

*Torts II - Prof. Charity Scott, G.S.U., Spring 2001*

**I. Strict Liability- (No Fault)**

A. Common Law:

- Rylands v. Fletcher (I and II)-
  - Rule I: When someone brings on his land something which, though harmless if it remains there, will do harm if it escapes from the land, they will be strictly liable if that harm occurs.
  - Rule II: If someone introduces a non-natural use, which creates the potential of harm (likely to do mischief), they will be strictly liable if that harm occurs.
- Losee v. Buchanan - rejected Rylands and went with a fault standard; society needs some non-natural uses that may create a risk of danger.

B. Ultra-Hazardous Activities (Restatement I):

1. Involve a high degree of risk,
2. Of serious harm,
3. That cannot be eliminated by the exercise of the utmost care AND
4. Is not a matter of common usage.

C. Abnormally Dangerous Activities (Restatement II):

1. Risk of harm is great.
2. Harm created by materialization of risk is great.
3. Inability to eliminate the risk by using due care.
4. Activity is not a matter of common usage (not a highly valuable activity)
  - Reciprocal Risk = Common usage and should use a negligence standard (Fletcher).
5. Activity was inappropriate to the place in which it took place (risk of harm could be reduced by relocation of activity).
6. Value of activity does not offset its unavoidable risks.

D. Reasons for Strict Liability:

- Fairness- person getting the benefit of the risky behavior should pay for any injuries that it creates; defendant should pay for harming the plaintiff, even if he exercised utmost care, because he knew that the safety of his activity could not be ensured.
- Ideal of the sanctity of property ownership- one expects to be safe from other people's negligence on his own property.
- 1. Deterrence (Posner)- Strict liability deters activities, negligence encourages participation in dangerous activities. May be no deterrence value in strict liability because by its very nature, the activity is one that cannot be made any safer; may stop activity completely.
- 2. Judicial Administration- notice to defendants; easier for the plaintiff to prove.

E. Prima Facie Case:

1. Duty- to make an Ultra-Hazardous Activity or Abnormally Dangerous Activity safe.
2. Breach- unsafe condition.
3. Causing- cause in fact/proximate cause.
4. Damages- injury to person or property.

## II. Products Liability (Strict “No Fault” Liability)

### A. Prima Facie Case: Restatement II § 402(a)

1. Commercial Seller- in the business of selling the product.
2. Product- not a service.
3. Defective- unreasonable danger caused by defect; 3 Types:
  - Manufacturer Defects- Product did not perform as it was designed to.
    - Consumer Expectation Test: Is this how the ordinary consumer would expect the product to perform? Does it exceed the consumer’s expectation of danger?
    - Manufacturer Expectation/Intention Test: Did the product perform the way the manufacturer intended it to?
  - Design Defects- Overall design had faults.
    - Consumer Expectation Test: Would the ordinary consumer expect the product to perform that way? Does it exceed the consumer’s expectation of danger?
    - Risk/Utility Test- 7 Factors:
      1. Usefulness and desirability of the product to the public.
      2. Likelihood and probable seriousness of injury posed by product.
      3. Availability of substitute product.
      4. Feasibility of alternative product with same cost and usefulness.
      5. User’s ability to avoid danger by exercise of due care.
      6. User’s anticipated awareness of dangers inherent in the product.
      7. Ability of manufacturer to absorb the loss by higher prices/insurance.
    - Which test to use?
      - Soule v. GM: Consumer expectation test should be used for design defects when an ordinary consumer would be able to develop an expectation; Risk/Utility should be used when the product is of complex design; consumer expectation after the fact will always be higher (too subjective).
      - Camacho v. Honda: Open and Obvious dangers use the Risk Utility Test.
  - Failure To Warn- Whether or not adequate warning was given.
    - Pittman Test for adequacy of warning:
      1. Warning must adequately indicate the scope of the danger.
      2. Warning must reasonably communicate the extent or seriousness of the harm that could result from the misuse of the product.
      3. Physical aspects of the warning must be adequate to alert a reasonably prudent person to the danger.
      4. Simple directive warning may be inadequate if it fails to indicate the consequences that may result from failure to follow directions.
      5. The means to convey the warning must be adequate.
    - Learned Intermediary- If a manufacturer provides training to the retailer, who is expected to, and has the opportunity to, provide the necessary warnings to the consumer, it cuts off the manufacturer’s liability.
    - Bulk Supplier- If manufacturer sells in bulk (raw materials) to another manufacturer, the second manufacturer is responsible for warning its employees.
4. Ultimate User or Consumer (or property of user or consumer)- doesn’t have to be the person who bought it, doesn’t require any privity.
5. No Substantial Change- since it left manufacturer.
  - Jones v. Ryobi- When a third party modification makes a product unsafe, the seller is relieved of liability. If the modification is foreseeable, some courts allow recovery.
6. Causation (defect causes harm)
7. Physical Harm- plus pain and suffering if there are with physical manifestations of it.

B. Common Law:

- MacPherson v. Buick- removed the privity requirement- plaintiffs can sue a manufacturer for selling a defective product, even if they actually bought it from a retailer.
- Escola v. Coca-Cola- court allowed her to sue Coke on RIL negligence theory, but Traynor (concurrency) said she should be liable even without negligence.

C. Reasons for Strict Products Liability:

- Deterrence- discourage the marketing of defective products that are a public menace.
- Negligence is not enough- consumers expect the goods to be safe and they do not have the ability to make the inspections themselves.
- Fairness- unfair to make the consumer pay for their harm when the manufacturers are making all of this money through selling their products.
- Economic Efficiency- the cost can be spread out or insured against by the manufacturer raising the costs of the product, but the plaintiff would have to pay the whole amount.
- Compensation- if the manufacturer was not negligent, plaintiff will go uncompensated.
- Judicial Administration- too costly and difficult for plaintiff to find information to show negligence, because he doesn't know as much about the product as the manufacturer.

D. Defenses to Products Liability

- Unavoidably Unsafe Products: not be held to a strict liability standard if they are properly prepared and marketed, and proper warning is given, because public policy wants to encourage development of such products (i.e. prescription drugs, knives).
- Assumption of the Risk/Comparative Fault: where plaintiff is aware of defect or that his use of the product is not proper, and used it anyway, resulting in an injury (not a total bar, used to reduce damages).
- Preemption: When a federal law says that it preempts all state remedies of conduct violating that law (statutory privilege).
- Attack the prima facie case:
  - Modification- can show intervening act and assumption of the risk.
  - Misuse- Defendant argues intervening act or comparative fault; plaintiff argues foreseeable misuse or modification.
  - Open and Obvious Danger- not unreasonably dangerous if a reasonable person could see that the defect was there.

E. Open Questions not Addressed by Restatement:

- Whether a person injured by a product that is not the ultimate user/consumer (i.e. bystander) can have a strict liability cause of action against the manufacturer.
- Whether strict liability applies to the seller of a product expected to be processed further before it reaches the consumer/user.
- Whether strict liability applies to sellers of component parts (some courts say yes).

### III. Intentional Torts

#### A. Basic Prima Facie Case:

1. Voluntary Act
2. Intent
  - a. Desire of Result
  - b. Actual Knowledge or Substantial Certainty of Result
3. Causation
4. Consequences

#### B. Battery:

- Prima Facie Case:
  1. Voluntary act
  2. With intent (can be transferred intent)
  3. To cause
  4. A harmful/offensive/unconsented touching. Can include a physical attack on an extension of a person's body like a camera, but not objects that are not extensions; can also include causing a person to come into contact with something without their consent.
- Battery has no separate standard for children like negligence does.
- Doesn't have to result in injury or harm, just without consent, but only nominal damages would be available, unless some other type of damage could be shown (mental distress).

#### C. Assault:

- Prima Facie Case:
  1. Voluntary act- physical acts or threatening nature
  2. With intent (can be transferred intent)
  3. To cause
  4. Reasonable fear or apprehension of an immediate offensive or harmful contact. Not merely verbal, fear is not needed, words are not usually enough; there must be an imminent threat and conditional future harm is not considered.
    - Must be reasonable fear, hypersensitivities don't matter; if there is no way for the person threatening to carry out his threat, then it is not a reasonable fear.

#### D. False Imprisonment/False Arrest:

- Prima Facie Case:
  1. Voluntary act
  2. With intent (can be transferred intent)
  3. To cause
  4. Involuntary constraint of personal liberty or freedom of movement, with no option of escape; plaintiff must be aware of constraint at the time.
- Shopkeeper's defense allows detainment of thieves. Must be reasonable in time, method and belief that the crime was committed.
- Voluntary Acts are actual physical barriers, overpowering physical force, threats of physical force, other duress, or asserted legal authority, against your person or property, emotional duress or moral pressure is not enough.

E. Intentional Infliction of Emotional Distress:

- Prima Facie Case
  1. Voluntary extreme or outrageous conduct (beyond the bounds of human decency).
  2. With intent, including recklessness (would a reasonable person have expected result).
  3. That causes
  4. Severe Emotional Distress
- If the conduct is constitutionally protected speech, two elements are added to the Prima Facie case:
  5. False Statement of Fact
  6. Actual Malice- knew the statement was false, or recklessly disregarded the possibility that it was false (actual malice only applies to public figures).
- Extreme or outrageous conduct examples- sexual harassment, racial harassment, title seven actions, debt collections outside of the bounds, interference with marital relationship, alienation of affection, etc.
- Causation- But for the conduct, the emotional distress would not have resulted; this was the legal/proximate cause of the distress.
- Wagonmound- was it foreseeable that the harm would result? Was there an intervening or superseding cause that would break the causal chain?
- Severe Emotional Distress- some courts require a physical manifestation, some don't.
- Public Policy against allowing claims of emotional distress because of fraudulent claims, frivolous claims, judicial economy, hard to establish/quantify injury.

F. Defenses to Intentional Torts:

- Consent: Permission to do the act.
  - Express- you actually give your consent.
  - Implied- i.e. sports- when you play a game, you agree to be subject to the regular physical contact normally associated with that game; emergency situations can create implied consent.
  - Scope of the Consent- Is the harm within the scope of the consent given?
  - Invalid Consent- Was the consent validly procured? If you have given your consent under a substantial mistake, or if it was induced by fraud or duress it may not be valid (fraud, mistake or duress must be the substantial reason for the consent).
  - Many jurisdictions hold that you can't consent to an illegal act.
  - If the plaintiff is aware, and fails to object, consent may be implied.
  - Consent is a complete bar to recovery.
- Immunity against Liability: (Government Employees)
  - Qualified Immunity- If you act with a good faith belief that you are acting reasonably
  - Absolute Immunity- You can do whatever you want- doesn't matter what you thought at the time.
  - Federal Tort Claims Act- does not apply to assault, battery, false arrest, false imprisonment, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with a contract, BUT- does apply to false arrest, abuse of process, and malicious prosecution when it is done by a law enforcement officer of the U.S. Government.

- Self Defense:
  - Threatened with death or imminent bodily harm.
  - Can only use as much force as is reasonable under the circumstances.
  - Deadly force is reasonable only when deadly force is used on you.
  - Self Defense is a complete bar to recovery.
  
- Defense of Property: Must be reasonable force under the circumstances.
  - Reasonableness Factors: (Posner)
    1. Value of the property.
    2. Existence of a legal remedy.
    3. Location of the property.
    4. Was there a warning?
    5. Was a deadly device (spring gun) used?
  - Question of law as to whether the force was reasonable.
  - Deadly force can never be used to protect property (majority rule).
  - Defense of Property is a complete bar to recovery.
  
- Public Necessity:
  - Act reasonably for the public good.
  - Government employee or private person in an emergency situation.
  - Public Necessity is a complete bar to recovery.
  
- Private Necessity: Incomplete privilege, only a partial defense; excuses the tort, but defendant is still liable for actual damages.
  
- Insanity- Defendant would lack ability to form intent.
  
- Recovery of Chattel- Like Private Necessity.

#### IV. Defamation- Slander (spoken) and Libel (written)

##### A. Prima Facie Case at Common Law:

1. Statement of Fact- should be able to be verified, not opinion, if unclear it goes to jury.
2. Defamatory- harmful to reputation; subjects one to hatred, contempt or ridicule; may be defamatory in context of additional information (inducement).
3. Of and Concerning the Plaintiff- must mention the plaintiff by name or reasonably lead someone to believe that it is about the plaintiff (colloquium).
4. Publication/Heard by Third Party- every repetition is a publication.
5. Damages
  - If Slander, Special Damages must be proven (ex. lost profits, lost customers, lost wages, lost friends).
  - If Libel or Slander per se, damages are presumed. Slander per se is alleging:
    1. Commission of a crime
    2. Something that harms trade or business
    3. A loathsome disease
    4. Unchastity of a woman (14<sup>th</sup> amend. might have changed to sexual misconduct)

- Where there is only one possible meaning, a judge decides if a statement is defamatory; where a statement may have several meanings or be unclear, a jury decides.
- The dead cannot be defamed because there must be a resulting ongoing damage that they cannot suffer. However, the family or close associates a dead person may be defamed by the same statements. Thus, the death of a potential plaintiff is not a bar, if other plaintiff's are still living.
- The intent standard for publication is different than the other elements. Instead of strict liability, this requires intent, recklessness or negligence. A distributor (i.e. newspaper) must have actual knowledge and not just negligence or recklessness.
- Internet site providers are insulated from liability and are not considered to be publishing where a third party posts the material.
- Damages can include pecuniary losses, loss of hospitality (dinner invitations), mental anxiety, stress, emotional disturbance, etc.

B. Constitutional Parameters to Defamation: The common law tort of defamation that gives civil damages for certain speech that is protected by the Constitution, is unconstitutional. Therefore, Public Official/ Public Figure plaintiffs or Matters of Public Concern add elements to Prima Facie Case:

6. Fault- need some level of intent if it is a matter of public concern.
  - Public Officials/ Public Figures: Actual Malice
    - Actual Malice- must show by clear and convincing evidence that there was knowledge that the statement is false (deliberate lie) or reckless disregard for the possibility that it is false (entertained serious doubts about its truth, and avoided evidence that would confirm doubts ).
    - Simple failure to check facts before publishing is not actual malice.
    - Must actually subjectively believe that it might not be true, not just a negligence standard (knew or should have known).
    - Vehement denials do not necessarily alert the reporter to the fact that the statement could be false (when there is no evidence that the reporter had serious doubts about the truth of the statement - no actual malice).
  - Private Plaintiff/Public Matter: Usually Negligence; reporters must act reasonably:
    - Did you make a reasonable effort to substantiate the truth of the story?
    - Look at the publications own policies on checking sources, etc.
    - Was there a deadline to publish or could the story have been run at any time?
    - Some courts allow expert testimony of what is customary in the industry.
    - Look at how large the potential impact on the plaintiff was.
  - Private Plaintiff/Private Concern: Plaintiff can get presumed and punitive damages.
7. Damages- must prove actual damage (out-of-pocket loss, and mental anguish/distress) if:
  - You are a public official/public figure/or it is matter of public concern
  - You are a private plaintiff and did not show actual malice (if actual malice is shown, you can get presumed damages and punitive damages).

- Who is a Public Official?
  - Any public employee who has influence over public policy decisions or who has some level of discretion in implementing that policy (police officers, teachers, social workers) that will affect the general welfare. Factors to consider (3-legged stool):
    1. Do they occupy a position of apparent importance sufficient to give the public an independent interest in their qualifications and performances?
    2. Do they have access to the media to counteract the impact of the false statement?
    3. Degree to which the plaintiff has assumed the risk of criticism.
  
- Who is a Public Figure?
  - All Purpose Public Figure (Gertz)- Chooses to be in the limelight, or invites comments/critiques; if they have general fame/notoriety they have more influence over the public than normal people so they can influence public policy/public opinion and have more access to the media to exonerate themselves.
  - Limited Purpose Public Figure (Foretich)- A person who voluntarily injected themselves into a particular controversy or discourse, in order to influence its outcome. Their Public Figure status applies only to that controversy or discourse.
  
- A person cannot be deemed a public figure merely because they accessed the media to rebut a defamatory statement, as long as they did not go beyond the extent necessary. Reasonableness of response is determined by whether it was:
  1. Relevant and responsive to the defamatory statement.
  2. Reasonably proportionate to the defamatory statement.
  3. Addressed to the same audience that heard the original statement.
  
- Why not strict liability like at common law?
  - Judicial Administration (easier for the plaintiff to prove).
  - Economic Efficiency- usually the publisher is in a better position to pay for the harm.
  - High protection for a person's interest in their reputation/social status because once the damage is done, its almost impossible to undue it.

#### C. Defenses to Defamation:

- Consent: gave permission for it to be published.
  
- Truth: if it is substantially true, it is an absolute defense. If the inaccuracies do not affect the "sting" of the article, then it is substantially true.
  
- Absolute Privileges: statements made by legislators, executive officials, judges and participants in judicial proceedings in the course of their official duties are immune; communications between spouses.
  
- Conditional/Qualified Privileges: if defendant shows an absence of malice\*, these communications are privileged:
  - Communications between parties with a common interest in the defamed party.
  - Speech to protect own self-interest (self-defense).
  - Speech to protect public interest.
    - ❖ Malice has two forms:
      - Common Law Malice: Hatred, ill will, or spite towards defamed person.
      - Constitutional Malice (Actual Malice): Speaker knows, or has reckless disregard, that his speech is false.

- Libel Proof- plaintiff's reputation is so low that defamatory comments could not possibly have further harmed his reputation.
- Fair Comment- privilege to make opinions about books, movies, food. Two Views:
  - Hallam- must be supported by underlying facts.
  - Coleman- underlying facts must only have been honestly believed to be true.
- Fair and Accurate Report- must be a fair and accurate report of an official government meeting or proceeding. Elements of defense\*:
  1. Responsible, prominent organization
  2. Makes a serious charge
  3. Against a public figure
  4. Protects accurate and disinterested reporting
  5. Even if the reporter may know that the statement is false (doesn't matter what the reporter's personal feelings are).
    - ❖ The elements of the defense are decided as a matter of law, and the defense can be taken away if abused or malice is shown.
- Retraction- applies only to general damages and is not a total bar to recovery.

## V. Invasion of Privacy (Damages always presumed)

### A. Public Disclosure of Private (True) Facts:

- Prima Facie Case:
  1. Truthful, private fact- cannot be a fact that is a matter of public record or something that you have told other people, otherwise it is no longer private.
  2. Publicity- must be wide spread, usually involves mass communications media.
  3. Disclosure would be highly offensive to a reasonable person- can't just be embarrassing to the plaintiff, but must be deeply shocking.
  4. Lack of Newsworthiness- something that is not of legitimate public concern- legitimate public concern is not just whatever the public wants to know.
- Daily Mail Rule- state cannot punish a newspaper if it publishes:
  1. Lawfully obtained
  2. Truthful facts
  3. About a matter of public significance
  4. And there is no "state interest of the highest order".

### B. False-Light Privacy: casting someone in a false light through knowing or reckless untruth.

- Prima Facie Case:
  1. False Impression- not necessarily defamatory, but is a misrepresentation of facts.
  2. Publicity
  3. Highly offensive to a reasonable person
  4. Fault- varies depending on situation:
    - Negligence: Private Plaintiff/Public Concern
    - Actual Malice: Public Plaintiff/Public Concern

C. Intrusion Into Seclusion:

- Prima Facie Case:
  1. Intrusion- for purpose of gathering information.
  2. Into Seclusion or Private Realm- into areas where you would normally have a reasonable expectation of privacy.
  3. That would be highly offensive to a reasonable person OR was obtained by improper means (overzealous).

D. Commercial Appropriation:

- Prima Facie Case:
  1. Appropriation and
  2. Use- for profit; look for incidental commercial advantage.
  3. Of Name or Likeness- look for identity; similar image alone may not be enough.
  4. Without consent- look for defense of consent.

## VI. Intentional Economic Harm

A. Misrepresentation:

- Prima Facie Case:
  1. False Representation- only sellers, not buyers.
    - Common law: Only affirmative statement or action was misrepresentation, not nondisclosure, unless there was fiduciary relationship or half-truths.
    - Modern law: More duties to disclose; nondisclosure can be misrepresentation.
  2. Material Fact- taken from a reasonable person point of view. What a reasonable person would consider when buying; seller must know that it is important to buyer.
  3. Intent
    - Scierter (knowing or reckless disregard)
    - Inducement
  4. Causation/Reliance
    - Actual Reliance: Completed transaction based on false representation; (no reliance if buyer knew it to be false).
    - Justifiable Reliance: No reason to know. You may not rely on statements that are obviously false, but there is no duty to inspect.
  5. Damages- Actual and Punitive, no Nominal.

B. Interference With Contract:

- Prima Facie Case:
  1. Contractual Relationship
  2. Intent (knowledge of contract)
    - Active interference shows intent, while passive interference does not.
  3. Improper or Wrongful Interference- shown by:
    - Sole motive is to harm.
    - Any illegal/tortious action.
    - Purely economic motive.
  4. Causation
  5. Damages
- Defenses:
  - Protection of defendants own contractual rights.
  - Valuable social interests.