

American Torts 2019

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Overview of the Semester

- Intentional Torts
- Negligence
- Strict Liability
- Products Liability
- Imputed Liability
- Defamation
- Causation
- Damages

Torts?

- What is a Tort?
- Reasons of Regulation
- Sources of Law
- History
- Criminal law v. Tort Law
- Modern Applicability
- Concepts of Fault

- Intentional v. Unintentional Torts

Intentional Tort

- Assault
- Battery
- False Imprisonment
- Trespass
- Intentional Infliction of Emotional Distress

Intentional Tort

- Assault
- Battery
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- Intentional Infliction of Emotional Distress
- Defamation
- Malicious Prosecution

Negligence

- Damage
- Duty of Care
- Breach of Duty
- Causal link & Remoteness of Damage
- Foreseeability, Proximity, Reliance & Legal Policy

Assault v Battery

- Assault:
 - D tries to or does physically strike another,or
 - Acts in a threatening manner to put another in fear of immediate harm
- Battery:
 - intentional touching;
 - the touching must be harmful or offensive
 - no consent from the victim

Assault v Battery

- More than mere words?
- Intention to cause apprehension of harmful or offensive contact; and the act indeed caused apprehension in the victim that harmful or offensive contact would occur.

Western Union Telegraph v. Hill (1933)

- Plaintiff sued for assault on the grounds that Defendant's employee made offensive remarks to his wife and attempted to grab her when she came into its store. Defendant's employee admitted to having been mildly intoxicated at the time, but denied Plaintiff's version of events. The physical evidence also suggested that Defendant's employee could not have been touch Plaintiff's wife as described.
- The trial court found that whether assault had been committed was a question for the jury, who found for Plaintiff

Western Union Telegraph v. Hill (1933)

Assault-

- An attempt or threat to touch another's person in a harmful or offensive manner such that it creates a well-founded apprehension of imminent battery.
- The Plaintiff (victim) must also believe that the Defendant has the apparent ability to commit the battery if not prevented.

Western Union Telegraph v. Hill (1933)

- Issues:
 - Why not criminal?
 - Employer liability
 - Impossibility
 - Definition of Assault

Western Union Telegraph v. Hill (1933)

- If evidence shows that a party could have made an effort to reach out and touch another in an offensive, unwanted manner and may or may not have had the apparent ability to do so at the time, whether an assault has occurred is a question for a jury.
- The Court also found, however, that the employee was acting beyond the scope of his employment if he committed assault and Defendant was thus not liable for his actions. The Court reversed the verdict on this ground.

Intentional Tort

- ASSAULT
- Assault occurs when the defendant acts to intentionally cause the victim's reasonable apprehension of immediate or harmful contact.

Intentional Tort

- ASSAULT
- Not all assaults include battery but all batteries include an assault.

Intentional Tort

Battery

- The defendant acts to intentionally cause harmful or offensive conduct contact with the victim's person.
- Garret v. Daily (1955 - Musical Chairs)
- Fisher v. Carrousel Motor Hotel (1967 TX)

Garret v. Daily (1955)

- Five year-old Brian Dailey (D) visited Naomi Garrett (P) at her sister Ruth's home. P was about to sit on a lawn chair, Dailey pulled it out from under her causing her injury.

Garret v. Daily

- The question of Intention is central to the tort of battery
- While a minor who has committed a tort with force is liable as any other would be, a plaintiff must establish that the defendant committed the act with the intention of causing the harmful contact or with substantial certainty that such contact would result.

Fisher v. Carrousel Motor Hotel

- Plaintiff, a mathematician with (NASA) was attending a seminar luncheon at Brass Ring Club (part of Carrousel Motor Hotel) and while the plaintiff was waiting in the line to get food, the defendant (manager) grabbed the plate from the plaintiff and yelled in a loud voice "a Negro could not be served in the club." Plaintiff was not physically injured by the defendant's conduct, but he did testify that he was extremely embarrassed by and hurt by the defendant's conduct. He filed a complaint against defendants, alleging that the intentional grabbing of plaintiff's plate at a buffet luncheon constituted a battery.

Fisher v. Carrousel Motor Hotel

- "...it has long been settled that there can be a battery without an assault, and that actual physical contact is not necessary to constitute batter, so long as there is contact with clothing or an object closely identified with the body..."
- Manager's actions equal liability for the Hotel

Battery and assault Intentional Tort

What is the intent?

The concept of "intent" denotes a defendant's desires to cause the consequences of his actions, or his belief (with substantial certainty) that the results will follow. The distinction to be drawn is not merely whether the defendant intends to commit the act in question, but whether he intends to cause the consequences of his act.

Intentional Tort

- **False Imprisonment**
- Defendant willfully acts to ***intentionally*** restrain or confine a person in a bounded area
- Big Town Nursing Home v. Newman (1970)
- Enright v. Groves (1977)

Big Town Nursing Home v. Newman

- Plaintiff, a retiree, was checked into Defendant's nursing home by family member.
- Admission papers indicated that Plaintiff's presence was voluntary and he could leave at any time.
- When Plaintiff attempted to leave on numerous occasions, he was restrained, punished, denied privileges, and moved to a wing of the home for drug addicts and the insane.

Big Town Nursing Home v. Newman

- When a nursing home detains a retiree against his will despite an agreement that his presence is voluntary and has no other legal justification for the physical detention, it has committed false imprisonment.
- When a Defendant's acts which gave rise to actual damages are undertaken wrongfully, intentionally, and without regard to the rights of the Plaintiff, punitive damages may be appropriately awarded.

Enright v. Groves (1977)

- Defendant police officer saw a dog running without a leash in violation of an ordinance.
- He determined Plaintiff to be the owner, he located her and demanded her driver's license without explaining why. Plaintiff refused, instead telling the officer her address.
- The officer told Plaintiff he would arrest her if she did not surrender her driver's license. Plaintiff again failed to do so, and the officer placed her under arrest. Plaintiff was later convicted of violating the leash ordinance. Plaintiff brought suit for false imprisonment, and the jury awarded her \$500 in actual damages and \$1000 in punitive damages.

Enright v. Groves (1977)

- While Plaintiff was ultimately convicted of a crime, she was not convicted of the crime for which she was arrested. As the facts elucidate, she was arrested for failing to produce her driver's license to the officer, which is not a crime. The officer's arrest of Plaintiff was therefore unlawful and the verdict was proper.

Intentional Tort

- Assault
- Battery
- False Imprisonment
- Trespass
- Intentional Infliction of Emotional Distress
- Defamation
- Malicious Prosecution

Trespass to Property

- Trespass (to Land/Chattel)
- The intentional interference with the rights of possession of property by another person for a significant period
- Dougherty v Stepp (1835) any unauthorized entry is trespass. Damages assumed.

Dougherty v Stepp (1835)

- Defendant entered Plaintiff's land to perform a survey, but did not mark trees or cut timber. Plaintiff sued for trespass. The trial court instructed the jury that no trespass had occurred and the jury found for Defendant.
- BUT, Rule: **Every unauthorized entry upon another's land qualifies as a trespass, regardless of the degree of damage done in the process.**

Trespass to Property

- Conversion:
- The total intentional interference with the rights of possession of property by another person rendering the property unavailable to the owner.
- Damage?

Poggi v. Scott (1914)

- Poggi (P) stored wine barrels in a storeroom he rented from a judge. The judge sold the building to Scott (D) and testified that he had informed Scott of Poggi's lease. The judge did not notify P that he had sold the premises.
- After the sale, P visited the basement storeroom and discovered that all of his wine had been sold. Two men had told D that they wanted to purchase the broken barrels stored in the basement. D claimed that he had inspected the barrels and that they had been empty. D sold the barrels to the men in exchange. The two men were arrested for theft and P filed suit against D for conversion. At trial the court granted a nonsuit in D's favor and P appealed.

Poggi v. Scott (1914)

- Is innocent mistake a defense to conversion?
- No.

Poggi v. Scott (1914)

- A conversion is the exercising of an unjustifiable and unwarranted dominion and control over another's property which causes injury to the owner of the property. The foundation for the act of conversion rests upon the unwarranted interference by the defendant with the dominion over the property of the plaintiff from which injury results. The knowledge and intent of the defendant are not relevant. The plaintiff need not prove a wrongful motive behind the acts or that the defendant was negligent. The fact that the defendant did not intend to commit a wrongful act is not a defense to conversion.

Trespass to chattels

- Glidden v. Szybiak (1949)
- (Dog pulled ears)
- One who non-consensually uses or interferes with a chattel of another is guilty of trespass if the chattel is damaged, the possessor is deprived of use for a substantial time, or harm is caused by the interference.

Intentional Tort

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Intentional Infliction of Emotional Distress

- Defendant, by extreme or outrageous conduct, intentionally, or recklessly causes the victim severe distress.
- State Rubbish Collectors v. Siliznoff (1952)

State Rubbish Collectors v. Siliznoff (1952)

- Defendant, a non-member of Plaintiff association, collected garbage from a company Plaintiff claimed was within its domain. Plaintiff's agent allegedly demanded that Defendant surrender the money derived from the collection or suffer physical consequences, in response to which Defendant attended Plaintiff's meeting and signed notes promising to pay. Plaintiff sued Defendant to force payment of the notes, and Defendant argued they were unenforceable and counter-sued for intentional infliction of mental distress.

State Rubbish Collectors v. Siliznoff (1952)

- The law recognises a right of action for intentional infliction of emotional distress for serious threats of physical violence whether or not such threats technically rise to the level of assault. When one acts outrageously, intends to cause such distress and does so, he is liable for the emotional distress and the bodily harm resulting therefrom.

Defamation

- the act of making untrue statements about another which damages his/her reputation. If the defamatory statement is printed or broadcast over the media it is libel and, if only oral, it is slander.

Defamation

- Injury is assumed
- prima facie case consists of a simple allegation that the defendant intentionally communicated to a third person a statement about the plaintiff which tended to expose the plaintiff to "public hatred, shame, obloquy, contumely, odium, contempt, ridicule, aversion, ostracism, degradation or disgrace."

Defamation

- Libel and Slander examples from the past
 - (1) committed a crime of moral turpitude; or
 - (2) has venereal disease or something equally loathsome and communicable; or
 - (3) is somehow unfit or not to be trusted in her occupation; or
 - (4) is not chaste.
- Defense: Truth and Privilege

Defamation

- **Amendment I**
- Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

NY Times v Sullivan (1964)

- Sullivan was a Commissioner of Montgomery, Alabama, who claimed that he was defamed in an ad taken out in the NY Times. The ad was entitled, "Heed Their Rising Voices" and it charged in part that an unprecedented wave of harassment had been directed against those who participated in the civil rights demonstrations in the South. Some of the details of the ad were false.
- The advertisement did not mention the Plaintiff by name. He claimed that it referred to him indirectly because he had oversight responsibility of the police. The Defendant claimed that it authorized publication of the advertisement because it did not have any reason to believe that its contents were false. There was no independent effort to check its accuracy. The Plaintiff demanded retraction. The Defendant was puzzled as to why the Plaintiff thought the advertisement reflected adversely on him. The jury found the ad libelous per se and actionable without proof of malice. The jury awarded the Plaintiff \$500,000 in damages. The Alabama Supreme Court affirmed. The Defendant appealed.

NY Times v Sullivan

- Under Alabama law, a publication was libelous per se if the words tended to injure a person's reputation or to bring him into public contempt. The jury must find that the words were published of and concerning the plaintiff. Once libel *per se* has been established, the defendant has no defense as to stated facts unless he can persuade the jury that they were true in all their particulars.

NY Times v Sullivan

- US Supreme Court: The First and Fourteenth Amendments act as a limit on the power of the state to allow for damages for libel *per se* with regards to actions brought by public officials. In order to sustain a claim of defamation, a public person must prove that the publisher acted with actual malice (as opposed to reckless disregard for the truth)



Class Action Prerequisites

- Class actions are governed by federal and state court rules:
- **Numbers.** There have to be so many possible plaintiffs and lawsuits against a defendant that it's not practical for them to file their own suits.
- **Same claims.** Claims need to raise common legal and factual issues, making it efficient to deal with all claims together.
- **Typical cases.** The named plaintiffs, the representatives, have the same claims and defenses as the others in the class.
- Representatives provide **fair and adequate protection for the class.** The named plaintiffs and class lawyers must look out for the interests of everyone in the class.



Negligence v. Intentional Torts

- What action constitutes the negligence?
- What was the duty?
- Was the negligence the *Proximate Cause* for the injuries?
- Damages?
- Defenses?
- What did the actor attempt to achieve?
- What were the damages?
- Was the action the *Proximate Cause* for the injuries?
- Consent?
- Defenses?

Negligence

- Duty
- Breach
- Proximate Cause
- Damages
- Defense

Negligence

- Duty - *Did the defendant have a legal obligation to exercise reasonable care to avoid the risk of harming persons or property? Is there an obligation?*

Negligence

- Breach – *Was defendant's conduct, in light of the foreseeable risks created by the conduct, unreasonable under the circumstances?*

Negligence

- Causation - *Does a causal connection exist between Defendant's unreasonable conduct and the Plaintiff's harm? Is the negligence the Proximate cause for the injury?*

Negligence

- Scope of Liability - *Does the defendant's duty extend to the plaintiff, the general type of incident that occurred, and the harm plaintiff suffered? Did the negligence cause the type of harm that reasonable conduct would have prevented from occurring? Was the damage foreseeable?*

Negligence- Duty

- Reasonable person
- Custom
- Statutory Duty

Negligence- Duty

- Reasonable person-
 - Objective standard of reasonable person under similar circumstances.
- Hand's Formula for determining reasonableness
 - Probability of risk happening (P) x Nature and seriousness of harm (L) v. Cost and effort of feasible, safer alternative conduct that does not unduly impair utility or activity (B).

Negligence- Duty

- Reasonable person: Mentally disabled persons have no such standard
- General rule: reasonable person standard
- Minority rule: care consistent with diminished mental capacities (with burden of proof of incapacity on party asserting incapacity.)
- Sudden onset: usually only applies to physical illness, except in some jurisdictions where it's treated like a heart attack.

Negligence- Duty

- Possible Excuse Doctrines
 - Incapacity
 - Lack of knowledge of occasion for compliance
 - Inability after reasonable diligence to comply
 - Emergency
 - Compliance Involves Greater Risks
 - Otherwise Reasonable under the Circumstances

Negligence- Duty

- Statutory Duty
 - Was plaintiff a member of the class of persons the legislature sought to protect?
 - Was the harm suffered by the plaintiff the type of harm the legislature sought to protect against?
 - statutory standard of care approaches
 - strict negligence per se – violation of the statute is proof of negligence
 - presumption of negligence – burden is shifted to the defendant to rebut the impact of the statutory violation.
 - evidence of negligence

Negligence-**Medical Malpractice**

- **Medical Malpractice professional standards**
 - professional rule – what do other doctors say
 - patient rule – what would a reasonable patient need to know
 - subjective piece – what did this particular patient need to know
- *Informed Consent - Disclosure would have led a reasonable patient to make a different choice.*

Negligence- **Medical Malpractice**

- Defenses for Doctors
 - Child patient – consent transfers to parents
 - Emergency
 - Obvious risk
 - Simple procedure with remote risk
 - Freak risk
 - Situations in which complete and candid disclosure might have a detrimental effect on the patient (burden is on the dr. to prove).
- *Consent can be exceeded – was the result a battery?*

Damages

Special Damages

Lost Income

Past earning losses and future earning power losses
 Lost earning capacity for those outside the traditional earning market –
 homemakers, artists, etc.

Medical Expenses

Medical surveillance – you don't have the disease now, but you're at
 risk as a result of the incident so we'll pay to watch for it.

Past and future medical expenses.

Negligence- Damages

General Damages

- Pain, suffering, and emotional distress
 - (no pain no gain)
- Loss of Enjoyment of life damages
 - loss of inability to see sunsets, play favorite sport, hear music, sexual activity, find a life partner. Independent of pain.
- Property Loss
 - diminished value rule

Negligence- Damages

- Punitive Damages
 - Serious misconduct with malintent or callous disregard (could happen in some negligence cases)
 - Must be some compensatory to go after punitive.
 - Purpose is to punish or deter.
 - Awarded when tortfeasor creates harm from an extreme departure from reasonable conduct, some kind of antisocial mental state – something shocking.

Cannot request punitive against public entities.

Martin v. Herzog (1920)

- **Facts:**
- Martin was killed in a collision between his buggy and Herzog's car. Martin was driving at night without lights and Herzog was driving on the wrong side of the road. Herzog claimed that **Martin's failure to use headlights constituted contributory negligence** and barred him from recovery.

Martin v. Herzog (1920)

- At trial the judge instructed the jury that it could consider whether Martin had been contributorily negligent in failing to have a light upon the buggy as provided by law, but that not having a light did not necessarily make him negligent. The jury was instructed that they were at liberty to treat the omission of the lights either as innocent or as contributorily negligent. The jury found in favor of P. The Appellate Division reversed and P appealed.

Martin v. Herzog (1920)

- **Issue: May a jury relax the duty that one owes under a statute to another? Is negligent conduct actionable by itself, or must there also be a showing that the negligence was the cause of the injuries incurred?**

Martin v. Herzog (1920)

- **Holding and Rule: The unexcused violation of a statutory duty is negligence per se and a jury may not relax the duty that one traveler owes under a statute to another. Negligent conduct is not actionable by itself unless there is a showing that such conduct was the cause of the injuries incurred.**

Martin v. Herzog (1920)

- The rule is applied less rigidly where the other party was not a member of the class for whose protection the safeguard was intended, and where the safeguard is by local ordinance rather than by statute. A defendant who travels without lights is not to pay damages for his fault unless the absence of lights is the cause of the accident. To say that conduct is negligence is not to say that it is always contributory negligence. To impose liability there still must be a showing of cause, proximate cause and damages.
- The court held that evidence of a collision at night between a car and an unseen buggy proceeding without lights is evidence from which a causal connection may be inferred between the collision and the lack of lights. If no other evidence is offered to break the causal connection, then there is contributory negligence.

Palsgraf v. Long Island R.R (1928)

- **Facts**
- Palsgraf was standing on a Long Island Railroad train platform when two men ran to catch a train. The second man was carrying a small package containing fireworks. He was helped aboard the train by one guard on the platform and another on the train. The man dropped the package which exploded when it hit the tracks. The shock of the explosion caused scales at the other end of the platform many feet away to fall, striking and injuring Palsgraf.
- Palsgraf brought a personal injury lawsuit against Long Island Railroad and the railroad appealed the court's judgment in favor of Palsgraf. The judgment was affirmed on appeal and Long Island Railroad appealed.

Palsgraf v. Long Island R.R (1928)

- **Issues:**
- How is the duty of due care that is owed determined?
- To whom does a party owe the duty of due care?

Palsgraf v. Long Island R.R (1928)

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Palsgraf v. Long Island R.R (1928)

- The court held that the conduct of Long Island Railroad's guard was wrongful in relation to the man carrying the parcel, but not in relation to Palsgraf standing far away. No one was on notice that the package contained fireworks which when dropped could harm a person as far from the zone of danger as Palsgraf. To find negligence there must first be a finding that a duty was owed and breached, and that the injury could have been avoided if the defendant had been following that duty. The orbit of the danger or risk associated with a danger or risk is that which a reasonable person would foresee. Even if the guard had intentionally taken the package and thrown it he would not have threatened Palsgraf's safety from the appearances of the circumstances to a reasonable person. Long Island Railroad's liability for an inadvertent or unintentional act cannot be greater than it would be if the act had been intentional.

Palsgraf v. Long Island R.R (1928)

- **Holding: (Cardozo – “Zone of Danger” rule)**
- A duty that is owed must be determined from the risk that can reasonably be foreseen under the circumstances. A defendant owes a duty of care only to those who are in the reasonably foreseeable zone of danger.

Palsgraf v. Long Island R.R (1928)

- **Dissent (Andrews)**
- Everyone owes the world at large the duty of refraining from acts that may unreasonably threaten the safety of others. In determining proximate cause the court must ask whether there was a natural and continuous sequence between the cause and effect and not whether the act would reasonably be expected to injure another. The court must consider that the greater the distance between the cause and the effect in time and space, the greater the likelihood that other causes intervene to affect the result. In this case there was no remoteness in time and little in space. Injury in some form was probable.

Palsgraf v. Long Island R.R (1928)

- The majority adopted the principle that negligent conduct resulting in injury will lead to liability only if the actor could have reasonably foreseen that the conduct would cause the injury. In a 4-3 opinion by Cardozo, the court held that the Long Island Railroad attendants could not have foreseen the possibility of injury to Palsgraf and therefore did not breach any duty to her. Andrews asserted that the duty to exercise care is owed to all, and thus a negligent act will subject the actor to liability to all persons proximately harmed by it, whether or not the harm is foreseeable. Both opinions have been widely cited to support the two views expressed in them.
- The reasoning in this case was that Long Island Railroad did not owe a duty of care to Palsgraf insofar as the package was concerned. Cardozo did not reach the issue of “proximate cause” for which the case is often cited. There is no general principle that a railroad owes no duty to persons on station platforms not in immediate proximity to the tracks, as would have been the case if Palsgraf had been injured by objects falling from a passing train.

Products Liability

• 3 Theories:

- Negligence
- Warranty
- Strict Liability

Product Liability

Negligence

- Mac Pherson v Buick (1916)
- Donoghue v Stevenson (1932)

MacPherson v Buick Motor Co (1916)

- Facts. Plaintiff sues for negligence for injuries sustained after he was thrown from his car when the wheel collapsed.
- Defendant had sold the automobile to a retail dealer, who in turn sold it to Plaintiff.
- Wheel sold to Defendant by another manufacturer, was made of defective wood.
- The defect could have been discovered through reasonable inspection, but no inspection occurred.

MacPherson v Buick Motor Co (1916)

- The case is in negligence rather than Warranty- WHY?
- Issue of the case:
Does Defendant owe a duty of care to anyone besides the immediate purchaser in this case the retailer?

MacPherson v Buick Motor Co (1916)

- One line of cases has suggested that manufacturers owe a duty of care to ultimate purchasers only when the product is inherently dangerous.
- Other cases have suggested a duty of care is owed to foreseeable users if the product is likely to cause injury if negligently made.

MacPherson v Buick Motor Co (1916)

- In order for a duty of care to arise in relation to ultimate purchasers, two criteria are necessary.
 - **First**, the nature of the product must be such that it is likely to place life and limb in danger if negligently made. This knowledge of danger must be probable, not merely possible.
 - **Second**, there must be knowledge that in the usual course of events, the danger will be shared by people other than the buyer. This may be inferred from the nature of the transaction and the proximity or remoteness of the relation.

MacPherson v Buick Motor Co (1916)

- Holding:
 - The manufacturer of a finished product placed this product on the market to be used without inspection by its customers. If the manufacturer was negligent and the danger could be foreseen, a liability will follow.

Donoghue v Stevenson [1932]

- Facts: On 26 August 1928, Ms Donoghue drank a bottle of ginger beer, manufactured by Stevenson, which her friend had bought from a retailer and given to her. The bottle contained the decomposed remains of a snail which were not and could not be detected until the greater part of the contents of the bottle had been consumed. As a result she alleged and that she suffered from shock and severe gastro enteritis.

Donoghue v Stevenson [1932]

- Demurer- a case where the facts are assumed in order to test the supposition at law.
- Whether there was a snail or not is irrelevant.

Donoghue v Stevenson [1932]

- The question is whether the manufacturer of an article of drink sold by him to a distributor in circumstances which prevent the distributor or the ultimate purchaser or consumer from discovering by inspection any defect is under any legal duty to the ultimate purchaser or consumer to take reasonable care that the article is free from defect likely to cause injury to health.

Donoghue v Stevenson [1932]

- "That case established that under certain circumstances one man may owe a duty to another even though there is no contract between them. If one man is near to another or is near to the property of another a duty lies upon him not to do that which may cause a personal injury to that other or may injure his property."

Products Liability

• 3 Theories:

- Negligence
- Warranty
- Strict Liability

Strict Liability v. Negligence

- The distinction between products liability and negligence was explained in *Jiminez v. Sears, Roebuck & Co.* (1971)
- "It is pointed out that in a products liability case the plaintiff in strict liability in tort must prove that he was injured by a defect in the product and that the product was defective when it left the hands of the retailer or manufacturer; whereas to recover in negligence the plaintiff must prove the same two elements plus an additional element, namely, that the defect in the product was due to negligence of the defendant."

Strict Liability:

Greenman v. Yuba Power (1963)

- defective power tool
- injury to an ultimate consumer
- California Supreme Court assigned strict liability to a manufacturer who placed on the market a defective product even though both privity of contract and notice of breach of warranty were lacking.
- The court rejected both contract and warranty theories, express or implied, as the basis for liability
- Strict liability does not rest on a consensual foundation but, rather, on one created by law.

Strict Liability:

Greenman v. Yuba Power (1963)

- Judicially created liability because of the economic and social need for the protection of consumers in an increasingly complex and mechanized society, and because of the limitations in the negligence and warranty remedies.
- Court's purpose: "to insure that the costs of injuries resulting from defective products are borne by the manufacturer that put such products on the market rather than by the injured persons who are powerless to protect themselves."
- 402A of the Restatement Second of Torts

Strict Liability: Products Liability

- **DEFECTIVE PRODUCT** - product may be defective because of a defect in manufacture or design or a failure to adequately warn the consumer of a hazard involved in the foreseeable use of the product.

Products Liability: **Manufacture Defect**

- The plaintiff's injury must have been caused by a "defect" in the product. Thus the manufacturer is not deemed responsible when injury results from an unforeseeable use of its product. The essential elements of a claim based upon an alleged manufacturing defect are:
 - 1. The defendant was the manufacturer or supplier of a product;
 - 2. The product possessed a defect in its manufacture;
 - 3. The defect in manufacture existed when the product left the defendant's possession;

Products Liability: **Manufacture Defect**

- 4. The defect in manufacture was a cause of injury to the plaintiff; and
- 5. Plaintiff's injury resulted from a use of the product that was reasonably foreseeable to the defendant. A defect in the manufacture of a product does not exist if the product differs from the manufacturer's intended result or if the product differs from apparently identical products from the same manufacturer

Products Liability: **Design Defect**

- The essential elements of a claim based upon an alleged design defect are:
 - 1. The defendant was the manufacturer or supplier of a product;
 - 2. The product possessed a defect in its design;
 - 3. The defect in design existed at the time it left the defendant's possession;
 - 4. The defect in design was a cause of injury to the plaintiff; and
 - 5. Plaintiff's injury resulted from a use of the product that was reasonably foreseeable by the defendant.

Products Liability: **Design Defect**

- A product is defective in design if it fails to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner or if there is a risk of danger inherent in the design which outweighs the benefits of that design.
- In determining whether the benefits of the design outweigh such risks the trier of fact may consider, among other things, the gravity of the danger posed by the design, the likelihood that such danger would cause damage, the mechanical feasibility of a safer alternate design at the time of manufacture, the financial cost of an improved design, and the adverse consequences to the product and the consumer that would result from an alternate design.

Products Liability: **Design Defect**

- EXCEPTIONS:
 - The manufacturer or seller of a product is *not* liable for injuries death caused by a defect in its design, which existed when the product left the possession of the manufacturer or seller, if:
 - 1. The product is inherently unsafe and the product is known to be unsafe by the ordinary consumer, who has the ordinary knowledge common to the community, and who consumes the product; and
 - 2. The product is a common consumer product intended for personal consumption.

Products Liability: Failure To Warn

- - **ESSENTIAL ELEMENTS** The essential elements of a claim based upon an alleged defect from failure to warn are:

1. The defendant was the manufacturer of a product;
 2. The product was defective;
 3. The product defect was a cause of injury to the plaintiff.
4. Plaintiff's injury resulted from a use of the product that was reasonably foreseeable to the defendant.

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Products Liability: Failure To Warn

A product is defective if the use of the product in a manner that is reasonably foreseeable by the defendant involves a substantial danger that would not be readily recognized by the ordinary user of the product and the manufacturer knows or should have known of the danger, but fails to give adequate warning of such danger.

A manufacturer has a duty to provide an adequate warning of potential risks or side effects which may follow the foreseeable use of the product.

Knowable in light of the generally recognized and scientific and medical knowledge at the time of manufacture and distribution.

Product Liability

Warranty (privity needed?)

“Born at the intersection of Contract and Tort”

1. Express Warranties
 - Un ambiguous statement which guarantees the the product
 - Baxter v Ford (1932) Sound of Breaking Glass
2. Implied Warranties
 - Over-arching warranties of merchantability
 - Henningsen v Bloomsfield Motors (1960)

Products Liability: UCC

§ 2-314. Implied Warranty: Merchantability; Usage of Trade.

- (1) Unless excluded or modified (Section 2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.
- (2) Goods to be merchantable must be at least such as:
 - (a) pass without objection in the trade under the contract description;

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- (2) **Goods** to be merchantable must be at least such as:
 - (a) pass without objection in the trade under the **contract** description;
 - (b) in the case of fungible **goods**, are of fair average quality within the description;
 - (c) are fit for the ordinary purposes for which **goods** of that description are used;
 - (d) run, within the variations permitted by the **agreement**, of even kind, quality and quantity within each unit and among all units involved;
 - (e) are adequately contained, packaged, and labeled as the **agreement** may require; and
 - (f) conform to the promise or affirmations of fact made on the container or label if any.
- (3) Unless excluded or modified (Section **2-316**) other implied warranties may arise from course of dealing or usage of trade.

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- (3) Unless excluded or modified (Section 2-316) other implied warranties may arise from course of dealing or usage of trade.

Products Liability: UCC

- § 2-315. Implied Warranty: Fitness for Particular Purpose.
- Where the **seller** at the time of contracting has reason to know any particular purpose for which the **goods** are required and that the **buyer** is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.

Products Liability: UCC

- § 2-316. Exclusion or Modification of Warranties.
- **Exclusion must be conspicuous and clear**
- **Generally for used items, not new**

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Product Liability

Strict Liability (Europe)

Council Directive of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products (85/374/EEC)

Strict Liability: Products Liability

- ***Defective PRODUCT*** - product may be defective because of a defect in **manufacture** or **design** or a **failure to adequately warn the consumer of a hazard involved in the foreseeable use of the product.**

Products Liability: **Manufacture Defect**

- The plaintiff's injury must have been caused by a "defect" in the product. Thus the manufacturer is not deemed responsible when injury results from an unforeseeable use of its product. The essential elements of a claim based upon an alleged manufacturing defect are:
 - 1. The defendant was the manufacturer or supplier of a product;
 - 2. The product possessed a defect in its manufacture;
 - 3. The defect in manufacture existed when the product left the defendant's possession;

Products Liability: **Design Defect**

- EXCEPTIONS:
 - The manufacturer or seller of a product is *not* liable for injuries death caused by a defect in its design, which existed when the product left the possession of the manufacturer or seller, if:
 - 1. The product is inherently unsafe and the product is known to be unsafe by the ordinary consumer, who has the ordinary knowledge common to the community, and who consumes the product; and
 - 2. The product is a common consumer product intended for personal consumption.

Products Liability: **Manufacture Defect**

- 4. The defect in manufacture was a cause of injury to the plaintiff; and
- 5. Plaintiff's injury resulted from a use of the product that was reasonably foreseeable to the defendant. A defect in the manufacture of a product exists if the product differs from the manufacturer's intended result or if the product differs from apparently identical products from the same manufacturer

Products Liability: **Design Defect**

- The essential elements of a claim based upon an alleged design defect are:
 - 1. The defendant was the manufacturer or supplier of a product;
 - 2. The product possessed a defect in its design;
 - 3. The defect in design existed at the time it left the defendant's possession;
 - 4. The defect in design was a cause of injury to the plaintiff; and
 - 5. Plaintiff's injury resulted from a use of the product that was reasonably foreseeable by the defendant.

Products Liability: **Design Defect**

- A product is defective in design if it fails to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner or if there is a risk of danger inherent in the design which outweighs the benefits of that design.
- In determining whether the benefits of the design outweigh such risks the trier of fact may consider, among other things, the gravity of the danger posed by the design, the likelihood that such danger would cause damage, the mechanical feasibility of a safer alternate design at the time of manufacture, the financial cost of an improved design, and the adverse consequences to the product and the consumer that would result from an alternate design.

Strict Liability: Baker v. Snell, [1908] (UK)

- One employee had the responsibility of letting the dog out early and chaining it up before the other employees arrived. One day this employee brought the dog into the midst of the other employees and encouraged it to bite. The defendant-employer was strictly liable for the injuries unless he could prove that the employee let the dog loose with malicious intent. The basis for the decision was that if a man chose to keep a ferocious animal then he was bound to keep the animal secure at his own peril.

Strict Liability: Rylands v. Fletcher

- Facts:
- Defendant owned a Mill and built a reservoir for the purpose of keeping and storing water to be used about their mill. Underneath the land of the Defendants on which they proposed to construct their reservoir there were old and disused mining passages and works. There were five vertical shafts, and some horizontal shafts connected them. The vertical shafts had been filled up with soil and rubbish, and it does not appear that any person was aware of the existence either of the vertical shafts. In the course of the working by the Plaintiff of his mine, he had gradually worked through the seams of coal underneath the land, and had come into contact with the old and disused works underneath the close of the Defendants.

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Strict Liability: res ipsa loquitur

- "When a thing which causes injury, without fault of the injured person, is shown to be under the exclusive control of the defendant, and the injury is such as, in the ordinary course of things, does not occur if the one having such control uses proper care, it affords reasonable evidence, in the absence of an explanation, that the injury arose from the defendant's want of care."
-San Juan Light & Transit Co. v. Requena (1912)

Strict Liability: Rylands v. Fletcher

- If a person brings, or accumulates, on his land anything which, if it should escape, may cause damage to his neighbour, he does so at his peril. If it does escape, and cause damage, he is responsible, however careful he may have been, and whatever precautions he may have taken to prevent the damage.
- (T)he question in general is not whether the Defendant has acted with due care and caution, but whether his acts have occasioned the damage.

Strict Liability: Powell v. Fall, (1880)

- Property damage when a steam traction engine emitted sparks and set fire to the plaintiff's hay pile on a neighboring farm. Although the engine was not defective and was being driven appropriately, the defendants were liable for the damage caused to the hay pile.

Strict Liability: Madsen v. East Jordan (1942)

- facts:
- Plaintiff owned a Mink farm. Defendant an irrigation company. Blasting caused the Mother minks to eat their babies (230).
- Liability?
- Was the infanticide foreseeable?
- Is this like the other cases?

Strict Liability:
Madsen v. East Jordan (1942)

- “In the instant case, the killing of their kittens was not an act of self-preservation on the part of the mother mink but a peculiarity of disposition which was not within the realm of matters to be anticipated. Had a squib been thrown and suddenly picked up by a dog, in fun, and carried near another, it is ventured that we would not have had a famous Squib case, as such a result would not have been within the realm of anticipation.”

Strict Liability:
Siegler v. Kuhlman, (1973)

- Plaintiff was killed in an explosion when her car entered a pool of thousands of gallons of gasoline.
- A truck driver had been towing a tanker loaded with gasoline when he turned a corner and the trailer came loose and fell onto the road below, disgorging its contents and then bursting into flame. The appeal concerned [the res ipsa loquitur doctrine](#), in which the plaintiff argued that strict liability applied as a matter of law from all of the circumstances of the event. Gasoline is dangerous, and has an even greater potential for harm when carried as freight. The evidence as to the cause of the accident was destroyed because of the escape and explosion of the gas. Strict liability rests on the idea of rectifying a wrong and putting the burden where it should belong as regards to problems of proof. It is applied to situations involving abnormally dangerous activity. Strict liability applied in this case because gasoline transportation was a high-risk activity that created dangers that could not be eliminated by the exercise of reasonable care.

Strict Liability:
res ipsa loquitur

- Latin for "the thing speaks for itself"
- *Res ipsa loquitur* is a rebuttable presumption rebutted by showing that the event was an inevitable accident and had nothing to do with the defendant's responsibility of control or supervision.

Strict Liability:
res ipsa loquitur

- 1. A "duty" exists for a person to act "reasonably"; and
- 2. A "breach" of this duty occurs because a person [or agency, etc.] acted outside this duty, or "unreasonably"; and
- 3. There was "causation in fact"...the result would not have occurred "but for" the "breach" of this duty;
- 4. There was actual legally recognizable harm suffered by the plaintiff who did nothing wrong (i.e., no contributory nnce).

**Strict Liability:
Spano v. Perini Corp. (1969)**

- Blast destroyed a neighboring garage as well as a car located inside the garage at the time of the accident. The issue before the court was whether a person who sustained property damage caused by blasting on a nearby property could maintain an action for damages without proving that the blaster was negligent:
- "Since blasting involves a substantial risk of harm no matter the degree of care exercised, we perceive no reason for ever permitting a person who engages in such an activity to impose this risk upon nearby persons or property without assuming responsibility therefore."

**Strict Liability:
Hammontree v. Jenner, (1971)**

- Defendant drove his car into the bicycle repair shop owned by the Hammontrees. The defendant claimed that the accident had taken place during an epileptic seizure, and that he had lost control of the car. The plaintiffs rested their argument on strict liability principles. The defendant was on medication to prevent seizures and did not have any warning before the event took place. Previous case law held that negligence principles would determine liability in such circumstances. Strict liability was aimed at manufacturers, retailers and distributors of products engaged in distributing goods to the public.
- The court held that entities such as manufacturers were an integral part of the overall producing and marketing enterprise and therefore should bear the cost of injuries from defective parts as well as the profits from such endeavors. However, this policy justification could not extend to drivers, presumably because it would be too burdensome on society. Additionally, it would be inappropriate to have insurance carriers bear the cost of injuries to innocent victims on a strict liability basis.

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Damages

Contract

- Compensatory
- Nominal
- Expectation
- Liquidated
- Punitive
- Also Remedies (such as) :
 - revision
 - Specific performance

Torts

- Compensatory (special damages)
 - Lost income
 - Medical expenses
- General
 - Pain/Suffering
 - Loss of enjoyment
 - Property loss
- Punitive

Negligence- Damages

- Punitive Damages
 - Serious misconduct with malintent or callous disregard (could happen in some negligence cases)
 - Must be some compensatory to go after punitive.
 - Purpose is to punish or deter.
 - Awarded when tortfeasor creates harm from an extreme departure from reasonable conduct, some kind of antisocial mental state – something shocking.

Cannot request punitive against public entities.

Class Actions

- **Common Types of Class Actions**
- Class action lawsuits are used in many types of cases, such as
- Products liability claims, such as automobiles, health products and drugs, electronics, tobacco and building materials
- Claims related to services, such as phone, banking, cable TV and other consumer services
- Corporate and securities issues
- Employment claims, like discrimination and wage and hour law issues