CONDENSED OUTLINE FOR TORTS I

[Use this only as a supplement and corrective for your own more detailed outlines!]

The classic definition of a tort case places the burden upon the plaintiff to show (1) that the defendant breached a duty that he owed to the plaintiff; (2) that this breach was a proximate cause of the plaintiff’s injury; and (3) that the plaintiff suffered legally compensable damages. Each subsequent chapter describes one of these components.

I. ESTABLISHING A BREACH OF DUTY

In General. Tort law deals with cases where the plaintiff has suffered a loss and is trying to shift the responsibility for that loss to one or more defendants. To do so, the plaintiff must first prove that the defendant's conduct was of a type that entitles the plaintiff to be compensated. The two most common forms of conduct on the defendant’s part that justify such loss-shifting are negligence and strict liability.

A. Negligence

1. The Standard of Reasonable Care—In General

   Negligence is the failure to exercise reasonable care; reasonable care is what a reasonably prudent person would do in the same or similar circumstances. It is judged objectively, although it may be “customized” where appropriate (i.e., reasonably prudent blind person standard for a person who is blind). When children engage in adult activities (driving, power boating), they are held to an adult standard.

   In determining reasonable care, one should consider both the potential for an accident and the cost of taking measures to avoid one. Learned Hand's test (Is B < P* L?) is simply a mathematical expression of the intuitive judgment that reasonable prudence, not perfect safety, is expected.

2. What Evidence Establishes Negligence?

   a. Juror Experience. The simplest way to prove negligence is to suggest to a jury, based upon their experience, that a reasonable person would not have done what the defendant did. Sometimes it is difficult for the jury to identify what it is that a reasonable person would have done, and whether the defendant departed from that standard. Therefore the following aids are often employed:

   b. Custom. To suggest what standard of care a reasonably prudent person might exercise, the plaintiff (or the defendant) may invoke custom: what do other people customarily do in such circumstances? Although early cases made compliance with custom dispositive, more recent cases suggest that compliance with custom is a minimum expectation, but not the ceiling.

   c. Statutory violations. Where a defendant violates a statute, the plaintiff may have dispositive proof of what a reasonable person would have done. If the statute is intended to prevent the kind of injury the plaintiff suffered, and if the defendant has no excuse for his behavior, the court may find that violation of the statute is negligence as a matter of law. This still leaves the question of whether the statutory violation caused the injury.
d. Res ipsa loquitur. Where the plaintiff's injury occurs as a result of a process that does not ordinarily produce injury in the absence of negligence, and where the evidence concerning negligence is more readily available to the defendant than the plaintiff (because the "instrumentality" or process causing the injury was in the defendant's control), the plaintiff may invoke the res ipsa doctrine. If the plaintiff makes this showing, the case will go to the jury with a presumption of negligence; if the defendant can show that he was not negligent, he can overcome the presumption. Some courts (Ybarra) have extended this concept to include cases where there is ignorance of who caused the injury, not just whether there was negligence.

e. Employer's Adoption of Safety Practices. To encourage defendants to correct potentially unsafe conditions, courts refuse to allow plaintiffs to use evidence of post-accident repairs as evidence that the condition prior to the accident was unsafe. However, where employers instruct their employees on safety procedures (e.g., through company rulebooks), the employee's failure to obey such instructions may be used as evidence of negligence.

3. Establishing Vicarious Liability (Respondeat Superior)

Where an employee acts negligently, he makes his employer liable for damages caused by his negligence so long as the negligence occurs within the course and scope of his employment.

B. Strict Liability

1. The Distinction Between Strict Liability and Negligence

A determination that the defendant is strictly liable doesn't mean that the defendant was wrong to carry on the injury-causing activity; it simply means that where an innocent plaintiff is injured by this particular activity, the plaintiff is entitled to be compensated.

2. When Is Strict Liability Imposed?

a. Where the defendant's activity is "abnormally dangerous"

Some activities are so dangerous that even with reasonable care injury cannot be avoided. Based on a number of factors (listed in the Restatement), courts may classify an activity as ultrahazardous or "abnormally dangerous"; when they do, the defendant is strictly liable for injuries resulting from that danger. The fault of third parties, or of the plaintiff himself, may or may not affect the plaintiff's right to recover, depending on the jurisdiction.

b. Where the plaintiff's rights are invaded: Nuisance

Even though an activity is not ultrahazardous, and even though it is carried on with reasonable care, the plaintiff may be entitled to be free from injury from the activity because of his right to enjoy his own property. Where water is artificially dammed up, or vicious animals or livestock are kept, the owner may be strictly liable for their escape. In cases of nuisance, the law traditionally permits not only damages, but an injunction against further nuisance; to determine a nuisance the court looks to whether the plaintiff's reasonable expectations have been violated by the defendant's activity.

c. Animals

Traditionally courts made the keeping of "ferocious" animals subject to strict liability. Owners of "domesticated" animals were only held to the standard of reasonable care. However, once an owner of an animal was put on notice of an animal's ferocity, the owner then became strictly liable for future damage, even if the injury occurred through no negligence of the owner (e.g., neighbor allows dog to escape). Many jurisdictions now have special statutes dealing with dog bites.
d. **Statutory Strict Liability**

By statute the legislature may apply strict liability to an activity that it believes should bear the risk of injury, or where the determination of fault is unduly burdensome. For example, the disposal of hazardous wastes, or the sale of alcoholic beverages, may (with certain limits) be the basis of strict liability.

## II. CAUSATION

**The General Concept.** "Proximate cause" is both a philosophical concept as well as a policy determination of whether imposition of liability is appropriate. Most jurisdictions define proximate cause as a combination of but-for cause + legal cause.¹

A. **"But-For" Causation**

1. **The Traditional Burden of Proof**

   The plaintiff must show first that the defendant's breach of duty more probably than not was a "but-for" cause (or "cause in fact") of his injury, that is, that the plaintiff would not have been injured if the defendant had not committed the breach of duty.

2. **Modifying the But-for Cause Requirement**

   a. **Excusable Inability to Identify the Injury-Causing Actor.** The plaintiff may be permitted to proceed despite failing the "more probably than not" standard where (a) his injury was caused by one of two or more negligent defendants, all of whom have been brought into the courtroom [alternative liability]; (b) the joint conduct of the defendants produced the injury [concert of action]; (c) the defendants' industry assigned the task of insuring safety to a body under its control [enterprise liability]; or (d) the defendants negligently manufactured an identical product, and plaintiff cannot identify the supplier except in terms of market shares for the total amount of the product sold [market share liability]. Where the market share theory is used, the plaintiff is limited to a judgment for the percentage of the injury represented by the defendant's market share.

   b. **Loss of a Chance.** If the plaintiff would probably have suffered the injury anyway, but the defendant's conduct deprived plaintiff of a chance to avoid the injury, the plaintiff may argue for the opportunity to prove that his injury be defined in terms of a lost chance. Not all jurisdictions recognize this theory, nor do they agree on how it is to be implemented.

   c. **Multiple Redundant Causes.** Where multiple defendants have contributed to an injury in a cumulative way (e.g. asbestos exposure), such that the defendants might plausibly claim that (individually) their conduct probably made no difference in producing the ultimate outcome, the court may shift the test from "but-for" causation to the test of whether the defendant's conduct was a "substantial factor" in causing the injury.

B. **Legal Cause**: The Policy Considerations

Even where the defendant's negligence was a but-for cause of the plaintiff's injury, the plaintiff must also be prepared to show that the relationship between the defendant's conduct and his injury is "proximate"

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¹ California has abandoned the traditional definition of "proximate cause" and has replaced it with what it calls the "substantial factor" test. However, most jurisdictions still use a test for proximate cause that is a combination of but-for cause and legal cause.
enough to make imposition of liability appropriate, i.e. "fair." This is a policy judgment that is difficult to formulate into precise rules. Most cases do not raise the "legal cause" issue because, where a breach of duty can be shown to be a "but-for" cause of the plaintiff's injury, imposition of liability seems appropriate. However, a defendant may escape liability if it appears that (a) the defendant's conduct did not increase the risk of the kind of injury the plaintiff suffered, but was connected to it by mere chance; (b) a superseding tortfeasor (such as a drunk driver or car thief) behaved so reprehensibly and unforeseeably that the "chain of causation" was broken; or (c) the plaintiff was so remote in time and/or space from that which made the conduct negligent that the injury to the plaintiff can be said to be unforeseeable.²

Jurisdictions differ over whether to impose a rule of foreseeability based upon the Cardozo approach or the Andrews approach (in the Palsgraf case). Cardozo thought that the "zone of danger" limited the extent to which the defendant owed a duty of care. Thus, a plaintiff found outside the foreseeable zone of danger would be owed no duty of care and consequently could not claim negligence. On the other hand, Andrews thought that negligence was a determination of the nature of the defendant's act, regardless of who might be affected; however, foreseeability limited the extent to which liability could fairly be extended. The determination of which injuries were proximately caused by a defendant's negligence required for Andrews a pragmatic evaluation of the relationship between negligence and injury.

III. DAMAGES

In General. Damages are an important part of torts analysis, but do not lend themselves to ready theoretical classification.

A. Types of Recoverable Damages

1. Property Damage

Property damage is measured by the lesser of (1) the cost to repair the item; or (2) the reduction in the item's fair market value as a result of the accident.

2. "Economic" Losses

Economic losses have to be calculated based on educated guesses about the future, comparing (1) what will likely happen to the plaintiff as a result of the injury with (2) what would have been the plaintiff's future in the absence of the injury. Any award must be adjusted to take into account investment opportunities and risks. Damages that directly affect the plaintiff's bankbook balance are sometimes referred to as "special damages."

3. Pain and Suffering and Emotional Losses

"Pain and suffering" that accompany an accident (also described as "noneconomic damages"), although they don't necessarily make the plaintiff financially worse off, are considered part of the compensation.

² It needs to be understood that the foreseeability limitation only applies to the fact of injury to the plaintiff; it doesn't apply to the extent of injury. Thus, under the so-called "eggshell plaintiff" rule, a defendant cannot limit liability to what a person of normal constitution would have sustained. If the defendant negligently bumped into the plaintiff and is admittedly liable for some degree of injury, it is no defense to point out that a catastrophic result (like permanent brain damage from a fall) was not foreseeable.
due an injured plaintiff. Although emotional injury alone is usually not compensable, damages will be awarded where accompanied by physical injury (or in exceptional cases where there is a "guarantee of genuineness").

4. **Punitive Damages**

In addition to compensation for the victim, tort law sometimes permits punishment of the defendant where the defendant's conduct is malicious, or so reckless that it reflects flagrant disregard of the plaintiff's safety. Modern mass tort cases raise difficult problems concerning the computation and distribution of such awards. The U.S. Supreme Court has overturned awards that fail to provide due process for the defendant.

5. **Attorney's Fees**

Under the "American rule," each side is expected to pay its own attorney's fees, except where contract or statute provides otherwise. Most tort cases involve neither exception.

B. **Related Parties: Who Is Entitled to Compensation?**

1. **Wrongful Death**

At common law no recovery for wrongful death was recognized; thus it is a creature of statute. Statutes may be in the form of a wrongful death action (compensation to the decedent's relatives) or a survival action (damages awarded to the decedent's estate). They may or may not include non-economic damages. Statutes may mix elements of both types of actions, but will be interpreted to avoid double recovery.

2. **"Wrongful Birth" and "Wrongful Life"**

Where a defendant's negligence results in the birth of a child, and the child is healthy, courts are divided on whether to permit a recovery to the parents. Some have permitted only childbirth costs, while others have permitted the award of all costs associated with raising the child, minus the "imputed benefit" derived from the child. In the case of a "defective" child, most courts permit a recovery to the parents under the imputed benefit theory, and some permit an award to the child himself (a "wrongful life" claim) for the costs of his defective condition beyond those already awarded to the parents.

3. **Bystander/Loss of Consortium Claims**

Where one party's injuries lead to emotional harm to those nearby, courts have divided on how to limit claims for bystanders or for loss of consortium. One form of injury is for those who are at the accident scene, while others are based on an injury to the relationship. Courts consider the severity of the emotional shock, and how closely related the plaintiff is to the one who was physically injured. Spouses typically may recover for loss of consortium, but other family (or quasi-family) relationships may or may not qualify.

C. **The Size of Damage Awards**

1. **How Much is Too Much (or Too Little)?** An award of damages will be sustained on appeal if it is supported by evidence. One response to large personal injury awards has been an effort to limit pain and suffering awards. "Tort reform" statutes have survived constitutional challenge in some cases as a rational response to "crises." But some courts have struck down limitations as violating "access to courts" or the right to trial by jury.

2. **Collateral Source Benefits.** When a plaintiff receives compensation from a source other than one of the defendants, the court must decide whether to deduct this amount from the compensation owed by the
defendants or to allow the plaintiff a "windfall." Actually, most such payments are subject to "subrogation"—repayment pursuant to statutory right (e.g., worker's compensation) or contractual obligation (e.g., health insurance). The "collateral source rule" disallowed evidence of collateral source recoveries, but some tort reform statutes have permitted the introduction of such evidence, even if there is an obligation to repay the amounts.

3. The Scope of Acceptable Argument. In asking a jury to award a large amount of damages, plaintiffs' attorneys like to use arguments that either focus on the amount of the pain suffered (e.g., the per diem argument) or on the need to "send a message" to discourage the conduct giving rise to the injury. Most jurisdictions place limits on the use of such arguments to avoid "runaway" verdicts.