Torts notes, Spring 2004. Professor Goble.

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Tuesday, April 20

Products liability: defenses

Products liability

Defenses

Taxonomy

1. Π's conduct that shifts risk to Π
   - Contributory/comparative fault
   - Misuse
   - Assumption
2. Δ's conduct that shifts risk to Π

Contributory fault

- A defense to negligence only.
- IPLRA? Changes this—see § 1405(1): changes where defect is open and obvious.

Misuse

- A defense to negligence and SLiT.
- *Duff*: court holds that Δ failed to prove misuse. Goble says this is wrong—the court of appeals was right. This is contrib., which is not a defense.
- IPLRA? Changes this—see § 1405(3): Goble says this section sounds like contrib.

Assumption

- A defense to everything probably: IW & EW (see n3p139), negligence, intentional torts, SLiT.
- IPLRA? Doesn't change anything—see § 1405(2).
- *Johnson*: three elements (¶7):
  1. Knowingly
  2. Voluntarily
  3. Unreasonable decision (¶10)

  The court acknowledges that there's always a degree of compulsion in employment situations, meaning that it's sometimes reasonable to continue working in unsafe conditions.

Wrt. warranty requirements, see pp140-141.

Δ's conduct shifting risk

Clark v. International Harvester

- No summary judgment here, court says, because there's a factual dispute as to the content of the warranty that Π received.
- Π's other arguments:
  - Exclusivity: see n1pp144-145. And see UCC § 2-719(1):
    - (a) may limit warranties
    - (b) limitation must be clearly expressed (as it was itc.)
  - Failure of purpose: see UCC § 2-719(2).
    - When has the purpose been failed? See ¶¶18-19.
    - Note that this does not require negligence —only strict liability. (How many times do you have to take the tractor back, then? You can't answer this question, Goble says. So, fault isn't required—but good faith might be relevant.)

Idaho Power

- Π's two arguments:
  1. Conflicting contract terms (UCC § 2-207). The court rejects this—there must be a direct conflict.
  2. Invalid disclaimers (under § 402A). The court rejects this—the UCC, not § 402A, governs commercial transactions. (I.e., these corporate parties should be limited to their contract remedies. The result would probably be different if a commercial end-user was involved.)

Steiner

- Π argues that the disclaimer is void as against public policy. The court says that freedom of contract is more important.
  - Except in two conditions:
    1. Obvious bargaining inequalities.
    2. Public duty.

  Note that this is express assumption of risk in tort (disclaimer in contract).

Solna Corp.

- Π's two arguments:
  1. Inadequate warnings. The court rejects this, because more information would have been of no help to the Π here. (See ¶10 for the warning requirement.)
  2. Warning adequacy should be for the jury to decide. The court rejects this, saying reasonable minds couldn't differ itc.

  This is implied assumption of risk in tort.

Thursday, April 15

Products liability: the distribution chain
Products liability: defenses

Products liability

The distribution chain

Effects of the distribution chain: Goble's inverted-T:

licensor/franchisor
component part manufacturer
assembler
wholesaler
retailer

bystander employee PURCHASER family household

Fulbright

- The problem itc. is not whether the product was defective, but whether there was a "sale," or at least something that makes this fit into strict liability products liability.
  - The formal classification of this transaction is: bailment for mutual benefit.
  - The court decides:
    1. Bailment for benefit is analogous to a lease (a bailment for hire), which is analogous to a sale.
    2. A product's container is sufficiently like a product that the container can make the "product" defective. I.e., containers are parts of the

products they contain.
- IPLRA? § 6-1402 includes bailors—but as a non-manufacturer, Δ is only liable if it had an opportunity to inspect (§ 6-1407).
  - Used-goods exclusion? We don't know for sure—IPLRA is not very artfully drafter, Goble says.

Steiner Corp.
- This is formalism at its most purest, Goble says.
- Π is a purchaser, we think; Δ is a service provider.
- There's no sale here, the court says, because all the stuff remained in the control and ownership of Δ.
- Strict liability, IWoM? No—services.
- Negligence? No independent duty (nonfeasance).

Glenn Dick
- How should courts treat exchanges in goods that are not sales?
  - Itc., should a lease be included in products liability coverage?
    - Other courts have said:
      - A lease <u>is</u> a transaction of goods.
      - A lease <u>is like</u> a transaction of goods.
      - Parts of UCC art. III should apply <u>by analogy</u> to lease transactions. Itc. court adopts this one (¶1p123).

Notice that the court does <u>not</u> follow this idea in *Steiner* (and *Steiner* was second—why doesn't the court there just apply *Glenn Dick*? It would have, if it wanted to develop a consistent body of law, Goble says).

Simplot (n1p125)
- It's not clear whether you can recover for pure economic loss under common law warranty in negligence. (If personal injury was involved here, then maybe no—but we don't know if personal injury was involved here.)

Horizontal privity

Elmore
- Would IPLRA change the result itc.? No—see § 6-1402 (4): the definition of "claimant" includes bystanders, it seems.

Defenses

Π conduct that shifts responsibility

Findlay

- The court distinguishes three potential defenses:
  1. Contributory fault (¶¶3-4):
     - Incidental carelessness.
     - Not a defense—even if it's a causal factor.
  2. Assumptioon of risk: [a defense??]
  3. Misuse: i.e., unforseeable use—this is a defense.
- Contributory fault (now comparative fault): how different is this from misuse?
  - Contrib. is not a defense to intentional torts.
  - Contrib. is a defense to fault-based torts.
  - Contrib. is not a defense to SLiT.
  - Contrib. is not a defense to SLiK (see *Hensley*, *Kassouf*).

  Does IPLRA change this? Maybe. See § 6-1405(1): no contributory defense, but there <u>is</u> a failure to inspect defense.

<u>Tuesday, April 13</u>

Products liability: the distribution chain

Products liability

The distribution chain

<u>Primary products liability theories</u>

- Negligence
- 402A
- EW
- IWoM

How to distinguish these? Look at:

- Status of the parties (e.g., § 2-318 requirements)
- Type of damages (e.g., no pure economic loss recovery in tort)
- Type of injury

- Type of defect

And remember the IPLRA

Carter

- Π is purchaser, seeking recovery for personal injury resulting from a design defect; Δ is licensor.
- Δ argues that it's not liable because it's not a seller (¶16). The court rejects this, saying this licensor is liable because it was sufficiently involved in the process to be considered a seller. Plus, it made a representation—it's name on the label.
- Applying IPLRA to this Δ:
  - § 6-1402(1): sufficiently involved (as in itc. opinion).
  - § 6-1402(2): a designer? Of the dress, or something else? Holds itself out? Well, its name is on the label.

N.b., § 6-1407(1): not all product sellers are equally liable.

Seattle First

- Π is heir of decedent, standing in his place through the wrongful death statute, seeking recovery for personal injuries as a result of a design defect; Δ is a wholesaler/importer and retailer.
- Applying IPLRA to this Δ:
  - Δs are product sellers (1402(1)).
  - Are Δs manufacturers? No—they didn't manufacture anything (but see § 1407(4)(a)).

Frericks

- Δs are a driver, manufacturer, and retailer. A design defect is involved here.
- Π v. manufacturer:
  - Negligence claim? Yes—a design defect (¶¶9,13).
  - Warranty claim? Yes—IWoM.
- Π v. retailer:
  - Negligence claim? No, unless the retailer should have known of the defect; the retailer can not be <u>presumed</u> to know of the defect.
  - Warranty claim? Yes.
  - IPLRA? No liability under § 6-1407(1) (unless the retailer had reason to know (1407(1)(a))).

N.b., does IPLRA override the UCC? See n3p127.

Hanberry

- Π is purchaser, seeking recovery as a result of a design defect;

Δs are a wholesaler/importer, retailer, and endorser (the magazine).
- Negligent misrepresentation? Yes. Source of this duty is that Δ sought to induce reliance on its seal. See Π's allegations (¶8) and Δ's argument wrt. puffing (¶9).
- Strict liability? No—only applicable to manufacturers and sellers.
- IPLRA? Does it change anything? Presumably not—see § 6-1401. Can you sue in Idaho for negligent misrepresentation? See *Duffin*.

What happens when people up in the supply chain sue <u>each other</u>?

Kelly
- Why did Π only sue the retailer here? Because the retailer has a strong incentive to settle to avoid publicity.
- Π is a retailer/purchaser, seeking recovery for pure economic loss, presumably as a result of a design defect.
- IWoM: yes existence, yes nonconforming, and yes merchant.
  - Measure of damages: amount Π paid. So the retailer can just turn around an sue up the chain—thus it has an incentive to settle for whatever it takes. (Ultimately, it will be the person who introduced the defect that will ultimately be responsible; i.e., at some point up the chain, there will be an argument about who introduced the defect.)

<u>Friday, April 9</u>

Products liability: defects

Products liability

Defects

<u>Taxonomy</u>
- Manufacturing process defects
  - These are easy—a product is defective if it's aberrational (e.g., *MacPherson*, *Escola*, *Zahn*).
- Design defects
  - A product is defective if it was as it was intended to be but should have been designed differently (e.g.,

Greenman, *Phillips*).

- Failures to include sufficient instructions or warnings

Self

- The defects: Π alleges:
    1. Manufacturing defect—weak weld. The court rejects this on causation grounds: no weld would have held.
    2. Design defect—the location of the gas tank.
- Defective design (see ¶¶5ff.):
    1. Safe alternative
    2. Knowledge of alternative
    3. Knowledge of a risk
- Δ argues that this wasn't the intended use. The court rejects this —the test isn't "intended" use, it's "forseeable" use; vehicles must be designed with crashworthiness in mind.
- Dissent: there's no safe place for the gas tank. Dissent proposes a standard—"whether, on balance, the vehicle is designed to minimize damage in the usual and forseeable mishaps." But is this really any different from the majority's standard?, Goble asks.

Buccery

- Design defect—see ¶12 (this is closer than *Self* to the ordinary consumer standard).
- So, it looks like we have different <u>kinds</u> of design defects:
    - *Self*: <u>no</u> safe place kind.
    - *Buccery*: adding something that doesn't add any risk, but makes the product safer kind.

Barker

- Δ argues that *Cronin* was limited to manufacturing defects—that it is not applicable to design defects (where, Δ argues, "unreasonably dangerous" means the same thing as "defective").
- The court finds two distinct approaches to "defective":
    1. Ordinary consumer standard (*Buccery*).
    2. Excessive preventable danger standard *ex post* (*Self*). This is really risk > benefit evaluation. It's the ex post aspect that makes this standard different than negligence (like *Phillips*).

    Negligence = foresight
    Strict liability = hindsight/presumed knowledge.

- Burden of proof: once Π has made out his prima facie case, Δ bears the risk of nonpersuasion.

- When the jury doesn't have enough information to apply the ordinary consumer standard, we will use the preventable danger standard, is what the court comes to.

O'Brien

- *Self* or *Buccery*? *Self*. A risk/utility standard is appropriate when design tradeoffs are involved.
- "State of the art": this is similar to but slightly different than custom:
    - Custom: how things <u>are</u> done.
    - SoA: how things could be done.

    SoA is not conclusive on liability—a product can still be defective even if it is the best that it can be. E.g., it could:
        - Have way, way low utility.
        - Have way, way high risk.

        The jury gets to make these determinations.

Warnings

Borel

- Seller must warn of all defects reasonably forseeable or scientifically knowable. Is this negligence? Maybe.
    - The court itc. imposes a duty on the manufacturer to be an expert and keep up with scientific advances.
- What's the difference between design and warning defects? If the product is as safe as it can be, but still poses a risk, the manufacturer must warn.

Beshada

- Is SoA a defense wrt. warnings? No.
    - Must the manufacturer know of the risk before having to warn about it? Δ itc. argues there be be no imputing of knowledge if the risk was not actually known at the time by the manufacturer.
    - The standard is: would a warning have made the product safe if the utility would be the same but the risk goes down? (See ¶¶10, 13.)
    - So, we're holding people liable for things they can't know!! This is an extension of *Phillips*.
        - N.b., liability for injuries in products liability is a market-based solution (market-based solutions run throughout

products liability, in fact).

- Best accident avoider.
- Fact-finding simplification—we don't want to require the jury to think about too much.

Thursday, April 8

Products liability: theories

Products liability

Theories

Strict liability

Strict liability for misrepresentation

Express warranty

Hauter

- Prima facie case for breach of warranty, generally:
  1. Existence of warranty.
  2. Breach.
  3. Causation.
  4. Damages.
- Existence of express warranties:
  1. Some kind of statement (a fact or a promise or an opinion)
  2. that goes from seller to buyer,
  3. and that's part of the bargain.
- Itc.:
  1. Statement? ". . . SAFE BALL . . ."
  2. To buyer? Yes—it was on the box.
  3. Part of the bargain? Yes. (Note that reliance is not part of the Π's prima facie case; it is however, and affirmative defense to show no actual reliance (see §2-313, comment 3).)

See also *Jensen* (n4p69), where the statements were the "FULL ONE YEAR WARRANTY," the advertising pamphlets, and the product manual.

- Breach of express warranties: the question is: did the product conform to the express warranty?
- Affirmative defenses itc.?
  - Privity? No, but see § 2-318—note the differences between alternatives A & B (any natural person; in the home; injured in person) and alternative C (any person (i.e., including corporations); injured (only)).

Implied warranty of merchantability

Dickerson

- Are there express warranties here? Yes—see ¶2pp70-71; but they weren't breached because the company repaired the product, as they promised, during the warranty term.
- IWoM? See § 2-314.
  1. Existence—whenever seller is a merchant of goods of the same kind.
  2. Breach—see § 2-314(2): Π must prove the product was unmerchantable (see § 2-314(2)(c) for default definition).
- Unmerchantable itc.? The court looks at two things:
  1. The contract description of the product (n.b., it can be that the express warranties are not breached but still describe the product for the purposes of IWoM analysis). The court decides the contract description is too ambiguous by itself.
  2. The parties' actions. Here, the tranny was rebuilt, meaning the

parties treated the warranty as a 90-day warranty (as was described in the contracts).

- Δ argues:
  - IWoM is limited or nonexistent itc. because the product was sold used. The court rejects this:
    - Most jurisdictions apply IWoM to used goods. (N.b., why is the court concerned with what other jurisdictions do? Because it's the Uniform Commercial Code—we want the same law everywhere.)
    - The UCC does not explicitly limit its coverage to new goods.
    - Used goods fit within the UCC's definition of "goods."
    - UCC official comments contemplate used goods.
  - IWoM itc. is superseded by the express warranties. The court rejects this under § 2-317(c): the EW and IWoM are not inconsistent here.
    - § 2-317: presumes that warranties are cumulative; if the warranties are inconsistent, § 2-316 becomes moot. (So, if you're a seller, you must disclaim IWs per § 2-316 (not § 2-317).)
    - § 2-316: modification: you must mention merchantability, and the disclaimer must be conspicuous.
  - Π didn't prove that he didn't misuse the product. The court rejects this because it sees no evidence

introduced by either party on this. (So, the court implicitly says the misuse is a defense—not part of the Π's prima facie case.)
- The product was not defective when it left Δ's control. The court rejects this because there is conflicting evidence and so this is for the jury to decide.

Implied warranty of fitness

Catania

- Existence of IWoF:
  1. Seller must know of the buyer's particular purpose and that the buyer is relying on the seller's skill (an objective standard is applied).
  2. Seller must reccommend a product.
  3. The buyer must purchase that product.
- Breach of IWoF: the question is: Did the product conform to the buyer's expectation?

Tuesday, April 6

Products liability: theories

Products liability

Theories

Review

- Fault-based theories:
  - Fraud
  - Negligence
- Strict liability theories:
  - Tort-based
    - § 402A
      - *Heaton*: ordinary consumer expectation standard.

Strict liability

Strict liability in tort

Kimwood Machine

- Π is employee of purchaser, seeking to recover for personal injuries.
- Δ is the manufacturer.
- What's the SLiT evaluative standard itc.? (See ¶7p53.)
    - "Would a reasonable person have put the product in the stream of commerce assuming (i.e., with constructive knowledge of) the risk involved?" So, this is negligence with constructive knowledge.
    - The court here argues that this test is just the flip-side of the ordinary consumer test.
    - How is this different from negligence? Again, it's different because of the constructive knowledge imposed on the seller (i.e., "the person would not have sold it <u>if they had known</u>").

Cronin

- Π is employee of purchaser, seeking recovery for personal injuries.
- Δs:
    - Δ GM is a component part manufacturer.
    - Δ Olsen is the assembler.
    - Δ Chase is the retailer.
- The Δ argues bad jury instructions—the jury should have been told that the product had to be "unreasonably dangerous." The court says it is actually <u>improper</u> to tell the jury about "unreasonably dangerous"; rather, the product need only be defective. Otherwise:
    - The SLiT standard would just be negligence.
    - Πs' proof problems would get worse (¶18).

    But does "unreasonably dangerous" actually make a difference, especially if the ordinary consumer expectation standard is used? Well, the *Cronin* and *Berkebile* courts think

so, at least.

Idaho: Π must prove four things for 402A-like SLiT:

1. Δ was a merchant wrt. the product involved.
2. When it left the Δ's hands, the product was both:
   - defective, and
   - unreasonably dangerous to people or property.
3. Causation.
4. Damages.

The ordinary consumer expectation standard is used.

Strict liability for misrepresentation

SLiT: misrepresentation (402B)

Hauter

- Π is son of purchaser, seeking recovery for personal injuries.
- Restatement § 402B elements:
  1. Chattel seller.
  2. Seller makes a:
     - misrepresentation of
     - material
     - fact.
  3. Misrepresentation goes to the public.
  4. Consumer justifiably relied on the misrepresentation.
  5. Causation.
  6. "Physical" injury (i.e., not economic loss—only personal injury and, probably, property damage).
- Itc., Δ argues that it's statement ("COMPLETELY SAFE BALL WILL NOT HIT PLAYER") was not a statement of material fact—it was only puffing. (Compare this to the puffing examples at n3p66.) The court rejects this—it says that statements about safety will, for public policy reasons, always be construed as statements of material fact.
- What is a "material" statement? A

statement that enters into the consumer's decision to purchase the product. (N.b., itc. involves a catalog purchase—in the catalog was only the puffing, not the "SAFE BALL" statement (!).)

- Did the statement itc. go to the public? Yes—it was on the outside of the box.
- Did Π rely on the statement? Δ argues:
  - Golf is dangerous, so Π's reliance isn't justifiable.
  - Π should have known the produt would be unsafe when hit "beneath the ball" like he did.

  The court rejects these:
  - The inujury here wasn't the result of golf—it was the result of the product.
  - If Π can't rely on the statement, it's illusory.
  - If Π can't rely on the statement in hitting the ball oddly, then the statement contradicts the instructions inside the box (which talk about hooks and slices).

Thursday, March 25

Products liability: theories

Products liability

Theories

The template tort prima facie case:

- Δ was required to behave in some socially-acceptable way (duty)
- Δ breached that requirement
- Π suffered injury of some kind
- There is a causal relationship between Δ's conduct and Π's injury

In products liability, the duty is give—you can't make defective products

that could cause injury. So, the question in product liability is: in what way did Δ breach that duty?

Fault-based theories

Fraud

St. Joseph Hospital

- Π is purchaser, seeking to recover for pure economic loss.
- Δs:
  - GE is a component part manufacturer.
  - The architect is somewhere to the left of the supply chain (on Goble's inverted-T products liability status plot).
- The fraud prima facie case (n2p44):
  - A representation.
  - Its falsity.
  - Its materiality.
  - Speaker must either:
    - Know the representation is false, or
    - be ignorant of the representation's truth.
  - Speaker must intend that the representation be acted on by the hearer in "the manner reasonably contemplated."
  - The hearer must be ignorant of the representation's falsity.
  - The hearer must rely on the representation's truth.
  - The hearer must have a right to rely on the representation.
  - The hearer must suffer injury, causally related.

  Fraud is a theory that courts don't like much—that's why there are all these requirements.
- Itc., what's the misrepresentation? "No flame rating." This is technically true, but it's misleading (¶14p43) because it's a half-truth, and later became a falsity (¶15p43). (N.b., there are no issues with the other fraud elements itc.)
- Was there a warranty here? Sure—there was a sale involving representations about the product.

But the warranty was that the product wasn't flame rated—so there's no breach of the warranty here.

Negligence

Zahn

- Π is a bystander, seeking to recover for personal injury.
- Δ is an assembler (and might be a manufacturer, too). Δ's duty in negligence is one of reasonable care (the general rule).
- Breach: Δ argues that, because they inspect the ashtrays, the potential of harm is low and the burden of better inspection is high. The court rejects this, saying sharp things in cars will cause injuries—i.e., the potential harm is actually high (high enough to go to a jury, at least).
- SoR: Δ argues that the injury here was too weird. The court rejects this, saying you don't have to be able to forsee the precise sequence of events to be liable in negligence.

Strict liability

Strict liability in tort (402A)

Heaton

- Π is a purchaser, seeking to recover for personal injury (probably) and for economic damage (to his truck).
- Restatement § 402A: elements of the theory:
  - Δ must be a seller engaged in the business of selling the products in question.
  - That seller must have sold a product that is:
    - Defective, and
    - Unreasonably dangerous, and
    - Reaches the purchaser substantially unchanged.
  - Causation.
  - Damages.
- What's the evaluative standard for SLiT? (See Restatement § 402A, comment g., and see itc. ¶12.)

- "Is the product more dangerous than would be contemplated by the ordinary consumer?" Contrast this with the evaluative standard in negligence—reasonable people (vs. ordinary consumers, here).

- Could Π itc. say exactly what was wrong with the wheel? No—but he's not required to say or know this. He only has to show that whatever was wrong would be unexpected by the ordinary consumer (and that' decided by a jury—so this is just like negligence, except that the evaluative standard is slightly different).

Note that Restatement § 402A strict liability is <u>not</u> the same as traditional strict liability in tort (i.e., ultrahazardous activity liability).

<u>Thursday, March 11</u>

Products liability

Products liability

The history of products liability is the story of two revolutions:

1. The end of the privity requirement (*Winterbottom* to *MacPherson*).
2. *MacPherson* onwards . . .

Henningsen

- The implied warranty of merchantability.
  - What's an "implied" warranty anyway? Isn't "express" warranty redundant? A warranty <u>is</u> a representation. "Implied warranty" is really a torts idea—society is imposing a warranty on the seller. But the IWoM is still partways in contract . . .
  - That's why the manufacturer argues that it is not in privity with actual consumers (¶21): it sold to the dealer, therefore it's only liable to the dealer.
  - The court holds against Δ here—IWoM runs with the product (¶¶26-27). Why?
    - National ad campaign (¶¶26-28): the consumer is the target, and so ought to be protected (especially since the dealer <u>wasn't</u> the target).

- Risk control (¶22).
- Loss spreading (¶22)

These last two mean that this is essentially an insurance scheme—the manufacturer becomes the insurer. It's unlikely that an accident will be catastrophic to the manufacturer, whereas it's likely that an accident will be catastrophic to Π. So, there's equity running around behind here.

- The express warranty (¶6).
  - These shouldn't be called warranties—they're disclaimers, is what they are.
  - The court expands the express warranty here somewhat: it says part of the express warranty is the national ad campaign.
  - Holding: the contract is an adhesion contract, but the court nevertheless sticks to freedom of K but strictly construes the express warranty, saying it is too vague. This is a standard game courts play to wiggle out of a contract situation like this, says Goble.
- Goble notes that this case should have been decided in tort, not contract —that way the court could leave contract alone. That is, when a contract is contrary to public policy, use tort to defeat it. (N.b., there is no difference between the manufacturer and the seller, legally.)

Greenman

- The express warranty here comes from ads, brochures, and product documentation.
- Δ argues that Π failed to give notice of the breach.
  - N.b., if notice was required, the court would have to remand, since the jury gave only a general verdict—the jury could have decided either on neligence or notice.
  - The court says that notice was not required itc. This warranty did not arise in contract.
- The court then abandons the warranty language (¶9) and moves to strict liability in tort.
- Π must prove that the manufacturer:
  - Placed an article on the market
  - knowing that it will be used without inspection for defects
  - that is defective
  - and injures a human being.

This was the second revolution; from *MacPherson* to *Greenman*—from negligence to strict liability (which is imported from contract).

What else have we been doing, besides studying products liability?

- Distinguishing torts from contract:
    - Torts is concerned with safety, ignoring quality.
    - Contract is concerned with quality.
- Identifying liability theories and their respective defenses:
    - Fraud
    - Negligence
    - Implied WoM
    - Express warranty
    - Strict liability in tort

The questions:

1. What is Π's status?
    - Purchaser
    - Bystander
        - Family member
        - Friend
        - Employee
2. What is Δ's status?
    - Component part manufacturer
    - Manufacturer (i.e., assembler)
    - Retailer
3. What's the recovery theory?
4. What kind of injury?
    - Personal injury
    - Property damage
    - Purely economic loss (recovery in contract only)

Tuesday, March 9

Products liability

Products liability

Langridge to *Torgesen*: an illustration of the changing law.

- Exceptions are added—torts intrudes into a contracts universe.
- Then *Longmeid* adds a new exception:
    - Misfeasance (no recovery) vs. in its nature dangerous (recovery).
- *Thomas*—a step away from "designed to cause injury" limitation, towards neglience.
- *Loop*—backtracks. The court here argues that *Thomas* turned out how it did because the act was criminal, and reaffirms the "designed to cause

injury" limitation.
- *Devlin*—starts forward again.
- *Torgesen*—significantly progressive. But privity is still the general rule.

The evolution here has a number of steps:

1. Privity requirement.
2. Misfeasance/inherent danger categories.
3. Courts place things in these boxes. While doing that, the courts reshuffle and readjust the categories, sometimes changing words around in order to do it.
4. *Huset*—which demonstrates the inadequacy of these rules in the modern era. The court there is stuck in the old universe.

Two dichotomies

- Privity vs. no privity
- Inherent vs. not inherent danger

MacPherson

- Both dichotomies are apparent in Cardozo's issue statement: "whether the defendant owed a duty of care and vigilance to any one but the immediate purchaser" (¶1).
- *Thomas* is used as the general rule (!!). The court takes all the cases we've studied and focuses on other parts of them—it rearranges them and finds a different pattern.
- Then the court looks to *Heaven* for a new general rule. Because its changing things, the court provides a very abstract statement of the law: ¶7p19.
- The holding (¶8):
  - The manufacturer must know that the product will be used by someone other than the immediate purchaser.
  - The manufacturer must know that the product will be used without further tests.

  If so, Π may recover. This is negligence. The exception has swallowed the rule.

Contract vs. tort:

- Contract is an allocation of risk between parties. It is consensual, and concerned with quality and representations.
- Tort is an allocation of risk by society. It is nonconsensual, nonrepresentational, and concerned with safety.

Escola

- Traynor's concurrence is the important part: he says *MacPherson* held that the manufacturer is reponsible regardless of privity (note that this is

the same technique—reinterpreting old cases—that Cardozo used in *MacPherson* itself).
    - See ¶17.
    - See ¶21: *MacPherson* is a warranty case!? Traynor wants to get out of negligence and into strict liability.
- Majority's negligence analysis:
    - A proof of breach problem—Π uses res ipsa.
        - Control? Π can establish control if it can prove proper handling after Δ delivered the bottle (that is, constructive control, like dirty baby food).
        - Type of accident? Why would a bottle explode?
            - Excess charge, or
            - Defective glass.

            The question becomes whether Δ could have discovered defective glass with reasonable inspection. The court looks to something like trade custom—it says a good test was available that was known to Δ, and so Δ's failure to use that test was negligent. This court is being generous, Goble thinks.

- Traynor wants to solve the majority's problem by going all the way to strict liability.
    - Traynor says the majority's res ipsa approach is both over- and under-inclusive (¶18).
    - Why strict liability?
        - Solves proof problems by eliminating them.
        - Public policy grounds:
            - Loss spreading
            - Manufacturer can insure the risk (consumer can't)
            - Deterrence of bad products
            - Ethics
            - Changing times
            - Manufacturer is better suited to bear the risk
    - Warranty: requires only nonconformance with the representation for recovery. Traynor wants to import warrant from contract into tort.

Tuesday, March 2

Products liability

Coffee urn quiz

- *Longmeid*: "in its nature dangerous": patent vs. latent defects.
  - The urn? No—it was a latent defect that made the urn dangerous.
- *Thomas*: "in its nature dangerous," "natural and necessary consequence" (¶5), "natural and almost inevitable consequence" (¶8), "imminent danger" (¶10).
  - The urn? No—every time you use a coffee urn its not going to explode.
- *Loop*: "in its nature dangerous," "calculated to do injury" (¶3), "natural result or the expected consequence" (¶4). The court is going backwards—it doesn't like what *Thomas* might lead to, so it establishes a line between products dangerous just as they are and products dangerous only if messed up in their manufacture.
  - The urn? Obviously no—it's a product dangerous only if messed up in manufacture.

  N.b., also in *Loop*, that the manufacturer told the purchaser about the defect.

  (Goble says that the duration of use in *Loop* probably doesn't make a difference.)
- *Devlin*: "in its nature dangerous": the defect makes the product imminently dangerous (¶4). The court isn't talking about "scaffolding" in general, its talking about this scaffolding. This collapses privity into forseeability (¶5).
  - The urn? Yes! It's a large urn, for one thing, and the people injured were forseeable users of it.

Torgesen

- ¶4: if you're manufacturing products that are either:
  - In their nature dangerous, or
  - Such that defects could make them dangerous

  then you have a duty to either:
    - Warn the potential user, or
    - Prevent harm to the potential user by using reasonable care.
- Here, privity is practically a throwaway phrase.
- What's the difference between itc. and *O'Neill* (¶5)? Knowledge—i.e.,

notice. Itc., Δ had an advertisement saying that they tested the bottles; that's a warranty—a promise. The court itc. uses the warranty idea to show notice in negligence (it doesn't use it within a contract theory).

Shifts we've seen

- From *Langridge* to *Torgesen*:
  - Hand-made to mass-produced: Δ knew about the safety of that gun to Δ didn't know about the safety of that bottle.
  - Representation directly to Π to representation didn't go directly to Π (the rise of advertising).

How should the law react to these kinds of social changes?

- Like it did in *Torgesen*, by moving the line between recovery and nonrecovery. (??)
- But see *Huset* (n4p15), an example of how courts can be blinded by the rules.

Thursday, February 26

Products liability

Products liability

- General rule: no recovery without privity.
- Exceptions:
  - Fraud (*Langridge*)
  - Public duty
  - Public nuisance

Longmeid

- Why isn't itc., as Π argues, like *Langridge*?
  - There's no fraud—no intentional misrepresentation (especially since Δ didn't know the product was faulty).
  - Thus, here, Δ's conduct was only negligent.
- Structure of the opinion:
  1. Not a fraud case.
  2. Misfeasance analogies:
     - Doctor/apothecary: assumed duty.
       - The doctor, even w/r/t a third person, is dealing directly with the inujured person. Consider *Langridge*, where Δ also "dealt" directly with the

injured person (i.e., Δ knew the gun was going to be used by the purchaser's son).
- Stagecoach owner: public duty.
- Mason: public nuisance.

The court says itc. is not like any of these.

3. "In its nature dangerous" things are an exception, but latent defects are not. The court gives no rationale—but, anyway, why? Because Δ has notice (a contract idea).

Recovery after *Longmeid*:
- Privity
- Intentional misrepresentation
- Misfeasance
  - Public duty
  - Public nuisance
  - Assumption
  - In its nature dangerous—this is the category that Πs will want to exploit, because it's ambiguous.

Thomas v. Winchester
- N.b., here the distribution chain is longer than in the earlier cases we've seen so far.
- Note the distinction between ¶5 (wagons), where the court says injury is not a natural consequence, and ¶8 (poison), where the court says injury is a natural if not inevitable consequence.
- The court redefines the old "in its nature dangerous" category, replacing it with "imminent danger." "Imminent danger" has a ring of forseeability to it, Goble says.
  - Note that nowadays, contract is all about representation and tort is all about forseeability.

Tuesday, February 24

Products liability

Products liability

- Covers a wide range of causes of action—it referes to a result, not a claim.
- There is no single prima facie case—we will in fact look at eight theories of recovery.

History of products liability:

K on privity → tort on fault → tort on strict liability

We will have two objectives:

1. Study a classic line of cases, which show how the law changes over time.
2. Study why products liability is the way it is today.

N.b., these cases track:

- The rise of unintentional torts.
- Industrialization.

Langridge

- Structure of the opinion:
    1. Contract—Π can't bring a contract action because there is no privity between Π and Δ.
        - Why does the court consider contracts first? Because it is 1837, and the court lives in a mostly contract-ruled universe.
        - N.b., unlike torts, contract allows the parties to allocate the risk of their conduct. But why should Π be bound up by other people's risk allocation??
    2. Π argues that Δ assumed a duty because of the contract. The court rejects this—it says it needn't go that far to find for the Π.
    3. The court goes with "deceit," which is now known as "intentional misrepresentation," aka fraud.
        - Fraud has a six-element prima facie case:
            - Knowing misrepresentation
            - done expecting Π to rely
            - and Π does, in fact, rely.
    4. But what about the 3d party (the father) between Δ and Π? The court says that since the 3d party was effectively Π's agent—i.e., Δ knew the father was purchasing for his son , the Π—Π may still recover.
- Note the emphasis on "representations" itc. Is that a tort idea??
- Structure redux:
    1. No contract action.
    2. Assumed duty rejected because it would lead to too much liability.
    3. Π allowed to recover on fraud for representations to an agent.

    So, the case establishes:
        - A privity requirement.

- An exception to the privity requirement.

Winterbottom

- Structure of the opinion:
  1. No contract action because no privity. N.b., ¶4 (Rolfe): the court will not allow contracts to be "ripped open" by 3d parties —the court wants to preserve the sanctity of contract.
  2. Court rejects Π's arguements:
     - No fraud.
     - No agency.

     Note the representation (contract) vs. forseeability (tort) dichotomy.
  3. Court rejects other possible arguments:
     - No public duty.
     - No public nuisance.
- The court's rationales:
  - Administrative rationale: too many actions if we "rip open" contract.
  - Justice/ethical rationale: an injustice on the Δ who had expected his liability to extend only as far as the contract.
  - Doctrinal rationale: precedent supports this decision.

Thursday, February 19

Deconstructing Fletcher v. Rylands
Strict liability

Deconstructing *Fletcher v. Rylands*

- ¶¶ 2 – 3: procedure.
- ¶¶ 4 – 6: fact statement and preliminary legal conclusions.
  - Mingling facts and law is a rhetorical device. Itc., e.g., "Δ's free from all blame," "resevoir is a latent defect."
- ¶ 7: beginning of the analysis, where the court sets out the issue.
  - sent. 1: general principles.
  - sent. 2: issue question.
  - sent. 3: two possible answers—strict liability or negligence.
  - sent. 4: more detail on the two options.
- ¶ 8: consideration of an alternative—vicarious liability.
  - This is housekeeping—it removes a secondary issue from the analysis

and reemphasizes ¶6 (personal liability).

- ¶ 9: holding and court's first argument.
  - sent. 1: holding.
  - sent. 2: introduction to two possible exceptions to the holding (defenses). Neither is here itc., so this is dicta. However, the court mentions them so as to lessen the apparent severity of the holding.
  - sent. 3: ethical/policy justification of the holding.
  - sent. 6: demonstration that the holding is supported by precedent; and a bridge to the rest of the opinion.
- ¶ 10: analogy to animals.
- ¶ 11: court distinguishes itc. from wagons, referring back to ¶ 8. This echoes the disctinction between nonfeasance and misfeasance—Π didn't <u>do</u> anything.
- ¶ 12: court ties up loose ends.

<u>Arguments in the opinion</u>:

1. Strict liability for people who bring dangerous things on their land is good social policy.
   - A problem with this, though, is that such a social policy is overinclusive. It would apply to all situations where Δ did something and Π didn't. The court attempts to solve this problem by distinguishing the wagon cases.
2. Water is more like cattle than wagons.

Cardozo on *Fletcher*: the analogies aren't precise. The persuasiveness of the opinion depends on the reader's view of the "ends of the law."

Strict liability

Dunham:

- Why strict liability in *Hay*? We don't want people using their land in ways that harm their neighbor's land. This is the same principle as in nuisance.
- Itc., the court distances itself a little from *Hay*—it talks about risk to <u>all</u> of Π's land. Also, it distinguishes direct (liability) from indirect (no liability) damage.
- Remember in *Losee*, the boiler case, there was no liability—negligence was required.

Koos: how do we distinguish activities subject to strict liability from others? Well, the legal difference between grass fires and domestic fires is one of scale. See ¶13.

Tuesday, February 17

Review of liability in tort
Rylands v. Fletcher

Review of liability in tort

Intent and negligence—predicated on fault:

- Intent: actor knows the result will occur.
- Negligence: there is an unreasonable and forseeable risk that the result will occur, and the actor proceeds anyway.

But other situations will still lead to liability. For instance, where there is a forseeable but not unreasonable risk of harm because the danger is very high but the probability of harm is low. That is, $B \geq PL$. In such a case, we hold the actor liable even if he was careful. Note that the liability decision is a cost-allocation question, rather than a fault question.

Strict liability: liability without proof of either intent or negligence.

Roadmap to upcoming classes:

1. Substantive law re: strict liability and products liability.
2. Examination of how law changes over time. Remember that the blackletter law is the least important thing you will learn here; law is less a collection of rules than a collection of possible arguments.

Rylands v. Fletcher

Is whater more like a wagon, or more like an animal?

1. Court of Exchequer: Δ wins.
   - No trespass (not direct), no nuisance (not continuous).
   - The court analogizes to the collision cases:

sample HAS property
target ISLIKE sample (the model)
target HAS property

wagons HAS (no liability without fault)
water ISLIKE wagons (itc.)
water HAS (no liability without fault)

GROUNDS (fault required) → CLAIM (no recovery for Π)

↑
WARRANT (analogy to collision cases)
↑
BACKING (wagon cases require fault)

2. Exchequer Chamber: Π wins.
   - Like O. W. Holmes said: no liability unless there is some reason to shift costs.
     - Holmes said fault is the only reason.
     - Here, there is no fault (¶6p499). (Though, note that the engineers were at fault. But the court sees no need to find vicarious liability of Δ (today, Δ would probably be held vicariously liable, though)).
   - The court states the issue in terms of duty. Two possible rules (¶7p499):
     1. "Absolute" duty (really, strick liability).
     2. Duty to take reasonable precautions (negligence).

     The court picks strict liability. Why?
     - This water is like animals (and filth and stenches) (¶¶ 9 – 10p500).
       - It is not naturally present.
       - It is not ordinarily unlawful to keep.
       - There is a small but significant probability of it getting loose.
     - This water is not like wagons: in the collision cases, the Π voluntarily assumed the risk.

     So, is the question simply one of causation? Yes, says Goble.

     Are there any defenses of justifications? Yes.
     - Π at fault.
     - Act of god.

     So, this isn't absolute liability—it's only strict liability.
   - Holding: if you bring something on your land and it escapes and causes injury, you will be subject to strict liability.
3. House of Lords: Π wins. Following Exchequer Chamber, but added the confusion of a line between natural and nonnatural things.

The *Rylands* rule:
1. If you bring something on your land
2. that could cause extraordinary (nonnatural) risk
3. and it escapes and causes harm:

then you're subject to strict liability.

Thursday, February 12

Intentional torts against property

Intentional torts against property

Intent:

(desire OR belief) + act

Each intentional tort protects a specific interest. And each has a prima facie case dictating how the invasion must come about.

Taxonomy

- Trespass: physical intrusion onto another's land.
- Nuisance

Distinguishing trespass and nuisance: trespass and nuisance describe results of conduct. The conduct itself may be either negligent, intentional, or subject to strict liability.

- Trespass protects the interest in exclusive possession.
- Nuisance protects the interst in use and enjoyment.

Martin: Π brings trespass action because of the longer statute of limitations under trespass (compared to nuisance).

- Trespass requires some direct breaking or entering.
- Δ proposes a "dimensional test" (¶6p655). The court rejects it.
- Court applies strict liability itc.: only the effect matters, not the quality of the conduct (which is relative only to determining punitve damages) (¶18p657).
- Force and energy—where's the line? This court says dimension doesn't matter. It's just possession (trespass) vs. use (nuisance). So, if the owner is dispossessed, it's a trespass.

Boomer: why no injunction here?

1. Court feels it ought not settle these "public" matters—it should leave that to the legislature, it says (¶¶4 – 7).
2. Costs (Π's) and benefits (local investment and jobs) analysis (¶¶ 8 – 9).
3. Permanent damages will spur research, the court thinks (¶23). "Yeah, right," says Goble.

Taxonomy of nuisance approaches, per Goble

- Libertarian (or property) approach: protect private property—grant injunctions; You determine the value of you own property (Calabresi & Melamed). E.g., *Whalen*, p667.
- Communist approach: balance costs and benefits to determine if there even has been an interest invaded. This is the approach in the first Restmt. E.g., *Spur Industries*, n14p675.
- Moderate (or liability) approach: Balance costs and benefits to determine what remedy is best. This is the approach in the Restmt. 2d. E.g., *Boomer*.

Tuesday, February 10

Intentional torts against persons

Intentional torts against persons

Intent: actor desires or expects the result (Restmt. 2d § 8A). E.g., *Garrat*, where Δ concedes that he moved the chair by his own volition.

- The intent standard is subjective (unlike negligence, where an objective standard is used). So, the reasonable person is irrelevant.
- The actor must desire to invade a legally protected interest of Π. Note that he needn't desire to injure anyone—he just has to have desired to invade an interest. See *Vosburg*; *White*; *Garrat*.
- "Substantial certainty": actor desires to invade the interest if he knew to a "substantial certainty" that it would be invaded. See *Garrat*, ¶11p866.

Negativing intent

- Infancy: Δ's age may impact the determination of what Δ knew. See *Garrat*, ¶13p867.
- Insanity: the majority rule is that a Δ's insanity doesn't establish a defense to liability for intentional torts (n9p871).
- Mistake: even a reasonable mistake doesn't negative intent.

Taxonomy

Note: intentional torts are old, and so each type has a specific list of elements.

- Battery: intentional touching that is either harmful or offensive, or both.
  - Emotional harm is enough.
  - Contact is required. Contact with things in close proximity to Π

is enough (see *Picard v. Barry Pontiac-Buick*).
        - Implied consent is a defense. E.g., jostling on a subway, touching on playgrounds (hypo on *Vosburg*).
- Assault: invasion of the right to be free of apprehension of imminent harmful or offensive contact.
    - Π must have perceived the imminent contact (so, if you're approached from behind, no assault).
    - Assault comes up in two contexts:
        1. Preceding battery.
        2. Failed battery.
    - Imminence: there is an assault only if Δ had the present capability to carry out the threat.
        - Ask: did Π have a basis for apprehension (e.g., Δ had only an unloaded gun, but Π didn't know that)?
        - Words alone are not enough.
    - Apprehension: this does not mean "apprehensive." Fear is not required. However, Π must have had a well-founded belief that there was imminent harmful or offensive contact.
    - It is still assault if the threat was conditioned.
- False imprisonment: invasion of the right to free movement.
    - Π must be completely confined. E.g.:
        - Physical barriers.
        - Force or threat of immediate force, directed at Π, Π's family, Π's friends, or Π's property.
        - Moral pressure is not enough (*Lopez v. Winchell's Donut House*). But note that the line between force and moral persuasion is very fine.
        - Omissions might be enough. E.g., A takes B out on a boat, telling B he'll take her back when she wants. While out, A won't take B ashore when she wants.
    - Π mujst be conscious of the confinement. E.g., there is no false imprisonment if Π was asleep throughout the entire process.
    - False arrest: arrest is completed with a touch if done with claimed legal authority.
        - False arrest cases usually turn on whether the arrest was privileged or not.
- Outrage: invasion of the right to be free of emotional injury.
    - Unlike assault, outrage doesn't require apprehension of physical contact. Words are enough. See *State Rubbish Collectors Ass'n v. Siliznoff* (ass'n coreces Π to pay dues even though he's not a member).
    - Δ's conduct must:
        - Be extreme and outrageous.
        - Cause severe emotional injury.
    - The identity of Δ may play a role. E.g., if Δ is engaged in a pulic

calling, the outrageousness requirement may be significantly less.

Π's prima facie case

1. Intent
2. Invasion of a protected interest (specific to each tort)
3. [additional elements in some torts, e.g. outrage]

Δ's case

- Privileges: excuses, justifications, defenses.
  - Consensual privileges: consent is Π's willingness for the conduct to occur.
    - An objective standard is used. E.g., rescued Π doesn't consent but doesn't object, either. Δ probably has a privilege.
    - Consent needs to go only to the invasion of the interest, not as a far as the actual result. See *Hackbert*, n3p913 (pro football injury).
    - Implied consent: e.g., jostling on a subway.
  - Nonconsensual privileges: two kinds:
    - Conditional: based on the interest to be protected.
      - Self-defense: the actor may use reasonable force to defend himself. In theory, the central idea is reciprocity. Restmt. gives two levels:
        1. Likely to cause death or serious harm.
        2. Otherwise.
      - Defense of property or other people: approximately the same as self-defense; Δ can use reasonable force to defend.
      - Necessity:
        - Public necessity: an absolute privilege. The private person bears the loss. E.g., city dynamites a house to prevent the spread of fire. See *Surocco*, n10p927.
        - Private necessity: a conditional privilege. The actor bears the loss. See *Vincent*, p923. E.g., trespass on land to save people or property (see *Ploof*, p922), or to escape.
    - Absolute: based on the status of the actor.
      - Public necessity: e.g., city dynamites a house to prevent the spread of fire. See *Surocco*, n10p927.

Finally, note that intentional torts are largely irrelevant since there is not insurance available for them, and inentional tort Δs are usually not wealthy.

Thursday, February 5

Assumption of risk

Assumption of risk

Taxonomy

- Express
- Implied, with reasonable Π
- Implied, with unreasonable Π

Issues

- Did Π assume the risk?
- If so, does comparative fault apply?

Express assumption

Dalury

- Duty: yes – so: landowner, sc: invitee.
- Π's arguments for being in tort:
    1. Ambiguous language in the express assumption. Court says no.
    2. Express assumption itc. is invalid as against public policy. The court agrees that it is invalid for four reasons – see ¶¶11-14.
- See similar cases *Lee v. Sun Valley* and *Davis v. Sun Valley*, pp 367G-368G.

Implied assumption

Reasonable Π

Murphy (The Flopper)

- Duty: yes – so: landowner, sc: invitee.
- Breach: no – the ride was no more dangerous than it appeared to be. This is like the opposite of the eggshell Π – Π takes the risk as he finds it. Note that this case can be thought of as a consent case.
- N.b., if lots of people were injured on the ride, it probably doesn't matter what the Π knew – the courts won't want to encourage such rides.

- N.b., today, *Murphy* would likely be an express assumption case – there would be an exculpatory clause on the ticket stub.

Tantillo: Is itc. distinguishable from *Murphy*? Here, Π didn't know he was going to be thrown in the air – you can't consent to a risk you don't know of.

Issue: the issue where there is implied assumption by a reasonable Π is "Was there full disclosure?"

Idaho taxonomy: in Idaho, *Murphy* would be called a case of primary implied assumption. See n3p369G.

Unreasonable Π

Davenport

- Duty: yes – so: landowner, sc: invitee.
- Breach: jury could so find.
- CiF: jury could so find (by counterfactual).
- SoR: same type of harm, so no SoR issue.

Taxonomy: express, primary implied, secondary implied (¶¶ 7-9). Itc. we have secondary implied, so the question is whether the assumption is a bar to recovery or if we use comparative fault. The court considers RI (total bar) and WV (comparative) approaches, and chooses the WV, comparative approach.

What must Δ prove to avoid liability under the court's standard?

1. Π knew the facts of the risk.
2. Π appreciated the risk.
3. Π chose to assume the risk voluntarily

Roberts v. Vaughn: whether the firefighter's rule a bar to recovery. N.b., the firefighter's rule started out under an assumption of risk rationale; increasingly, other rationale's are employed.

Tuesday, February 3

Palsgraf

Scope of responsibility review

SoR issues come up in three situations usu.:

1. Unexpected harm – the extent of harm needn't be forseeable.
2. Unexpected manner – manner of harm needn't be forseeable.
3. Unexpected type – the type of the harm does have to be forseeable, to some extent. The required forseeability falls on a continuum:

personal----------property----------economic
less forseeability----------more forseeability

Palsgraf

Duty: yes, but the beneficiary doesn't include the Π. Note that if the package was labeled "explosives," we would probably get a different result. Note, too, that Π is an invitee, right? And so Δ had a duty to disclose hidden dangers (e.g., the unstable scales), right?

Dissent: we should be talking about SoR here.

N.b., duty is usu. a question for the judge, but sometimes a court will ask the jury to decide factual questions on which duty depends. See ¶4p421.

Bowline (n3cp430): cited in *Bowline* is *Walmsley* (sp.), which Goble says may be his favorite case. *Walmsley* stands for the rule that if the type of harm is forseeable, that's enough for liability.

So, is negligence about anything other than forseeability, really?

- Duty: forseeability + risk.
- Breach: unreasonable conduct in light of forseeable risk.
- SoR: *ex post* forseeability.

Kinsman Transit (where a ship gets loose and ends up blocking the river and flooding the area)

- Duty
  - Kinsman Δ: general rule.
  - Continental Δ: general rule.
  - City Δ: statutory duty (obstructing navigable rivers requires a permit).
- Is this a *Palsgraf* case? I.e., were the Πs forseeable victims?
  - Downstream Πs: not a *Palsgraf* case. There is an argument, though, about whether the type of risk was forseeable (but,

really, damage to property was the risk type and that's what happened. We don't care that it happened by flooding rather than direct contact by the loose ship).
    - Upstream Πs: a *Palsgraf* case – loose ships don't go upstream.
- What if this happens again? That is, how forseeable does the harm have to be? Note that the result in *Kinsman* might be different if there hadn't been ice in the river when the ship broke loose (without, there might be a greater likelihood of flooding). Also, note that forseeability issues are different as between the Kinsman Δ and the Continental Δ.
- *Kinsman II*: owners of ships stuck because the river is blocked <u>can't</u> recover – their damages are purely economic.

<u>Friday, January 23</u>

Unexpected manner
Dewey
Lundy
McLaughlin

Last hour redux

Wagon Mound: forseeability is relevant to both breach and scope of responsibility. But are we talking about the <u>type</u> or the <u>extent</u> of the injury? *Leech Brain* says just the type, but this varies depending on the sort of interest that has been invaded (*Leech Brain* was a personal injury case).

Unexpected manner

Dewey v. Keller

<u>Type of risk</u>: what risk made the conduct a breach? Someone could run into your parked house. So, the harm that occurred here is of the <u>same type</u> as the risk. How does Δ have an argument then? Superceding cause.

<u>Superceding cause</u>: Δ argues that the sherriff's intervention was a superceding cause, shielding Δ from liability. The standard looks to whether the injury followed naturally and probably from the original cause (¶7p337)

Lundy v. Hazen

N.b., the duty itc. comes from statute.

Scope of responsibility: Δ argues that the mom consented, as evidenced by her acquiescence. Under the *Dewey* standard, we can certainly say here that the harm that occurred was within the negligent risk.

What standard does the *Lundy* court decide should be given to the jury? See ¶23p341: was the consent extraordinary? The court says that it is at least not extraordinary enough to find for Δ as a matter of law.

Ex post applicability: the Restatement directs us to apply the forseeability test in these cases *ex post.* Here, looking retrospectively, we see that Δ created a situation where Π had no good choice.

McLaughlin

Δ argues that the fireman's conduct was gross misconduct, and so abolves Π. The Restatement, as §445 sets a standard looking to whether the result was "highly extraordinary." Consider *Kosmos Cement*, *Addis*, and *Hines v. Morrow*.

Tuesday, January 20

Review
Scope of responsibility
Benn
Polemis
Wagon Mound I and II

Review

Limiting liability: note and remember that the causal chain is really infinite (see *Sugar Notch Borough* FRp411). So we have to limit liability (see your health insurance policy). The duty requirement is the first major liability limiting aspect of torts; scope of responsibility is the second.

The prima facie case

Duty (law-declaring; judge's job)
Breach (law-applying; jury's job, usu.)
Cause-in-fact (fact-finding; jury's job, usu.)
Scope of reponsibility (law applying; jury's job, usu.)

Injury (fact-finding; jury's job, usu.)

Scope of reponsibility

Fairness: scope of responsibility questions are questions of fairness in that they are line-drawing problems – when has Π returned to the normal course of her life?

Benn

Prima facie case

- Duty: yes. The source is the wrongful death statute, as to the Π heirs; so, we look as to the decedent, where the source of the duty is Δ's conduct – the general rule. The scope of the duty is, of course, due care under the circumstances. The beneficiaries of Δ's duty under the wrongful death statute are heirs, and the beneficiaries of Δ's alleged duty to the decedent are highway users.
- Breach: the jury could so find.
- Cause-in-fact: yes. See the medical expert's testimony (¶3p400) -- "the straw that broke the camel's back."

Scope of responsibility: what standard is applicable?

- See *Christianson* (cited in ¶7p401): we must find an unbroken sequence, without intervening causes, such that the cause in question is the "natural and proximate" cause of the results in questions. Remember *White v. UI*. See *Linder*.
- Should we use the same standard for mental conditions?? See *Steinhauser* and *Bartolone*, essentially emo. cases
- And what defenses are available w/r/t scope of reponsibility? See *Dillon* (n2p402), where Δ argues that Π would have been killed anyway. N.b., *Dillon* results in a remand; what evidence would be relevant on remand??
- What about *Pridham* and *Anaya* (n9p404), the ambulance and helicopter wreck cases? Or what about *Wagner* (n10p404), the rebroken leg case??

Polemis

Prima facie case

- Duty? Yes – general rule, due care, ship owners.
- Breach? Jury could so find.
- Cause-in-fact? Of course.

Scope of responsibility: two theories are proposed: that forseeability is relevant only to breach, and that scope of responsibility is an appropriate

concern for the purposes of limiting liability. The court chooses to go with scope of responsibility, just as in *Benn*.

Wagon Mound I

Scope of responsibility (see ¶4p406; nn9-10p411).

- The trial court: why is it relevant that oil fouled Π's slips? Because that was the risk that was forseeable, and so allows the trial court to assign all liability to Δ. The trial court's approach takes scope of responsibility out of the equation.
- Privy council reverses, contemplating three arguments:
    1. Ethical argument: see ¶8pp406-407. Δ should be responsible only for probable consequences. A counterargument would ask, is it more moral to impose the injury on the party that is completely innocent? The counter to that counter would assert that everyone benefits from being free from strict liability.
    2. Administrative argument: see ¶9p407. The court would rather not deal with a "maze of causation." Goble's proposed counterargument is that forseeability is not a maze at all.
    3. Doctrinal argument: see ¶10pp407-408.

So, what has to be forseeable under *Wagon Mound I*? Compare ¶10 – that there will be damage, only – with ¶12 – the kind of damage. What has to be forseeable under *Leech Brain* (n4p409)? *Leech Brain* develops a line between the extent of damage, which need not be forseeable, and the type of damage, which must be forseeable for liability. Is *Wagon Mound II* a change??

Scope of responsibility, redo: what has to be forseeable?

- *Polemis*: just that some damage might occur. In *Polemis*, the risk was that anything below the deck could be injured; the harm that actually occurred was of the type that made Δ's conduct a breach.
- *Wagon Mound I*: fouling of the slips was a forseeable risk for which we will impose liability, whereas burning down the ship and wharf was not.
- *Pridham* and *Anaya*: liability where (a) physical harm was forseeable and (b) that physical harm happened.

Prosser describes the "magic circle," outside of which there is no liability. The circle is large in personal injury cases, where only limited forseeability is required for liability, smaller in property damage cases, and largest in relational injury cases. Where does

liability stop in, for instance, personal injury cases? We don't know – this is why we have judges. But it stops somewhere.