**Torts Final Outline**

**Ch. 18 Statute of Limitations & Federal Preemption**

**Statute of Limitations**

* Window of time frame to file suit
* TN Statute of Limitations
  + Tort of Slander: 6 months at time of slanderous words
  + Property Damage: 3 years, but discovery rules apply
    - Real property: Land and everything attached
    - Personal Property: Everything else
  + Tort of Libel: 1 year
  + Tort of Personal Injury: 1 year at discovery
  + Tort of Personal Injury or Property Damage due to Defective Product:
    - Same as above with statute of repose at 6 years from date of injury

**OR** statute of repose at 10 year from purchase of product **OR**

statute of repose at 1 year past expiration

* Statute of Repose= OUTER MOST LIMIT
* Medical Malpractice
  + 1 year from malpractice plus discovery
  + Statute of Repose= 3 years
    - Except- Fraudulent concealment
    - Except- foreign object left in body
* Mental capacity does not toll repose
* Wrongful death statute of limitation is 1 year from date of death
* Minors: Whatever state of limitation is, does not begin until 18

Does not toll repose

* Statutes of Limitation
  + Prescribe period of time in which the plaintiff must bring a given kind of claim
  + Vary from state to state
* *As an Affirmative Defense*
  + Bright-line rule that bars claims after a period specified
  + Defendant must prove the facts showing it has run if using as defense
  + If statute is not plead in timely way, defendant waives the defense

**The Accrual Rule**

*Starting the Clock: Accrual of the Claim*

* Traditionally, statutory clock began to run when claim accrued
  + Negligence Claims
    - Accrue when

1. The defendant committed the negligent act AND
2. Negligent act had caused legally cognizable harm

*Act vs Harm*

* Sometimes courts say clock starts when the act was committed
  + Usually protecting certain group of people
  + Ex) Start meds in Jan. Meds make you sick 3 years later. S of L says 2 years at

time of act. Plaintiff cannot sure because S of L is up.

* + Traditional view says “no! must start when plaintiff knows about harm!”

**The Discovery Rule**

* *Undiscovered Injury* 
  + Under accrual rule, plaintiff barred unless commenced suit within time EVEN IF she did not know about harm, yet

*Facts that MUST be discovered to start the clock*

* Clock begins when reasonable person should have discovered effects that she has a claim
* Many decisions specify particular facts to put plaintiff on notice to sue
  + All elements of tort are present AND
  + Plaintiff discovers she is injured
  + Defendant or defendant product had casual role in injury
  + Defendant may have been negligent or legally responsible

*Discovery of Facts and Consequences*

* Even if plaintiff knows facts but does not know legal rules, clock still starts
* Plaintiff does not have to discover ALL consequences or full extent of injury
  + Statute still begins to run if plaintiff only discovers a portion on injury
* If 2 distinct injuries: discovery of 1 does not start clock on another

*Not Discovering Defendant’s Connection*

* If plaintiff reasonably believes defendant not at fault or defendant ID not known, then clock does not start just because she knows of injury

*An Objective Test*

* “Should have discovered” is IMPORTANT
* If known facts would have led reasonable person to investigate, statute will run when that investigation leads to discovery of injury

**Statutes of Repose**

*Statutes of Ultimate Repose*

* Provide counter-rule to accrual-discovery whereby time begins running at time of ACT
  + Ex) Traditional accrual statute says no more suit once 3 years from harm or discovery
  + Repose says, “Oh, and no suits can commence more than 10 years after the act”
* Plaintiff gets benefit of accrual and discovery rules, but defendant gets benefit of repose

*Trigger Dates*

* Architects/builders: start of repose is when building complete
* Health care professionals: start of repose when last procedure complete
* Government entities: Administrative notice must be given shortly after accrual

**Continuing Negligence**

*Continuing Relationship*

* Statute should not run until relationship has ended
* As long as patient is in care, she could reasonably expect a correction of diagnosis or treatment
* In a sense, defendant continues to be negligent
* Statute should then be tolled until the relationship to the issue is terminated
  + But, the time still does not start until injury discovered

*Major Variables*

* 2 Important Variables

1. Continuing negligence might produce series of separate harms or 1 harm
2. Defendant may owe duty to take affirmative steps to minimize harm to patient or may not

\*When defendant does owe duty and fails or when that failure makes

makes a harm statute does not begin to run until definitive moment

**Tolling, Grace Periods, and Postponed Accrual**

*Grounds for Tolling*

* Statute is tolled under certain conditions listed in statute or judicially imposed

*Fraudulent Concealment*

* Fraudulent concealment by defendant can be grounds for equitable tolling OR
  + Appealing instance for treating claim accruing upon discovery
* Concealment will extend plaintiff’s time for bringing suit
* If grounds for tolling, some courts say plaintiff must prove affirmative acts other than original negligence
  + Act of concealment must be ACTIVE as opposed to just remaining silent
  + If defendant is fiduciary (like dr) nondisclosure may count as concealment

**Federal Preemption**

*Defense*

* Federal statutes sometimes construed to preempt or displace state laws
  + Ex) federal statutes require certain warnings on products
    - If company complies with warnings, no tort liability
* Compliance with federal preemptive statute is complete defense

*Forms of Preemption*

* Federal preemption comes from Supremacy Clause of US Consitutution
* Two types

1. Implied

Court deduces congressional intent from a statute’s broader purpose

1. Express

Congress, in the text of the law, displaces state statute (in preemptive clause)

*Implied Preemption*

* 2 Forms

1. Field Preemption
   * + - Federal regulation in certain field is so pervasive, no room for states to supplement
       - Federal interest in the field is dominant
2. Conflict Preemption
   * + - Federal and state law indirectly or directly conflict

**CASES**

* *Hataway v McKinley* 
  + Scuba diving accident
  + Comparative fault state v Contributory negligence state
  + Most Significant Relationship approach
    - Law where injury occurs is applied unless other state has more significant relationship to the parties or issues.
  + Holding: *Lex loci delicti* will no longer be used in Tort cases in TN; “Most Significant Relationship” approach adopted
* *Spence v Miles Lab*
  + AIDS via blood prior to 1986 transfusion
  + TCA 68-32-10 (Facilities to test for AIDS; Cause of Action)
    - Obligates blood product suppliers to screen and test their products for HIV and provides cause of action for any individual that contracts HIV as a result of untested blood product
  + TCA 29-28-102(6) (Product Liability)
  + TCA 29-28-103(a): (Product Liability Statute of Limitations)
    - Action to be brought within 6 years of date of injury, within 10 year from date product was first used (repose), or within 1 year after the expiration of the product
  + To satisfy statute tolling for fraudulent concealment, plaintiff must prove the defendant engaged in affirmative action (not just silence) to conceal
  + Holdings:
    - TCA 68-32-102 cannot be retroactively applied to hold manufacturer liable
    - Action was barred under TN products liability statute of repose
    - TN products liability statute of repose does not violate constitutional guaranty of equal protection
* *Stanbury v Bacardi* 
  + Medical malpractice claim for surgery on both feet
  + TCA 29-26-116 (Medical Malpractice Discovery Rule)
    - 1-year statute of limitation from time of discovery, a 3-year statute of repose ceiling except for fraudulent concealment, and an exception for foreign objects left in body.
  + Holdings:
    - The continuing medical treatment doctrine is abrogated by the discovery rule under TCA 29-26-116
    - The plaintiff’s claims are time-barred under the statute of limitations prescribed in TCA 29-26-116
* *Shadrick v Coker* 
  + Spinal surgery with experimental screws (not told to P)
  + TCA 29-26-116 (Medical Malpractice Discovery Rule)
    - 1-year statute of limitation from time of discovery, a 3-year statute of repose ceiling except for fraudulent concealment, and an exception for foreign objects left in body.
  + Holding:
    - Disputed issues of material fact exist when determining when statute of limitations began to run and whether statute of repose was tolled due to fraudulent concealment.
* *Roe v Jefferson* 
  + Client-therapist sexual relationship
  + Plaintiff was informed in early 1988 that defendant was being investigated by TBE for inappropriate sexual relationships
  + Plaintiff filed action against defendant February 1990.
  + TCA 29-26-116
  + Holding:
    - Plaintiff failed to file malpractice action within one year of learning that sex in patient-therapist relationship was wrong and thus, was barred by the statute of limitations.

**Wrongful Death, Survival, & Damages**

**Compensatory damages**

* Make plaintiff whole again
* Personal Injury
* 2 types
  + Special Damages (economic damages)
    - Readily quantifiable
    - Medical expenses (past and future)
    - Loss Wages (past and future)
    - Lost profits
  + General Damages (Non-Economic Damages)
    - Not readily quantifiable
    - Some states place caps (TN included)
      * Capped at $750,000 but up to $1M if catastrophic injury
      * Caps not apply if
        + Defendant was intentional OR
        + Defendant was intoxicated OR
        + Defendant was convicted of felony based on tortious cond.
    - Physical pain and suffering (past and future)
    - Mental anguish and emotional distress (past and future)
    - Loss of enjoyment of life/loss of wellbeing
    - Disfigurement
    - Shortened life expectancy
    - Permanent impairment/disability
    - Loss of consortium
      * Value of tangible services provided by family members in the home plus value of intangible benefits that family members receive from one another
      * Ex) Attention, guidance, training, companionship, loss of sexual intimacy
      * **TN only for SPOUSES**
      * Only spouse can recover LOSS OF CONSORTIUM

**Wrongful Death Claims**

* Claims used to die with the tort
  + Made tortfeasors want to kill the plaintiff
* Today: Most claims do survive death of victim
  + States differ in statutes
  + Survival Statutes
    - Claims that victim had prior to death can go forward after
    - Preserves victim cause of action
    - Damages are same as though they lived
      * Death terminates future accrual of those damages
  + Wrongful Death Statutes
    - New causes of action where survivors can recover for their OWN LOSS
* TN has hybrid approach
  + **TCA 20-5-113**
    - Survival recovery and wrongful death recovery
    - Damages resulting TO THE DECEASED **AND** damages resulting TO THE SURVIVORS
* Pecuniary value of life
  + What person would have made – living expenses
* Hedonic Damage NOT ALLOWED in WRONGFUL DEATH
  + Value of being able to enjoy life
  + Most jurisdictions not recoverable (including TN)
* Loss of spousal and parental consortium is RECOVERABLE
  + Parents can recover for loss of child’s consortium in TN
    - Even adult child
  + Cannot recover for “sorrow and anguish”

**Damages for Property**

* Destruction: full market value at time of destruction
* Deprived of Use: Equivalent rental value at time plaintiff was deprived of use
* Harm
  + If property can be repaired: Lesser of cost to fix it and decrease in market value
  + Not able to restore: Decrease in market value

**Punitive Damages**

* Punish and deter
* Jury must be told about differences between punitive and compensatory damages
* 4 Types of Misconduct for Punitive Damage (FIRM)
  + Fraud
  + Intentional
  + Recklessness
  + Maliciousness
* Must prove FIRM by clear and convincing
* Trial must be Bi-furcated

1. Jury determines compensatory damages AND whether punitive is awarded
   * + - Defendant financial status inadmissible
2. Determines how much punitive
   * + - Defendant financial status is admissible

* Supreme Court says excessive punitive damages are violation of due process (14th Amendment)
* ***Goff***says punitive damages cannot be excessive
* ***Hodges***says you must bifurcate the trial on punitive damages

**Injunctive Relief**

* Defendant must do or must stop doing a particular thing
  + Ex) A seeks injunction against B because B keeps trespassing

**Miscellaneous Damage Rules**

* All plaintiff’s damages (past present future) must be determined in ONE ACTION AT SAME TIME
  + Plaintiff gets one bite at damages apple
  + Termed “Single Action Requirement”
* Duty imposed on plaintiffs to take reasonable steps to make damages minimal
  + Ex) Broken bone due to collision
    - Cannot just refuse medical treatment as way to inflate damages
  + Termed “Duty to Mitigate”
* Although jury sets amount of damages, trial court can suggest upwards or downwards
  + If verdict is adequate, court suggest increase= “Additur”
  + If verdict is too high, court suggest decreased= “Remittitur”
  + Parties can decline additur or remittitur but will have to go back to court

**Collateral Source Rule**

* Payment of damages by 3rd party will not reduce amount that plaintiff is permitted to recover
* Relation to medical malpractice in TN
  + If plaintiff or own insurance company or member of immediate family pays medical bills that will not reduce amount plaintiff can recover
  + If medical bills are paid by ANY OTHER SOURCE than above, then it will reduce amount of plaintiff’s recovery
* Note About Attorney Fees
  + American Rule: each side pays own attorney fees
    - Not recoverable as part of compensatory damages in MOST cases
  + TN Loser Pays Law
    - Require party who is represented by attorney to pay cost in attorney’s fees up to 10k if case is dismissed by the court for failure to state a claim (ie: case is frivolous)
  + Some attorney’s fees contingent upon plaintiff winning case
    - Better take meritous cases
  + Defense attorneys to pay by the hour
  + TN Medical Malpractice Plaintiff Charge Cap
    - Limits what plaintiff’s lawyers can charge client to 1/3 of what is recovered

**CASES**

* *Still v Baptist Hospital* 
  + Mother died in care of hospital from brain seizure. Grandmother brought loss of consortium claim on behalf of granddaughter
  + TCA 25-1-106 (Damages- Spouse’s Loss of Consortium)
  + TCA 20-1-105 (Parent can only sue for expenses in minor tort)
    - parents can only sue for a minor’s injury and get damages from the expenses, not for society and companionship
  + Holding: Extending the scope of cause of action outside spouses should be left to the consideration of the legislature.
* *Jordan v Baptist Three Rivers* 
  + Should spousal and parental consortium losses be permissible in wrongful death actions?
  + Plaintiff, surviving child, is seeking damages for loss of consortium and for the decedent's loss of enjoyment of life/Hedonic damages
  + TCA 20-5-113 (TN Hybrid WD and S)
    - allows for recovery of damages resulting **to the deceased** and also allows for damages resulting **to** **the survivors** based on the consequences of the death.
  + TCA 20-5-110
    - Allows for a suit to be brought by a surviving spouse and the children of the deceased
    - When read in pari materia with TCA 20-5-113, we would then allow consideration of parental consortium damages
  + Holding:
    - Consortium type damages, both spousal and parental, may be considered when calculating pecuniary values of the deceased's life in wrongful death actions
* *Hodges v S.C. Toof*
  + P fired by D after being called in for jury duty
  + Is the statutory remedy under TCA 22-4-108(f) the soul and exclusive relief available to any employee who has been discharged or discriminated against for serving on jury duty?
  + Is the current manner in which punitive damages are awarded in Tennessee sufficient?
  + TCA 22-4-108(f)
    - employee to bring suit against an employer for having been discriminated against or discharged for serving on jury duty.
    - employee to be reinstated and reimbursed for lost wages and work benefits if he were discharged demoted or suspended because of jury duty.
  + TCA 49-50-1409
    - employees to recover damages in addition to reinstatement and backpay if they're disciplined or discharge in violation of statutory policies
  + TCA 22-4-108 not to be exclusive and reinstates the jury award of compensatory damages
  + Holding:
    - Courts may award punitive damages only if it finds the defendant has acted either intentionally, fraudulently, maliciously, or recklessly; and, courts must follow bifurcate trial procedure when deciding whether to award punitive damages and if so, what amount.
* *Goff v Greer*
  + Buried tires intentionally
  + TCA 68-212-101-121 (TN Hazardous Waste Management Act)
  + TCA 68-212-201-227 (Hazardous Waste Management Act)
    - creates additional rules and regulations and imposes an additional civil penalty of up to $10,000 for each day the violation continues
  + There is material evidence supporting the jury's finding by clear and convincing evidence that the defendant acted intentionally or recklessly.
  + In order to determine if the punitive damage award was excessive and violated the defendants due process rights under the 14th amendment
    - The court must also review the decision de novo
  + Holding
    - The evidence presented at trial does support the award of punitive damages.
    - The trial court did not err an considering the states environmental laws in approving the punitive award
    - The amount of punitive damages is excessive and does violate the defendant's due process rights

**Intent, Assault, and Battery**

Common elements to intentional torts= INTENT

Intent must be PROVEN for liability for intentional tort

Cannot accidentally commit intentional tort

Negligence cases are accidental in nature

Intentional torts are NOT

Defendant had the desire to do the act OR had knowledge that consequences would result

All intentional torts MUST be proven by PREPONDERANCE OF EVIDENCE

2 ways to prove intent

Show tortfeasor’s desire

Show knowledge that it would occur

Precise consequences to NOT have to be intended

Still liable for full consequences

Motive from intent

Motive is the REASON someone did something

Motive is IRRELAVANT TO INTENT

Transferred Intent

Tortfeasor intends to commit tort against one person but instead commits DIFFERENT

tort against that person

OR

Commits same tort as intended but against different person

OR

Commits different tort against different person

Original intent to commit tort is transferred to other person

Ex) A intends to shoot neighbor’s cat but misses and hits neighbor B

A is liable for battery against B

Intent follows the fist

Tortfeasor must act “voluntarily”

Defendant was in control of himself

“Volitional act requirement”

Cannot be having medical issue or unconscious

Ex) A intends to push B and then B falls into C and C falls into path of car and gets hit

A is liable to B for battery

B is not liable to C for battery

A is liable to C for battery because of transferred intent

Children and intent

Can be held liable if they have awareness of natural consequences of intended act

*Horton v Reaves*

Children can be held liable if they meet definition of intent

Parents must be put on notice for liability if kid hurts someone

Parents only liable for own child injury must be more than negligent

Parental liability in TN

Parent held liable up to 10k in personal injury and property damage BUT

1. harm must be willfully or maliciously caused
2. Child must be under 18 and lived at home
3. Parent must have known/should have known of child’s tendency to commit wrongful act
4. Must have had opportunity to control but negligently failed

One narrow TN exception

When child has vandalized public property AND

Child has been convicted of doing that on prior occasion

If both met, then parent liable

**Assault (“Touching of the Mind”)**

Intentional placing of another in reasonable apprehension of imminent threat of harmful of offensive contact coupled with actual or present ability to make good on the threat

Good will does not matter (motive does not matter)

Elements plaintiff must prove for assault for prima facie case by PREPONDERANCE of EVIDENCE

1. Intent
2. Reasonable apprehension (expectation of being on receiving end of harmful contact)

Reasonable= ordinary person is that circumstance would be apprehensive

Apprehension tested OBJECTIVELY

Fear has nothing to do with apprehension

1. Threatened contact must be imminent
2. Threat of harmful or offensive contact

If phrases put together that would make reasonable person apprehensive

then assault. (usually words do not constitute assault)

Plaintiff must be AWARE of threatened contact

1. Must be apprehensive about contact his/her OWN PERSON
2. Actual OR apparent present ability to make good on the threat

**Battery**

Intentionally causing harmful or offensive contact with another person

Component parts to prove

1. Intent
2. Harmful or offensive contact

Offensive measured by reasonable (OBJECTIVE) standard

Actual physical contact is required but does not have to come from defendant

Ex) Poisoning, rock hitting someone instead of fist

Plaintiff need not have knowledge of contact at time it occurs

1. Contact with the plaintiff’s person

Includes anything attached to body

Battery and assault can occur both at same time or separately

**Cases**

* Bouton v Allstate
  + Assault was not committed by the events of trick-or-treating while holding toy gun
  + Conduct of trick-or-treating was not negligent because the boys could not have reasonably anticipated course of events creating risk of harm.
* *Manning v Grimsley*
  + The evidence from multiple witnesses shows that the defendant looked at the hecklers sever times immediately following the heckling. Because of this, the jury could have reasonably inferred that Grimsley intended to throw the ball in the direction of the hecklers, cause them imminent apprehension of being hit, and/or respond to conduct presently affecting his ability to perform his duties.
* *Horton v Reaves* 
  + In order to hold an infant liable for intentional tort there must be sone awareness of the natural consequences of the act and there must be an intent to make harmful contact.
  + Requisite intent must include awareness of the natural consequences of the intended act, but the extend of the resulting harm does not have to be intended nor foreseen. The infant must appreciate the offensiveness before liability inures
* *Brzoska v Olson* 
  + Doctor Olson was a general dentist for over 30 years and in March 1989 Owens was advised that he was HIV positive and continued to practice.
  + Holding: Because patients had no physical injury and were never subjected to procedures outside of their consent, no battery claim existed, and the Superior
  + Holding: There were questions of material fact concerning patients who claimed they were told by Owens he did not have AIDS, and as a result, the Superior Court erred in granting summary judgement. Should the jury find fraudulent concealment, only economic damages are recoverable.
    - In torts and the law of negligence and battery the law is limited to those circumstances in which a health care provider performs a procedure to which the patient has not consented.
    - In terms of fraudulent misrepresentation, the defendant must make a false representation of material fact, must have knowledge of the falsity and the victim being ignorant thereof, the victim must have believed it to be true, and the victim must have been damaged

**Intentional Infliction of Emotional Distress; False Imprisonment; Conversion**

Protects interests that people have in their peace of mind

Only around for the last century

Courts were traditionally reluctant to recognize legal action of IIED because

Mental disturbances are hard to calculate damages

No objectively ascertainable injury (you can’t see a mental injury)

Mental injury could be easy to fabricate

Courts concerned about potential flood of trivial litigation

Absolute peace of mind is fiction anyway and law shouldn’t get involved

1897 changed things

D saw himself as practical joker

D told friend that husband had been in bad accident

Shock to the P caused her incapacitation

Court allowed plaintiff to recover to IIED for 1st time

Today most jurisdictions do recognize IIED as distinct tort

*Medlin v Allied Inv Co (*1966) (TN)

Mortgage said they are in foreclosure due to non-payments

Payments were actually current

Attorneys hired

Payments were all tracked down

P sued for IIED (said bank verbally berated her knowing her child died)

Holding: IIED is viable claim, but conduct was not outrageous enough

*Johnson v Woman’s Hospital* (1975) TN

Premature baby died and placed in jar with formaldehyde

MAJORLY OUTRAGEOUS

IIED was justified

Rule for IIED elements:

1. Extreme and outrageous conduct
2. Intentional or reckless conduct
3. Severe emotional distress

Tortfeasor takes plaintiff as he is BUT D not held liable if plaintiff’s emotional response exceeds

bounds of reasonable reaction

IE- Super sensitive person

Exception: When the D KNOWS they are frail

No expert testimony needed for IIED

Can still be used, but not mandated

The egregious conduct in IIED serves to objectify the injury

*Rogers v Louisville Land Co*

Cemetery in disarray

P cries a lot and makes her sad

Emotional reaction is not severe emotional distress

Third Person Injury for IIED depends on 3 things

1. Was plaintiff present?
2. Did plaintiff actually see the act?
3. Were they related to the victim? If not, did distress result in physical harm

If all 3 are yes, then P can recover

IIED is still being molded and shaped

It’s only been 100 years

S of L: 1 year

**False Imprisonment**

Intentional confinement, restraint or detention that requires or compels plaintiff to go somewhere or stay somewhere against their will

Component parts

1. Intent
2. Unlawfulness
3. Confinement, restraint, or detention

What constitutes confinement, restraint, or detention?

Must be specific area that plaintiff is prevented from leaving

Plaintiff must have no reasonable means of escape known to him or her

If means of escape are unsafe, not reasonable

Ways to bring about confinement, restraint, or detention

1. Physical (locked room, fence, etc.)
2. Physical force (directed at plaintiff, family, or property)
3. Threat of Force (must be credible threat of force and of immediate harm)

*Newsom v Thalhimer* (1994) (TN)

Sales-person accused of stealing money

Guards questioned her and kept telling her to confess

Threatened to call the police

Moral pressure not sufficient for confinement

Businesses that have probable cause to believe that theft is being attempted then

business does have legal right to confine, restrain, or detain for a reasonable

period of time and using reasonable force.

Plaintiff HAS TO BE AWARE of confinement at time it occurs

Exception: When plaintiff is injured (plaintiff is knocked out or incapacitated)

Length of confinement is immaterial except as to extent of damages recovered

There is no set time P has to be confined

As SOON as confinement begins, it is complete

**Trespass to Land**

Intentional physical entry onto another property without consent or legal privilege to be there

Elements

1. Intent
2. Physical entry

Personal entry by tortfeasor or

Tortfeasor causing something or someone onto land

Does not have to be body of tortfeasor himself

Overstaying welcome (tenant won’t leave after lease is up)

Failure to remove something

1. Without consent or legal privilege

Ex for intent) A pushes B and B falls into C’s garden and crushes flowers

A is liable to B for battery

A is liable to C for trespass (transferred intent)

B is NOT liable to C (lack of intent)

When entry is something not tangible (smell, noise, etc.) it is NUISSANCE

NOT TRESPASS

Above property or below property

Modern rule: extend to height and depth that plaintiff COULD use if wanted to

Ex) Wire across airspace, bullet through airspace, etc.)

AIRSPACE EXCEPTION

Feds say public domain does not cause trespass

Damages

If trespass is intentional (and it has to be), no harm need proven

Some courts will say you have to show damage

TN MIGHT BE ONE

TN law is unclear

**Trespass to Chattels**

Personal property interference

Intentional interference with chattel of another without consent or legal privilege

Element

1. Intent
2. Interference with chattel

Intermeddling (D did something directly or indirectly impaired chattel’s condition)

Dispossession (took chattel away)

1. Damage to chattel (if intermeddling is interference)

**Conversion**

Intentional exercise of dominion or control over someone else’s chattel which seriously interferes with owner’s ability to control their chattel

Applies to personal property ONLY

No conversion of real property

Elements

1. Intent
2. Dominion or control
3. Substantial interference to control

Ways to Convert

Wrongfully acquire (steal)

Wrongfully keep

Substantially alter or damage the chattel

If A shoots Bs cat on purpose (conversion)

The more significant the interference and damage, then conversion

The less significant the interference or damage then trespass to chattel

*Russell-Vaughn Ford Inc v Rouse* (1968) (AL)

Conversion with car key

Major conversion and got punitive damages

No need to jump through hoops to get chattel back that belongs to him

**CASES**

*Medlin v Allied Inv Co (*1966) (TN)

Mortgage said they are in foreclosure due to non-payments

Payments were actually current

Attorneys hired

Payments were all tracked down

P sued for IIED (said bank verbally berated her knowing her child died)

Holding: IIED is viable claim, but conduct was not outrageous enough

*Johnson v Woman’s Hospital* (1975) TN

Premature baby died and placed in jar with formaldehyde

MAJORLY OUTRAGEOUS

IIED was justified

*Newsom v Thalhimer* (1994) (TN)

Sales-person accused of stealing money

Guards questioned her and kept telling her to confess

Threatened to call the police

Moral pressure not sufficient for confinement

*Russell-Vaughn Ford Inc v Rouse* (1968) (AL)

Conversion with car key

Major conversion and got punitive damages

No need to jump through hoops to get chattel back that belongs to him

**Defenses to Intentional Torts**

A defendant has the opportunity to provide defense to preclude liability even if plaintiff has proof of prima facie case

Prima facie case

Plaintiff does not automatically win

Only means plaintiff does NOT automatically LOSE

Burden of Proof Shifts

Shift from plaintiff to defendant

Standard of proof remains same: PREPONDERANCE OF EVIDENCE

Defense of Mistake

One who intentionally interferes with person or property assumes the risk they are wrong about

something

General Rule: Mistake is not a defense to committing intentional tort

Ex) If trespasser truly believes land is his, he is still trespasser

\*Exception\*

REASONABLE mistake made in connection to SELF-DEFENSE or DEFENSE OF PROP

Defense of Consent

Tortfeasor not liable to intentional tort if plaintiff has consented to conduct at issue

Types of Consent

1. Actual/Express Consent

-Words or conduct expressing consent

1. Implied/Apparent Consent

-Words or conduct (or lack thereof) that would lead RPP to think consent existed

-Ex) Dr comes toward patient with shot and patient just sits there

Even if plaintiff in his heart of hearts did not consent, consent is

nevertheless implied

1. Consent implied by operation of law

-Emergency Privilege

Healthcare provider has implied consent to give emergency treatment

Must be under the following:

1-Person was unable to give consent (incap)

2-Time is of the essence

3-RPP would have consented

-Good Samaritan Privilege

Any person has a defense when acting as a good Samaritan

Must be under the following:

D was really acting in good faith

D did not charge for services

It was an emergency (convenience is not a defense)

Protection afforded will not apply if D had preexisting obligation

Consent NOT A DEFENSE

If person who gave consent lacked capacity to do so

1. Intoxicated
2. Mental incapacity (defective)
3. Minors

-Mature Minor Exception (*Cardwell v Bechtol*)

\* TN uses Rule of 7s (0-7 no consent; 7-14 rebuttable presumption

of invalid consent; 1-17 rebuttable presumption of valid consent

D has acted beyond scope of consent

Consent can have strings (time, place, etc.)

Ex) “You can fish in my pond on M, W, F”

Fish on Saturday and you have exceeded consent

Consent obtained by fraud or duress

Conceit, trickery, or duress

Defense of Self-Defense

Actual necessity to defend oneself or apparent necessity to defend oneself

If person REASONBLY thinks they need to defend their self, then they have a defense

Force Standard (How much force)

Minimum amount of force that is or reasonably appears to be necessary

If deadly force is reasonable or appears to be reasonable, then deadly can be used

When does privilege to use force terminate?

Once the danger has passed or the threat is gone, no more privilege to use force

Duty to retreat (even if safe) before using force?

No!

“Stand Your Ground” Laws

\*Exception\* some states say before using deadly force you must try and retreat

MINORITY

No jurisdiction requires retreating from home before using deadly force

If 3rd party is accidentally hurt, then still not liable for harm

Defense of Others

Ex) A attacks B and C comes to B defense by attacking A

Any person (even a complete stranger) has a right to defend another using same degree of force that person could have used (REASONABLE FORCE)

Mistake made in defense of others WILL CAUSE LIABILITY

If you come to the defense of another, you better be right or you are liable for

whatever intentional tort you commit

**Defense of Property**

Possessor of real or personal property privileged ot use reasonable force to protect

This is the rule in TN

TCA 29-34-201

Person who is injured while committing a felony or attempting

to commit felony on other’s real property is barred from recovering damages.

Even if injuries were accident or intentional by possessor.

Felonies: Homicide, rape, kidnapping, robbery, carjacking, etc.

Limitations of scope: Does not extend to injuries that occur to 3rd parties

Ex) Bystander injured as result of property owner’s efforts to

stop tortfeasor

To whom is this privilege (protecting property) available?

Anyone who is in lawful possession or entitled to possession can use this defense

Privilege to defend property isn’t limited to technical owner

Extends to anybody who is entitled to possess (ex: Tenant)

Ex) A allows B to use Torts book. C tries to take book from B

B can use force to protect book

So can A (obviously)

Does this extend to businesses?

Yes. Business have privilege of defense of property

Generally, only applies after business has “made a demand” that tortfeasor stop

Exception: If demand cannot be made safely

Ex) TN case where 70 year old man went into convenience store while on a date

Told date to stay in car while he goes inside

Man goes inside and is belligerent. Manager told him to leave

Manager then put hands on customer and escorted him to door and

“deposited” him on sidewalk

As soon as manager let go, 70 year old punched him in the face

Manager punched man and man died

Man’s estate sued store

Jury found that store was liable, BUT awarded customer $1 damages

Jury felt like manager used unreasonable force, but customer had

it coming.

When does this defense (defense of property) to use force apply?

Whenever there is a danger to the property OR when reasonably appears to be danger

A reasonable mistake won’t destroy defense (just like self defense)

How much force can you use?

D must first make demand that person cease and desist (unless demand is dangerous)

Possessor can use “reasonable” force

MINIMUM amount of force that appears reasonably necessary

Use of Deadly Force

Deadly force CANNOT be used merely to protect property

Law places higher value on human life and safety than it does to rights of things

Defense of Property can evolve in Self Defense Case

Ex) Person breaks into car to get Torts book and you confront them

Person then takes up threatening posture

Now becomes self-defense case

Can you use a mechanical device to protect property?

*Katko v Briney*

Spring gun in abandoned home (fruit jars victim)

Not dealing with protecting home (only abandoned home)

Court held: spring guns only justified when trespasser would be committing

felony of violence or felony punishable by death or where trespasser is

endangering human life.

Law places higher value on human life than it does right to things

We don’t want people to get killed over THINGS

Dissenters Position: Crime should not pay

Clean Hands Doctrine

“When you are asking the court to evoke damages for you

you need to go into court with clean hands”

If you are culpable in some way, don’t come into court

asking that we evoke power of the law to do something in your

favor when you have dirty hands.

TN Position of Using Mechanical Devices to Protect Property

TCA 39-11-616

Mechanical device can be used to protect property IF

1. Use of device was reasonable under the circumstances
2. Device must be one that is customarily used to protect property OR warnings were given to probably intruders
3. Device must not be designed or known to cause death or serious injury

**Forcible Retaking Back of Chattel**

Owner or person who is lawfully entitled to possess property has privilege to use force to

recapture property

Limitations:

1. Force can only be used to recapture a chattel when owner is in hot pursuit of person who took it (hot pursuit requirement)

* Immediately upon learning of dispossession or in process of dispossession
* Must be without an undue lapse of time

1. If change in possession was lawful, then no force can be used

* You let me borrow your laptop then decide not to give it back. You cannot use force to get it back

How much force can you use to recapture a chattel?

Reasonable force

Deadly force cannot be used to recapture a chattel

Recpature of chattel may evolve into something else (self defense) and rule changes

What about mistake?

Mistake will DESTROY this defense!

Ex) I THINK you took my torts book (they all look alike)

I snatch that book out of your hand and your name is in it

My mistake was reasonable (your book looks like mine) but STILL LIABLE

**Forcible Retaking of Real Property**

No force can be used to retake real property

Person may peacefully enter and retake it

Ex) Landlord goes in when tenant not there and changes the locks

Landlord cannot bust down the door and grab the tenant

**Defense of Necessity**

Rule is that there is a privilege to interfere with someone’s real and personal property where

there reasonably appears to be a need to avoid a greater harm

2 Types

1. Public necessity

* Any person has a privilege to commit what would otherwise be an intentional tort IF it is or reasonably appears to be necessary to avoid a **public disaster**
* A reasonable mistake in connection with this defense will not destroy defense
* COMPLETE DEFENSE
  + Defendant not liable for ANY damage
* Ex) 1850s fire broke out in neighborhood where homes were close together and made of wood
  + Defendant purposefully set fire to P’s house to stop the fire and burn it out
  + P lost everything he had because D set the fire to his house
  + Court found that D had absolute privilege by averting fire from whole block and not liable for anything

1. Private Necessity

* If danger only threatens D’s property (as opposed to public at large) then D can use privilege to commit what would otherwise be intentional tort
* Tortfeasor is liable for actual harm caused
* Ex) D hiking and caught in blizzard
  + Finds P’s cabin and breaks window to get in
  + D will have to pay for window still

**Defense of Discipline**

Privilege inherent in some relationships (parent-child mainly) that calls for orderly discipline

Parent is privileged to use reasonable force and impose reasonable confinement that

the parent feels proper for control

Ex) Case in Wilson Co where parents chained small child to bed for long time

Parents were LIABLE because not reason

Privilege also extended to those who stand in the shoes of parents

School systems, babysitters, etc.

**Authority of Law Defense**

If person had legal right to do what they did, it is not tortious

Ex) Meter reader cannot be sued for trespass

**Statute of Limitations**

Frequently used in tort cases

**Cases**

* *Cardwell v Bechtol* 
  + Cardwell had the capacity as a mature minor to consent and appreciate the nature, risks, and consequences of the medical treatment involved.
  + Under the rule of sevens, Tennessee may treat mature minors without parental consent over the age of 14 in less rebutted by evidence of incapacity.
  + TCA 29-26-118 requires that proof of standard of care for obtaining informed consent must be shown by expert evidence
* *Katko v Briney* 
  + Spring guns are only justified when the trespasser would be committing a felony of violence or a felony punishable by death, or where trespasser is endangering human life.
  + The law has always placed a higher value upon human safety than upon mere rights and property.

**Negligence: Standard of Care**

Negligence is independent basis of liability

Different from IT in that negligence is focus on conduct (or lack thereof)

IT focuses on intent

Negligence: Intent is IRRELAVENT

Focus on what tortfeasor did or failed to do

Negligence Definition

Conduct (or lack) that creates an unreasonable risk of harm to people or property

“Lack of due care”

“Lack of ordinary care”

Tortfeasor failed to do something that RPP would have done

Negligence has 5 elements (plaintiff must prove ALL 5 BY PREPONDERANCE OF EVIDENCE)

1. Tortfeasor must have owed duty of care to plaintiff

* Legal obligation to conduct himself in a way not to create harm

1. Tortfeasor must have breached that duty

* Must have engaged in conduct that falls below standard of care
* D must have been negligent

1. Tortfeasor’s negligence must have been actual cause or factual cause of plaintiff’s damages

* Plaintiff must prove causal connection

1. Tortfeasor’s negligence must be legal cause of harm

* Focus on whether policy of the law ought to impose responsibility

1. Actual loss or damage

* NO NOMINAL DAMAGES ALLOWED
* Plaintiff must show actual loss/actual harm

What is the benchmark of conduct (STANDARD)?

REASONABLE PERSON STANDARD

D’s conduct evaluated against RPS

“What would an ordinary hypothetical prudent person have done under those very

same circumstances?”

The test in a negligence case is OBJECTIVE TEST (not subjective)

Issue is not what the defendant believed to be true about her conduct

Issue is whether that conduct purported to what an RPP would have done

Because reasonable person does set the standard, we must know thing about this RP

Reasonable Person

Considered to have identical physical characteristics of the tortfeasor

-Physically they are the same

-If tortfeasor is blind, then RP is blind

Individual mental consideration are NOT considered

-Tortfeasor deemed to have mental capacity of normal person even if they don’t

-If D is insane, D’s conduct is still measured against sane RP

-Voluntary intoxication is viewed as a mental limitation

\*Voluntary intoxication is not a defense in negligence case

Tortfeasor is charged with things he actually knew, observed or perceived and those things an

RP would have known or perceived.

Ex) If tortfeasor didn’t see car coming because he’s look at phone and steps in front

of car

Testifies that he does not see car

Still deemed to have known the car was coming if RP knew that car was coming

Tortfeasor is deemed to know what ordinary person in community would know

Regarding commonly known qualities and habits of people, animals, and characteristics

of things

Ex) Fire is hot, water can drown, snakes can bite.

Negligent Tortfeasor is MINOR

Law recognizes that children do not have same capacity as adults to recognize and

avoid dangerous situations

Minor is charged with care that RP minor of like age and mental capacity would be

expected to exercise under the same circumstances

Minors can be held liable for their negligent acts assuming their conduct falls below

what would be expected

EXCEPTION\*\*\*\*

If minor is engaged in dangerous activity that adults usually engage in, then

no special allowance is made for that child’s lack of limited capacity

Held to same standard of care that reasonable adult held to

TN Law: Rule of 7s applies

Child under the age of 7 is deemed by law to be incapable of negligence

Child 7-14 has rebuttable presumption that incapable of negligence

Child 14-17 has rebuttable presumption that child is capable of negligence

**Professional**

If tortfeasor engaged in activity requiring SKILL AND KNOWDGE

Conduct measured against someone who is skilled and knowledgeable in that activity

Ex) Mechanic, electrician

Professional Standard of Care

Professional must possess and exercise skill and learning of a reasonable professional in

that profession practicing in the same or similar location that the defendant

If person is a specialist, then held to hire standard of their specialty

Ex) Brain surgeon is held to the higher standard of that specialty

Medical specialty are held to the higher standard NATION WDE

\*Medical specialists have national standard of care except in TN

TN law

A medical professional (specialist or not) held to standard of care of

a reasonable medical professional practicing in same or similar location

of where defendant practices.

TN law statewide law standard of care for lawyers

Standard of care of Nashville lawyer is same standard as lawyer practicing

in Memphis, Chatt, etc.

Professionals, like anyone else, not held to standard of perfection

Just because professional was unsuccessful does not mean liable

Professionals are not liable for bad results

When professional is D then standard of care and breach must be proven by expert testimony

Expert must tell what standard is and if D breached it

Reason for rule is that jurors have no idea of what is expected of a lawyer/surgeon/etc.

Law requires the plaintiff to educate the jury by bringing in expert to tell what

the standard is and if the D breached that standard

*Bechtol*

Orthopedic doctor could not testify to osteopathic standard of care

EXCPETION

Not required if failure of professional performance is obviously clear

Ex) Surgeon amputates wrong limb or dentist pulls wrong tooth

TN STATUTE REQUIREMENTS

TCA 29-26-121

Require written notice of potential medical malpractice case must be given to

healthcare provider 60 days prior to filing suit

Plaintiff must confirm in complaint that notice was given

TCA 29-26-122

Plaintiff must file “certificate of good faith” with complaint confirming that 1 or

more experts have been consulted about case and that they have IN WRITING

expressed opinion that there is good faith basis for the claim

Battle of the Experts

When 2 experts have diametric testimonies

Jury will then determine which expert comes out on top

Duty to Disclose Risks (Medical Malpractice)

If procedure performed without consent then that is BATTERY NOT MALPRACTICE NEGLIGENCE

If patient consents, but provider does not disclose risks

Then plaintiff does have negligence case based on lack of informed consent

What risks do NOT have to be disclosed (*Shadrick v Coker*)

1. Risk is immaterial/ extremely unlikely to occur
2. Risks that are obvious or already known to patient
3. When patient is incapable of giving consent (emergency)
4. Risk is something that is unforeseeable or unknowing

*Kellum*

Sues dentist because 16 teeth pulled

Court said it was battery (not medical mal) and no expert testimony needed

Standard of care in battery case is irrelevant!

Either patient consented or he/she did not.

*Ashe v Radiation*

Dr does not tell patient about risk of spinal cord injury (less than 1%)

Patient expert testifies that risk is 2%-3%

Dr had consent given but he didn’t disclose info

Expert testimony said even though risk is small, standard of care is to disclose the risk

Consent is tested objectively

Central theme: Negligence is tested objectively

*Parker v Vanderbilt*

“look to the person higher up” spondeat superior

Sudden emergency doctrine

* When someone is presented with a sudden emergency they did not create they are not held to the same accuracy of judgment that they would be held to if they had to think before they had to respond
* Could still be liable, but emergency is one of the things taken into account when assessing D’s actions
* Only applies when D had choice to make when faced with emergency
* Still can be liable if choice was unreasonable

Unavoidable Accident Doctrine

If harm at issue was unavoidable in sense that it was

1. unforeseeable
2. could not have been prevented through exercise of reasonable care

Then no negligence

“Just because some bad thing happened does not mean someone is liable”

*McCall v Wilder*

Reasonable minds can reach different conclusions on foreseeability and jury must decide

Sudden incapacitation

*Nichols v Atnip*

Drunk 18 year old

TCA 37-10-103

Parent or guardian shall be liable for tortious activities of minor child

Not applicable in this case b/c he is a minor

Negligent Entrustment

1. entrustment of chattel
2. to a person incompetent to use it
3. with knowledge that person is incompetent
4. that is the proximate cause of injury

There was no indication that “but for” what the parents did supply (oil change money)

that Robert jr still would have been their car

Parents have no duty to supervise their adult children

Parents must show that they were negligent in entrusting chattel to their child

*Stamp v Honest Abe Log Homes*

Negligent misrepresentation

Abe says it did not misrepresent a FACT (which is an element of negligent misrep)

Court says “yes you did, he was not a contractor and you put him on the list”

Court says Stamp also relied on this representation -Stamp said they needed 1st class job

Negligent Misrepresentation

Courts have struggled with how far to extend liability

If A makes neg misrep to B and C relies on that neg misrep, can C sue A?

Yes, if it is reasonably foreseeable that 3rd party will rely on info

The lack of privity does not bar recovery

Lack of relationship does not mean someone cannot recover

A and B are in relationship, A and C are not but C and sue A

*Bethlehem Steel*

Negligence Per Se

Standard of care expected as reasonable person can be set out in law

Under some circumstances, just violating statute is deemed “negligence per se”

Not all statutory violations result in liability

Requirements

1. must be causal connection between harm and violation of statute
2. P must have been within class of individuals that statute was aimed at protecting
3. Statute was intended to prevent type of harm that occurred

Ex) Speeding and causing injury to other motorist is negligence per se

Ex) A and B have wreck, but now A is able to prove that B was driving without DL

No negligence per se because no causal link between wreck and not having DL

One group of injuries where standard of care doesn’t matter=work related

Controlled by workers’ compensation law

All P has to do is prove there is work connection

Does not have to prove negligence

If case is controlled by workers comp then P can only recover benefits that are provided

for in workers comp

\*Cannot recover traditional tort damages (mental anguish, punitive, etc.)

**Cases**

* *Cardwell v Bechtol* 
  + Plaintiffs were not able to demonstrate “a breach of duty to the patient to use that degree of skill and learning which is ordinarily used under similar circumstances by members in good standing in his profession.”
  + If informed consent is not obtained, then it is not medical malpractice, it is battery.
* *Shadrick v Coker* 
  + Disputed issues of material fact exist when determining when statute of limitations began to run and whether statute of repose was tolled due to fraudulent concealment.
* *Blanchard v Kellum* 
  + The plaintiffs claim was a medical battery claim and did not need to produce expert testimony on such claim.
  + Whether the patient consented to extraction was material issue of fact to be determined by a jury.
* *Ashe v Radiation Oncology* 
  + TCA 29-26-118 whereby the plaintiff must prove by expert testimony that the defendant did not supply appropriate information to the patient in obtaining his informed consent to the procedure.
  + TCA 29-26-115 requires that the plaintiff prove the recognized standard of acceptable professional practice , that the defendant acted was less than ordinary and reasonable care according that standard, and that the plaintiffs injuries was a direct result of the defendant's negligent act
  + The standard to be applied in an informed consent cases is the objective standard of whether a reasonable person in the patient's position would have consented to the procedure or treatment.
* *Parker v Vanderbilt* 
  + In order to hold a doctor liable for malpractice expert testimony must show the standard of care, that the defendant deviated from that standard, and that as a proximate result of the defendant's negligent act that the plaintiff suffered injuries which would not otherwise have occurd
  + Tennessee law emaster is liable for his servants negligent solely on the doctrine of respondeat superior. The doctrine is based on the principle that the wrong of the agent is the wrong of his employer. Tennessee cases indicate that the actual control of means an method is determinative of the existence of the relation of the master and servant. To determine whether a person is a servant of another, one must inspect the amount of control exerted over the means and method of the work of the putative servant.
* *Cook v Spinnaker* 
  + TCA 57-4-203(b)(1) which makes it a misdemeanor to sell or furnish alcohol to persons under 21
  + TCA 57-4-203(c)(1) which makes it a misdemanor to sell alcohol to anyone who is visibly intoxicated.
  + Minor should be held to adult standard and minor is not necessarily guilty of contributory negligence even though she was negligent per se in purchasing and consuming alcohol and in driving while intoxicated.

**Negligence: Proof and Duty**

Negligence. Burden of Proof

1. Who has the burden or legal obligation?
2. What is the applicable standard?

Plaintiff’s Side

Plaintiff has burden of proving each element of his claim

That standard is by a P of E (greater weight of evidence)

If scale is equal, then D wins because if P doesn’t prove by greater weight he loses

It is the P’s obligation to prove by the probability (P of E; greater than 50%) each

element of his claim

Defendant’s Side

Burden of proof shifts from plaintiff to defendant

Defendant’s obligation to prove any defenses to negate his liability

Standard does not change; still P of E

So although burden of proof changes, the standard of proof does not

Presumptions

Presumptions allow jury to infer existence of fact A because fact B was proven

Ex) TN presumption that repair or medical bill incurred by P are reasonable and

necessary. So, fact P has proven he had to pay medical bills or repair bills bc of

D’s act, that is accompanied by legal presumption that those bills are necessary.

TCA 24-5-113

Ex) Rule of 7s

Presumptions can be rebutted in which case the presumption disappears

Ex) just because P has incurred medical bills does not mean they are reasonable

and necessary if D presents evidence that those bills are excessive. Presumption

disappears

Evidence of what is customary

Whether conduct is negligent

Proof of what is customary in the business, industry, or community can be considered

Evidence of what is NORMALLY DONE can be taken into account when assessing

reasonableness of tortfeasor

Evidence of custom isn’t’ necessarily conclusive bc customary way of doing something

may be a negligent way of doing that thing.

Res Ipsa Loquitur

Literally means “the things speaks for itself”

Rule of circumstantial evidence

What res ipsa allows is an inference that tortfeasor was negligent if certain

requirements are met

1. Harm at issue (accident, etc.) must be something of nature that does not normally happen without negligence

Ex) P drives new car off lot and steering wheel comes off and she

wrecks. Normally steering wheels don’t just come off

1. Condition or object that produces the harm must have been under the D’s exclusive control at the time of the purported negligent act
2. P has to establish that harm was not result of his own conduct

Assuming 3 requirements are satisfied, then res ipsa ALLOWS jury to infer that there was negligence on part of the D

Not conclusive in nature; jury can accept or reject that inference

*Boyatt v Yancey*

Gas line truck explosion

Res ipsa loquitur

Loss of Consortium—wife

P has no idea what happened; has no idea where fire started or what D’s did wrong

Res ipsa is not a substitute for proof; P still has burden to prove every element of the

claim

D must have been in exclusive control (element 2 of res ipsa) and it wasn’t

*Sullivan v Crabtree*

Truck loses control and no obvious cause

D says because P cannot prove what happened, then I win

Finding res ipsa does not automatically find negligence and finding negligence

is up to the jury

*Underwood*

Res ipsa is not a substitute for proof

There was no evidence that the hospital was negligent in regard to the ice machine

*Seavers*

HCA bilateral pneumonia

TCA 29-26-115—in a malpractice case, there shall be no presumption of negligence

on the part of the D.

\*Just because there is a bad result, does not mean negligence

Medical malpractice res ipsa loquitur has been codified (TCA 29-26-115)

Does res ipsa loquitor apple when P must present expert testimony?

Majority rule is that res ipsa can be used in MM case needing experts

Minority says no it cannot

TN adopts majority rule

The injury speaks for itself in that field

**Duty Element of Negligence: Who Owes Duty**

* Duty in the context of negligence has nothing to do with moral or ethical obligation
  + Nothing to do with treating people well
* Duty refers to LEGAL obligation to act in such a reasonable way to avoid subjecting people or property to UNREASONABLE risks of harm
* When does duty of care arise?
  + Whenever the risk is an UNREASONABLE risk
  + A risk is unreasonable when the foreseeable probability of the bad thing happening PLUS the gravity of the bad thing; use the weighing scale
    - One side of scale: foreseeable probability of harm occurring + gravity of harm
    - Other side of scale: burden on the defendant to have acted such a way to avoid the harm
    - If foreseeable probability and gravity outweigh the burden, then there is a duty to act reasonably under those circumstances
    - PROBABILITY not Possibility
  + A tortfeasor can be as negligent as can be as long as he doesn’t have a duty
* Courts have struggled with scope of duty owed
  + Just how far to extend concept of duty
  + Wherever duty goes, so does potential legal liability

**NEID**

* 2 categories of cases
  + Cases where there is physical injury and the emotional distress flows from that injury (emotional distress results from physical injury)
    - Damages P can get aren’t just for the physical injury, but also for the emotional distress and mental anguish
  + Cases where emotional distress is all there is and it is a result of negligent conduct (as opposed to intentional conduct)
    - Stand-alone mental injury or mental injury that manifests itself physically
* *Camper v Minor* 
  + Sees mangled body of teenager after wreck and he got emotional distress
  + Suing for NIED
  + Argument was: He’s having sleeping trouble, crying a lot, nightmares, etc.
  + 5 distinct approaches to how these cases are analyzed
    - Physical Impact Rule: P can recover only if he/she suffered physical impact
    - Physical Manifestation Rule: P can recover if proof of physical injury OR proof that emotional injury has manifested itself physically
    - Zone of Danger test: P either suffers physical injury OR was placed in danger of physical injury AND feared for his safety
    - Foreseeability Rule: if emotional injury was reasonably foreseeable as a result of D’s conduct then emotional distress is compensable
    - General Negligence Approach: If P proves all elements of negligence, then he can recover for emotional injury
      * P can only recover if emotional injury is SEVERE and proven by EXPERT testimony
* *Ramsey v Beavers*
  + Mom hit at mailbox while son in car
  + Son was not in zone of danger but did witness the accident (iiednder case)
  + General Negligence now controls Zone of Danger cases and bystander cases
  + Assuming all 5 elements of negligence are proven and P shows he suffered severe emotional injury by expert testimony, then he can recover
* *Bain v Wells* 
  + Rehab patient housed with AIDS patient
  + Alleges outrageous conduct and NIED
  + Unless there is a channel of transmission, P cannot recover for NIED
  + No channel of transmission, no recovery for P and no liability for D

**Duty to Fetus**

* Does duty extend to injuries occurred prior to birth?
* General rule: One who negligently causes injury to unborn child, is liable for that harm (generally…)
  + However, the prerequisite is that child be VIABLE at time of negligent act
* What if child dies of injuries suffered in womb?
  + Majority (TN): permit child’s estate to recover and bring wrongful death claim provided child was viable at time. Does not matter if child was born stillborn or is born and then dies.
  + Substantial Minority: Apply born alive standard. Child must be born alive
  + 1 or 2 jurisdictions: “Quick Standard” permits recovery for death of unborn child who is “quick.” Child is “quick” when child is capable of movement in the womb
  + Nonviable Standard: Wrongful death action can be brought for ANY unborn child. Viable or not. Only handful of jurisdictions.
* Most jurisdictions require showing of viability before duty of care is owed by D
* *Miller v Kirk* 
  + 20 week old fetus died as result of blunt force trauma to mother’s stomach
  + Child was not viable

**Torts to Unplanned Children**

* Wrongful Pregnancy
  + Parents bring claim and they are allowed to recover damages resulting from some failed pregnancy avoidance technique
  + Resulting child is HEALTHY (MUST!)
  + Majority (and TN): allow wrongful pregnancy claims.
    - 3 ways to recover for child rearing expenses
      * Full Recovery: Parents recover ordinary costs of raising child
      * Benefits Rule: Parents allowed to recover ordinary cost of rearing child BUT in making that award the jury is allowed to consider the benefit that child has brought to family
      * No Recovery Rule (MAJORITY RULE and TN): No recovery for ordinary costs of raising child
  + *Smith v Gore*
    - Young woman who had tubal ligation after 4 kids and was not financially stable
    - Healthy child #5 arrives after failed tubal ligation
    - Sues and asks for award of damages for healthy normal child
    - P took steps to not have more kids and but for the negligence of her healthcare provider, she would only have 4
    - Damages recoverable include ALL medical expenses, pregnancy care and delivery, medical complications, pain and suffering from time P has found she is pregnant until pregnancy termination, loss of wages, loss of consortium, recovery of emotional distress but limited to time she discovers pregnancy until no longer pregnant
    - Mom and dad have duty to raise child
    - Punishment doesn’t fit crime
      * Yes, physician was negligent but making him pay is disproportionate
      * Healthcare’s provider’s negligence is not proximate cause of harm
* Wrongful Birth
* Wrongful Life

Duty element (from last class) relating to unplanned children

1. wrongful pregnancy (parents seeking to recover damages they have incurred from wrongful pregnancy with a healthy child)
2. Wrongful Birth
   1. action brought by parents (NOT CHILD) seeking to recover damages for the birth of unplanned child and unplanned child has physical or mental problems stemming from D’s negligence
   2. Ex) “Botched abortion” cases
   3. Question is: Whether parents can recover for wrongful birth
      1. (Majority): Yes, parents can recover
         1. Same damages that can be recovered in wrongful pregnancy can be recovered in wrongful birth cases BUT
            1. Parents can ALSO recover the ordinary expenses associated with raising that child and education that child that are connected to birth defect
            2. If parents have to go beyond normal expenses of rearing child, then they can recover
         2. TN: Parents can recover to emotional distress
3. Wrongful Life (CHILD’S CLAIM)
   1. Child is suing to recover damages and child is the one who has physical or mental issue stemming from D’s negligence
   2. Child is seeking to recover damages for having been born at all
      1. Plaintiff’s position: award me damages because I am here and I am not supposed to be here
      2. “My parents took steps to prevent me”
   3. Most jurisdictions have reacted negatively to these types of cases
      1. Courts say prospect of awarding damages just because they have been born is so inherently speculative that any award would be pulled out of thin air
   4. In jurisdictions that have permitted, the damages are limited to SPECIAL DAMAGES
      1. Damages that are readily quantifiable

Whether there is legal duty to come to aid of other person who is in danger

* CL says there is no duty to come to aid or protect another from harm
  + Even if it can be done with little or no risk to would be rescuer
  + Ex) Olympic-level swimmer sees small child fall off edge of boat dock and is drowning. It would be very simple for expert swimmer to jump into water and save child. Swimmer does not jump in and does not help.
* Exceptions\*\* Special Relationship
  + Common carrier and passenger (airlines and customers)
  + Innkeepers and guests (hotels and customers)
  + Employers and employees
  + Schools and students
  + Family members
  + Businesses and their customers
  + Social hosts and their guests
    - *Lindsey v Miami Dev* (drunk party guests fell from balcony)
      * Estate sued D (social host) and said you didn’t do anything to help after jump
      * D said I did not have a duty to do anything after you jumped
      * Court found that he DID HAVE A DUTY to act reasonably under the circumstances because he assumed control of the situation
      * There was factual dispute over whether or not D told people to wait to call for help
      * Court said even if they do not have duty to do anything, once performance has begun then at that point the D has assumed a duty of care (D assumed a duty when he said “let’s wait a while”)
      * D also asserted Good Samaritan law (no liability for ordinary negligence when D acting in good faith (no charging money either) are not liable if they make matters worse)
        + Court said Good Samaritan principle does not apply to people who have preexisting duty to render aid
      * Duty to do something is only do what is reasonable
      * D also argues that his action was not proximate cause of death
        + Court says you did not raise that argument in trial court
* Other Exception\* When D is one who is responsible for putting P of needing help
* Statute exceptions: TN Driver involved in accident must render reasonable assistance to other people who might have been injured in that accident
* Exception\* Duties that are voluntarily assumed
  + Someone who voluntarily undertakes to render aid has a duty to use reasonable care
  + Ex) Go out to parking lot exhausted. See someone lying on wet pavement by car door and it is obvious person is having medical catastrophe. You take a look and decide not to do anything. There is no duty to render aid.
  + Ex) Go out to parking lot exhausted. See someone lying on wet pavement by car door and it is obvious person is having medical catastrophe. You then decide to help and say that you are going to go inside and get help. Running into the lobby you get distracted and person dies. There IS A DUTY because you voluntarily undertook to render aid.
    - The minute performance begins, the D has assumed a duty where one might otherwise not exist

Duty to Warn of Foreseeable Dangers

* *Bradshaw v Daniel* 
  + Whether healthcare provider owes duty to non-patient to warn of risks of rocky mountain spotted fever
  + Wife dies after husband died of RMSF and estate sues doctor saying he should have warned her to be on the lookout for symptoms
  + Court says there is a duty to warn 3rd party, but it is a specific duty
    - Only warn those individuals who are identifiable in patient’s IMMEDIATE FAMILY or FORRESEEABLE risks
* *Pittman v Upjohn*
  + Adult grandson took diabetes medicine and suffered severe hypoglycemia and suffered coma
  + Court said it was not reasonably foreseeable that adult houseguest would take pills

Duty that business has to protect customers from criminal acts of 3rd party

* *McClung v Delta Square Ltd* 
  + Woman went to Walmart in daylight and was abducted, raped, and died in trunk of car
  + Whether Walmart was negligent I failing to provide adequate security in parking lot
  + TN SC said a business does have an obligation (does have a duty) to use reasonable measures to protect customers for FORESEEABLE criminal acts
    - Prior to *McClung,* foreseeability required that business have actual notice that criminal act is about to occur
  + Court now says yes businesses do have a duty to act reasonably when criminal act is foreseeable and looks at ways to see foreseeability
    - Prior Incidents rule: if this thing had occurred then it is foreseeable
    - Totality of the circumstances: courts will look at entire circumstantial situation (where is business located, what is nature of business, etc.)
    - **Balancing Approach (TN)**: Balance of degree of foreseeability against burden of duty imposed
    - Court said what happened to P was foreseeable (crimes had been occurring all the time, other business has watch towers, D said he couldn’t put anything outside for fear of stealing) and gravity of harm was great. Burden on D is not great because it does not cost much to put employee outside in bright vest and have them just walk around

Parents are not vicariously liable for the actions of their children

Unless parents are negligent

Narrow TN Law exception: when child has vandalized public property and child has don’t

so before.

Common Law Rule

* Seller of alcohol is not liable to third persons who are injured by intoxicated purchaser of alcohol and also not liable to injuries of the purchaser himself or herself
  + There is no duty of reasonable care that is owed by a seller or alcohol
  + Consumption of alcohol is viewed as legal cause of bad thing that happened as opposed to the purchasing of the alcohol
* Dram Shop Statutes DO CREATE a tort cause of action that can be brought against seller of alcohol
  + Minor
  + Visibly intoxicated
* *Cecil v Hardin* 
  + 2 friends (20 and 21) had been drinking and unbeknownst to Harden (passenger), Edwards (driver) had been taking drugs. Drove around and hit a cyclist. Parents of cyclist brought action against driver and passenger.
  + P argues that Harden allowed Edwards to drive knowing that he was intoxicated
    - Court says Harden had no right to control Edwards’ car and they did not have a special relationship that would make Harden owe a duty to prevent Edwards from driving while intoxicated. No duty
  + P argues that Harden should be held liable because he failed to stop and render aid
    - Court says passenger has no legal duty to stop and give person assistant to person injured by car unless it was the passenger that caused the accident or there is a relationship between passenger and driver
  + P argues that Harden was negligent in providing alcohol to his friend
    - Court says acceptance of alcohol is independent intervening cause even if what happened was foreseeable
  + P argues that Harden is vicariously liable for negligence of Edwards because they were engaged in a joint venture
    - Court says no joint venture because there was no common purpose, no manner of agreement, no equal right on each party to control both the venture of a whole.
    - Court says this was only a social venture, not a joint venture (which is usually business-like)
  + P argues that Hardin should be vicariously liable because Hardin aided and abetted Edwards
    - Court says no because D must know that his companions conduct constituted a breach of duty or give encouragement or substantial assistance.
    - D must have done something more than “just being present”
  + Friends can let friends drive drunk (absent a special relationship)
    - It is the CONSUMPTION that is the problem, not the providing
* *Worley v Weigels*
  + Parents sued store who sold alcohol to minor who then gave alcohol to other minor and caused accident (Goosie bought the beer and then Kaiser drove the car and caused an accident with Worley as the passenger). Beer was bought at Weigels and Goosie was not ID’d
  + TCA 57-10-101
    - CL rule codification
    - The general assembly hereby finds and declares that the consumption of any alcoholic beverage or beer rather than the furnishing of any alcoholic beverage or beer is the proximate cause of injuries inflicted upon another by an intoxicated person.
  + TCA 57-10-102
    - Dram shop statute
    - Notwithstanding the provisions of § 57-10-101, no judge or jury may pronounce a judgment awarding damages to or on behalf of any party who has suffered personal injury or death against any person who has sold any alcoholic beverage or beer, **unless** such jury of twelve (12) persons has first ascertained **beyond a reasonable doubt** that the sale by such person of the alcoholic beverage or beer was the proximate cause of the personal injury or death sustained and that such person:
      * **(1)**Sold the alcoholic beverage or beer to a person known to be under the age of twenty-one (21) years **and** such person caused the personal injury or death as the direct result of the consumption of the alcoholic beverage or beer so sold; **or**
      * **(2)**Sold the alcoholic beverage or beer to a visibly intoxicated person and such person caused the personal injury or death as the direct result of the consumption of the alcoholic beverage or beer so sold.
  + Is seller of alcohol who DOES NOT ask for proof of age,
    - D says we did not know Goosie was under 21
    - Court says knowledge of being a minor must be BRD
    - Court says store is not liable because the minor who purchased the alcohol did not cause the injury
* *Biscan v Brown* 
  + Sisters go to party hosted by friend who had parent present at party. One sister (Jennifer) gets in accident with another person (Brown) because Brown had been drinking.
  + Parent (Worley) had rule you had to spend the night if you drink but did not enforce the rule
  + Court says Dana (sister) cannot be held liable under TCA 57-10-101 or 102 because 101 says there is no proximate cause for furnishing alcohol under TCA 57-10-101 and only for SELLING to minors under 102
  + Worley says he did not owe a duty because he did not provide any of the alcohol (says I am not a furnisher or a seller)
    - Court says you did have a duty because you were a social host and kids were guests which means there is a special relationship
* *Lett v Collis Foods Inc* 
  + Waffle House waitress showed up drunk to work then leaves at the request of her employer. Got in car accident and seriously injured Lett
  + Employer did not contribute to intoxication, she was not on the clock and was driving her own car. No duty
  + If you held employers liable because they tried to help would be a disincentive to provide help

*West v East Tennessee Pioneer Oil Co.*

* Drunk person wants gas and employees help him
* Gets in car accident
* P’s argue that store (acting through employees) were negligent in selling gas and assisting him at the pump
  + Store says they did not owe duty to plaintiffs (users of the roadways)
* Court says Exon did owe duty of reasonable care
  + Court uses balancing scale (foreseeable probability of harm and gravity of harm--- defendant of burden to act differently)
    - Test is what is LIKELY(PROBABLY) not possible
    - Court says if you sell a drunk person gasoline and you help them to pump it, it is reasonably foreseeable they will get into accident
    - Court says the gravity of the foreseeable harm is GRAVE and SERIOUS
    - Court says burden was small; all they had to do is say no
* Holding: Convenient store owes duty of reasonable care to persons on the roadway when selling gas to an obviously intoxicated driver and or assisting an obviously intoxicated driver with pumping the gasoline
* All court did was find that Exon owed duty of care but P must still prove other 4 elements of negligence (therefore, court did not find Exxon LIABLE)

**Cause in Fact (Actual Cause)**

* Basic requirement: Defendant’s negligence must have caused the plaintiff’s injury/damage
* Traditional test: “But for” test
  + Harm would not have occurred but for the tortfeasor’s negligence
  + If harm would have occurred despite that (in any event) then D’s negligence cannot be said to be cause in fact of the harm
    - Even if D owed a duty and breached that duty, then not liable if not cause in fact
* Category of cases that require different analysis
  + Cases with multiple tortfeasors and therefore cases with multiple causes
    - There can be more than 1 cause in fact that produced harm
    - Ex) It’s Fall and leaves are down. Homeowner A rake dup leaves in yard and puts them in pile and sets them on fire (on windy day). Assume it is negligent to burn leaves on windy day. Homeowner B does the same thing. A’s fire gets out of control. B’s fire gets out of control. Fire burns down C’s house.
    - A and B acting independently of one another and those causes combine to cause injury
  + But for test will not work in these cases because it eliminates all tortfeasors
  + Courts come up with new test Substantial Factor Test
    - Was A’s negligence a substantial factor in bringing about harm to C? Yes
    - Was B’s negligence a substantial factor in bringing about harm to C? Yes
    - If those multiple acts of negligence cause harm that is INDIVISIBLE (harm cannot be separated out) then all of tortfeasors are JOINTLY (together) and SEVERALLY (several of them) liable
      * Ex above) A and B jointly and severally liable. No way C could divide up damage of fire between fire A and fire B
      * C can sue just A recover all damages OR C can sue B and recover all damages OR A can sue both and recover how court sees fit
    - If the injuries ARE DIVISIBLE, then individual tortfeasors are liable only for the harm they caused
      * IE: They are liable SEVERALLY only
      * 2 exceptions
        + 1) When Ds are acting in concert with one another
        + 2)Original Tortfeasor Rule

When original tortfeasor foreseeable exposes plaintiff to further harm, he is liable for original harm and other harm

Ex) A and B involved in car accident. It was B’s fault (ran stop sign). A taken to hospital and is malpractice on.

Under traditional rule, B is liable for injuries and malpractice

* + - * + Rare case in TN because of comparative fault
  + Multiple independent tortfeasors but only one cause
    - Ex) Two deer hunters hunting separately, not together. Acting independently. At same time they see what they think is deer and shoot at it. Turn out, it was person. 1 bullet hits plaintiff
      * Both hunters negligent (shooting at something they cannot ID)
      * One hit the plaintiff
    - Courts say that plaintiff is permitted to recover against one or both (at his election) IF 1) plaintiff can prove that both were negligent 2) the harm was only caused by 1 and 3) given circumstances, plaintiff can’t reasonably prove which one did it
      * Tortfeasors are JOINTLY and SEVERALLY liable
  + Loss of Chance Doctrine
    - *Kilpatrick v Bryan* (took SC 2 years and 2 months to decide)
      * Medical malpractice for wrongful diagnosis of breast cancer
      * Plaintiff is asking court to recover for loss of chance (because of the delay, my condition is worse that it would otherwise be)
      * D argues that P cannot recover because she failed to prove causation
      * 2 physicians testify:
        + 1 physician said D fell below standard of car for diagnosis
        + 2nd physician said D’s conduct increased likelihood that she suffered irreparable harm
      * Pivotal State: TCA 29-26-115 says P must have suffered injuries which would not otherwise have occurred (ie: but for test)
      * Loss of Chance: P seeking to recover damages for lost opportunity of more favorable medical result
        + Permits recovery where delay of proper diagnosis or treatment results in patient being deprived of less than even chance of surviving
      * 3 categories for loss of chance recovery
        + Pure Loss of Chance: P can recover even if only had 5% chance of recovery. Has cause of action against D who negligently deprived him of his 5% chance. Does not matter extent to which P would have suffered same ultimate result

Dr was but-for cause of LOST CHANCE

* + - * + Loss of Substantial Chance- Plaintiff must have a substantial chance of recovery (a realistic chance) in order to recover damages
        + Traditional Causation—Rejects loss. “All or nothing” approach….

Would P have suffered same medical result (most likely) but for the D’s negligent medical care? Yes, so D cannot be but-for cause of the harm

* + - * Concurrence says this is a damage problem not a causation problem

**Negligence and Proximate Cause**

Once D has been found to be cause-in-fact then must determine if D is proximate cause (legal cause)

Proximate Cause

* Limitation that the courts (or legislature) has put on the wrongdoer’s legal responsibility for negligent conduct
* Liability must have some sort of boundary or it could go on forever
* Proximate Cause 3 Prong Test
  + Tortfeasor’s conduct must have been SUBSTANTIAL FACTOR in bringing about the harm
  + If court can identify good reason (policy, statute, court decision, common sense) that would suggest that liability should not attach then that BREAKS CAUSATIONAL CHAIN of legal responsibility and D not liable
    - Ex) *Smith v Gore* 
      * P with 4 kids and had failed sterilization technique
      * Wrongful pregnancy: Wanted compensation for raising normal child
      * D negligence was not proximate or legal cause of the harm
  + Harm must be foreseeable
    - Extent of harm does not have to be foreseeable but general character of harm DOES
* Implications: Rescue Doctrine
  + *Caldwell v Ford Motor Co* 
    - Engine fire in truck and injured back when trying to save materials from bed of truck
    - Ford concedes that new truck should not have caught fire, but says they are not liable because
      * 1) He was not burned by fire
      * 2) He would have had to unload the material anyway
    - Court says Ford is wrong
      * P had to sling the material in a way he would not have but for the fire
    - Rescue Doctrine
      * D is liable for rescuer when D’s negligence creates danger that invites rescue
      * Extends to property for reasonable efforts to rescue or protect property
      * P acted REASONBLY and rescue doctrine applied
* Superseding Intervening Cause Rule
  + If there is some superseding intervening act of 3rd party (not D or P) or some event that occurs AFTER D’s negligence, and itself acts a new or independent superseding cause of the bad thing that happens then that proximate legal chain will break
  + In order for there to be superseding intervening cause which breaks chain of proximate cause, that cause must be UNFORESEEABLE
  + *McClenahan v Cooley* 
    - Keys in ignition while he went into the bank and thief gets in wreck
      * Wreck kills woman, baby in utero, and 4-year-old
    - P asserts negligence per se and common law negligence
      * Negligence per se on basis on TCA 55-8-162
        + Do not leave keys in ignition on highway
        + Trial and C of A focused on “highway”
        + SC says don’t focus on highway
      * CL Negligence theory
        + CL negligence principles provide analytic framework for seeing foreseeability
    - Foreseeability is a jury question in terms of being a superseding intervening cause

**PREMESIS LIABILITY**

**Premises Liability**

* Owner’s and occupiers of real property
* Legal obligations of owners and occupiers of real property
  + Legal obligations vary depending on 3 general factors
    - 1) Whether P was injured on or off D’s property
      * Duty of owner/occupier to those OFF PREMISES
        + General Rule: Owner has duty to exercise reasonable care with respect to activities that he conducts on his land and conditions he creates on his land for the protection of those OFF the land
        + There is a duty of reasonable care to those OFF D’s property
        + Ex) Homeowner’s property ran adjacent to public sidewalk. Along sidewalk, owner erected iron fence with spear tip on top. P slips on ice and grabs fence and impales his hand. Sues owner. Court recognized that TN law is consistent with general law that there is a duty of reasonable care owed by owner’s of property to those on adjacent public ways. No duty to keep adjacent way safe unless D has altered it.
        + If it is reasonable foreseeable that someone will deviate from adjacent public way onto Ds land as normal part of travel, then there is a duty of reasonable care
      * Duty of owner to those ON PREMISES?
        + Must look at status

Trespasser (Adult)

Someone who is there that does not have right to be there.

Undiscovered trespassers: Someone that owner does not know is there and has no reason to know is there

NO DUTY OF REASONBLE CARE TO UNDISCOVERED TRESPASSER (owner cannot intentionally or recklessly injure)

Discovered trespassers: Owner knows or should know that person is there.

Limited duty owed to discovered trespasser. “Duty to exercise ordinary care which is a duty to warn or make safe or conceal artificial conditions that pose risk of serious harm.”

Frequent Trespassers: Owner knows or should know that this person habitually intrudes on their property

Duty owed to frequent trespasser is SAME as duty to discovered trespasser.

Trespasser (Child)

Attractive Nuisance& Playground Doctrine: Provide a way for court to turn a trespassing child into some other legal status.

Because children do not have same capacity as adult to understand risks, then

Legal fiction where court can take child and morph them into some other legal status to whom a duty of reasonable care is owed.

If thing that caused the injury LURRED child= Attractive Nuisance

If thing that caused the injury was that the property is regarded as a virtual playground= Playground doctrine case

*Bloodworth v Stuart*: Boys were lured because construction site was regarded as playground.

Always ask what lured the child? Was he attracted to the thing that caused the injury or something else?

The older the child, the harder it will be for P to recover. (*Metro v Counts*; 10 year old should know about drowning and if body of water is normal, then no liability.)

* + - 2) Legal status of the P in relation to the property
      * Was P trespasser, licensee, invitee?
    - 3) Whether the harm is caused by naturally occurring condition or artificial one?
      * Natural Condition Exception: owners and occupiers of real property not liable for harm caused by naturally occurring condition. ONLY applies if condition is UNALTERED
* *Roberts v Roberts*
  + Tree fell on daughter in law
  + DIL knew about bad tree and owner’s knowledge was not superior
  + Owner’s of real property are not insurers of the safety of those on the property
    - Just because you are the owner of the property, that *ipso facto* does not make you liable.
    - Owner’s and occupiers of property are not STRICTLY LIABLE for a bad thing that happens on the property
* Tree situation: in situations where tree is DEAD, then that is negligence case and liability revolves around 2 factors
  + 1) Whether D lived in urban area v rural area
  + 2) Whether D knew or should have reasonably known they had a dead or decaying tree
* What if LIVING tree or plant encroaches ABOVE or BELOW ground and causes damage to P? Nuissance cases, NOT negligence
  + **Every** jurisdiction recognizes Remedy of “Self Help”
    - Landowner whose property is encroached by living tree or plant, they can trim the tree or plant to the extent of the encroachment
  + Some jurisdictions adopt “Massachusetts Rule”
    - Self-help is the EXLCUSIVE REMEDY
  + Some jurisdictions adopt “Restatement Approach”
    - Landowner may be liable for encroaching damage by encroaching tree or plant WHEN that vegetation is artificial (it was put there at some point), but not when encroaching tree or plant is naturally occurring.
    - Issue is how to prove whether plant was put there
  + Other “Virginia Rule”
    - Landowner limited to self- help remedy UNLESS tree or plant is NOXIOUS (inherently dangerous or poisonous)
  + Other jurisdictions (and TN) “Hawaii Rule”
    - Trees and plants are NOT nuisance merely because they encroach, but they can be regarded as a nuisance when they CAUSE ACTUAL HARM **or** POSE an IMMINENT DANGER OF THAT (then adjoining landowner can require that plant be removed or require owner of plant to pay damages if it does cause harm)
  + Pennsylvania Rule
    - Owner of tree or plant can be legally required to remove it to the extent it encroaches PLUS recover damages that tree or plant caused
* Dead plant= negligence principle
* Live plant= nuisance principle
* Duty owed to person on adjacent **public** property???
  + Duty of reasonable care
* TN 29-34-201: If someone is injured while committing a felony or attempting to commit a felony on someone’s real property then they are barred from recovering

**2nd SEMESTER BEGINS**

**Premises Liability Cont…**

* Premises owner owes no duty of reasonable care to trespasser
  + Premises owner owes limited duty to frequented trespassers and discovered trespassers

**Topic Tonight: What duty is owed when status changes?**

* Licensee
  + Someone who is on the property with the consent of the owner or occupier
    - Could be express or implied
  + Most commonly: A Social Guest
  + What is duty of care owed?
    - Owner owns DUTY TO WARN OF CONCEALED conditions (artificial or natural) that he actually knows about and to carry on his activities with reasonable care
      * No duty to inspect property to discover dangerous conditions
      * No duty to fix something that is dangerous (only to WARN)
      * No duty to warn about obvious dangers
    - Some states: Duty owed to social guest is merely to refrain from willfully or recklessly injuring that person
      * Same duty owed to trespasser
    - *Coln v City of Savannah* 
      * Danger is open or obvious (uneven pavers at city hall *Coln*; pool skimmer hole on deck *Vancleave*)
        + Open and Obvious does NOT ipso facto relieve D of duty of care
        + Fact that it is open and obvious is just one of the factors to put on the scale to determine duty (one side foreseeable probability of harm and gravity of harm and one other side then burden on person to act differently)
        + A danger can be unreasonable EVEN IF it is open and obvious
      * Open and obvious danger NO LONGER PRECLUDES D to act reasonably
* Independent Contractor
  + *Blair v Campbell* 
    - Property owner (Campbell) lives in retirement home and needs work done on duplex property
    - Campbell hires Blair to pain and also fix a leak on the front porch roof
    - Blair props up ladder, goes on roof, comes back down and roof supporting ladder gives in and Blair falls
    - Campbell says “you failed to provide me a reasonably safe place to work”
    - Does property owner owe duty to I.C. to provide reasonably safe place to work?
      * General rule, yes (removing or warning of latent dangers)! But there is an EXCEPTION
        + *Risks that are inherent in work* that I.C. was hired to perform
        + *I.C. assumes the risk* that he will fall off the ladder
* LEO and Firefighter
  + *Carson v. Headrick* 
    - Wife calls 911 and says she needs escort; says he is violent and has guns.
    - Dispatcher relay this info to LEOs.
    - Husband shoots at LEOs (then commits suicide)
    - LEOs sue wife for negligence because 1) she didn’t tell us he made threat earlier about killing LEOs and 2) he didn’t tell us he ahd a rifle with a scope
    - Legal Q: Keep or abolish the Police Officer/FF Rule?
      * Police Officer/FF Rule: Cannot recover for injuries inherent in their work
      * Does person who is seeking assistance owe them a duty of care?
        + Under LEO/FF Rule: No
      * Holds: Retain rule
        + Exception: Intentional, malicious, or reckless conduct
        + Why? Public policy and societal expectations
* Invitee
  + People on property for business related purpose
  + If P exceeds scope of permission by going somewhere on property that permission does not extend, they can lose that status and become trespasser
    - Ex) Customer in grocery store slips on peel in aisle (status is invitee)
    - Ex) Customer in grocery store goes beyond “employees only” doors and fall and breaks his arm (status is trespasser)
  + Duty owed to Invitee: Duty of reasonable care under the circumstances
    - EXCEPTION: People who come onto property for recreational purpose
      * Recreational Use Statutes (Recreational Use Immunity)
        + Developed to help encourage land owners to open up land for recreational uses
        + These statutes protect these land owners by negating a duty of reasonable care
        + Does NOT apply if person charges admission fee
        + *Exception* to immunity defense

Gross negligence, recklessness, or willful

* + - * + *Bishop v Beckner* (teens caving and falls to death)

Owner knew cave was on property

Owner knew people went in that cave

P argues that D failed to warn about dangers of us being in the cave AND you were negligent by not barricading

D argues 1) you are a trespasser and 2) raises recreational use statute claiming immunity

TN statute explicitly includes caving in recreational use statute and there was no evidence of gross negligence

NOT limited to caving: Also includes hunting, fishing, trapping, camping, water sports, white water rafting, sight seeing…SUPER BROAD

* Lessors and Lessees
  + Duty owed by landlord to tenant? (lessor to lessee)
    - General CL Rule: No duty of reasonable care owed by lessor to a lessee
      * Idea is that since the lessee is the one who takes physical possession, then he is the one who should have the duty to maintain as to avoid unreasonable risks of harm.
      * EXCEPTIONS:
        + 1) When lessor (landlord) knows or reasonably should know of some condition (natural or artificial) that exists at the time possession is transferred that is NOT obvious and is something that a reasonable person would not discover.

Then has DUTY TO DISCLOSE/WARN

* + - * + 2) When lessor retains or keeps control over something on the property (swimming pools, tennis courts, laundry facility, stairways outside, parking lots, etc…)

Then there is a DUTY OF REAOSNBLE CARE to keep those areas in reasonably safe condition

In order for liability to attach, lessor must have ACTUAL OR CONSTRUCTIVE NOTICE of dangerous condition and have reasonable opportunity to fix it

* + - * + 3) Where property is being leased for admission of the public and there is a dangerous condition that lessor knows or reasonably should know

Then there is DUTY OF REASONABLE CARE

Ex) Theater

* + - * + 4) If lessor has negligently undertaken to repair something

D can assume a duty

* + Lessor/Lessee statuses are HEAVILY IN THE LEGISLATURE
    - Always look at the statutes
* Seller and Buyer
  + Duty to DISCLOSE CONCEALED UNREASOABLY DANGEORUS CONDITIONS that the seller knows or reasonably should know about

**CASES**

* *Coln v City of Savannah* 
  + 2 cases; uneven pavers at city hall and open pool skimmer
  + Rule: Fact that it is open and obvious is just one of the factors to put on the scale to determine duty (one side foreseeable probability of harm and gravity of harm and one other side then burden on person to act differently). A danger can be unreasonable EVEN IF it is open and obvious
* *Blair v Campbell* 
  + Retired landlord needs work done on rental home and roofer falls.
  + Rule: Property owner owe duty to I.C. to provide reasonably safe place to work; however, the exception: *Risks that are inherent in work* that I.C. was hired to perform *I.C. assumes the risk* that he will fall off the ladder
* *Carson v Headrick* 
  + Domestic violence call and husband shoots at Leo
  + Rule: Police Officer/FF Rule: Cannot recover for injuries inherent in their work. No duty of care. Exceptions: Intentional, malicious, or reckless conduct
* *Bishop v Beckner* 
  + Owner knew cave was on property and people went in. Kid died.
  + Rule: TN recreational use statute explicitly precludes liability for caving in recreational use statute and there was no evidence of gross negligence NOT limited to caving: Also includes hunting, fishing, trapping, camping, water sports, white water rafting, sight seeing…SUPER BROAD
* *Hudson v Gaitain*
  + BBQ and neighbor fell on steps that were outside and not code compliant
  + Rule: Common law classification of one injured on land as invitee or licensee are no longer determinative in TN when assessing duty of care owed by landowner.Duty of care owed is one of reasonable care under all attendant circumstances with foreseeability of the presence of the visitor and likelihood of harm being one of the principal factors in assessing liability.
* *Ogle v Winn Dixie*
  + Slipped in bathroom; paper towels piled up on trash can
  + Rule: Liability in premises liability cases stems from the superior knowledge of the condition of the premises . Thus, a plaintiff must prove that the defendant had either actual or constructive notice of the injury causing condition . This proof may be in two forms 1) plaintiff may show that the defendant itself caused or created the condition and therefore had notice of it or 2) plaintiff may show that the dangerous condition existed for so long and the defendant should have known about it.
    - A customer's allegation that there were extremely large number of paper towels in the restroom at the time of fall occur it was insufficient

**Defenses to Negligence Cases**

* If P has failed to prove prima facie case of negligence, then that is raised as defense
  + If there is a problem with duty, that is a defense…
* Other defenses to negligence claims
  + Contributory Negligence
    - Conduct on the part of P that contributes to his own injuries
    - If P has acted unreasonably, (ie P is contributorily negligent), then that breaks the proximate/legal chain of responsibility and relieves D of liability
    - Putting P’s conduct under the microscope

**Contributory Negligence**

* Prima facie case for CN same as for negligence generally
  + EXCEPTION: Duty owed is *not* duty that runs from D to P, but duty that P owes HIMSELF to act reasonably under the circumstances.
* Standard of conduct P is held to, is SAME STANDARD of reasonableness that D himself is held to
  + One of “reasonable care under the circumstances”
* Question to address: Whether CN applies to minor
  + Yes, minor Ps can be barred from recovering when THEY are guilty of CN
  + Minor Ps are held to same standard of care that would be expected of ordinary prudent MINOR under same circumstances
  + Just like minor Ds are held to standard of care of ordinary prudent RPP minor, same with P who is a minor
* Not only are Ps held to common law standards of reasonableness, also held to STATUTORY standards
  + P can use sword of negligent per se against D because D violated statute
  + Same principle as above works in reverse
    - If P has violated statute that is designed to prevent that bad thing that happened, then D can use that as a shield
      * Contributory Negligence Per Se (P guilty of negligence per se)
    - Sometimes there are statutory provisions against raising contributory negligence per se
      * TN seatbelt law: must wear seatbelt in moving car
        + Next section says, FAILURE to wear is inadmissible in civil case
* Limitation to CN: Conduct on part of D that is intentional, grossly negligent, or reckless
  + If D acted any of those ways, then no contributory negligence defense
* Limitation to CN: If Ps claim is NOT negligence and is SL, then no contributory negligence defense
* Legal Effect of CN
  + Finding that P was CN results in COMPLETE BAR to recovery
    - Why? because when P is CN, then it breaks that legal chain and D is not liable
* Ex) P and D collide at intersection. P is 1% to blame and D is 99% to blame
  + P recovers ZERO
  + Why? Because Ps CN (no matter how slight) breaks that proximate legal chain of responsibility
  + D gets a free pass even though negligent
* Can CN of 1 person be imputed to another person so as to bar THAT person’s claim against a 3rd party?
  + Ex) Mom driving with child and gets in accident (mom is negligent and so is other driver)
    - Mom was texting and other driver was speeding
    - Mom cannot recover damages from driver because she is CN
    - Driver cannot recover against mom bc he too was CN
    - Is CN of mom imputed to child so child cannot recover against driver?
      * Most jurisdictions general CL: NO
        + CN of one party stays on the shoulders on THAT PARTY

3 exceptions

1) Employer/Employee: CN of an employee will be imputer to the employer so as to preclude an employer from recovering against 3rd party

UPS driver involve in accident and he was accident, but so was other.

UPS looks to recover for damages of truck (so looks to other driver)

UPS employer precluded from recovery bc CN of UPS driver is imputed to employer

2) Joint Ventures: Someone in joint venture is negligent and that negligence combined with 3rd person negligence causes injury. Question is whether other party of joint venture has CN

Negligence of someone in joint venture AFFECTS EVERYONE IN JOINT VENTURE

3) Suits based on injury to someone else:

Mom is driving child. She is negligent and so is other driver. Now husband sues driver of other car for loss of wife’s consortium

Husband CANNOT RECOVER. CN of wife is imputed to him.

* Remote CN
  + Defense in negligence case
  + Negligence on part of P that the court finds is just too far removed as to time/place/causative force to be regarded as the proximate cause of P’s damages.
  + Chain of proximate cause BENDS, NOT BREAKS
  + Therefore, P can still recover BUT recovery will be reduced to reflect the fact that he was partially at fault
* Last Clear Chance Doctrine
  + Intended to soften harshness of CN rule
  + A negligent P can recover ALL of his damages if the D (who is likewise negligent) had a LAST OPPORTUNITY to avoid the harm, but negligently failed to take advantage of that opportunity
  + Thrust of this defense: D must have been the LAST wrongdoer
    - D’s negligence must have occurred AFTER P’s negligence
  + 2 versions
    - 1) Helpless Version
      * P (who is negligent) can recover all damages IF (prove all 3)
        + 1) P was UNABLE to avoid the bad thing by exercising reasonable care
        + 2) D KNEW or SHOULD HAVE KNOWN P was in danger
        + 3) D thereafter had the LAST CLEAR CHANCE to avoid the harm but negligently failed to do that
    - 2) Inattentive Version
      * P (who was negligent) can recover all IF
        + 1) D actually knew of the peril P was in
        + 2) D realized (or should have realized) P was inattentive
        + 3) D had last clear chance to avoid the harm and he negligently failed to do that

**Assumption of Risk**

* If P can sense that danger then he has assumed that risk and is barred from recovering (just like CN)
* Difference between CN and A of R (both result in bar of recovery)
  + A of R: P’s voluntary exposure of danger he knew about (reasonable or unreasonable)
    - Tested subjectively
    - Does not make difference if
    - Because if P can sense to confront a danger he knows about, then that relieves D of a duty of care
    - This is a duty problem
  + CN: P’s conduct is by definition unreasonable
    - Tested objectively
    - This is a proximate cause problem
* 2 types
  + Express
    - Parties have agreed IN ADVANCE that the D would not owe P a reasonable duty of care
    - “Exculpatory Agreement”
    - P has expressly assumed the risk of getting hurt
    - Courts GENERALLY uphold the agreement
      * *Exceptions*
        + D acts intentionally, recklessly, or grossly negligent
        + When agreement violates public policy (litigation focuses)

*Copeland*

Professional services cannot have exculpatory provisions (drs)

Some non-professionals cannot (leases) (field trips)

* + Implied
    - P impliedly assumes risk (making bar of recovery) when:
      * 1) He KNOWS of danger
        + Specific knowledge, NOT GENERAL
      * 2) He APPRECIATES it
      * 3) He VOLUNATRILY EXPOSES himself
        + If P was tricked or lied to or out of duress, NOT SUFFICIENT
    - Minor can assume the risk (thus, be barred from recovering) just like minor can be CN
  + *Haga* 
    - Lumber yard and got wood from high up
    - He had general knowledge of climbing, but not specific knowledge of danger (loose boards)
    - Knowledge of the danger in general is not enough, P has to know about the specific thing that materialized
* Major changes with A of R in recent years
  + *Perez*
    - P had job and exposed to small room with no ventilation
    - Sued D for failing to provide reasonably safe place to work (negligence)
    - D says “you didn’t have to work here. You assumed the risk”
    - Court must decide whether and to what extent to change 700 years of CL A of R (in light of CF)
    - Hold: Express A of R is retained (exculp clauses) and Implied A of R is abolished
      * Primary A of R is subsumed into duty

Secondary A of R is subsumed into CF

**CASES**

* *Learue* 
  + Diving into shallow water from retaining wall
  + Rule: Diver was contributorily negligent due to his failure to make shallow dive given his experience and awareness of depth of water.
    - When a child is over 14, there is a presumption that he is capable of exercising care for his own safety and there is nothing in the record that says P was otherwise incapable of doing so.
    - Assumption of risk involves actual knowledge and contributory negligence is a matter of some fault or departure from the standard of reasonable conduct. Reasonable conduct would mean that the person make shallow dives, and the claimant made a dive too deep which is unreasonable and departed from the standard. Claimant was guilty of contributory negligence and departed from the standard of reasonable care. Claimant surely knew he could injure himself if he entered the water at a downward angle.
* *Braden*
* *Haga*
  + Getting wood from high; binding broke
  + Rule: In order to assume the risk you must know about the specific thing, not generally. Man did not assume the risk
* *Copeland*
  + Healthcare transport; man fell getting into van but he signed exculpatory provision
  + Rule: Must use 3 factors to determine is exculpatory agreement is valid.
    - First, a party may not for public policy reasons exempt itself from liability for gross negligence, reckless conduct, or intentional wrongdoing. Second, exculpatory provisions in contracts involving common carriers are unenforceable on the grounds of public policy and disparity of bargaining power (the same applies to airports and inns. 3rd, although exculpatory agreements are generally enforceable they are disfavored in many states. 4th, most courts require that exculpatory language be unequivocal and clear. Faith, most jurisdictions do not enforce exculpatory provisions that are contrary to public policy
    - The enforceability of an exculpatory agreement should be determined by considering the totality of the circumstances and weighing these non-exlcusive factors 1) relative bargaining power of the parties 2)clarity of the exculpatory language which should be clear, unambiguous, and unmistakable about what the party who signs the agreement is giving up and 3) public policy and public interest implications
* *Perez* 
  + Printing job with no ventilation
  + Rule: Express A of R is retained (exculp clauses) and Implied A of R is abolished
    - * Primary A of R is subsumed into duty
      * Secondary A of R is subsumed into CF

**Defenses in Negligence Case Cont..**

Review

* + CN=P barred from recovering
    - If remotely negligent= P recover some
    - If last clear chance= then negligent P can recover all
  + Assumption of Risk
    - Express= recovery precluded
      * Now part analyzed under duty
      * Now part analyzed when assessing relative degrees of fault

**Comparative Fault**

* Most jurisdictions have adopted CF in one form or another (by statute or by case law)
* Allows P who is negligent to recover damages, BUT those damages are reduced by whatever percentage of fault is attributable to him/her
  + Jury will weigh Ps fault against Ds fault, assign percentage to both, and then Ps recovery reduced by amount attributed to him/her
  + Ex) P drives through stop sign and D is intoxicated and they collide
    - P’s damages are $10k
    - Jury then says P is 40% at fault and D is 60%
      * If CN, then P gets 0
      * If Cf, then P gets 6k
* By considering relative degrees of fault, what is it to be compared?
  + *Eaton v McClain*
    - Mom sues daughter and son in law when she falls down stairs
  + Must compare ALL CIRCUMSTANCES OF THE CASE
    - (1) the relative closeness of the causal relationship between the conduct of the defendant and the injury to the plaintiff; (remote CN)
    - (2) the reasonableness of the party's conduct in confronting a risk, such as whether the party knew of the risk, or should have known of it; (secondary implied assumption of risk)
    - (3) the extent to which the defendant failed to reasonably utilize an existing opportunity to avoid the injury to the plaintiff; (last clear chance)
    - (4) the existence of a sudden emergency requiring a hasty decision; (sudden emergency doctrine)
    - (5) the significance of what the party was attempting to accomplish by the conduct, such as an attempt to save another's life; (rescue doctrine) and
    - (6) the party's particular capacities, such as age, maturity, training, education, and so forth
* Goal of CF
  + Link liability with fault
* Different Types of Comparative Fault
  + 1) Pure Comparative Fault
    - Allows P to recover no matter how great his negligence is vis a vis D’s negligence
    - Whatever percentage is assigned to P, that’s how much his damages will be reduced (regardless of how much that percentage exceeds D’s percentage)
    - Advantage
      * D is required to pay to the extent that he caused or contributed to P’s damages, but ONLY to that extent
      * Meets goal of CF (links liability to fault)
    - Disadvantage
      * Allows P, who is more to blame than D, to recover.
  + 2) Modified Comparative Fault
    - 3 approaches
      * 1) 50% Jurisdictions
        + P can recover as long his negligence is not GREATER than D (P’s fault must be equal to or less than to recover)
        + If P’s fault is 51% or more, then no recovery
      * 2) 49% Jurisdictions
        + P can recover as long as his negligence is LESS than D’s negligence (P must be 49% or less at fault) TN RULE
      * 3) Slight Gross Rule
        + P can recover provided his negligence is “slight” compared to D’s
* Multiple Tortfeasors
  + 3 general issues with multiple tortfeasors in CF
    - 1) Do you compare P’s fault individually or do you aggregate the total amount of Ds fault and then make comparison?
      * Ex) P is 40% at fault with 2 D’s at 30% each
        + Do you compare 40% to 30% or to 60%?
      * Some states compare individually
        + 40% to 30%

P cannot recover

* + - * Some states aggregate (majority rule)
        + Compare 40% to 60%

P can recover but eat 40% of his damages

* + - 2) Limited Liability of each Tortfeasor
      * Each D in theory is liable only to the extent they are at fault
    - 3) Non-Party Tortfeasors (Phantom Tortfeasors)
      * In general, a D is permitted to raise a defense that “a non-party” (someone NOT before the court) caused or contributed P’s damages and then jury can assign percentage of fault to non-party
        + HOWEVER, P must be able to make them a party and bring them into the case

If he cannot do that, then whatever percentage of fault assigned to non-party, then P must eat that

Creates practical problems

S of L

States address this by statutorily open window for limited period of time to allow P to make non-party a party (TCA 20-1-119)

* TN Version of Comparative Fault
  + *McIntyre v Balentine* 
    - Both drivers consumed alcohol and both were negligent
    - Both were equally at fault which means under CN then no recovery
    - CN “good things”
      * 1) penalize P
      * 2) deter P from injuring himself
        + Idea like “clean hands doctrine”
        + You come in here, you better have acted reasonably
      * 3) P’s negligence supersedes D’s so as to render D’s negligence no longer proximate
    - Court should adopt CF because:
      * CN doesn’t allow a P to recover even if they are just the tiniest bit at fault and D essentially gets free pass.
    - Court adopts MODIFIED CF (49% rule)
    - Guidance on implementing CF
      * Remote CN and LastClear obsolete; only use when addresses degrees of comparative fault
      * P can recover against multiple tortfeasors if P’s fault is LESS THAN ALL COMBINED (aggregation) tortfeasors
      * Joint and several obsolete
        + Joint and several liability imposes liability that is disproportionate to fault
      * D’s can raise an affirmative defense that a non-party contributed to the injury and trial court can instruct jury to assign percentage to that person, BUT P must make timely amendment to the complaint in order to recover against non-party and make him part of the case
  + 1993 TCA 20-1-119
    - Result of *McIntyre*
    - Addresses SoL issue
    - Allows P to amend his complaint **within 90 days** of when D files an answer pointing finger of fault at non-party
  + *Brown v Walmart* 
    - Ice on ground and phantom tortfeasor
    - Jury says 30% to store and phantom tortfeasor was 70%
      * P would have to eat 70% of her damages
    - Trial judge says “this doesn’t look or feel right. Walmart pay it all.”
      * Walmart says, “what?! That’s not linking liability to fault!”
    - COA: You can assign fault to phantom if you can prove EXISTENCE
    - SC holds: D must prove IDENTITY in order to assign fault to phantom

**Cases**

* *Eaton* 
  + Mom falls into basement at daughter’s house
  + Rule: McClain’s duty included the responsibility of either removing or warning against any latent dangerous condition on the premises of which the McLains were aware or should have been aware through the exercise of reasonable care.
    - In order for the McLains to be charged with the duty to leave on the light in the hall and to lock the basement door, they must have been able to reasonably foresee that Ms. Eaton would get out of bed in total darkness, walk across the hall, and step into the basement stairwell, all without turning on any lighting whatsoever.
    - McLains did not have a duty to warn Ms. Eaton of the location of the stairs.
    - Rule: When considering relative degrees of fault, must compare:
      * (1) the relative closeness of the causal relationship between the conduct of the defendant and the injury to the plaintiff; (remote CN)
      * (2) the reasonableness of the party's conduct in confronting a risk, such as whether the party knew of the risk, or should have known of it; (secondary implied assumption of risk)
      * (3) the extent to which the defendant failed to reasonably utilize an existing opportunity to avoid the injury to the plaintiff; (last clear chance)
      * (4) the existence of a sudden emergency requiring a hasty decision; (sudden emergency doctrine)
      * (5) the significance of what the party was attempting to accomplish by the conduct, such as an attempt to save another's life; (rescue doctrine) and
      * (6) the party's particular capacities, such as age, maturity, training, education, and so forth
* *McIntyre v Balentine* (COMPARATIVE FAULT)
  + Rule: Contributory negligence is replaced with comparative fault and under the modified comparative fault system, P may recover as long as his/her negligence is less than the defendant’s (49% jurisdiction).
    - So long as a plaintiff's negligence remains less than the defendant's negligence the plaintiff may recover; in such a case, plaintiff's damages are to be reduced in proportion to the percentage of the total negligence attributable to the plaintiff.
* *Brown v Walmart* 
  + Ice on Walmart floor; toddler breaks ankle. No one knows who spilled ice.
  + Rule: D cannot attribute fault to unidentified tortfeasor who cannot be served process (even if D establishes person by C and C evidence).
    - MUST PROVE IDENTITY
* *Becker v Ford Motor* 
  + Issue: When a plaintiff knows the identify of a 3rd party tortfeasor during the original complaint, are they precluded from amending that complaint to add the known 3rd party if the S of L is up?
  + Rule: Plaintiff may add previously known non-party tortfeasor after the running of the S of L (even when P knew ID of tortfeasor when original complaint was filed).
    - TCA 20-1-119. The purpose of this statute was to provide a plaintiff “with a fair opportunity to bring before the [trial] court all persons who caused or contributed to the [plaintiff's] injuries.” It enables a plaintiff to amend its complaint to add any non-party, alleged by another defendant to have caused or contributed to the plaintiff's injury, even if the applicable statute of limitations would otherwise bar the plaintiff's claim against the non-party. This court has repeatedly held that the statute should not be construed narrowly because it is an integral part of a comparative fault system that is built on the concepts of fairness and efficiency.

**Comparative Fault (Cont…)**

* So many issues that swirl around CF defense and impact on established tort law
* Tonight, we will continue to address inherent in CF system
* 1) Question of whether fault can be assessed an immune tortfeasor
  + *Snyder v LTG* 
    - P got injured at work on cotton baler
    - P sues manufacturer and seller arguing machine was defective
    - D’s turn around and blame employer
      * P cannot sue employer because employer is immune from tort liability
      * Ds says employer took off piece where P stuck in arm
    - *McIntyre* says when someone gets sued for negligence, they can say that someone else caused or contributed to harm
    - In *Ridings*, P sued manufacturer of ladder because ladder collapsed when he was using it at work
      * Ladder manufacturer says it was the employer’s fault (stored ladder outside)
      * SC addressed issue: Can fault be assigned to immune tortfeasor?
      * SC holds: No, because P cannot sue and recover from immune employer, it would be fundamentally unfair to put that employer in bowl of comparative fault. Every percentage assigned to immune tortfeasor it would be less percentage assigned to non-immune Ds. P would get less because cannot recover against immune tortfeasors.
      * *Ridings* said P’s right to recover on allegations of negligence must be determined WITHOUT reference to employer’s conduct.
        + Tortfeasor then has to say, “we are not liable, but we cannot tell you why”
    - Court says, “we just told you in *Ridings* that no you cannot assign fault to immune employer, a D CAN STILL ARGUE that employer’s conduct was cause in fact of harm. If that argument works, then there is no fault to divide up. If D is not CIF of harm, then one of the essential elements of negligence is missing and D not at fault.
  + *Carrol v Whitney* 
    - Sick baby with sepsis. Ped orders antibiotics and sends her to hospital. Baby dies.
    - Gets to hospital and 2 resident physicians failed to administer the antibiotics
      * Standard of care is that once antibiotics are ordered, they need to be administered within 30 minutes
    - Mom sues pediatrician, hospital, and 2 residents
      * 2 residents are state employees and are immune
    - Jury apportioned 70% fault to 1 residents and 30% to other resident
    - Issue: Can fault be apportioned to immune tortfeasor?
    - Holding: YES, because goal of *McIntyre* is to link liability to fault and if you hamstring the jury to where they cannot assign fault to whomever was negligent, then that fault is going to be assigned to someone else and that will not link liability with fault. Liability would be imposed in a way that is disproportionate to fault and that upends *McIntyre* and CF system
    - *Ridings* and *Synder* not overruled! Immune EMPLOYERS do not get put into the CF bowl, but any other immune negligent actors DO get put in the bowl (MAJORITY rule in other jurisdictions).
      * Why? In Workers Comp statutes, there is a right of subrogation which allows employer who pays employee/P works comp benefits to get reimbursed for those when the employee recovers damages from negligent 3rd party
  + After *Carrol* decided, the court later held that tortfeasor who is protected by statute of repose ALSO goes in the bowl.
* 2) Can jury assign fault to an intentional actor?
  + *Turner v Jordan* 
    - D (doctor) as psych patient that attacks nurse (P)
      * D charted that patient was “dangerous, combative, aggressive”
    - P sued D alleging D knew patient was dangerous and committed malpractice by NOT taking steps to ensure he could not act out (does NOT sue patient)
      * Experts said that standard of care was that man should have either been restrained or medicated
    - Case is tried and jury is told that fault can be assigned to patient (non-party) and D(dr) (*McIntyre* allows fault of non-party to be considered)
      * Jury assigns 100% of fault to D and NO FAULT to patient
    - D says “what? that is not linking liability to fault!”
    - D did owe P duty because there his patient posed a FORESEEABLE risk of harm to IDENTIFIABLE 3rd person
    - 2 CF issues in this case
      * 1) Whether negligent act of D can be compared with intentional act of some other person?
        + Court says NO, you cannot compare negligent act of D with INTENTIONAL wrongdoing of someone else

Why? Because intentional misconduct are totally different things (degree, kind, nature). Cannot do meaningful comparison between the two.

* + - * + Court also says it would be unjust to allow negligent actor to hide behind intentional actor when it was Ds negligence that CREATED situation
      * 2) Whether trial judge can alter percentages of fault assigned by juror?
        + Court says NO, the only remedy is to do a new trial

Why? because those percentages of fault are tied to liability and if the court can re-do those numbers then the court has effectively torn the jury’s verdict apart

* + - * + Courts can do additurs and remittiturs which is not the same thing
  + *White v Lawrence* 
    - Patient was alcoholic and D(dr) was treating him for long list of problems (liver issues, depression, etc.)
      * Testified that he knew patient was likely to commit suicide
    - At one point, patient’s wife (P) goes to D and asks what she can do about alcoholism
      * D prescribes Antabuse without patient knowing
    - D consumes alcohol with Antabuse in system and gets sick. Goes to ER
      * Did not tell ED that he had Antabuse in system because he did not know so ED diagnosed with heat exhaustion and then commits suicide
    - Wife(P) sues Dr(D) for medical malpractice
      * Experts testified that Dr was RECKLESS and that it was FORESEEABLE that giving Antabuse to man in this condition would die by suicide
    - D argues that suicide was superseding intervening cause
      * SC says NO IT IS NOT because the intervening act (suicide) was foreseeable
        + If intervening cause IS foreseeable, then it is NOT superseding in order to break chain of legal causation
    - D then argues that man goes in CF bowl and he is part to blame
      * SC says NO, you cannot compare negligent to intentional
  + *Limbaugh v Coffee Medical Center*
    - Nursing home (D) gets sued for negligence because nursing home kept aggressive employee who had a history of bad temper and being aggressive with family members of residents
    - Employee attacked a 90 year old resident in nursing home
    - Intentional wrongdoing (employee) negligent wrongdoing (nursing home; D)
    - D argues that fault should be assigned to aggressive employee
    - SC says YES you can put intentional actor in bowl with negligent actor because to do otherwise would not link liability with fault
      * Why? Because in this case ALL THE PARTIES ARE BEFORE THE COURT (employee was ALSO sued)
        + In *Turner*, intentional actor was NOT party
        + In *White,* intentional actor was NOT party
    - SC then says not only do they go in the bowl, but they are jointly and severally liable
      * *McIntyre* said J and S liability is obsolete because it does not impose proportionate fault soooo WTF?!
  + If they are a party, *Limbaugh* controls and CAN COMPARE negligent and intentional
  + If they are NOT party, then *Turner* and *White* control and CONNOT COMPARE negligent and intentional

**CASES**

* *Snyder* 
  + Cotton baler injury at work; manufacturer said employer should not have removed piece and were at fault.
  + Rule: You cannot assign fault to IMMUNE EMPLOYER, but you can ARGUE they were cause in fact.
* *Carrol* 
  + Sick baby with sepsis; 6+ hours for antibiotic order
  + Rule: You CAN assign fault to IMMUNE tortfeasors as long as they are NOT EMPLOYERS.
    - Can also assign fault to tortfeasors already outside of statute of repose
* *Turner*
  + Psych patient assaults nurse and dr knew of violent propensity
  + D did owe P duty because there his patient posed a FORESEEABLE risk of harm to IDENTIFIABLE 3rd person
  + Issue 1: Can negligent act of D can be compared with intentional act of some other person?
    - NO, you cannot compare negligent act of D with INTENTIONAL wrongdoing of someone else
      * Why? Because intentional misconduct are totally different things (degree, kind, nature). Cannot do meaningful comparison between the two.
  + Issue 2: Can trial judge can alter percentages of fault assigned by juror?
    - NO, the only remedy is to do a new trial
      * Why? because those percentages of fault are tied to liability and if the court can re-do those numbers then the court has effectively torn the jury’s verdict apart
      * Courts can do additurs and remittiturs which is not the same thing
* *White*
  + Anabuse prescription without knowledge
  + Rule 1: If intervening cause IS foreseeable, then it is NOT superseding in order to break chain of legal causation
  + Rule 2: You cannot compare negligent to intentional
* *Limbaugh* 
  + Nursing home did not fire violent employee and employee attacked P
  + Rule: You CAN compare intentional with negligent IF BOTH PARTIES ARE ALREADY NAMED IN THE SUIT
    - In *Turner* and *White*, the parties were not already named.
* *Conroy v City of Dickson* 
  + LEO and motorcycle collide; both negligent
  + Rule: You can compare regular negligence and gross negligence.

**IMPUTED NEGLIGENCE AND VICARIOUS LIABILTY**

**Respondeat Superior**

* Must have EMPLOYER-EMPLOYEE relationship
* *Parker v Vanderbilt* 
  + Endotracheal tube wrong insertion
  + Dr Alacantra (head of anesthesiologist but not even there) was NOT VL
    - Why? He is NOT the employer
      * He is only the boss and the supervisor
      * Bridge is not there
  + Vanderbilt U liability (surgeons were Vanderbilt students)
    - P says Vandy liable for negligence of surgeons (if they were negligent)
    - Court says NO…why?
      * Because these surgeons were “loaned servants” such that it was General that schedules and supervises the work
  + Surgeons in the room (captains of the ship) liability
    - VL for negligence of nurses
    - Courts say NO…why?
      * Because those surgeons did NOT EMPLOY THE NURSES
  + Demonstrates that employer-employee relationship is pre-req to respondeat superior
* Scope of the employment at the time the negligent act occurred
  + If it did not, then no VL for employer
* *TN Farmers*
  + Son worked with father at father’s business. Needed to look for new truck
  + Son met with Mr. Smith (friend) to go to auto auction
  + Father (employer) not VL because he went home on his own accord for his own reasons
  + If there is a dual purpose, then it is still within scope of employment
  + Employers are generally responsible for torts occurring within the zone of risk that an employee might reasonably be expected to deviate even for entirely personal reasons
  + Was driving Smith’s car back to Smith’s lot (not his job) and this had nothing to do with his job on the way back
* *Craig v Gentry* 
  + Girl goes to deposit bank slips and buy birthday present for employee when she got in a wreck
  + Employer liable because she was in the scope of employment
    - She was in the “zone of risk”
* *White v Revco*
  + LEO working as security at Revco; issues citation to individual
  + That individual then gets warrant
  + Revco then tells LEO to go arrest him
  + There is a split authorirty in regards to VL and LEOs
  + Rule: Private employers may be held VL for offduty LEO under any of the following circumstances (only 1)
    - 1) Action taken by offduty LEO was within scope of off duty employment
    - 2) Action taken by off duty LEO is at request
    - 3) Action was taken by officer with consent or ratification by off duty LEO
* *Lisa M v Henry Mayo*

**CASES**

* *Parker v Vandy* 
  + Endotracheal catastrophe
  + Rule: If a loaned servant, then the loan-er is not liable (Vandy); Sruegons were captain of the ship but no VL because they did not employ the nurses. MJUST HAVE EMPLOYEE-EMPLOYER RELATIONSHIP FOR RESPONDEAT SUPERIOR
* *TN Farmers* 
  + Son goes to buy truck for both him (personal) and his dad’s business (where he too worked)
  + Rule: Dual purpose is still within scope of employment and employers are generally responsible for torts occurring within the zone of risk that an employee might reasonably be expected to deviate even for entirely personal reasons.
    - Going back to Smith’s lot in Smith’s car was not reasonably expected
* *Craig* 
  + Rule: You are in “Zone of Risk” when getting into a car wreck while running an errand for your employer but still going somewhere else while en route
* *White* 
  + Rule: Private employers may be held VL for off duty LEO under any of the following circumstances (only 1)
    - 1) Action taken by off duty LEO was within scope of off duty employment
    - 2) Action taken by off duty LEO is at request
    - 3) Action was taken by officer with consent or ratification by off duty LEO
* *Lisa M* 
  + Ultrasound sexual battery
  + Rule: An intentional tort is foreseeable, for purposes of respondeat superior, only if “*in the context of the particular enterprise* an employee’s conduct is not so unusual or startling that it would seem unfair to include the loss resulting from it among other costs of the employer’s business. The employment must be such as predictably to create the risk employees will commit intentional torts of the type for which liability is sough

**Vicarious Liability**

* Employer/Neg. Employee Respondent Superior= JOINTLY and SEPARTAELY LIABLE
  + P can sue just the employer and recover all damages OR
  + P can sue employee and recover all damages OR
  + P can sue combination of the 2
  + TN law with punitive damages in respondeat superior
    - Punitive damages can be awarded to D in respondeat superior case ONLY IF
      * It is show by C&C that at least one of the following 3 circumstances apply
        + 1) Act or omission at issue was committed by someone employed in management capacity **OR**
        + 2) Employer was RECKLESS IN HIRING/RETAINING the employee who committed negligent act (does not have to be management) **OR**
        + 3) Employer ratified/approved the conduct committed by the employee
* Partners in partnership
  + Viewed as agents of one another
  + Each partner is vicariously liable for tortious conduct of other partners as long as conduct occurs in scope of partnership business
  + Wrong in one partner viewed as wrong for other partner
  + TN Law
    - Codified as 61-1-305
      * Partnership is liable for injuries that occur as a result of any wrongful act of someone acting in the ordinary course of partnership business
      * All partners are JOINTLY and SEVERALLY LIABLE for all obligations of the partnership
    - Ex) Partner at big firm representing lady in divorce
      * Lawyer told lady (client) that unless she has an inappropriate relationship with me, I will actively work to make sure you lose custody
      * Sued lawyer
      * Got judgement of 225k against lawyer AND got a judgment of 225k against every single partner in the law firm
* Employers and Independent Contractors
  + Employer generally NOT vicariously liable for IC (or employees of IC) because employer does not control means and methods
  + Focus of litigation in these cases is whether wrongful actor WAS AN IC ***OR*** AN EMPLOYEE
    - If court find tortfeasor is employee, then respondeat superior applies and that means VL
    - If court finds tortfeasor is IC, then no VL
  + *Youngblood* 
    - Wanted to purchase a house but did not have the credit
    - Real estate agent lied and forged tax returns
    - Youngbloods sue both the agent and the broker
    - Agent was found liable for fraud (mislead Ps the whole time)
    - Must determine if agent is employee or IC
      * Must have “right to control” to be employee/employer (does not have to exercise control)
      * Agent IS EMPLOYEE
    - Employer is liable for negligence and for misrepresentations
  + EXCEPTIONS: When company IS LIABLE for IC torts
    - 1) When employer is negligent in its own right then it can be held liable for that negligence
      * ex) if employer negligently hires IC to do some work and that IC fails to exercise reasonable care, then employer is liable bc employer was liable in its own right in failure to do its due diligence
    - 2) When there is some law that makes doing a particular thing personal to the employer (non-delegable duties)
      * Ex) Reg that says road contractors are responsible for putting out barrels and signs for road construction areas
        + GC hires IC that specializes in putting out signs and barrels
        + If that IC is negligent, then GC is liable if P sues
    - 3) Work that can be characterized as “inherently dangerous.”
      * Ex) factory hires IC truck driver to haul away toxic waste that is biproduct of factory. Truckdriver is negligent and causes accident.
        + Factor is VL for IC truckdriver assuming that type of work is inherently dangerous
    - 4) Context of medical care: A hospital is VL for IC negligent physician who works at the hospital provided **ALL 3 things** shown:
      * 1) Hospital held itself to the public as providing medical services **AND**
      * 2) P must have looked to the hospital rather than the individual doctor to perform those services **AND**
      * 3) P accepted those services with the reasonable belief (looking objectively) that the service they were being provided by someone who worked for the hospital
      * ex) P involved in car wreck and taken to ER
        + In the ER, they are malpractice upon
        + That ER physician was IC
      * In TN, hospital can get around these requirements
        + If hospital provides “meaningful notice” that care is being provided by IC **AND**

Meaningful notice: Hospital has posted conspicuous signs (admissions area

* + - * + Patient signs something acknowledging that
* Relationship between “joint venture” (“joint enterprise”)
  + Arises when there is an agreement (express or implied) between 2 or more people to come together to come together for a common purpose
    - Usually purpose is financial or business related objective
  + In order to form joint venture (which triggers VL), P must prove (elements):
    - 1) Parties involved do have common purpose in coming together
    - 2) There was express or implied agreement
    - 3) Everyone in joint venture has equal right to control any instrumentality involved in joint venture
    - 4) Parties must come together for business purpose (as opposed for social reasons)
  + Everyone in joint venture is JOINTLY & SEVERALLY liable
    - P can pick one person and recover all damages from that one OR
    - P can pick someone else and recover fully OR
    - P can sue them all and recover in whatever combination P chooses
* “Aiding and Abetting” Someone
  + Committing unlawful act
  + Individual who participates in unlaw act with someone then person is vicarious legally responsible for that act just as if they had committed it.
  + P must prove (elements):
    - 1) D knew (not should have known) his/her companion was illegal
    - 2) Gave substantial assistance to that person
      * Means more than just being physically present at time act occurred
      * Must be affirmative overt nature
  + *Cecil v Hardin* 
    - Edwards and Hardin got into car wreck. Hardin smoked weed. Edwards took pills. Drink more and Hardin took pills. Edwards driving his car and hit bicyclist with Hardin in passenger seat.
    - Both get sued. Jury found Edwards guilty but judge direct verdict for Hardin saying he was not VL as a matter of law
    - Consumption of alcohol, not providing alcohol is cause of Ps damages
    - There was no joint venture (it was social, not business)
    - There was no aiding and abetting
      * Hardin only acquiesced to Edwards driving his own car
      * To prove aiding and abetting,
* Family Purpose Doctrine
  + Person who has right to control vehicle (may or may not be owner) is VL when they provide that vehicle to0 a family member for a family purpose
    - Technical ownership NOR age is dispositive
    - Doesn’t matter is driver is 16 year old kid or 38 year old adult
  + To impose VL via FPD, P must prove (elements):
    - 1) Family member who has right to control vehicle made with available to family member for their use
    - 2) Furnisher of the vehicle gave their consent for the member to use the vehicle and that was done consistently with the scope of consent
    - 3) At time of accident, the vehicle was being driven in furtherance of that family purpose
  + Reason for FPD
    - Deeper pocket for more meaningful remedy
  + *Starr v Hill* 
    - Paul Hill hit Star
    - Star sued father (Paul Hill sr) (father owns car) under FPD
    - Paul had car because father was mandated to provide car under parenting plan
    - Father argues against FPD
      * Father argues that at the time of the accident, father was living with his parents and not in the same household as son Paul (we didn’t live together)
        + Doesn’t matter.
        + He still provided the car for family purpose
      * Father argues he did not have control of the vehicle (Paul lived with mom and she had day to day control over his comings and goings)
        + Reasonable minds could differ on this due to the parenting plan, so there needs to be a trial and no SJ
        + Father is head of household along with mom (you can have 2 for purpose of FPD)
      * Father argues that he provided the car to the son only as opposed to the “family” for a family purpose
    - TC gets SJ
    - COA reversed and said FPD applies
  + *Driver v Smith* 
    - Father gave Gail Driver (18) permission to use the car (50s case; going to listen to music; making out in the front seat and boyfriend starts driving)
    - Gail gives bobby joe permission to drive car (not father)
    - Father says she has to have special permission every time she takes the car out; BUT, that doesn’t matter
      * You furnished the car and made it available for their purposes
    - Father says “I don’t even know Bobby Joe and did not give him consent”
      * Doesn’t matter because the person you did give permission to drive the car allowed him
      * AND, Gail was negligent in her own right in kissing the driver of the car (which was the proximate cause of the accident)
    - Father says at time of accident, they were 3 miles outside city limits and Gail only had permission to go to city limits and gail exceeded the scope of the authority
      * Doesn’t matter because father said on several occasions he gave her permission to drive outside city limits
      * 3 miles beyond city limits was not material deviation from scope
* Did VL survive adoption of Comparative Fault?
  + Under *Camper v. Minor*, driver of cement truck collides with car and sees lifeless body of 16 year old
  + Cement driver sues her and owner of car for his NIED
  + FPD
    - Cement truck driver sued owner of car/family member of 16 year old car
    - FPD, liability is imposed without regard to fault (just a type of joint and several libailty)
    - Family member says who cannot be held liable under CF because joint and several liability was rendered obsolete in *McIntyre* 
      * Court says no. Because liability under FPD is based on agency relationship (employer/employee, partnership, etc.) and there is not more than 1 negligent actor, joint and several liability does still apply
      * What we meant to do in *McIntyre,* make J&S liability obsolete when they are MULTIPLE negligent actors
  + *Browder v Morris* (1998 2 years after Camper)
    - VL still applies where liability attaches under FPD, respondeat superior, or similar circumstances where liability is vicarious due to agency type relationship between actual wrongdoer and one who is vicariously responsible
  + Vicarious liability still imposes joint and several liability even though liability is disproportionate to fault. That does seem to run counter to comparative fault principles.
    - At there core they are based on agency relationships.

**CASES**

* *Youngblood* 
  + Real estate agent forging tax documents
  + Rule: If employer has “right to control” then individual is employee and employer is VL
* *Starr*
  + Father gets son a car but is divorced from mom
  + Rule: The father was a head of the household because he had a family relationship with his son and a duty to support his son and the father furnished and maintained the vehicle for the purpose of providing pleasure or comfort to the family. However, a genuine issue of material fact remains as to whether the father had sufficient control over the vehicle.
    - The essential elements of the family purpose doctrine are that the owner must be a head of the household who furnishes and maintains the vehicle for the purpose of providing pleasure or comfort for the family, and at the time of the injury, the vehicle must have been driven in furtherance of that purpose with the head of the household's express or implied permission.
* *Camper* 
  + Rule: FPD is still in effect event though *McIntyre* said Joint and several libailty was abolished because FPD attaches liability to the head of the household not because of any negligent act committed by that person, but because of the agency relationship that is deemed to exist between the head of the household and the driver of the family car.
    - The family purpose doctrine is applicable when two requirements have been satisfied. First, the head of the household must maintain an automobile for the purpose of providing pleasure or comfort for his or her family. Second, the family purpose driver must have been using the motor vehicle at the time of the injury “in furtherance of that purpose with the permission, either expressed or implied, of the owner.”
* *Driver*
  + 1950s car making out and dad allowed daughter to use the car, but bf was driving at the time.
  + Rule: FPD makes dad liable because daughter had permission to drive the car and she gave bf permission and 3 miles from town is not significant deviation from scope
* *Ali* 
  + Rule: Negligent entrustment does not create vicarious liability which would make the entrustor completely liable for the entrustee's negligence, and thus, the jury must allocate the fault between the entrustor and the entrustee under comparative fault principles.
* *Browder* (2 years after *Camper*)
  + Rule: VL still applies where liability attaches under FPD, respondeat superior, or similar circumstances where liability is vicarious due to agency type relationship between actual wrongdoer and one who is vicariously responsible

**MULTIPLE DEFENDANT ISSUES**

* Satisfaction
  + Acceptance of full payment/compensation for the injury
  + Until there is a satisfaction, P can continue to recover damages from any culpable person
  + Once P is satisfied, then that is it; can no longer recover
  + Ex) Respondeat Superior situation: Walmart truck driver is negligent and causes accident. P sues both driver and Walmart on a respondeat superior theory. Court enters judgment for 50k against both Ds
    - Walmart then writes P check for 50k
    - P can then NOT recover anything from driver D (P has already been satisfied)
* Release
  + Settlement agreement whereby P surrenders cause of action to whom the release is given
    - P essentially surrenders/gives up his claim in favor of the party to whom release is given
    - CL Rule (minority rule): Release given to 1 D has the legal effect of releasing ALL OTHER Ds AND POTENTIAL Ds
    - Rule (majority): Release given to 1 D does NOT apply to other Ds
      * Ex) Suppose A sues both B and C
        + A settles with B and gives B release
        + A can still recover against C
* Covenant NOT to sue
  + Same as release but it does NOT extinguish Ps claim, but is a promise to forego any attempts to enforce that claim
  + P is contractually obligated not to pursue claim
  + Does NOT discharge any other Ds or potential Ds
    - Exception: When liability is vicarious in nature
      * Ex) truck driver Walmart example
        + If release is given to driver, then that will release Walmart
* *Rosenbaum* 
  + First American bank relocated to Belle Meade and there was ATM machine enclosure to be erected
  + Guards were on duty
  + Rosenbaum was robbed and shot while at night ATM
    - Alleges bank was negligent
    - Alleges Murray guard company was negligent in failing to train and supervise employees
    - Alleges architects and landscapers were negligent of construction of ATM enclosure
  + A week before trial, P settles with Murray for 20k and ESA settle for 4k. Both Ds then get released
  + P then takes a non-suit against landscaper (goes out of the case)
  + Trial comes and bank is only D left
    - Jury finds bank liable and award 75k to Rosenbaum and 15k to his wife
    - Bank then files motion to amend judgment to allow credit for what was paid by ESA and Murray via TCA 29-11-105
      * *Effect of release or covenant not to sue upon liability of other tort-feasors.*—(
      * a) When a release or covenant not to sue or not to enforce judgment is given in good faith to one (1) of two (2) or more persons liable in tort for the same injury or the same wrongful death:
        + (1) It does not discharge any of the other tort-feasors from liability for the injury or wrongful death unless its terms so provide; but it reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater; **and**
        + (2) It discharges the tort-feasor to whom it is given from all liability for contribution to any other tort-feasor.
      * (b) No evidence of a release or covenant not to sue received by another tort-feasor or payment therefor may be introduced by a defendant at the trial of an action by a claimant for injury or wrongful **\*876** death, but may be introduced upon motion after judgment to reduce a judgment by the amount stipulated by the release or the covenant or by the amount of the consideration paid for it, whichever is greater.
    - Court says “if you take money from a D as to their own fault, then you can reduce that amount from another liable D”
      * Statute is clear
    - Court says “here is the test:”
      * The test in such a case is whether or not the settling defendant was sued as a tortfeasor. If so, even if the defendant is discharged by release or covenant a judgement against the remaining defendant or defendants will be reduced by the amount paid by the defendant to whom their release or covenant is given.
      * IE: Do what the statute says
* Settlement Credit with regard to CF
  + Not still available
  + Under CF principles, a non-settling D would only be held liable to the extend of THAT D’s FAULT
  + There is no need to “even things out” by giving non-settle D a credit which would in essence amount to a windfall
* Indemnification and Contribution
  + Remedies that D seeks AFTER having been found liable
  + Remedies designed to recover all or a part of a loss
  + Remedies asserted by Ds against other Ds
  + P is out of the case (he has been satisfied)
  + Ds are now litigating among themselves of who should pay what to one another
  + Indemnification (shifting entire loss from person not at fault to one who is)
    - Shifting of the entire loss from one D to another
    - Basically, it is reimbursement from one tortfeasor who had to pay for it against tortfeasor
    - Places loss on party who is primarily deserving of the blame
    - Ex) Truckdriver negligent. P recovers judgment against driver and Walmart based on RS. Walmart writes P check and P is satisfied
      * Walmart then turns to driver and says “I paid for something YOU did so now you need to reimburse me fully. You need to indemnify me.”
  + Contribution (apportioning loss between culpable tortfeasors)
    - Allows tortfeasor who is JOINTLY & SEVERALLY liable with another tortfeasor, but is paid more than his/her share of the damages than
    - Contributions apportions the loss among those who are at fault
    - CL used to not allow, but now most states do and TN does
      * UCATA (unform contribution among tortfeasor act)
      * In states with no CF: Ds required to pay in equal shares
        + Called Pro-Rata Contribution (disperse damages equally between Ds for how much each D is liable to the other Ds)
        + Ex) if 2 Ds in case, then they are liable to each other for 50% of the damage
      * In states with CF: Contribution imposed based on relative degrees of fault
        + Comparative Contribution
    - *Wharton* 
      * Truckdriver hits family on side of the road
      * Truckdriver was declared legally disabled but dr for truck company cleared him
      * Trucking company settles with the family
        + Release is given
      * Trucking company then sues truckdriver for indemnity
        + They then discover that he was found to be totally and permanently disabled
      * Dr Bridges acknowledges that if he missed these problems, then he was negligent and committed him malpractice
        + Issue is whether Wharton can recover on contribution or indemnification theory against Bridges

In order for Wharton to be indemnified (shift entire loss) by Dr Bridges must be negligent and Wharton cannot be negligent in its own right

Indemnification only works if one D is fault-less

If contribution (allocating loss among culpable parties) is to be awarded to Wharton from Bridges then both Wharton and Bridges must be liable

* + - *Boeverts* 
      * Wreck involving alcohol
      * P gets settlement from Safeco and restaurant
      * Safeco then seeks contribution restaurant
      * Issue: Did CF do away with contribution because *McIntyre* did away with joint and several liability (which is required for contribution)?
        + No, we cannot abolish contribution (its statutorily), but we can change the CL and change CL pro-rata contribution.

We are now making contribution, comparative contribution.

D is entitled to contribution based on relative degrees of fault

* + - Post-script to *Boeverts* 1999
      * Legislature codified *Boeverts* by changing UCATA
        + Party seeking contribution can only od so to the extent that it is paid damages beyond it’s share of fault
    - *Volz*
      * Groin pain and testicular cancer; then told he was fine after it came back and died
      * He can prove “but for the negligence of the dr, he would not have suffered same unfavorable medical result”
      * Dr Leeds point fault to Texas Dr (which is correct)
      * Jury apportioned out fault between drs
      * Issue: Did court mean to abolish joint and several liability?
        + Yes, it is still obsolete

**CASES**

* *Rosenbaum*
  + Person robbed at bank atm; sued multiple people (bank, guards, landscape designer)
  + Rule: The test in such a case is whether or not the settling defendant was sued as a tortfeasor. If so, even if the defendant is discharged by release or covenant a judgement against the remaining defendant or defendants will be reduced by the amount paid by the defendant to whom their release or covenant is given.
    - TCA 29-11-105
      * a) When a release or covenant not to sue or not to enforce judgment is given in good faith to one (1) of two (2) or more persons liable in tort for the same injury or the same wrongful death:
        + (1) It does not discharge any of the other tort-feasors from liability for the injury or wrongful death unless its terms so provide; but it reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater; **and**
        + (2) It discharges the tort-feasor to whom it is given from all liability for contribution to any other tort-feasor.
      * (b) No evidence of a release or covenant not to sue received by another tort-feasor or payment therefor may be introduced by a defendant at the trial of an action by a claimant for injury or wrongful **\*876** death, but may be introduced upon motion after judgment to reduce a judgment by the amount stipulated by the release or the covenant or by the amount of the consideration paid for it, whichever is greater.
* *Wharton*
  + Trcuk driver hits family on side of road; family sues trucking company; trucking company then wants payback from Dr Bridges who should have said truckdriver was disabled.
  + Rule: In order for Wharton to be indemnified (shift entire loss) by Dr Bridges must be negligent and Wharton cannot be negligent in its own right
    - Indemnification only works if one D is fault-less
    - If contribution (allocating loss among culpable parties) is to be awarded to Wharton from Bridges then both Wharton and Bridges must be liable
* *Volz*
  + Testicular cancer; told it was fine then he died.
    - Dr 2 points finger at Dr1 (rightfully so)
* *Bervoets* 
  + DUI accident and Safeco wants contribution from restaurant; restaurant says no more contribution because of CF
  + Rule: No more pro-rata contribution; now we have comparative contribution where D is entitled to contribution based on relative degrees of fault
    - Party seeking contribution can only do so to the extent that it is paid damages beyond its share of fault
* *Resolution Trust*

**Circle jack to J & S Liability**

* When tortfeasors are jointly and severally liable
  + They are liable together and they are liable separately
    - P can sue one and recove3r all or sue both (or however many) and recover in whatever combination they want (but no more than the judgment allows)
  + Until there is full settlement, P can continue to recover damages
  + Sometimes ICs can be joint and several
  + Sometimes partners can be J & S
  + Sometimes multiple concurrent causes can be J & S
  + Sometimes respondeat superior can be J & S
  + Sometimes Family Purpose J & S
* Question: To what extent is all of the above law still good law in relation to *McIntyre* CF? (specifically part 5…”obsolete”)
  + *Boeverts* (did you really mean to say J & S is obsolete in *McIntyre)*
    - Yes, we meant what we said; J & S is obsolete because it can impose liability disproportionate to fault
  + *Volz* (did you really mean to say J & S is obsolete in *McIntyre*?)
    - Again, we confirm J & S is obsolete
  + *Camper v Minor* 
    - 1 D asserts “Family Purpose Doctrine is a variant of J & S and it is obsolete now so FPD is likewise obsolete”
    - Court says “J & S is obsolete to the extent that more than 1 negligent actor is involved”
      * J & S still applies when liability is vicarious (no more than 1 negligent actor)
  + *Resolution Trust*
    - J & S is still integral part of the law
  + BOTTOM LINE:
    - J & S still applies when liability is vicarious (but not otherwise)
    - If more than one negligent actor, then those defendants are liable severally only so liability is imposed consistent with fault
  + All of this case law culminated in 2013 with legislature codifying J & S in relation to CF

CF lecture now over\*\*\*\*

**STRICT LIABILITY**

* Underpinning of SL
  + Because D has created undue risk of harm, he should be held liable for that harm even though he was not negligent and even though it was not his intent to cause any harm
  + Liability attaches no matter what he intended or how careful he was
* SL Elements
  + 1) Duty
  + 2) Breach of duty
  + 3) Causation
  + 4) Proximate cause
  + 5) Damages
  + NO DEVIATION needed from reasonable person standard of care
    - Does not need
    - It does not matter how careful you were, it is SL!
* SL is a theory of recovery typically asserted in 3 types of cases
  + 1) animals
  + 2) abnormally dangerous activities
  + 3) defective or unreasonably dangerous product
* Animals
  + Trespassing Livestock
    - CL Rule: Owner of trespassing livestock (cow,horse,etc) IS SL for harm caused by that animal
      * P does not have to prove negligence
    - *Bohannon* 
      * TN says we do not follow CL rule; SL for livestock animals does NOT apply
      * TN CL rule is that owner of trespassing animal is liable only if negligence can be proven
        + Liability cannot be imposed on livestock owner just because the animals escaped; owner must have been negligent or willful
      * TCA says there is liability when owner willfully allows animal to run loose
  + Domestic animals (dogs, cats, etc)
    - CL rule: Owner of dog or cat is NOT SL for harm caused by that animal provided:
      * Owner was reasonably unaware of that dog’s dangerous propensities (“1st Bite Free” Rule)
        + If owner of the animal DID KNOW or reaosnbly should have known of that animals dangerous propensities, then SL will be imposed
        + Half states rejected this idea and DO IMPOSE SL for dog attacks
    - *Gaut* 
      * TCA
        + If dog is allowed to run loose and dog hurts then SL IS imposed; otherwise, 1st bite free rule controls in TN
    - *Moore*
      * Does the fact that the dog is large or of a certain breed make the owner “aware” of it being dangerous?
        + No, there is no such thing as a suspect class of dogs
    - A lessor of real property can be held liable for harm done by tenant’s dog
      * Provided landlord had knowledge of dog’s dangerous propensity AND retained enough control over the property to have been able to do something about the situation (ie: notice of knowledge AND degree of control)
    - Is it permissible to use a dog known to be dangerous as a guard dog?
      * These dogs are treated like deadly force
    - It is a criminal offense to intentionally kill someone’s animal
      * In tort it is conversion of chattel
      * DEFENSE: If the animal was killed under a “reasonable belief” that it posed an imminent danger to a person or to an animal owned by that person, then there is no liability
      * TN: Statute that says “if a person’s pet (dog or cat only) is negligently or intentionally injured or killed, the D can be held liable up to 5k for loss of consortium.
        + Limitation: Recovery can be had only if that pet was injured or killed on property that was controlled or owned by the owner of the animal.
  + Wild Animals
    - There are people that keep elephants (elephant sanctuary), bears, etc.
    - CL Rule: The owner of a wild animal, no matter how well trained or how tame the animal, IS SL for any harm caused by that animal
    - TN: Legislature ID some animals that are “inherently dangerous” to humans (gorillas, orangutangs, chimps, baboons, wolves, bears, lions, tigers, jags, cheetahs, cougars, elephants, rhinos)
      * Expressly EXCLUDED: hamsters, chipmunks, rabbits, giraffes, camels
* Abnormally dangerous and ultra hazardous activities
  + CL Rule: one who engages in that type of activity is SL for harm caused by that activity
  + *Sterling* 
    - Operating chemical toxic waste dump is deemed to be ultrahazardous activity
    - Use factors to use if trying to determine if activity is ultrahazardous
      * (a) existence of a high degree of risk of some harm to the person, land or chattels of others;
      * (b) likelihood that the harm that results from it will be great;
      * (c) inability to eliminate the risk by the exercise of reasonable care;
      * (d) extent to which the activity is not a matter of common usage;
      * (e) inappropriateness of the activity to the place where it is carried on; and
      * (f) the extent to which its value to the community is outweighed by its dangerous attributes.
    - Blasting (use of dynamite) is ultrahazardous
      * Use of fireworks on a SMALL SCALE is not ultrahazardous
* Duty owed in SL case
  + Duty is owed only to foreseeable plaintiffs
    - Persons to whom a reasonable person would foresee a risk of harm
    - Ex) SL has not been imposed for blasting activities that hurls rock and debris so far away that it was not reasonably foreseeable
* Harm that results must be from kind of danger anticipated from that type of activity
  + Ex) Farmer raised minks and on adjacent property there was construction going on
    - Blasting upset the mother minks and they killed the baby minks
    - Farmer sued the neighbor dynamiting and lost because the harm that occurred was NOT the type of harm that you would associate from that type of activity
* SL Defenses
  + Contributory negligence NOT a defense in SL case
  + Assumption of risk IS a defense
  + Comparative fault IS a defense
    - Courts will reduce Ps recovery to reflect fact that P caused his/her own injuries
* Workers Comp Statutes impose SL on employers for injuries that occur on the job
  + Regardless of negligence on part of employer
  + P can only recover damages provided for in workers comp statutes

**CASES**

* *Way v Bohannon* 
  + Rule: TN CL rule is that owner of trespassing animal is liable only if negligence can be proven
    - Liability cannot be imposed on livestock owner just because the animals escaped; owner must have been negligent or willful
    - TCA says there is liability when owner willfully allows animal to run loose
* *Moore*
  + Rule: If dog is allowed to run loose and dog hurts then SL IS imposed; otherwise, 1st bite free rule controls in TN
* *Sterling* 
  + Rule: Operating chemical toxic waste dump is ultrahazardous and therefore SL applies.
    - Factors to use if trying to determine if activity is ultrahazardous
      * (a) existence of a high degree of risk of some harm to the person, land or chattels of others;
      * (b) likelihood that the harm that results from it will be great;
      * (c) inability to eliminate the risk by the exercise of reasonable care;
      * (d) extent to which the activity is not a matter of common usage;
      * (e) inappropriateness of the activity to the place where it is carried on; and
      * (f) the extent to which its value to the community is outweighed by its dangerous attributes.

**MISREPRESENTATION**

* Liability can be based on
  + 1) Intent
  + 2) negligence
  + 3) Strict liability
* Intentional Misrepresentation (Fraud)
  + IE: Fraudulent misrepresentation
  + IE: Deceit
  + Definition: The intentional misrepresentation of a material fact in order to mislead the P and the P relies on that misrepresentation
  + Elements
    - 1) Representation of a material fact
      * Wrapped up in the idea that the fact at issue must be MATERIAL
      * A fact can be characterized as a material fact IF
        + It would have influenced a reasonable person in their business transactions OR
        + If the D knew that P considered that fact to be an important one to their transaction
      * There must be A FACT (not a sellers puffing, opinion, etc.)
      * Ex) If P is in market for a car and goes to D (dealership) who says they have the best cars made in American or “we will not be undersold” = seller’s puffing
      * Ex) “You know that car you’re looking at has 20k miles”=FACT that is being represented
      * Statements of the law are treated as statements of OPINION and are not actionable
        + Exception: When that statement of law is made by a lawyer

Ex) Lawyer says “The SOL has not run” but it has then that is fraud

* + - * What if D makes a promise to do a particular thing in the future but then doesn’t do it; is there liability for fraud?
        + A promise to do something in the future will be regarded as misrepresentation of fact IF the promisor never attended to carry out the promise at the time it was made= PROMISSORY FRAUD/FRAUD IN THE INDUCEMENT

P has to show that D never intended to make good on the promise at time promise was made

* + - * + If the promisor (D) had the intention to carry out the promise at time it was made but then changes his mind, then no liability for promissory fraud

Not tortious to change one’s mind

Is tortious to mislead and deceive

* + - * Fact must have been represented (written, oral, or conduct)
        + Sometimes there is no overt representation, (just silence)

Fraudulent concealment

Suppression of the truth

P must prove 4 things

1) D was under legal obligation to disclose that fact

2) D intentionally concealed or suppressed that fact for the purpose of misleading or deceiving P

3) P was unaware of that fact and had he known about it he would not have acted the way he did

4) As a result of the concealment, P suffered damages

Usually there is no duty to disclose facts, but there are exceptions:

1) When there is fiduciary/confidential relationship between the parties

2) Where the D knows of the materials facts and knows that P cannot reasonably discover what those are

3) Knew info has come to light that makes a represented fact untrue and misleading even though it may have been true when it was represented

ex) Someone trying to sell house and couple comes by to look at buying it. Buyers then asked the sellers “has this house ever been flooded?” The sellers responded truthfully “no.” One day later, the house flooded. Now they have to disclose because new info has come to light

* + - 2) The falsity of the represented fact
      * Fact needs to be false or at least misleading
      * Scienter requirement: D must have made misrep KNOWING it was false or with reckless disregard for its truth
        + Ex) Now lawyer tells client “SOL has run on claim” but lawyer has no clue

That is RECKLESS

* + - * + Scienter makes fraud the egregious tort it is
    - 3) Mislead (scienter)
    - 4) Reasonable reliance
      * Reliance must be REASONABLE
        + Objective test
      * Does P have obligation/duty to verify or test out the accuracy of the representation?
        + NO
        + Ex) You buy a used car. You are under no obligation to take it to your own mechanic to have it checked out
      * What is D communicated directly with one person but some 3rd person ends up relying on it? Can 3rd person due the party who made the misrep for fraud?
        + Is the lack of privity (direct relationship) between 3rd person and D a bar in a fraud cause?

No, 3rd party can sue D if it was reasonable foreseeable that the 3rd party would use that info to their detriment

* + - * + *Bethlehem Steel*

We will sell you steel on credit, but we need financial info to make sure you can pay us

Jackson Manufacturing then goes to financial person (Ernston) and Ernston gives financial report that is wrong

* + - 5) Damages
      * ACTUAL damages must be shown in fraud case
        + No nominal damages
      * Measure of damages
        + 1) Award difference between market value of what P received (may or may not be what P actually paid for them) and the value of the item had misrep been true (called Benefit of Bargain Rule) (majority rule) (TN rule)
        + 2) Limit recovery to the difference between actual price P paid for the item and the market value of the item as it was received
      * Punitive Damages allowed in fraud claim because punitive damages allowed in the following cases
        + Only 4 types of conduct

1) intentional wrongdoing

2) malice

3) recklessness

4) fraud

* Negligent Misrepresentation
  + Liability for negligent misrep rests upon an unintentional but negligent misrepresentation
  + Even though D may have honestly believed that his erroneous misrep was true (lacks scienter) he is still liable because he failed to exercise reasonable care
  + Elements
    - Same as fraud except no scienter req
      * Instead of scienter requirement, P must prove that D made misreprentation without reasonable care
  + Scope of liability
    - 3rd party can sue D for negligent misrepresentation (*Bethlehem Steel)* 
      * IE: privity is not a bar
        + *John Martin*
  + *Robinson v Omer* 
    - attorney sex photographer in secret room
    - Restatement Rule section 552:
      * (1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.
    - Court says attorney advice to 3rd party was not in the course of business. Omer did not give that advice to guide the parties in their business transactions
      * Lineberry and Robinson were friends
  + Lawyers can be sued by someone who is not their client if the advice given to their client is reasonably foreseeable that a 3rd party will rely on that for business purposes
* Innocent Misrepresentation
  + Some courts impose SL for misrepresentations
  + D did not know and had no reason to know info was false (it was INNOCENT)
    - Not intentional and not negligent
  + *First National* 
    - Dairy farmers bought silos where advertisers made claim that oxygen would not get into the silos
    - Jury said the manufacturer committed fraud because they knew what was in advertising material was not correct
    - SC grants review to reconsider *Ford Motor Co* 
      * Adopts section 402b and 552d
        + 402b Restatement

One engaged in the business of selling chattels who, by advertising, labels, or otherwise, makes to the public a misrepresentation of a material fact concerning the character or quality of a chattel sold by him is subject to liability for physical harm to a consumer of the chattel caused by justifiable reliance upon the misrepresentation, even though

(a) it is not made fraudulently or negligently, and

(b) the consumer has not bought the chattel from or entered into any contractual relation with the seller.

* + - * + 552d

Physical harm replaced with pecuniary loss

* + - Should 402b and 552d remain part of CL?
      * 402b should
        + Allows recovery for innocent misrepresentations and there is also physical harm, personal injury, or property damage
      * 552d should NOT (huge change in TN law)
        + No other jurisdiction had adopted 552d except TN

Why? Because if P only has diminished economic expectation, those can better be addressed by other areas of the law (contracts, sales, UCC, etc.)

PI and property damage is tort law

* + A P in TN can recover for innocent misrep if they have PI or property damage (402b)
  + A P in TN CANNOT recover for innocent misrep if they only have economic damages (552d no longer law in TN)
    - If they have PI/property damage AND economic damages then they can recover
* Assumption of risk defense
  + Works in innocent isrep case
  + Works in negligent case
  + Does NOT work in fraud
* Contributory negligence defense
  + Defense to negligent misrep ONLY
* Comparative Fault
  + NOT defense in Fraud
  + IS defense in negligent misrep
  + Defense in innocent misrep is an open question in TN
* There is a statutory cause of action in TN for “unfair or deceptive trade practices”
  + TN Consumer Protection Act
    - If the court finds that the unfair or deceptive trade practice was WILFULL or KNOWING then P can recover TRIPLE DAMAGES plus attorney’s fees
    - Disclaimers will NOT work (they are ineffective)

**CASES**

* *John Martin* 
  + Rule: 3rd party can sue for NEGLIGENT MISREP (privity is not a bar)
* *Bethlehem Steel*
  + Wrong financial report prepared and relied upon by creditors
  + Rule: 3rd party can sue D if it was reasonable foreseeable that the 3rd party would use that info to their detriment.
    - Lack of privity (direct relationship) between 3rd person and D IS NOT a bar in a fraud cause
* *First National* 
  + Silos with oxygen getting in; advertising false
  + Rule: Recovery for innocent misrepresentations and there is also physical harm, personal injury, or property damage. NO recovery for ONLY pecuniary loss
* *Robinson*
  + Attorney sex photo room
  + Rule: Lawyers can be sued by someone who is not their client if the advice given to their client is reasonably foreseeable that a 3rd party will rely on that for business purposes
    - One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

**DEFAMATION**

* Defamation 2 torts
  + 1) libel: written defamation
  + 2) slander: spoken defamation
* Everything in tonight’s lecture applies to both libel and slander
* Defamation: A false communication about P that injures Ps rep
  + Exists to protect the interest that people have in their good names
  + There are some people who do not have good names and CANNOT BE DEFAMED
    - These are “defamation-proof”
      * *Davis* 
        + Ps rep was “valueless”
* Defamation 6 elements (prima facie)
  + 1) Defamatory language on the part of the D
    - Any language about P that adversely affects Ps reputation
    - Ex) Might be defamatory to call into question someone’s honesty or morals
    - Ex) Astronomer Cark Sagan was famous for saying in describing events out in space “billions and billions of years ago”
      * He and Apple computer had an issue over that phrase
      * Techs at Apple were developing new technology and gave their secret project a code name of Carl Sagan that it would bring in billions and billions of dollars
      * Sagan found out about it and instructed his lawyers write Apple and demand they not use his name in this way
      * Apple then said “ok, fine we won’t call it that; we will rename it BHA (butthead astronomer)
      * That was then leaked to industry publication and article was written
      * Sagan then filed defamation claim against Apple
      * Federal case of whether it is tortious to call someone a butthead
      * US DC said it is not defamatory to call someone a butthead
    - Communication at issue is only defamatory if the recipient understood it in a defamatory sense
      * Ex) If A falsely says to B, C is a thief because he once stole money from me= that is defamatory on its face
      * Communication at issue does not have to be defamatory on its face
      * When P steps beyond words that word said and puts the words in context= inducement
      * Innuendo= implication of the defamatory statement in light of the additional facts and circumstances
      * Innuendo and inducement alert the Court that extrinsic facts are being introduced to establish the 1st element
    - Recipent does not have to believe it to be true
      * Just having your name associated with certain conduct can have reputation bad effects
    - In order for there to be defamatory language, there must be an implied or expressed assertion of a FACT
      * Ex) If A falsely says to B, C is a thief because he once stole money from me= asserts fact
      * Ex) Name calling= NOT a fact
      * What about an opinion?
        + “Hey B, I think C is a thief because I believe he once stole money from me.”
        + Courts say there is NO blanket 1st A protection for opinion (ie: there can be defamation), but there must be assertion of FACT
      * *Seaton* 
        + Dirtiest hotel in America
        + Was not a fact because when a reader reads it, no RPP would think it were true
      * *Weidlich*
        + Picture of confederate flag
        + No defamatory language
    - Any living person can be defamed (as long as they aren’t defamation proof)
      * No defamation of deceased
      * Can defame business
  + 2) Of or concerning the P
    - Reasonable person must know communication is about P
    - If defamatory communication uses Ps name then that is easy case
    - If communication does not ID P by name, then P can introduce extrinsic facts to show communication was referring to him
      * Called “colloquium”
        + Means ID of P is not apparent so P has to prove additional facts or circumsatnces to show it was about him
        + Ex) Certin well known lawyer on Maple st is keeping company of prostitute

If lawyer can show that was him, then that is colloquim

* + - If defamatory communication is directed at group of people, then 2nd factor depends on size of group
      * No individual member of a group can be defamed unless that group is small enough so that the statement at issue can reasonably be interpreted as applying to each member of that group
        + Ex) Small town newspaper falsely prints that jurors in *Smith v Jones* took bribes

That small group of jurors can probably prove that was meant about each of them

* + - * If the defamatory statement refers to all people in large group
        + No individual member in that group can recover

Ex) All lawyers in Nashville are crooks

* + - * The larger the group, the less likely P can prevail
  + 3) There must be a PUBLICATION
    - Not an ordinary publication meaning as a layperson
    - Term of art that means that the language at issue was communicated to at least a 3rd person who understood it in a defamatory sense (they do not have to believe it, but they have to understand it in its defamatory sense)
    - Ex) A sees defamatory statement written about B but it is in a language A cannot read
      * Then not a publication because A cannot understand it because he couldn’t read it
    - Ex) What is A falsely says to B “you are a thief”
      * Not a publication because there was no 3rd party (unless someone else was around)
    - Ex) What if P is the one who did the publication?! Self publication
      * *Sullivan v Baptist* 
        + Disclosing she got fired for stealing
        + Court says no, you cannot sue for defamation when you self-publish

If self-publication were to be adopted then employers would not tell or explain why they got fired

* + - * + TCA 50-1-105

Grants a qualified immunity for employers who disclose information to a prospective employer

Provides a measure or protection for former employers who provide info to a prospective employer

Qualified immunity: Circumstances under which this protection would NOT apply

When the former employer makes a knowingly false assertion of fact

When the former employer is deliberately misleading or make disclosure for malicious reason

When former employer is reckless

Negligence is not enough to remove immunity

* + - * + Court says legislature has already declared a policy
    - *Stones River Motors* 
      * Datsun purchase and lemon car and dad writes letters to editor
      * Both newspapers get sued as well as father, mother, and daughter
        + Mom and daughter not liable because they did not know of the defamatory communication before it is published

You must know defamatory statements existed

* + - * Daily News Journal republished the letter and deleted any reference to Datsun (said foreign car) and said Stones River was local dealer
      * The Press referred to dealer as Datsun dealer and at the time there was only one car lot that sold imported cars in the area
        + Of and concerning requirement was satisfied
      * There was no false assertions of FACT; it was only opinion
      * Did not matter that P knew it was about him
    - What if there is more than one publication?
      * Each one of the multiple communication to a 3rd person is viewed as a separate publication and D can be liable for each one of those
        + Ex) If A tells C B is a thief and then tells D the same thing, then A liable for 2 communications
      * A single communication heard at same time is a single communication
        + Ex) If A tells C that B is a thief and D hears it at same time then that is single publication
      * Each broadcast of TV or magazine etc is a single publication
    - What is person who hears defamatory language about P and the repeats that, is there libailty for repeating defamation?
      * Generally, yes
      * Layterm used for this is gossip
      * Legal term for gossip is “republication”
      * A person who repeats or otherwise republished defamatory language is subject to liability to the same extent as though he were original publisher (each repetition of a defamatory statement is a separate publication for which P can recover)
      * A secondary republisher serves as conduit and is not liable
        + Mail carrier who delivers defamatory letter
        + Newspaper deliverer
      * TN broadcasters: No liability for republishing defamatory communications (false by defamation) unless that was done negligently
  + 4) Statement must be FALSE
    - Truth is a defense
    - General rule: Burden of proving truth has been on D to assert as defense
      * In cases that involve media Ds and in cases that involve matters of public concern, the 1st A requires that P prove falsity as part of prima facie case
      * In TN: Requires P prove falsity in ALL DEFAMATION cases
    - EVEN WHEN DEFAMAOTRY STATEMEMT is true, P may still have remedy
      * P can sue for invasion of privacy
      * P can sue for intentional tort of IIED
        + *Hustler v Falwell*

Incestuous parody along with fabricated interview

Falwell sues for defamation and invasion of privacy and IIED

While litigation was going on, Hustler runs it again

Case tried and jury decides against Falwell against defamation because no RPP would think this was true (failed to prove defamatory language—must be false fact that RPP would believe was true)

Jury still awards 200k for IIED. Hustler appeals and COA affirms

During depo, “what is your name?” Flynt says “I’m Christopher Columbus.”

Hold: A public figure cannot recover for IIED unless they can prove that there was a false fact and that false fact was published with malice.

Most of the time, public officials and figures cannot recover for defamation either

If a public official cannot recover for defamation, then cannot recover for IIED either

* + 5) Must have been damage to Ps reputation
    - Libel: A defamatory communication that is written; if you can see it, it is probably libel.
      * Radio and TV are usually treated as libel because broadcasted material has some tie to a writing.
      * Once it is libel, it is always libel
      * If the libel is defamatory on it’s face (libel per se), then damage to Ps reputation will be presumed by law.
        + In majority of states, P does not have to prove actual harm or special damages (pecuniary losses) to show that reputation was harmed.
        + Minority of states AND TN: P does have to prove actual harm in ALL defamation cases

Actual harm: emotional distress, etc.

Does not have to prove special damages (pecuniary losses)

* + - * If libel is NOT defamatory on its face and requires other evidence to prove defamation (libel per quod)
        + Jurisdictions split on whether special damages must be proven to show injury to reputation

TN requires actual harm on all defamation cases

* + - Slander: Anything you can hear.
      * Written repetition of slander is treated as libel
        + IE: You write down slander, it is now libel
      * Slander is not actionable without proof of actual harm to Ps reputation (injury will NOT be presumed): EXCEPTIONS
        + Slander per se (reputation harm presumed) (4 categories)

1) When defamatory communication adversely affects P in his business/profession

2) Defamatory communication that P has a “loathsome communicable disease”

Traditionally limited to STDs and Leprosy

3) False accusation that P has committed a crime involving moral turpitude

Bigamy, incest, child sexual abuse

4) Defamatory statement that imputes sexual misconduct to P

Tends to be directed at female Ps

5) Defamatory communicated that imputes racial prejudice (maybe)

*Ward v Zel*

Ocean club condos; man yells “they hate jews”

Jury awards punitive but no compensatory damages

TC judge says “uh oh, you cannot award punitive damages without finding comp damages as well”

Jury then says “ok $1 to comp then”

Ward says they have no special damages but we were harmed

P can recover

* + - P can recover special damages, compensatory damages, and punitive damages (only if it was done with malice—knew he was telling a lie or was reckless)
  + 6) Fault on the part of D
    - US SC says 1st A imposes various fault restrictions for public officials, public figures, and matters of public concern (this is a floor, not a ceiling)
      * State can give more restrictions
      * States can not make those fault requirements less strict
    - Public officials: *Ferguson v Union City Daily* 
      * Late city bills and Ferguson (city employer) blamed
      * Ferguson sues paper and says paper got his title wrong
      * What is the applicable fault standard for a public official in TN?
        + Rule: One who publishes a false communication about public official in that capacity must do so with malice to be liable
        + *NY Times v Sullivan* (federal law)

As a matter of law, public official cannot recover unless he meets malice standard (knowledge it was false or D made publication with reckless disregard for its truth)

* + - * + TN Art 1 section 19: The free communication of thoughts and opinons is one of the most valuabe rights of man but that liberty can be abused (abuse means malice)
      * What is a public official?
        + Rule: A public official is an occupant of any position in any branch of government who has substantial control (or appears to have) over governmental affairs
      * Malice standard?
        + Offical did not prove malice
        + Very hard to prove malice

Must be proven by C and C

The reckless component of malice means that D entertains serious doubt about truthfulness of what was said or printed

* + - Public figure (fault standard is malice):
      * 2 types
        + 1) All purpose public figure:

When person (P) has gained sufficient fame or notoriety that they become public figure for all purposes and contexts (president or well known actor)

* + - * + 2) Limited-purpose public figures

Ps who inject themselves or are involuntarily pulled into some limited public controversy (local environment activist)

* + - * Fault standard? Same standard that applies to public figure
        + Must prove malice
      * *Spence v Flynt*
        + Attorney representing client against Hustler.

Hustler then ran derogatory remarks about the attorney

* + - * + Court talks about *Hustler v Falwell*

Says this case is not controlled by *Falwell* because in *Falwell* it was a parody and not believable

Court says the more outrageous the publishing, the more protected it is

* + - * + Public figure? No!

Attorney is not a public figure even though he has been on tv interviews; he was acting as attorney for client

* + - * + Rule: A lawyer who merely advocates for a famous or controversial client is not a public figure just because he has taken on the cause of an advocate.

If were deciding other way (saying attorney is public figure as matter of law) then that would have a negative effect on lawyer’s taking controversial cases.

* + - Private Persons
      * Fault standard is NEGLIGENCE (majority and TN)
* Defenses (ABSOLUTE)
  + Consent
    - If P consents, then no liability to D
  + Truth
    - If publication is true, that is defense (even if it was made in complete spite)
    - Must be false (element) so if it’s true, then it’s not defamation
      * TN: P has burden of proving falsity
  + Retraction Statutes
    - Some states have them
    - If P gives notice to “would be D” within a certain number of days and the “would be D” retracts the defamatory communication, then depending upon jurisdiction…P cannot claim damages or damages will be less
      * TN: If within 10 days there is a retraction, then P can only recover actual damages. (no punitive)
  + Judicial Proceeding Privilege
    - All statements made by jurors, lawyers, judge, witnesses, etc. is covered under this privilege
    - What if lawyer is trying to get business (no judicial proceeding yet) and lawyer defames someone as part of advertising
    - *Simpson* 
      * Simpson posted an ad that “if you’ve been connected with Simpson Strongtie screws the. call us because your deck is going to fall”
      * Strongtie says you defamed us
      * Stewart says “we have litigation/judicial privilege”
      * Issue: Is juridical proceeding privilege broad enough to encompass lawyer advertising when there is no case yet?
      * Rule: An attorney is privileged to publish what may be defamatory information prior to a proposed judicial proceeding even when the communication is directed at recipients unconnected with the proposed proceeding . In order for the privilege to apply:
        + 1) the communication must be made by an attorney acting in the capacity of counsel
        + 2) the communication must be related to the subject matter of the proposed litigation
        + 3) proposed proceeding must be under serious consideration by the attorney acting in good faith AND
        + 4) the attorney must have a client or identifiable prospective client at the time the communication is published.
        + If not, you could be disciplined by BPR, malpractice, or malicious prosecution
  + Legislative proceeding privilege
    - State and federal legislatures who say something in the course of their duties that is defamatory, they are absolutely privileged
    - Limit: Does not extend to press conferences
  + Privilege for higher-rank executive members
    - Cabinet-heads
    - *Jones v State*
      * Jones was director level of TDOC and president of TN employment association
        + Traveled in capacity of both and got reimbursement from both orgs for the same trip

Viewed as false claim

* + - * Issue: Do executive branch officials have the same absolute privilege that judicial and legislative have?
        + If qualified privilege, does not work with malice
        + Absolute privilege does ont matter if there was malice; it is absolute
      * Rule: Yes, but only if statements are made inside scope of employment.
        + Cabinet level executive officers are entitled to absolute privilege from defamation claims arising out of comments made within their scope official duties.
        + TDOC commissioner was acting within the scope of his employment when he made allegedly defamatory statements and thus the state and TDOC were entitled to absolute privilege against defamation claims.
  + Publication required BY LAW
    - ex) if radio or TV gives airtime to particular candidate and is thereby required to give equal airtime to opposing candidate and that candidate gets on the air and says something defamatory, then that station has absolute privilege
  + Spousal Communication
* Defenses (QUALIFIED)
  + Protection of Private Interest
    - Mother tells daughter that she belives daughter’s husband is ahvibng an affair and it turns out it is wrong.
    - Hisband sues the mother.
    - Mom says she was looking out for welfare of her daughter (that is her defense)
      * Must be in good faith no malice…
  + Protection of Public Interest
    - False report to police of P having committed a crime
      * Must be in good faith no malice…

**CASES**

* *Davis* 
  + Rule: If your reputation is already bad (valueless) then you cannot recover for defamation
* *Seaton* 
  + Dirtiest hotel in thr world
  + Rule: To be defamatory, RPP must believe it to be a true FACT. No RPP would believe that.
* *Weidlich*
* *Stones River* 
  + Dad pubishes letter about crappy car dealership
  + Rules:
    - Mom and sister not liable because they did not know about writing (mjust know about defamatory language to be held liable)
    - Daily News not liable because they deleted any refernces to the dealership (people would not know it was about P)
    - No liability to dad because no assertion of facts.
* *Hustler v Falwell* 
  + Incest parody
  + Rule: A public figure cannot recover for IIED unless they can prove that there was a false fact and that false fact was published with malice.
    - Most of the time, public officials and figures cannot recover for defamation either
    - If a public official cannot recover for defamation, then cannot recover for IIED either
* *Sullivan*
  + Self-disclosure of why she wqs fired
  + Rule: If you self-publish, then it is not defamation.
    - TCA 50-1-105
      * Grants a qualified immunity for employers who disclose information to a prospective employer
      * Provides a measure or protection for former employers who provide info to a prospective employer
      * Qualified immunity: Circumstances under which this protection would NOT apply
        + When the former employer makes a knowingly false assertion of fact
        + When the former employer is deliberately misleading or make disclosure for malicious reason
        + When former employer is reckless
        + Negligence is not enough to remove immunity
* *Ferguson*
  + City official late with paying bills. Sues newpaper for getting his title wrong
  + Rule: : One who publishes a false communication about public official in that capacity must do so with malice to be liable
    - *NY Times v Sullivan* (federal law)
      * As a matter of law, public official cannot recover unless he meets malice standard (knowledge it was false or D made publication with reckless disregard for its truth)
* *Spence*
  + Lawyer representing lady suing Hustler
  + Rule: A lawyer who merely advocates for a famous or controversial client is not a public figure just because he has taken on the cause of an advocate.
* *Ward*
  + Rule: Even if a statement is false it can be slanderous per se even if it does not fall into one of four categories.
    - Defendant's characterization of plaintiffs as Jew Haters was slanderous per se.
* *Strong-Tie*
  + Attorney trolling for clients
  + Rule: An attorney is privileged to publish what may be defamatory information prior to a proposed judicial proceeding even when the communication is directed at recipients unconnected with the proposed proceeding . In order for the privilege to apply:
    - 1) the communication must be made by an attorney acting in the capacity of counsel
    - 2) the communication must be related to the subject matter of the proposed litigation
    - 3) proposed proceeding must be under serious consideration by the attorney acting in good faith AND
    - 4) the attorney must have a client or identifiable prospective client at the time the communication is published.
    - If not, you could be disciplined by BPR, malpractice, or malicious prosecution
* *Jones*
  + State employee double reimbursement. TDOC head makes public omment
  + Rule: Cabinet-level executive officers are entitled to absolute privilege from defamation claims arising out of comments made within their scope official duties.
    - TDOC commissioner was acting within the scope of his employment when he made allegedly defamatory statements and thus the state and TDOC were entitled to absolute privilege against defamation claims.

**INVASION OF PRIVACY**

* Invasion of privacy is not in and of itself a tort; just a descriptive umbrella that includes 4 different torts
* 4 distinct torts fall under invasion of privacy label
  + Commercial misappropriation of name or likeness
    - Unauthorized use of a person’s name or picture or likeness of that person for some commercial purpose
      * Usually in advertising
    - 3 Elements to CL claim of commercial misapp of name or likeness
      * 1) Use of plaintiff’s ID
        + ID defined broadly to encompass Ps picture or name or likeness of P
      * 2) Must be for commercial or business purpose
      * 3) Lack of consent
    - Some states (especially those in the entertainment business) have statutory claims that can be brought as well
      * TN Personal Rights Protection Act
        + Recognizes that people have a property right in their name or likeness
        + Imposes liability when D knowingly uses name or likness as an item of commerce without Ps consent
    - When Ps name or likeness is newsworthy (fair use defense) then it is not actionable
      * TCA 47-25-1107
    - Damages
      * For celebrities, primary damages is the reaosnble value of the use of that person’s name
      * Non celebrities, emotion distress and mental anguish
    - Does right of publicity survive someone’s death?
      * *Memphis v Factors* 
        + elvis statues
        + Issue: Is right of publicity inheritable?

No, this right to control publicity that is not inheritable and ends upon death.

**CASES**

* *Memphis v Factors*
* *State ex*
* *Beard*
* *Essex Microtel*
* *Ashby*
* *Neff*