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Torts

Maynard Jackson

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TORTS

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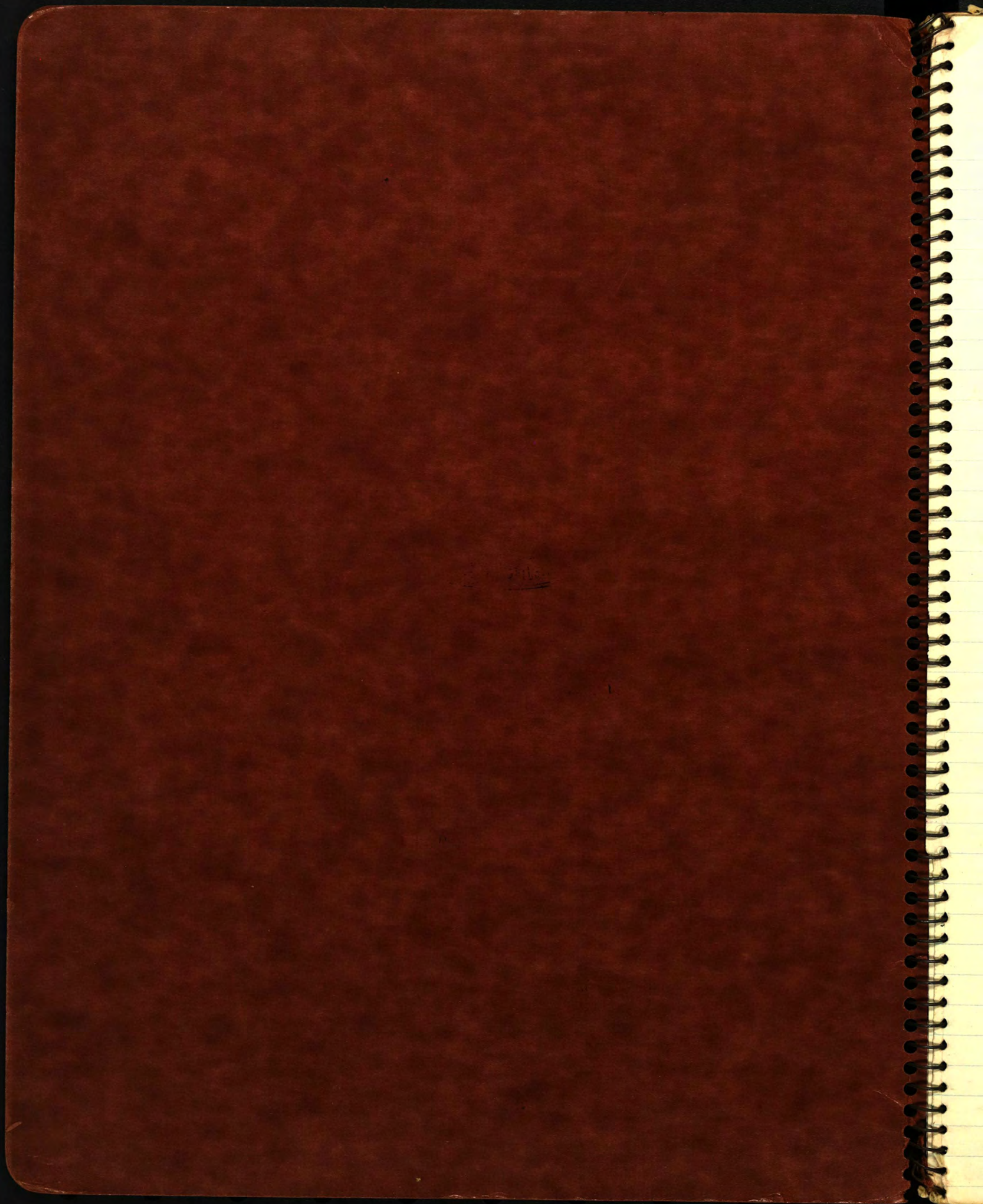

Prof. Curran

Torts -

NOTES : 9-22-58

References that may be used:
(1.) Prosser on Torts
(2.) Harper and James
(3.) Restatement of Torts - student edition

We will be concerned with civil wrongs.

TORT -

Definition

(def.) a collective name for a group of actions to recover financial reimbursement for damage to a private individual by another private individual. It originally arises out of a trespass either to property or a person, the P, or out of any agreement between individuals other than K actions. The only thing that can be gotten in a tort case is money.

Classifications:
(1.) Intentional - e.g. Trespass [(def.) an intentional and direct wrong to an individual], False Imprisonment, Assault, Battery, etc.
(2.) Negligent - tort liability is based on some type of fault plus adjustment of burdens, considering such things as the social value of conduct involved, comparative financial responsibility of the parties to the litigation (risk

bearer), possible sociological consequences, etc.

Types of Tort Actions:

(1.) Intentional harm caused to another without his legally effective permission, self defense, given privilege or other defenses.

(2.) Negligent or forseeable harm without a privilege or other defenses.

(3.) Strict liability without fault imposed for social consequences. (ex., dynamite blasting)

Three kinds of cause:

(1.) D caused harm directly by himself. DIRECT

(2.) D caused harm by someone or something over which D has control or duty to control. INDIRECT

(3.) Harm results from some source as a result of D's failure to perform a duty towards the person to whom harm came. FORBEARANCE

* Five kinds of Objective Remedial Actions:

(1.) Punishment of wrongs and deterrent of future wrongs (Crim. Law)

(2.) Provide for A what B has promised (Contracts).

(3.) Restoring to one what has unjustly been received by another. (Quasi-Contracts)

(4.) Determination of rights in property (Property)
(5.) Compensation for harms (Torts)

NOTES: 9-23-58

* ASSAULT (A) *

*I. De S. and Wife v. W. De S. (1348)

Ax case

It is not necessary for there to be physical contact to have assault. Anticipation or apprehension of a reasonable nature is suff.

*Allan v. Hannaford (1926)

L(D) threatened T and moving men with unloaded gun, the latter fact being unknown to T (P).

Whether or not the pistol in this case was loaded is immaterial; the c/a is proved w/o it. An A depends on the reas. apprehension of bodily harm created in the mind of P (by D's actions) + not on the secret intentions of D. It is surely not unreas. for a person to be put in fear of personal injury when a pistol is pointed at him in a threatening manner, whether or not it is actually loaded.

*Ross v. Michael

Master, conditionally threatened butler and wife (Ps) with knife and gun.

There must be reasonable apprehension in an A case. Here, the ct. ruled that a well-grounded fear was invoked.

Every A is not an attempted B.A tortibus A must create a

Reasonable apprehension.

hypo: A, standing on edge of cliff, is frightened by B who is trying to frighten A, and A falls over and dies. - Is there a Battery? (Consider the intent)

B is responsible for all consequenses which naturally flow from his tortious act and/or are the natural result. B should have reasonably foreseen the possible consequenses.
(Scott v. Shepherd - squib case)

hypo: D knows that H always eats a candy bar at 11 A.M. each day. D fills the candy with poison but W eats the candy before H can get to it. - Is there an A? - a B? (problem is one of transferred intent). There was A + B.

(Carnes v. Thompson, p. 29)

NOTES: 25 Sept., 1958

Caveat: Stay at least four (4) cases ahead of where we stopped at the preceeding lecture.

Ross v. Michael (1923)

The question raised was the charge to the jury.

hypo: On telephone, A tells B that he is going to "blouse" B's eyes at 11 A.M. on the next Monday. - There is no A because there is no threat of immediate harm.

Ordinarily, there can be no conditional A unless there is present ability and unless a reas. man would apprehend an immediate injury. But, here there was a reas. anticipation of immediate harm due

to D's angry, mad manner and decorum and wild actions. [The trend today is moving away from self-help in the discharge of desires or duties.] One must employ reas. means of ejecting another from one's property.

O'Brien v. Cunard S. S. Co.

Secret fears no defense when there are overt manifestations which denote consent

We do not consider secret fears because of the difficulty of proving them. (P sued for $1.00!)

Mohr v. Williams

DEFENSES:
I.* CONSENT *

D's intention here (as also in O'Brien case) was well-meant and good. D had no intention to do harm, D had no permission from P.
What is necessary to a valid consent? What was the importance of the family physician's presence at the surgery?

Notes: 29 Sept., 1958
Mohr v. Williams

No apprehension, no assault

There is no assault here. All Batteries are not accompanied by assaults. An unconscious person cannot be assaulted; no apprehension. There was a Battery.
General Consent: not usually valid in medical cases because the person does not understand the full consequences of the consent, and the Ct would probably find that the consent was

(Query: would this depend on the person - the reas. man in the circums. of the case?)

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illegally exacted. The amount of coercion involved is a question of fact for the jury.

Caveat: We are here talking about consent, not a release. No matter what kind of consent form is signed, the P can still claim neg. + bring an action in neg. Usually there are more than just the allegations of neg. Battery is usually included because if B is proved, P need not prove neg.

It is highly doubtful that, in the absence of express permission to H, a H can give consent for W in an operation like this. If the operation is involving a matter relating to the marriage (sterilization, etc.), the H may have the power to offer consent. The C.L. concept of H + W being one + H being the one has no bearing on personal relations.

H = husband
W = wife

Hart v. Geysel

Mutual consent to prizefight case. Reasoning: one who has sufficiently expressed his willingness to suffer a particular invasion has no right to complaint if another acts upon his consent so given.

Notes: 30 Sept., 1958

Often, a tort case will involve a crim. stat. the violation of which could result in either crim. or civil action.

Rule of Law on Consent

There is no consent where there is not an understanding of the nature and consequences of the act to which consent is given.

Advantages to allowing an action to be adjudicated criminally before civilly where such can be done.

In most cases where a crime + a tort are involved, the crim. action will usually be brought first. The P will usually allow it because:

(1.) The facts will be brought out and the questions of law adjudicated

(2.) The case, if won by the state, might assume the weight of "precedent" in the civil litigation.

2. OCT. 58

HUDSON v. CRAFT (1949)

18 yrs. old boxer. Promoter (D) had no license.

hypo: A is adequately and carefully treated by an M.D. Later, A finds out that the M.D. has no license. Does A have a c/a against the M.D.? (Whipple v. Brandshaw 261 Mass 40. — case of the chiropractor who gave patient

a spinal adjustment by jumping on her back from a chair. Chiropractors are not licensed in Mass.).

Note: The Comm. of Mass. has the Rule of the Trespasser on the Highways: anyone driving an unreg. car or a car illegally reg., the driver is liable for any damage he causes, whether he is reg. or not. Further, anyone causing damage to this driver must be reckless before liability will accrue to the one inflicting damage on the driver of the unreg. ~~dr~~ car. This violates tort law but is valid and logical: strict liability and a method of enforcing compliance with the statute.

Registrar of Motor Vehicles is legal agent for service of process

II.→ SELF-DEFENSE - Germolous v. Sausser (1901) - The mere belief that force is necessary to prevent an injury to oneself must be justified by the facts as they appeared at the time. There must be either real or apparent necessity. — Keep v. Quallman (1887) - a state of facts might show that a reas. man who reas. anticipates the threat of imminent harm would be justified in using reas. force in preventing the attack.

7 OCT. 58 * FALSE IMPRISONMENT *

Bird v. Jones (1845) Action in tort for F.I. Here, P was prevented from going further in a certain direction because of his refusal to pay an admission. The cops told him and made it possible for him to return the way he came. The ct. found that there was no F.I.

hypo: Suppose someone were told that he could go anywhere within the city of Boston except the Metropolitan Theatre. Would this be F.I.? No. This would be exclusion, not F.I.
The old cases on F.I. had the idea of confinement to a "rather small place." At the old C.L., the thought that someone could be confined within the U.S.A. would be doubtful as being F.I.

hypo: A confined in room. Door locked but A may jump thru open windows 10 feet to ground and he may or may not hurt himself. Is there F.I.? Would it be T.I. to know whether the person confined was athletic? If y is no available, safe & convenient way of leaving, then y is F.I. Even if the chances of harm are slight, the person may be F.I. and would not be compelled to take the chance.

Most of the old cases say that an unconscious person may not be F.I.

hypo: A chloroforms B two hours beyond ~~the~~ B's normal waking hours. Is there F.I.?

hypo: A hit on head, bound and carried across a state line, unbound and set free. He was unconscious during the time he was bound. Was there F.I.? No. There must be mental awareness of the F.I. during the time he was imprisoned. It will not suffice to wake up later and find out that he was imprisoned.

Rule of Law: There must be awareness of imprisonment during the time of the imprisonment.

Rule of Law: There can be F.I. by other than phy. barriers. Coercion may suffice. If there is a threat to life and limb unless someone stay somewhere, this may be F.I.

hypo: Could a dept. store detain a person for ~~suspect~~ suspicion of theft of goods? If they detain the wrong one, is it F.I.? If they detain the right person, is it F.I.?

Bettolo v. Safeway Stores
Collyer v. S.H. Kress Co.

Generally speaking, a dept. store can detain a reas. suspect by reas. force for a reas. time in the U.S.

7 OCT. 58

Weiler v. Herzfeld - Phillipson Co. (1926) [MIMEO]

Contra: Dillon v. Sears-Roebuck

There has been no clear decision as to the amt./force that can be used in the detention of an employee by an employer where the Eee has been suspected of theft or infidelity. Here, the ct. held that the detention of the Eee was justified. According to this case, Π may the detention for a reas. length where there are reas. grounds for suspecting the person detained to be the wrongdoer.

9 OCT. 58 * TRESPASS TO LAND (Q.C.F.) *

Dougherty v. Stepp (1835)

Δ thought that he was surveying his own land and claimed it as his own. This was actually a trial of title: who owns the land? This tort is actionable w/o proof of damages. The intention ~~required~~ to trespass is not necessary.

hypo: A tells B to cross over the boundary line of X's prop.

B had a choice: get shot or walk onto X's land (tres.)

If or he will get shot. If B walks onto X's land he is a trespasser. In tres. QCF, there can be strict liab. The modern trend in the law of neg. torts is to make necessary some proof of damage. Usually there need be no proof of damage in tres. to chattels because conversion is usually involved and will suffice as an action to proof of title. The Rest. of Torts is trying to move to the side where there must be some damage in trespass. ("Probably" no Tres. on the exam. + Curran. "It's not T.I.")

**

III. * DEFENSE AND RECOVERY OF PROPERTY *

Anseth v. Buffalo Ry. Co. (*Defense of Prop.)

10 year old boy stealing ride on D's streetcar. How much force can be used against a known trespasser? This was an action for A + B to recover damages. We could say that although the conductor may not have subjectively intended to have harm come to P reas. men could well find that this should have been

A duty of care is owed to a known trespasser.

realized by conductor and ∴ there is constructive intent suf. to constitute Battery. D should have reas. foreseen that such harm might occur. D did intend to scare P. There was no way that P could have gotten off of the car at the time buf. an appreciable risk of harm.

Hodgeden v. Hubbard (1846) * Recovery of Property *

Action for Trespass for assault and battery. How much force is a lawful owner justified in using in recapturing chattels peacefully obtained? Reas. force under the circums., but violence is never condoned where poss. is gotten peacefully.

14 OCT. 58

KIRBY V. FOSTER (mimeographed) (1891)

88881

* Curran: there is fraud and an unconscionable act on the part of the atty. What distinguishes this case from Hodgeden v. Hubbard? In both, poss. was obtained peacefully. But, a stove is possessed differently than money. If it is money more than likely it is on the person, and to get it might require a battery. The manner of recapturing property peacefully gotten must be considered.

16

Rogers v. Kabakoff (1947) 81 Cal. App. 2d 487.

The ct. here held that if the poss. is obtained lawfully, no force can be used for recaption. On if is a K stating that the prop. will be recaptured in case of default, can force be used? Force cannot be used but there may be a trespass. K seems to be the basis for allowing the recapture of chattels.

Any right of self-help is conditioned on time. If there is no emergency or excitement, there can be no self-help. Fresh pursuit is necessary in many cases and the opportunity to recapture in many cases is a matter of immediacy. In these cases, the cts. now hold that hot pursuit or immediacy will justify a person in using force & tres. to recapture property. This applies to property taken forcefully only.

T.I

16 OCT. 58 IV-* Legal Authority* (or Immunity)

Rush v. Buckley (1905)

* Malicious Prosecution requires that:

1. D is found not guilty
2. There were no valid grounds for the action in the first place, maliciousness.

Legal authority is actually in the line of immunity rather than privilege. Both are closely related however.

(Trespass) Ab Initio Doctrine

hypo: officer has warrant + good grounds for arrest + he does arrest A. A is confined that night but the case is not heard until 2 days later. Statute holds that an arrested person must be brought before a magistrate at the next sitting & this was the next day after arrest. – Because of the wrongful act subsequent to the lawful arrest, the officer will be liable for F.I. from the time of arrest. (6 Carpenters Case) This is the theory of ab initio. A privilege is conditional upon the proper use of the privilege. If one abuses his privilege it is as if he never had it. This applies to public privileges not private. This is given by law conditional on the proper use of the privilege. Ab initio would not apply to one who is invited into a home for dinner (private) but would apply to a cafe or bar, etc. For all practical matters, ab initio today primarily applies to arresting officers for F.I. This is the running back of the action to the beginning of the fact episode despite lawful acts initially. It is said, in furtherance of the fiction, that the actor at the time of the act never had lawful

Use of Privilege

intent and did not enter into it with clean hands.
There are three general areas:
(1.) Immunity - legal authority
(2.) Privilege - consent, self-defense, defense of property,
(3.) Necessity

*VI Necessity *

Surocco v. Geary (1853)
This was a case of public necessity whereby it is sought to protect the community. The indiv. rights of prop. give way to the rights of the community to safeguard itself. There is apparent necessity at the time, there is privilege.
In private necessity, one is privileged to trespass but is liable for any damage he does.
In private necessity, there is a privilege to do the necessitous thing, but the actor must pay his way.

20 OCT. 58
United States v. Holmes.
(62 Harvard L.R. 616)

* MENTAL DISTURBANCE *

KRAMER v. RICKSMEIER

Woman threatened on the telephone.

Rule of Law: Normally, words do not constitute an assault. One exception is in the special relationship of common carrier and passenger or Innkeeper and guest. (this exception was Lipman v. Atl. Coast Line R.R. Co.) The locale and the indiv. (man or woman) might definitely have a bearing on the outcome.

If A shoots B and B's wife sees it, B's wife might well recover for M.D. even in the absence of contact.

Many states do not recog. M.D. By the amends. to the Rest. of Torts (1948), M.D. is recog. as a Tort.

Rule of Law: You take your P as you find him. Altho' this is subjective, this is the maj. of law.

Wallace v. Shoreham Hotel Corp.

This sounds more like a neg. infliction of M.D. than intentional M.D.

Assignment:

Read: the group of transitional torts cases.

21 OCT. 58

Carnes v. Thompson (1932)

This is the concept of Transferred intent. A man is taken to intend the natural consequences of his intended act. The man acts intentionally to harm A but accidentally harms B as a result. If this theory of action fails, there may be two alternatives:

(1) Mental Disturbance
(2) Negligence.

Wilkinson v. Downton (1897)

Action here is for M.D. The practical joker intended the act and it was not the result of negligence. This was constructive intent, not negligence.

Cohen v. Petty (1933)

hyp: D here had a med. record + cont'd to drive. - Would you as an atty. plead the theory of neg. or constructive intent?

(1.) 2 N.Y. 2d 133, 138 N.E. 2d 199 - Decina
(2.) " " " 794 - Eckard

In #1, D was an epileptic but licensed. Had seizure + killed 4 kids on sidewalk.
In #2, D was a licensed epileptic + ran down 1 kid after a seizure.
In both cases the Ds were

Intent torts – C/N + Ass/Risk no def
Neg " " – " "Complete defense"

found guilty. Upon appeal, the cts. ~~reversed~~ dissented in both saying that an uncon. man cannot have intent and that at the time of the homicides the Ds were both uncon. However, the majority of the cts. in both affirmed.

Dissents

23 OCT. 58

For review of the Intentional Torts { See: Harper and James Text (3 vols.)
7 Buffalo L.R. 7

Wilkinson v. Downton (1897)

This could either be M.D. or Battery. Actually, the tort was for intentional infliction of nervous and physical harm. If D intended to inflict phy. harm, Battery would lie. If D intended to inflict M.D. then the tort would be the Intent. infliction of emotional distress and give extra damages for the phy. harm. This is the practical joker who poses the additional problem of constructive intent, thereby necessitating the use of an objective test.

* RECKLESSNESS *

* Contributory negl. is a complete defense to a neg. tort regardless of the amt. of contrib. negl. Assumption of the Risk is a complete defense to a neg. tort, but neither Contrib. negl. nor Assumption/risk are defenses to intentional torts.

All of the consequenses that apply to intentional torts apply to cases of recklessness: (1) Punitive damages (2) Assump/risk no defense (3) Contrib. negl. no defense.

The old Common Law made distinctions between:

Intent { Intentional
Recklessness (or wilful, wanton conduct)

NEGL. { gross
ord. negl.
slight } defenses to any grade of negl: (1) C.N. (2) Ass./risk

It does not matter what grade of negl. is used. Most negl. cases are involving just negligence ~~as~~ and involve a br/duty of ord. care. Never plead gross negl. where you just have negligence. Never prove more than you must. There need be only one grade of negligence: negligence (sometimes called ord. or normal or basic). The only time gross negl. has to be alleged and proved is in the case of gratuitous passengers where only a duty of slight care is required and gross negl. must be proved. The bulk of our negl. cases involve ordinary care and the breach thereof.

Negl. can only be had where there is a breach of a duty of care. Where no duty is owed, there can be no negligence.

false!

27 OCT. 58

* NEGLIGENCE *

(1.) What is it?
(2.) How do we define it?
(3) How do we prove it?

Concepts:
(1.) Negligence
(2.) Causation
(3.) Foreseeable harm
(4.) Defenses
(a.) C. N.
(b.) A/R
(c.) Some privileges

Henry Maine - a legal philosopher. He held that y is a progression from what you are to the concept of K whereby people can make some of their own laws or rules of association. Along with this idea of a freedom of an indiv. + the concept of K grew Tort law.

Tort law and criminal law developed together but there was only punishment. Along with the concept of K grew the idea that as between two people y should be compensation for a breach of the indiv. rules. Therefore, damages arose and Tort law developed.

There then arose the need of a test. The test used by Tort law is the Reasonable Man, the objective test. We should bear in mind that juries are Plaintiff prone. They generally favor the injured party.

* We must always ask ourselves

what the question of fact is and what the question of law is.

In Negl. there must be proof of actual damages. The c/a accrues when the damage occurs. The part of the complaint requesting damages is called the AD DAMNUM. The complaint is incomplete w/o the allegation of actual damages.

Wells v. Poland

There must be actual damages in an action for negligence.

White v. Schnoebelen

The cause of action accrues when the damage is done regardless of when the negl. act occurred. There must be, however, a causal connection between negl. and harm. Lightning rod case.

Blyth v. Birmingham Waterworks Co.

Ct. here decided the question to be a question of law — that of the ORPM test. The reas. man here is the reas. engineer, and expert testimony as to what reas. engineers do or would anticipate in this situation would have to be given. [STANDARD OF CARE]

The question of law is given to the jury in the charge. The question of law is the standard estab. by the charge to the jury.

Carpini v. Pittsburg Bus Co. 216 F.2d 404

(Goodrich, J.) Ct. held that the jury could still find that it was a question of

fact as to the negl. of General Motors, the mfgr. of the bus. The air brake chamber had a little hole in it. Chamber was in a position and unprotected that stones could fly up and puncture it. G.M. produced records showing that this sort of thing had not happened on any of their busses for so many years. Ct. said that it was still a question of fact for the jury as to whether G.M. was negl. Ct. held that G.M. was negl.

28 OCT. 58

Louisville & N. R. Co. v. Gower

Here, the court deals with the reasonably prudent man. We must consider what the ORPM would do in like circumstances. We are not concerned with hindsight. The question of law upon appeal is the charge to the jury. The real test is of the ORPM. The word prudent imports carefulness, conservatism. It denotes conservative care and is not governed by what "average" men do. The ORPM is more careful than the average man. Cts. consider the man (his phy. cond.) and the circumstances.

30 OCT. 58 Standard of Care (cont'd.)

McMichael v. Penn. R. Co.

(see abstract of this case.) St./care is discussed.

What negl. is, is a question of law, but whether certain acts are negl. is a question of fact. This was brought out in Pokora v. Wabash Ry. Co. (Cardozo, J.)

Worthington v. Mencer (1892)

Here we are considering whether to hold everyone to the same st/care. P was mentally dull. D pleaded CN and the question of P's exer. of care came into question. P was held to the same stan/dare as other reas. men over the age of 21 as was P.

It will not suffice that someone has acted in the best way he could. The ORPM test must still be applied.

Sforza v. Green Bus Lines

McGuire v. Jalone 297/323

The mentally insane are held to the same st/care. (see McGuire v. Jalme 297 Mass. 323). We do not concern ourselves w/ the moral question.

The ORPM applies to everyone 21 or over.

The Atty. here made a mistake by concentrating on the insanity other than on the sudden illness theory.

3 Nov. 58

Charbonneau v. MacRury

Test for Minors

The test applied to minors is definitely more subjective than the ORPM test applied to adults. We take into consideration the age, experience and education and we have an objective test to the extent that the minor is compared to the reas. minor of similar age, education and experience.

A blind man is held to the stand/care of the ord. prudent blind man. Therefore, we do take into consideration physical characteristics. That does not mean that there will be concessions or special allowances, but it does mean that *the tests will have to be commensurate with the phy. characteristics. Normally phy. characteristics require a greater degree of care on the part of the person having such characteristics wh are deficient.

*In certains circumstances, we do make concessions for phy. and mental defects or characteristics:

(1.) where the characteristic comes

into being suddenly (Sforza v. Green Bus Lines, supra.)
(2.) where the other party knows of the phy. characteristics or defect.

* The fact that there may have been previous accidents of the similar nature would not be admissable into evid. because it would be prejudicial and would not be suff. probative on the accident in question.

Peterson v. Minnesota Power & Light Co.

Common Knowledge — This case lets us know that all people are held to a minimal amount of knowledge. These are things which are commonly known to the community and should be known to the party involved. It is no excuse to say that such was unknown to the party speaking.

[Where a minor is licensed to drive a car, most courts hold that the minor is held to the stan. care of the reas. licensed driver, not that of a minor. In those courts minority is no defense in this type of action (automobile accidents).

4 Nov. 58

We must view the following things objectively:
(1) Mental state
(2) Reflexes
(3) Some kinds of knowledge.

hypo: Is a man from Borneo held to know things commonly known in Boston, such as what lights to cross on? Yes. He should even exercise greater care.

Overaverage intelligence or education.

When a person has special or over-average education or knowledge, it is only relevant when he is being questioned on the basis of that knowledge. Otherwise, the over-average person is held to the standard of the ORPM.

Skill

Skill only has a bearing when the question of skill is involved. It would not be relevant to bring in the skill of a physician in a tort action for his negl. in driving a car.

Stan/care for Physicians

What is the test for deter. the stan/care required of physicians? He is held to the stan/care of similar physicians of the community or of a similar community. A new physician is held to the stan/care of the community. However a gen. practicioner is not held to the stan/care of a specialist.

hypo: A (M.D.) asks B, C + D (M.D.s) what is the best way to set a leg. Each says that he would do it differently, but all 3 (B, C + D) agree that method #4 is out of the question. - A will be safe using either of the first three, but would probably be clearly negl. to use #4.

6 NOV. 58

St/Care of Physicians (cont'd)

Stan/care for a Specialist — The specialist is measured as a specialist although he may not actually be medically qualified to be a specialist.

Representation and Estoppel — One who holds himself out to be something is estopped to later deny it if someone relies thereon to his detriment. The representation invites reliance and affords the basis of estoppel.

Stan/care for a G.P. — The G.P. is held to the stan/care of similar G.P.s in the community. But the specialist is not held to the stan/care of other physicians in the comm.

c/a for Misrepresentation — If one reps. himself to have a license but in fact does not have one, this could give rise to an action of misrep.,

but that would require proof of the reliance on the misrep. and the occurrence of dams. as a result.

A specialist would probably not be required to have the full store of knowledge of a G.P.

* Duty to Act *

The "good Samaritan" has no legal obligation to help; but, once he does, he must use due care. The same applies to a physician. Police have no authority to force a person to act where such person has no legal duty to act.

Emergency and Danger

Cardozo, J.: "Danger invites rescue."

In cases of apparent danger + emergency, some courts abandon the ORPM test and say that the actor must be judged subjectively. [Curran: "I prefer the continued application of the ORPM test." e.g., the ORP nitro-glycerin truck driver. Therefore, on the exam, argue the ORPM test in the circums. of the case.] The existence of the whole emergency is viewed objectively. Dire emergencies often and usually dictate that men will react to save their own lives. Moral law is often

set aside in times of emergency

Degrees of Care and Negligence

Peck v. Fanion

Special Relationships

[There is a special relationship of common carrier and passenger which requires the use of the highest degree of care and y will be liability even for slight negligence.

Altman v. Aronson (1919) 231/588

Bailments (Mass. case)

[In a gratuitous B^mt, the B^ee is required to exercise only slight care and is liable only for gross negligence.

Test: what care would the T.O. give to his own property? (applied in Mass.).

10 NOV. 58

Problems of Degrees of Care

(1) When is it required that the degree of care required be more than ordinary?

— The vast majority of cases involve only ord. negl.

The highest degree of care is required only in the special rels.:

(1) Common carrier — passenger
(2) Innkeeper — guest

Most common areas of degrees of negligence:

(1) Automobile cases on y are passengers,

gratuitous or paying.
(2.) Property law on ¶ are degrees of care wh vary depending on whether the D is (a.) a trespasser, (b.) Licensee, or (c) Invitee.
(3.) Bailments
(4.) Others where the du/care depends on the circumstances.

(II.) Degrees of care other than ord. and how to prove them? — The most important and hardest to prove are gross negl. and RECKLESSNESS. A consideration is probably given to whether the conduct might be Criminal. Recklessness is best equated with indifference.

Grat. passengers

[The requirement that gross negl. be shown in a grat. passenger situation is probably imposed due to the possibility of collusion against the driver's Insurance Company.

Since juries are plaintiff-prone, it would benefit the D to have the case tried by the Judge if possible. Methods:
(1) Directed Verdict — slim chances, but there are two places on a D.V. will prob. be allowed: (a.) On there is a question of C.N. It is easier here

Contributory Negligence and proof thereof

because even the slightest showing of C.N. will defeat the P's case. The amount of proof in C.N. is not significant, but it only need be shown in any amount, even the slightest. C.N. is, however, a question of fact and many judges are reluctant to grant a motion for a D.V. on the question of C.N for fear of being reversed.

Proof of Gross Negligence

(b) Our y is a question of gross negl. The amount of proof que must be shown is great and the question arises as to whether P has sufficiently proved gross negl. If P hasn't, it will ord. be rather clear que le verdict should be directed for D due to insuf. evidence. Negl. is a question of fact, but insuf. evid. is a question of law.

Negl. is such an uncertain field that it is difficult to ascertain before trial whether a person has acted negligently. But many states now have statutes.

Query: Is going to sleep at the wheel of a car gross negl. ???

(1955) Flynn v. Hurley, 332 Mass. 182 — reversed a D.V. stating that the mere showing of falling asleep at the wheel would not

warrant the granting of a motion for a D.V. It must be shown que le driver was aware of falling asleep, and had prior warnings.

Sleepers

(*) Welts v. Caldwell, 120 N.E.2d 280 — D allowed a youngster to ride on the front bumper of his car and the kid was hurt. D.V. affirmed: negl. per se.

Dallas v. Carzis, 120 N.E.2d 294 — D was waving out of the car window and struck P. This was inattention at the wheel. D.V. allowed on the question of gross negl.

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VIOLATION OF STATUTE

OSBORN v. McMASTERS

Despite statute forbidding the sale of poison w/o proper labelling D's servant sold some to P wh was not properly labelled.

Rule of Law

Br/duty imposed by statute is negl. per se and it is no defense to say that such an act by the actor would not have given rise to a c/a. at C.L.

Note: (A) On a stat. requires a fire escape on public bldgs. be built, it

would not be reas. to impose negl. per se for the absence thereof or may not be a need for a fire escape on a particular bldg.

Satterlee v. Orange Glenn School Dist.

(1) Judge Traynor's partial dissent is the strongest in favor of the stat. He says that viol. of a statute should constitute negl. per se. In the charge to the jury, according to Traynor, the judge would only say that if the jury finds a viol. of the stat. the jury "must find" negl. - a "must find" charge.

(2) The second dissent holds that viol. of a stat. const. a prima facie case of negl. wh creates a presumption and requires a "must find" charge unless there is found a justification.

(3) The third dissent holds that viol./stat. is only evid. of negl. and re-

quires a "may find" charge based on the ORPM. This is the minority in U.S.A., Mass. in accord.

x The majority of states are negl. per sé states, and the presumption of negl. theory is only adopted by two or three states.

Justification

In theory #1 (per sé), justification is a matter of law. What may be justification in a tort action may not be justification in a crim. action, however.

Cooper v. Hoeglund

The purpose of the stat. is considered here.

Rule of Law re purpose of statutes:

A party may not invoke a viol. of a stat. where the harm complained of was not w/in the contemplation of the Legislature when they enacted the statute.

Crim. stat. and consideration of who the complaining party is:

The crim. stat. applies only when the P is one of the group wh the Legis. sought to protect or benefit.

Non-feasance: In a case of non-feasance, the C.L. itself must impose a duty to act.

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Quaere: Party-line "Occupants" (Telephone)

What duty/care is owed by party line telephone occupants to each other in cases of emergency? — Most C.L. cases say there is no liability if one of the parties' house burns down because the other party (D) would not get off of the line. This is a refusal to act. There is reluctance to put such possible consequences on such parties. Mass. is in accord w/ the majority that there would be no liab. on the party who refuses to relinquish the line.

144 F. Sup. 635 (1936)

P made K with govt. to sell imported tomato paste. Food and Drug Comm. inspected it at port of entry in a cursory manner. Later when P sold the paste to the govt., the Comm. again inspected the paste more carefully and said it was adulterated and could not be used. P sued Food & Drug Admin. for negl. at the Port of Entry by allowing it to

be sold. If the Admin. had said then that the paste was adulterated, P would not have had to buy the paste. As such K's with importers & exporters are made subject to the provision that the goods will pass the Port of Entry inspection. - Ct. held that the stat. involved was passed for the protection of Amer. consumers of tomato paste and that the merchant could not sue under the statute. It held that the inspections of the F&D Admin. are for the purpose of protecting eventual consumers.

Ross v. Hartman (1943)
U.S. Ct. of Appeals, D.C.

Every Tort case contains two issues:
(1) Issue of negl.
(2) Issue of cause
Palsgraf Case says that there is but one issue - negl., and that the P is foreseeable.

Causation

This is the doctrine of causation. In negl. cases, there must be an act (~~causal~~ negl.) and an injury.

and the actor negl. must proximately cause the injury.

It might not be good to use Palsgraf v. Long Island R.R. because the Judge is using hindsight, but many cts. adhere. The ct. there held that due to the stat. ☐ is no need to argue prox. cause as ☐ was negl. and that was a viol. of the statute wh ~~[illegible]~~ resulted in injury. * If you are defending, you should do best to try to force P to argue causation as mere viol. of a stat. does not prove causation.

Br/duty imposed by statute eliminates necessity of proof of causation.

Galbraith v. —
323 Mass. 255
↙ pres. on highway.

*Brown v. Shyne

Even though ☐ is a stat. requiring doctors to have license, since P did not prove que D was not meeting the stan/care, T/D. Ct. held that the stat. was not even evid. of negl. unless a causal connection could be shown. The Ct. held that the fact of a person not having a license would be irrelevant if the D has the skills, etc., and proving the absence of such skills would be on the P

There must still be a showing of causation on ☐ as a br/duty imposed by statute.

would have to show, in negl. cases a causal connection between viol. of the stat. and the injury. (contra: Whipple v. Grandchamp)

Trespasser on the Highway (Mass.)

Mass. has a Trespasser on the Highways statute which makes a violater strictly liable and someone else who hits the P w/ an unreg. car or illegally reg. car must be wilful & wanton. C.N. may be pleaded, however. — It must be pleaded. If this **stat. is not** pleaded but is presented in evid., it will be treated only as evid. that the stat. was violated and its effect would be watered down.

Kelly v. Henry Muhs Co.

Rule of Law

It is insufi. to show a viol. of a stat where the complaining party is not w/in the group or class intended to be protected by the stat. P must show que the duty was imposed for his protection **and/or** benefit.

Two purposes of a Statute:

(1) Protection of a certain class of persons.
(2) Protection against a particular risk.

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Mass. Tres. on the Highways (Common Law)

Mass. Automobile Law - Martin & Hennessey (In Mass. Practice Series)

* Vehicle must be reg. in the name of the true owner.

* The vehicle must be suff. described and it must be the one described and identified on the registration.

* This must be pleaded to be effective. The gen. denial will not raise it. It must be specifically pleaded. See 202/443 at 446 for probably the first case involving this concept of the auto being a dangerous instrumentality. This case was in 1909.

(Dudley v. Northampton Ry)

(For Viol. of Stat. as only evid. of neg., see 209/155 which held that license or the lack thereof is irrelevant if due care is used (Accord: Brown v. Shyne, supra).) Cohn doctrine. Stat. requires reg.

Cook v. Seidenverg (1950), p. 307

Rule of Law: The ct. is here saying that the injury must have been w/in the contemplated risk against wh the stat. was intended to afforded protection.

Caveat: Prox. cause is not settled by viol. of a stat. It is a separate matter. * If a statute is viol., prox. cause must still be shown between the viol. and

the resultant injury.

Doherty v. S.S. Kresge Co., p. 322 (Wis.)
Viol. of crim. stat. is per se negl. in this state (Wis.)

⊛ Schuler v. Union News Co. 295/350 - death stat. action. No evid. intro. as to packaging or methods used. No death recovery under br/warr. at C.L. All death recoveries are under statute. Limit. of recovery depends upon the degree of culpability. Here, no evid. of negl., only que le stat. was violated. ⊛ Ct. held that viol. of the stat. was evid. of negl. Of course, ∃ is still a need for evid. as to the degree of negl. This case shows what significance we can get from statutes.

295/3..

Viol. of crim. stat. can "jump over" prox. cause, necessity of evid., evid. re stan/care and can be held to be per se evid. of negl.

⊛ Whether we are dealing w/ non-feasance ~~and~~ or misfeasance, prox. cause must be shown. If we are dealing w/ non-feasance, it must be shown que ∃ was a C.L. du/act.

20 NOV. 58 (Chap. on Default, pp 324, 328, 331, 332 + 346. — Assignment after R.I.L.)

* RES IPSA LOQUITUR *

Byrne v. Boadle

A barrel fell from D's shop and hit P as he passed in the street. This ct. held that the accident alone would be prima facie evidence of negl. The ct. here held that a rebuttable presumption of negl. was created and would be suffi to defeat a motion for a D.V. by D.

The majority of cts. hold that only an inference of negl. would be created by an accident like this.

The fact of the barrel falling was prima facie evid. of negl. We can say that such a thing would not have happened had it not been negl., and since the barrel was in D's custody, D will be held to answer.

In a R.I.L. case, we have:

(1) The fact of the injury
(2) An inference of negl. — "more prob. than not," someone was negl.
(3) An inference that D was the person responsible, more probably than not.

We can ask ourselves ~~that~~ whether it is "more probable than not" that the inj. was due to negl. rather than non-negl. conduct.

(*)(*) [There must be reas. evid. of negl.; but on the thing is shown to be under the management of the D or his servants, and the accident is such as in the ord. course of things, does not happen if those who have the management use proper care, it affords reas. evid., in the absence of explanation by the Ds, that the accident arose from want of care.

R.I.L. is only circumstantial evid. as it is only an inference.

(*) Wigmore, on Evid., made up a fourth requirement for RIL cases, to wit:
(4) ~~Exclusive control~~ Other proof not available.

It is often said that **act.** will allow RIL on **a P** actually has no recourse other than RIL, on other proof **is:**
(1) Not available, or
(2) Under the D's control and can be reached only by having D. Tell what happened.

In most states, RIL is purely a question of fact for the jury, an inference which can be found by reas. men, i.e., a jury.

(*) The procedural effect of RIL is to almost guarantee a P of getting his case to the jury. The judge charges the jury that "having heard the evid., you may find negl." This is a "may find" charge. Inference = "may find" charge
Presumption = "must find" charge.

[A (*) presumption creates an artificial connection be-

Procedural effect of a Presumption

tween facts, and unless the jury finds other facts or unless the D proves otherwise, the factual connection will stand; and, from the factual connection a presumption can be made.

Galbraith v. Busch (1935)

Query: Why Did the P lose here? =

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Galbraith v. Busch (cont'd)

ɣ was no explanation of the circumstances under wh the accident occurred. Although ɣ was an injury and the instrumentality wh produced the injury was in the exclusive control of the D. But, it could not be said here that it was more probable than not that the injury would not have occurred but for want of due care by D. Therefore, J/P/Revsd.

Further, P was a guest in the D's automobile and she assumed the risk of any mechanical defect wh was not known to the D.

The P cannot place upon D the burden of exculpating themselves from the charge of neglect of duty until evid. showing prima facie that ɣ is such negl. has been presented.

Ayers v. Parry

Query: How much weight is actually given to statistics in deciding the probabilities of the act occurring?? RIL is seldom applied to

Hampton v. U.S. 121 F. Sup. 303 RIL - navy
Wank v. Ambrosini 307 N.Y. 371 (1954) - no RIL
Stein v. Polisi 308 N.Y. 293 (1955) - 19 mos. - held RIL - J/P
Goffrey v. Brown 220 Cal. 57, 29 P.2d 165

Cases involving medical malpractice.

284 P. 2d. 133 (1955) Bower v. Podis - in basic agreement with the Ayers case. M.D. here was administering vitamins and an intermuscular vitamin injection. P's ~~arm~~ wrist became paralyzed and a doctor who examined the arm said that it was an obstruction to the radial nerve which controlled movements of the wrist. D's expert witness said it could have been that since the injection was an irritant, it passed through the blood stream & caused a clot at the radial nerve. The P's expert witness said it was impossible for that to happen. Ct. charged the jury that since this was the only time in hundreds of similar injections by doctors that injury occurred, it is a definite inference of neg., i.e. RIL. But, that if the jury believed D's expert witness, they must find for D.

Hampton v. U.S. 121 F. Sup. 303 - 12 month-old baby found dead under truck last driven by a sailor. The Navy said they would not produce the sailor because they did not know his whereabouts, and Navy produced no evid. - Held, RIL applied because it was no other reas. explanation of any other way the "accident" could have occurred. J/P.

Wank v. Ambrosini 307 N.Y. 371 (1954) - body of adult man found under D's car, and it seemed that it had been dragged 200 yards. - No RIL.

Stein v. Polisi 308 N.Y. 293 (1955) - a 19 month-old

baby was found bleeding and dusty beside a private country drive. Witnesses said they had seen D's car passing that way at a **high rate** of speed. There was no evid. that D did actually hit the child. D testified that he did not hit the child. = Held; RIL did apply. J.P.

Godfrey v. Brown 220 Cal. 57, 29 P. 2d 165 — this case goes contrary to Galbraith v. Busch even though the situation was the same as far as deciding whether there could be an inference of negl. from the facts. The ct. said that RIL would apply here.

Applicability of Statistics

Actually, the applicability of statistics to cases involving RIL is not as governing as ~~many~~ some people seem to think. We aren't really concerned w/whether the injury was the first of its kind in a thousand similar cases. We only want to know whether, in the facts of a particular case at bar, the injury was of the nature that it can be inferred that it ordinarily would not have occurred but for the lack of due care on D's part.

* Ash v. Child's Dining Hall Co. ~~Larson v. St. Francis Hotel~~

Reasoning

The ct. seems to be saying that if P can show that all other third parties could not have caused the act complained of, the inference will be made that the D is to blame or at fault.

Perlooc case
259 N.Y. 252 (1932)
24 Cal. 2d. 453 (1944)
Escola v. Coca Cola Bottling Co.

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Honea v. Coca Cola Bottling Co. (1944)

* RES Ipsa Loquitur is really only an inference of negl. prima facie to get the case to the Jury and the Jury will decide how much weight it has in deter. liability.

*Query: Is exclusive control necessary? NO!

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[Insurance Counsels Journal, vol. 25, no. 1, p. 97 by Morris: "R.L., Liab. w/o Fault."]

In a medical RIL case, expert testimony is necessary to show that, in the absence of a showing to the contrary, it can be said that it is more probable than not that ∆ was negl. on D's part.

The case of Ybarra v. Spangard was the last nail in the coffin of the "exclusive control" doctrine. This was a joint enterprise. Elements of a joint enterprise:

(1) Common purpose
(2) Control over each other.

* DUTY TO ACT *

We begin to talk about obligations and duties to act because we are beginning to talk about nonfeasance. On ∆ is

misfeasance, ȝ need not be shown a personal relationship between P and D, because ȝ is a legally imposed obligation to refrain from the commission of the tortious act.

Nonfeasance

In nonfeasance, ȝ must be shown a relationship between P and D on which is ~~breached~~ based the duty to act wh P claims was breached.

Relationship between P and D.

If ȝ is no relationship at all between the parties, the vast majority of cases holds that nonfeasance will not be actionable. The failure to act ~~on~~ no duty/act exists is not actionable. ("Sam Samaritan")

Assumption of a duty or obligation

But, if ȝ is no du/act and the party acts anyway, ȝ is then a duty to exer. due care and it will be no defense to say that no du/act orig. existed.

Hurley v. Eddingfield (1901)

The D (M.D.) had no du/act because he did not enter into a K to care for the patient. Therefore, since ȝ was no duty/act, ȝ can be no liab. for nonfeasance.

Hypo:

D (M.D.) has a retainer fee for a year to care for P. During the year, P becomes ill and D refuses to

come to P's aid. — There are only two cases in point and both hold that D still had no du/act.

~~Intervill~~ * Turbeville v. Mobile Light & R. Co.
A "rather disturbing" decision according to Curran.

Rule of Law of this case

[* Mere failure by a D to take prompt steps to extricate P from a perilous situation, brought about solely by P's own negl., and w/o negl. on D's part, there being no legal duty on the part of the D to so extricate him, will not impose liability on D and will not be deemed an act or omission, as a matter of law, wh will impute liability. Most cts. wh have passed on this question are in accord.

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* Montgomery v. National Convoy and Trucking Co.

This case is actually one of misfeasance in that the D acted but acted improperly. * D owed an obligation to avoid the creation of an unreason risk of harm. We could argue the existence of an affirmative obligation on the basis of the relationship of highway users. Also, * D was a participating bystander which caused an injury as a result of causing a dangerous condition. We could also say that * once D began to act, an affirmative obligation arose to exercise due care. Even though a "good Samaritan"

244 F.2d 53 (1957) – an obligation to warn of the possibility of allergy to sizable portion of the public.

296/168 – Assumption of the risk denied – flying puck
325/419 – " " " " granted – baseball
324/505 – " " " " denied – flying wheel

has no du/fact, once he does act he must use due care, and failure to exercise due care will result in liability therefor.

In du/act cases, one may argue one of two ways:

(1.) Nonfeasance – failure or omission to act.

If you are arguing nonfeasance, you want to try to make the ct. focus on the specific incident wh caused the injury.

(2.) Misfeasance – wrongful act. If you want to argue misfeasance, try to make the ct. encompass the entire situation and take into account all of the acts of the D.

236 F.2d 673 (1956) – Supt. held liable for failing to check the references of an asst. who beat up a girl tenant, even though ∃ was nothing in the D's background wh would have put the bldg. supt. on notice. Ct. held D had an obligation to check the asst.'s references.

Query: Is ∃ an obligation to warn? – (See the citations around the page). Many cts. hold ∃ is an obligation to warn people w/in the foreseeable risk of the existence of that known risk.

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NOTE: * [We have now finished consideration of the portion of negl. re the bases of liability

* CAUSATION *

There are three major issues in a

Negl. case:

(1.) Negl. issue

(a) Fact issue - 1. what happened 2. Application of standard

(policy) (b) Law issue - the standard to be used; found in the charge.

(2.) Responsibility - having found D at fault, will he be required to pay dams.? Is he responsible? Was y cause? Was y proximate cause?

(a) Fact - was y a causal rel. between the act and * the injury? "But for" the act of D, would P have been injured? Was it causally related w/o regard to the remoteness of the injury?

(policy) (b.) Law - granting causation, was the act suff significant and suff related as to require D to pay in full for the resultant injury as a matter of policy/justice?

Rule of Construction [Where y are multiple Ds, the assessment of damages will be divided pro rata on as a matter of fact, it is mathematically possible so to do.

(3.) Damages

(a) Fact - jury must deter. how much injury y has been.

(policy) (b) Law - jury must deter. how much P will be compensated w/in the

control limits set by the Judge in his charge to the Jury.

(*) Most other breakdowns (per the Prof. Leon Green formula) of issues in negl. cases are:

Issues in a negl. case per the Green Theory:
(1.) Duty
(2.) Breach
(3.) Causation - "But for" test
(4.) Damages

Rouleau v. Blotner

(*) The "but for" test is more often used in connection w/ the defense of CN as any amt. of CN will defeat the P's case. [Caveat: the Last Clear Chance doctrine.] - The case here showed the necessity of sine qua non: i.e. must be a causal connection between the negl. act complained of or relied on, and the resultant injury.

Kramer Service, Inc. v. Wilkins

(*) We are not concerned w/ the possibility of an act causing an injury. (*) It must be shown that but for the D's act the injury would not have occurred, not that it was "possible" that the act caused the injury. Case dealt w/ the fact issue of cause.

Gulf Refining Co. v. Williams

This deals w/ the question of negl even though the word "possibility"

is used here as in the Kramer Case.

Rule of this case

⊛ [When the inquiry is one of foreseeability, as regards a thing that may happen in the future and to wh the law of negl. holds a party to anticipation as a measure of duty, that inquiry is not whether the thing is to be foreseen or anticipated as one wh will probably happen, according to the ord. acceptation of that word, but whether it is likely to happen, even though the likelihood may not be sufficient to amount to a comparative probability.

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Summers v. Tice

Both Ds hunting and negl. shot simultaneously and hit P in the eye. No proof as to who actually caused the injury. J/P/A. Ds appealed saying that P must prove which one caused the injury. Affirmed. Ct. said that the only people who could prove the liability would be the Ds and it would not be equitable to make it so that P would have no recourse even though y was a br/duty and an injury caused thereby.

Anderson v. Minneapolis, St. P. + S. St. M. R.R. Co.

⊛ Where y are two or more causes of the same injury and D's negl. act would have

Rules on Multiple Causation

caused the injury anyway by itself liability. * Further, where one of the wrongful acts supersedes the other(s), liability on the party who causes that superseding tortious act. These are problems of multiple causation.

* In concurrent causation, y can be:
(1) Concurrence in the initiation of the cause.
(2) Concurrence in the happening of the injury to the P.

These are assuming that the tortfeasors acted at the same time but not necessarily in concert w/ each other. * However, y can be concurrent causation where you have multiple contributors to an injury but the tortfeasors do not act simultaneously. e.g., many factories along river, or where one fire, negl. begun, connects w/ another + w/ another. This is the "chain of causation" situation.

Joint and Several Liability

* Joint tortfeasors are jointly and severally liable. * A P can recover full damage from either one because it is not possible to mathematically pro rate and it will not be done arbitrarily at P's expense or to his detriment. The P should not be made to suffer. One of the Ds may be judgment proof, too.

* Apportionment of Damages *

McAllister v. Penn. R.R. Co.

P stepped between train and platform but months before had also been injured by another incident. Ct. held that it should be left up to the jury to apportion, by "guessing", the damages to the P. There was no question of liability on D but only of Damages and for how much D is Responsible.

Griffith v. Kerrigan

Sec. 881 of the Restatement of Torts:

Rule of Law: * "Where two or more persons, each acting independently, create or maintain a situation which is a tortious invasion of a landowner's interest in the use and enjoyment of land by interfering w/ his quiet, light, air or flowing water, each is liable only for such proportion of the harm caused to the land or of the loss of enjoyment of it by the owner as his contribution to the harm bears to the total harm."

Rule of Law: * Where factually a correct division cannot be made, the trier of fact may make it the best it can, which would be more or less a guess, stressing the factor that the wrongdoers are in no position to complain of uncertainty. Were it not for the wrongdoers, the case never would have arisen.

9 DECEMBER 58

DILLON V. TWIN STATE GAS AND ELECTRIC CO.

(*) We are here dealing w/ the situation of the assessment of damages where the victim's life expectancy is short anyway.

Assessment of Damages

In assessing damages, the Jury will assess for the injury and pain and suffering from the time of the injury to the trial and for pain and suffering after the trial until his "expected" death. Life expectation is considered. — But, if P dies after the time of the accident but before trial, the jury will assess damages for the pain and suffering from the time of the injury to the time of death. If a verdict is returned including damages for the life expectancy (e.g. 30 years) and P is killed two days thereafter, the money (JUDGMENT) is irrevocably a part of P's estate.

Garrett v. Garrett

Joint and Several Tortfeasors

Where is are joint and several tortfeasors, they are jointly and severally liable for the full amt. If P makes a selection as to wh of the tortfeasors he will sue, that D will be liable for the full amt., but, that selection works as a discharge of the other tortfeasor(s). The c/a is merged in the judgment.

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Thomas' Admr. v. Maysville St. Ry. and Transfer Co.

When the P collected the amount of his judgment against the Gas Co. from the surety in the supersedeas bond, he accepted satisfaction of the judgment. He no longer has a judgment against the Gas Co., for the benefit of it has been assigned to the surety. ⊛ The P's c/a was merged in his judgment, when his judgment was satisfied, his c/a was at an end.

He has his election whether he would collect the judgment against the Gas Co. or the judg. against the Street Ry. Co. ⊛ He could not collect both. He made his election, and thus satisfied his c/a.

[⊛ It is a sound rule of public policy that the P who has in his pocket one complete satisfaction of his c/a shall not, while retaining this, litigate the c/a further.

As long as a P does not get a full satisfaction against one of the Ds, he may go against the other D and recover another verdict.

hypo:

A v. B and C

(1.) A v. B for $5000 but recovers only $4500

(2.) A v. C for $6000 and could recover not only the $500 from above but also the remaining $5500.00 sought against C.

⊛ Covenants not to sue are not the same as releases.

A release under seal is a complete release w/o the requirement of showing consideration.

15 DECEMBER 58

Contribution

In the absence of std. most jurisdictions have denied the right of contribution among joint tortfeasors except only was absence of negl. or other fault, altho permitting it in the case of joint obligors violating their K.

As long as it is decided that parties are joint and several tort-feasors, it is not really important as to the degree to wh each is liable.

*The only time that the right of contrib. comes into being is on one of the tortfeasors has paid in excess of his pro rata share, and y is no litigable question.

After D-1 has paid above his share, the real question is not how [redacted] much each owed, but the real question before the court is whether they are joint tortfeasors or wrongdoers. Generally, C.L. courts say leave the wrongdoers as you find them.

If, however, y can be contribution, then

D-1 v. D-2 for contribution on D-1 has paid e.g. full damages. Then, D-2 and P would have to litigate and the same trial would have to be gone through, same witnesses to be subpoenaed, etc. This could be another argument in favor of ⊛ the general rule that there is no contribution as between joint tortfeasors.

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Indemnity and contribution are matters governed by state statutes, not C.L.

Joint and Several Tortfeasors - basically means that people of a certain liability MAY be joined.

Contribution has its main meaning in whether or not a ct. will allow contribution. Underlying this and the fact question that must be decided before contribution can be allowed is whether the parties between whom contribution is sought are joint tortfeasors.

Indemnity as a concept includes, also, the concept of Subrogation. (Look up: (1) Indemnity (2) Subrogation (3) Contribution.)

5 JANUARY 59

* PROXIMATE CAUSE *

1. FORESEEABILITY OF RESULT — 6 January 59

Mauney v. Gulf Refining Co., p. 471.

Rule of Law [There is no prox. cause problem when π is contributory negl.

TEST TO BE APPLIED:

[* In order that a person who does a particular act which results in injury to another shall be liable therefor, the act must be of such a character, and done in such a situation, that the person doing it should reas. have anticipated that some injury to another **would** probably result therefrom.

[* **The actor is not** bound to a prevision or anticipation which would include an unusual, improbable, or extraordinary occurrence, although such happening is w/in the range of possibilities.

* The π was not allowed to recover here because of a number of probable reasons.
(1) The court probably felt that it was not reasonably foreseeable that some pregnant woman would fall over a chair, and
(2) it is not a matter of definite fact that that the act complained of was even the cause of the instant act which directly caused the injury.

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Christianson v. Chicago, St. P., M. & O. Ry.

* The specific danger in question from wh the injury complained of resulted need not have been foreseen. This type of

injury may not have been fore-
seeable.
This case differs from the Mauny Case in that the chain of causation here is more direct.

* Once a person is negl., he will be held for the injuries that are the natural and probable consequences whether or not they were foreseeable. So long as some injury is foreseeable, the type or manner of injury that resulted need not have been foreseeable.

* Here, the last act of the D occasioned the injury to P and is therefore the prox. cause of the injury. Not so in Mauny Case.

Gulf Refining Co. v. Williams
A man must consider the likelihood of harm that will or might be occasioned by his act.

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12 JANUARY 59

McCahill v. New York Transportation Co.
You take your P as you find him.
This type of result is unforeseeable and exceptional.
Then, why recovery? = One who has negl. forwarded a diseased condition cannot escape

responsibility. — ⊛ If a party injures another, it will be no defense to allege ~~drunken~~ intoxication, etc.

hypo: What about a man who produces a skin product and P is allergic to it. Is there any action for P to recover? = No. It is a situation on you take the P as you find him.

Quaere: How could you show negl. on the manufacturer's part? = By showing that a significant portion of the population has the same trouble. In terms of a nationally produced product, it could be a large amount of the pop. This is an issue of negl. and a question of fact for the jury.

Kimble v. Mackintosh

⊛ If there is an unforeseeable + unprecedented vis major (act of God) wh/ causes injury there will be no liability on the owner of the premises. ⊛ This "holding" is really dicta.

hypo: D=RR Co. shipping goods of P. Due to negl. of RR, the train is delayed in transit and a raging flood destroys the goods of the P (vis major). "But for" the negl. of RR, the goods would not have been at the point on the flood occurred. Is the D RR Co. liable? = YES. However, there is a division of authority on this point. The majority holds that the RR would probably be discharged from liability; also, the I.C.C. is in accord because the

intervening act wh/ caused the destruction could have in no way been foreseen and could not have been prevented. Minority view holds que the D RR would be liable. i.e.,

hypo: assume two fires combine to cause damage to P's property. One of the fires was caused by an act of God, the other by D. = As long as the D's fire would have singularly caused the fire, it does not make any diff.

⊛ The "But for" test is not sufi to impose liability in these circumstances.

⊛ Gibson v. Garcia

D hit pole wh/ snapped due to weakened cond. caused by much termite action. Pole falls and injures P.

Ct. said that if the act of the D is the SUBSTANTIAL FACTOR wh/ brought about the harm, liable.

The ct. is assuming to use a theory of prox. cause, but wishes to attach significance to the next act behind the prox. act. So, they resort to the use of the SUBSTANTIAL FACTOR TEST. The result is that the substantial cause is equal to liability.

⊛ Green Theory — has transferred "Substantial" out of responsibility to cause and effect, merely as a "But for" test. The basis of liab. will come from breach and duty wh/ together = foreseeability.

Green Theory

[(1.) Duty] foreseeability
(2.) Breach]
(3.) Causation → Substantial Factor
(4.) Damage

1934 – The Substantial Factor Test – used for whatever is relevant of cause and effect and liability.

1940 – Rest. of Torts, sec. 435 – "Legal Cause" – has been reduced to refer only to cause and effect.

* Theory of Substan. Factor – tends to favor P.
* Theory of Prox. Cause – somewhat in the middle. In the classic sense of the prox. cause, the last act, the most immediate cause, it tends to favor P.

Theory of Intervening Cause – for cutting liab., tends to favor the D by the use of foreseeability. If you can successfully argue that "it" was not foreseeable, D wins.

If "it" is the thing that D negl. did, the mechanism of injury is the T.I. factor.

13 January 59

Watson v. Kentucky and Indiana Bridge & R.R. Co.

What did the court say about liability? = The liability of the D is cut off by an intervening act whether negl. or criminal.

Quaere: What kind of intervening cause will cut off liability?? = (1.) Intentional (2) Negligent (3) Criminal (culpable) – all are intervening causes = The key

is the idea of whether the or a negl. or criminal act is foreseeable by the D. The majority of cts. refuse to do that (e.g., key in the ignition of the truck cases), and will cut off the D's liability. Yet, in the Bower Case, the ct. did not cut off liability.
Why do the cts. not apply foreseeability in the key in the ignition cases? = Is it foreseeable that the car will or might be stolen? = Yes. ⊛ The ct. said in the Bower Case that the guards should have protected the prop. of the P, and that it was foreseeable that it would be stolen by thieves (Intervening Cause)

The bulk of cases in wh/ crim. Intervening Acts do not cut off D's liab. are on D was supposed to be guarding against something ~~of~~ ~~the~~ and ~~the~~ crim. act brings out something else.

hypo:
Due to neg. of D's guard, thief steals something and takes it out and kills someone w/ the stolen chattel. D's nightwatchman is supposed to be guarding the goods. Curran: the liab. is placed on the party who is being paid to guard the prop.

⊛ HINES V. GARRETT, footnote, p. 502 of cbk. - why should the RR be held for such a vicious act? = It was foreseeable that some harm would come to her. We should note the close rel. between P and D RR. The RR owes a great du/care. They put P in that position wh existed and continued. This does not shock us, however, as a crime. It's happened before in this area.

As long as we can find a close rel., ∴ is a chance to find D liable. ⊛ On pure foreseeability, liab. could then be well established.

⊛ The bulk of the cts. will not find it on a pure foreseeable basis primarily because they use the words emptily and in a somewhat senseless way.

⊛ Independent, Subsequent and Intervening — In many courts, ∴ is the constant application of foreseeability for the cutting off of liability.

The bulk of the material thus far read favors the P and adheres to the Proximate Cause Theory. The opposing position still favors the P. Once the D gets into court, he will have a rough way to go.

⊛ Wallace v. Ludwig

Would this woman have contracted this fatal disease had she been healthy in the hospital? = No. a "But for" test: can it be said that "but for" the D's injury to P she would not have died from the disease? = We are given a cause effect + ∴ exists a causal rel. between the injury and the fatal condition. The majority of cts. hold D responsible for P's illness.

⊛ Squires v. Reynolds — found the D liable as a result of his (D's) negl. The D would be responsible for the subsequent injury of P.

Intervening causes – we find another human element which can be used.

⊛ The "But for" test is not a basic or legitimate test for prox. cause and not a basis for responsibility.

To solve the intervening malpractice of doctors is to use the Substantial Factor theory. The substan. factor is the best explanation.

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Quaere: What about the cause wh/ enlarges the injury? = e.g., Malpractice, etc. The cts. have allowed recovery in these cases.

hypo: D causes brain injury wh/ in turn causes insanity. Is D liable for all that will result from insanity? = Probably, yes. The D was the cause, and the effect of D's act was the insanity.

hypo: Would D be liable if the insane man were to commit a crime like murder? = No. This was an intervening crim. act. If the actor were found not to be insane, y would not be a better case for convicting D because the actor would be independent and self-motivated.

hypo: Insane man committed to asylum at age 20 and kills a man at the age of 45. — The courts would find it difficult if not impossible to convict D under these circumstances.

hypo: Insane man commits suicide. — It would be hard to get D on this because, normally, even an insane person is cognizant of his act and wills his own death. This would be sufi to cut off the responsibility of D.

BETTER RULE [The better way to test these cases is the "cause and effect."]

* The question of time — the immediacy of the act complained of — must be considered.

Diehl v. Fidelity Philadelphia Trust Co.

Here, P slipped on ice formed from steam escaping from the side of D's bldg. The steam is coming from another co. across the street and both have full knowledge. This deals w/ concurrent causes. This deals w/ distribution of liability.

CONCURRENT CAUSES

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***May Exam:**
(1.) Not responsible for comparative negl.
(2.) " " " govt. and charitable immunities.
(3.) Workmen's Compensation.

***Should be concerned w/:**
(1.) C.L. Defenses, e.g., Contrib. Negl.

***Methods:**
(1.) Write legibly
(2.) Attack a problem chronologically.
  (a.) Facts and ~~Issues~~ are complicated and require taking them as they come.
(3) Don't answer fact questions, but take both sides and say, "If the jury finds thus + so, then etc.", or "if the jury finds the other way, etc."
(4.) Recognize and raise the issues and apply them to the facts!

***Pittsburg Reduction Co. v. Horton**

In Hill v. Wilson (1949) 216 Ark. 179, (p. 525 of cbk.), the ct. explains the principal case by saying that the mother was actually misfeasant by taking the caps out of the closet and allowing the child to play w/ them. Further, the caps had found a safe resting place and that cut off the liability of the Co., esp. when ~~the~~ the mother acted w/ misfeasance by taking the ~~mother~~ caps out of their

safe resting place. This was the "Coming to Rest" Doctrine.

In re Guardian Casualty Co.

Here, we have an orig. wrongful act w/ intervening negl. and innocent causes. The majority opinion felt that the D could be held liable because D could have reasonably foreseen despite the fact that the accident had occurred minutes before. This act by the wrecking co. of taking the car out of the bldg. was not a shocking act that would sway the ct. to cut off liability. The "coming to rest" Doctrine of the Pittsburg Reduction Co. v. Horton case applies to coming to rest in a situation of apparent safety. In this principle case, there was a coming to rest, but not in a situation of apparent safety.

Foreseeable Plaintiffs and Palsgraf (p. 480)

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Ryan v. New York Central R. R. Co.

J/D because the ct. felt that despite the risk to many houses being burned as being foreseeable, public policy demands that the chain of causation be cut off somewhere. * y is a tendency on the part of courts to limit liability on the risk is

great and the dangers numerous. This is law only in New York re fires, and is clearly arbitrary.

(p.483) In re Arbitration Between Polemis & Furness, Withy & Co., Ltd.
The ct. here has rejected foreseeability and has applied the directness of result test. The ct. says that the particular result need not be foreseen, so long as some result is foreseen. If, however, no result is foreseen, it would be immaterial so long as the result was direct. If y was a direct result, it need not be that any result be foreseen. This brings to mind the case of Christianson v. Chicago, St. P., M. & O. Ry. Co. (p.475)

Cardozo, C.J. — Palsgraf v. Long Island R.R. Co. (p.224)
To merely show y was negl. would not be suf. There must be a relationship between the tortfeasor and the complaining party wh gives rise to a duty. Then y must be a breach of THAT duty. It will not suffice to show that B was injured as a result of a br/duty owed to A where no duty under the circumstances was owed to B. There is no theory of the transfer of negligence altho y is a transfer of intent.

Andrews, J. (dissenting) - y is a du/care owed to all the world. Therefore,

if ỿ is negligence and someone is injured thereby ỿ is liability on the ~~injured~~ negligent party.

*In other words, Andrews refutes the idea of a duty as to a specific party in re a certain negligent act.

*Three Factors in Proximate Cause: (Curran)

(1.) Rel. between the parties + any obligations.
(2.) Amt. of Culpability
(3.) Intervening events
 (a.) Human
 ~~[illegible]~~
 (1.) Act non-blameworthy
 (2.) Act is negl.
 (3.) Act is intentionally tortious or criminal
 (b.) Non-human

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*Reading matter on proximate cause:

Outside Reading

(1.) Prosser - Palsgraf Revisited - cited after case
(2.) Cowan - Riddle of the Palsgraf Case - cited after case.
(3.) F. James - Legal Cause - vol. II - at p. 1132
 60 Yale L.J. 761

Mental Disturbance (Negligent)

(p. 531) Mitchell v. Rochester Ry. Co.

Court here found that ỿ could be no recovery merely for fright and consequent illness occasioned by the negl. of another, on ỿ is no immediate personal injury. The

ct. argued public policy to the effect that to allow recovery would open the doors of the courts to false and fraudulent claims because proof of only mental disturbance is not easy and cannot be disproved easily.

Cohn v. Ansonia Realty Co.

The court allowed P to recover on the theory that when the fright results in an actual phy. injury the one causing thus proximately will be held liable. The D is bound to the foreseeability of some injury resulting from his negl. act.

Comstock v. Wilson

The ct. here enunciated the *Impact Rule: on y has been a physical impact, even though slight, accompanied by shock, y may be a recovery for the damages to health caused by the shock, even though that shock was the result produced by the impact and fright concurrently.

New York Rule - Phy. Impact

Thus, the New York rule has evolved to require some phy. impact in order to have recovery for mental distress.

Third Parties:

*Where y is a third party involved,

y may still be recovery:
(1.) Misuse of dead bodies - somewhat doubtful because the body is not a person. Relative recovers
(2.) Telegram sent wh is wrong and wh causes mental dis. Relative can recover.
(3.) Danger zone - relative can recover on, e.g., a child is injured w/in close physical proximity to the complaining relative.
This third party recovery is used in some states! But, generally this is still a developing phase of this area of mental disturbance.

PRE-NATAL INJURY

Woods v. Lancet (p. 551)

Recovery here was allowed. The courts generally hold that the baby must be separate and independent because otherwise they would have no rights. There are 13 states allowing recovery and only 8 not " ". In most of the cases permitting recovery the child was viable at the time of injury. However, in 212 Ga. 504, 93 S.E. 2d 727 (1956), it was held that a child born after a tortious injury at any time after conception could recover.

The obvious and marked trend in America today leaves no doubt que the law of the future will consistently allow recovery in these cases.

5 FEBRUARY 59

* DEFENSES *

[I.] * Contributory Negligence

(A) A complete defense
  (1.) The majority of states require the D to plead it as an aff. def.
  (2.) Some states require the P to allege his due care.
    (a.) It is a procedural device.

(B.) It is determined along the same test lines as negligence, and usually any contributory negl. will defeat the P's case even though the degree of P's negl. was comparatively far less than D's negl.

[II.] * Assumption of Risk

(p.557) * Hunn v. Windsor Hotel Co.

The P was a guest in the hotel and knew of the risk involved by walking down the newly retread stairs.

The Ct. held that P was fully aware of the risk of some danger but proceeded.

A/R — has as its gravemen ventureousness.

C/N = Carelessness.

* The doctrine rests on two premises:
  (1) That the nature and extent of the risk are fully appreciated; and
  (2.) That it is voluntarily incurred.

Definition of the Voluntary Element

*Where a person has knowledge of and fully appreciates A danger, and under such circumstances, w/o any special exigency compelling him, he exposes himself to such danger or peril, his act in the premises may be deemed to have been voluntary.

*Ridgway v. Yenney p. 568
The ct. here found that the Ps did not assume the risk by not leaving the car due to the reckless driving of the decedent. There was a snowstorm and they were out on a lonely highway. The question involved was whether the Ps' acts of remaining in the car were really voluntary.

Voluntary Element

If the cont'd exposure to a known risk ~~[illegible]~~ of injury is due to a lack of reasonable opportunity to escape after the danger is appreciated, or if continuance of exposure to the danger is the result of influence, circumstances, or surroundings, wh are a real inducement to continue, the doctrine does not apply, since the exposure is not in a true sense voluntary.

*If is is an alternative, it must be less risky than the known risk, and

325/419 (1950)

it must not be too inconvenient.

Shanney v. Boston Madison Square Garden Corp. (1936) - Ct. held that P did not assume the risk because she did not know the nature of hockey and could not therefore have known of nor appreciated the risk of being hit by a flying puck.

325 Mass. 419 (1950) - P (woman) attending baseball game and was sitting in a box and was hit by a baseball. Ct. held that P had assumed the risk because she knew of the nature of baseball and it was common knowledge that baseballs fly into the grandstand w/ a good degree of frequency.

Norwood Arena Case - (Mass.) - P had been to this race track 4 times before and knew fully of the sport. A crash occurred on the track and a wheel hurdled a 50 ft. fence and hit P and killed her. Husband sued. Ct. held that there was no A/R because it was not to be expected that a wheel would fly off over a 50 ft. fence, nor was it a matter of common knowledge that such things happen.

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hypo: Old lady sees next door neighbor driving car on several occassions, and she erroneously thinks he drives recklessly. One day she accepts an offer of a ride downtown. His wife is y. She gets in thinking that he drives recklessly even though, as a matter of fact, he only drove 30 M.P.H. There is an accident. - The question is whether to view this objectively or subjectively? = No A/R if viewed objectively because as a matter of fact y was no risk to be appreciated. However, P, (old lady), being a guest, would have to show recklessness to recover. (See Reynolds v. Sullivan, 330 Mass. 549, 116 N.E. 2d 128 (1953).

Rey. v. Sull.
330/549
116 N.E. 2d. 125 (1953

Intervening Events:

1. No human cause
2. Cause attributable to P
3. Cause attributable to a third party.

[III.] ***LAST CLEAR CHANCE***

Davies v. Mann p. 591

ct. held that although y may have been negl. on le part of le P, yet unless he might, by the exercise of ord. care, have avoided the consequences of the D's negl., he is entitled to recover; if by ord. care he might have avoided them, he is the author of his own wrong.

Hamlin v. Roundy p. 593

Elements of L.C.C.

* To warrant the submission of this issue, it must be evid. from wh the jury might find the following facts:
  1. That the one to be charged w/ liab. was actually aware of the other's presence.
  2. That he was actually aware that the other was either ignorant of the peril or unable to extricate himself from it.
  3. That, after discovery of the situation, due care required and time afforded an opportunity for saving action.

Mass. applies L.C.C. through the language of proximate cause.

It is often said that L.C.C. is used to avoid the severity of the C.N. rule. Actually, on proper L.C.C. eliminates C.N. It is either all L.C.C. or all C.N.

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12 FEBRUARY 59

Measure of Damages in Actions for Personal Injuries (p. 632)

Damage in any case will not exceed the amount demanded in the complaint.

The Jury assesses damages basically according to ~~their~~ its own reasonable scale and commensurate w/ the applicable rule or yardstick of the jurisdiction.

Functions of Judge and Jury in Damages:

We are concerned here w/ only Compensatory Damages.

Recovery is usually allowed for:
(1.) Physical Suffering
(2.) Mental Anguish
(3.) Temporary Impairment of working Capacity
(4.) Medical Expenses
(5.) Permanent Impairment of Working Capacity

[Note: Policy Issues:
(1.) If you are neg. and are responsible for the injuries, you will pay for all injuries whether or not they could have been foreseen.
(2.) Any injury occurring after the initial injury wh. is due to the orig. " by D, will be covered by damages assessed on the basis of the neg. of the tortfeasor.]

Where ɏ are special damages (e.g., liquidated amounts such as doctor's bills, nursing expenses), the specific amt. is already decided for the Jury. But, the Judge never suggests a limit nor an amt. and the Jury merely sits down and decides, in the view of reas. men and matters generally known, and assesses General Damages.

After the damages are decided, the Judge has only the power to decide whether the damages are arbitrary and excessive. This is done by comparing the damages assessed w/ what he has estab. for himself to be a minimum and a maximum. But, he

In order to avoid new trials in such cases, trial courts frequently in cases of excessive verdicts grant a motion for a new trial unless the P agrees to accept a lesser amt. Such an order is called a Remittitur.

Where the verdict is inadequate the trial judge sometimes grants a motion for a new trial unless the D will agree to pay a larger sum fixed by the Ct. Such an order is called an Additur. The latter's constitutionality is hotly disputed.

will never let the jury know before hand what the limits are that he has set for a personal yardstick.

General Damages always include pain and suffering.

Included in the Judge's power of discretion re the acceptance of the assessment are the Additur and the Remittitur.

13 FEBRUARY 59

Survival and Wrongful Death

*Under the C.L., there are no provisions for the survival of torts nor for recovery for a wrongful death. Therefore, all of this area is Statutory.

Survival Statutes All States have Survival Statutes, but most specifically state which actions do survive. In Mass., Ch. 228 G.L., sec. 1 governs this matter.

Usually, actions of Defamation, Malicious Prosecution, and (if recognized) the right of privacy. These involve generally matters dealing w/ the reputation or very private and personal matters.

These relate to the death of either party.

Mass. G.L. Ch. 229, Sec. 5A – Action for death on tortfeasor dies first: the death of the " is immaterial

Death Statutes

The majority of States have the Death Stat. styled after Lord Campbell's Act.

TYPES:

[A.] Lord Campbell's Act:

(1.) The measure of damages is the amt. of loss to the beneficiaries.

(2.) It is a new c/a accruing at the death, not to the decedent, but to the beneficiaries.

(3.) The theory is that the loss is not to the decedent himself, but the loss is to the beneficiaries. This would be measured according to the estimated amount of money the decedent would have earned and been worth had he lived the life span of the actuarial estimate. Therefore, the no. of children would have no bearing on the amt. of the recovery. There would be a lump sum recovery.

States vary in their theory of recovery and the beneficiaries who may benefit.

[B.] Death Recovery to Estate —
This goes to the estate based on financial loss just as Lord Campbell's Act. But, it goes to the estate, not to beneficiaries. This is used by New York. This is another type of death act used by some states. Under this type, the recovery would be subject to creditors of the estate because the recovery is a part of the estate. Under the Lord Campbell's Act type, creditors cannot reach the recovery.

[C.] Survivorship Type —
Based on the financial loss of the decedent. Can be brought by the beneficiaries only on the decedent could have brought it himself had he lived. Conn. follows this, but y is difficulty involved because of the requirement that of have been conscious pain and suffering.

[D.] Punitive Type — Mass. + Alabama. The recovery depends on the degree of culpability of the D. There can be no recovery less than

A new c/a accrues at death.

\$2000.00 nor more than \$20,000.00.
Most states impose some sort of limit.
This Punitive type goes to the beneficiaries per the scheme of intestate succession.

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17 FEBRUARY 59

DEATH STATS. (CONT'D)
A. Effect of C.N.

[I.] Would C.N. on the part of the deceased bar a recovery by a beneficiary under a death act? = see I below

[II.] Would C.N. of a beneficiary bar his recovery under a death act? = see II below

[I.] Under the Ala. and Mass. statutes, the measure is by the culpability of the D regardless of the negl. of the deceased.
Under Lord Campbell type, the negl. of the deceased would be a bar to a subsequent suit by a beneficiary.
Under the Survival type of death act, clearly the negl. of the deceased would be a bar.

[II.] Under Mass. and Ala. type stats. if a beneficiary were negl. the suit would not be barred as to other beneficiaries who could collect but the negl. bene. would be barred.
Under Lord Campbells

Act type of stat., the negl. bene. would be barred, but the action per se would not be barred.

Under Estate type of statute, the negl. of the bene. does not bar the recovery. The C.N. of the deceased would bar the action.

The other beneficiaries could bring a suit to bar the negl. bene. on the grounds of unjust enrichment.

Under the Lord Campbell's Act type, the C.N. of the deceased bars the suit because the C.N. of the deceased made the death not wrongful, and these statutes are for wrongful death.

B. Would the S/Ls have any effect on the right to maintain the action?

[I.] Under the survivorship type of stat., the S/Ls would bar the action by the beneficiaries because it is the same c/a.

GENERAL RULE OF LAW

[II.] On the death of the deceased starts a new c/a in the beneficiaries, the S/L would not be a bar.

A problem arises under the

Conn. style statute. Normally, there is nothing a bene. can do!

[III.] [Mass. says that any recovery under the death act must be brough w/in ~~two~~ years of the date of injury. The injured must die w/in that time to have a recovery under the death act. If death occurs w/in the two years, two more years are allowed in wh to bring the action from the date of death. If by automobile accident + death occurs w/in the two years, you have one year from date of death in wh to sue under the death statute.

C. What about the effect of a Release?=

[I.] Under the Lord Campbell's Type, the majority holds it would be a bar. But, a strong and "better reasoned" minority holds that a release would not be a bar.

[II.] Under Mass. and Ala. type a release would not be a bar because this type of statute is punitive and works on the negl. D.

D. Could a judg. by the deceased bar the action ??=

E. Could a covenant not to sue between deceased and the tortfeasor bar the action ?? = Regardless of the type of death stat., this would not be a bar.

F. Could a settlement between the deceased and the tortfeasor bar recovery?

19 FEBRUARY 59

Heath v. United States (p. 654)
U.S.D.C. N.D. Ala. 1949

227 F.2d 385 (1955)

Alabama, like Mass., has a stat. re tortious death which gave, in addition to compensatory damages, punitive damages. But, is can be no punitive damages against the sovereign unless the sovereign consents. Since the case arose under the Ala. stat. and it had no application here, the fed. stat. re the type and extent of damages governed.

The damages, held the Ct., recoverable by P in this

case must be measured by the pecuniary loss wh the evidence shows was sustained by the persons for whose benefit this action was brought.

Damages recoverable are based on the pecuniary loss to the surviving beneficiaries under this type of statute.

The ct. here allowed P recovery of $1.00.

The law in this area is pretty much statutory and varies to some degree according to the State.

Williams v. McDowell (p.665)

RECOVERY FOR loss of INTANGIBLES

A parent may enjoy the comfort and society of a child after its minority, and even after its marriage; and ∃ is nothing in the law wh will limit the consideration by the jury to the period of minority only.

Loss of comfort, protection and society is a proper element of injury and is by no means to be classed as compensable by merely nominal damages. So, the ct. allowed the P (daughter) to recover $2,000.00 for the death of her mother. P = 13 years old.

876
917

* STRICT LIABILITY *

Rylands v. Fletcher (p. 687)

The ct. required two things:
(1.) Escape
(2.) Non-natural use of the land.
There could be no strict liab. w/o showing those elements.

The Texas Ct. later rejected the doctrine of Rylands saying that non-natural use of the land should not be the basis of strict liab. Only a few states — primarily in New England — have adopted the rule of Rylands v. Fletcher. The majority rule in ~~many~~ America is the "ultrahazardous activities" rule. Rest. of torts adopts the Ultrahazardous Activities Rule.

The majority Amer. Rule rejects Rylands, and sec. 519 of the Rest. of Torts states the rule: barring ultrahazardous activity carried on in pursuance of a public duty, contributing actions of third persons, animals and forces of nature, participants in ultrahazardous activities, and contributory negl., one who carries on an ultrahazardous activity is liable to another whose person, land or chattels the actor should recognize as likely to be harmed by the unpreventable miscarriage of the activity for harm resulting thereto from that which makes the activity ultrahazardous, although the utmost care is exer. to prevent the harm.

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Snow and Ice Cases —
No responsibility to sweep snow and ice off of sidewalks even on there is a statute, unless the snow and ice accumulation are unnatural.

(p. 695) **Read v. Lyons and Co., Ltd.**

The Ultrahazardous Activities Rule is not applied in England. Y is still applied the rule of the natural Use of the Land.

Hypo: Blaster knows the potential of dynamite sticks through experience. But, the mfgr. of the dynamite has negl. put more powder in the sticks than he had marked the sticks for. The blaster is not negl. A bigger blast than anticipated occurs and X is hurt. — The blaster would still be liable under the theory of strict liability. (Ultrahazardous Activities)

(p. 723) **FOSTER v. PRESTON Mill Co.**

Blasting operations by Δ caused mother mink to eat the mink kittens owned by P. The ct. here cut off liability because

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Arguments for Strict Liability:

(1.) Spreads the risks - thru insurance.
(2.) Inefficiency of civil tort litigations:
(a.) Lawyers
(i.) fees
(b.) Juries
(c.) Dockets (crowded)
(3.) Demands for more adequate medical programs - easier to accomplish than in negl. cases.

An activity is ultra-hazardous if it: (a) necessarily involves a risk of serious harm to the person, land or chattels of others which cannot be eliminated by the exer. of the utmost care, and (b.) is not a matter of common usage.

* NUISANCE *

This must be a substantial interference,

when the alleged nuisance would const. a private wrong by injuring prop. or health, or creating personal inconvenience and annoyance for wh/ an action might be maintained in favor of a person injured, it is none the less actionable because the wrong is committed in a manner and under circumstances which would render the guilty party liable to indictment for a common nuisance. The possible numerousness of people affected is not the factor determinative of it being a PUBLIC nuisance. A public nuisance is an invasion only of the rights of the public at large.

Caveat

and it must be objectively defined. The test does not relate to the peculiar sensitivities of individuals.

This is a tort or public author. can become much involved.

In Mass., it is called a Common Nuisance. A public official can take direct action to abate the nuisance or it is a public or common nuisance.

Rule of Law and Test

Before public nuisance can be properly brought, it must be that the party complaining had a right of abatement in a Ct. of equity.

Hampton v. N.C. Pulp Co. p. 739 of cbk. - the personal right here: security of an estab. bus.

Dixon v. N.Y. Trap Rock Corp. - discomfort and inconvenience caused by the disturbance of the prop. are valid grounds of recovery in an action for a Nuisance. - Page 748

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Everett v. Paschall p. 753

P brought this suit to enjoin D from operating a tuberculosis sanitarium on adjoining property because P felt it would make his prop. less salable.

The ct. found that the sanitarium was a nuisance per se because the sensitivities of dwellers and prospective buyers are such that they would feel constrained to not live in that

A person who suffers no special or peculiar damage from a public nuisance cannot maintain an action to recover damages. There are many exceptions to this rule, however.

It is uniformly held that a private individual P.S.— has no action for a purely public nuisance unless his damage is in some way to be distinguished from that sustained by other members of the general public.

neighborhood because of their fears. The fact that the fears may be ungrounded is immaterial here.

(p. 755) Amphitheaters, Inc. v. Portland Meadows

Public Nuisances: the major. of cts. have said that the damage suffered by the private indiv must differ in kind, rather than in degree, from that suffered by the gen. public. A strong min. of cts. have said it is enuf that P has sustained damage materially greater than that of the ord. person entitled to exer. the same public right. (e.g., Hampton v. N.C. Pulp Co.). Usually distinguished by a peculiarly personal pecuniary loss.

P seeks damages from D due to D's brilliant race track flood lights reflecting on P's outdoor movie screen and causing dimmed pictures.

The ct. held that a man cannot increase the liabilities of his neighbor by applying his own property to special uses, whether for biz or pleasure. This is so even only is an intentional invasion.

* There is no Jury in a ct. of Equity.

* OWNERS AND OCCUPIERS OF LAND *

[I.] OUTSIDE OF THE PREMISES

(p. 779) Hay v. Norwalk Lodge No. 730, B.P.O.E.

Only a duty of ordinary care is owed to persons outside of the prop in re something on the prop. * The only distinction is between the natural and the unnatural conditions.

Duty of Care

It is therefore concluded that, altho' there is no duty imposed upon the owner of prop. abutting a rural highway to inspect growing trees adjacent thereto to ascertain defects wh may result in injury to a traveler on the highway, an owner having KNOWLEDGE of a patently defective cond. of a tree wh may result in injury to a traveler on a highway must exer. reas. care to prevent harm from the falling of such tree or its branches on a person lawfully using the highway. The same is true on le danger is apparent but nothing to correct it is done. Greater no. of cases have held no duty to inspect here.

196/431 - Miles v. Janvrin
233/391 - Bergeron v. Forrest
Cutter v. Hamlen
147/471

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[II.] * LESSOR AND LESSEE *

Obligation to Repair at Common Law

The common law does not impose an implied obligation to repair on the lessor.

Ames v. Brandvold (p. 834)

The general rule is that y is no liab. upon LL, either to the T or to others entering the land, for defective conds. existing at the time of the lease.
Exception: the LL or lessor must disclose concealed dangerous conds. existing at the time of transfer of poss., of wh he has knowledge.

Here the lessor was definitely guilty of misfeasance in the construction of the outhouse over an abandoned well in violation of a city ordinance. Here, the P won due to the failure of the landlord to notify ~~him~~ the lessee of the concealed defect of wh the landlord (lessor) had full knowledge.

CONCEALED DEFECTS Known to the LL:

sec 358 Rest. of Torts

If y is a concealed danger on the premises, known to the landlord and unknown to the tenant at the time of the lease, the LL is liable to the tenant or to his licensees, who may w/o neg. be injured thereby, though the LL does not covenant to make repairs.

Mass. View

Bergenson v. Forrest 233/391 =
If a LL gratuitously makes repairs, even on y is mis-

feasance, the LL is liable only to the one to whom he makes the promise (lessee), and then only for gross negligence.

Unknown Concealed Defects

On y are hidden defects unknown to both lessor and lessee, the lessee takes at his risk. Caveat emptor — let the buyer beware.

Extent of the Common Law Obligation to Repair

* At C.L., the only obligation on the LL is to maintain the premises at the same level of condition as existed at the time of the lease.

Obvious Defects

On y is no agreement by the LL to repair the demised premises, and he is not guilty of any fraud or concealment as to their safe condition, and the defects in the premises are not secret, but obvious, the tenant takes the risk of their safe occupancy, and the LL is not liable to him, or to any person entering under his title or by his invitation, for injuries sustained by reason of their unsafe condition.

Agreement to Repair

On y is an express agreement by the LL to repair, he is liable for injuries caused to the T or his

licensee by reason of a defective condition of the demised premises.

"Hold Harmless" Clauses

The "hold harmless clause" has been held illegal by statutes in Mass. as against public policy. This clause was in the nature of an exoneration clause, and in effect said that T would hold the LL harmless for any tort wh might occur by reason of the tenancy. It was complete exoneration from liability for LL. It is held void in about ½ of the states. However, if the clause was in a lease before the "hold harmless" clause was ruled void as against public policy, it will be deemed good and valid. The statutes are not retroactive. Furthermore, the clause will last as long as the lease, even if the lease is continuously renewed.

Nuisances - on le LL demises premises w/ a nuisance upon them, he is presumed to authorize its continuance, and is liable to third persons subsequently injured thereby.

Miles v. Janvrin 196 Mass 431 (1907)
(Landlord and Tenant)

*On a LL agrees w/ his T either to make specific repairs, or generally, to make such repairs as may be needed from time to time upon the pre-

nises, as the premises of the T, and then negl. fails to repair after notice from the T, he is not liable in tort for an injury rec'd. by the T and due to the want of repair of wh he was notified.

*On a LL agrees w/ his T to maintain the premises, the use of wh is let, in such a cond. que they will be safe for the T and those claiming under him to use them, + to relieve the T from any duty to provide for their safety or to notify the LL of their want of repair, the LL is liable in tort to the T or any one claiming under him for an injury wh is due to a want of repair of such premises.

*While a LL, who lets premises in a cond so unrepaired that they are a nuisance and agrees to keep them in repair, is liable in tort to any person other than the T who is injured because of such cond. on the ground that by the letting he has authorized the maintenance of the nuisance, he is not in such case liable in tort to the Tenant.

*Cutter v. Hamlen, 147 Mass. 471 (1888).

*At the trial of an action for deceit, was evid tending to show that the lessor knew that the child of a former T had died of diptheria in the house, wh subsequently was fumigated by and made satisfactory to the board of health; that he (lessor)

knew the drains to be in bad cond, as to wh he misled the lessee by specific statements; and that the lessee did not know que y had been diptheria in the house. There was also uncontradicted evid. that the lessee was warned at the time of the letting that the lessor was old, forgetful, and incapable, and that he was to deal only w/ the lessor's agent, as well as evid. wh, it was contended, showed lack of due care on the part of the lessee. HELD, that there was evid. for the jury that the lessor knew or ought to have known that there was special danger of infection from the drains, wh he was bound to disclose to the lessee, and which he was not warranted in assuming to be removed by the doings of the board of health; and that the question of the lessee's C.N. was also for the jury.

Evidence of the cond. of the drains, when they were repaired seven months after the lessee took poss., coupled w/ evid. of what had been done in the meantime, was HELD admissable to show their cond. at the time the lease was made.

[III.] Trespassing Adults

Lary v. Cleve., Cols., Cincy + Indianapolis R.R. Co. (p. 787)

P's intestate, during rainstorm, trespassed upon D's land and took refuge under old "abandoned" bldg. thereon. Severe and sudden wind blast blew portion of rotted roof onto P's intestate. The ct. held, there could be no negl. on the part of the appellee, D of wh the appellant P could be heard to complain, unless at the time of the injury, the appellee D was under some obligation or duty to him to repair its freight house. Actionable negl. exists only on le one whose act causes or occasions the injury owes to the injured person a duty, created either by K, or by operation of law, wh he has failed to discharge. P was a trespasser, and as such he entered upon the appellee's premises, taking the risks of all the mere omissions of the D-appellee as to the cond. of the grounds and bldgs thus invaded w/o leave. Under such circumstances, the law says to him who intrudes into such a place, that he must proceed at his own risk.

Hanks v. Great Northern Ry. Co. (p. 790)

P's intestate was run over and killed by one of D's trains on a winter evening while he was walking along the track between two small country towns. J/P, D appealed after its motion for N.O.V. was denied. Held, P's intestate was a trespasser even though the

tracks were frequently used by foot travelers.

The absence of all benefit to the railroads and the continual presence of danger both to those so trespassing and to the passengers and prop. of the railroads prevents and forbids the inference of implied consent, and we think (said the court) P's intestate was so clearly a trespasser that the court, under its view of the law as expressed in the charge, should have ~~been~~ ordered judgment for D.

No invitation can be implied for mere use; that the invitation must be expressed, or evidenced by such a physical cond. of the premises, created or permitted to exist by the D, as amounts to an assurance to the public that they are invited to enter and travel; that the mere passive or silent sufferance and neglect to eject trespassers or post notices is not enough to estab. an invitation. So, J/P/R. (Accord: Rest. of Torts, sec. 333.)

As in the case of dangerous conds. on the land, exception has been made, and a duty to exercise reas. care to discover the trespasser imposed, on y is frequent trespass on a limited area,

as in the case of a path crossing a railway track, or a short-cut between city streets. (see note, p. 793)

Frederick v. Philadelphia Rapid Transit Co. (p. 793)

Unless and until the property owner, or the operator of the instrumentality involved, becomes apprised of his presence, no duty in regard to the trespasser's safety arises, but when the owner or operator is put on guard as to the presence of the trespasser, the latter immediately acquires the right to proper protection under the circumstances. What const. notice depends on the facts in each instance.

P not actually tres., but duty toward him was no greater than if he were, as his appearance was not to be anticipated.

The du/care to avoid injury to trespasser arises even on circumstances are such that likely presence of tres. is foreseeable.

The legal obligation to tres. has been traditionally stated to be the avoidance of wanton negl. It is wanton negl. to fail to use ord. and reas. care to avoid injury to trespasser after his presence has been ascertained.

Whether train operators were put on notice that a person was underneath train was for the jury, thereby rendering erroneous the granting of D's motion N.O.V.

[IV.] Trespassing Children: Attractive Nuisance Doctrine

Keefe v. Milwaukee and St. Paul Ry. Co. (p. 798)

When an owner or occupier of land sets before young children a temptation wh. it has reason to believe will lead them into danger, it must use ord. care to protect them from harm. What would be proper care = jury question.

An owner or occupant is bound to keep his premises in a safe and suitable cond. for those who come upon or pass over them, using due care, if he has held out any inducement, invitation, or allurement, either express or implied, by wh they have been led to enter thereon.

The child would not be a tres. per se because D has induced the child's entrance upon the land.

Weber v. St. Anthony Falls Water Power Co. (p. 804)

The possessor of the premises is subject to liability to children who after entering the land are attracted into dangerous intermeddling by such a cond. maintained by him although they were ignorant of its existence until after they had entered the land, if he knows or should know that

the place is one upon wh children are likely to trespass and that the cond. is one w/ which they are likely to meddle. (note: Gimmestad v. Rose Bros. Co., p. 804).

Rest. of Torts, sec. 339:

A possessor of land is subject to liability for bodily harm to young children trespassing thereon caused by a structure or other artificial condition wh he maintains upon the land, if

(a.) the place on he cond. is kept is one wh the poss. knows or should know that such children are likely to tres; and

(b.) the cond. is one of wh the poss. knows or should know and wh he realizes or should realize as involving an unreasonable risk of ~~harm~~ death or serious bodily harm to such children, and

(c.) the children because of their youth do not discover the cond. or realize the risk involved in intermeddling in it or in coming w/in the area made dangerous by it, and

(d.) the utility to the possessor of maintaining the cond. is slight as compared to the risk to young children involved therein.

[V.] LICENSEES

Newman v. Fox West Coast Theatres

Generally, a licensee is obligated to accept the premises as found upon entrance. However, admitting that an

READ 56 H.L.R. 72 (Seavey)

Assignment:
(1) Tort + K - 856, 859, 865, 872, 877 + read notes carefully.
(2) 3rd Party Liability - notes 884 + 885, 886, 891, 893, 898, 900, 903, 906, 918

owner or occupier need only use ord. care, a licensee may recover for active negl. or an overt act of negl. as distinguished from passive negl. "Active negl.," w/in the rule authorizing a licensee to to recover for active negl. as distinguished from passive negl., is a dereliction of duty.

The occupant of a bldg. must compensate for bodily injuries caused to a gratuitous licensee by either a natural or artificial cond. if such occupant knows of it and realizes that it is an unreasonable risk to visitor in bldg. and has reason to suspect that the visitor will not discover the cond. or realize the danger.

Wolfson v. Chelist (p. 812)

What is the land occupier - host's duty to his social guest? = The same as his duty to an ordinary licensee. See p. 817, notes, for Auto Guests.

[VI.] INVITEES

Wood v. Prudential Ins. Co. (p. 847) On premises are leased for a public or semi-public purpose, + on, at the time of making the lease, conds. exist on the premises wh render them unfit for the

(See notes, pp. 817 and 818.) The Rest. of Torts uses the words "biz visitor" instead of invitee, and defines it:

"A biz visitor is a person who is invited or permitted to enter or remain on land

intended purpose or const. a nuisance, the landowner being cognizant thereof, an innocent third person rightly on the premises at the invitation of the T, who suffers injuries because thereof, and is not himself guilty of C.N., may recover damages from the owner.

in the poss. of another for a purpose directly or indirectly connected w/ biz dealing between them."

Those who enter premises upon biz which concerns the occupier are called "invitees."

Campbell v. Weathers (p. 819)

An invitee is one who is either expressly or impliedly invited onto the premises of another in connection w/ the biz carried on by that other. If one goes into a store w/ a view of then, or at some other time, doing some biz w/ the store, he is an invitee.

Cullings v. Goetz (p. 836) - *generally, covenant by lessor to repair does not impose upon lessor liability in tort to persons lawfully on premises at lessee's invitation.

*Occupation + control of leased premises, so as to render lessor liable in tort, are not reserved thru agreement to repair.

*Lessors of garage, notwithstanding covenant to repair, HELD not liable in tort to invitee injured by sliding door; remedy, if any, being against lessee.

Also, the following are deemed to be invitees:

(1.) Children w/ parents in stores or other places of biz, generally.
(2.) Adults accompanying customers.
(3.) Friends meeting or seeing off passengers at carrier station.
(4.) Salesman drumming up trade, or a workman seeking employment, if he comes to an office held open for the purpose.

*A canvasser at a private home is only a licensee.

Lerman Bros. v. Lewis (p. 825)

The ct. HELD that appellee — P was not an invitee but was a licensee, and that the classification defines the duty owed.

"Even tho' one is an invitee upon the premises of another, the duty of the owner of the premises to maintain the same in a safe condition applies only to that part of the premises that is appropriated by the owner as a place in wh his biz is conducted, and the necessary and proper part of said premises reas. to be used for biz purposes. The invitation, express or implied, to conduct biz upon the premises, is an invitation to use the premises in the ord. and usual manner in wh biz is conducted thereon, and it does not render the owner or occupant of the premises liable for negl. on le invitee is using a portion of the premises to wh the invitation has not been extended, either expressly or impliedly, and wh the occupant would not reasonably expect the invitee to use in connection w/ the conduct of biz on said premises.

Mulcrone v. Wagner (p. 830) = An owner or occupant of prop. subject to fire inspections is not liable for an injury sustained by a fireman, who entered the premises in the discharge of the duty from some defective condition of the premises. They do not enter in discharge of any private duty due from them to the occupant, but of a duty wh they owe to the public. In such circumstances, no duty rested upon the occupant to keep the prop. in a reas. safe condition.

Firemen are uniformly held to enter under a bare license, and to be entitled at most to disclosure of known defects.

Sinn v. Farmer's Deposit Savings Bank (p. 829)

When a person invites another to his place of biz, he assumes toward the invitee, certain duties, and if he negl. permits a danger of any kind to exist, wh results in

Dean v. Hershowitz (p. 838) — ou y is a precedent relationship (K), all that is necessary to furnish a basis for an action of negl. is that y be present the elements necessary to estab. such a c/a, and if that is so, that that relationship is one of K is no sound reason why the action should not lie. — Ord. rule as to T's assumption of risk from obvious defects in leased premises does not apply if LL agrees to make repairs.

injury to the person invited, w/o negl. on the latter's part, the invitor is answerable for the consequences of such injury.

What const. a danger would be a question of fact for the jury.

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TORT AND CONTRACT (p. 856)

(Relation Between the Actions)

Parties who might be involved:

1. O^or^ and O^ee^
2. 3rd party beneficiaries
3. 3rd person (injury to) — someone not involved in the K but injured as a result of a breach by one of the parties to the K.

This deals w/ the problems of remedy and damages. y are certain possibilities:

1. Recovery in K — w/ K damages
2. Recovery in K — w/ tort damages.
3. Recovery in Tort — w/ tort damages

*In #1, tort is irrelevant, and in #3, K is irrelevant.

(p. 856) Louisville and Nashville R.R. Co. v. Spinks

Gen. Rule: on K rel. exists, the parties assume toward each other no duties whatever beside those the K imposes. =

Here, L. and N. said that they would pay and provide for P's transportation from Atlanta to Cincy so that P could be interviewed in Cincy for work.

Two types of Negligence:
(1.) Nonfeasance
(2.) Misfeasance

Assuming the P performed his part of the agreement, the D's refusal to comply w/ its obligations thereunder was like any other breach of an ord. K involving no violation of a public duty or of a private duty resulting in any invasion of a vested right of the P in the premises.

Flint + Walling Mfg. Co. v. Beckett = (p. 859) - if a D may be held liable for the neglect of a duty imposed on him, independently of any K, by operation of law, a fortiori, ought he to be liable when he has come under an obligation to use care as the result of an undertaking founded on a consideration. TEST: whether br/K also const. negl.

P went to Cincy, but, due to a slight, temporary illness, was denied employment by D. P requested transportation back home but D (L.+N.) refused. P walked back to Atlanta and brought an action ex delicto for pain, weariness and blistered feet.

The Ct. reversed the J/P and denied recovery, saying that there was only a breach of K and nothing to give rise to an action in tort.

(1.) There can be no recovery in Tort for mere nonfeasance arising out of K.
(2.) There must be a C.L. obligation breached for tort dams.
(3.) A tort action might arise out of misfeasance or breach of a C.L. obligation.

Basis of Tort Recovery & Damages

The measure of dams. in tort liability is what it would take to return the complaining party to status quo. The dams. are not governed by what the parties foresee or contemplate, but by what injuries accrued because of and were occasioned by the wrong or by the br/K if tort dams are allowed. So in tort, there may be recovery for all

injuries occasioned to the injured party no matter whether the injuries were contemplated or not, or foreseeable or not.

Dams. in Contract — Basis of K Recovery - return to the statu quo based on what the parties could have reas. foreseen would result as a result of the br/K, i.e., profits of the K had it been performed.

Contracts With Physicians

What about doctors who make Ks w/ parties or families to attend them? = May be liable in K.

hypo: M.D. has K w/ Jones family. At 2 A.M., Junior gets sick. M.D. refuses to come. — The damages would be for br/K and would only be the difference, if any, between the cost of M.D. w/ K making the call and M.D. who came and treated Junior.

Measure of Damages for the Breach

hypo: If y is no K, the M.D. would not be liable in either K or tort. e.g., on one merely picks a name and calls.

hypo: M.D. has K, treats Jr. negl. — There could be recovery in either K or Tort, but the preference is

to sue in Tort due to the possibility of recovering greater damages for the misfeasance.

(p. 865) Edd v. Western Union Tele. Co.

Here, the P is a third party beneficiary to a K between the D and the addressor of the telegram.

So, here we have a tort case w/ K dams. being allowed.

Owners and Occupiers of Land (cont'd)

(VII.) VENDOR AND VENDEE

Caporaletti v. A-F Corp. (p. 849)

At C.L., the grantor of realty was not liable for dams. caused by any defect in construction of bldg. after he had parted w/ title to the realty.

House builder who defectively constructs a house is liable to purchaser, or any other invitee, for personal injuries sustained by purchaser or invitee if the defect wh causes the injury could not have been discovered on inspection by the ordinary man in the street and, in such cases, the builder must be charged w/ knowledge of his own negl.

(see p. 850 for Rest. of Torts, sec. 353 on vendor-vendee rels.)

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Edd v. W. U. Tele. Co. (cont'd)

Rule as to Measure of Damages

The true rule as to the measure of damages in this class of cases is the same, whether it be considered sounding in K or in tort: i.e., the P can recover only such dams. as could reas. have been anticipated would follow as a result of its wrongful act. The dams. must be the direct, natural and proximate result of D's negl. The "contemplation of parties rule" applies when the tort grows out of the K.

Basis of Addressee's Recovery

The majority of cts. wh have considered the question have held that the addressee's action must be regarded as "founded" on the K made by the sender, so that the K rule of dams. is to be applied. It means, among other things, que any limitation of liability in the sender's K will limit the addressee's recovery.

"Contemplation of Parties Rule"

Dams. for br/K are usually more restricted than in tort actions. Hadley v. Baxendale (1854) 9 Ex. 341, estab. the rule que, in K cases, the dams. must be Ltd. to those w/in the contemplation of the parties at the time the K was made.

Olwell v. Nye and Nissen Co. (p. 872)

This was an action on the theory of unjust enrichment. The tort involved was tres. to a chattel, to wit: the egg washing machine, title to wh P retained when he sold the biz and plant to D.

It is uniformly held that, in cases on the D tort feasor has benefited by his wrong, the P may elect to "waive the tort" and bring an action in assumpsit for restitution. Such an action arises out of a duty imposed by law devolving upon the D to repay an unjust and unmerited enrichment.

This is based on the C.L. common count of money had and rec'd to the use of the owner.

Election of Remedies

P-respondent here had an election of remedies. He chose rather to waive his right of action in tort & to sue in assumpsit on the implied K. Having so elected, he is entitled to the measure of restoration wh accompanies the remedy.

Greco v. S. S. Kresge Co. (p. 869)

for breaches of warr. either express or implied, if there is an injury to the P arising from the br/warr., there can be recovery in Tort. If the br/warr. is equated w/ br/K, however, there will be no recovery if there is only nonfeasance.

Issue

The question here is whether br/ of the implied warr. in a case such as this, on personal injury to the person to whom the warr. is made results from the br/ is tortious in nature and effect and is due to the wrongful act or neglect or default of the person making and breaching the warr./?

Holding

The ct. found that at times the same facts may warrant procedure ex contractu or ex delicto. At such times recovery is not conditioned on definition nor measured by a deter. of whether it is grounded in a violation of a duty owing to another, or in a br/Kual rel.

Violation of a duty owing to another is a wrongful act; br/K

244 F.2d 53
235 F.2d 893 (1956)

involving violation of duty may be likewise a wrongful act.

Though the action may be brought solely for the br/ of the implied warr., the br/ is a wrongful act, a default, and, in its essential nature, a tort.

However, an action for br/ warr. is essentially an action arising out of K.

Disclaimers of Implied Warranties

Specifically providing for the legality of disclaimers of implied warranties are sections of both the Un. Sales Act and the Un. Com. Code. So, the disclaimers are valid since they are specifically provided for. (Note: this was on last year's final examination.)

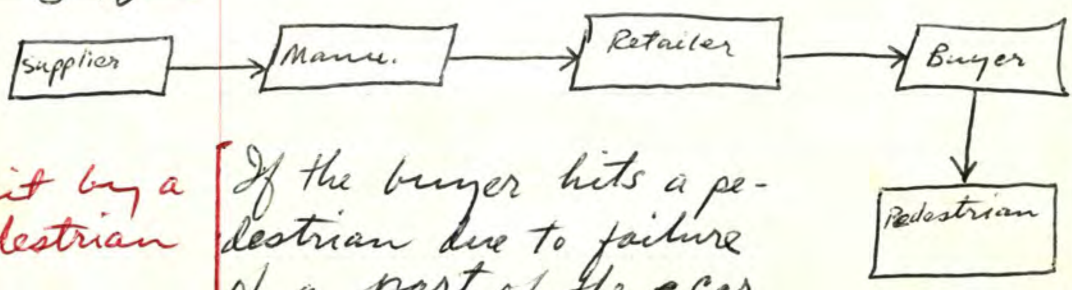
Hypo: A buys dented cans of goods and day-old bread! — There is still a warr. to the extent that the food will will not be "unfit" beyond what would be reas. expected.

19 MARCH 59

LIABILITY TO THIRD PARTIES

McPherson v. Buick Motor Co. (p. 886)

Cardozo, J.



Suit by a Pedestrian

[If the buyer hits a pedestrian due to failure of a part of the car wh is defective, the pedestrian would have to sue as P sued here, to wit, on theory of negligence. The pedestrian could not sue for br/warr because there was no privity of K between the ped. and the retailer.

If there is an express warr. (e.g., for 90 days) and the defect shows itself after the warr expires, there could be no recovery in br/warr (i.e., K) because the express warr. negates the existence of an implied warr. So, after the expiration of the express warr., there can be no recovery on nor allegation of an implied warr.

If the nature of a thing is such that it is reas. certain to place life and limb in peril when negl. made, it is then a thing of danger. If to the element of danger there is added knowledge that the thing will be used w/o new tests, then, irrespective of K, the manu. of this thing of danger is under a duty to make it carefully.

Retailer v. Supplier

[In some situations, it may be possible for the retailer to sue the supplier under the manufacturer's K as a third party beneficiary, and join the two as Ds.

Buyer v. Manufacturer

The same holds true as to the ~~re-tailer~~ buyer using the ~~manufactur-ale~~ retailer's K to sue the manufacturer, alleging validly a third party beneficiary K. (1.)

Rule of Law

*In any case, to sue for br/warr, y must be priority of K between the P and D.

Hypo: 90 day express warr. On the 92nd day, P is injured by defect in the car. If the defect is one wh could not have been detected upon reas. inspection by the retailer, manu. is liable. (2.)

Liability of a manufacturer for Parts used in his product (parts made by other manu.)

On a party - manufacturer brands the whole product w/ his brand name whereas a part of the whole product is made by another manufacturer and such part is defective and causes the P injury, the manufacturer will not be heard to say that someone else made the part. He will be estopped to allege non-liability due to another person having made the defective part. e.g., on G.M. just says it's a G.M. car, but as a matter of fact, some of the parts are made by XYZ Corp. (3.) (4.)

Liability of Manu. of Component Part of the Article Finally Sold

Spencer v. Madsen 142 F.2d 820 ('44)

(1.) The gen. rule is that a constructor, manufacturer or vendor of an article is not liable to third persons who have no K-ual rel. w/him for negl. in construction, manufacture or sale of such an article.

(2.) If nature of a thing manufactured is such that it is reas. certain to place life and limb in peril when negl. made, it is a thing of danger and its nature gives warning of consequences to be expected and if manu. knows that the thing will be used by persons other than purchaser w/o new tests, manu. is under a duty to make it carefully irrespective of K.

(3.) Not based on inherently dangerous here, but on principle that on a thing when put to uses for wh it is intended by manu., by reasons of defects known or wh could have been known by exer. of reas. care by manu., is dangerous to life and limb, manu. is liable to third parties.

(4.) The principle that manu. or seller of an article is liable for injuries due to defects therein if nature of thing is such that it is reas. certain to place persons in peril when negl. made applies to dams. to prop. ~~as~~ well as to personal injuries.

See Rest. of Torts. secs. 395 & 396.

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Misrepresentation
923 – 926
Cases
927, 931, 934, 983, 985
991, 994, 998, 947, 944,
964.

Even when the retailer has a duty to inspect, the manu. and the retailer will and can be held jointly and severally liable. The intervening factor of retailer's negl. will not cut off the liab. of the manu. on the manu. could have reas. foreseen that the intervening cause was w/in the risk.

(p. 893) Hentschel v. Baby Bathinette Corp.

General Rule of Law

The general rule is that when the manu. of an article sells it ready for use and when used in the way the manu. intended to have it used it is an inherently dangerous instrumentality, the danger being unknown to the purchaser and not being patent upon reas. inspection and not being disclosed to him, the manu. is liable to one who is personally injured while using it in the usual and intended manner.

This case differs from the McPherson v. Buick Motor Co. Case in that here (Hentschel) we are faced w/ an attempt to prove

Hyatt
106 F. Supp. 676 (1952)

301 N.Y. 468
Campo v. Scofield

negl. in the design of the article, whereas in McPherson y is an attempt to prove negl. in the construction of the article.
See Hyatt v. ______ 106 F.Supp. 676 ('52) and 216 F.2d 404 (1954) - here, G.M. was sued for defective design and constr. of a drum under the bus of the Bus Co. wh drum caused the Bus to wreck and kill 9 passengers. Although y were no other companies manufacturing busses to wh D's design could be compared. But, the ct. recognized that D had used the same type of drum on a line of trucks, and, upon notice of defects therein, D had changed the design of the drum. But, D had not changed the design of the drum used on the busses. D was held liable.

These cases often arise in the area of highly inflammable clothing, and pork is another source of litigation.

Campo v. Scofield 301 N.Y. 468
Ct. held y is no duty to warn against obvious defects and obvious risks. This is an indication of the cutting off of liability of the manufacturers. Here, P purchased a buzz saw w/o a guard rail.

Damage to Property due to Defect therein

[There are cases wh say that for damage to prop. only due to defect in that piece of prop. (e.g., automobile) y is no recovery. This is so in warranty, too.

2 April 59

Misrepresentation

[I.] *Concealment and Non-Disclosure*

Swinton v. Whitinsville Savings Bank (p. 927)

There is no liability for bare nondisclosure absent a special rel. between the parties wh gives rise to a duty to disclose.

P alleges D misrep. the cond. of the house to P and knew that y were termites; that D fraudulently concealed the condition from P. Ct. held for D saying that the D did not prevent P from acquiring information. There was no peculiar duty to reveal. The parties were dealing at arm's length. The buyer of realty buys at his peril or y is no duty to disclose and mere nonfeasance is involved.

Loewer v. Harris (p. 934)

When one of the parties, pending negotiations for a K, has held out to the other the existence of a certain state of facts, material to the subject of the K, and knows that the other is acting upon the inducement of their existence, and, while they

A statement that a business made money during a previous year is not a representation that the business will profit the forthcoming year. This is a statement as to a changeable condition wh the buyer should have anticipated. But,

are pending, knows that a change has occurred, of wh the other party is ignorant, good faith and common honesty require him to correct the misapprehension wh he has created. It becomes his duty to make disclosure of the changed state of facts, because he has put the other party off his guard. (Rule of Law)

On parties negotiate for K and A makes a statement to B, if the truth of that statement changes between that time and the signing of the K, A has a duty to inform B of the change of facts which makes the orig. statement not fully true. So, on this duty to inform of the facts exists, by maintaining silence when you should **speak**, it is deceit.

Mass. says ~~that~~ most sales talk can be counted off as puffing. However, Mass. is almost alone here. The vast majority of the courts hold that certain types of puffing are actionable, esp. on the stmt. is one reas. to be expected to induce action as a result thereof. e.g., "This is a one-owner car."

[II] * OPINION *

Saxby v. Southern Land Co. (p. 983)

Rules of Law

A misrepresentation, the falsity of wh will afford ground for an action for damages, must be of an existing fact, and not mere expression of an opinion. The mere expression of an opinion, however strong and positive the language may be, is no fraud. Statements

wh are vague and indefinite in their nature and terms, or are merely loose, conjectural or exaggerated, go for nothing, though they may not be true; for a man is not justified in placing reliance upon them.

1.

2.

3.

1. T who leased premises in reliance on LL's agreemt. to replace floor of front porch might recover in tort from LL for her injuries resulting from breaking of floor board on porch, if LL failed to exer. due care & neither C.N. nor AR was shown.

2. Complaint, in T's action against LL for injuries alleging that parties had agreed to enter into written lease provided Ds made certain repairs, & que parties executed lease in reliance upon LL's agreement to repair, furnished suf. basis for admission of evid. that LL's agreement to repair was intended as a collateral and independent agreement, not merged in written lease.

3. Liab. for negl. for failure to use proper care may arise out of K rel. if circums. are such that party to K in performance of some act w/in scope of rel. is likely to injure other party or his property or rights unless he uses proper care.

① Legis. and Jud. hist. of c.159B, sec. 6, since 1950 ______ by act of ______, c ______; construed by ______ Mass. ______.

② c.128A, sec. 13A, since 1950 Amended by act of 1951, c. 777; construed by 322 Mass. 413; and 324 Mass. 309.

③ c.180, sec. 6 since 1950 Approved by Acts of 1952, c. 602 and of ______, c ______ by 327 Mass 694.

325/636