

1-1-1957

Torts II

Maynard Jackson

Follow this and additional works at: <https://archives.law.nccu.edu/jackson-notebooks>

Recommended Citation

Jackson, Maynard, "Torts II" (1957). *Maynard Jackson Notebooks*. 24.
<https://archives.law.nccu.edu/jackson-notebooks/24>

This Article is brought to you for free and open access by the Law School History and Archives at History and Scholarship Digital Archives. It has been accepted for inclusion in Maynard Jackson Notebooks by an authorized administrator of History and Scholarship Digital Archives. For more information, please contact jbeeker@nccu.edu.

BOSTON UNIVERSITY



Property of Maynard H. Jackson, Jr.

Class TORTS II

LAW RECORD

Boston University Law Supply Shop

"ANOTHER **MAPLE LEAF** PRODUCT"



Notes: 2-21-57

Next week: Res Ipsa Loquitur; pick up the case in the library. Only facts are given; draw your own conclusions.

Francis v. Fitzpatrick

Cabbie had the right of way but ~~the~~ X keeps coming at a very fast rate.

General rule: cabbie owes highest care to passenger in the circums. of the case.

Judge gave the rule but didn't give the chg. requested by P; duty of care owed to P was greater than the right of way. T/D/Reversed. As far as

highest degree of care owed by the com. carrier to the passenger.

common carriers are concerned, a higher than average duty of care is owed to the passenger.

Mass. is in accord with

Carson v. Boston Elev. Ry. Co.
309 Mass. 32 (1942)

This ruling. (see Carson case). But everytime someone accepts payment for trans doesn't make him a com. carrier & he only owes the reas. degree of care. ("I'll pay you \$100 to carry me to Canada"). A gratuitous guest must prove gross neg. to recover from the com. carrier.

Union Traction Co. of Ind. v. Berry (p. 183)

Held: a minority pt. of view.

Held that the highest degree of care is not owed; due care in the circums. of the case was held to be the standard. "In the circums./case" is the deciding factor & the degree of care will vary with the circums./case.

Note:

An obj st/care ~~is~~ imposed to the drunk man. An involuntarily
" " is held to the circums./case.

Grill v. Gen. Iron Screw Collier Co. (p. 184)

Comp. - plea (Ans.)

Replication -

Rejoinder - surrejoinder

rebuttal - surrebuttal.

P alleged goods were shipped on D's vessel under a bill of lading; that D caused the goods to be lost. D said it happened

" due to perils of the sea & cited an agreement containing the stipulation pleaded by D. P said

" did not apply because the loss was due to the neg of the D - the GROSS NEG. of the D. Eng. Ct. said it did not recog. degrees of neg and there is only one stan/care (orm in the cir/case). What kind of bailment was this? The kind of bailment will const. cir/case + vary the st/care. Maj. pt. of view

Altman v. Cronson (p. 186)

(Mass. in accord): degrees of care vary according to the type of bailment is concerned.

* How do you distinguish between slight, ord., & gross negligence?

(1) S.N. - failure to take a few less precautions than the O.P.M. would take.

(2) O.N. - failure to take less than the no. of precautions in S.N.

(3) G.N. - failure to take many fewer precautions than the O.P.M. would take.

Host guest (gratuitous passenger) Requires gross neg.:

(1) Not paying

(2) Friends usually + would invite

Moneketh v. Fitzroy

228 Mass. 487 (1917)

"Grt. guest must show
Gros. neg. to recover."

Collusion if proof of gros. neg. were
not required.

How do you prove gross
neg. in Grt. guest cases?

(32 B.M.L.Rev. 168)

*Allen (B.M.L.Rev.) gives the 9
situations where G.D. can be proved!

- (1) Speeding and skidding situation
- (2) Passing situation
- (3) Sleeping at the wheel sit.
- (4) Inimpeachment of reas. restraint
and persistence of palpable
conduct over a length of
time (speeding on icy road
after being told to slow down).
- (5) Inattention to driving
- (6) Intoxication sit.
- (7) Defective vehicle sit.
- (8) Unlicensed driver sit.
- (9) Running board sit. (or riding
somewhere on outside of vehicle
with driver's permission).

Usually more than one factor
is proved when recovery is
granted. However, one factor
may swing the case and per-
mit recovery.

Wells v. Caldwell 120 N.E. 2d. 280 (Mass.) (P)

D had allowed a boy to ride on
the back bumper of the car going
down driveway and car hit
bump, throwing P & injuring
him. T/P/Rev? holding D should
have had a dir. verdict

120 N.E. 2d. 294

D driving 40 to 50 mph in residential

section & driver waves at friend. Car crashes and girl in car (grat. guest) Dues. Ct. held that there was enuf to get the case to jury. Here, there was probably an inattention to driving site.

Notes: 2-26-57

Wrongdoers:

- (1) Intentional
- (2) Malicious
- (3) Negligent
 - a. Slight
 - b. Ordinary
 - c. Gross

(4) Wanton & Reckless misconduct - T.I. to know why

Wanton & Reckless Misconduct - T.I. to know why it is T.I. to know what W&R Mis. is:

- (1) Damages
 1. Punitive
 2. Compensatory
- (2) Effect of contrib. neg. may be avoided if D is guilty of W&R M.
- (3) In areas of unenforceability, extent of duty & proximate causation the usual rules are liberalized.
- (4) You owe a duty to a tres. not to act W&R.
- (5) Where you have an injury, the injured may not be able to excuse liability of the actor if the latter was W&R.
- (6) If D is guilty of W&R M, you may be able to get physical execution in satisfaction of a W&R wrong.

- (7) Parent-Child immunity may be waived.
- (8) Altho' many tort judgments may be discharged in bankruptcy, W + R M tort is not discharged (sec. 17 Bankruptcy Act)
- (9) In many states which have changed the common law + instituted statutes, a gratuitous guest must show the driver was W + R.

See: LaMarra v. Adam
for another T.E. reason

- Definition: (1) hypo: Clyde Calypso driving 30 miles above local speed limit but doesn't know it.
- (2) hypo: Clyde knows he is driving 30 miles above speed limit but thinks it to be safe.
- (3) hypo: Clyde knows but hopes no one ~~will~~ would be hurt.
- (4) hypo: Clyde knows and wants to hurt someone.

Rest. Torts - sec. 500: { If the D actually knows or on OP M would know or recog. that his conduct involves a high probability ^{of harm} to others, then he is acting ~~wanting~~ wanton + reckless.

Definition of Wanton and Reckless Misconduct.

- (1) Malice
- (2) Intent - sub. certain to follow
- (3) Wanton + Reck. Mis. - high probability
- (4) Neg. } Gross neg. } - appreciable risk of harm.
 } Ord. neg. }
 } Slight " }
- (5) Careful Murder
 / Strict Liability

RES IPSA LOQUITUR

127

* (3) Must not be due to any ^{voluntary} ~~act~~ ^{or contribution} acting on the P's part.

Used in some states

* (4) Suid of true explanation of the accident must show be more accessible to D than to the P.

Pillars v. R. T. Reynolds Tobacco Co. - Miss. -

Relied upon circumstantial evd. P found bad + foreign elements (human toes) in the chewing tobacco. Ct. said: "we can assume that if due care had been exercised, human toes would not be found."

Doctrine applied in types of cases:

* (1) Falling object cases

* (2) Exploding boiler cases

* (3) where P suffers injuries from electrical wiring.

Honea v. Coca Cola Bottling Co.
143 Tex. 272

* (4) Exploding bottle cases.

Mass. in 1/2 of states which don't presume RIL in the CC cases.

* (5) (some cts.) In 1/2 of the states, as far as suits by passengers of com. carriers for wrecks involving " " " " RIL is applied.

231 Mass. 80

250 Mass. 198

* (6) Defective foods - depends upon the probability of neg.

Geo. Foltis, Inc. v. City of N.Y. (p. 205)

* (7) Bursting gas + H₂O mains.

* (8) Automobile collision cases.

hyp: A + B have car out on the road. C is a guest in A's vehicle. Pedestrian named P, on the street. (If A is a com. carrier, we'll call him A(cc)).

Not probable there was neg, i.e. no RIL.

(a) A v. B - only evidence intro. was fact that collision occurred. 4 possibilities: No RIL.

NR (No recovery)

1. A neg B not neg (NR) 3. A + B neg. (NR)

2. B neg A " " (NR) 4. A + B not neg. (NR)

A+B not neg.; no RIL in this case.

* (b) G or P v. B - based upon mere fact that there was a collision. Recovery where B neg + A not neg, and " Both were neg. No RIL.

* (c) G (grat. guest) v. A - based upon mere fact that there was a collision. Where A neg B not neg, + where A+B neg the P (G) could recover. But since it is not more probable that there was neg., no RIL.

* (d) P v. A or A(cc) - makes no diff. if A is a cc or not. Based upon mere fact of collision. Where A neg. B not neg, + where A+B neg., recovery, NO RIL.

* (e) G (paying guest) v. A(cc) - where A neg B not neg, + where A+B neg, recovery. In Mass et al, ~~not~~ no RIL. In other 1/2, RIL (where they impose liability sans fault).

335 Mo. 104

[If you join ~~of~~ A+B in the suit, the ratios would be 3 to 1 and RIL would be applicable and there would be an inference of neg., warranting the case going to the jury. 312 Ky. 668 (1950) - passenger sued streetcar co. A streetcar had a collision with another vehicle driven by B. Ct. said that neg. would not be presumed. But, P can join B + streetcar co. + RIL would then apply.

269 Mass. 337 - I parked car on steep hill. I said he had ~~brakes~~ brakes on. Car rolled down + damaged P's store. An inference of neg. here + RIL applied.

(NOTE: 335 Mo. 104)

Aviation Cases - earlier cases said due to ignorance of planes a probability of neg. could not be measured + RIL would not be applied. BUT, today many states apply RIL to these plane cases.

hypo: Plane takes off from N.Y. (RIL) + crashes in Ill. (no RIL). Ill. prevails because the place of the accident is the one whose law is applied. RIL lies in the field of substantive law.

ASSIGNMENT: mined & capped malpractice case.

28 Feb, 57

RIL creates a permissible inference of neg. It allows the case getting to the jury and avoids a directed verdict or dismissal.

hypo U.S. govt. has one of its atomic plants to explode + injure the Ds. Until 1946 (Fed. Tort Claims Act) as far as the ^{negligent} ~~negligent~~ torts are concerned, the govt. waives its immunity (neg. torts), but does not waive its immunity as far as strict liability (liab. ~~no~~ fault) and intentional torts are concerned. So, to have the liab. of the govt., we must apply RIL. We can say it was more probable than not that neg. was involved. We say this because of the known safety record of the atomic plants. And, the other two elements of RIL would apply.

Under the fed. rules there is just one form of action - the civil action. And, if we plead neg. we run the risk of pleading two causes of action (Moose Case) having it thrown out, or of pleading neg. too generally.

In Medical Malpractice cases, do we apply R 12? Mimeographed Case
We shall assume there was no neg. in hiring the nurse, Otis & that Otis was competent. There was great conflict of expert testimony. Many Ct's. are reluctant to apply R 12 in malpractice cases; but, here the doctrine of R 12 was allowed. Why don't we tell the jury to weigh all evid. and decide whether it is more probable than not that it was due to neg., then they (jury) should be permitted to draw an inference of neg. Even with pure conflicts of testimony or proof, the jury could be allowed to reconcile the conflicts and decide the probability of neg. & whether R 12 would apply.

The balance of probabilities is (maybe) a question of fact to be submitted to the jury. So far we have been concerned with element #1. Now, let us move on to the requirement that the instrumentality must be in the exclusive control of the D.

Lyns
Larson v. St. Francis
Hotel
83 Cal. App. 2d 210

Chair falls out of 10th story window of hotel. - 83 Cal. App. 2d 210 held that the chair was not within the exclu control of D. D rents rooms & cannot be in exclu con of the room.

Kilgore v. Sheppard Co. 52 R.I. 151 (1952) where P sits in chair on a store & chair collapses, it held that R.I. would not apply, for at the time of the injury the P was in exclu control of the chair. - This court goes to extreme here.

If we accepted this, exploding bottle cases could not be included in R.I. || We are not concerned with ex cont at the time of the injury, but who had cont at the time the unreason risk of harm was created is the T.I. thing.

p. 860, 861

127 A.2d 858 (1956) P. ~~Chimbs~~
 Climbs ladder up all
 right but fell down when
 climbing down. P sued
 the construction K^{or}. Ct.
 said the ladder was
 under the exclud con
 of the latter and went
 on to prove neg. specifi-
 cally. Ct. said this was
 not a RIL case, but a
 theory of exclud con + that
 RIL + exclud con are not
 one in the same. Ct
 went on to say that a
 theory of exclud con may
 infer neg. RIL does
 not concern itself with
 a duty of care owed. Judge
 charged that even if the
 ladder was borrowed, the
 D owed a duty of care
 to P who was a big
 invitee. So, when the
 judge spoke of a duty of care
 he meant exclud control,
 and that he was not speak-
 ing of br/duty of care but
 was saying there was a
 duty of care. They are referring
 to exclud con prior to some-
 one using the ladder
 + a duty of care owed to
 one who might ~~use~~
 use the ladder.

Procedural effects of the application of R12: (three views)

(jury permitted to accept it but not required to accept it)

* (1) Wt of authority regard R12 as creating an inf/neg but the jury is not compelled to find for P.

* (2) A rebuttable inf/neg requiring D to rebut the inf/neg if he wishes to avoid a dir ver in favor of ~~P~~ P.

* (3) Burden of proof shifts from P to D and that R12 is really in favor of the P.

5 Mar, 57

Res Ipsa Loquitor

A type of circumstantial evid.

Procedural effects (supra, cont'd)

1. Mass. in accord with this maj view. Two types of burdens:

* a. Going forward with evid - will shift.

(or risk of non-permission) * b. Proof - if P has burden & fails to estab. suft proof, J/D. Does not shift

Proof - The purpose here is to protect D from suffering a dir ver. So, even if D sits still and P gets to jury, the jury still doesn't have to find for P. The sole effect ord is to get P's case to jury, & if D sits still, he will not suffer a dir ver.

Go. for. - If P has a rebuttable presum/neg and D sits still, D ~~might~~ will suffer a dir ver because the burden of go. for with evid had shifted. So D must come forward to save his case if burden shifts.

Proof - according to third pt/view, both burdens shift and D must meet this shifting burden or suffer a loss of suit.

Wright v. Valan (p. 202)

P sued D for destruction of P's car by burning asphalt. We have no specific evid of neg; so, we must use RIL, and RIL is applicable here according to all of the elements of the doctrine. However, trial judge chgd jury that there was a presumption of neg & D failed to come forward with rebuttable evid, & v.: a dir ver for P. D appealed & it was reversed & remanded: RIL creates only an inference of neg, not entitling the P to a dir ver, but only allowing P's case to get to the jury. ✓/D

Wt. of authority →

Geo. Faltis, Inc. v. City of N. Y.

Good case for application of doctrine of RIL. Trial T dir ver for P. Reversed above: in accord with maj view that RIL only creates an inference of neg not warranting a dir ver but only protecting P from a non-suit and dir ver, permitting the case to go to the jury.

Galbraith v. Busch

P failed to meet the bur/proof that D was neg. "The accident may have been caused by a defect in the car, unknown to D,

for a knowledge of which I was not liable to a gratuitous guest."

Not a good rule. Worsham v. Duke

220 F.2d 506 (1955) had similar fact pattern + here RIL was applied. This was contrary to Gallbreith v. Busch.

Rocona v. Guy F. Atkinson Co. (1949 p. 210)

D tug co. towing P's barge. While mooring, the barge overrode a heavy mooring float. The barge was later found listing and leaking. RIL was applied. "Exclusive control" defined broadly and liberally. Ct. said they were only interested in:

- (1) Whether the act comp'd of was more than likely ~~that it was~~ due to neg.
- (2) And whether this neg can be attributed to the D.

If these two are shown, the doctrine of RIL ~~may~~ will be applicable. RIL may be applicable even if there is direct evidence in the case. Here, the direct evidence, from a probative pt. of view, was not good because these were interested parties.

If the probability of neg outweighs the soundness of the evidence, RIL ^{will} ~~might~~ apply.

Ybarra v. Spangard

Ct. held that RIL applied here. Seavey criticized this.

63 Harv. L. Rev. (Seavey):
643 hyps:

You go into Tex Dist Ct + plead in Comp one count of neg very specifically + a second very generally. Can you apply RIL? Law of Tex is that you have waived right to rely on RIL. Does this affect the fed. Ct.? (NO)

6 Mar, 57 *Res Ipsa Loquitur*
Ybarra v. Spongard (p. 214)

P went to DR T who arranged for an appendectomy to be performed by DR. Spin a Hospital owned by DR S₂. Nurse (N₁) took care of P also. DR R placed P on operating table between or on two blocks. Next morning N₂ comes in & looks after P who complains of pains between neck & shoulder. P joined all of the Drs. & nurses under the liberal joinder rules of California. Ct. held R₁ to apply. Ds sat still and case got to the jury. So, now, more than likely, the jury will find for P. i.e., Ct. said that a conspiracy of silence could not defeat P. Seavey criticized this saying:

- (1) Ct shifted the burden of proof to the Ds. And, how could you say that all Ds were guilty of neg. It was probable that all were not guilty of neg.
- (2) It is clearly more probable than not that each one was not guilty of negligence.
- (3) Not only did they not only ^{NOT} know what the dangerous instrumentality ^{was}, but who was in exclusive control?
- (4) P could pick any ^{one} of the Ds and saddle this one with the damages.

Seavey's criticisms of Ybarra v. Spongard

Prosser was in favor, saying:

- *(1) All parties were joint-adventurers and all were liable. The rule is that if one of the joint-adventurers committed a tort, all connected in the joint enterprise:

Elements of the joint enterprise

- (1) Common purpose
(2) Control over each other
— A very poor rationale by Prosser.

Schwartz:

- (1) Drs. + nurses owe a special duty of care + responsibility to patients

37 Va.L.R. 208

Fleming (Yale U. Sch. of Law) - policy argument.

- *1. Since all nurses + Drs. have malpractice insurance, the cost of damages will go to ins co → Drs. + nurses → patients.

Summers v. Dice (p. 268) - Cal. case too
P didn't know which one of the 2 Drs. had accidentally shot him. Ct. held against both as joint tortfeasors. Ct. said that even if they were not acting in concert, unless one can prove his shot was not the one.

Schwartz: Both owed a duty of care to P + breached it by neg. Differently from Yerra v. Spangard because we cannot prove which one owed a duty.

216 Fed. 72

Q1 Dr. stored explosives in bldg owned by both Drs. Ct. held P must show which one was neg. & it was not enough to show that there was just an explosion. We will not

shift liability on one not proved to be neg.

So, from a legal pt/view, Seavey was probably correct. Ybarra v. Spangard has been reaffirmed by a Cal. case in 1955. Seavey feels that Ybarra should be treated like the federal explosives case (216 Fed 72).

Johnson v. United States

Under the Jones Act - trying to sue U.S. for the acts of an see. Under this act the fel-S doctrine has been abrogated (done away with). U.S. Sup. Ct. held this to be a good case for RIL & RIL would apply even to the acts of fellow employees under the Jones Act. Is this good? By the 3rd requirement of RIL (P must show he did not contribute to the act complained of) this is not such a good rule. The P has probably not rebutted this third requirement. So, P did not rebut whether he had contributed to his own loss.

Frankfurter dissents:

- (1) If we have evid to the case (and here we had an eye-witness), RIL should not apply. RIL should only apply when there is no evid. He imposed too much responsibility on the trial judge.

hypo: P in comp (auto case) alleged neg very generally. At trial, P alleged a specific act or evd. of neg. Does the introduction of this specific evd. outlaw the application of R1L? ~~Many~~ Some Cts hold that once this is done, R1L is waived. Better reasoning Cts. hold that intro of specific evd does not waive R1L.

hypo: Specific allegations of neg. in the complaint. At trial, he can't prove these specific allegations & says that it is more probable than not that neg. was involved. *4 views: (check your own state)*

Points of view re the waiver of the right to use the doctrine of Res ipsa loquitor.

- (1) Once you specify the acts of neg., you don't have to say the thing speaks for itself & must waive R1L.
- (2) The application of R1L is a strengthener to the specific allegations & there is no waiver of R1L. (Schwartz: "very good")
- (3) If, in a comp, you only have specific allegs of neg, waived. If you have specific and general allegs, no waiver of right to rely on R1L. (Mass. pt/ views)
- (4) Makes no difference whether there are spec or gen allegs or both, R1L is NOT waived. Held that for the purposes of Erickson, complaints ^{R1L} ~~this~~ is a substantive law, but

They applied Texas law anyway
(owner of RIK if you plead gen &
spec re neg). i.e., what is
substantive for Eric R. v. Donkins
may not be substantive for pur-
pose of conflict of laws.

12 Mar, 57

A. Violation of Criminal Statutes

(1) Do crim. stats. abrogate Ct. no duty rules?

hypo-

C (Cap) at bldg - door open. Goes in;
dark; falls down open elevator shaft.
C sues bldg. owner. At Ct not a big
visitor - no dupca. Now a crim
stat for failure to fence in
elevator shaft - to abrogate Ct. no duty
rules.

(2) Assume dupca owed

Does violation of statute conclusively
indicate a br/duty owed?

hypo: D left keys in car. Thief takes
car and injures P. P sues owner,
not thief.

a) Was a dupca owed P? Yes at Ct.

b) Did owner breach duty/ca owed at Ct?

no - not deemed to have br dupca
unless a special risk of theft.

c) "a misdemeanor to leave keys" duty of care.

Does it conclusively indicate a br/dupca?

Why should it effect law/torts?

(1) Legis intended to create tort liability at
writing of stat - a fiction.

(2) 27 Har. L.R. 317 - Thayer says
OPM obeys crim law & if he
disobeys he is not an OPM.

abrogate =

annul, abolish

criticize this - stat priv of protection of a class of people legis wants to protect. Presume it doesn't apply to class, but a violation of a crim stat.

- 3) Imposition of tort liab to fortify crimlaw.
- 4) Ct looks at crim stat - policy to protect a class of indivs but it creates tort liab on its own initiative.

(Back to A1)

Survey indicates:

not conclusive - "take each case as it arises"

Cts may differ in given situations
Cop in elev shaft - at CL no du/ca.

Meyers v. Fred Koch p.434 cop + fireman
not just licensee - an affirmative du/ca owed in N.Y.

135 Mass. 116 abrogates CL no duty rule
... an affirm du/ca owed ... legal
heirlooms. Attempt to change CL no
duty rule to get at crim. stat.

237 Penna. 8 Drake v. Finten (1912)

Similar to Mass. rule (135 Mass. 116)

Contra

294 Mass 562, 1936 - we have to
look at the intent of the legis. Did
legis intend to abrogate? NO. We can't
either.

Lh. + Tenant - at CL had no duty
to T, let's presume, but crim. stat.
must give safe tenancy to tenant stat.
Richman v. Warren 307 Mass 403 -
legis hadn't intended to abrogate
No duty CL rule.

Ind., Minn., N.Y., Ohio, N.J. - Lh
commits a misdemeanor if he fails to
hand over a safe tenancy.

Two Cts differing as to desirable law. - not legis' interest.
 Hypo - driving on auto (defective).
 Could P sue manufacturer at Ct? NO
 Is there any K between consumer + manufacturer?

1916 McPherson v. Buick - Cardozo said
 Manuf owes a du/ca to consumer
 as to life + limb. (Casebook 447)

In Mass up to 1946 - no du/ca.
 Carter v. Gardley 445 adopted the
 McPherson rule - a manuf owes a
 du/ca.

162 NE 84 (1928) Pine Grove v.

P owns a farm. D a manuf of
 feed. Sold to store which store sold to P.
 Ducks die due to adulterated food.
 P sues manuf. - Any recovery?
 D said McPherson case said only
 injury to human life not animals.
 But P found a crim stat. Ct said
 it created a du/ca.

1934: same P goes to same D again,
 same facts but crim stat does not apply.

263 N.Y. 463 Hermese v. Sarbonne, but Ct said
 applicable even to animal life, even
 absent crim stat.

Ct adopts its own ~~rules~~ views on
 no duty rules. Inconsistency in some
 jurisdictions.

127 Fla. 426 (1937) P in jail. Eyes
 infected; sues city. At Ct no du/ca
 but municipality violated crim
 statute as to clean jails. - abrogated

Cts abrogate no
 du/ca rules (C.L.)

no duty rule.

abutting land owners

Most cts in agreement on no duty of care. — abrogated — abutting land owners.

Owens bldg — public sidewalk. He is an abutting land owner. P falls on walk due to snow. At CL no definite du/ca. But have crim stat: must clear snow from walks. D violates it. P takes advantage of it.

Hanley Case (p. 222) — effect of crim stat does not abrogate CL no duty rules. (Mass cases in accord (19 Gray 249, 1849))

Nonfeasance — no action at all

Results 27 Har. L.R. 317. Thayer says: conduct of landowner — non-feasance to act. ∴ Crim stat does not apply to non-feasance. Is this correct?

Carefully injure someone — no liab D fails to aid him — no affirm du/ca at CL. but statute says must stop — now, Thayer said it would only be non-feasance if he failed to stop.

13 Mar, 57

Thayer says crim stats do not abrogate no du/ca.

cb p. 241

U. Pacific R.R. v. Cappier

If you non-tortiously injure someone, no du/ca, ∴ no breach. Suppose stat on hit + run. Now apply.

see § 116 So. Car. 402 (1941)

*59 Ga. 808 (1936)

Georgia: A violation of crim. stats abrogates
no du/co rule.

Buchanan v. Roe 138 Tex. 390 (1942)

Carefully knocked down a tele-
phone pole - no du/co.

typi: stat: no obstruction of highway
cb p. 246 Simonsen v. Thoren et al.

Violation of crim. stat. is to
abrogate no du/co, where ~~where~~ we
have non-feasance.

Snow + ice stat was to impose
duty as a whole, but not to
private individuals.

(2) What effect on a co/action for
neg? then. rule: violation of
crim stat constitutes br/duty
as a matter of law.

Martin v. Hertig [sic] cb. p. 225

N.Y. P + husband riding at night
in a buggy. D's car on a curve,
hit them on their side of road - a
violation of a crim. stat. - Neg. I said
Contrib neg. on part of P because no
lights on buggy. I showed stat re-
quiring proper lights + asked
for conclusive evd on P's part.
Judge said weigh contrib neg as
against other factors. On appeal, the
sole question for the jury was:
was the violation of crim stat
neg per se?

minority view
(mass in accord)

cb. p. 234

Chiapparine v. Public p232 cb
P in auto & I trolley car. I must
signal when approaching crossing.
(Only evd of a br/dn/ca - not
conclusive evd. Mass view in
accord with minority.

Haulon v. So. Boston Horse RR Co.
Key in car. Thief hits P. At CL no
dn/ca. If in bad area, might be
a br/dn/ca. Suppose stat violated?
Ross v. Hartmann 132 Fed 2d 14 (1943)
In line with authority; conclusive.
This is not just a procedural problem.
It creates liab when at CL there
would be none.

* Exceptions to General Rule:

① * Statutory Purpose Rule

- (1) Must show P was in class of
indivs legis wants to protect.
- (2) Show inj was type legis
wanted to prevent.

Ex of (1):

6d Iowa 333 (1882) - cow injured
but not covered by legis.

* Unregistered automobile - on road, accident
with kid. At CL - no liab, but violates
stat, so P must show (1) above. It is
immaterial that the car is unregis-
tered. Mass: unreg car is a tres. on
the highway. Liability w/o fault.
(226 Mass. 474, 1917)

* Dudley v. Northampton 202 Mass. 443 (1906)
Dresspasser can only recover when there's
wanton & willful misconduct.

Bar exam question

Wt./authority

Unlicensed Driver - same case.

Violation immaterial in law/torts.
Does (1) apply? Is estab. a minimum standard of competence.

We only care about due care, not minimum standards/care.

Mass. holds on licenses - violation is neg.
(209/155, 1911) Violation of stat const
evid/neg. Mass rule somewhat twisted.

hypo: Unguarded elevator shaft, fireman
falls thru. Show a br/dn/ca...
Violation of a crim stat.

Kelly Case p.345 cb

Was P in class of indivs. legis
wanted to protect? NO. ^{ees} were
the ones.

Now, on to (2): the Injury...
was it the type the legis. wanted to
~~protect~~ prevent?

Gorris v. Scott
cb p.292

Shipowner. Sheep on board

"All animals shipped must have separate pens". Violation of crim stat.?

As to (1) ans. is YES

As to (2) ans. is NO.

Main reason of (2) is SANITATION reason.

Not known to animals themselves.

Presume statute: "Rk with right/way must have fence."

No fence, cow eats grass & dies.

As to (1) ans is YES

As to (2) ans is NO

146 Miss 192 (1927) Kid in store orders firecrackers. By
stat a misdemeanor. Kid injured
by eating them.
as to (1) Yes
as to (2) NO

Mansfield Case Grinding wheel, flies in eye, Blinded. Sues
294 Mo. 235 (1922) owner - violated crim stat. : no guard on
wheel. As to torts
As to (1) Yes
As to (2) ct said NO - inhalation of dust was
what legis wanted to protect.

Dehauen v. Rockwood D owns a bldg. with no guarded elevator
288 N.Y. 350 (1932) shaft. Radiator falls on workman from
5th to 1st floor. Was workman do to (1) Yes
as to (2) could be YES / but held NO.
Applied to people falling down.

14 Mar, 57

2nd Exception **Causation**
*(2) **Doctrine of Causation** - actual + proxi-
mate. Ross v. Hartmann 139 F.2d. 14

* K.C. v. Boson 83 Wash Rept 884
Prox Cause - not prox ca due to a 3
day period between leaving car &
key & actual accident.
Slater v. Baker 26/424

Next limitation
*(3) **Reasonable Diligence**
Phillips v. Brittainaca etc. ch. 219
old Eng. law - the person injured
had to show privity of K before he
can sue the manufacturer.

cb 454 Donahue v. Stevenson - overruled this case "the snail in the coke bottle", Phillips case & statute - no car on highway likely to cause accident, etc. P claims D has violated crim stat. & is neg per se (rather than a stat it is an admin regulation but many states hold that violation of adm. stat was only evd/neg).

fb 234 Schumer v. Caplin says in admin regulations, it's only evd/neg.

even in exercise of Reas Diligence, it is evd/neg.

* An exception to an exception
Beauchamp v. Sturges

250 D.L. 303 Downs factory, kid misrepresents age & is injured. Sues boss, kid 16. D claims reas mistake in age. Ct says make no allowance for reas diligence due to public policy.

fed. statutes

{ Fed. Safety Appliance Act.
{ Pure Food & Drug Act.

Hudson v. Orest - minor boxer violated stat. Public policy protects group of indivs who are in boxing.

* (4)

cb 229

Interpreting Statute so that there is no Violation of Statute
Idla v. Ellman - D claimed con-
tut neg on part of P. Is it complete defense here? She was on right side because all cars were on left side & none

were on the right. Ct held justified - no br/crim law for purpose of tort suits only. Suppose it is crim prosecution? results - might be a crim - diff interpretation for torts - crim violations.

Shoemaker v. Caldwell (1947)

146 Tex 165 "impounding fee for stray cattle" cow diligently tied up but wandered off. Electrocuted on P's wire. "crim stat does not apply to tort" but may apply to ~~tort~~ impounding fee.

Statute

eb p. 222

McKenzie v. People's Baking Co.

Steel particles in a cup cake. Pure Food + Drug Act (adulterated food) doesn't apply as an ingredient w/in meaning of Act for crim law - no violation.]

for tort law - a viol. - interpreted diff.
- Would reas diligence to comply c law be a defense? NO.

*22 Cal 2d 22 (1943)

D goes thru stop sign & kills a kid. Contra to stat but no pronouncements of stat - criminally no conviction tortiously - neg per se

on exam

Hopkins v. Dreper 184 Wis. 400

Father gives son a motorcycle. Injures P. P sues father. Stat "no one under 21 may drive a cycle"

Criminally - can't sue father because stat doesn't apply to ~~stat~~ father, only those under 21. But tort law wise father violated it.

* 5 Excusable Violation (extreme emergency)

Steering wheel loosens & accident results. Violated Stat by crossing to wrong side road, but excusable.

* 124 Conn. 223 (1938)

Violated Crim. law emergency present. It is excusable, justifiable violation.

19 Mar 57 Effect of the Violation of a Crim Statute on the Law of Torts and Negligence

- 1) Defamation
- 2) Liability same fault
- 3) Defamation
- 4) Misrepresentation

The majority holds that it is neg. per se.
Exceptions:

- * (1) Person ^{not} intended to be protected & act not one guarded against by legis.
- * (2) Proximate cause (lack of)
- * (3) Reasonable diligence to comply with stat.
Exceptions to this rule:
 - (a) Child Labor Law
 - (b) Pure Food & Drug Act.
 - (c) Fed. Safety Appliance Act
- * (4) Interpreting stat is that there is no violation

* (5) Excusable violation

Jaber v. Smith

26 S.W.2d 722 - truck driver has breakdown on highway + lights fail. In trying to reach gas station sans lights, P was injured. If you can show it is justifiable & excusable violation of the crim. stat., no liab. If you are in an evid of neg juris., you have a good chance & you can probably rebut the allegation of neg.

P's point/view

If P violates the crim. stat., it is contrib neg as a matter of law (maj. view). Min. view holds it is evid of contrib neg.

Contributory neg. complete bar to recovery under majority view

If D viol crim. stat., is P's viol of the crim. stat a bar to recovery? According to the maj view, it is a complete bar to recovery. Exceptions:

- (1) D viol Child Labor Law
- (2) FELA
- (3) Factory Safety Acts

* What trial tactics may be employed where a crim. stat is used to prove neg.?

Depends upon:

- (1) Type of juris (per se, or evid of neg.)
 - (2) Whether you are P's or D's counsel.
- P must be careful that he gets to the jury sans committing any reversible error. So, P should

not use novel tactics. D has a better chance to use novel tactics. P should bend over backwards to have the chg to jury agree with D.

* ① P's counsel in neg per se juris:

a) D pleads contrib neg due to P's violation of a crim. stat + this is a fact. ... It may constitute reversible error if P pleads excusable and justifiable violation if the juris doesn't recog this. P could use the following:

1. D had "last clear chance"

b) In Mass. (evid/neg), P's counsel charges D of viol of stat. P should not ask for the standard chg. ("viol is neg. per se") because in evid of neg juris D may sit still + still be able to get his case to the jury.

347 Mo. 836 - in a state holding evid/neg., if D sits still, it will now be deemed to be conclusive evid of neg.

* ② D's counsel - if only D guilty of (neg per se juris) violating the crim stat, he should run the risk of asking for the chg. of excuse + justification. where both parties are accused of viol, D should not ask for excuse + just chg.

In an evid/neg juris - (Mass.)

* ① Only D has been accused of viol - D should not ask for the chg that since P failed to explain away viol, it is conclusive neg even in an evid/neg juris.

* ② Only P has viol. - yes, because D

can't lose anything.
 * (3) Both viol - yes, he should ask for the chg.

Attacking statute as possible defense - not good!

* Can D's counsel attack the reasonableness of the statute? Generally, you can not attack the wisdom or reasonableness of the statute. The wisdom of the statute is for the legis. to decide.

278/456 * Nashville v. White 278 U.S. 456 (1928)
 Stat required RR's to have human at crossings. They have a better machine + say the stat is unreas. Per Holmes, Jr. D's liable + it is up to the legis to decide the wisdom.

135 Neb 178 - crim. stat. required all opt. owners to have a hand rail. P fell, alleged that D should have had 2 although stat only req one hand-rail. No recovery.

Liability even with Compliance with Statute

The mere fact that you have complied doesn't prove lack of neg.

If speed limit is 50 MPH + you hit P doing 48 mph (But it is snowing + dark), even though you (D) have complied with the stat, there is liability. (1) You must show that the optimum conditions under which the stat is supposed to operate are present.

(2) You must show that the stat regulates that portion of your conduct in issue.

Administrative Regulations

- (1) Violation of admin. reg. is viol per se in some juris.
- (2) Some cts. hold that even tho' viol of crim. stat is neg per se, " " admin. reg is not necessarily the same & may be ^{only} neg.
- (3) And some cts hold that no matter, viol of admin reg is only evid / neg.

20 Mar 57 Non-feasance & Duty of Care
Rex v. Smith (CB 235)

The patriarch died leaving land to his children provided they paid £50 annuity to the idiot child. Ct held there was pure non-feasance.

Rule of Law

In the absence of ^{affirmative} duty to act, failure to act is non-feasance and is generally not actionable.

Hypoi Minister brings food to X but the other children say X has enuf food and that they have and are taking care of X. Liability here, because they diverted third party help & this is misfeasance.

Do you owe an affirm du/to act to ~~you~~ one staying in your pad?

Dutch Penal Code, Art. 50 - non-feasance made actionable just like misfeasance. True in a few other countries, too. A very moral code.

Szabo v. Penn. R. Co.

Ct. imposed an affirm du to act. In relat between M & S, the M owes an affirm du to act to S when rendered helpless in the scope/em. Represents mod pt/view.

Rest. of Agency, sec. 512

Mod. pt. of view

(1) If an S, while acting in sc/em, comes into a position of imminent danger or serious harm & this is known to M or ~~one~~ to a person who has duties of management, the M has a duty to act to protect S.

(2) If a servant is hurt & i.e. becomes helpless, while acting in sc/em, in an isolated place or in a dangerous activity with a risk arising therefrom, & this is known to the M or one having duties of management, the M has a du to act to protect the S.

Hypo: Book hits customer in bookstore in Times Sq. Owner just lets X lie there. Liab under Rest/Agency rule?

Rule of Law

If one decides to act, he must use care equal to the degree a reasonable man in the circumstances of the case would use.

SPECIAL CASES & RELATIONSHIPS

(1) In maritime cases (shipper-sailor relationship) there is a du/care to provide "maintenance & cure" & if the inj is caused

- by the unseaworthiness of the ship.
- (2) Parent-child, rel + maybe
H + W rel. (Rex v. Russell)
 - (3) ~~Int~~ Innkeeper - guest.
 - (4) Common Carriers - passengers
 - (5) Big invitees - owner or occupier
- cb. 238 L. S. Ayres & Co. v. Hicks

The kid is classified as a big visitor. An affirm du/ca owed to big visitors especially re moving things. So, no liab for the orig impact bc cause the escalator was carefully constructed. But they are liab. for aggravation of the injuries due to failure to stop the escalator.

Two possible rationales: (1) This was a moving, dynamic force (affirm du/ca owed even to a tree where you have moving, dynamic forces).

* (2) Kid was big visitor + there was a du/ca owed by the owner to the big visitor + non-feas actionable here.

Is there a ~~situation~~ distinction between large + small stores?

Theories:

(1) Where there is a misrep, either express or tacit, which is relied upon to one's detriment, an affirm du/act is owed + non-feasance is actionable.

(2) One party confers a benefit on the other ∴ making an ^{affirmative} du/act.

Social Guest - Host (liability here?)

One has a ~~du/p~~ fade away re a privileged trespasser. The better view is that there should be an affirm du/pact owed by a host to a soc. guest.

21 MAR 57

Duty to Act

Generally, nonfeasance is not actionable.

Exceptions:

- (1) M-S
- (2) Parent - child
- (3) Inkeeper - guest
- (4) H-W
- (5) Big visitor - owner or occupier
- (6) Common carrier - passenger
- (7) Others

Common Carrier - Passenger

Special duty owed. (Southern Ry Co. v. Sewell)

Peace Officer - Prisoner - Taylor v. Slaughter (p. 240)

Union Pacific¹⁴ Co. v. Cappier

Train carelessly injured P. Is a du/pa owed to one you injure non-tortiously? Rest. Torts, sec. 322 - deals with one tortiously inj. + the du/pa owed. Here, if you non-tortiously inj. one, no ~~breach~~ breach du/pa. This is peculiar rule:

- (1) Ct could have said that if one injures another non-tortiously there is a duty to render aid.

Ward v. Morehead City Sea Food Co (p. 245)
Spoiled fish here. I was notified

YOU CANNOT ASSUME
A DUTY OF CARE.

that a person died due to consumption of the fish & failed to properly notify the retailers; & P's intestate died. Was there a duty to act here? How does this differ from Cappier Case?

note: You cannot assume a tort or criminal duty of care.

Technically speaking, I viol state (Pure Food & Drug Act). Under the " " " " " the mere fact that he exercised reasonable care & diligence is no defense.

Impacts * Distinction of cases: pre-impact & post-impact cases. In Cappier, no du/to act after the impact has taken place. Here, the impact had not taken place, & I could easily avoid the injury & he owed a duty to act to prevent the harm.

If the orig impact is non-tortious, no du/to act after the injury occurs.

Here, even tho' the orig act of shipping the fish was non-tortious, he acquired a du/ca after the orig act but before the harm resulted.

Simonsen v. Thorin et al.
I held liab to P for failing to remove the trolley pole

that he knocked down. He carefully (non tortiously) knocked the pole down. 2 possible rationales

- (1) Statutory viol + liab thereby.
- (2) Pre-impact case + i. on affirm due to ACT.

hypo: D did \$100 dam to pole + later P's car did \$200 " " " , Is D liab for the \$200? If it is pre-impact situation, yes. If it is a post- " " , no.

Wedel v. Johnson (p. 247)

D left dead horse hit on highway to get medical aid. There was a du/pact here: pre-impact case. Did D breach the du/pact here? No, he exercised reasonable care + the value of the collateral object was ^{greater} then value of the other object.

Black v. N.Y. , N. H. & Hart R.R. Co.

Drunken passenger (P) left on stairs (after leaving train) by agents of D. Here, this was not non-feasance. They committed misfeasance by substantially increasing the risk of harm. Did they act like reasonable men in the circumstances of the case? No. If you create foreseeable risks of harm, you thereby assume an affirmative du/pact. (The dictum here was clearly wrong).

Rule of law

Fagan v. Atlantic Coast Line R.R. Co. (p. 249)
Liab here even though the agents of D

took him 150 ft. away from the depot. I was drunk.

[A voluntarily drunken man is held to the standard of the reasonable man.]

In the Black case, Ct. said that drunken state was not the cause but only a contrib. element. This is the "last clear chance doctrine."

Zelenko v. Gimbel Bros.

P alleged aggravation of injuries. D said this would not be because P alleged neg & failed to prove neg. Ct. said there was liability here due to MISFEASANCE and that D diverted third party aid by locking P up in the infirmary. P must show "but for" causation here.

Could rationalize this on the grounds of a special relationship which creates a duty. (by visitor - occupier).

U.S. v. Lander 219 Fed 2d 559

Rescue operation failed. P's intestate dies. P sues under the Fed. Tort Claim Act. Coast Guard told other boatmen not to worry & that they would rescue the decedent. Sent out an

Diversion of 3rd party

219 Fed 2d 559

U.S. v. Lander

inexperienced man. - Liab here due to diversion of third party help.

ch. 250 Bollin v. Elevator Const. & Repair Co.

P is elevator operator, owner of bldg.
(W) Called up D for repairs & D neg. repaired the elevator. W also had indemnity ins. (I Co.) & I Co. had agreed with W to inspect the elevator, too. I Co. could be joined as a joint tortfeasor. Does I Co. have to pay anything to P? Is I Co. a joint tortfeasor?

Liability rationals: (1) I Co. posted a sign saying that the elevator was O.K. A representation relied upon to one's detriment (P's intestate died).
(2) Like the Weismüller - Buster Crabbe case: representations made to third person & ∴ third party aid was diverted. So I Co. would be liable to P for saying that I Co. would repair elevator & ∴ diverting the "work" W Co. or some other party would have done.

hypo: M owns a bldg & S is in chg of maintaining the bldg (agreed in S's employment K). P inj in bldg. Is S liable here for not properly maintaining the bldg? This is like diversion of third party aid. If S had not represented

that he would care for bldg, M could have gotten someone else to care for the bldg. M could sue B for breach of his agency K.

cb. 253
Cardozo: *H.R. Mott Co. v. Rensselaer H₂O Co.*

D failed to provide sufi H₂O pressure as agreed. P's ~~house~~ house burned down as a result. K between D & city. Can P recover for br/K even tho' he was not a party to the K? You would have to show that P is a 3rd party beneficiary (like ins. policies). Privity of K required.

The only people who can recover on this 3rd party beneficiary Ks other than the main parties are the direct beneficiaries (P here was an incidental beneficiary).

Even tho' stat was viol, legis did not intend to protect this P.

P actually arguing a diversion of 3rd party theory. But Cardozo did not take this approach & from pt/view of tort law, this is not well decided. The city was lulled into a false sense of security.

The real Ps + Ds here were the ins cos + Cardozo probably felt that it was easier for the prop owners ~~to~~ ins. co. to bear the burden. Majority of the H₂O works cases are in accord.

Erie R.R. Co. v. Stewart
Was D liab here for failing to have the watchman (drunk) there? D made representation to the world that when no watchman is there, no train; + P relied on it to his detriment.

hypo: If P were a stranger in town + unaware of the custom, is there liability? No. ~~the~~ X was no repre relied upon to his detriment. Should the drunk watchman be personally liable? YES, under the theory of dis/3rd par aid.

Neg Non-performance of a Gratuitous Undertaking
Thorne + Another v. Deas (cb. 259)

D failed to get ship ins. as he had promised. Ct. held no liab: no recovery on gratuitous promise. This is old pt/view. Mod. pt/view is expressed by Sec. 90 of the Rest. of Ks.

Rest. Ks - sec. 90

(look up)

This is Promissory Estoppel!

A promise, which the prom should reasonably expect to induce action or forbearance of a definite & substantial character on part of promisee, ~~the~~ promise is binding only if injustice

can be avoided by imposition of liability.

Sec. 90 referred to as the doctrine of Promissory Estoppel. Applies only to "hands down" & transactions.

Theories of recovery:

- (1) Promissory Estoppel (Sec. 90, Rest Ks)
- (2) There was a change of position + " " " ~~representation~~ relied upon to one's detriment. See Sec. 378, Rest. of Agency
- (3) Old pt/view - Thorne v. Near

The big differences between 1 & 2 are ⁽¹⁾ the damages, ⁽²⁾ S/L.

Problems for thought:

- (1) X drowning. Johnny Weismüller starts saving him & en route to safety, Johnny changes his mind & drops X. Is there liability? (Osterlind v. Hill, 1928, 263 Mass. 73)
The D is never required to do more than is reasonable; and he may ~~discontinue~~ ^{performance} his responsibility, where it is reasonable to do so, and step out of the picture upon notice of his intention & disclosure of what remains undone (Backus v. Ames, 1900, 79 Minn. 145; Kirschentbaum v. Gen Outdoor Advertising Co., 1932, 258 N.Y. 489)

Benny Bishart
L
Stark naked
Damon & Pythia swimmers
H
Sam Samentan

65 Har. L. R. 875-946

Defamation

I. The Interest Protected

A. The Nature of the Interest - ⁽¹⁾the law of defamation seeks to protect the interest in reputation. ⁽²⁾Because the defamed might react violently, the primary purpose behind the development of legal remedies for defamation was the prevention of such breaches of the peace. ⁽³⁾The loss of personal honor & an injury to reputation may result in serious material consequences, such as pecuniary loss, impairment of social relationships, physical injury, & mental distress.

Definition:

A statement is held defamatory "if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." (Rest. of Torts, sec. 559). * Liability for defamation is imposed sans fault & sans specific proof of harm.

B. Distinction from Other Related Torts - ⁽¹⁾the communication of an idea is the act essential to a defamation. ⁽²⁾The resulting reaction of third parties is distinguishing. ⁽³⁾Harm to reputation must ensue. Truth is not always a defense in other related torts. ⁽⁴⁾P need not prove that D either intentionally or negligently injured his reputation. ⁽⁵⁾Action for defamation will abate upon P's death.

C. Determining Injury to Reputation -

1. Effect on Third Persons - ⁽¹⁾must be a publication (i.e., "reception of an idea by an indiv other than the one defamed."). ⁽²⁾Whether an idea injures a person's reputation depends upon the opinions of those to whom

to whom it was published. ⁽³⁾ This will vary as the climate of opinion changes according to the time & place of publication. ⁽⁴⁾ The idea must be applied to someone (by the recipient) whom he has a means of identifying. ⁽⁵⁾ The idea must be understood as reflecting adversely upon the P. ⁽⁶⁾ The recipient must give credence to the idea (he must believe it.).

2. Proof of the Necessary Effect - ⁽¹⁾ testimony by the recipient re the effect the publication had on him ~~may~~ be disallowed. ⁽²⁾ The decision as to whether the necessary reference, understanding, & belief have occurred is made on the basis of an examination of the allegedly injurious statement itself & of those extrinsic facts which would be used to interpret it. ⁽³⁾ Ct should consider the nature of the statement, circumstances under which it was made, & the extent to which it has been published.

II. Actionable Injuries to Reputation

Two barriers to recovery have developed; the opinions of the recipient in whose eyes the injury to reputation occurred may not have been suff. representative of the community, & the defamatory idea may have been expressed by such means that the showing of special damage is required.

A. The Significance of Community Opinion
Where the inj. to reputation resulted because the recipients held. nonrep opinions it has been said that no action will be allowed if the size of

the group holding these opinions is insignificant. Where the recipients are held to be wrong-thinking, no recovery. No recovery where:

1. An opinion held by most of the community is an undesirable one;
2. Where the recipients are deplored by most people in the community; and
3. The P's reputation among the wrong-thinking groups is the result of his own unlawful activities.

B. The Libel - Slander Distinction

1. Libel - action for written defamation. Only reputational harm is necessary; pecuniary loss need not be proved.

Slander - action for spoken defamation. Recovery allowed only where pecuniary loss was proved, or where the slanderous accusation was one of a few which were considered so serious as to create a great probability that such loss would be suffered.

2. The Development of Libel Per Se - the terms "libel per se" and "libel per quod" had long been used to describe respectively writings which were on their face defamatory & "defamatory solely in the light of extrinsic facts. Many possible meanings.

III. Who May Bring a Defamation Action

A. Those Defamed By the Defamation of Another -

1. Where a defamatory statement directed at a big enterprise impugns the reputation of those responsible for its mgmt, an officer or a dominant stockholder should be able to recover. However, cts are reluctant here to grant relief.

2. Relatives - close relatives or not allowed to recover unless specific econ harm can be shown. Exceptions: chg of illegitimacy against a child (mother may recover); ancestors of a person said to have Neg. blood. This is unduly restrictive: when I can prove by direct testimony that others have in fact changed their opinion of him, such a showing should support recovery for harm even of a non-econ nature.

B. Members of Defamed Groups

1. The danger of harm to any member of a group resulting from a defamation of that group will depend upon the probability that others will refer the statement to indiv members. When that danger becomes unreasonably great, recovery is allowed sans a showing of specific econ. harm. ^① Size of group (T.I.). ^② Type (e.g. club, apt. house) ^③ Reliability of defamor. ^④ Nature of the statement

C. Organized Groups

Size is T.I. Some cts hold that pecuniary loss must be shown (*A.D.A. v. Meade*) & some cts hold that loss or impairment of reputation.

D. Defamed Classes

1. Suit by a Class - little relief to unorganized groups of indivs who constitute a "class" because of a common characteristic; e.g. race, religion, or nat'l origin.
2. Criminal Sanctions Against Class Defamation
Some states have statutes (Ill., Ind., N.M., W. Va., Mass., Conn., Nev.) specific

punishing defamations which subject a class to "contempt, derision, or obloquy" because of "race, color, creed, or religion." [Beauharnais v. Illinois, 343 U.S. 250 (1952)], Ct. usually reluctant to enforce the group libel acts unless the publication is likely to cause a breach of peace (clear + present danger doctrine). It would seem that protection to defamed classes cannot be successfully provided by the law of defamation.

IV. The Standard of Conduct & State of Mind Requisite to Liability for Defamation.

A. Problems of Intent - in every defamation case the problem of motivation is present in three contexts: Did D intend to communicate his statement to third persons? Did D intend to refer to P? Did D intend his statement to injure P's reputation?

A man publishes at his peril what he publishes either intentionally or negligently. The D's intent or neg in referring to the P was immaterial if third persons could regard the publication as "of and concerning" the P.

B. Indivs Not Publishing Through Mass Media -

It is generally assumed that indivs not publishing thru mass media are strictly liable for the substance of all material communicated to third persons. Strict liab is not appropriate.

C. Mass Media: Originating Organizations

Strict liability is imposed (usually have insurance against large losses from defamation liability) on printed matter as well as radio + T.V.

D. Disseminators

It is generally held that disseminators such as news vendors, libraries, & handbill distributors are not strictly liable for defamation but are liable only if they knew or should have known that the material distributed contained defamatory matter.

E. Individual Participants

The law at present would hold every indiv. participant in the publication by a mass medium of a defamatory statement, except the disseminator, strictly liable, be he reporter, editor, linotypist, radio announcer, or engineer. - Not a good solution to the problem.

F. Means Used by Mass Media To Shift Losses From Defamation Liability.

1. Indemnity and Insurance - The indemnification K is the basic means of shifting the loss in a defamation action from the party sued to the one ultimately responsible for the defamatory material.

Ins & indemnification Ks seem valid for at least accidental, neg, or vicarious defamation. They help effectuate the ~~def~~ deterrent purpose of defamation law.

2. Contribution or Indemnification Among Joint Tortfeasors

The CL of most American jurisdictions denies a joint tortfeasor any right of contribution against another equally at fault, but allows a secondary wrongdoer to recover indemnity from a primary wrongdoer. Many jurisdictions have modified the CL rule by statute. A joint judgment is a condition precedent to a right of contribution.

V. Privileges and Other Defenses

Where the policy of encouraging communication is especially important, the privilege will be absolute; & even proof that the D acted solely to injure the P will not defeat it. If, on the other hand, this policy is of lesser importance, the privilege is only qualified, & a P may defeat the defense by convincing the jury that the D acted unreasonably or for improper motives.

A. Absolute Privilege - The grant of an absolute privilege is limited to certain governmental activities. A qualified privilege does not eliminate the necessity of litigating questions of fact.

1. **Acts of Public Officers** - High govt. officials & all judges have an absolute privilege for communications made within the range of their official duties. Remarks made by members of Congress are not actionable due to protection by U.S. Constitution.

2. **Official Proceedings**

Ⓐ **Proceedings in which Absolute Privilege is Granted** - judicial & admin proceedings are included, along with legislative hearings.

Ⓑ **Treatment of Different Participants in a Proceeding** - In holding communications absolutely privileged cts have generally drawn no distinction between the different participants in a proceeding.

Ⓒ **Relation of the Communication to the Proceeding** - A communication will be held absolutely privileged only if it was pertinent to the proceeding & made in connection with it.

Modern cts usually hold that a communication is sufficiently pertinent if it has reference to the subject matter of the proceeding. "The matter to which the privilege does not extend must be so palpably irrelevant to the subject matter of the controversy that no reasonable man can doubt its irrelevancy or impropriety. The circumstances in which the communication is made must be such that it may properly be considered a part of the proceeding. Atty-client correspondence is absolutely privileged along with settlement offers & pretrial depositions.

B. Qualified Privilege

Fair
Comment

QPs may be divided into those accorded conduct implementing indiv or group interests, & those attaching to communications on public matters by mass media. Unlike an AP, a QP can be lost by abuse on the part of the D. Generally speaking, he must not say more or communicate to a larger audience than is reasonably necessary to serve a socially desirable purpose, must have reasonable grounds for belief in the truth of what he says, and must not be actuated by ~~an~~ improper motive.

Proof of "actual malice" ordinarily defeats the defense.

p. 927

1. **Fact and Opinion** - the important distinction is between conclusions which are arrived at from an unstated basis and those which are inferred from a basis presented or referred to, or from general knowledge. The reader in the latter case is aware of

the basis from which the inference has been drawn and is thus able to appraise it.

2. Abuse of Qualified Privilege - the D has abused a privilege when he does not act for the purpose of furthering the interest which the privilege is granted to protect. There is an inference of "actual malice" from his unreasonable conduct in making the statement, the result of which is forfeiture of the privilege.

C. Other Defenses

Consent - Consent to a particular publication is a complete defense to an action for defamation from that publication. Cts must determine whether the defamed had reason to expect that the communication would be defamatory.

Truth - At Cd there is no civil liability for the publication of a true statement even though it is uttered maliciously and injures a person's reputation. In a few states, the severity of the rule has been slightly altered by statute. An action for invasion of privacy suggests that the defense of truth might appropriately be withheld when the D has not acted in good faith and the injurious communication does not involve matters of public concern.

VII Remedies

Depends upon the extent to which it serves to prevent, compensate, or ameliorate the injuries which were caused.

A. Words Actionable Per Se. (a) Gen. Damages

Where defamatory words are actionable per se a P may be able to establish a claim to three types of damages - gen, specific, &

punitive. General damages are those which presumptively result from the publication of words actionable per se & may be recovered sans specific evd of ~~injury~~ injury to the P. The jury is permitted to find substantial damages on the basis of this presumption, and must return at least nominal damages.

Gen damages include compensation for all harm likely to result in the future. Specific damages (special damages) are those which must be alleged in the Complaint in order to give the D notice. Words actionable per se are those actionable sans proof of special damage.

Ⓐ **Specific Damages** - specific items of damage must be pleaded in order that the D may have notice and opportunity to prepare a defense.

Ⓒ **Punitive Damages** - In addition to gen & specific damages, the P may recover punitive damages where actual malice or recklessness is shown. Intro into evd of financial condition of D is admissible.

Words Not Actionable per se - where defamatory words are not actionable per se the P must plead and prove special damage - which in this context means proof of pecuniary loss - in order to maintain an action.

B. **Retraction** - A full retraction by the defamer, given the same publicity as the orig publication, is probably the best means of restoring the P's reputation.

C. Injunction - Although a retraction may be desirable for direct restoration of lost reputation, injunctive relief, if available, might be even more desirable to a P because it is designed to prevent the original injury from taking place. Courts have, however, been reluctant to enjoin defamation.

D. Criminal Libel - a malicious libel directed against an indiv constitutes a crime in every jurisdiction in the U.S., although prosecutions for this offense are rare. A few states, by statute, extend criminal sanctions to slander.

2 April 57 (Pick up mimeographed material in the library.)

If there is an affirm du fact, non-feasance is actionable. There are special relationships, also, in wh there is an affirm du fact.

Nonfeasance is really misfeasance when you divert third party aid.

Non-performance of the Gratuitous Undertaking or Performance

Thorne v. Dees - no action of assumpsit sons consid. (old view)

But recent cases apply Promissory Estoppel & sec. 382 of the Rest. of Agency in finding liability.

hypo on nb 164: there is no liability here because the man's position was not worsened. See sec. 324 Rest./Torts (This was my "day in court". Jackson v. Schwartz)

In certain special relationships, there is an affirm du/care in controlling the acts of a 3^d party.

1) Parent - Child - where the child has a propensity which it is the duty of the parent to curb or control.

(2) Keeper - Insane person

(3) Others (e.g., A owns Filthyacre and allows hobo's to camp there.)

cb. 260

Causation and Contribution

To recover in negligence:

Four necessary elements which must be shown to recover in an action of negligence

(1) Must show a du/ca

(2) " " br/du/ca

(3) " " a resulting injury

(4) " " actual causal connection

(a) "But for" test of " " "

hypo: A removes ice from frozen river. Statute requires a fence to be put up around holes from which ice is removed. P's horses fall thru. Ct held that the horse would have gone through the fence anyhow.

cb. 289 Ford v. Trident Fisheries Co.

No liability here: (1) there was an affirm du/care owed (2) there was br/ch/oa (3) there was injury (4) But there was no actual causal connection here since the seaman was wearing lead shoes.

cb. 260 Berryhill et al. v. Nichols

P's ^{plaintiff's} shot wound extended from the wrist ~~and~~ to the elbow. Elements 1, 2, and 3 were present, but there was no showing that the decedent would have recovered "but for" the M.D. The burden of proving actual causation is on the P.

cb. 262 Smith v. The Texan

Elements 1, 2, 3 were present, but P failed to prove or allege "but for" causation and the D's demurrer was upheld.

hypo: A driving to California from N.Y. with B, a paying passenger. A driving at 100 mph & when they reach San Francisco

an earthquake occurs hurling debris on B, i.e. injuring him. B sues A. Held, all 4 elements are present because but for A driving 100 mph, they would not have been & when the earthquake hit. However, there was no PROXIMATE CAUSATION and this must be shown. The occurring or resulting harm must be within the ambit of the foreseeable risk.

Substantial Factor Test

Was the D's misconduct ~~of~~ a substantial contribution or factor in producing the injury? This should be asked where two persons start the same act at the same time & the P is injured by both at the same time.

3 April 57

Asterlund v. Hill - (Refuted by Schwartz)

Proprietor rented house to drunk man there. The case was held not on the merits. Not the same fact situation as our hypothetical P's situation.

Hypo: $D_1 \xrightarrow[50 \text{ miles}]{\text{fire}} P \xleftarrow[50 \text{ miles}]{\text{fire}} D_2$ We must apply the Substantial

Joint Tortfeasors

Factor Test. Can they be held as joint tortfeasors? At early CL, only those who conspired (not so, here) could be held as joint tortfeasors. But, as time passed, you see, this concept was broadened & special situations were established:

(1) M-S relationships - both are liable. Johnson v. Chapman (p. 263 ct.)

Common - party wall fell on P. D₁ & D₂ were not conspirators; no M-S either. Yet, they were treated as joint-tortfeasors & were jointly liable. They owed a common duty to P to keep

the well in repair, So, situation #2 is the Common duty situation.

② Common Duty situation - under this, D_1 + D_2 in the hypo are both. Where two people cause a single indivisible injury, they will be treated as joint tortfeasors. So, where two people, owing a common duty of care, concur to cause a single, indivisible injury, they will be held jointly and severally liable. Can you apportion the damages? If they perpetrated a single, indivisible injury by concurring, the P may go against either both jointly, or one severally, & it is no defense by a D to say that the other D helped to damage the prop or inflict the injury.

Apportionment of Damages amongst joint tortfeasors

Where the damages can be separately determined, they may be so apportioned.

Joinder is permissive. If they are sued together, the judgment must be for the same amt. The P is not compelled to split the damages, but may do so if he pleases. If D_1 pays only part, P may go against D_2 for the remainder.

Release of one joint tortfeasor from liability

If you release 1 of the Ds, all of the Ds are released. Instead of giving a release, give a bill warranting not to further sue.

4 April 57

Macelli v. Hirsh [sic]

Hypo: D₁ carelessly hits P's testator & D₂ kills him (automobiles). Both Ds are negligent. D₂ is liable for wrongful death and so is D₁, because the latter exposed P's testator to a great risk of harm, and the death was the proximate consequence of his tortious act; and, the death was within the ambit of the foreseeable risk created by D₁. Although two or more people may act in succession, if the ^{single and indivisible} injury or death of the P is the result of their ~~separate~~ ^{tortious} ~~and actionable~~ acts, they will be held liable as joint tortfeasors. D₁ is guilty of the initial impact.

Hypo: D₁ injures P with car & D₂ runs over him & kills him. However, after D₁ had hit P, he had only 1 hr. to live. D₁ held liable for \$50,000. D₂ only liable for wrongful death, & little if any can be recovered in money damages from D₂ since P was worth little or nothing having only 1 hr. left.

CONTRIBUTION

As between joint tortfeasors, at CL, there is no contribution. This bad rule has been modified ~~between~~ by stat in 20 jurisdictions allowing some contribution. In 6", CL rule has been modified by judicial decisions.

Knell v. Feltman 273

Modified the CL rule: CL rule outmoded & must conform to the times. Here D₂ was S of M (the one being

sued here). Ct. held that since $D_2(M)$ was not personally liable, he will be allowed to recover contribution from D_1 .

227 Mass. 203

Gail Lumber Co. v. Busch (1917)

P assigned execution rights to X, an employee of D_2 , for \$10,000, & X then went against D_1 . D_1 shouted fraud. Ct said no fraud. (Not a good decision: opens up possibility of legal blackmail [D_2 against D_1 to persuade him to contribute or else they'll get P to assign & D_1 will have to pay the full judgment.])

INDEMNITY

At Ct., although contribution is generally not allowed as between TTFs, indemnity is allowed liberally in 9 situations (see mimeographed distribution). Otherwise, it would be logical not to allow indemnity as between TTFs.

Tipaldi v. Riverside Memorial Chapel

Not only sued the 2Kor, but also sued the Eer under the "inherently dangerous rule" of Hexamer v. Webb (plank left on a bridge after 2Kor completed construction nearby). Eer allowed indemnity to be collected from 2Kor: the latter & was principally liable.

Kittleson v. American District Telegraph Co. (Ch 279)

Eer of D fell thru skylight onto Eer of P. The WCA is also involved here.

9 April 57

Ainsworth v. Berg CB 282 Here, the S/L did not bar D₂ claim against D₁:

- (1) S/L here not intended to deal with cases of contribution & indemnity
- (2) S/L is 2 yr. period after c/a accrues, and here the S/L would not start running until judgment was handed down.

Gay v. State CB 270

Pig pens in neighborhood. One is insufficient to constitute the stench complained of. D chgd with crim chg of public nuisance. (private nuisance (tort) is an unreasonable interference with the use & enjoyment of private property. A private nuisance can come about in three ways:

- (1) Intentional nuisance
- (2) Negligent nuisance - neg allow horses to camp on your prop.
- (3) Nuisance thru extra hazardous activity - liability sans fault.

Most of the nuisance is intentional:

- (1) Actions brought in equity to enjoin,
- (2) Requests to stop are usually given before the trial.

Here, they should be treated as TTFs. H's act, in + of itself, is not harmful. Better view: A could be sued by treating all as TTFs, permit contribution among the TTFs.

(Trespass would not lie here.) The Ct went all of the way in favor of H & was harsh on P.

Farley v. Crystal, Coal & Coke Co. et al. CB 270

6 coal cos. upstream dump debris into river & deposits were

formed on P's land. All of the cos. were independent & you cannot measure the damages of each one. Their damage was single & indivisible. P joined all 6. Ct said:

- (1) Damage caused indirectly,
- (2) they acted independently, and joinder was not permitted and the cos. were not treated as JTFs.

Difference between Gay v. State is that in Gay, one of the Ds could not have done any harm, but here one of the coal cos. could have, alone, caused harm & did. So, you must:

- (1) sue them separately for the pro rata damage. Since you can't apportion the " ", Ds go free.

The decision stinks like the pigs.

72 Okla. 76 -

- * Ct here said that since damages were unapportionable, treat them as JTFs & allow contribution. Here, oil was dumped into river by cos. & it caught on fire, ~~injuring~~ injuring P's property.

Kingston v. Chicago Northwestern Ry. Co.

Negligently set fire & fire of natural origin unite and burn down P's prop. If D proves that one of the fires was of natural origin, no liability. This is not the majority. The majority view holds that even if one of the fires were of natural origin and D negligently started this fire, D liable (Rest Torts, Sec. 432 + 146 Minn. 430 in accord).

48 Wis 624
146 Minn 430
Rest 432

Cole v. Shell Petroleum Corp. Ct. 287

Here, even if D hadn't placed the obstructions, the land of P would have been damaged anyway due to the huge floods in the area. Here, substantial factor test instead of "but for causation" should have been used. No liability here. A special rule is applied to the flood situation.

Dillon v. Twin States etc. Ct. 286

P's intestate would have died from his fall off of the bridge anyway and on the way down he hit D's electric wire.

10 April 57

hypo: D₁ pushed intestate (X) off of Empire St. Bldg. & as he passed by the 99th story, a knife thrown by D₂ accidentally hit X & killed him. Who is liable? Possibilities:

- (1) D₂ liable solely because it was the knife that killed him.
- (2) D₁ solely liable because if he had not pushed him, the knife would not have hit him, & X would have died from the fall anyway.
- (3) JTFs - weak argument.

How much damages? If D₂ had not interfered, P (the family) could have possibly recovered \$175,000. So, maybe D₂ will be liable for a lot of damages.

29 HARRIS

hypo: Avalanche falling on A but before it killed him, D shot & killed A.
 - Little damage because at that time, A's life expectancy was little and worth even less.

hypo: A boarding ~~State~~ S.S. Titanic & D shoots him. - Damage large because at the time A's life expectancy was good. Not concerned with hindsight & subsequent events, but foresight were concerned with.

* Proximate Causation *

hypo: A breaks Marilyn Monroe's leg while neg driving his car. How much will her leg be worth? Will A be held to have known it was MM thru prox causation?

hypo: MM is disfigured (a black day, boy), becomes despondent & commits suicide. Will A be held liable for the death?

Ford v. Trident Fisheries Co. ch 289

Test: Was the result within the risk contemplated by and guarded against by the legis?
Was the result contemplated?

Larimore v. Amer. Natl. Ins. Co.

Statute held: forbids the laying out of rat poison "except in a safe place." P defended on the statute.
 Ct. held for D, however, because:

- (1) poison was in a safe place.
- (2) Was it the prox cause of P's injury? No. The stat ~~was~~ ^{was} not made to prevent this result (explosion of poison).

Mandell v. Dodge - Freedman Poultry Co.

Dean v. Leonard - where it is pleaded that a party was driving an illegally registered car, the violation of law is, as a matter of law, a proximate cause of a collision. But, this strict rule only applies where specifically pleaded.

The result in question was not within the risk the statute was designed to prevent. Here, I was driving CAREFULLY sans a license. Statute designed to prevent neg or haphazard driving. Mass: one who drives sans registration is deemed to be a trespasser on the highways. Limitation on this is Dean v. Leonard, cb-295. (sa)

Watson v. Rheinderknecht cb-297

As far as injuries to the person are concerned, you take your victim as you find him & are liable for resulting consequences, even though the result could not have been foreseen. (ans. to MM hyp about the leg. I would be liable for the full worth of her leg - \$1,000,000.)
cb-298

Hill v. Winsor

Was there "but for" causation? Was this within the foreseeable risk? Was there proximate causation? The D was liable even tho you could not reasonably foresee the chain of events causing the injury; *Where the D subject. the P to personal phy. harm & this phy harm might have occurred in many ways, it is no defense that the way the harm was caused was one which could not have been foreseen.

In re Arbitration Between Polemis & Another & Furness, Withy & Co. Ltd.

Was this result (fire) within the risk contemplated. Is this case contrary to everything we have learned so far?

11 April 57

cont'd For what consequences will we hold a given D liable?

Spark ignited by negligently-knocked-down plank-into-the-hold. What consequences could we have foreseen? Personal injuries, damage to the ship, etc., but not the spark. The result was not within the ambit of the foreseeable risk. Once we decide that the D is guilty of neg., it is not important that the result was not within the ambit of the foreseeable risk. As far as the issue of prox caus is concerned, the Eng. Ct. threw out the concept of foreseeable risk. *Was the damage the direct result of the D's conduct? (The test, here.)

Intervening - Supervening Direct Result Test

*Directness of result: concept imposed by the Eng. Ct. here. They did not use foreseeability of risk doctrine.

Gilman v. Noyes Ch 303

- (1) The jury has to determine whether the damage is the natural consequence of the neg. & such as might have been anticipated by the exercise of reasonable prudence. Sheep escape thru gate left open by D. Bailee of the sheep sued D. Ct. gave instruction using the "but for" test. T/P/R: Bailee has sufficient interest to allow him to sue (Winkfield Case, p. 79 Prop. Ch.).
- (2) If the damage would not have happened sans the intervention of some new cause, the operation is the natural consequence of D's

of which could not have been anticipated (reasonably), it would then be too remote.

(3) Here, the intervention of a new cause, the bears, was shown, & it was for the jury to determine whether it was natural and reasonable to expect that if the sheep were suffered to escape, they would be destroyed in that way.

neg & as such, might have been anticipated by the exercise of reasonable prudence. This is actually equated with the foreseeable risk concept.

There was no conversion here (no taking over of poss.). The upper ct. in reaching said the ct below erred by applying the "but for" test. Should be up to the ct or the jury to deliver the prox causation question.

hypo: When sheep wandered into forest assume we could have foreseen the following:

(1) Many wild animals known to be Y but no bears. Bears kill the sheep.

(2) Mines, poisons, etc. are X, but unknown bears kill the sheep. How broadly or how narrowly do we define the risk?

hypo: Kid ~~has~~ has his leg broken by 10 lb. can of Nitroglycerine which fell off of a table. Is there liability. Rest. Tort sec. 281(d) said no liability here.

Shrout v. The Mayor, Aldermen & Commonalty of City of N.Y. 1887
An intervening act of nature which is foreseeable, does not isolate D from liability. D is liable for causation by an independent natural force, the probability of whose intervention was appreciably increased by D's act. Usually, the ?? of foreseeability of risk to the jury. Here, D neg maintained the ditch & P drove carefully into it. While waiting for other transportation, he caught a spinal ailment or disease from standing in the rain. ~~No~~ Liability here.

The Mariner CB 310

If the misconduct is of such a character, which, according to the usual experience of mankind, is calculated to afford an opportunity for the intervention of some subsequent cause, the subsequent mischief may be held to be the result of such misconduct.

The ship went aground negligently. A storm, which ~~could~~^{should} have been ~~avoided~~ foreseen, came up & damaged the cargo. The cargo owners (Ps) sued D. D said that since these storms should have been known anyway, just being Y should not further extend their liability. The ship had stayed afloat, & because of this, Y was liable. But for the ship staying afloat for a longer than the scheduled time, the cargo would not have been damaged.

Green-Wheeler v. Rock Island Ry. Co. CB 312

There was liability, some fault here. ~~The~~ D was liable on an insurer's theory and the br/dn owed to the goods & the P. Mass different from N.Y. on this rule.

As far as prox. caus is concerned, we can use these tests:

- (1) Foreseeability of the risk - have to deter broadness of the risk. As the risk broadens, the liability spreads.
- (2) Directness of the Result - whatever that means. (*In re Polemis*)

Ill. Central R.R. Co. v. Filer

To stop fire set by D which fire threatened her home, P was injured. D said that here's was a voluntary intervening act, & therefore, D was not liable. D also said

avoid contrib

Comparison

that she was guilty of assumption of risk. Ct said P did not assume a risk here, but was obligated to save her house due to the DOCTRINE OF AVOIDABLE CONSEQUENCES: if the P does not live up to her duty to mitigate damages & (2) make reasonable efforts to avoid the consequence, then P is under a disability to sue D. Contrib neg - D absolved from liability completely. Doctrine of AC - damages only mitigated or lowered, but D not absolved completely from liab. So, bearing in mind the preservation of her prop, we can say that she did not act neg under the circumstances. Can she prove that D was negligent? What sort of direct causation? There is none here due to third party intervention (P). But, D should have foreseen the consequences & ∴ the P's injury was within the risk. P not barred by contrib neg, nor assumption of risk due to a du/pet on P's part.

Scott v. Greenville Pharmacy

Under a death statute. Came up on demurrer. P alleged D sold habit forming drugs to H (husband) some prescription & A did not know of the nature of the drugs. H then hung himself. Ct here affirmed Ct below &

held for D saying that H was guilty of contrib negligence; that there was no prox causal connection between the selling + use of the drugs + the hanging. Was the latter rationale wrong? It had two bases:

(1) Legal policy to discourage suicide.

(2) Cannot prove "but for" causation.

How do we know the H would not have committed suicide anyway?

Where the injured person becomes so deranged that he fails to realize his following acts + loses control, D liable for the suicide.

hypo: A tells bartender that he has to drive home. Bartender^(B) allows A to get to an advanced stage of intoxication. A kills X with car. A liable to X, but is B liable to A? No liability at C.D. But many states have Dram Shop Acts making the bartender liable. See Martin v. Blackburn ct 296.

Ct. here could have taken judicial notice of certain facts (e.g., that H must have known, due to common knowledge, of the danger of the drugs). Also, H had the last clear chance to prevent the death.

Thompson v. Louisville & N. R. Co.

Hypo (1).

P had little scratch + doctor put arsenic instead of iodine neg in the scratch.

(2).

P with broken leg in hospital which burned down.

- (3) P killed in ~~an~~ ambulance wreck in which he was riding.
- (4) Broken leg by D. lowers resistance of P & he dies of pneumonia.
- (5) P catches smallpox in hospital.
- (6) MD neg operates on wounded leg.
- (7) After finishing operation on " " , MD asks to do " " on good arm & injures him.
- (8) Mix-up of hospital chart & P mistakenly goes to brain surgery.
- (9) After recuperating from broken leg, MD tells P to walk on crutches & P falls again & injures himself.

Intervening Negligence of Third Persons

General rule: the act of a third person, intervening and contributing a condition necessary to the injurious effect of the original negl, will not excuse the 1st wrongdoer, if such act ought to have been foreseen.

Where P is injured through D's fault so seriously that the injury will produce death in time, but his death is immediately due to lack of skill or care in an operation or in the administration of medicine or to disease, which immediate cause would not have been brought into operation but for the wrongful injury by D, D is liable for P's death.

18 April 57 Proximate Causal Connection (cont'd)

Hypos under Louisville case

Foreseeability

- (1) Probably no liability here. However, when you injure another, you may be liable for exposing the injured to a foreseeable risk of harm as a result of neg. actions by others. Just think about this."
- (2) Probably no liability here, but Y may be.
- (3) We could well say this was within the foreseeability of the risk + ∴, Y is liability.
- (4) No doubt that he D is liable for the first impact & whether he is liable for the rest of it, it is probably a question for jury.
- (test) (5) Is this risk foreseeable or not?
- (6) The orig D is liable for the surgeon's negligence. The result is within the risk. i.e., Y was prox caus. The surgeon & D are treated as joint Tfs (indemnity allowed here), & are ∴ jointly and severally liable. The M.D. had the "last clear chance" to avoid the second injury.

Contributory negligence

If P is guilty of contrib neg in selecting a crack, D not liable (complete defense to a neg tort) re the second injury.

- (7) No liability for injury to the arm which was not injured at all by D.
- (8) Purchase v. Salpe Co 324
 Such a mistake was not an act of neg which could be found to flow legitimately as a natural and probable consequence of the original injury.
- (9) Sporn v. Kalina - no recovery in this situation. The Ct. may have narrowed the concept of foreseeability here.

O'Neill, Adm'r, v. City of Port Jervis et al.
 Suit brought against D, the man who placed the obstruction on the sidewalk forcing the P & his parents to walk in the street. P brought action under the Death Act (N.Y.).

There is proper proximate connection; it is a foreseeable risk that the P will be injured from either a carelessly driven car or from a neg driven car.

If the car were being driven carefully, D₁ is liable only. If D₂ ~~was~~ driving negligently, and D₁ paid the recovery, D₁ is entitled to be indemnified by D₂.

Maryland is the only state

which imputes the neg of the parent to the child.

Morrison v. Medaglia

D₁ + D₂ are JTFs as far as the death act (the second impact) is concerned. D₁'s first impact exposed P to a foreseeable risk.

Collins v. City Nat. Bank & Trust Co. of Danbury

D bank and X bank involved.
Possibilities:

- (1) Breach of K - bank agreed to honor all checks and did not even though P had safe funds.
- (2) Defamation - libel; may be a privilege (conditional) here.
- (3) False Imprisonment - not valid because when the police arrested P, they were not acting as agents of D or X.
- (4) Malicious prosecution - not too valid.

P sued D for negligent misrepresentation resulting in confinement. The P recovered on this theory, too.

Neering Case

Brower "

Miller "

Neering Case - involved a voluntary intervening crim. act of a third person. Ct. imposed liability against the D (RR).
Brower Case - D's train hit P's truck, spreading contents over road. Hijackers steal the goods. R.R. (D) held liable: their

acts ^{were} foreseeable even though this was re criminal acts. Miller Case - did the intervening act of the ptur cut off the chain of proximate causation? Ct. said yes. This was not a foreseeable risk.

24 April 57

For what consequences are u liable? Is the P the proper party to sue?

Kelly v. Henry Muls Co cb 345

Fireman, while putting out fire, fell thru open elevator shaft. Statute requires elevator shafts in this type of bldg. must be guarded. D demurred: I have violated a crim. statute, but I did not owe a du/care to the P. Policemen + firemen fall between licensee + big visitor in re classifications. No du/care owed to Pat C.L. P said this was not C.L. Ct. said under this statute, the only persons protected by the statute are the employees of the D. Rule: P must show a du/care owed to himself. However, we transfer intent; but, we don't transfer negligence nor duties/care. This is the American pt/view.

Smith v. London & SW Ry. Co. cb 349

English pt/view: Once you establish that the D owed a du/care to someone in the world and give

There was a br/dy/care, The P may recover even though he, himself, was outside the zone of danger & not within the foreseeable risk or harm or danger.

Where Y is a duty, y is a risk. Do the English Ct's still follow this decision. Here, y was an expansion of scope of liability.

Ryan v. N.Y. Central R.R. Co. ct-352

No strict liability in re fires. Must show negligence. Ct. held no recovery here; this is a special N.Y. fire rule, law only in N.Y. = the D is liable in case of fire only to the immediate adjacent occupier and to no one else. This was a contraction of liability.

* Palsgraf v. Long Island R.R. Co. ct-354 Cardozo, C.J.

D's moved to dismiss on 12 (b) 6. After instructions, verdict \$6,000 for P. D moved for new trial. Denied. Appeal to Appellate Division. J/P/A. Cardozo ruled this: a du/care owed only to a foreseeable P and ∴ there could be no recovery as a matter of law. Not even a question of fact for the jury. (1) Neg is a matter of some rel between the parties: a duty owed by D to this particular P. (2) A duty extends only to a foreseeable P. "The risk to be perceived defines the duty to be obeyed." (3) No doctrine of transferred negligence although we have "intent"

Palsgraf Case

Cardozo:

Andrews, J. dissenting:

- (1) Neg does not depend on any rel between the parties.
- (2) If D is neg with respect to X, he is liable to the injured P even tho' he is out of the foreseeable risk of harm, i.e., transferred negligence. There are 5 limitations based on prox cause:

- (1) All a matter of politics
- (2) All a matter of policy
- (3) Can't be too many intervening factors
- (4) Whether P is within foreseeable risk is only one of the bases of determining liability.

24 April 57 - afternoon session

(Brilliant lecture by Schwartz)

NEGLIGENT INFLECTION OF EMOTIONAL DISTRESS

Is there recovery here? (see Sullivan v. Old Colony R.R.) → held

General Rule of Law
in re physical harm

that u must show some phys. harm. Generally, in a neg. suit u must show some phys. injury and this is true of N.E. of E.D.

Exceptions:

- (1) Closest relative of a decedent for the neg mutilation of a corpse. (v.e. cases to the point). No necessity for phys. injury to accompany the mental anguish.

80 A.L.R. 304

(2) Large minority of states - recovery for bare mental anguish in failing to transmit or transmitting erroneously a message. (as against a telegraph co.) No phy harm is required. The type of message is one usually in re death.

Majority view in re a physical impact

Must you show a ^{contemporaneous} phy impact or connection? Orlo Case holds that if ~~must~~ need not be some phy contact (majority view).

(1896) Mass - there must be all three requirements!

(1) Mental anguish

(2) Physical harm

(3) Physical impact or contact.

i.e., Mass required this phy impact to have recovery. The impact requirement, however, is very liberal. As long as it is some type of impact, no matter how slight or where it comes ^{from}, the impact requirement is satisfied. Practically, Mass has probably abandoned this requirement but we can say that there are at least some vestiges remaining.

Third persons

Say, P fears for the safety of another?

Handbook 1K.B. 141 (1925)

Stoke Bros.

Mother sees runaway truck will

1 K.B. 141 (1925)

207 N.E.S. 502

hit her kids. - Y was recovery here. But, here the P herself was in the zone of danger (a few ft. away from the kids.) Say, the P is outside of the foreseeable zone of danger.

Walby v. Warrington, p. 370 ch.

P sitting in her home, sees her kids hit by D's truck. Ct. held: Since P was outside of the zone of danger, no recovery because this result was not foreseeable.

General Rule of Law
in re third persons

If P, herself, is within the zone of danger, Y may be Recovery. Otherwise, no Recovery.

Rasmussen v. Benson

Recovery for fear for property

P feared for safety of his cows i.e., his property, + there was here recovery.

* Distinction between neg. I of E.D. due to fear for a third person, + the intentional I of E.D. due to fear for a third party. In the latter there is recovery whether or not within the foreseeable zone of danger.

ch. 372

Boorhill v. Young

Ct held that if the motorcyclist was neg, Y would still be no recovery. P was outside the foreseeable risk or zone of danger.

Summary

General Rule: must show some
phy injury with some exceptions.
Majority also holds that it is no
need for phy impact.

The English Ct. adopt the
 Palsgraf theory in re the
 N.T. of E.D. (END Neg. Inf. of Em. Distes)

{ Newland case ch. 380

Pole maintained by D fell on
 power line & P's mushrooms
 spoiled. P recovered.

{ Stevenson Case ch. 383

P lost 8 days of wages due to the
 neg ~~loss~~ of D. No recovery here.

Distinction: in #1 there was harm to a
 tangible property. In #2, y
 was damage only to a pecuni-
 ary intangible thing - wage
 earning power.

Y can be no recovery for the
neg interference with a K. Y
can be recovery for the inter-
ferential interference with a K (an
advantageous relationship)

Exception:

(1) Master-Servant relationship
 Recovery here but only for
 the loss of the S's services &
 the value thereof, i.e., ltd.
 recovery.

Hypoi I Co. (ins. co.) insures X. D neg
 injures X. After I co. has ~~paid~~
 paid X, can they now sue D?

On the theory of Subrogation, T could recover. But, no recovery for the neg inter with the X.

hypo: A owns automobile, neg manufactured by X. A continues driving car even after discovering the defect. A hits P. P sues X. Can X say that his created risk has terminated due to failure of A to rectify the defect? Ask the questions: is the result foreseeable, within the ambit of the foreseeable risk? Was the act of the third person foreseeable?

Manufacturer's Liability

C.L. Development (History)

Winterbottom v. Wright (1892)

No privity - no recovery

R under K to repair O's coach. P injured when coach broke down. Ct. said this action of br/k could not be maintained by P due to lack of privity of K (P & R had no privity). Ct. went on to say that due to lack of privity of K, no recovery in tort (all ~~not here~~ ^{or supplier}). Gen. C.L. rule: a man, ^{or supplier} repairer, owes no duty of care to one injured in the device. Only owes duty of care to the initial buyer.

183 N.Y. 78 Exceptions to C.L. Rule:

(1) where y is deceit in the sale, the third party sans privity of K may recover.

Shubert v. Clark 49 Minn. 331

(2) Where y is fraud (concealment), y is recovery by 3rd party.

89 N.Y. 70 →

(3) where is inmate the 4th party to use the device.

(4) Inherently Dangerous Article Exception - Thos. v. Winchester 6 N.Y. 97 = druggist misdelivered a dangerous poison to X who gave some to P's intestate, Y was recovery here.

What do we mean by inherently dangerous? Coke, soap, tobacco have been held inherently dangerous.

* McPherson v. Buick Motor Co. 217 N.Y. 687
Cardozo, T. - D had purchased the defective wheel from X but neg failed to ascertain the defect. D injured while driving the car with the defective wheel.
- Cardozo reversed the C.L. rule & said that no longer is any concept of privity of K. Mass agrees (Carter v. Yardley, 241 Mass. 445).
So, the C.L. rule was completely abrogated.

Quackenbush v. Ford Motor Co. 151 N.Y.S.
Recovery for damage to chattel due to the defect
Y is recovery for injury to one

not using the car (defective wheel hits Pin eye). Fries v. Fox Bros. et al 473

* Who is liable under the McPherson Rule:

- (1) Manufacturer (4) lessor of goods
- (2) Supplier
- (3) Repairer

Rule of Law

Manufacturers of component parts of the automobiles are held to the same degree of liability as the manufacturer who sells the finished product, even though no privity & it doesn't matter who or what is hurt.

Proof of negligence:

Standard of care: Reasonable man in the circumstances of the case. The Manufacturer's neg is based on Res Ipsa Loquitur.

(cb 459)

Commissioners of State Inv. Fund v. City Chemical Corp.

* Where a retailer puts his name on the manufacturer's product or represents that he made it, he is liable for the manufacturer and estoppel may have some bearing.

REST. Torts, sec. 400, NOTE D.

No additional liability where the words "distributor" follows the retailer's name, no liability.

Rule of Law

A manufacturer will not be held liable for personal idiosyncrasies found among a small % of the population. It is a duty

to give some type of warning.

hypoi M → W → R → Buyer. R knew of the defect but continued using the thing. (cf. 471, + Ford Motor Co. v. Wagoner: the manufacturer is not relieved of liability. The buyer's Acts were not foreseeable. (Some cases going the other way, holding that the chain was broken.) You must show neg. manufacture of the product if y is primary def, no need to prove neg. since under action for breach of K of warr no need to prove neg.

Building Contractor Liability

hypoi A builds bldg for O & P is injured when a wall collapses. - Ct held P could not recover due to lack of privity of K between the P & A (when P sues A instead of O). Exceptions:

- (1) Where structure is inherently dangerous.
- (2) Concealment of defect (fraud)
- (3) Structure creates a nuisance.
- (4) Where K^r (builder) impliedly invites the P to enter upon the property.

Ford v. Sturgis Co 481
Once the bldg has been finished and delivered to O, however, the K^r cannot be sued; for, O assumes the liability when he accepts the bldg. If, tho', the O hasn't yet accepted the bldg., the K^r will be liable.

Recent decision

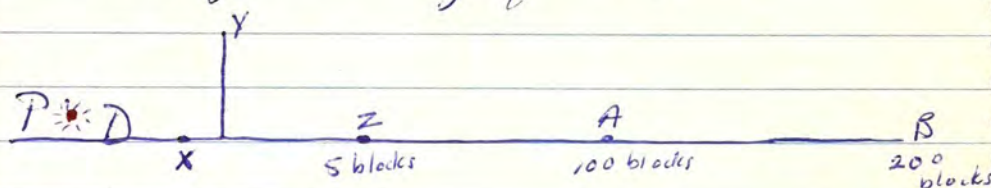
A case from D of Columbia (1956) held that P could recover against the builder even tho':

- (1) Bldg turned over to O
- (2) " built 7 years before.

25 April 57

Palsgraf v. Long Island R.R. Co.
(Pick up from Palsgraf Case)

hypo:



According to Cardozo:

- (1) D could recover
- (2) X - probably a question of fact for the jury
Y, Z, A, B are probably outside of the zone of danger since even they are past the point where X was.

The risk reasonably to be perceived defines the duty to be obeyed.

In re case of administration, Cardozo's way is much better than Andrews. But, Cardozo's pt. of view is much harder to apply and determine. His approach is a fault orientated approach since he says you must show that P had fault. Andrews approach may be a sounder approach.

hypo:

Box in driveway. Empty when truckdriver enters. Leaving with truck, D drives neg over the box, but now Egbert (5 yr. old boy) is inside the box. See 134 Fed. Sup. 231 (1965) which held that there could be recovery here. This was not in accord with Cardozo because the injury was not within the foreseeable zone of danger. Many decisions only pay lip service to Cardozo, even though it is the wt / author in this country; England follows this pt. of view.

134 Fed. Sup. 231
(1965)

Even in the area of strict liability there is some cut-off point, & probably we will apply the test of foreseeable zone of danger.

In the Palsgraf Case, the lawyer could have

won for the P if he had brought up the theories of common carrier-passenger rel and neg in having scales that could be knocked down by fireworks.

Sinrau v. Pennsylvania R.R. Co.

S/P. Appealed; Reversed holding that P should have more closely inspected their barge and that the Doctrine of Avoidable Consequences, which we say in the case on p. 316, would apply here.

hypo: D collides with P, & the spindle on the car is damaged. On the way to the garage, P₂ is hit by P, due to the broken spindle.

Probably recovery against D. - NOTE: the "last clear chance" doctrine only affects prime parties to the case (P & D) inter se.

Wagoner v. R.R. Co. case

Rescue Situations

Wagner v. International Ry. Co. (1921)
J.
Cardozo!

"Rescuer case." Was y a duty/care owed to this particular P? Cardozo said give "danger invites rescue." And hence the duty/care owed to the imperiled, you owe a duty/care to the rescuer since the rescue is within the foreseeable risk.

Danger invites rescue.
The cry of distress is the summons to relief.

where the D puts the P into a dilemma whereby he does not know which one to save (himself or the imperiled one) & P chooses to save the other, there will be no assumption of risk & P may recover.

P is held to the ~~same~~ Standard of care of a reasonable man in the circumstances of the case.
Whether or not the other person was neg., the P can still recover since a duty/care is still owed to P.

81 Iowa 246 - the rescue doctrine applies to your property and the property of others.

It D neg endangers himself (no third party) and P tries to rescue D and was injured, no recovery. 122 Iowa 679

* The act of rescue does not have to be instinctive, but may come after a reasonable cooling-off period.

* The injury in question does not have to come from a second act of neg. Only one act of neg is required. The result must be within the risk.

Kroeger Case ct 372

D rented plane to X. X's flying permit did not have allowance for him taking passengers. P, girlfriend, rode with X & plane crashed. P sued D, not X. Ct said no recovery because she was outside of the foreseeable ^{risk} ~~zone~~ of ~~danger~~ X had a reputation of recklessness and carelessness. Schwartz said that there should have at least been a question for the jury in re to whether the result was within the foreseeable risk.

hypo: A leaves car at B's garage, gets drunk, returns for the car & B's garage won't give it to him. A v. B - no recovery. B made a qualified refusal & was \therefore privileged.

Summary of Negligence

Four Elements:

- (1) Duty of care owed
 - (a.) To the particular P
 - (b.) Nonfeasance or not actionable
- (2) Breach of that duty/care
 - (a.) Comparative values to deter whether you have acted like a res man in the circum/case.
 - (c.) Must deter the circumstances.

- (3) Must show actual physical harm
 (4) Must show causal connection between breach + injury

(a.) Actual causation

- (1) But for test
 (2) Substantial factor test

(b.) Proximate causation

- (1) Was this specific result within the risk?
 (2) In re element #1, we ask whether ^{any harm} ~~the result~~ was within the scope of
 (3) the foreseeable risk. // Foreseeable risk not always applicable: in re personal injuries, you take your P as you find him.

A. Intervening causes

Assumption of Risk and Contributory Negligence

Defenses used by a D. Must distinguish between the two because:

- (1) Fed + state statutes treat them differently
 (2) The C.L. treats different
 (3) C.N. no defense to an intentional tort.
A.R. is a defense to an intentional tort.
 (4) Wilful, wanton + reckless misconduct:
C.N. not a bar to recovery no defense
A.R. is a bar to recovery defense
 (5) D guilty of neg:
C.N. complete defense
A.R. " "
 (6) D guilty of gross neg:
C.N. complete defense
A.R. complete defense
 (7) P + D guilty of evil, want, reck misconduct
No recovery
 (8) C.N. is not a bar to strict liability. no defense

Burden of proof

(9.) A.R. is a bar to strict liability defence

The D must raise and ~~prove~~ prove C.N. + A.R.

Assumption of Risk

A P is deemed to have assumed a risk where he has consented to release D of an obligation of conduct toward him & he takes his chances of injury from a known risk.

Contributory Negligence

Just like neg but we are concerned with a P's imprudence toward himself. All elements of negligence must be present except element no. 1 - duty.

It is not necessary que y be a M-S rel nor que y be a K. So, K + M-S are not necessary to have the defense of A.R.

An A.R. can come about in two ways:

(1.) Thru an express agreement.
These Ks are valid except when contrary to public policy. (e.g., train, telegraph cos., when one of the parties is at a bargaining disadvantage).

(2.) Thru an implied agreement.

hypo: A.R. but not C.N. - P in ballpark hit by ball. - A.R.

hypo: C.N. but not A.R. - P drives car, falls asleep. D drives neg. A.R.? No - sleep does not come unheralded.

hypo: A.R. + C.N. - dark nite. P in car with D who is drunk. - He assented to a known danger (Stark Naked + Aurora North)

30 April 57

Assumption of Risk

Comes about by two ways:

(1) ^{Express} Agreement of the parties - if one of the parties has inferior bargaining power & is coerced, the agreement is void.

(2) Implied A.R. - usually it is this situation. It is inferred from the conduct of the P in the circumstances of the case. The P must Requirements:

(a) P must have knowledge of the risk - He must comprehend not only the facts but also the full danger.

hypo: A - "watch these two chemicals mixing." B doesn't know they will explode but he watches.
- No A.R.

(b) In re A.R., the test is a subjective test & not objective test - we make allowances for individual deficiencies. P must have actual subjective knowledge. However, not completely subjective due to the minimum area of knowledge which is presumed (e.g., fire burns; water drowns).

Paul v. Hitz Ch. 431

Postman on private, icy sidewalk. Ct. said he was a big visitor & he was presumed to know that ice was slippery & ∴ he assumed the risk.

Clayards v. Dethick Ch. 499

Horses over ditch. P not guilty of AR

Elements of A.R.:

(1) P must know & comprehend the risk.

(2) P's participation must be free and voluntary.

because P was not required to surrender a right (walking the horses) due to the acts of another.

(c) The P's acts must be free and voluntary. (P) cannot be put into a dilemma & be forced to do the act.

Campbell v. Pire Oil Corp ch 501

Rule of Law

(Policemen & firemen) Altho' those who voluntarily pursue employments fraught with danger are taken to assume such risks & dangers as are normally and necessarily incident to the occupation, they are not treated as assuming obscure & unknown risks, which are not naturally incident to the occupation & which in the existing conditions, would not be reasonably observed & appreciated.

Murphy v. Steeplechase Amusement Co.

One who takes part in such a sport accepts the dangers that inhere in it so far as they are obvious & necessary, just as a fencer accepts the risk of a thrust by his antagonist or a spectator ~~at a ball game~~ ^{at a ball game} the chance of contact with the ball. "At baseball games, AR unless sitting behind the screen. In Hockey, it is a question of fact, at least, for the jury. (296 Mass. 168) Wrestling - a question of fact for the jury."

Baseball is the nat'l sport, but ^{Mass. 168} Hockey is not. The rule might be different in Canada where Hockey is the nat'l sport.

Contributory Negligence

definition

A complete defense to a negligent tort.

The failure of the P to act prudently for his own safety - C.N.

CN v. A.R.

Difference between CN & neg is absence of element #1 from CN because you can't owe a duty to yourself.

Smithwick v. Hall

P doesn't slip off the slippery platform but is hit by neg maintained wall. Y must be a causal connection between the P's act & the resulting injury.

Leroy Fibre Co. v. Chicago, M & St. P. R. Co. Ct 501 (lead) (T.I. case)

CN is no defense to statutory strict liability.

Jury found that P had put the flax straw too close to the RR track & that even a careful train can emit sparks. The dissent here was better. The Ct. erroneously held that altho' he was guilty of CN, he had the right to enjoy his own property. Not good because there are limitations on prop. zoning laws, nuisance, etc. Holmes' dissent is better and more logical.

Mahoney v. Beaman Ct 532

(T.I. case)

Was this result (\$6000 recovery) sound?

1 May 57

(cont'd)

Know this case thoroughly.

Initial impact - \$1,000

Hitting tree - \$6,000

Here, P recovered \$6,000. This decision is questionable:

(1) Submitted, P's CN not applicable due to

lack of actual or but for causation, for the accident, i.e. the initial impact would have occurred anyhow. So, P should get \$1,000.

(2) However, but for P's imprudence (speeding at 75 M.P.H.) the additional \$5,000 would not have occurred.

Butterfield v. Forrester ob 517

C.L. view: C.N. is a complete defense to a negligent tort, generally. Exceptions and limitations:

(1) Admiralty Rule - arbitrary apportionment of damages, (No C.L. here)

(2) Comparative Negligence Statutes - some states have them (Wis., Canadian provinces). Here, they compare fault and apportion damages accordingly. (No C.L. here)

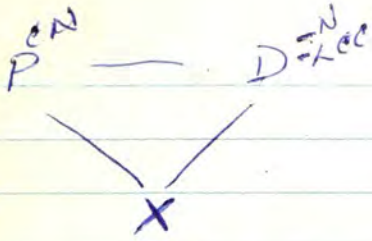
Practically, states that follow the C.L. view (e.g., Mass.) make allowances via the jury.

* (3) DOCTRINE OF THE LAST CLEAR CHANCE —

Davies v. Mann co 518 *definitive case*

This doctrine is the P's reply to D's defense of C.N., and it goes to defeat D's defense of C.N.

In Mass., even though they do not formally recognize the doctrine, it is actually recognized. It is spoken of in terms of actual and proximate causation. This rationale, however, is not good.



The defense of Last Clear Chance is applicable only among the parties to the suit, i.e. P & D. What is it? ...

Definition of Last Clear Chance Doctrine

It places its emphasis upon the time sequence of events, + holds the D liable, even if P is C.N., if immediately prior to the accident the D had the superior opportunity to avoid the accident. Most Ct's apply the doctrine:

Doctrine of Discovered Peril

(1) Where the P is helpless to avoid the accident due to his prior C.N., + D actually discovers P's helpless state in time to avoid the accident by the application of due care.

Doctrine of Discovered Inattention

hypo: P, knowing he has heart seizures, crosses RR tracks; P has heart seizure + car stops on track. P unconscious. D train sees this + has time to stop but doesn't. D liable. - The Doctrine of Discovered Peril.

Doctrine of Discovered Inattention

hypo: (2) Where the P is not helpless but is merely inattentive and D discovers P's inattention in time to avoid the accident by the exercise of due care, but fails to do so, D liable. - The Doctrine of Discovered Inattention. (Boy + girl snoozing on the tracks).

Doctrine of Unconscious L.C.C.

hypo: (3) R.R. doesn't have proper lookouts, + if they had they would see P (heart seizure or boy + girl), D liable. - Doctrine of

Unconscious Last Clear Chance. -
This is a strong minority view.

hypo: P sitting with his girl on tracks + is inattentive, AND the RR train is also inattentive. - Can P recover? P not helpless here. Wt of Authority: Doctrine of L.C.C. not applicable (exception: Mo. - Humanitarian View: recovery permitted, on both P + D are inattentive, if D has a dangerous machine at its control).

hypo: P helpless + unconscious. Engineer on train discovers P's peril + puts on brakes. But, due to prior neg, the brakes are defective, + \therefore P is killed.

Loach Case CB 525

Loach Doctrine -
Not followed by
wt/author in U.S.A.

- A last opportunity which D would have had but for his own neg is equivalent to one that he actually did have. The Loach Doctrine, England. The wt. of authority in U.S.A. does not follow this.

(on exam)

* hypo:

P neg drove upon track + the battery died. P knew his battery was defective. D would have known this if they had had proper lookout. P saw the train in time but frantically tried to start the car. P + car damaged.

Query: (1) Can P recover for injuries?
(2) " " " for car damages.

* In re the car, P could not have possibly moved the car or physically extricated it; so the car would have been hit anyway. So, here D had L.C.C. & P would get damages for the car.

* In re himself, P had opportunity to get off himself & could have but imprudently did not. ∴ L.C.C. will not apply to D + P will not get personal injury damages.

2 May 57

Basis of Imputed Negligence

Imputed Negligence

Here, the P or D will be held strictly liable due to the neg of a 3rd person. A form of vicarious liability.

hypo: D₁ driver of one vehicle with passenger who is not a gratuitous guest. D₂ + D₁ collide & both are neg. Passenger is inj due to concurrent neg of D₁ + D₂ & sues D₂. ∴ D₁ + D₂ are TTFs. Can D₂ say that P is barred due to riding with D₁? W/author: the neg of the driver is not imputed to the P, absent a special rel. ∴ P can recover here.

hypo: Passenger sleeps in car. Neg? No. Falling asleep does not constitute imprudence. He has no duty to watch the road.

hypo: Passenger sees danger & does not warn the driver. This would be imprudence &

would be a bar to recovery (C.N.)
(Hayden Case, ch 498)

hypo: Driver drives neg & P fails to protest to Driver. 111 Kan 735 - failure of Passenger to protest constitutes imprudence as a matter of law. Other cases

hypo: Driver does not heed request to slow down. Kenfro v. Keen ch 495 - P does not necessarily have a duty to get out or to ask to be let out, for it is a question of fact for the jury. Depends on the circumstances & whether it would work an undue hardship on P to get out of the car.

hypo: P is also owner, i.e., he reserves the right to control & has the duty to intervene. A.M. - S. rel. Maj of cts say. If we could prove the P retained the right to control, we could impute the neg of D₁ to P. — [Does mere presence mean one has right of control if retained? Cases hold that it is possible for P merely to be a passenger.]

hypo: D₁ borrows car from P for weekend, P not in the car. D₂ & D₁ neg collide (both are neg.)

O^{B2} — D₁ — D₂
Do we impute neg. of D₁ to P (owner + B^{B2})? No.

58 Rule of Law
B²² - B²² relationship
* The neg of the B²² is not imputed to the B²².
Nash v. Lang ch 538

H + W buy car. Who will be deemed the owner? If H drives most of the time, the car should be put in W's car, i.e., H would be a B²² & if neg & he hits D₂, D₂ cannot say W is barred & W can recover from D₂.

Rule of Law
H + W relationship

B^{mt} stat abrogates CL
no-liability rule

The neg of a H is not imputed to a W & vice versa.

Where a state has a B^{mt} statute, the B²² is liable for the torts of the B²².

Some states say que if a person operates the car of another with permission, this creates prima facie evidence of an agency rel.

Here, a rebuttable presumption was made.

Commercial Credit Corp. v. Southworth (src) ch 540 (*)

(Read this) Action by a conditional seller of a car against the D for harm caused to the car by the neg of D & the conditional buyer. Held, J/D/R for P

M - S Relationships

hypo: M owns car. S (D₁) & D₂ are concurrently neg. M v. D₂ - no recovery; The neg of the S is imputed to M & i. M guilty of C.N. - M v. S - M can recover.

These rules hold true with partnerships.

Joint Enterprise

There must be a mutual right to control the common thing.

Hypo: A, B, C, D all own car together + are traveling together to St. Louis. A (driving at the time) + D₂ collide + are concurrently neg. B, C, D v. D₂ - no recovery; they are guilty of C.N. due to A's neg. - B, C, D v. A - recovery.

Parent-Child Relationship

The neg of a parent is not imputed to the child + vice versa.

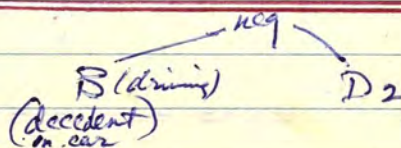
Loss of Services

Reliance Laundry Case 6551

The right of a father to sue for loss of services of his W or children is a derivative right based upon whether W or the children could recover themselves.

Survival Statutes.

Hypo:



Can the beneficiary recover against D₂?

Stefford Case 65441

The beneficiary may recover

under the theory the decedent would be recovering for his injuries (if not C.N.) & the damages would become a part of the estate. This is so even if the beneficiary was neg.

Death Statute (Wrongful Death Act)

hypo: Many states provide that negligence of the decedent will preclude recovery. You (P) must prove that the decedent was not neg.

hypo: 3 beneficiaries: B-1, B-2, B-3. Suit for \$150,000. B-1 driving & was C.N. Decedent was riding in car. — Recovery should be defeated to the extent of B-1's interest, \$50,000. So, B-2 & B-3 would get \$50,000 each.

Owners and Occupiers of Land

In re people themselves, distinction must be made re injury on the land or outside the land, & whether it is natural or artificial.

I.

A. People Outside The Premises & Natural Case on ch 412 (T.I. case)

Pontardawe Rural District
Council v. Moore-Gwyn

No duty of care re natural consequences to people outside.
This is a C.L. No duty rule.
(Boulder rolls off on P from D's land due to erosion).

Re falling trees in rural area,
no duty; urban area, is a duty.

B. People Outside - Artificial Conditions Watts Case ch 414 - The D held

liable (even tho' only a tenant - poss. is the deciding factor)
to people injured outside of the land by artificial conditions,

7 May 57

Owners and Occupiers of Land

So far, we have only dealt with duty owed,

Person Inside

If A is on the land + is injured,
O will be liable depending on the status of the person at the time WHEN INJURED. Three types of persons:

- (1) Trespasser
- (2) Licensee
- (3) Big visitor

Trespasser

Larry Case CB-418

Rule of law
(Basic)

A trespasser is not owed a duty of care by the occupier of the land (the C.L. rule) GENERAL RULE

P, due to storm, took refuge on D's prop & wind blew roof off onto P. Ct held the T/D because the D owed ~~not~~ no duty of care to P, a privileged trespasser but still a trespasser. However, there are exceptions:

- (1) Where the trespasser is actually discovered in re the active conduct of the D. This duty only arises upon discovering the presence of the P. What do

means this
literally

we mean by active conduct?
e.g., train, airplane, cars,
machines, etc. The standard of
care is the OPM in the circum.

Mass says you have to show
willful, wanton, + reckless mis-
conduct. Defines W, W, + R misconduct
as failure to act like an OPM in
the circumstances of the case
after discovery of the trespasser; —
this is the pt/view of a minority
of jurisdictions. Mass, however,
defines the terms (W, W + R) literally.
In these minority jurisdictions
a trespasser is accorded more
protection than a big visitor.

(1924) 8 Minn L.R. 329

(on last year's exam)

→ hypoi: A natural pit on O's land + T
is about to walk into it. The
pit is not "active conduct". O
says nothing. Rest./Torts is quiet here.
hypoi: T about to walk into a faulty high
voltage wire. O says nothing.

Rest. Torts, sec 337

Rule of Law

On you have an artificial
condition involving a risk of
dangerous phy harm, yis a
du/ca owed to the Tres.

What do we mean by "a dis-
covered trespasser."

Herrick Case Ct 437

It held P to be a discovered
trespasser + made it very broad.

Query: Is a du/ca owed where
there is only anticipation of

the presence.

Shean Case 438

A R is entitled to a free track & it would be too great a burden on R's in general.

Rule of Law

However, in re active or dangerous conduct, a R owes a duty to an anticipated trespasser in a ltd. area

memo:

The no-duty rule benefits O only when O is himself on the land.

These people stand in privity with O.

The general rule holds true re the wife & kids & servants who act in the sc/employment, i.e., no duty owed, generally.

The adjoining land owner does not benefit by the general rule, i.e., the adjoining land owner will owe a duty to T.

hypoi: Licensees

Rule of Law

Telephone co. (D) injures T. D. is liable. No licensee nor a biz visitor have the benefit of O's no duty rule. (Pumphrey case, see it.)

Another exception to the no duty rule of C.L.:

(Mass not in
accord)

Child Trespasser - a duty of care
will extend to a Child Trespasser
if the doctrine of Attractive
Nuisance is adopted ($\frac{3}{4}$ of
states do adopt the doctrine
along with Rest/Torts, see, 339)

Doctrine of Attractive Nuisance:

- (1) The place on the land is maintained must be one where the O. knows or should know que kids will trespass.
- (2) The condition inj the kid must be one which the occupier should regard as involving an unreasonable risk/harm to such kids.

(The question is one of an
unreasonable risk/harm.)

- (3) The particular kid must be unable to better the danger due to his immaturity. Very seldom applied to kids over 12.
- (4) Utility to the possessor of maintaining the cond must be slight as compared with the risk to kids involved.

Shell Petroleum Co. v. Beers 423

4 yr. old kid of father, employed by Shell, has arm cut off while tampering with machinery while trespassing on the premises. However,

Doctrine of Attractive

Nuisance - an exception

to the C.L. no duty rule.

(Mass. Contra this doctrine). Followed by $\frac{3}{4}$ of the states.

element #1 was missing & i.e., the undiscovered trespasser rule was applied.

8 May 57

Rule of Law

Ord, an undiscovered is not owed a duty of care

At this stage, we are concerned with only element #1 - duty of care.

Doctrine of Attractive Nuisance

Rest of Torts, sec. 339

A du/co is owed to a child trespasser in a state following the Attractive Nuisance Doctrine (34 of the states. Mass. contra)

Rule of Law
(minority)

Does the particular attraction have to be the one causing the injury? YES.

hypo:

I own sulfuric acid plant & two kids entered, not knowing of the acid. They discovered the acid thru deadly experience.

United Zinc & Chemical Co. v. Britt cb427

T/D: it was not shown that poisoned water was the inducement, direct or indirect, that led children to trespass. - Not the wt/author!

wt/author holds that the kids could recover.

An occupier owes a licensee only the following duties:

- (1) In re active conduct of D,
The occupier owes an affirmative
duty to exercise reas care
to discover ~~the~~ licensee's
presence and avoid the
injury.

Trespasser - only one duty
to a discovered trespasser.

Licensee - owe a duty to a
licensee who should reas be
discovered.

- (2) In re dangerous concealed
conditions, the only duty
exists ^{only} when you have
actual knowledge of ^{condition.} ~~licensee~~.

Business Visitor (what duty is
owed)

- (1) You have a duty to
exercise reas care to put
the premises in a
safe condition. This is
true across the board.
Lack of knowledge of a
dangerous concealed condition
is no defense re a biz
visitor.

Newman v. Fox Film Corp. (1948)

86 Cal. App. 2d 428

P, non-paying, slips on bathroom
 floor of the theatre. Ct held
 that P could recover because

86 Cal. App. 2d 428
 1948

the theatre knew of the defect (another customer has become sick & the floor was made slippery as a result. - "Not what you think". There was blood, water, & paper towels on the floor.)

hypo:

137 Conn. 469
(1951)

Mother visits married daughter & daughter asks her to go to basement for something, not knowing hubby had let half of the steps unrepaired. "December Bride" was injured & sued her daughter. It held no recovery here. I was a social visitor & it held this to be a licensee. The general rule is, therefore, that a licensee can recover for injuries only by doing concealed acts only when the occupier knows of the condition.

209 Mass. 409
O'Brien

Mass. - (contra) a licensee can recover only for willful wanton & reckless conduct. (See 209 Mass. 409, O'Brien Case.)

The big visitor & licensee:

- (1) Both have some degree of authority to enter.

Caveat: i.e. thing is your
status at the time of the
injury.

Added Ingredient:

①. Invitation

②. REPRESENTATION (THIS

THEORY CAN TAKE

CARE OF ALL CASES.

REST THEORY CAN

ONLY HANDLE SOME

CASES.

②. Added ingredient:

Rest of Torts, sec. 332 holds
that a person will be
deemed a biz visitor (or
invitee) where ^{potential} pecuniary
profit flows or can
flow to the occupier.

Sometimes come up with an
alternative:

There must also be a rep
to be implied when the
occupier encourages people
to enter the premises to
further a purpose of the
occupier, that means one
has been ~~encouraged~~ to make
the place safe for those
people who later come for
that purpose, i.e. an
invitation to enter, plus
an express or implied
representation. (e.g., public
toilets.) Private toilet not
included, because a private
toilet is not open to the public
& ∴ no rep of safety is made.)

[A house-to-house canvasser
is classified as a licensee.]

Summary:

Biz visitor owed greatest
duty. Next below is the
licensee. Difference is being
concealed cases. Then comes
the trespasser.

See Guildford v. Yale (University)
128 Conn 549 (1942)

9 May 57

3 Basic Types of persons entering land:

- (1) Trespassers
- (2) Licensees
- (3) Big Visitors

The critical thing is your status at the time of the injury.

If you attend a free lecture, you are a big visitor.

Public Employees

The classification of this group is arbitrary:

Big Visitors:

- (1) City "g-men"
- (2) Postmen
- (3) City H₂O meter readers
- (4) City Sanitation Inspectors

Licensees:

- (1) Cops
- (2) Firemen

Gallagher v. Humphrey CB 442

Son delivers lunch every day to dad where he works with sugar - lifting cranes. Son was injured.

Jones Case CB 435

Paying hotel customer invited men over to gamble. Gambling illegal in the state. The hotel customer is a big

visitor. Since one usually assumes the status of the host, the man invited to gamble would normally be a big visitor. However, since they were doing something illegal, the P (the invited gambler) ~~was~~ was precluded from being a big visitor & therefore no recovery.

293 N.Y. 196 (class got big laugh)

Boy + girl pass themselves off as H+W in hotel. Boy "fell on an unguarded shaft" (laugh). M.V. Ct. held that the boy could recover, even though he was doing something illegal, he would still be a big visitor.

Finis!!!! (Excellent course and better professor.)

NOTE:

Brown v. Kendall - fault

Watson Case -

Hypo: False

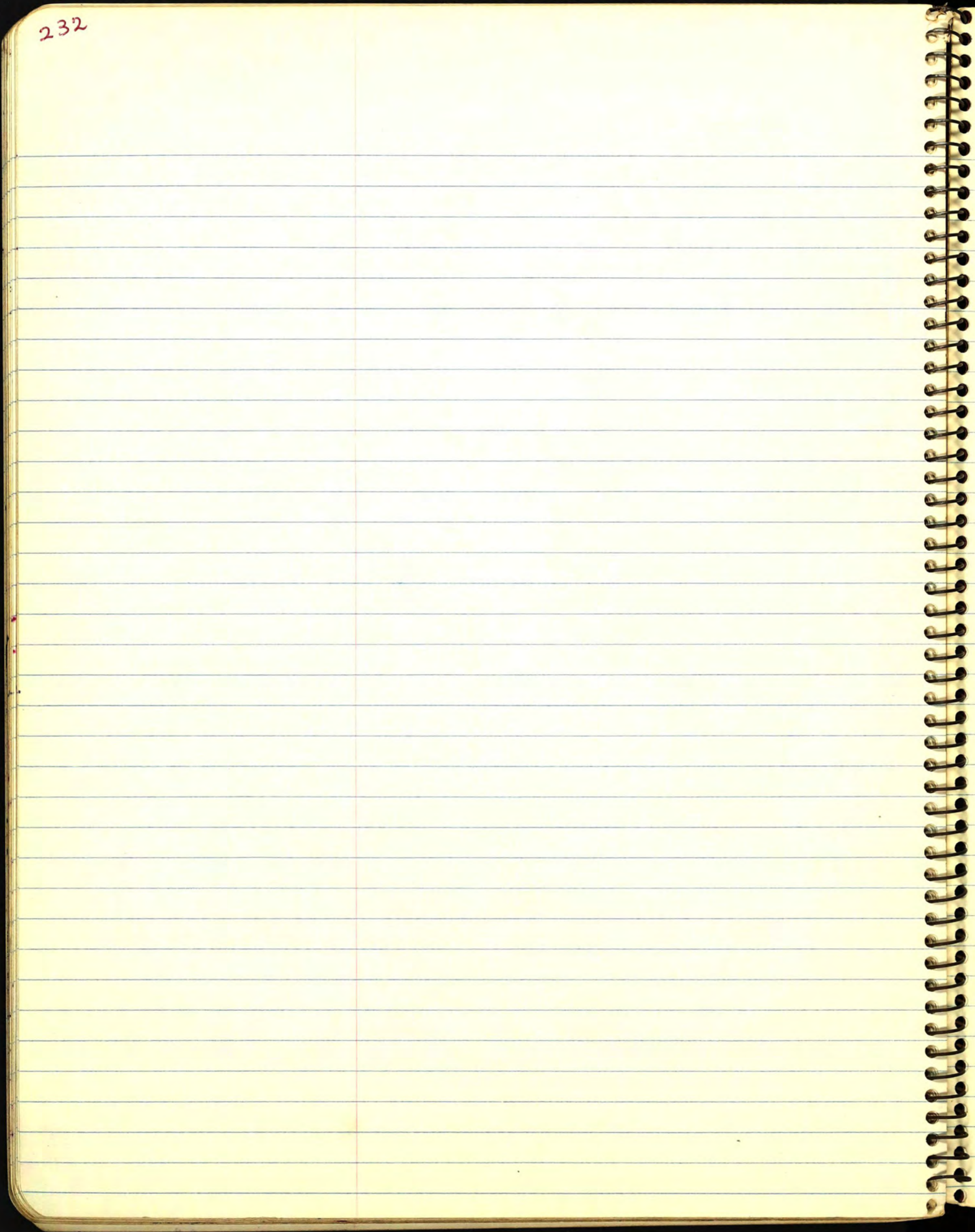
Policeman hears believes that X is a murderer
only way to stop him

Exam:

45 pts. I. Do essay part first - 1 1/2 hrs.
15 liability situations, Ans. fully

55 pts. II. 220 T + F + completions. 2 hrs.

Does NOT DEDUCT more for a false ANSWER THAN FOR NO ANSWER. i.e., GUESS WHEN IN DOUBT.



234

238

