trespasser: (classical rule) The duty to not commit any wrongs is a legal duty. The duty to *protect* against a wrong is, generally speaking and excepting

certain intimate relationships in the nature of trust, a moral obligation only, not recognized or enforced by law.

1. Actionable negligence is the neglect of a legal duty.
2. The defendant is not liable unless they owed the plaintiff a legal duty which they failed to perform.
3. The owner of land does not owe a duty to warn a trespasser against hidden or secret dangers arising from the condition of the premises or to protect him against any injury that may arise from his own acts or those of other persons. If the landowner does nothing, the trespasser has no cause of action against him for any injuries they receive.
  - a. The owner of land owes the same duty to infant trespasser as he does to an adult trespasser.
    - (i) An infant, no matter how young, is liable at law for his trespass.
  - b. The trespasser has no legal rights against the landowner.
4. A defendant cannot be held liable to a plaintiff (when the plaintiff is a trespasser) for neglecting to prevent the act which caused injury to both parties (landowner was trespassed against; trespasser was injured).  
\*[Bush v. Amory].
5. **Exceptions:** cases involving enticement, allurements, invitation, onto the land or setting a trap on the land [see attractive nuisance *infra* §1.3; III, Rule A and B, p. 8].

**D. G/R: Ames' Rule of Law and Morals:** one who fails to interfere to save another from impending death or great bodily harm, when he might do so with little or no inconvenience to himself, and the death or great bodily harm follows as a consequence of his inaction, shall be punished criminally and shall make compensation to the party injured or to his widow and children in the case of death.

1. However, as the law stands today, there would be no liability civilly or criminally in these types of cases because the law does not compel active benevolence between man and man. It is left to one's conscience whether he shall be the good samaritan or not.
2. There are a lot of practical problems with Ames' rule and the rule that is applied, the general duty of care, is more apt for modern society and the American jurisprudence system [Epstein; Bender].

**E. G/R: Defendant Created Danger:** if the defendant created the dangerous situation, even without negligence, the defendant needs to exercise reasonable and take reasonable precautions to warn of the danger he created. If the defendant fails to exercise reasonable care in warning of the dangerous situation, he may be held liable [Montgomery v. National Convoy & Trucking Co.].

1. That is, the defendant may be held liable for failing to warn, or neutralize the danger he created (even if he created the danger without negligence) and his failure to take such precautions as would reasonably be calculated to prevent injury are a basis upon which liability can be predicated.

D. **G/R: Defendant Caused Harm:** if the defendant is responsible for the plaintiff's injury or peril he is under a duty to go to the plaintiff's aid *and* exercise reasonable care in doing so.

1. If the defendant caused the harm without fault on his part, that is his original conduct was innocent, but he has nevertheless created the perilous situation, under modern rules the defendant still has a duty to aid the a person in peril [Rst. (2) §321].

E. **G/R: Duty to Aid Another Harmed by Actor's Conduct:** [Rst. (2) §322]: if the actor knows or has reason to know that by his conduct, whether tortious or innocent, he has caused such bodily harm to another as to make him helpless and in danger of further harm, the actor is under a duty to exercise reasonable care to prevent such further harm.

1. In some jurisdictions, the duty to aid another is a *separate* duty from the one giving rise to the injury. That is, the defendant may be held liable for his original misconduct which caused the injury; and then if he fails to aid the helpless victim he can also be held liable for breach of that duty [Summers v. Dominguez].

F. **G/R: Duty of One Who Takes Charge of Another Who is Helpless:** [Rst. (2) §324]: One who, being under no duty to do so, takes charge of another who is helpless adequately to aid or protect himself is subject to liability to the other for any bodily injury cause to him by:

1. The failure of the actor to exercise reasonable care to secure the safety of the other while within the actor's charge; *OR*
2. the actor's discontinuing his aid or protection, if by doing so he leaves the other in a worse position than when the actor took charge of him.

G. **G/R: Preventing Aid:** any person who knows, or has reason to know, that a third person is giving or is ready go give another aid necessary to prevent physical harm to an endangered person is tortiously liable if he negligently prevents or disables the third person from giving such aid [Rst. (2) §327].

H. **G/R: Good Samaritan Rule:** where the defendant was not responsible for the plaintiff's predicament and no special relationship existed between them then the defendant is under no duty to aid the plaintiff.

1. Exception: if the defendant *voluntarily undertakes* to aid the plaintiff, he owes a duty of reasonable care to the plaintiff [Black v. New York RR].
2. Exception: if the defendant created the danger, he is under a duty to exercise reasonable care to prevent further harm [see rule E].
3. Exception: a separate cause of action may arise after the defendant has caused harm to the plaintiff. The liability which Rst (2) §322 imposes is not a penalty for the actor's original misconduct, but for a breach of a separate duty to aid and protect the other after his helpless condition is caused by the actor's misconduct is known, or should have been known [Summers v. Dominguez].
4. Statutes: most states have enacted "good Samaritan" statutes. There are two general types of good Samaritan statutes:

1. statutes which are designed to induce efforts to rescue by by insulating the rescuer against liability for ordinary negligence; and
2. statutes which impose affirmative duties to rescue, subject to payment of fines for noncompliance (which are usually fairly nominal).

\*\*Remember, if there is a state statute, it trumps the common law rules and restatement.

### §1.3: Duties of Owners and Occupiers

#### I. Overview

A. Cases: (1) *Robert Addie & Sons v. Dumbreck*: P owned and operated a milling and hauling business. P knew that kids often trespassed on the property and around the equipment. D, a kid, came onto the property and has killed and the court held because D was a trespasser, P was not liable. (2) *Rowland v. Christian*: the court applying a general negligence theory for landowners held D liable when P hurt her hand on D's faucet while visiting her home. (3) *Clark v. Beckwith*: P was going to a party at D's house and as she was going up the walk she slipped and fell breaking her leg in 7 places the court held D liable under a modified modern approach for failing to exercise reasonable care.

#### B. Terms:

1. Invitee: an invitee is either a public invitee or a business visitor. An invitee is *not* a person, like a social guest, invited to come onto one's premises. Invitees are generally business visitors or the public invited to come into the owner's place of business either directly or indirectly.

a. *Public Invitee*: public invitee is a 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.

b. *Business Visitor*: a business visitor is a person who is invited to enter or remain on the land for purpose directly or indirectly connected with business dealings with the possessor of the land.

2. Licensee: a social guest who visits the property with direct permission by the landowner.

3. Trespasser: a trespasser is someone who enters the land without permission of the landowner, and usually without his knowledge.

C. Generally: There are three different approaches courts have taken (of which all are still in effect today) in qualifying and delineating the duties of landowners and occupiers:

1. Classical Approach: some jurisdictions follow the traditional tripartite system which classifies the duties of the landowners with respect to whether the guest was an invitee, licensee, or a trespasser.

2. Modern Approach: Some jurisdictions make no distinction between the three categories and apply a rule of reasonable care under the circumstances to anyone on the landowner's property.

3. Modified Modern Approach: some jurisdictions continue to treat trespassers as a distinct group but apply the rule of reasonable care under the circumstances to all other people who come onto the landowner's property.

## II. Traditional Tripartite Scheme

A. **G/R: Landowner's Duty to Visitors Under Traditional Tripartite Scheme**: (classical rule): there are three categories in which persons visiting the premises belonging to a landowner may fall and respective duties for each category:

1. *Invitees*: a person on the premises by invitation, express or implied, of the occupier.
  - a. **Duty**: the landowner owes a duty of taking reasonable care that the premises are safe, this is the highest duty is owed to visitors of the occupier.
2. *Licensees*: a person on the premises with the leave and license of the occupier.
  - a. **Duty**: the landowner has *no* duty to ensure that the premises are safe, but he does have a duty not to create a trap or allow a concealed danger to exist on the premises, which is not apparent to the visitor, but which is known, or ought to be known by the occupier. A landowner also has the duty not to willfully or wantonly injure the licensee.
3. *Trespassers*: a person on the premises without permission of the occupier.
  - a. **Duty**: the occupier does *not* owe any duty to the trespasser. He has no duty to take reasonable care for his protection or event to protect him from concealed dangers. The trespasser comes onto the premises at his own risk.
  - b. A landowner is only liable for a trespasser's injuries where the injury is due some willful act involving something more than the absence of reasonable care (i.e. spring guns or the like).

\*[Robert Addie v. Dumbreck].

B. **G/R: Determining the Status of a Visitor**: in focusing on the distinction between licensees and invitees the courts focus not on the nature of the visit but on the nature of the premises.

1. Those who run business premises, or premises to which the public generally is invited, are subject to the rules for invitees.
2. Those who maintain residential or private premises to which the public is *not* generally invited are subject to the rules for licensees.
3. The nature of the premises, not the nature of the business, generally controls.

C. **G/R: Test for Determining Invitee or Licensee**: (a) *Invitee*: an invitee must be on the land for some purpose in which he and the proprietor have a joint interest; (b) *Licensee*: a licensee is a person whom the proprietor has not in any way invited—the landowner has no interest his being there—but he is permitted him to use his lands or has knowledge of his presence there (i.e. a social guest on the premises not for business purposes) [Robert Addie v. Dumbreck].

D. **G/R:** the tripartite scheme trumps the general negligence principle that one must exercise reasonable care under all circumstances because the duty of a landowner changes with respect to his personal property.

1. Originates from the traditional notions or rights attached with the ownership of personal property.
2. The “concealed trap” duty for social guest originated from the notion that the occupier need not protect his home more for a guest than he does for himself, thus the occupier's only duty was to put the social guest on the same footing as the occupier by warning the guest of the dangers.
3. The landowner or occupier has an elevated duty with respect to invitees because the typical case involves customers entering a place of business; thus, the occupier who brings the invitee on his land to make money off him should exercise reasonable care.

E. **Policy for Rule:** the tripartite system may make it easier to manage the judicial system.

1. Motions for failure to state a claim under FRCP 12 are easier to establish; as are motions for summary judgment under FRCP 56.
2. Gives the plaintiff more incentive to file suit and a stronger bargaining position for settlements because there are clearly established and bright line rules.

F. **G/R: Trespassers:** under the tripartite system the landowner generally does not owe *any* duty to a trespasser except to not willfully or wantonly harm him.

1. **Exception:** if trespassers, especially children, are known to trespass frequently and the landowner has knowledge of the trespassers, then there may be liability for the landowner if he recklessly disregards his duty of reasonable care. It is really a higher duty to protect trespassers when landowner has continued knowledge of the trespassers and does not remedy the situation [Excelsior Wire Rope Co. v. Callan].
2. **Exception:** trespassers on land adjacent to public ways, in which they diverged from the public way by mistake, have been allowed to recover under limited circumstances. Thus, if the dangerous (artificial) conditions substantially adjoin a public road, there is a duty to exercise reasonable care to protect users of the road from harm; this may involve a duty to erect and maintain fences, prune plantings, etc...

## II. Modern Approach

A. **G/R: Duties of Landowner under Modern Approach:** (general negligence approach) (minority approach) the landowner has a duty to exercise reasonable care under the circumstances and the landowner's duty does not depend entirely upon the visitor's stature (trespasser, licensee, invitee).

1. **Test for liability:** whether the occupier has acted as a reasonable person in the management of his property in view of the likelihood of injuries to others (i.e. the general duty of due care under the circumstances).

a. The status of the visitor may have some bearing on the question of liability but it not determinative.

\*[Rowland v. Christian].

**B. G/R: Concealed Conditions:** where the occupier of land is aware of a concealed condition involving an unreasonable risk of harm to those coming into contact with it and the landowner is aware that a person on the premises is about to come into contact with it, the failure to warn or to repair the condition constitutes negligence [Rowland v. Christian].

**C. G/R: Duty owed to Trespassers** [used under traditional tripartite system, modern approach and modified modern approach to determine the liability of a landowner for trespassers on the land based on the Restatements]:

1. **G/R:** Except as stated in Rst. (2) §334-339, a possessor of land is not liable for a trespasser's harm caused by natural or artificial conditions on the premises [Rst (2) §333].

2. **Exception: Constant Trespassers:** a higher duty is owed to a habitual trespasser (i.e. someone who continually cuts across a portion of the occupiers land as a shortcut) because if the landowner knows that persons are in the habit of trespassing on their land and does nothing about it is presumed that the trespassing is tolerated; i.e. the landowner has given a type of implied consent to their presence [Rst. (2) §334].

3. **Exception: Artificial Conditions Highly Dangerous to Constant Trespassers on a Limited Area:** if the landowner is notified that a habitual trespasser is intruding, the landowner owes a duty to exercise care to warn them of, or make safe, *artificial conditions and activities* that involve a risk of death or serious bodily harm that they are unlikely to discover [Rst. (2) §335].

4. **Exception: Artificial Conditions and Activities Dangerous to Known Trespassers:** if the landowner *knows*, or from the facts should have reasonably realized, that there is a trespasser on the land, the land occupier is under a duty to exercise reasonable care to warn the trespasser of, or make safe, *artificial conditions* that involve a risk of death or serious bodily harm and all activities that involve any risk of harm that the trespasser is unlikely to discover [Rst. (2) §§336; 337].

5. **Exception: Attractive Nuisance:** [see *infra* §1.3, IV, Rules A and B, p.7-8].

### III. Modified Modern Approach

**A. G/R: Duty of Landowner under Modified Modern Approach:** (minority view) some jurisdictions apply the modern approach, the general duty of reasonable care under all circumstances, when the visitor is an invitee or licensee but continue to apply a separate standard when the entrant is a trespasser either basing liability on the common law rule not to willfully or wantonly injure the trespasser or the Restatement provisions (see *supra* §1.3; II, Rule "C").

1. Wyoming Rule.

\*[Clark v. Breckwith].

#### IV. Attractive Nuisance Doctrine and Other Rules

A. **G/R:** Attractive Nuisance: the attractive nuisance doctrine allows infant trespassers to recover when lured onto the defendant's premises by some attractive condition created and maintained by the defendant, such as railway turntables, explosives, electrical conduits, smoldering fires, rickety structures, and the like.

1. Caveat: exposure to liability under the doctrine, however, is not unlimited, case law has not extended it to cover rivers, creeks, ponds, wagons, axes, woodpiles, haystacks, and the like.
2. The duty of care owed by the landowner under the doctrine is the duty of reasonable care under the circumstances [Railroad Co. v. Stout].
3. The attractive nuisance doctrine was adopted by Rst. (2) §339 which was one of the most influential Restatement provisions and has been adopted by almost every jurisdiction (see *infra* Rule "B").

B. **G/R:** Artificial Conditions Highly Dangerous to Trespassing Children: a possessor of land is subject to liability for physical harm to children trespassing thereon caused by an *artificial condition* (not natural) upon the land if:

1. The place where the condition exists is one upon which the possessor *knows* or has reason to know that children are likely to trespass;
  2. The condition is on which the possessor knows, or has reason to know, and which he realizes will involve an unreasonable of death or serious bodily harm to such children;
  3. The children because of their youth *do not discover the condition or realize the risk involved* (no assumption of risk defense) in intermeddling with it or in coming within the area made dangerous by it;
  4. The utility to the possessor of maintaining the condition and the burden of eliminating the danger are slight as compared with the risk to children involved; and
  5. The possessor fails to exercise reasonable care to eliminate the danger or otherwise protect the children.
- \*[Rst. (2) §339].

C. **G/R:** Obvious Conditions: (majority rule) a 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:

1. 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
  2. Should expect that they will not discover or realize the danger, or will fail to protect themselves against it; and
  3. Fails to exercise reasonable care to protect them against the danger.
- \*[Rst. (2) §343].
4. Caveat: a possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness [Rst. (2) §343A].

5. Classical Rule: (minority rule) the landowner owed no duty to protect the visitor if the dangerous condition was open and obvious.

D. **G/R**: Recreational Use Statutes: virtually every state has enacted legislation that protects owners of land against lawsuits brought by person who have been using the land for recreational purposes, unless the owner has engaged in willful or wanton conduct.

1. **Policy**: the statutes have been put in place to encourage individuals to keep their land open for recreational purposes and use; so individuals who do are exempt from liability.
2. Generally, the land must be open for the general public without charging them for use of the land.

\*Remember, statutes trump common law analysis.

### §1.4: Gratuitous Undertakings

A. Cases: (1) *Coggs v. Bernard*: D promised to move brandy for P and while doing so broke several barrels and a great quantity of brandy was lost; the court held D liable for not exercising reasonable after undertaking the job. (2) *Erie RR v. Stewart*: P gratuitously undertook the job of putting a watchmen on the tracks, D who was aware of the watchmen and relied on his services was injured while crossing the tracks. P was held liable because it negligently performed a duty it had undertaken. (3) *Marsalis v. Lasalle*: P was bit while in D's store shopping; after being bit P asked D to keep the cat under observation until it could be determined if it was rabid, then D lost the cat and P had to have medical care. The court held P liable for not exercising reasonable care in securing the cat after she promised to do so. (4) *Moch v. Rensselaer Water Co.*: P sued D for failing to maintain adequate water pressure in the fire hydrants, the result of the inadequate pressure caused P's building to burn down. The court held D was not liable because it performed the duty it undertook, that is to supply water.

B. **G/R**: Gratuitous Undertakings: (majority view) when the defendant makes a gratuitous promise and then enters upon its performance in any manner has a duty to exercise reasonable care.

1. Any man that undertakes a duty and is negligent, is liable for the goods that are lost or damaged while under his care.
2. Failure to exercise reasonable care is misfeasance and is a sufficient basis for tort liability.

\*[*Coggs v. Bernard*].

C. **G/R**: Gratuitous Undertakings: (minority view) if one gratuitously undertakes a duty, and the defendant fails to perform that duty where he knew or should have known that the plaintiff was refraining from obtaining other necessary assistance in *reliance* on the duty the defendant can be liable. (Reliance on the promise or duty is the difference between the majority and minority view) [*Erie RR v. Stewart*].

1. In other words, if one gratuitously undertakes a duty, and the plaintiff relies on that duty, and the defendant fails to perform the duty or acts negligent, the defendant can be held liable [*Erie RR v. Stewart*].

**D. Rst. (2) §323: Negligent Performance of Undertaking to Render Services:** one who undertakes, gratuitously or for consideration, a duty to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking if:

1. his failure to exercise such care increases the risk of such harm; or
  2. the harm suffered is because of the other's reliance upon the undertaking.
- [Combines majority and minority approaches].

**E. G/R: Companies:** when a company undertakes a duty, whether gratuitously or for consideration, the duty has been recognized not only actual and positive, but absolute, in the sense that the practice may not be discontinued without exercising reasonable care to give warning of such discontinuances, although the company may thereafter do all that would otherwise be reasonably necessary. Thus, the duty is qualified. [Erie RR v. Stewart].

1. In other words, once the duty is undertaken it is absolute, but the duty is also qualified because after giving adequate warning of discontinuing the service, it may be repudiated.

**F. G/R: Sick Persons:** one who gratuitously undertakes to care for, or to afford relief or assistance to, an ill, injured, or helpless person is under a legal obligations to use reasonable care and prudence in what he does [Marsalis v. LaSalle].

**H. G/R: Contractual Promises:** Generally the rules for gratuitous promises apply to contractual promises.

1. Liability to third parties (general): a defendant's misfeasance (failure to exercise reasonable care after undertaking to perform a contract) in the performance of a contract with one person may involve a foreseeable risk of harm to others; in such cases, the defendant's liability is judged by negligence standards—foreseeability of harm—and no privity or contractual relationship need be established. However the no tort liability can be predicated solely on nonfeasance (failure to perform the contract).

a. Ex: railroad worker throws the wrong switch and causes harm to passengers.

2. Liability to third party guests under a lease: a landlord may be held liable for failing to perform his contractual obligations under a lease to keep the premises in repair if the tenant or *guest of the tenant* (a third party who is not in privity of contract with the lessor) is injured while on the premises [Putman v. Stout; Rst. (2) §357].

3. Exception: most courts have held that a private water company that contracts with the city to furnish water is *NOT* liable to a private citizen (third party) if the service fails at a critical moment because failure of water pressure is considered nonfeasance on the theory that the private utility had not undertaken any direct performance to the private citizen, hence, no tort liability. [Moch v. Rensselaer].

## §1.5: Special Relationships

A. Cases: (1) *Kline v. 1500 Massachusetts Avenue Apartment Complex*: D leased an apartment from D and there were reasonable security measures in place, after time the security measures decreased and the P was assaulted in a common area of the complex so D was held liable. (2) *Tarasoff v. Regents of University of California*: P was killed by a third party who D had been giving therapy to; the therapist knew that the third party had threatened to kill P but failed to warn anyone so he was held liable.

B. **Rst. (2) §315: General Rule**: there is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless:

1. a *special relationship* exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or
2. a *special relationship* exists between the actor and the other which gives the other a right to protection.

C. **G/R: Misfeasance and Nonfeasance**: (a) *misfeasance*: exists when the defendant is responsible for making the plaintiff's position worse; (b) *nonfeasance*: is found when the defendant has failed to aid the plaintiff through beneficial intervention.

1. Rst. (2) §315 illustrates that liability for nonfeasance is largely limited to those circumstances in which some special relationship exists.
2. If the question is one of misfeasance, §315 is inapplicable because the ordinary standards of negligence apply.  
[Weirum v. RKO General Inc.].

D. **G/R: Landlord Tort Liability**: A landlord who has leased possession of land to another may owe certain duties with respect to dangerous conditions on the property and such duties are generally extended to the tenant's guests as well as the tenant. However, the general rule is that the landlord is not liable for injuries to the tenant or his guest subject to five major exceptions:

1. Common Areas Exception: where the landlord leases separate portions of property and reserves under his own control the halls, stairs, or other parts of the for use in common by all tenants, he has a duty to all those on the premises of legal right to use ordinary care and diligence to maintain the retained parts in a reasonably safe condition [Kline v. 1500 Mass. Ave.].
  - a. The duty is the landlord's because of his control of the areas of common use and common danger and he is the only party who has the *power* to make the necessary repairs or to provide protection.
2. The other four exceptions are (a) duty to disclose latent defects; (b) duty to perform a covenant repair; (c) duty to not make negligent repairs; and (d) public use exception.

E. **G/R: Landlord's Duty Safeguard Against Crime**: several courts have enlarged the landlord's duty to control the common areas to include taking *reasonable precautions* against *FORESEEABLE* criminal acts of third parties (i.e. such as installing a security guard service to protect against muggings and robberies in hallways of an apartment

house where criminal acts had occurred frequently, or replacing old or faulty deadbolt locks) [Kline v. 1500 Mass. Ave.].

1. **Duty:** the landlord has a duty to take reasonable precautions to protect the tenant from assaults by third parties that are reasonably foreseeable. The duty extends especially to the parts of the premises he retains under his exclusive control.

a. This duty has been extended to the tenant's invitees; it is the landlord's duty to insure that common areas are kept in good repair and *reasonably safe* for the use of the tenant and his invitees [Sampson v. Saginaw Professional Bldg.].

2. The general rule exonerating a third party from any duty to protect another from criminal attack has no applicability to the landlord-tenant (*special*) relationship in multiple dwelling houses.

3. **Policy:** as between the landlord and tenant, the landlord is the only one in position to take the necessary acts of protection required. He is not an insurer, but he is obligated to minimize the risk to his tenants. Moreover, the police do not have the power or the resources to perform this duty for the landlord. Thus, the landlord has a duty to use reasonable care in all the circumstances in guarding against the criminal activity of third parties against the tenant.

F. **G/R: Common Carriers:** the duty of care owed by one who is legally charged with the care of others is duty of reasonable care under the circumstances with the obligation to care for the passengers as one of the circumstances.

1. Carrier employees have an affirmative duty to use due care to aid passengers when they become ill or are attacked by robbers [Lopez v. Southern California Rapid Transit].

H. **G/R: Condominiums:** the court extended the *Kline* rule to condominium boards and their individual members who function as *de facto* landlords [Frances T v. Village Freen Owners Ass'n].

I. **G/R: Shopping Malls:** the court refused to extend the *Kline* rule to an owner of a store who was assaulted inside her place of employment in the defendant's shopping mall.

a. Some courts have held that *foreseeability* only arises if the activity or crime has occurred previously.

J. **G/R: Therapists and Psychologists:** (a) *Foreseeable Plaintiff:* a defendant (therapist) owes a duty of care to all persons who are foreseeable endangered by a patient's conduct, with respect to all risks which make the conduct unreasonably dangerous.

1. **Factors in Establishing Duty:** (of the therapist):

- a. foreseeability of harm to the plaintiff;
- b. the degree of certainty that the plaintiff suffered injury;
- c. the closeness of the connection between the therapist's patient's conduct and the injury suffered;
- d. the moral blame attached to the defendant's conduct; and

- e. the consequences to the community of imposing a duty to exercise reasonable care with resulting liability for breach and the availability, cost and prevalence of insurance for the risk invoked.
2. In cases in which the defendant (like a therapist) stands in some special relationship to either the person whose conduct needs to be controlled (the patient) or in a relationship to the foreseeable victim of the conduct the duty to control the conduct of another arises.
3. Rule: A therapist who knows, or has reason to know, that patient is going to harm a *specific and identified third party* has a duty to warn the intended victim or police of the danger.
  - a. The therapist's duty is not one of 100% correctness; but rather, the therapist need only exercise that reasonable degree of skill, knowledge, and care ordinarily possessed and exercised by members of that professional specialty under similar circumstances.
4. **Policy**: the risk that unnecessary warnings may be given is a reasonable price to pay for the lives of possible victims that may be saved. The imposition of the duty is not a burden on the therapist because the therapist's obligations to his patient require that he not disclose a confidence unless such disclosure is necessary to avert dangers to others. The public policy favoring protection of the confidential character of the patient-therapist communications must yield to the extent to which disclosure is essential to aver dangers to others. The protective privilege must end were public peril begins.

K. **G/R: Misrepresentation by Employers**: the writer of a letter of recommendations owes to third persons a duty not to misrepresent the facts in describing the qualifications and character of a former employee, if making these representations would present a substantial, foreseeable risk of physical injury to third persons [Randi W. v. Muroc Joint Unified School District].

## **§2: TRADITIONAL STRICT LIABILITY**

### **§2.1: Analytical Framework For Traditional Strict Liability Problems**

A. **G/R: Elements of Strict Liability**: for the plaintiff to hold the defendant strictly liable he must establish:

1. Duty: the duty owed is the duty to avoid harm from the animal, activity or condition that is classified as abnormally dangerous.
  - a. Liability is therefore imposed for resulting injuries to person or property, regardless of whether anyone was at fault (i.e. there does not have to a breach of the duty, if there is a duty to avoid the activity and harm ensues, the defendant may be held liable if the other elements are established).
  - b. The duty is only owed to foreseeable plaintiffs and foreseeable hazards which flow from the dangerous activity.
2. Cause: the plaintiff must still establish that the result of the activity caused the harm owed by the duty [see Rst. (2) §519(2) (see *infra* §2.4, Rule E)]. That is

strict liability is limited to the kind of harm brought about by the abnormally dangerous activity.

- a. Actual Cause: all courts used the same rules regarding actual cause as in negligence cases.
  - b. Proximate Cause: (majority view) virtually courts apply the same rules of proximate causation in strict liability as they do in negligence.
3. Harm: the harm must be caused by the abnormally dangerous activity.

**B. G/R: Defenses to Strict Liability:** (a) contributory negligence: is not a defense to strict liability UNLESS the plaintiff knew of the danger and his negligence caused the accident; (b) comparative negligence: most courts in comparative systems reduce the plaintiff's recovery in strict liability cases where his injury was caused in part by his own carelessness; (c) assumption of risk: is a valid defense where the plaintiff *voluntarily* encountered a *known* risk.

C. Remember: the strict liability torts of conversion and nuisance have their own elements that must be satisfied for the defendant to recover.

## §2.2: Conversion

A. Cases: (1) *Moore v. Regents of University of California*: P went into a medical center to seek treatment for leukemia at D's university. D removed P's spleen and without his consent used his cells in biological research and made a billion or so dollars. P sued for conversion and the court held that he could not recover because the tort of conversion is not necessarily to protect a patient's rights.

B. **G/R: Conversion**: conversion is a distinct act of dominion wrongfully exerted over another's personal property in denial or inconstant with his title or rights therein, without the owner's consent and without lawful justification.

1. Conversion is an act of willful interference with a chattel, done without lawful justification, by which any person entitled thereto is deprived of use and possession.
  2. To establish the tort of conversion, the plaintiff must establish an actual interference with his ownership or right of possession.
    - a. If the plaintiff neither has title to the property alleged to have been converted, nor possession, he cannot maintain an action of conversion.
- \*[*Moore v. Regents of University of California*].

C. **G/R: Elements of Conversion**: to establish the tort of conversion the plaintiff show:

1. plaintiff's ownership or right to possession of the property at the time of conversion;
2. the defendant's conversion by wrongful act or disposition of plaintiff's property rights; and
3. damages.

D. **G/R: Conversion and abandonment:** if the plaintiff has abandoned the property, he cannot allege the tort of conversion because he does not have ownership or right to possession of the property at the time of the conversion.

1. **Abandonment:** the elements of abandonment are:
  - a. a voluntary act to relinquish an item with;
  - b. no intent to reclaim.

E. **G/R: Conversion and negligence:** conversion is a strict liability tort and therefore he does not have to prove the negligence of the defendant in converting his chattel. The plaintiff only needs to demonstrate that the defendant exercised dominion over his property without title, right, lawful justification, or consent.

### §2.3: Animals

#### I. Overview

A. **Cases:** (1) *Baker v. Snell*: P was injured when D's agent told a dog to sick P which caused her injuries; the court held D strictly liable.

B. **Overview:** liability for animal owners can be divided into two main categories:

1. *Personal Injury to Humans:*
  - a. Liability for wild animals;
  - b. Liability for tame animals; and
  - c. Liability for tame animals with known dangerous propensity.
2. *Injury to Real Property.*

#### II. Personal Injury Caused to Humans

C. **G/R: Animals Generally:** whoever keeps an animal, and knows it is dangerous to humans is prima facie liable for any person attacked and injured by the animal, even if he was without negligence or default in securing or taking care of the animal [*Barker v. Snell*].

D. **G/R: Liability for Wild Animals:** the possessor of wild animals is strictly liable is strictly liable for any harm resulting from a wild animal's *normal* propensities [Rst. (2) §507].

1. A wild animal is any animal that does not belong in civilization (i.e. tigers, lions, bears, etc...).
2. Knowledge of the wild animals dangerous propensity is not necessary, so long as the harm results from the normal propensities of the wild animal.
3. **Exception: animals kept pursuant to a public duty:** where wild animals are kept under a public duty (i.e. zoo) strict liability does *NOT* apply. Negligence must be shown, although the defendant is held to high level of care.

E. **G/R: Liability for Domestic (tame) Animals:** (majority view) normally, the owner of domestic animal (cat, dog, horse, etc...) is not held strictly liable for harm caused to

another person if the animal does not have an known dangerous propensity. The standard of care is that of a reasonable person under the circumstance; and therefore the plaintiff is held to a general negligence theory.

1. It is sometimes said that every well-behaved dog is entitled to “one free bite,” that is, only when the owner has reason to know the dog has vicious tendencies will strict liability apply.

a. This rule has been abolished in some states pursuant to statute.

F. **G/R:** Liability for Domestic Animals with Known Dangerous Propensities: the possessor of a domestic animal with a known dangerous propensity (i.e. dog that bites) is strictly liable for all harm done as the *result* of that dangerous propensity [Rst. (2) §509; Baker v. Snell].

## II. Damage to Real Property

G. **G/R:** Livestock: the possessor of livestock trespassing on the land or chattels of another is strictly liable for the trespass itself and any harm done thereby.

1. **Exceptions:** Strict liability of the possessor of trespassing livestock does not extend to harm:

a. Not reasonably to be expected from the intrusion;

b. Done by animals straying onto abutting land while driven on the highway; or

c. Brought about by the un-expectable operation of a force of nature, action or another animal, or intentional, reckless, or negligent conduct of a third person.

\*[Rst. (2) 504].

2. Livestock is defined as any animal of domestic value that is relatively easy to control (horses, cattle, pigs, sheep, etc...).

F. **G/R:** the owner of an animal is responsible for the damage it does to the plaintiff’s real property and to animals peacefully grazing there [Williams v. Goodwin].

H. **G/R:** Fencing In and Fencing Out:

1. *Common Law Rule:* at common law it was presumed to be the duty of the owners of animals to keep them properly enclosed and under control, and if they failed to do so and the animals trespassed upon the property of another, fenced or unfenced, the owners of the animals were liable for damages.

2. *Western (modern) Rule:* the owner of a private premises, which is next to private or public lands that are used for grazing, has a duty to keep the animals out [by fencing his land in] rather than to compel the owner of the animals to fence the land upon which they were grazing in order to keep them in.

### §2.4: Abnormally Dangerous Activities

A. Cases: (1) *Spano v. Pernli:* D set off 194 sticks of dynamite which caused damage to P’s property and the court held D strictly liable. (2) *Madsen v. East Jordan Irrigation*

Co.: P owned a mink farm; while D was blasting out an irrigation ditch it scared P's minks causing them to eat 230 of their kittens; the court did not hold D liable because the mother mink's eating their children broke the causal connection, that is, the blasting wasn't the proximate cause of the harm. (3) *Indiana Harbor Belt R.R. v. American Cyanamid Co.*: P sued D for clean-up costs that occurred when acrylonitrile spilled out of a railroad car onto P's property. The court did not hold D strictly liable because the activity was not abnormally dangerous and the accident could have been avoided by using reasonable care.

**B. G/R: Classical Blasting Rule:** one who engages in blasting may be held strictly liable if there is a trespass upon the land, that is, a physical invasion that causes harm.

1. Ex: the defendant was blasting, and some rocks flew from the blasting site onto the plaintiff's property causing him damage.
2. There was no liability for concussive damage, that is, the compressive effect of the blasting.

\*[Booth v. Rome] *overruled by* [Spano v. Pernli].

**C. G/R: Modern Blasting Rule:** the intentional setting off of explosives, that is, blasting in an area which is likely to cause harm to neighboring property results in strict liability.

1. The defendant may be liable for physical invasions and concussive damage.
2. **Policy:** since blasting involves a substantial risk of harm no matter the degree of care exercised, there is no reason for ever permitting a person who engages in such an activity to impose the risk upon nearby persons or property without assuming the responsibility therefore.

- a. The court is not saying that one cannot blast on their property, or use it as they may, BUT if the activity moves into the category where the blaster is creating a non-reciprocal risk, he will be held in another category of liability, namely, strict liability.

3. If the property owner who engages in an abnormally dangerous activity is doing it for a profit, and did not have to engage in the risky behavior, he will be held liable and have to compensate people who are harmed as a result.

- a. Internalizing/ Externalizing Costs: Externalities should be factored into the cost of a product (internalities) to spread the cost of dangers in producing or engaging in an abnormally dangerous activity. This is more fair to the consumer, even if the consumer has to pay more, because the consumer is paying for the risk of the good that is produced.

\*[Spano v. Pernli].

**D. G/R: Strict Liability and Causation:** the rule of strict liability applies when one uses explosives, however, the plaintiff still has to prove causation. That is, the one who engages in the abnormally dangerous activity can only be held liable if the damage was a *foreseeable* risk of harm to the plaintiff [Madsen v. East Jordan Irrigation].

**E. Rst. (2) §519: General Rule:** (1) One who carries on an abnormally dangerous activity is subject to liability for the harm to the person, land, or chattels of another resulting from the activity, *although he has exercised the utmost care to prevent the*

*harm.* (2) The strict liability is limited to the kind of harm, the possibility of which makes the activity abnormally dangerous.

1. Ex: it is abnormally dangerous to drive a truck full of dynamite; however, if the driver runs a red light and kills a pedestrian, the driver cannot be held strictly liable because the harm is unrelated to the abnormally dangerous activity.

**F. Rst. (2) §520: Abnormally Dangerous Activities:** in determining whether an activity the following factors are to be considered:

1. whether the activity involves a high degree of harm;
2. the gravity of that risk;
3. whether the risk can be eliminated by the exercise of reasonable care;
4. whether the activity is a matter of common usage;
5. whether the activity is appropriate the place where it is being carried on; and
6. the value of the activity to the community.

**G. G/R: Strict Liability:** strict liability is applicable to any activity that is carried on with all reasonable care and is such that while carrying on the activity in a reasonable manner *all* the risk cannot be eliminated.

1. Strict liability is applicable to an activity that is carried on with all reasonable care, and that is of such utility that the risk to the individual which is involved cannot be regarded as *so great* of an activity or *so unreasonable* as to make it merely negligence to carry on the activity at all (i.e. if the activity is of high utility to society, it is not negligence just to do the activity).

\*[Rst. (2) §520 cmt. b].

**H. G/R: Nuisance:** if the abnormally dangerous activity involves a risk of harm to others that substantially impairs the use and enjoyment of the neighboring lands or interferes with rights common to all members of the public the interference may be actionable on the basis of public or private nuisance [Rst. (2) §520 cmt. c].

**I. G/R:** strict liability is a matter of law that is to be determined before the case is submitted to the jury [Rst. (2) §520 cmt. 1].

**J. G/R: Common Usage:** the extent to which the activity is a matter of common usage is a factor in determining whether the activity should be considered abnormally dangerous. An activity is a matter of common usage if it customarily carried on by a large mass of mankind or by many people in the community. Certain activities, notwithstanding their recognizable danger, are so generally carried on as to be regarded as customary.

1. Thus, if the activity is dangerous, but customary, it may not be abnormally dangerous because of non-reciprocal risk creation.
2. Ex: automobiles.

\*[Rst. (2) §520 cmt. i].

**K. G/R: Value to the Community:** even though the activity involves a serious risk of harm that cannot be eliminated with reasonable and it is not a matter of common usage,

its value to the community may be such that the danger will not be regarded as an abnormal one [Rst. (2) §520 cmt. f].

L. **G/R: Contributing Actions of Third Persons:** one carrying on an abnormally dangerous activity is liable for harm under the rule stated in Rst. (2) §519, *although* the harm is caused by the *unexpected*:

1. innocent, negligent or reckless conduct of a third person; or
2. action of an animal; or
3. operation of a force of nature.

\*[Rst. (2) §522]

\*\*Basically means that the person engaging in the abnormally dangerous activity has to first satisfy the elements of Rst. (2) §519; and if the harm results as a result of the abnormally dangerous activity, no matter what caused the harm, the person engaging in the activity will be strictly liable.

M. **G/R: Assumption of Risk:** the plaintiff's assumption of risk (primary) of harm from an abnormally dangerous activity bars his recovery for the harm [Rst. (2) §523].

N. **G/R: Contributory Negligence:** the contributory negligence of the plaintiff is not a defense to the strict liability of one who carries on abnormally dangerous activity UNLESS:

1. the plaintiff knowingly and unreasonably subjected himself to the risk of harm from the abnormally dangerous activity.

\*[Rst. (2) §524].

2. There is no strict liability for harm caused by an abnormally dangerous activity if the harm would not have resulted *but for* the abnormally sensitive character of the plaintiff's activity [Rst. (2) §524A].

O. **G/R: Non-Reciprocal Risk Creation:** [USE on TEST]: the general principle expressed in all of these situations [abnormally dangerous activities and common usage] is governed by the diverse doctrinal standards is:

1. \*\* that a victim has the right to recover for injuries caused by a risk *greater* in degree and different in order from those created by the victim and imposed on the defendant, in short, injuries resulting from non-reciprocal risks.
2. Liability: cases in which liability is imposed are those in which the defendant generates a disproportionate, excessive, risk of harm, relative to the victim's risk-creating activity.
3. Non-Liability: cases of non-liability are those of reciprocal risks, namely those in which the victim and the defendant subject each other to roughly the same degree of risk.

P. **G/R: Aviation:** Airplane owners and pilots are strictly liable for ground damage; but *not* midair collisions.

1. Risk of ground damage is non-reciprocal—homeowners do not create a risk to planes flying overhead; the risk of midair collisions is reciprocal because each

party is subjecting the other party to roughly the same degree of risk and is therefore governed by negligence.  
[Rst. (2) §502A].

**Q. G/R: Burden Shifting:** if the damage caused by an activity makes it so it is impossible for the plaintiff the defendant's fault, the burden of production can shift to the defendant to prove that he was not negligent.

1. Ex: if a tanker truck carrying gasoline crashes and explodes it is likely that all the evidence will be burned up as a result of the accident, therefore, the defendant will have to prove that he was not negligent.

## **§2.5: Nuisance**

### **I. Private Nuisance**

**A. Cases:** (1) *Morgan v. High Penn Oil Co.*: P owned a restaurant on hill abutting D's oil refinery; D's refinery often caused those residing on P's property to become sick and the court held that D was created a nuisance. (2) *Fontainebleau Hotel Corp. v. 45, 25, Inc.*: D began building a 14-story addition to its hotel, when completed it would have cast a shadow over the pool area owned by P. The court held that D was not liable and it could not be precluded from using its land the way it wanted. (3) *Rodgers v. Elliot*: D was a manager of a church and rang the bell every regularly; when P told D that he was ill and that the ringing the bell was causing him injury D told him he would ring the bell if his mother was sick and continued ringing it which caused D to suffer injuries court held it wasn't an unreasonable nuisance and therefore D was not liable. (4) *Ensign v. Walls*: D bred St. Bernard's at her home which started causing a nuisance to her neighbors, D claimed she was there first so she could do whatever she wanted and the court held coming to the nuisance is only a limited defense. (4) *Boomer v. Atlantic Cement*: P's residence suffered damage from dirt and dust coming from D's cement plant and the court awarded P permanent damages for their suffering.

**B. G/R: Private Nuisance:** a private nuisance is a non-trespassory invasion of the plaintiff's interest in the use or enjoyment of his property.

1. Nuisance Per Se: is an act, occupation, or structure which is a nuisance at all times and under any circumstance, regardless of the location or surrounding.
2. Nuisance Per Accidens (in fact): are those which become nuisances by reason of their location, or by reason of the manner in which they are constructed.

**C. G/R: Elements of Private Nuisance:** for the plaintiff to establish a private nuisance he must demonstrate:

1. A non-trespassory of his interest by an act of the defendant;
2. which is a substantial interference;
3. that unreasonably interferes with the plaintiff's use and enjoyment of his land.

D. **G/R: Non-trespassory invasion**: the non-trespassory invasion must result in *substantial* and *unreasonable* harm to the plaintiff's interest in the use and enjoyment of the land.

1. **Substantially**: refers to the quantitative aspect of the interference: it be something that a reasonable person would take offense to rather than a simple annoyance.
2. **Unreasonable**: when an *intentional* or negligent nuisance is alleged, the defendant's conduct must be unreasonable in the sense of the interference. It does not have to do with the defendant's conduct.
3. **Intentional**: means that the defendant is aware of the harm that is occurring, it does *not* mean that the defendant intended the harm.
4. The substantial and unreasonable interference is distinguished from trespass because it does not require a physical entry upon the plaintiff's premises.

E. **G/R**: a private nuisance exists when one makes an improper use of his own property in a way that injures the land or some incorporeal right of one's neighbor.

1. The legally protected interest in a nuisance cause of action is the interference with one's use and enjoyment of the land.
2. A private nuisance in fact may be created or maintained without negligence.  
\*[Morgan v. High Penn].

F. **G/R**: an invasion of another's interest in the use and enjoyment of his land is intentional in the law of private nuisance when the person whose conduct is in question (the defendant) as a basis for liability acts for the purpose of causing it, or knows that it is substantially certain to result from his conduct [Morgan v. High Penn].

H. **G/R: Unreasonableness of Intentional Invasion**: an intentional invasion of another's interest in the sue and enjoyment of his land is unreasonable if:

1. the gravity of the harm outweighs the utility of the actors conduct; or
2. the harm caused by the conduct is serious and the financial burden of compensating for this and other similar harm would not make the continuation of the conduct feasible.  
\*[Rst. (2) §826].

I. **G/R: Substantial Injury**: where the invasion involves physical damage to tangible property, the gravity of the harm is considered as great even though the extent of the harm is relatively small.

- a. **Caveat**: where the invasion involves only personal discomfort and annoyance, the gravity of the harm is ordinarily regarded as slight unless the invasion is substantial and continuing.
- b. A continued invasion of a plaintiff's interests by non-negligent conduct, when the actor knows of the nature of the injury inflicted, is an intentional tort, and the fact the harm is administered non-negligently is not a defense for tort liability.

J. **G/R: Live and Let Live Rule**: those acts necessary for the common and ordinary use and occupation of the land and houses may be done, if conveniently done, without

submitting those who do them to an action. Thus, in disputes between neighbors minimal harms cannot constitute a nuisance because both parties have reciprocal interests.

1. Principle of reciprocity: since all interferences are reciprocal in character, no party may easily claim that he was made worse off or that his neighbor alone has profited.

**K. G/R: Locality Rule:** it is the general rule that every person may exercise exclusive dominion over his own property, and such it to such uses as will best serve his private interests. Generally, no other person can say how he shall use or what he shall do with his property.

1. Persons living in an organized community must suffer some damage, annoyance, and inconvenience from one another. For these they are compensated by all the advantages of civilized society. If one lives in the city he must expect to suffer dirt, smoke, noise, odors, and confusion incident to everyday life.
2. Every person is bound to make a reasonable use of his property so as to occasion no unnecessary damage or annoyance to his neighbor.

**L. G/R: Light and Air:** a property owner does not have the right to use his property in such a way that it will interfere with the legal rights of another.

1. No American jurisdiction has ever held that a landowner has a legal right, in the absence of a contractual or statutory provision, to the free flow of light and air across the adjoining property of his neighbor.
2. The English doctrine of “ancient lights” has been unanimously repudiated in this country.
3. Thus, if a structure is built partly out of spite, if the structure serves a useful purpose there is no action against an adjoining landowner for the interference with light and air across another’s property.  
[Fontainebleau Hotel Corp. v. 45, 25, Inc.].
4. **Exception: Spite Fences:** a fence that has been erected maliciously and with no other purpose than to shut out the light and air from a neighbor’s window, is a nuisance.

**M. G/R: Aesthetic Considerations:** (majority view) an aesthetic consideration may not ordinarily create a nuisance if the activity is being run without unreasonable noise, odors, etc...that is, noninvasive things that are ugly cannot be a nuisance.

1. Ex: P’s neighbor paints his house bright pink, P would probably not be able to recover.

**N. G/R: Extra-sensitive Plaintiff:** there is liability for a nuisance only to those to whom it causes significant harm, of a kind that would be suffered by a normal person in the community or by property in normal condition and used for normal purposes [Rst. (2) §821F].

1. **Test:** the test for whether an activity is a nuisance is whether the activity would be a nuisance to a reasonable person in the community [Rodgers v. Elliot].

2. Note: the extra-sensitive plaintiff rule, that is, it is not an issue in a nuisance cause of action is different from the general thin skull rule which states the tortfeasor takes the plaintiff as he finds him.
3. **Policy**: if the extra-sensitive plaintiff was allowed to recover for nuisance it would encourage everyone to complain about everything in court (i.e. neighbor's noisy lawnmower, etc...).

O. **G/R**: Coming to the Nuisance: (majority view) coming to the nuisance is usually not allowed to be asserted as a defense to a nuisance action, that is, the defendant cannot assert first in time first in right, although it is considered as a factor.

1. One cannot create a nuisance on his land and thereby attempt to control the uses to which surrounding land may be put in future years. The defendant may only make reasonable use of his land and thus cause the neighbor some inconvenience, and probably some damage which the law would treat as de minimus. But he cannot place anything on his land that would pronounce a nuisance, and thus compel his neighbors to vacate, or to use their land in such a way as the nuisance would allow.
2. It is therefore no defense to show that the plaintiff came to the nuisance.
3. **Policy**: if coming to the nuisance was used as complete defense it may chill development because the first in time could undertake some activity that could inhibit others use and enjoyment of their land.
4. *Minority View*: coming to the nuisance is a valid defense because the plaintiff assumed the risk of a nuisance by voluntarily moving into the neighborhood.
  - a. **Policy**: (a) Unjust enrichment; (b) assumed the risk.

P. **G/R**: Remedies for Nuisance: there are two main categories of remedies for a nuisance: (a) injunction and (b) Damages.

1. Injunction: (a) *permanent injunction*: at common law the grant of an injunction for the defendant to cease the nuisance was presumptive. A permanent injunction is still used today, although not as often. **Policy**: there are no measurement problems, the defendant only has to cease the action causing the nuisance, promotes finality. (b) *Temporary Injunction*: makes the defendant stop the activity that is a nuisance for a limited time or until he makes the repairs necessary so it ceases to be a nuisance.
2. Damages: (a) *Temporary Damages*: damages that are awarded for damage that has already occurred; it has high transaction costs because the plaintiff has to keep coming back to court to collect the damages; however, it creates incentives for the defendant to fix or cease the nuisances because they know the plaintiff can recover. (b) *Permanent Damages*: gives the plaintiff damages for future and past damages created by the nuisance. It promotes finality but the company, for the cost of the damages, has no incentive to remedy the nuisance and it creates servitude on the land for future grantees (i.e. grantor take permanent damages, sells it to the grantee and then the grantee cannot recover because damages have already been paid).

**Q. G/R: Permanent Damages:** permanent damages may be awarded in lieu of an injunction where the value of the activities sought to be enjoined is disproportionate to the relatively small damage caused thereby.

- a. **Policy:** permanent damages are fair because they fully recompense the damaged property owner and at the same time provide an incentive to the business to abate the nuisance and avoid other suits.
- b. Where a nuisance is of such a permanent and unabateable character that a single recovery can be had, including the whole damage for past and future harm resulting therefrom there can be but one recovery.  
\*[Boomer v. Atlantic Cement Co.]

## II. Public Nuisance

**A. G/R: Public Nuisance:** a public nuisance is an act by a defendant that obstructs or causes inconvenience or damage to the public in the exercise of rights common to all, or in the enjoyment of common property.

1. For a public nuisance, criminal as well as civil sanctions may be imposed.
2. Ordinarily a public representative should bring the action for public nuisance. If, however, the private person suffers an injury different in kind, then the private person may bring an action for those special damages.

**B. G/R: General Damages:** General damages from public nuisances are controlled only by direct public action, usually administrative regulation or criminal prosecution. The “private action” is maintainable only for special or peculiar or disproportionate harm to the individual plaintiff.

## **§3: PRODUCTS LIABILITY**

### **§3.1: Overview**

#### I. Introduction

**A. Historical Development:** there have been three broad categories that have developed in four historical phases for dealing with product liability case:

1. Period #1: (mid 19<sup>th</sup> Century to early 20<sup>th</sup> Century): the main question in this period was whether any suits against product manufacturers or distributors of products should be allowed at all. The general rule of recovery was that to recover the injured party had to be in privity of contract with the seller of the goods.
2. Period #2: (1916-1944) in this period the privity limitation for recovery was overthrown entirely, and a general liability for negligence on a remote seller, that is, one who had no direct contractual relationship with the injured party.
3. Period #3: (1944-1975) in this period strict liability, and not negligence, was imposed on the seller of a product who placed the goods in commerce. Thus, strict liability principles, and not negligence governed the manufacturer’s liability.

With the adoption Rst. (2) §402A in 1965, the manufacturer was governed by “absolute liability.”

4. Period #4: (1975-1999): the fourth stage of product liability law began with a series of important decisions dealing with defective designs and a duty to warn requirements for the manufacturer. These cases have adopted a hybrid strict liability/negligence approach for manufacturer liability.

5. Period #5: (1999-present) in 1999 Rst. (3) Products Liability came out which is not the predominant theory yet, but has categorized products liability into three general categories:

- a. Manufacturing Defects;
- b. Defective Designs; and
- c. Inadequate Warnings.

B. Three Categories of Products Liability: there are three main categories of product liability cases:

1. *Manufacturing Defects:* products that come out of the plant with some defect that makes them more dangerous and unlike all the other similar products that came out of the assembly plant.

2. *Design Defects:* products that are defective generally, it is not limited to one defective product (like manufacturing defects), but every item that comes out of the assembly plant has some defect that makes it defective. The design of the product was intentionally made, however, there was some defect which still made it defective.

3. *Warning Defects:* the warning on the product is either defective and inadequate or absent when it is needed.

\*The plaintiff’s conduct in using the product is also a consideration to be taken into account when dealing with products liability cases.

C. Theory of Recovery: throughout the history of product liability cases, the theory of recovery has been predicated on several different approaches:

1. Negligence;
2. Breach of warranty (implied warranties of merchantability);
3. Strict liability; and
4. Currently some deviation from negligence is being used.

### §3.2: Historical Development

#### I. Exposition: Period #1

A. **G/R: Classical Rule:** (in England) there must be privity of contract between the injured party and the negligent actor if a products liability action is to be maintainable; if there is no privity of contract the plaintiff may *NOT* recover [Winterbottom v. Wright].

1. **Exception:** where a party becomes responsible to the public, by undertaking a public duty, he is liable, though the injury may have arisen from the negligence of his agent or servant. In cases of public nuisance, whether the act was done by the party or an agent, he is liable to an action to any person who suffers (in all other

cases, such as manufacturers, they are not subject to any duty, irrespective of their contracts [Winterbottom v. Wright].

2. **Policy:** (a) if an action were allowed without privity of contract, it would permit an infinity of actions to be brought in the courts; (b) there is no case law supporting the expansion of tort law; and (c) during the industrial revolution courts did not want to chill manufacturing.

B. **G/R: Classical Rule:** (in America) American courts generally followed the English rule, that there must be privity of contract between the injured party and the negligent actor if a products liability action was to be maintainable, however, it was subject to three major exceptions, that is, liability can be predicated on the following:

1. **Exception: *Imminently Dangerous Article:*** an act of negligence of a manufacturer or vendor which is imminently dangerous to the life or health of mankind.
  2. **Exception: *Owner of Land:*** an owner's act of negligence which cause injury to one who is invited by him to use his defective appliance upon the owner's land; and
  3. **Exception: *Failure to Warn:*** one who sells or delivers an article which he knows to be imminently dangerous without notice of the dangers and harm results.
- \*[Huset v. J.L. Case Threshing Machine Co.].

## II. Exposition: Period #2

A. **G/R: Negligence Approach:** the defendant manufacturer owes a duty of care to all consumers, that is, persons other than the immediate purchasers with whom the manufacturer has privity of contract [MacPherson v. Buick Motor Co.].

1. **Rule:** if the nature of the item manufactured is such that it is reasonably certain, or foreseeable, to place life or limb in peril when negligently made, and if the manufacturer knows that it will be used by persons other than the immediate purchaser, then he has a duty to make it carefully.
2. **Reason:** The court did away with the privity rule because the only party that has privity of contract with the manufacturer is the distributor who never uses the product, therefore, the rule is perverse because the only person with whom privity of contract exists is the only party that will not use the product.
3. **Test:** absent privity of contract, there are three things that must be present for an injured party to recover against a manufacturer:
  - a. **Knowledge:** the manufacturer must have probable knowledge that the item is dangerous;
  - b. **Use:** that the dangerous item will be used by persons other than the purchaser;
  - c. **Proximity:** if the manufacturer is negligent, and the dangers were foreseeable, with a break in the chain of causation, the manufacturer has a duty to make the product carefully.

4. Recovery was predicated on the theory of negligence and duty the manufacturer owed was to make the product safely if it knew it would be used by consumers and had dangerous propensities.

**B. G/R:** If the reasonable person would foresee that the chattel would create a risk to human life or limb if not carefully made or supplied, the manufacturer or supplier of such a chattel is under a duty of care in the manufacture or supply thereof—and this duty is owed to all foreseeable users.

### III. Exposition: Period #3

**A. G/R: Strict Liability Approach:** the standard is strict liability for anyone who puts a product on the market knowing it will be used by consumers [Escola v. Coca Cola].

1. **Rule:** “Liability without fault,” or strict liability, is imposed as a matter of public policy due to the grave risk of harm in placing defective products in the stream of commerce.

2. **Policy:** the court did away with the negligence approach for six reasons:

a. *Enterprise Liability:* if a manufacturer chooses to engage in activity which he knows will be used by the general public, it must pay if harm results.

b. *Loss Spreading:* the manufacturer is in a better position to spread the loss than the public by either raising the cost of the product or taking preventative measures.

c. *Loss Minimization:* in most products liability cases, the source of the manufacturer’s liability was his negligence in the manufacturing process or in the inspection of the component parts. The manufacturer can guard against these hazards, whereas the general public cannot, and the manufacturer is in the best position to remedy the defect because an individual consumer has no clout with a large corporation.

d. *Elimination of Proof Complications:* if the manufacturer is to guarantee the safety of his product even where there is no negligence, then the doctrine of *res ipsa loquitur* will not have to be invoked in every case and the responsibility will fall on who can best prevent the harm (i.e. the manufacturer).

e. *Food Stuffs:* the rules of liability with respect to food were already a lot closer to strict liability than other products, and therefore it would not be a big jump to impose strict liability on other manufacturers.

f. *Less Judicial Activity:* if the plaintiff is required to sue the retailer (i.e. the one with whom privity exists) the retailer will sue the manufacturer, and therefore it is more efficient to allow the consumer to simply sue the manufacturer.

**B. G/R: Warranty Approach:** if the product manufacturer warrants (either express or implied) that the product will be reasonably safe and the purchaser relies on the implied warranty of merchantability, even if the purchaser fails to inspect the product, the retailer

will be held liable when the defect was latent and the product was under warranty [McCabe v. Ligget Drug Co.].

1. Implied Warranty of Merchantability: merchantable quality means that the goods are reasonably suitable for the ordinary uses for which goods of that description are sold.
2. The warranty theory is basically a strict liability approach because the plaintiff does not have to prove the manufacturer was negligent.
3. The warranty approach is usually based on a contract theory of recovery.

C. **G/R: Third Party Beneficiaries of Warranties Express or Implied**: a seller's warranty whether express or implied extends to any natural person who:

1. *Alternative A*: is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume, or be affected by the goods and who *injured in person* by breach of the warranty; or
2. *Alternative B*: may be reasonably expected to use, consume, or be affected by the goods and who is *injured in person* by breach of the warranty; or
3. *Alternative C*: may be reasonably expected to use, consume, or be affected by the goods and who is *injured by the breach* of warranty.

\*[UCC §2-318].

D. **G/R: Disclaimers**: the seller of a good cannot, by contractual means, disclaim all warranties as to the quality of the product, nor put in a contractual provision limiting liability between the purchaser and seller in privity of contract [Henningsen v. Bloomfield Motors].

E. **G/R**: Some jurisdictions (i.e. California) have done away with the warranty theory and negligence approach entirely and opted for an across the board strict liability approach [Greenman v. Yuba Power Products].

1. Rule: a manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being.

#### IV. The Restatement (Second)

A. **Rst. (2) §402A: Special Liability of Seller of Product of Physical Harm to Consumer or User**: (1) one who sells any product in *defective condition unreasonably dangerous* to the user or consumer or to his property is subject to liability for *physical harm* thereby cause to the ultimate user of consumer or to his property if:

- (a) the seller is engaged in the business of selling such a product, and
- (b) it is expected to and does reach the user or consumer *without substantial change* in the condition in which is sold.

(2) the rule stated in subsection (1) applies *although*:

- (a) the seller has exercised *all possible care* in the preparation and sale of his product (i.e. strict liability if the product was defective and unreasonably dangerous); and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller (i.e. no privity of contract requirement).

**B. G/R: Defective Condition:** the rule only applies where the product is, at the time it leaves the seller's hands, in a condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him. The seller is not liable when he delivers the product in a safe condition, and subsequent mishandling or other causes make it harmful by the time it is consumed [cmt. g].

**C. G/R: Unreasonably Dangerous:** the rule only applies where the defective condition of the product makes it unreasonably dangerous to the user or consumer. Many products cannot possibly be made entirely safe for all consumption, and any food or drug necessarily involves some risk of harm.

1. Test: the article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics.  
[cmt. i].

**D. G/R: Business of Selling:** the rule only applies to any person engaged in the business of selling products for use or consumption. It therefore applies to any manufacturer of such a product, to any wholesale or retail dealer or distributor, and to the operator of a restaurant.

1. Caveat: it does not apply to the occasional seller of food or other such products who is not engaged in that activity as part of his business.  
\*[cmt. f].

**E. G/R: Warnings or Directions:** in order to prevent the product from being unreasonably dangerous the seller may be required to give directions or warnings, on the container, as to its use [cmt. j].

**F. G/R: Unavoidably Unsafe Product:** there are some products which, in the present state of human knowledge, are not capable of being made safe for their intended and ordinary use (prescription drugs). Such a product, properly prepared and accompanied by appropriate warnings and directions, is not defective, nor is it *unreasonably dangerous*.

**G. G/R: Warranties:** the rule is not governed by the Uniform Sales Act or the UCC, as to warranties; and it is not affected by limitations on the scope and content of warranties [cmt. m] (i.e. strict liability governs).

**H. G/R: Defenses:** contributory negligence is not a defense because it is governed by strict liability principles.

1. Assumption of Risk: is a defense if the plaintiff knew of the danger and voluntarily and unreasonably proceeded to encounter the danger.

**I. G/R: Bystanders:** although the restatement did not express an opinion on bystanders, they have been able to recover under the rule because the bystander has an even stronger

claim than the consumer because the abnormally dangerous product or activity caused him harm which was in *NO* part his making; he did not even purchase the product.

J. **G/R:** Contract and Tort: §402A only applies to tort law and cannot be extended into contract law because the duties under each body of law are different and so are the theories of recovery [Casa Clara Condos v. Charley Toppino & Sons].

1. *Tort Duty:* the purpose of duty in tort is to protect societies interest in being free from harm and the cost of protecting society from harm is borne by society in general.
2. *Contract Duty:* Contractual duties, on the other hand, come from societies interest in the performance of promises and when economic harm is involved it is usually sustained by those who failed to bargain for the adequate contractual remedies.

K. **G/R:** Economic Loss Rule: (majority) the economic loss rule prohibits tort recovery when a product damages itself, causing economic loss, but does not cause personal injury or damage to any property but *itself*.

1. The rule is the fundamental boundary between contract law, which is designed to enforce the expectancy interest of the parties, and tort law, which imposes a duty of reasonable care and thereby encourages citizens to avoid causing physical harm to others.
2. *Economic loss:* is defined as damages for inadequate value, costs of repair and replacement of the defective product, or consequent loss of profits—*WITHOUT* any claim of personal injury damage to the property.
  - a. Economic loss includes the diminution in the value of the product because it is inferior in quality and does not work for the general purposes for which it was manufactured and sold.
  - b. In other words, economic losses are disappointed economic expectations, which are protected by contract law rather than tort law.
3. **Policy:** (a) if tort recovery was allowed to undermine contracts, then tort law would swallow up contract law because a party could out of his contract and bargained for exchange; (b) a tort theory of recovery cannot overcome a contract theory, however, that does not mean one cannot recover economic damages in tort (money); (c) if allow tort theory of recovery for breach or negligent performance of a contract for economic loss then it would be to hard to draw the line and foreseeable plaintiffs could be found more often.
4. *Minority Economic Loss Rule:* §402A overrides any warranty disclaimers even for pure economic loss.  
\*[Casa Clara Condos v. Charley Toppino & Sons].

L. **G/R:** Statutes of Limitations and Repose: the statutes of limitations, and in some states statutes of repose can bar recovery for an injured plaintiff if he does not timely file, in general:

1. Contracts: the statute of limitations for contracts usually begin to run when the product is sold.

2. Torts: the statute of limitations for tort actions usually being to run when the party is injured. The vast majority of §402A cases are governed by the tort statute of limitations.

3. Statutes of Repose: are generally longer than the statute of limitations and deal with how long a product can be placed in commerce before all actions dealing with the products are barred (usually around 20-years). Statutes of repose were instituted to deal with causation issues that arise after a product has been in the market for a substantial amount of time.

M. **G/R:** Proper Defendants under §402A: those who sell their services for the guidance of others (doctors, pharmacists, etc...) are not liable in the absence of negligence or intentional misconduct; thus, §402A does not apply to persons who provide services, but is limited to sellers of products [Murphy v. E.R. Squib].

1. A manufacturer or retailer may be held liable under §402A, that is, strictly liable, for injuries caused by defective product which it knows will be used without inspection for defects.

N. **G/R:** Seller's of Used Goods: the scope of §402A has not been extended to the sellers of used goods, although they make their business selling the goods, because holding every dealer of used goods responsible regardless of fault for injuries caused by defects in his goods would not only affect the prices of used goods; it would work a significant change in the very nature of the used goods market.

1. If a seller puts an "as is" clause in the contract, he is usually insulated from liability [Tillman v. Vance Equipment Co.].

### **§3.3: Product Defects**

#### I. Manufacturing (construction) Defects

A. **G/R:** Manufacturing Defects: as a matter of law, the plaintiff in a products liability case is required to prove that his injury resulted from a condition of the product which was unreasonably dangerous and which existed at the time the product left the manufacturers control.

1. The defect need not manifest itself at once, recovery is not barred simply because the plaintiff or a third party stored or used a product before the injury occurred.

2. A manufacturers liability for a defective product is predicated upon negligence in the manufacture or design of the product and juries are permitted to infer manufacturer negligence from circumstantial evidence where there is in the record direct evidence of an actual defect in the product.

[Pouncy v. Ford].

B. **G/R:** In a manufacturing defect case, the product is *not in the condition that the manufacturer intended* at the time it left his control; i.e., the product does not conform to the manufacturers own production standards.

1. Governed by strict liability.

## II. Design Defects

A. **G/R:** In design defect cases, the product was in the condition intended by the manufacturer or supplier, but was *designed* in such a way that it presented an undue risk of harm in normal use.

1. Test: a product may be defective by posing an unreasonable risk to consumer or by not protecting against foreseeable risks such as adequate safety devices.
2. Caveat: the defendant will not be held liable for manufacturing or selling a product that simply wears out with normal use.

B. **G/R:** Classical Design Defect Rule: if there was a patent defect in a machine, that was open and obvious, then the manufacturer was under no duty to protect the consumer from such defects.

1. The rule creates perverse incentives; i.e. the more open and obvious the danger the less liability.  
\*[Campo v. Scofield].

C. **G/R:** Modern Design Defect Rule: a manufacturer is obligated to exercise that degree of care in his plan or design so as to avoid an unreasonable risk of harm to anyone who is likely to be exposed to the danger when the product is used in the manner for which the product was intended as well as unintended, yet reasonably foreseeable [Micallef v. Miehle].

1. *Reasonable Care:* what constitutes reasonable care will depend will vary with the surrounding circumstances and will involve balancing the likelihood of harm, the gravity of harm, against the burden of precaution which would be effective to avoid such harm.
2. *Consumer Choice:* consumer choice is also a factor to be considered in determining whether the product was defectively designed (i.e. a party cannot claim that a convertible is a defectively designed product because it has no roof).
  - a. A product that functions as intended and is dangerous in its ordinary use, has no defect and cannot give rise to liability based on a defect (i.e. guns).
3. *Duty:* a manufacturer has duty to use reasonable care in designing his machine so as to avoid a foreseeable risk of harm when the machine is being used, as it was intended or reasonably foreseeable, even if the defect is patent to the consumer (latent defects too).
  - a. A relevant consideration in determining whether the manufacturer has used reasonable skill and knowledge concerning the design of the product is whether he has kept abreast of recent scientific developments and the extent to which any tests were conducted to ascertain the dangerous of the product.
4. **Policy:** the manufacturer of a product is in a superior position to recognize and cure defects.
5. The consumer's contributory negligence is not a complete bar to recover, however, the plaintiff still has a duty to use reasonable care under the circumstances.

D. **G/R: Product Modification**: the courts have taken two approaches if the plaintiff subsequently modifies a product after purchasing it:

1. *No Liability*: the manufacturer is not liable because the product alteration constitutes a superceding cause sufficient to relieve it of tort liability for design defect.
2. *Liability*: the manufacturer is held liable because manufacturers cannot escape liability on the grounds of misuse or abnormal use if the actual use proximate to the injury was objectively foreseeable. Thus, foreseeable misuse or abnormal use can be extended by analogy to foreseeable substantial change of the product form its original design.

E. **G/R: Crashworthiness (second collision)**: a manufacturer can be held liable for failure to design its product so as to minimize foreseeable harm caused by other parties or conditions.

1. In second collision cases an automobile manufacturer is liable for a defect in design which the manufacturer could have reasonably foreseen would cause or enhance injuries on impact, if the defect is latent and which does in fact lead or enhance injuries in an automobile accident.
  - a. Caveat: if the defect is patent to the user of the vehicle there can be no recovery for the user of the vehicle.
2. *Duty*: an automobile manufacturer has a duty to take steps to design vehicles in a manner that would limit the injuries on impact if such defects in design were not patent or obvious to the consumer.  
\*[Volkswagen v. Young].

F. **G/R: Defective Products**: a product is defective in design if either:

1. the product has failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner; or
2. if the benefits of the challenged design do not outweigh the risk of danger inherent in such a design.  
[Barker v. Lull Engineering]

G. **G/R: Burden of Proof**: a product may be found defective in design if the plaintiff demonstrates that the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner.

1. *Majority View*: the plaintiff has the burden of proving reasonable alternative design (RAD).
2. *Minority View*: the defendant has the burden of proving the design was not defective [Barker v. Lull Engineering].

H. **G/R: Approaches to Design Defect Cases**: the test used in *Barker* [supra, §3.3, II, Rule F] is one of three approaches used in design defect cases:

1. Reasonable Alternative Design Test: [Barker test plus majority burden of proof rule]: (majority view): (a) whether the defendant could have removed the danger without serious adverse impact on the product's utility and price; and the plaintiff

has the burden of proving that there is a reasonable alternative design. (b) There are seven factors that are determinative (Cost/Utility Test):

- a. usefulness of the product;
- b. type and purpose of the product (functional utility of design);
- c. style, attractiveness, and marketability of the product (psychological utility);
- d. number and severity injuries actually resulting from current design (social cost);
- e. cost of design changes to alleviate problem;
- f. user's anticipated awareness of inherent dangers in the product and their avoidability; and
- g. feasibility of spreading the loss by adjusting the products price.

\*[Volkswagen of America v. Young].

2. Consumer Expectation Test: [used mainly in food stuffs cases] (minority view in other cases): whether the product was as safe as an ordinary consumer would have expected.

3. Combination Test: some courts allow a combination (usually in the alternative) of the previous two tests: under this standard the jury may find a defect where the product left the supplier's control lacking any element necessary to make it safe for its intended use (RAD Test) *OR* possessing any feature that renders it unsafe for the intended use of an ordinary consumer (Consumer expectation test) [Azzarello v. Black Bros. Co.].

4. In certain types of cases the plaintiff may try and use the preemption doctrine also [infra §3.3, II, Rule I].

I. **G/R: Preemption Doctrine**: if the government has regulations mandating certain safety requirements they may be used as *evidence* that the product was either safe or unsafe. However, government regulation is usually not the final arbiter, unless there is an explicit preemption clause, because it would require the federal government to regulate more stringently and more oversight would be required which may be impracticable. So government regulation is usually the threshold (below which a product cannot fall) standard.

1. Federal rules are not dispositive, that is, compliance with federal regulations does not constitute a per se defense for the defendant.

J. **G/R: State of the Art Rule**: in setting the appropriate standard for product safety, many courts look to the state of the art in the product supplier's trade or business.

1. The state of the art rule is generally understood to refer to something more stringent than the common practice of the industry, and to embrace the scientific technical possibilities for product design and improvement.
2. Courts look at the state of the art at the time the product was manufactured and entered into the stream of commerce.

K. **G/R: Subsequent Improvements**: the plaintiff cannot enter into evidence of the defendant making subsequent improvements on the product after an accident to show the

defectiveness of the defendant's basic design because it promotes bad policy in that it would encourage manufacturers not to fix defective products [Fed. R. Evidence 407].

L. **G/R: Risk/Utility Test:** a risk utility test is used to determine whether a modification in the product would eliminate its utility or function (used in conjunction with the reasonable alternative design test also). The formula for determining the risk and utility of a products design include:

1. the usefulness and desirability of the product;
2. the safety aspects of the product;
3. the availability of a substitute product which would meet the same need and not be unsafe;
4. the manufacturer's ability to eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility;
5. the user's ability to avoid danger by the exercise of reasonable care;
6. the user's anticipated awareness of the dangers inherent in the product and their avoidability because of general public knowledge of the obvious condition of the product or the existence of suitable warnings and instructions; and
7. the feasibility, on the party of the manufacturer, of spreading the loss by setting the price of the product or carrying liability insurance.

M. **G/R: Elements of Recovery under Strict Liability for Defective Design:** there are four elements (using the combined test) that the plaintiff must demonstrate to recover for a defectively designed product:

1. the defendant sold the product in the course of its business;
2. the product was then in a defective condition unreasonably dangerous when put to reasonably anticipated use;
3. the product was used in a manner reasonably anticipated; and
4. the plaintiff was damaged as a direct result of such defective condition as existed when the product was sold.

\*[Linegar v. Armour of America]

5. **Consumer Expectation Test:** the article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with ordinary knowledge common to the community as to its characteristics [Rst. (2) §402 cmt. i].

6. In determining if a product is unreasonably dangerous the "open and obviousness" of the danger is a factor, although not conclusive.

7. A manufacturer is not obligated to market only one version of a product, that being the safest design possible.

\*[Linegar v. Armour of America]

\*\*The court used the combination approach applying both the dangerousness of the product and the consumer expectation test in *Linegar*.

### §3.4: Duty to Warn

#### I. Duty to Warn

A. **G/R: Duty to Warn**: a defendant manufacturer must warn all persons who it foreseeable will come in contact with, and consequently be endangered by, a product that it distributes [MacDonald v. Ortho].

1. **Exception: Learned Intermediary**: when warnings have been given to a reasonable intermediary the manufacturer has not duty to directly warn the consumer (i.e. doctor/patient).

a. **Prescription Drugs**: a manufacturer of prescription drugs duty to warn is that the prescribing physician acts as a “learned intermediary” between the manufacturer and the patient, and the duty of the ethical drug manufacturer is to warn the doctor, rather than the patient, although the manufacturer is directly liable to the patient for breach of such duty.

(i) **Exception**: birth control pills because the physician patient relationship is different.

B. **G/R: Duty to Warn Test**: the common law duty to warn necessitates a warning comprehensible to the average user and conveying a fair indication of the nature and extent of the danger to the mind of a reasonably prudent person [MacDonald v. Ortho].

1. An element of the duty to warn is causation, that is, the plaintiff must demonstrate that if there was a warning on the product, it would have made a difference.

C. **G/R: Adequacy of Warnings**: the adequacy of such warnings is measured not only by what is stated, but also the manner in which it is stated. A reasonable warning not only conveys a fair indication of the nature of the dangers involved, but also warns with the degree and intensity demanded by the nature of the risk.

1. A warning may be found unreasonable in that it was unduly delayed, reluctant in tone, or lacking in a sense of urgency.

2. A manufacturer has a duty to warn even if the risk of harm is very low (like one in a million).

\*[MacDonald v. Ortho].

D. **G/R: Pharmacist’s Rule**: a pharmacist usually does not have to warn like that imposed on the physician.

E. **G/R: Warning or Design**: the court assumes if a warning is given, that it will be read. However that is predicated on the premise that humans are rational and will take heed to the warnings; however, humans are usually momentarily inattentive.

F. **G/R: Information Costs**: there is an inherent danger in requiring manufacturers to warn about every possible danger because then the important warnings may get lost in the boilerplate list of warnings and it would discourage the consumer from reading the warnings.

H. **G/R**: a manufacturer *is* liable if there was an inexpensive way to design the product differently even if the gave an adequate warning.

I. **G/R: Unavoidably Unsafe Products:** many useful products are unavoidably unsafe (e.g. prescription drugs, knives, etc...) but this does not render the product defective and therefore the manufacturer is under a duty to give adequate warnings with these types of products [Brown v. Superior Court].

1. Some products which, in the field of human knowledge and experience, are quite incapable of being made safe for their ordinary and intended use. Such a product is not defective or unreasonably dangerous [Rst. (2) §402A cmt. k].
  - a. While there is some disagreement as to the scope and meaning of §402 cmt. k, it is based on the negligence doctrine and *not* strict liability [Brown v. Superior Court].
  - b. That is, comment k, would impose liability on a drug manufacturer only if it failed to warn of a defect of which it knew or should have known. This inquiry focuses not on a deficiency, but on the fault of the producer in failing to warn of dangers inherent in the use of its product that were either known or knowable.

J. **G/R: Unavoidably Unsafe Products:** a manufacturer of prescription drugs is *NOT* strictly liable for injuries caused by a prescription drug so long as the drug was properly prepared and accompanied by warnings of its dangerous propensities that were either known or reasonably knowable *at the time of distribution*.

1. Thus, the reasonable alternative design test or the consumer expectation test is not applied to the manufacturer of consumer drugs.
2. Consumer drugs are governed by the standard of *negligence* for the product and the warnings accompanying the product.
  - a. A drug that has significant health benefits for a vast majority of people, but is potentially dangerous to a small number of people, is still not abnormally dangerous so the drug is governed by *negligence* instead of strict liability under §402A.
3. In other words, a manufacturer is not under a duty to warn of the unknowable.
4. **Policy:** it would not benefit the court to create a rule which would delay, and in some cases make unavailable, prescription drugs. Public policy favors the development and marketing of beneficial new drugs, even though some risks, perhaps serious ones, might accompany the introduction, because drugs can save lives and reduce pain and suffering. If drug manufacturers were subject to strict liability, they might be reluctant to undertake research programs to develop some drugs that would prove beneficial or to distribute drugs that are available to be marketed because of the fear of large adverse monetary judgments. Further insurance for drug manufacturers subject to strict liability would increase the price of drugs.
  - a. In other words, the court rejected the strict liability approach because if manufacturers were held strictly liable it may:
    - (i) chill research or manufacturers might stop making the drugs;  
and
    - (ii) it would increase the cost disproportionately to the potential harm which makes drugs less available and is bad public policy.

\*[Brown v. Superior Court]

K. **G/R: Preemption:** state law is preempted by federal law if that law actually conflicts with the federal law, or if federal law so *thoroughly* occupies a legislative field as to make reasonable the inference that Congress left no room for the states to supplement it. Federal law can also explicitly preempt state law [King v. E.I. Dupont].

a. Some courts have limited the preemption doctrine to express Congressional preemption and have done away with the doctrine of implied preemption, that is, if the federal law so thoroughly occupies the legislative field.

L. **G/R: Defective Product:** a defective product is a product which is not reasonably safe, or is unreasonably dangerous, to the consumer or user.

1. If a product is safe for normal handling and consumption, it is not defective.  
2. The requirement of showing a defect is one common element to every products liability case.

3. The mere fact that an injury occurred is insufficient, in and of itself, to show the existence of a product defect. The plaintiff must offer some admissible evidence that the product was not reasonably safe for its intended or foreseeable use.

\*[Campbell v. Struder].

### §3.5: Plaintiff's Conduct: Defenses

#### I. Plaintiff's Conduct

A. **G/R: Contributory Negligence:** Contributory negligence of the plaintiff is *NOT* a defense when such negligence consists merely in a failure to discover the defect in the product, or to guard against the possibility of its existence [Rst. (2) §402A cmt. n].

a. Contributory negligence is not a defense because §402A is not based upon *negligence* of the seller, so the rule applied to strict liability cases applies.

B. **G/R: Assumption of Risk:** assumption of risk *IS* a defense if the plaintiff *voluntarily* and *unreasonably* proceeded to encounter a *known* dangers [Rst. (2) §402A cmt. n].

C. **G/R: Comparative Negligence:** the defense of comparative negligence can be asserted in product (strict) liability cases.

1. Plaintiff's will continue to be relieved of proving that the manufacturer or distributor was negligent in production, design, or dissemination of the article in question.

2. The defendant's liability for injuries caused by defective products remains strict.

3. The plaintiff's recovery will be reduced *only* to the extent that his own lack of reasonable care contributed to his injury.

4. The system of comparative fault is extended to actions founded on strict products liability; in such cases the separate defense of assumption of risk to the extent that it is a form of contributory negligence is abolished.

5. Extending the comparative fault system to strict liability actions promotes the equitable allocation of loss among all parties legally responsible in proportion to their fault (i.e. juries will look at the whole situation and apportion fault and loss where it should fall).

6. **Policy:** (a) loss should be assessed equitably in proportion to fault; (b) Assumption of risk (which was a previous defense to strict liability and total bar to recovery) is no longer a total bar to recovery because the plaintiff's negligent assumption of risk no longer defeats recovery because it is comparative; (c) thus, in either a strict liability or negligence claim the comparative defense will reduce but not bar recovery.

\*[Daly v. General Motors].

D. **G/R: Plaintiff's Misuse of Defendant's Product:** a plaintiff who makes a foreseeable misuse of a product is entitled to the same protection as those who do not, thereby removing from products liability defenses not only plaintiff's failure to discover latent defects in the product but also active negligence, or arguable, willful misuse of the product [LeBouef v. Good Year Tire and Rubber Co.].

### §3.6: Rst. (3) Torts: Products Liability

#### I. Analyzing a Products Liability Case for the Exam

A. **Getting Started:** Start with something to the effect: Rst. (2) §402A is still the law of the land in most jurisdictions, however, the case law has been basically outstripped so it is not the most useful method for analyzing a products liability claim; therefore Rst. (3) is better for analyzing a products liability problem...

B. **Rst. (3) §2: Categories of Product Defect:** A product is defective when, *at the time of sale or distribution*, it contains a manufacturing defect, is defective in design, or is defective because of inadequate instructions or warnings. A product:

(a) contains a manufacturing defect when the product departs from its *intended design* even though all possible care was exercised in the preparation and marketing of the product;

(b) is defective in design when the *foreseeable* risks of harm posed by the product could have been reduced or avoided by the adoption of a *reasonable alternative design* by the seller or other distributor, *OR* a predecessor in the commercial chain of distribution, and the omission of the alternative design renders that product not reasonably safe;

(c) is defective because of inadequate warnings or instructions when the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings by the seller or other distributor, or predecessor in the commercial chain of distribution, and the omission of the instructions or warnings renders the product not reasonably safe.

\*These rules are generally applicable to all products except prescription drugs and used products.

C. **G/R: Manufacturing Defects:** subsection (a) imposes liability whether or not the manufacturer's quality control efforts satisfy the standards of reasonableness. In other words, strict liability without fault.

1. As stated in section (a) a manufacturing defect is a departure from a product unit's design specifications.
2. In actions against the manufacturer the plaintiff ordinarily bears the burden of establishing that such a defect existed in the product when it left the hands of the manufacturer. As long as the plaintiff establishes that the product was defective when it left the hands of a given seller in the distributive chain, liability will attach to the seller.
3. Although section (a) calls for liability without fault, a plaintiff may seek to recover based upon allegations and proof of negligent manufacture.

D. **G/R: Design Defects and Inadequate Warnings:** in contrast to manufacturing defects, design defects and defects based on inadequate warnings are predicated on a different concept of responsibility. A risk/utility balancing test is necessary (it is the functional test that is important not the category of negligence or strict liability) to achieve objectives as does liability based on *negligence*. The risk/utility balancing test must be done at the time of distribution.

E. **G/R: Design Defects:** Rst. (3) §2(b) is *NOT* the exclusive means by which the plaintiff may establish liability in a products case based on the reasonable alternative design. Most courts, for example, while recognizing that in most cases involving defective design the plaintiff must prove the availability of a reasonable alternative design, also observe that such proof is not necessary in every case involving design defects. Thus a product can be otherwise (without the reasonable alternative design requirement) by proven:

1. Circumstantial evidence supports the conclusion that the defect was a contributing cause of harm and that the defect existed at the time of sale, it is unnecessary to identify the specific nature of the defect and meet the requisites of §2 [Rst. (3) §3];
2. Rst. (3) §4 dealing with violations of statutory and regulatory norms also provides an alternative method of establishing defect. A plaintiff is not required to establish the standard for design and warning under §2, but merely to identify a government-imposed standard; and
3. The Rst. (3) recognizes the possibility that product sellers may be subject to liability even absent a reasonable alternative design when the product design is *manifestly unreasonable*.

\*\*Thus, a reasonable alternative design is the predominant method for establishing a design defect, yet it is not exclusive.

F. **G/R: Causation:** whether a product defect caused harm to persons or property is governed by ordinary tort principles [Rst. (3) §15(a)].

G. **G/R: Affirmative Defenses: Comparative Negligence:** comparative negligence applies the way it normally does under comparative systems [Rst. (3) §17].

H. **G/R: Disclaimers and Waivers:** any disclaimer or waiver as to the merchantability will not bar recovery or reduce recovery on product liability claims [Rst. (3) §18]. That is, a defective product is prima facie unconscionable and the defendant cannot exculpate himself by boilerplate language.

#### §4: Causation

\*\*It probably won't be a main issue on the exam, but put down the basic analysis, and it will score you a few points.

A. **G/R:** the defendant's act must be the cause of the plaintiff's injuries in order to impose liability. This involves two separate determinations:

1. Whether the defendant's conduct was the actual cause (cause in fact); and
2. Whether the defendant's act was the proximate (legal) cause.

B. **G/R: Cause in Fact:** there must be causal connection between the negligence and the injury. The defendant's conduct has to *cause* the injury.

1. Cause in fact is essential to liability; but does not by itself determine it.
2. *But For causation:* the injury would not have happened *but for* the defendant's action. The rule is essential but not sufficient.
  - a. Caveat: when two simultaneous occur at the same time which cause harm and it is impossible to tell who's conduct actually caused the harm.
3. **Substantial Factor Test:** deals with the simultaneous causes and if the defendant's action was a substantial factor in causing the harm to the plaintiff then he may be liable.
  - a. Was the defendant's act or omission a substantial factor in causing the plaintiff's injury?
  - b. Look at facts and circumstances surrounding the accident, did the defendant's action really cause the harm?

B. **G/R: Post Hoc, Ero Proctor Hoc:** one cannot just say "A" happened and it led to "B" therefore "A" caused "B." In complex cases the party needs experts to prove causation, particularly products liability cases.

C. **G/R: Proximate Cause Elements:** the defendant's negligent conduct is a legal cause of harm to another if:

1. his conduct was a substantial factor in bringing about the harm; and
  - a. Test: was the defendant's act or omission a substantial factor in causing the plaintiff's harm?
2. there is no rule of law relieving the action from liability because of the manner in which his negligence has resulted in harm.
  - a. Ex: immunity.

D. **Analysis:** two commonly used methods of analysis for proximate cause:

1. Foresight Test: whether the chain of events that in fact occurred was sufficient *foreseeable, natural, or probable* at the outset for the defendant to be held liable

for the ultimate harm that ensued, assuming that causation in fact can be established.

2. Directness Test: starts with the injury and works back toward the wrongful action of the defendant, seeking to determine whether any act of a third party or plaintiff, or natural event, severed the causal connection between the harm and the defendant's wrongful conduct.

a. Here the only question is, whether when all the evidence is in, it is permissible to say that the defendant brought about the plaintiff's harm.

E. **G/R: Polemis Rule**: if the defendant is negligent, he is liable for any consequences that result, whether he could have foreseen them or not [In Re Polemis].

F. **G/R: Wagon Mound Rule**: a defendant can only be liable for his consequences, which are reasonable foreseeable as a consequence of his negligence [Wagon Mound #1].

G. **G/R: Unforeseeable Plaintiff**: (majority/ Cordozo Rule): the defendant owes a duty of care only those persons whom the reasonable person would have foreseen a risk of harm under the circumstances. Therefore, before the defendant may be held liable under any duty of care of the plaintiff, it must appear that reasonable person would have *foreseen the risk of harm to the plaintiff or class of persons to which the plaintiff belongs*, the plaintiff was a foreseeable plaintiff in the zone of danger.

1. *Minority/ Andrews Rule*: if a duty is owed to anyone it is owed to all. The defendant's duty of care is owed to anyone in the world who suffers injuries as the proximate result of the defendant's breach of duty. If the act was a substantial factor in causing the harm of another then the defendant may be liable to anyone harmed.

a. Foreseeability is a factor but in determining the defendant's negligence it is not the determining factor.

H. **G/R: Thin Skull Rule**: if the defendant's act of negligence cause an *unforeseeable* result because the plaintiff's injuries are unexpected the defendant IS laible for the full extent of the plaintiff's injuries.

J. **G/R: Legal Causation**: legal causation is defined as conduct that is a substantial factor in bringing about the plaintiff's injuries.

1. Causation Test: if the conduct is that cause which in natural and continuous sequence, unbroken by sufficient intervening cause produces injury, without which the result would not have occurred, it must be identified as a substantial factor in bringing about the harm.

a. Caveat: if, however, it created only a condition or occasion for the harm to occur then it would be regarded as a remote, not proximate, cause and would not be a substantial factor in bringing about harm.

2. Negligence and causation are not presumed simply because an accident occurred.

\*[Anderson v. Duncan].

K. **G/R: Proximate Cause:** proximate cause is explained as the accident or injury must be the natural and probable consequence of the act of negligence. The ultimate test for proximate cause is foreseeability of injury. In order to qualify as a legal cause, the conduct must a substantial factor in bringing about the plaintiff's injuries [Turq v. Shanahan].

## §5: DAMAGES

### §5.1: Overview, Pain and Suffering, Economic Loss

#### I. Overview

A. **Generally:** the principle of tort damage is compensation. The goal is to try and restore the injured party to the moment before the tort occurred with monetary damages.

1. Proof of damages is an element of the prima facie case:
  - a. Duty;
  - b. Breach;
  - c. Cause;
  - d. *HARM*: damages.

B. **Types of Damages:** there are several different types of damages an injured party can recover:

1. Medical expenses;
2. Custodial care;
3. Lost Earnings;
4. Pain and Suffering;
  - a. physical pain;
  - b. grief;
  - c. worry;
  - d. loss of enjoyment of life

\*\*All damages are for *past* and *future* suffering.

5. **Plus:** damages may also be recovered by people in a close relationship with the injured party.

- a. Loss of consortium;
- b. Negligent infliction of emotional distress.

C. **Recoverable Elements of Damages:** proof of damages is an essential element of the plaintiff's case in most civil litigation. There are three critical elements of damages:

1. pain and suffering;
2. lost earnings and other economic loss; and
3. medical expenses.
4. **Policy:** the main goal of awarding damages is to put the plaintiff in the position that he would have enjoyed if the tort had never been committed (i.e. compensation). Damages also serve a deterrent and control function:

- a. *Deterrent Function*: damage awards that are too low may induce over investment in socially costly activities by excusing potential defendants from bearing part of the costs they create;
- b. *Control Function*: damage awards that are too high could induce potential defendants not to engage in socially beneficial activities; either for the plaintiff or society at large.

**D. Pecuniary Damages:** compensate the victim for the economic consequences of injury, such as medical expenses, lost earnings, and cost of custodial care.

**E. Nonpecuniary Damages:** are those damages awarded to compensate an injured person for the physical and emotional consequences of the injury, such as, pain and suffering and the loss of ability to engage in certain activities.

1. Nonpecuniary losses are among those that can be awarded to compensate the victim.

## II. Pain and Suffering

**A. G/R: Pain and Suffering:** pain and suffering is a recoverable amount of damages, for both past and future harm. An injured party cannot recover for pain and suffering unless he is conscious of the pain and suffering [McDougald v. Garber].

**B. G/R: Loss of Enjoyment of Life:** (*Majority Rule*) A party can recover for future loss of enjoyment of life and is a sub-element of pain and suffering and is not to be considered separate from pain and suffering.

1. *Minority Rule*: loss of enjoyment of life is a separate element of damages distinct from pain and suffering and the jury can be instructed on that issue even if the injured party is unconscious which would make pain and suffering damages unavailable [McDougald v. Garber].
2. The majority rule kind of creates a bad incentive because the defendant actually has to pay less damages if he causes more damage (i.e. if he causes brain damage he will probably not have to pay pain and suffering if the plaintiff is in a coma).

**C. Policy:** an award of pain and suffering, or damages in general, to a person injured by the negligence of another is to compensate the victim, not to punish the wrongdoer.

1. The goal of pain and suffering damages is to restore the injured party, to the extent possible, to that position he would have occupied had the wrong not occurred.
2. *Punitive Damages*: placing the burden of compensation on the negligent party also serves as a deterrent, but purely punitive damages, that is, those which have no compensatory purpose, are prohibited unless the harmful conduct is intentional, malicious, outrageous, or otherwise aggravated beyond mere negligence.

D. **G/R:** cognitive awareness is a prerequisite to recovery for loss of enjoyment of life and loss of enjoyment of life should not be considered a category of damages separate from pain and suffering.

E. **G/R:** Per Diem Rule: pain and suffering should be broken down into seconds and minutes when calculating pain and suffering damages and therefore the award of damages does not sound so large and scary to the jury.

### III. Economic Loss (lost profits and medical expenses)

A. **G/R:** Lost Profits: an injured party can recover for lost profits of the income he would have received but for the accident.

1. Mitigation: the injured party has a duty to mitigate lost profit damages when possible.

a. **Test:** whether the injured party, with reasonable effort and diligence, could have found other comparable employment.

1. The injured party does not have a duty to take affirmative action (such as furthering his education or learning different skills) in his effort to mitigate damages by finding other employment.

b. The injured party does not have to have a track record of financial income to recover lost profits, he must only demonstrate that he had a reasonable expectation of future wage income.

\*[O'Shea v. Riverway Towing Co].

B. **G/R:** Principle of Discount: when the defendant has to pay a large sum of money for lost profits to the plaintiff then the interest rate has to be added to expected inflation rate in order to ensure that the defendant does not overcompensate the plaintiff. [For exam put what I just said and]:

1. An expert will have to be hired to compute the discount rate; and

2. the basic notion of discounting is that if the defendant has to pay the plaintiff now for loss in the future, the defendant will give him less money because of the notion of discounting.

\*\*Basically discounting boils down to: a dollar today is worth more than a dollar tomorrow, so when deciding how to compute damages today you have to compound interest and factor in inflation: HIRE AN EXPERT TO DO THIS FOR YOU because in all actuality, you're probably not smart enough.

C. **G/R:** Prejudgment Interest: at common law the general rule was that interest for a successful tort plaintiff only ran from the time of judgment (i.e. that moment when the unliquidated amount of the damages imposed by tort law was fixed by litigation—the final appeal).

1. Today, some courts allow the interest to compound from time of judgment at the trial court until the time of final appeal.

D. **G/R: Taxation:** under the Internal Revenue Code damage awards received in compensation for personal injuries are *NOT* taxable, even when they are a substitute for lost income.

1. **Policy:** if taxation was allowed, the defendant may actually pay less than the amount of harm he actually caused.

E. **G/R: Doctrine of Remitter:** under the doctrine of remitter, a court can reduce the amount of damages a plaintiff receives from the jury if it is not supported by the weight of the evidence. The plaintiff either has to agree to the remitter or have a new trial.

1. **Policy:** (a) *For Remitter:* complex trials are very long (time consuming) and costly (because of the amount of experts) and hard on the injured plaintiff, so in the interest of judicial economy, the remitter allows a reduction if the damages awarded are against the weight of the evidence. (b) *Against Remitter:* under the 7<sup>th</sup> Amendment the injured party has a right to trial by jury; and not a trial by the judge for damages.

2. **Doctrine of Additur:** under the doctrine of additur, the damages are inadequate so the judge adds more money to the damage award because it is clearly supported by the weight of the evidence.

- (i) This doctrine is used more in systems without comparative negligence.

F. **G/R: Attorney's Fees:** both parties bear the cost of their own attorney's fees except in certain well defined exceptions.

G. **G/R: Factors to Consider in Assessing Damages:** although consideration is properly given to the nature and extent of the injuries and the diminished earning capacity, there are other factors to consider also:

1. economic conditions;
2. plaintiff's age and health;
  - a. The defendant could argue that the injured party because of the health of that person has a shorter life expectancy and therefore should be awarded less money because they have a shorter life expectancy.
    - (i) Ex: plaintiff is overweight and smokes therefore life may be shorter and the defendant could obtain evidence of this from insurance companies;
    - (ii) however, it may make the defendant look like an ass to the jury, causing them to become pissed off and actually award the plaintiff more.
  - b. Conversely, the plaintiff could that in the future with medical technology advances the life expectancy actually increases, and could ask for more money.
    - (i) Ex: at the turn of the century the life expectancy of an individual was only 40-years, and in a century it has nearly doubled. It could be accurately calculated if the plaintiff wanted to make the argument.
3. comparison of the compensation awarded and permitted in cases of comparable injuries.

4. **Test:** the ultimate test for damages is what will fairly and reasonably compensate the plaintiff for the injuries sustained.  
\*[Firestone v. Crown Center Redevelopment Corp.].

H. **G/R: Medical Expenses:** the second major head of economic loss (lost earnings is first) covers medical expenses, both past and future. The following expenses usually count as medical expenses:

1. Doctor's and hospital bills;
2. Cost of nurses and attendants for persons with serious or permanent disabilities; and
3. In some cases costs for ramps and handrails at the plaintiff's house or trips necessary for health reasons.

I. **G/R: Reasonable Medical Expenses:** the plaintiff is entitled to the reasonable cost of medical expenses, although the price actually paid for services is ordinarily evidence of the reasonableness of the charges in question.

1. Damages are awarded for future medical costs, and like lost earnings, must be discounted to their present economic value.

J. **G/R: Excessive Damages:** the general rule when a motion is made challenging the excessiveness of a verdict is that the jury verdict will be respected unless the verdict is so plainly outrageously excessive as to suggest at first blush passion, prejudice, or corruption on the part of the jury.

1. It is the duty of the judge to set aside an excessive verdict, even when such a verdict is supported by substantial evidence if his of the opinion that the verdict is against the clear weight of the evidence, or is based on evidence, which is false or will result in the miscarriage of justice.

K. **G/R: Duty of Mitigation:** it is the general rule that the plaintiff must reasonably mitigate damages for employment or medical damages.

1. **Medical Injuries:** a plaintiff has a duty to submit to reasonable medical treatment and the test for reasonableness is to be determined by the trier of fact. It is the general rule that if injuries may be cured or alleviated by a simple and safe surgical operation, then refusal to submit thereto should be considered in mitigation of damages.

a. **Caveat:** this rule is not applicable where the operation is a serious one, or one attended by grave danger or risk of failure or death.

2. **Employment:** the law requires an injured party to use a reasonable effort to mitigate damages and this includes a duty to seek reasonable alternative employment.

a. **Caveat:** reasonable alternative employment is usually classified as substantially the same employment as before the injury injured. The plaintiff is required to do no more or less; in other words, the plaintiff does not have to re-tool himself or take a job in a position superior to that when he was injured.

\*[McGinley v. U.S.].

\*\*I have in my class notes that this will be on the exam.

## §5.2: Contingency Fees, Fee Shifting Devices, and Collateral Benefits

### I. Contingency Fees

A. **G/R: Contingency Fees:** under the contingent fee system, the plaintiff's attorney agrees to receive compensation for services rendered only out of the funds that the plaintiff receives from the defendant, either by settlement or judgment.

1. In the event that the action is lost, therefore, the plaintiff's attorney receives nothing for time and effort expended.
2. The normal contingency fee is somewhere between 30-50% of the damages.
3. **Policy:** (a) *For contingent fees: interest-alignment*, the lawyer gains only to the extent his client gains which gives him an incentive to work harder; enables individuals to bring claims that would otherwise remain un-prosecuted for lack of funds; feared abuses probably won't occur because lawyers have a strong incentive to choose those cases with the greatest chances of success. (b) *Against contingent fees:* they allow needless litigation to be stirred up; the economics of the system allow the lawyer to only work hard if he will gain substantially more; and it may cause lawyers to settle cases for their own interests (i.e. less time expended and still get a decent fee).

### II. Fee Shifting

A. **G/R: American Rule:** attorney's fees are borne by the respective parties, win or lose. In ordinary tort litigation attorney's fees are rarely awarded and only when the prevailing party can clearly demonstrate that the other side advanced a claim or defense that was frivolous or malicious.

1. Fees play an important role in how parties think about settling, if a party is going to win, but it will cost \$20K to do so, the fee-shifting devices will change the settlement strategies.
2. Although the losing side must often compensate the winning side for "costs" this term has been defined quite narrowly so that it usually only includes such incidental expenses as court filing fees.

### III. Collateral Benefits

A. **G/R: Collateral Benefits:** the plaintiff is not required to subtract the amount he received from a collateral contract (like an insurance contract) from the damage award at trial for the benefit of the defendant, and the existence of a collateral contract is not a defense with respect to liability [Harding v. Town of Townsend].

1. There is no privity between the defendant and the insurer, so as to give the defendant the right to avail itself of payment by the insurer.
2. The insurance policy is collateral to the remedy against the defendant, and was procured solely by the plaintiff at his expense, and since the defendant did not contribute to this collateral contract, he cannot benefit from it.

B. **G/R:** a collateral agreement which entitles the plaintiff to more than one full satisfaction for the injury cannot be deducted from the amount of damages awarded by the wrongdoer who breached his duty, thus, the collateral agreement made by the plaintiff will not absolve the wrongdoer from his liability for the damages attributable for the injury.

C. **G/R:** the defendant does not get the benefit (i.e. to put evidence in front of the jury) of the plaintiff entering into a collateral contract which benefits him for the same harm that the defendant will be liable for.

1. **Policy:** as between an innocent party, and a wrongdoer, the plaintiff should receive the benefit of the collateral benefit rather than the defendant because the plaintiff entered into the collateral contract and paid for the benefit.

D. **G/R:** Subrogation: gives the collateral source (i.e. the insurance company) the power to participate in, or even control, the tort litigation, and to recover its expenses from the tort claimant.

1. In other words, the insurance company pays the plaintiff and then takes over the litigation to recover from the defendant.

### **§5.3: Wrongful Death, and Loss of Consortium**

#### I. Wrongful Death

A. **G/R:** Classical Rules: the plaintiff could recover for the loss of services while his (the wife could not recover for her husband's death) wife was alive (and still injured), but after she died he could not recover anymore [Baker v. Bolton].

1. **Lord Campbell's Act:** whenever the death of a person is caused by the wrongful act, neglect, or fault of another, such as would have (if death had not ensued) entitled the injured person to sue and recover damages in respect thereof, then the person who would have been liable if death had not ensued shall be liable to an action for damage.

a. In effect, the Act said wrongful death is really a negligence action on behalf of the survivors for the decedent (not a separate claim with separate elements) and meant that a survivor can bring suit in place of the decedent. The class of survivors who could bring suit was limited.

(i) Therefore, the survivors who could bring suit are subject to any defenses that could have been raised against the decedent had he lived, including contributory negligence and assumption of risk.

B. **G/R:** Modern Rules: wrongful death is not an independent cause of action at common law, and is governed by statute in every jurisdiction. The scope of the statutes typically cover:

1. Who can bring the action;
2. Who can recover; and
3. Damages.

C. **G/R: Measure of Damages:** the measure of damages in all wrongful death actions is determined by the language of each particular state statute. Basically, most statutes are either (a) loss to survivor; or (b) loss to estate.

1. **Loss to Survivors Statutes:** (majority view) the defendant will be answerable in damages only if there is some beneficiary dependent upon the decedent for support.
2. **Loss to Estate Statutes:** (minority view) damages will be awarded against the defendant even if no one was dependent upon the decedent at the time of death.
3. In the wrongful death context, (of course) the beneficiary of the statute (i.e. the one who brought the wrongful death action) *cannot* recover for the decedent's pain and suffering or medical expenses (future).
  - a. The real debate ensues over both the suffering of the survivors and the estimation of lost earnings, especially for young children.

D. **G/R: Survivor Statutes:** at common law, any tort action, including ones for personal injuries and property damage, was extinguished by the death of either the plaintiff or the defendant. Today, every state has a survivor statute which will allow the action to continue if either the plaintiff or defendant dies, that is, the cause of action survives the death of either the plaintiff or defendant.

1. Under the typical survivor statute, compensation is allowed for the pain and suffering of the decedent before his death, an item of damages not covered under the wrongful death statutes.

## II. Loss of Consortium

A. **G/R: Loss of Consortium:** an action to recover against the defendant by a person related to the decedent for loss of companionship, services, friendship, and of course SEX.

1. **Rst. (2) §693(1):** in a loss of consortium action the liability of the defendant covers the resulting loss of society and services of the first spouse, including impairment of capacity for sexual intercourse, and for reasonable expense incurred by the second spouse in providing medical treatment.
2. Traditionally, loss of consortium actions were only available to spouses, however that has expanded in some jurisdictions to include actions for loss of consortium by:
  - a. Children for loss of their parents; and
  - b. Parents for the loss of their children (although this is a bit more controversial).
3. Most courts do not allow loss of consortium actions to be brought by unmarried couples who are living together.

## §5.5: Punitive Damages

**\*\*Goal:** the primary goal of punitive damages is general deterrence, that is, the deterrence of others from engaging in similar conduct. A subsidiary of this goal is to punish the wrongdoer.

1. Punitive damages are usually granted to punish a wrongdoing above normal negligence, usually willful, wanton, or intentional misconduct will suffice for punitive damages.

A. **G/R: Classical (and Modern) Punitive Damages Rule:** under the common law approach, the amount of the punitive award is initially determined by a jury instructed to consider the gravity of the wrong and the need to deter similar wrongful conduct. The jury's determination is then reviewed by trial and appellate courts to ensure that it is reasonable.

1. The Supreme Court has more than once approved the common-law method for assessing punitive damage awards.
2. It is a well established principle at common law, that in tort actions a jury may award exemplary, punitive, or vindictive damages upon a defendant, having in view the enormity of his offense rather than the measure of compensation to the plaintiff.
3. The amount of the award has always been left to the discretion of the jury, as the degree of punishment to be inflicted must depend on the peculiar facts and circumstances of each case.
4. There is no bright line rule for determining whether punitive damages are reasonable.

\*[Pacific Mutual v. Haslip].

B. **G/R: Hammond Test:** generally, a trial and appellate court must have a test for assessing the amount of punitive damages to determine if it is reasonable. The test for assessing the adequacy of punitive damages is: that the trial courts are to reflect in the record the reasons for interfering with a jury verdict, or refusing to do so, on grounds of excessiveness of the damages. Among the factors deemed appropriate for the trial courts consideration are:

1. the culpability of the defendant's conduct;
2. the desirability of discouraging others from similar conduct;
3. the impact on the parties;
4. the impact of the defendant's conduct on third parties;
5. whether there is a reasonable relationship between the punitive damages award and the harm likely to result from the defendant's conduct as well as the harm that actually occurred;
6. the degree of reprehensibility of the defendant's conduct, the duration of the conduct, the defendant's awareness, any concealment, and the existence of similar past conduct;
7. the profitability to the defendant of the wrongful conduct and the desirability of removing that profit and of having the defendant sustain a loss;
8. the financial position of the defendant;
9. all the cost of litigation;

10. the imposition of criminal sanctions on the defendant for its conduct, these to be taken as mitigation; and
  11. the existence of other civil awards against the defendant for the same conduct, these also to be taken as mitigation.
- \*[Pacific Mutual v. Haslip]

C. **G/R:** Relationship between Actual and Punitive Damages: both state Supreme Courts and the Supreme Court have been unwilling to take an approach that concentrates entirely on the relationship between actual and punitive damages. It is appropriate to consider the magnitude of the *potential* that the defendant's conduct would have caused to its intended victim if the wrongful plan had succeeded, as well as the possible harm to other victims that might have resulted if similar future behavior were not deterred [TXO Products Corp. v. Alliance Resources Corp.].

1. In that case the court upheld a punitive damage award 526 times more than the compensatory damages.

D. **G/R:** the absence of a standard for judicial review for the excessiveness of punitive damages violates due process norms as set out in *Haslip* (i.e. Hammond Test or a functional equivalent) [Honda Motor Co. v. Oberg].

E. **G/R:** Due Process Clause (14<sup>th</sup> Amend.): every state and federal court that has considered the issue of due process has rule that the common law method for assessing punitive damages does not in itself violate the 14<sup>th</sup> Amendment due process requirement.

1. **Policy:** punitive damages are imposed for the purpose of retribution and deterrence, and have been described as quasi-criminal.

\*[Pacific Mutual v. Haslip]

F. **G/R:** Due Process Clause: the due process clause of the 14<sup>th</sup> Amendment prohibits states from imposing a *grossly excessive* punishment on a tortfeasor [BMW v. Gore].

G. **G/R:** Purpose of Punitive Damages: punitive damages may properly be imposed to further a state's legitimate interest in punishing unlawful conduct and deterring repetition.

1. Most states authorize exemplary damages and afford the jury discretion in assessing the damages, requiring only that the damages awarded be reasonably necessary to vindicate the State's legitimate interests in punishment and deterrence.

H. **G/R:** Three Guideposts for Accessing the Excessiveness of a Punitive Damage Award: there are three main principles a that a court should look at in determining if a punitive damage award is reasonable:

1. Degree of reprehensibility;
2. Ratio; and
3. Sanctions for comparable misconduct.

H(1). **Degree of Reprehensibility:** the most import indicium of the reasonableness of a punitive damage award is the degree of reprehensibility of the defendant's conduct.

1. The reviewing court should examine the gravity of the defendant's conduct and the harshness of the award of punitive damages.
2. This principle reflects the accepted view that some wrongs are more blameworthy than others.

H(2). **Ratio:** the second, and perhaps most commonly cited indicium of an unreasonable or excessive punitive damage award is the ratio to the actual harm inflicted on the plaintiff.

1. Thus, the exemplary damages should bear a reasonable relationship to compensatory damages and the comparison between the compensatory damages award and the punitive damages award is significant.
2. In *Haslip*, the Court concluded that even though a punitive damages award of more than 4 times the amount of compensatory damages might be a close line, it did not cross the line into the area of unconstitutional impropriety.
3. **Test:** whether there is a reasonable relationship between the punitive damages award and the *harm likely to result* from the defendant's conduct as well as the harm that actually has occurred.
4. The Supreme Court has consistently rejected the notion that the constitutional line is marked by a simple mathematical formula, even one that compares actual and potential damages to the punitive award.
  - a. Thus, the Court will not draw a mathematically bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case.
  - b. However, the general concern of reasonableness properly enters into constitutional calculus.

H(3). **Sanctions of Comparable Misconduct:** comparing the punitive damages award and the civil or criminal penalties that could be imposed for comparable misconduct provides the third indicium of excessiveness.

\*In *BMW v. Gore* the Court held that a punitive damage award 500 times the amount of compensatory damages violates the due process clause as being *grossly excessive*.

\*\*[*BMW v. Gore*].

## **§6: TORT IMMUNITIES**

A. **Generally:** there is remarkable diversity in the nature and origin of immunity rules. Some of the rules are created at common law, some by statute, and some under the Constitution.

1. In general, modern cases in all areas have shown an increased hostility to absolute immunity. Thus, many personal immunities such as those that bar suits between spouses, between parent and child, or against charities have been abandoned or are in the process of contraction, if not disintegration.
2. Governmental and official immunities are both more problematic and vital.
3. Immunity is basically a situation where the defendant would otherwise be liable but because of their status they are immune from suit.

**\*\*Remember:** immunity is basically the second element of proximate cause, that is, if there is some rule relieving that defendant from liability then there is no proximate cause.

4. Absolute Immunity: is a complete bar to recovery.

5. Qualified Immunity: the plaintiff has to prove some threshold before the defendant can be held liable.

## §6.1: Domestic or Intrafamily Immunity

### I. Parent and Child

A. **G/R: Classical Rule**: a minor child cannot bring an action in tort against its parent.

1. **Policy**: (a) so long as the parent is under an obligation to care for, guide, and control the child there is a reciprocal obligation to aid, comfort and obey; (b) the state through its criminal laws will give the minor the protection it needs from potential wrongdoings; (c) presents the opportunity for collusion and fraud; (d) may deplete family resources causing other children to be deprived; and (e) the gray area between what is tortious conduct by a parent and what is not is too hard to define.

B. **G/R: Modern Rule**: the blanket form parental immunity is not indefensible, that is, under certain situations a child may sue its parents in tort. Thus, for parental immunity in negligence cases it is removed with two exceptions:

1. **Exception**: where the alleged negligent act involves an exercise or parental authority over the child; and

2. **Exception**: where the alleged negligent act involves an exercise of ordinary parental discretion with respect to the provision of food, clothing, housing, medical and dental services.

3. **Test**: the standard to be applied for parental liability is the traditional one of reasonableness, but viewed in light of the parental role. Thus, the proper test of parents conduct is:

a. what would an ordinary prudent parent have done in a similar circumstance.

C. **Rst. (2) §895G**: (1) a parent or child is not immune from tort liability to the other solely by reason of that relationship. (2) Repudiation of the general tort immunity does not establish liability for an act or omission that because of the parent-child relationship, *is otherwise privileged* or not tortious.

1. “Otherwise privileged” means that the parent can still engage in parental authority or discipline.

D. **G/R: Third Part Actions**: a parent may be held comparatively negligent for the actions of the child; there are two main theories for this liability:

1. Negligent Supervision: in general, creates no direct unreasonable hazard to third parties and thus liability is harder to establish liability under negligent supervision; and

2. Negligent Entrustment: liability can be predicated on negligent entrustment, because it can create a direct and unreasonable hazard to third parties on the ground that dangerous instrument in the hands of an infant child may be foreseeably cause various types of harm, such as, personal injury, property damage, or exposure to tort liability.

## II. Husband and Wife

A. **G/R**: Classical Rule: at common law there was absolute immunity between husband and wife because husband and wife were considered to be one legal entity.

B. **G/R**: Intermediate Rule: women could sue for property damage, and other interests in property (i.e. tenancy in common) but not for traditional torts.

1. **Policy**: deter collusion between husband and wife.

C. **G/R**: Modern Rule: [Rst. (2) §895F]: virtually every state (40) have abolished inter-spousal tort immunity

III. Charitable Immunities (its not interfamily, but fuck it, it doesn't deserve its own section).

A. **G/R**: Classical Rule: charities who created a trust for a beneficial purpose were immune from suit.

1. **Policy**: if tort actions were allowed it would discourage charitable contributions, deplete useful funds given for charitable purposes who were sometimes providing services for free.

B. **G/R**: Modern Rule: there is no immunity for charitable organizations because a doctrine which limits the liability of charitable corporations to the amount of liability insurances that they see fit to carry permits them to determine whether or not they will be liable for their torts and the amount of the liability, if any.

## §6.2: **Municipal Corporations**

A. **G/R**: Classical Rule: municipal corporations had a special immunity from private tort actions with the rationale basically being that they were supported by public funds.

B. **G/R**: Intermediate Rule: municipalities were immune from tort for *governmental functions* (public functions) but the municipalities were not immune from proprietary (private) functions and therefore result in tort liability.

1. Governmental Functions: governmental functions are those functions that can be performed adequately *only* by the government (i.e. police, fire, courts, etc...).

2. Proprietary Functions: are those functions that the city performs, but which *could as well be provided by a private corporation* and particularly where the city derives revenue from the operation (i.e. water, gas, electricity, public halls, etc...).

\*\*There was a shit-load of litigation over what constitutes a propriety or government function and therefore almost all states have adopted statutes governing the issues.

C. **G/R: Modern Rule (Statutes)**: almost every jurisdiction has adopted a statute categorizing immunity and for which actions a municipality is immune and for those which it are not immune, and most have abolished the distinction between government and proprietary functions.

1. Just like good ol' W.S. §1-39-101 to 120 (it is pretty typical).

### §6.3: Sovereign Immunity

A. **G/R: Classical Rule**: at common law, when a plaintiff attempted to sue the State for a personal wrong, the State was held to be immune from liability absolutely.

1. Originated from the notion that “the King could do no wrong.”

B. **G/R: Modern Rule**: the government (state and federal) has sovereign immunity and cannot be sued unless it consents to being sued or waives immunity.

C. **Federal Torts Claims Act: [§2674: waiver of immunity; §2680: exceptions]**: the federal tort claims act (FTCA) abolishes tort immunity (i.e. permits the federal government to be held liable) for negligence or other wrongful acts or omission by government employees, plus most intentional torts by federal investigative or law enforcement officers.

1. Caveat: immunity is retained for other intentional torts (misrepresentation, assault and battery), for strict liability, and for *discretionary acts* by government employees.

D. **G/R: Discretionary Acts**: [exception to FTCA]: whether the discretionary function exception bars a suit against the government is guided by several established principles:

1. **Test**: it is the nature of the conduct rather than the status of the actor, that governs whether the discretionary function applies.
2. In examining the nature of the challenged conduct, a court must first consider whether the action is a matter of choice for the acting employee.
3. Thus, the discretionary function exception will *NOT* apply when a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow.
4. Assuming the challenged conduct involves an element of judgment, a court must determine whether that judgment is of the kind that the discretionary function exception was designed to shield, namely, public policy.
5. Thus, the discretionary function exception insulates the government from liability if the action challenged in the case involves a permissible policy judgment.

\*[Berkovitz v. U.S.].

### §6.4: Official Immunity

A. **G/R: Official Immunity:** governmental officials are immune from suit while acting in their official capacity as government officers.

1. Government officials are entitled to some immunity from suits for damages. As recognized at common law, public officers require this protection to shield them from undue interference with their duties and from potentially disabling threats of liability [Harlow v. Fitzgerald].

B. **G/R: Presidential Immunity:** Article II does not provide the president absolute immunity from judicial process [U.S. v. Nixon].

B(1). **G/R:** the president gets absolute immunity from suits for acts taken in pursuance of his official conduct as president [Nixon v. Fitzgerald].

B(2). **G/R:** the president does not have implied temporary immunity from civil suits arising from non-official conduct.

C. **G/R: High-ranking Governmental Officials:** absolute immunity for high-ranking governmental officials who *are acting within the scope of their duties* is preserved for

1. President;
2. Judges;
3. Legislators; and
4. Prosecutors.

D. **G/R: Lower Level Governmental Officials:** lower ranking governmental officials (lower than the aforementioned) are usually only granted qualified immunity. Thus, for a defendant to hold a lower-ranking governmental official (like presidential aides) he must prove a certain threshold of wrongful conduct:

1. **Objective Test:** whether the official knew or had reason to know that the action he took was within the sphere of his official conduct and responsibility would violate the constitutional rights of the plaintiff.

\*\*If the plaintiff proves this; then the plaintiff may sue...still has to prove wrongful conduct.

