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Torts I

Maynard Jackson

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BOSTON UNIVERSITY

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Class Torts I

LAW RECORD

Boston University Law Supply Shop

"ANOTHER MAPLE LEAF PRODUCT"

PROF. Schwartz

Notes: 9.13.56

("Tortus": crooked, not straight, twisted) TORT: a private wrong against the individual; and the action for this tort is brought in his own name.

Purpose: To compensate for harm or injury done to the individual.

Law: (concerned with human relations)
" " physical and emotional integrity. The law seeks to preserve the integrity of the individual.

The law of torts is concerned with: Also concerned with the interests of honor and reputation (slander, libel); of obtaining accurate information (tort of deceit); interest in integrity of contracts already made;" in domestic relations (marital, parental, & filial), e.g. breech of promise [marital], statutory rape (parental); interest of being free from annoying litigations: tort of malicious prosecution; interest in privacy (invasion of); interest in the reputation of goods + protection of property

Course chiefly concerned with: (a) Negligence (2) personal interests

Process of viewing tortious cases:

(1) Status of the actor
   a. Intention
   b. Motive
   c. Was he negligent
   d. Extra-hazardous, but not neg. NOR intentional

(2) Victim
   a. Did he assent to act of actor

Notes: 9.17.56

M

Ask these questions of tortious cases

(1) What was the intention?
(2) " " " motive?
(3) Was there negligence?
(4) " " extra-hazardous activity?
(5) Look at status of the victim.
(6) Has a victim contributed to his own loss. If so, the victim will not collect damages. [A was drunk + B was speeding + B hit A. Yet, A contributed to his own loss: contributory Negligence].
(7) Did the actor owe any duty to the victim. Tort law is not concerned with moral duty. [Buster Crabbe + Johnny Weissmueller could not be sued for not saving the drowning man].
(8) Will the imposition of liability of an actor sway + deter other indiv. from similar conduct? i.e., if an example is made of one, it will deter others from doing the same.
(9) Will the imposition of liability ~~of an actor~~ prevent one from taking the law in his own hands.
(10.) Will the imposition of liability in this case result in the shifting of loss from an inferior risk bearer to a superior risk bearer.
[Benson lives near a Standard Oil ~~tank~~ which explodes + does $10,000 worth of damage].

Torts v. Crimes: In torts, there is harm to an indiv. & the indiv. must bring suit. But, in a crime, the state assumes the role of plaintiff. Often, the same act constitutes both a tort and a crime; and, one can be prosecuted on both counts. If a victim condones the action of an actor, it does not stop subsequent litigations on the part of the state. In criminal cases, the interest of the public is at hand & championed by the state.

Both can be sued for if the case falls into the two categories.

Compensatory damages: money in compensation for damages sustained. (TORTS)

Punitive damages: a penalty on the part of the state for malicious intent on the part of the actor.

Historically, the law of crimes has precedence over the law of torts.

TORTS v. CONTRACTS: Must be distinguished due to measure of damages differing; statutory limitations differ.

Contractual duties rest upon consent.

Tort duties are imposed regardless of consent.

In the area of Restitution, either torts or contracts may be used. There may be a quasi-contractual duty to get restitution. You select the one giving most damages.

TORTS v. Labor Relations:

ASSAULT

NOTES: 9.18.56

TORTS v. Labor Relations: Congress can preempt a state regulation. It is settled by precedent that federal law precludes state law. Where there is a labor problem as against a tort problem, the federal govt. is supreme; but, if a common law tort is involved, the state court has jurisdiction.

I. De S. & wife v. W. De S.

[Under ancient common law, husband and wife were considered to be one.] The original writ contains: (1) a summary statement of the complaint (2) a command or mandatory order to sheriff who informs the defendant that he must appear in court. In early common law, the Royal Office issued all writs. This was changed in 1258 when this power was limited by jealous lords. Some writs of Trespass are:

The writ here is called Trespass Vi et Armis.

- Breaking of the Close – " Quare clausum fregit
- For goods carried away – " De bonis asportatis
- With force of arms – " Vi et armis

The Statute of Westminster restored to the King the power to issue new writs as long as they are in consimili casu (in similar cases).

Trespass v. Trespass on the Case

Trespass : lies for the intentional wrong
" on the case: lies for the negligent ". Here you must show definite harm done.

In this case, the Judge did not decide on the facts. The facts were determined by a group of men called the Inquest. This Inquest is similar to our Jury.

NOTES: 9.19.56

I. DeS. + Wife : no harm + no bodily injury. ∴, she only collected nominal damages. Compensatory damages: compensation for actual damage done. Includes:

1) Compensatory Damages

(1) Wages lost up to date of trial
(2) Impairment of earning capacity (harm might be done to some part of his body needed to do his line of work).
(3) Recovery for medical expenses (past + future)
(4) " " pain and suffering

Stress this before Jury, for much potential for damages lies here.

2) Nominal Damages

(1) Unless you show actual damages, you do not collect redress. Trivial

3) Punitive Damages

(1) To punish the defendant; not to compensate the plaintiff. Also called exemplary damages. Anytime that nominal damages are awarded, punitive damages can usually also be awarded. Also, if a case arises where there is also a crime committed and punitive damages are awarded to the Plain., then the def. can also be punished for the crime.

NOTES: 9.24.56

Actor	Character of Act	Effect on Victim
1. Intent (was there any)	1) present v. apparent ability	1) Is it an element
2. " - what is it	2) Immediacy	2.) fear
3. Malice	3) Words	3) Injury (is it necessary? - NO.)
4. Personal hostility		4) Ordinary Prudent Man
5. Indifference to insult — (3–5: motive)		5) Or something
6. To injure		
7. To frighten		
8. Or something else — (6–8: was there intent to do these)		

(1) Improper phrasing of issue.
(2) Decision not in accord

Juberville v. Savage

(1) Plea of D – "Confession + Avoidance"
(2) Issue: was the Δ justified in self-defense?
(3) Decision: for P.
(4) Is an actual assault necessary to justify self-defense?

(Key v. Gellman / Keith v Guellman) ~~Note~~: this case says no to the above question.

Crabtree v. Dawson (p. 108) – drunk + dancehall. Owner's mistake not held to be an assault.

Dicta: comments made by the Ct. to estab. a point but which are ~~[illegible]~~ NOT BINDING.

(Restatements of Rule of Law §31.) (actionable words statutes)

In Va., W.Va., + Miss., words can constitute assault

W.Va. Code Annot. (1944 § 5471) } actionable word statutes
Miss. " " (1942 § 1059) }

If the words that are used from their usual construction and lead to violence + breach of the peace, assault is construed.

Boyd v. Boyd (W.Va)

This action is treated like an action for defamation or libel or slander. The ~~truth~~ of the averment is a de-fense for tort. – Miss.: insulting words may be construed as grounds for self-defensive measures.

Thomas v. Carter (148 Miss 637), 1927 – in a given context words may very well constitute an assault.

Brooker v. Silverthorn (111 S.C. 533) 1919 – man says to operator over phone: "If I were there ...." – No defamation + no assault due to lack of immediate danger

General Rule of Law

[Words in themselves, no matter how threatening, unless accompanied by some act which would put the indiv. in definite + immediate apprehension, would not constitute an assault.

Western Tel. Co. v. Hall 25 Ala App. 540
Allen v. Hannaford [138 Wash. 423 (1926)] - intent to inject fear is assault
Newell v. Whitcher 53 Vt. 589 (1880)

Notes: 9.25.56

Bare words cannot constitute an assault. Words may throw light on the acts they preceed, or, " " negate the forthcoming act. An act may be neuter, but the accompanying words may constitute assault. Mere words must be accompanied by an act to carry the " into immediate effect in order to have an assault. There must be immediacy of threat of contact.

Stephens v. Myers

The Judge, here, charged the jury: there must be in all cases both the means of carrying the threat into effect. This is all wet, for an unloaded gun [Beach v. Hancock], tho' not capable of perpetrating harm (present harm), it has apparent ability. There must be an element of immediacy, usually a question of fact left to the jury to decide. The Judge committed non-prejudicial errors (in favor of D.), therefore the D. can't appeal. Fear nor actual injury are necessary for assault; if the P. believes the act may result in an immediate or harmful contact, unless prevented from happening by self-defensive methods or fleeing or by intervention by another.

Hypos.: (1) A points gun at B. B thinks it is unloaded. It is actually loaded. Before A can shoot, a bystander overpowers him.
(2) MacArthur: .25¢ or die. I give no quarter.

[People v. Pate 66 Cal. 366]
explosives in stove

8 Hypo: (Damon + Pythias) Damon has cough & Pythias forces cough syrup down his throat to help him. - Assault + Battery.

Notes: 10/1/56

* There must be some effect & an anticipation of fairly immediate harmful or offensive contact. And because one might be capable of warding off the contact, that does not rule out the possibility of assault (Rocky Marciano + Little Larry). There must at least be anticipation at least at the time of the action.
* The mere fact that the actor abandons his design (if all of the constituents of assault were present) does not mean there was no assault.
* In addition to anticipation, it must be clear that the contact is to be inflicted by the defendant + not a 3RD party. (Jack + Jill: x is going to blow up the house. - Assault).
* If the D. has knowledge of the P. peculiar + abnormal timidity + he intends to take advantage of it, there should be assault. If one wishes to instill fear & achieves his goal, he should not object if the P. complains because D succeeded in instilling fear. (Walter Mitty and Lecherous Larry)
* A conditional threat "if you..., I will..."
* One must use reasonable force in ejecting a trespasser.
* If there is a conditional threat, the interval of time is not sufficient to do away with the anticipation or apprehension.

**** If the D. intentionally puts P. in apprehension of a fairly immediate harmful contact, he is liable for assault, altho' he gives P. opportunity to escape the contact by obedience to a command given by the D., unless the command is one which the D. is privileged to put into effect by the infliction of a threatened contact or by the threat to

Com v. Sheppard 179 Minn. 490 (shot at dog intentionally but hit a man).

enforce the ~~same~~ threatened conduct. This is called PRIVILEGED THREAT.

Notes: 10/2/56

Conditional Threat: (differs thusly:) (1) Intent is qualified or conditional. Yet, if all of the other parts of assault are present, assault is committed.
(2) One is privileged to do certain things. Only reasonable force can be used to eject a trespasser ordinarily. You can't even threaten to use deadly force.

Trogden v. Terry
172 N.C. 540
P. in restaurant. D enters with a whip. D accuses P. of slander and asks P. to sign a statement to retract his slander. P. refuses. D. ~~says sign~~ it or else. P. sues D for assault. [It was assault: present ability.]
A defamed person cannot compel retraction even in court. Retraction is a defense mechanism for the slander to help reduce damages.

Fright is not necessary, nor personal injury. Anticipation is enough.

Intent:
(1) to injure
(2) " frighten

An intent to frighten is sufficient. You don't have to have an intent to injure.

The affect and the intent don't have to correlate (intends to injure but only frightens; still an assault).

Doctrine of transferred intent: A had unlawful intent toward B but C also is affected ∴, since A had unlawful intent, it is also transferred to C.

Notes: 10/4/56

White v. Sanders.

Assault is an intentional tort + there was no intent to assault here. Intent + motive are not synonomous. You may not have desired to inflict harm, but you may intend to do so.

A person is deemed to have intended it if:

Intent: (1) He acts with the purpose of accomplishing the result.
(2) Where a reasonable man in the D's position will know or believe that a particular result was substantially certain to follow, even tho' he doesn't desire the result.

Types of Conduct:
(1) Malice - a person will desire a result + with anger attempt to get the desired result. Punitive damages.
(2) Intentional Tort - knowing that the result is substantially certain to follow.
(3) Wanton + Reckless Tort - very appreciable risk of harm
(4) Negligence - an appreciable risk of harm, but the result is not certain to follow
(a) Gross -
(b) Ordinary -
(c) Slight -
(5) Careful murder - accidental. No liability

Summary of Assault

[I.] Actor:

To have an actionable tort you must have intent (White v. Sander) (def. of intent above). (1) If the actor intends to inflict a harmful or ~~intentional~~ offensive contact upon the ~~p~~ victim or a 3rd person. (2) If he intends to put the 3rd person or the victim in anticipation of harmful or offensive contact. Intent either harmful or offensive. It is not necessary that the Actor have or believe to have the means of perpetrating the contact. It is not necessary that the actor have personal ~~malice~~ hostility or desire to offend (Danith + Pithian). There is no need of malice or anger. If you have the required intent + all other elements, the mere fact that you have mistaken identity is immaterial.

[II.] Character of Act

Act must pose a fairly immediate threat. Must be immediate in terms of time & geography. ~~If the actor is privileged to force the command by the infliction of~~ The mere fact that the act is conditional does not necessarily mean that there is no assault if all other elements are present. Words: may throw light on the acts (State v. Crow) that may accompany or preceed.

[III.] Effect on the Victim

There is no need for physical injury, nor contact, nor fright. The effect required is anticipation of a fairly immediate harm or off. contact. Anticipation not the same as fear. The mere fact that one is sure that he can prevent the act doesn't mean there is no assault (I. De. S. & wife). The actor must himself inflict and not a 3rd party. No assault if there's no anticipation of contact with your own person & not a 3rd person. The victim may still recover even if a reasonable ~~man~~ man would not anticipate a contact. (Rest. of Torts §27). If the attempt is abandoned or frustrated ~~there~~ before the victim knows, there is no assault. If the anticip. has been created, even tho' the intent is abandoned, there is still assault. You must have:

(1) Intent
(2) Anticipation
(3) Immediacy

Notes: 10/8/56 * Intentional Infliction of Emot. Distress *
Wallace v. Shoreham Hotel Corp.

Slander - oral or spoken defamation & you must show pecuniary damages suffered.

Libel - written & must show general damage to reputation. Actionable - per se.

No need to prove special or pecuniary damages:
(1) If you tell a woman she's unchaste, you don't have to show damage.
(2) Where you impute criminality to indiv. The crime must be indictable offense & must involve infamous punishment or moral turpitude.
(3) Impute a loathsome disease.
(4) Imputations which affect one in his bus. trade, or profession.
No indictment but the information is used.

Emden v. Vitz
No cause of action for slander because there was no third party on the scene. No assault. In Wallace case, the insult is trivial; here it is more serious. Also, phy. illness accrued. D intentionally inflicted emotional distress. §312 of the Restatements is not pertinent: deals with negligence, not intentional, infliction of emotional distress. §46: conduct which is intended to cause only a mental or emot. disturb. does not subject the actor to liability. - No recovery. §47: If actor, by his tortious conduct becomes liable for an invasion of any legally protected interest, there shall be recovery. [You find the existence of a legal tort + annex emotional distress.]
§48: {common carrier intentionally inf. emot. dist., + where an innkeeper " " " , there shall be recovery, even in the absence of a legally recognized tort.
1948: §46: one who isn't privileged to do so int. inf. emot. dist is liable.

Lynch v. Knight (1861) 1 H of L Cases 577
* "Mental pain or anxiety cannot be redressed if that is the only injury done." (Lord Wensleydale)

Bartow v. Smith 149 Ohio S. 301 (1948)
D. abused P (verbally) in presence of others. P was pregnant and suffered. Demurrer: affirmed. "No right to recover to bad manners." Mental anxiety cannot be gauged or measured in $$.
Assault - protects anticipatory state of person.
Battery - protects phy. integrity of person
Defamation - protects your rep, not your state of mind.
Craker v. Wis Ry. Co.
D, in employ of ry., made propositions for indecencies + touched the woman (P). Yet, ct. granted compensatory damages of $1000.
Emden v. De Silva 293 Fed 17 (1923
Wife in bed with man + mgr. of hotel broke in door + hurled abusive lang. Jd. P, $2000.
Talcott v. Nat'l. Exhibition Co. (p. 32)
Tort of false imprisonment. Really compensated ($500) for emot. disturbance.
Hypo: A dies. B cuts up corpse (intent. mutilation of deceased body). Redress granted: relatives had a property right. Yet, ct. really comp. for intent. emot. distress.
Damages are difficult to determine. This is, yet, left up to the Jury. It is difficult to distinguish between genuine + fake claims.
Lynch v. Knight ~~no~~ more valid.

Notes: 10/9/56
* Theories against recovery:
(1) Society needs a steam valve
(2) A toughening of the hide is essential to stop the cts. from being flooded with litigation.
(3) Many insults are de minimis (trivial) + not serious enuf.
There has been a qualification: If you have a recog. tort in the case + in addition you have mental dis-

14 Bowden v Spiegel 96 Cal App 2d 93 (1950) - tele. call from creditor
Emergency.
① Chamberlain v. 3 Mason 342 (1823
② Lipman v Atlantic Shipping Co. (S.C.)
Duty v Gen. Finance Co.
273 SW2d 64 (1954

turbance, there will be compensation for the emotional disturbance. The technical tort is a peg upon which the claim of emotional disturbance is hung. Hence, we see a change in the evolutionary process of law.

The earliest intention of compensation for an indep. claim of intentional inflict. of emot. disturbance came forth under laws relative to common carriers (Chamberlain v C— 3 Mason 342 [1823]). Bleaker v. Colo. & Southern RR 50 Colo 140: there is an implied contract to be polite. (Subsequent cases don't bear this out). The com. car. relationship is deemed a special relationship ∴, the cts. will impose liability here, where in others case they might not.

Some com. car. cases have held: physical injury not necessary for recovery.

Irwin v Milligan 188 Ark 658 (1894) - someone approached a girl & the girl recovered without even mentioning the possible technical torts of assault and battery. (∴, there may be harm in asking).

Two special relationships:
(1) Common Carriers
(2) Guest - inkeeper.

Cases for bill-collectors, etc.:

Many have been held liable for abusive language where there is a serious mental disturbance yet little, altho' some, phy. effects. (Duty v. Gen. Finance Co, 1954 273 S.W.2d 64 (1954))

Johnson v. Sampson 167 Minn. 203 (1926)
Principal threatened a girl of being unchaste. She suffered emot. distress.

In 1934 §§46, 47, 48 were guides to no recovery. The trend has changed & the Restat. in 1948

"Sharing the spoils"

Revised §46. State Rubbish Collectors Assn v. Siliznoff
The rubbish collectors divided Los Angeles into zones. D. was a non-conformist + went around to all zones. D was threatened by the other members. He vomited and was emot. disturbed. Got $4000 punitive damages for intent. inflict. of emot. harm. The Ct. cites §46: there is recovery here. The ct. did not look for a technical tort. ∴ In Cal., §46 is law.

§46. (1) (as amended) one may recover for emot. disturbance; There need not be phy. illness. (This is not well supported, for there are few cases in agreement.)
(2) Trivial insults - there is no support in decisions for recovery here. (Wallace case) There must be a flagrant outburst and/or phy. illness, so the cts. hold.

Hypos -
(1) A beats up B. B's wife sees the messy condition of her husband + is emotionally upset. - Recovery?
(2) [In a state which is in a state of flux about recovery, how would you argue for it?]
(3) A knows B's wife is nervous + B is hurt at work. A carries B home + says: "Here is your husband." Wife emot. disturbed. - Recovery?

Notes: 10/11/56
Above Hypo: Can wife recover from A for emot. dist.?
Lambert v. Brewster 97 W.Va. 134 - transferred intent from husband to wife. Once you have an intent for an unlawful act, you are liable for all ensuing results.

Hill v. Kimble 76 Tex 210 - Recovery on negligent inflict. of emot. disturbance

Jepson v Jenson 49 Utah 536 (1917)

If a reasonable man were of the opinion that it was substantially certain that wife would suffer emot. disturbance, there is recovery here.

Imposition of liability in these circumstances: (one may recover)

1. Transferred intent
2. Intent. Inflict. of emot. harm
3. No desire to " , but should have known this. Negligent inflict. of harm.
4. Phillips v Dickerson - 85 Ill. 511

Neg. Inf. of emot. dist.

Hypo.: A runs over little B. B's mother sees from window + suffers emot. dist.

Courts were reluctant to compensate for only emot. harm.

Steps in your own case:

(1) "Other states recog. it."
(2) " " compensate for the same thing.
(3) Attack reasons of oppositions for no recovery.

Bases of argument for recovery for inflict. of emot. dist. (4)

(a) If the state has an "actionable words" statute, you might recover (Va., W. Va., + Miss. — Boyd v. Boyd.
(b) State might have statute which §43 could be used to recover. Ex. — Calif. Civil Code (Mont., Okla., N.D., S.D.): every person has right to be free from personal insults.
(c) Several states have justified a legal right to protection from personal inflictions on a constitutional basis.
(d) Criminal statutes have (in many states) provisions making it unlawful to use abusive lang. Under

Byrd v Jones p 46 of casebook
see p. 86 Bings case - it borrowed from criminal law

these, it is a misdemeanor. The violation of a criminal statute makes it negligent on the part of the violator. [Texas says it is criminal to restrain a person from going in one direction. ∴, Texas allows recovery for false imprison.] Often, criminal law is used (or affects) to develop tort law.

Tort law is still growing. Legislatures may pass statutes because:

Ex.: statute against abusive lang.

(1) They may want to prevent fights & deter breaches of the peace. (No tort here on emot. dist. for legis. not concerned with recovering for emot. dist.).

Wilkinson v. Downton

There seems to be a duty to tell the truth tactfully.

Assign: ~~Battery~~

Hypos: A walks dog, B kicks dog (which is on leash). — ~~Battery~~.

BATTERY

Notes: 10/15/56

Battery: the tort associated with bodily contact

Cole v. Turner

(1) The least touching of another in anger is a battery. (too broad and not much help).

(2) Consent to the necessary social contacts is assumed and implied. (pushing on the subway; Tapping someone to ~~ask~~ ask the time). (A tells B to stop asking for time; C overhears)

(3) Not only bodily is necessary, but even offensive contact can constitute battery. The act might only be offensive to the dignity.

Innes v. Wylie - not helpful
P had a right to enter the hotel; otherwise, ~~active~~ force could have been used. P could have avoided the contact. Not so in the wire across the road, the rolling pin on the steps. Can you force one to assume a risk in his line of duty. - NO!

Gibbons v. Popper
Hypo: A takes B's hand + slaps C's face with B's hand. B didn't want to do anything and it was against his will. - B committed no act (: the external manifestation of the actor's will). A will be liable because B is like a dead instrument.

Do we require a hostile intent?: [No]
Hypo: A is in a bar before exams + B trys to take A to the library to study against his will. - Battery? (Like the Damon and Pythias case). Yes. A reasonable man should have known that an offensive contact would be the result, and you are said to have intended the result if you could have anticipated it. You can have a battery even if you only intend to raise anticipation but phy. contact ~~battery~~ accidentally occurs. (Ike playing golf with Nixon).
Hypo: A is asleep. B kisses A. - Battery:
" : Casper Milktoast (bad hand) →psychologically walked down a street. A saw him + shook his ~~hat~~ hand, knowing that Casper was abnormally timid + resented shaking hands.

Assault: you must have anticipation and you are concerned with the effect on the victim + the acts of the actor.

Hypo: Adelaide Lusty gets married and has a long train. ~~Violent~~ Violent Violet steps on the train. — Battery?

Battery: not concerned necessarily with the effect. No anticipation by victim necessary.

Notes: 10/16/56
Battery : (1) Intentional tort
(2) Requires phy. contact
(3) Intent and motive not synonomous.
(4) There is intent if there is reasonable knowledge that phy. contact will result.
(5) Innes v. Wylie — passive v. active
(6) Brabazon ~~case~~ — intent to harm not necessary if harm does accrue.
(7) Intent to inflict offensive contact is enough ("dirty water" in hands).

How do we determine if a given contact is offensive?

Hypo: Dude goes to Texas. Cowboy says "Welcome Pardner," and slaps him on the back.
Hypo: A goes to ~~DAR~~ ROTARY CLUB meeting by mistake instead of D.A.R. meeting. Members slap him on back.
Hypo: Sadsack, having been in Greenland for many mos., goes to a party in N.Y. & rubs noses with all of the girls.

De Marentille v. Oliver
P. contends ~~assault and battery~~ trespass, and D says that P " assault & battery & that the Justice of the Peace had no jurisdiction. Held, to be an assault & battery and the ct. had no jurisdiction. Even though the horse was hit, P, in carriage, anticipated harm or offensive contact. Possibilities for litigation here:
(1) Assault
(2) Battery
(3) Tres. to chattel — to have this you must show a definite injury sustained by the chattel.

Hypo: A + B in jungle. A knock mosquito off of B. — Battery?

TEST: Did the D use the object he was striking as a means of conveying a contemptible attitude to the P, or did he strike the object qua object.

* The length of the extension merely lends light to the intent of the actor.

State v. ~~Crow~~ Davis

Ct. found that cutting of the rope was a means of conveying a contemptible attitude. As a reasonably prudent man, he should have known an offensiveness would result, + regardless of the intent, it is construed that D. had a harmful intent.

Vosburg v. Putney

The child himself is being sued. A parent is not responsible for the torts of its infant. You have to show negligence on the part of the parent to hold liability on the parent. If you dont sue the minor, the statute of limitations might expire.

"Once you commit a tort you take your ~~damages~~ plaintiff "as you find him." Because you cant foresee a harmful result (in a technical tort assault) is not material.

NOTES: 10/18/56 Supra, (cont'd)

NOTE: White v. Sander throwing stone at house.

① Child himself is sued. Child can be held liable for his tortious acts. The parent, per se, is not liable for the torts of its infants.
② Once you have the tech. tort you will be held liable for the extent of the injuries even if you do not forsee the consequences. "You take your P as you see him."
③ Was there an intent here? Jury said no. Yet, A+B are intentional torts. ~~Rational~~ Just because an act is illegal does not mean the intent is illegal. The Ct. is all wet here.

* Consent is a defense to battery + there was an implied consent on the part of the P. But, the Ct. ignored the doctrine of Implied Consent.

Carnes v. Thompson
Hypo: ① If there is no unlawful intent, there is no transfer since the original intent was a lawful one. (Cop, shooting at escaping felon, hits bystander; Recovery? → NO RECOVERY.

[Summary] Battery:
① An intentional tort
② It is possible to have B without A, + A sans B. (sleeping man is Battered but anticipates nothing - no A). And, A+B can be together.

Intents in B:
① To inflict harm
② " " offensive contact
③ To raise anticipation that a h or O contact will result.

If the actor intends to inflict a harm or off. contact, or an anticipation of " " " ", or to a 3rd person and the effect is a h or O cont. upon the victim, then there is Battery.

③ Intent and motive not synonomous.

④ The harm or off. cont. must be caused by an act done by a person whose liability is in question. (Gibbons v. Pepper)

⑤ You can have B if you use an extension of victim's personality. If this extension is used as a means of conveying a contempt, there is B.

{No defense to B that you made a mistake (Man mistakes Marilyn Monroe for wife and kisses her. - Battery.)

⑥ As far as B, P's state of mind not concerned (can commit B on sleeper).

⑦ Bodily contact does not have to cause harm. It is sufficient if it offensive. It is offensive if it offends a reasonable sense of personal dignity. It must be unwarranted by the soc. usages which prevail at the time + place at which contact is inflicted. (See happy guilty of B by rubbing noses). (No B on dude in Texas: the slap on back was sanctioned by time + place). Casper case ($19 Rst. of Torts expresses no opinion as to act of one who knows of peculiarities and inflicts h or O contact)!

Gonner v. Sparks
(1) Arrest and imprisonment are different.

Notes: 10/22/56

Genner v. Sparkes

Ct. held the tapping on the shoulder signifies a symbolic taking of control and that bare words cannot make an arrest. This symbolic tapping has no significance if done by anyone not having lawful authority.
Even if a demand is unlawful but you submit anyway, there is recourse for False Imprisonment.

Privilege to arrest for crimes:

I. By warrant
II. Without warrant - difficulty here
[We are concerned with liability for F. I.]

Felonies: * (1) If a fel. has in fact been committed or is about to be committed, ~~then~~ either a cop or a private citizen may arrest the person sans warrant.

* (2) An officer may arrest ~~even~~ tho' a felony has in fact not been commit. provided the cop reasonably believes that a fel. has been commit. & that the person he arrests is the felon. The cop is privileged.

* (3) A private citizen may arrest sans warrant if a fel. has in fact been commit. & if he reasonably believes the person is the felon.

* (4) An officer & cop & private citizen may arrest sans war. in case of a misdemeanor, only if there is an actual misdemeanor committed in the

presence of the officer, etc. and if it is a breach of the peace.

Situations: T.I.

① F has committed murder. Cop told of this. — Cop can arrest F. Private citizen can arrest F too.

② X went to mt. cabin + stayed for mos. Blood found in kitchen + murder is assumed. Posters put up, and a suspect picked up. — Private citizen will be liable because no actual felony was committed. Cop would not be liable. If a felony here had actually been committed, the citizen ~~could~~ would be privileged.

If the person is a suicide victim, the citizen would make an arrest assuming murder and be held liable for the citizen purports

③ A walks on street + spits. Citizen or cop arrests ~~the~~ A sans warrant. — Citizen + cop liable because there was no breach of ~~peace~~ peace

Breach of peace — a disturbance to the public order done with violence. In 38 states, it is lawful for a cop to arrest sans warrants for any misdemeanor committed in his presence even though it might NOT be a breach of the peace.

④ A yells "B stole my dime" + C →citizen sees someone run from the building. — No privilege to arrest for it was no breach of peace and the misdemeanor was not committed in his presence.

"Committed in your presence" — the offense is deemed to be CIYP if

if is made known to you by any one of your senses. Presence does not have significance with geographical distance. An arrest unlawfully initiated not bearing on any subsequent actions or arrests.

⑤ A + X fight in streets. — No privilege for cop or citizen for it may be that X was acting in self defense & where it ~~is~~ ~~reasonably~~ apparent (supposedly) that A + X were breachers of the peace.

⑥ A, plumber, lives in B's mansion for time during B's vacation. B returns one day + lunch + having lost the key, fumbles around with the door. — (Breaking + entering a misdemeanor) No privilege for either cop or citizen if the misdemeanor not actually committed.

Warrants:

⑦ Cop gets a warrant on an unsworn complaint. Cop arrests A. A not guilty. But, " not liable because the warrant was "fair on the face." Suppose the judge had no jurisdiction to issue the warrant? Cop held liable for judge signed it + thence it is not "fair on its face."

Notes: 10/23/56

With a Warrant: (a warrant must be made on a sworn complaint).

⑦ Supra, when the officer arrests pursuant to a warrant and a warrant is not valid, the cop is liable.

⑧ Hypo: Cop sees citizen slap another citizen. Cop

If there is a fleeing misdemeanant, you

cannot use deadly force to prevent the flight. You must use reasonable force. If the fleeing person whips out arms, the cop would then be privileged to use arms ~~too~~ (this is more like self-defense).

(9) Cop sees A steal $21 (grand lar. in Mass) A runs away after cop says to stop. Thus, you have a fleeing felon (a non-dangerous felon). $131 (1934) - no privilege here to use dead. force because it was a non-dang. felon. This was amended in 1948; no distinction between ~~dang. & non-dang.~~ felons. You are privileged to use dead. for. for felonies.

(10) Cop arrests A at 6 A.M. & it is a privileged arrest. Within a reason. period of time A must be brought to a magistrate to determine if there is a cause of action. But, A is held for 3 days and never brought before a mag. 6AM to 12 noon is a reasonable per. of time. Held, all of the holding of A unlawful, from 6 A.M. to his release (doctrine of trespass Ab initio: (1) Arrest must be by the law-given authority; (2) positive and affirmative acts on the part of the ~~person held~~ official (cannot be a ~~non~~ feasant).

* You have to show misfeasance to apply the doctrine of ab initio. / The technique used to eliminate liability on the officer is to have the accused sign a waiver to his rights to sue the officer in ~~tort~~.

(11) Gilbert Galacad, on way to masquerade ball, stops in café + mistakes A for an old friend. Fracas results + breach of peace. G.G. goes to dance, returns home + can't find key. G.G., dressed as a burglar with a mask on, tries to raise a window in his own home, but Sgt. Joe Friday (with a warrant for G.G. for breach of the peace and " is signed by improper mag.) sees him + arrests G.G. – Privilege?

Notes: 10/25/56

False Imprisonment

Hypo: W. Mitty grabs Marciano's collar + says "if you leave, I'll beat you to a pulp." – False Imprisonment. (§39 Restat) The mere fact that you can get away but submit + don't leave constitutes F.I.

Hypo: (1) B says to A, "if you attempt to leave the room, I'll hang you up." – F.I. ← A stays

(2) B says to A who has his child with him "if you ...., I shoot your kid." A stays. – F.I.

If the threat is not immediate, there is no F.I.

Two types of F.I.:

(1) Assault
(2) Battery

Hypo: (1) B has unloaded gun + tells A not to leave. A feels the gun is loaded + stays – F.I. (assault type)

(2) Both A + B know gun is unloaded. A stays – No F.I.

Rules of Law: The confine. may be by compulsive phys. force or by submission thereto. Not

necessary that the phy. force should be such ~~as~~ as to be overcome by a normal type of person. Your submission is enuff. [This comes about by battery.] The confine. may be by a submission to a threat to apply phy. force to victim's person or to the person of a member of victim's immed. family immed. upon the " going or attempting to go beyond the boundaries of the confinement. [This comes about by assault]

Hypo: Gun unloaded but thought by A to be loaded – F.I. (he was restrained).

Hypo: Gun loaded but thought by A to be unloaded. – F.I. (present ability to restrain A.)

Moral Coercion (Smith v. State – p.30)
Not enough to constitute F.I.
* Confines of imprisonment don't have to be stationary (Fotheringham v. Adams, p.30)

Rule of Law: The victim isn't req. to run any risk of harm to his person or chattels or of subjecting himself to any substantial liability to any 3rd person, or to take a path open to him if the circum. are such as to make it ~~harm. for~~ offensive to a reasonable sence of decency or " " " " ~~dignity~~ personal dignity.

Case of the Thorns:

Hypos: (1) Window open two ft. off ground.
(2) Clothes stolen, victim naked but doors open.
(3) Rose bushes to pass thru.

(4) Easy-to-break wall, commonly owned by neighbor
(5) Open window 1ft. off ground which is muddy.

A moment of detention is sufficient.

Notes: 10/29/56

Two types of F.I.:
(1.) Assault type
(2.) Battery "

Moral Coercion is not enough. There can be an open door and you can still be confined.

~~Hypo~~: A locks B in Room. Extra Key is ~~in~~ the room. A knows this, B does not. — There is F.I.: there is intent to confine and there is actual confinement. You don't have to have actual barriers, for apparent barriers are suffi.

Hypo: A locks up B. A knows of keys + thinks B knows of key & B did know of key but has forgotten. — F.I. Contributory neg. is no defense to an intentional tort, only in cases of neg.

False Im. is an intentional tort. You must either intend or reasonably foresee what will result. An indirect act can constitute F.I. (Hypo: A digs hole, + B fall in. A intended ~~this~~ to happen. B can't climb out. — F.I.)

Whittaker v. Sanford — there was a failure to act (non-feasance). Altho' non-feasance is not usually actionable there are situations in which non-f. is " , these situations being where there is a duty to act. There was a duty to act here due to the promise made. [There was no duty to the stowaway in the hypo

because there was no knowledge of the stowaway + no duty was owed for there was no ticket bought nor any obligation)

Weiler v. Herzfeld-Phillipson Co. (p.26)
App. Ct. was NOT right in reversing.

Notes: 10/30/56

Weiler Case (supra)

The following elements are present:

1. Door closed but unlocked
2. 3 hours in office
3. "either sign or I'll call the police"
4. "Why no; no need to leave."
5. "Sit down."
6. Refusal of use of telephone
7. dictates confession - signs.

Contention of appellate court: no f.i. for she was on Co. time and was paid therefor.

The Dillon case (contra): the employee might wish to terminate his or her employment and to restrain the employee would be F.I.

Each one of the above 7 would not constitute F.I., but if put together + presented to the jury, a reasonable man might well assume F.I. ∴, it can be said that the trial Ct. was correct and the appellate Ct. was in error. ∴, the Dillon case was correct.

① Hypo: A says to B, "Don't leave room for all of the doors are locked." B believes it altho they are really unlocked. - F.I.? Can you fraudulently imprison someone? Yes (Whitman v. Atchison, T & S Fe RR.).

Paypon v. MacComber

No false I.: no confinement if told to leave, but there is actually EXCLUSION. There is no

threat to phy. confine, but a mere threat to harm one's reputation.

Bird v. Jones.

Bleachers obstructing sidewalk. No confinement when you merely prevent someone from going in one direction. [If a car were to hit P while he was walking in the street + there was no neg. by the driver (or there could be neg.), the owner of the sidewalk obstruction could be held liable, not for F.I., but for negligence.

Hypo: a double parker is not liable for F.I. for there is only exclusion from using the case and from going in one direction.

(1951) Cal. Case: A. blocked B's driveway + threatened her by saying "Don't leave."

(1951) N.Y. Case: [Dictum held: F.I. by Double parking]

② Hypo: A lives in Mass. + B tells A not to leave Mass. B stations the "Goon squad" around the borders.

③ Hypo: A, returning on Queen Mary, is told by B not to enter U.S.A. B puts goon squad all around U.S.A. — ~~F.I.~~ Exclusion

Wood v. Cummings.

Court is confusing motive and intent. D should have known what was substantially certain to follow. The mere fact that he let P out when he asked is immaterial. There is a tort of F.I. here, and also momentary detention, but there may be a privilege on the part of P: to protect ~~[struck]~~ yourself + the property in which you have ~~[struck]~~ interest.

Hypo: "If you attempt to leave, I'll blow up your home." Is a threat to one's chattel sufficient to maintain F.I.? [Note Griffin v. Clark (p.35)]

Queries: Does one have to be conscious of confinement? (Meering Case)

Notes: 11/1/56

* Hypo: A is in room with 500 doors and 500 people close the doors. – Who of the 500 people is guilty?
  (1) The first one?
  (2) " last "?
  (3) All of them?
  To try 500 doors is an odious task. After he tries 20 doors, he feels imprisoned. Are those 20 guilty or are the other 480?

Can you commit the tort of F.I. by threatening one's property? [Griffin v. Clark] In order for a gratuitous guest in a car to recover for damages, gross neg. must be shown. But, P alleged she was not a gratuitous guest for she was detained. This case does not answer affirm. the above ??. If A feels confined by a threat to his chattel, there is F.I. [Rest. backs by path. F.I. because harm to his clothes (chattels) might accrue.]

MEERING v. GRAHAME-WHITE AVIATION CO.

Query: Can one be F.I. without his knowledge?
Three judges here differed:
(1) F.I. from time guards came to house
(2) " " " " the P. was in court
(3) F.I. even tho' no knowledge thereof.

Hypo: Goon squad will shoot A if she leaves home. A never receives telegram. – F.I.?

Hypo: A is bound + locked up while sleep. B unbinds him + opens the door before A wakes up. – F.I.?

[55 Columbia L.R. 67, 1955 – PROSSER]

Note: Restat. of Torts – §42

Prima Facie Tort – a wrong (or tort) which is not classified in one of the existing torts.

The mother in the Herring case could have sued for Trespass Quo Servitium (deprivation of services) for detaining her child without the child knowing of the F.I.

Tort of * Malicious Prosecution *

1. **Malicious prosecution**: [Elements]
   1. Criminal proceeding was instituted by P against D.
   2. " " must terminate in favor of accused
   3. Absence of probable cause for commencement of criminal proceeding.
   4. There must be malice or ill will on part of the one bringing the crim. " proceeding.

This tort is mainly found in criminal ".
Melvin v. Pence (p. 902)
Tort will be even tho' there may be NO criminal proceeding.
Hypo: A owes B some money. (B can attach A's property). B can afford to wait + loot is $101,000 where the debt is $10,000. A is supposed to be in a race against B; so, B attaches A's [illegible] to stop A entering the race. — The tort of abuse of process (attachment)..
Abuse of Process (Tort of)
Using a legal process for a wrongful purpose. A plaintiff has only to show a use of process for a purpose for which it was not intended.

Notes: 11/2/56
Tort of Malicious Prosecution
① This tort is strict to protect the interest of the informer + the public in general.
② Also, there is a tendency to protect the person accused from unnecessary + malicious proceedings.
Thus, the tort cannot be had unless the four elements are satisfied. ~~This tort deals~~
* Tort of Abuse of Process *
The use of a legal " for a ~~the~~ purpose for which it was not intended. No necessity for showing lack of probable cause. In either civ. or crim. You

don't have to show the commencement of crim. proceedings. In given situations, these two torts overlap.

Hypo: A calls cops, swears that B committed a crime. B was found not guilty. – Is A bound by the verdict?

In a crim. case – proof beyond a reason. doubt.
" " civil " – a reasonable preponderance of proof.

The tort of M.P. is a civil tort and therefore because B was found guilty would not bind A + make him liable because, since M.P. is a civil tort, only a reason. prepon. of evidence is required.

* Trespass to Land (Q.C.F.) *

(1) Tres. QCF consists of an unauth. entry of a person or a tangible obj onto the land in poss of P or in remaining upon it or allowing a tang obj where there is a duty of removal.

(2.) The early cases impose liab for every direct entry even tho' there was no intent or neg. (Case of the Thorns, p. 133). Liability sans fault. [The old view.] [Mod. view: must either show intent, neg., or extrahazardous activity.] Mod. cases hold that even tho entry was direct, you must have one of the three.

(3) As far as early com. law (indirect entries), you had to prove either intent or neg.

Hypo: Const. Co blasting near Farmer Brown's farm + the concussions cause "you know what" to happen to the chickens. Farmer B. sued. – No recovery without int., neg., or ex haz act. where there is indirect entry.

(4.) To maintain an action in Tres. QCF, the P must have poss. (actual or const.)

(5.) Jus Tertii – A cannot assert B's rights as against C. The person who has bare poss can sue.

Hypo: Tenant for 5 yrs on land. B tres. The tenant can sue B on tres. QCF. The landlord cont. But, if dams. are done, Landlord can sue on the case for dams. against his reversion (land coming back).

Hypo: T wrongfully dispossesses A. When T first came on land, he had to tres. But T is now in poss. ∴, A cannot sue for tres. Q.C.F. but has remedy in ejectment and mesne profits.

Smith v. Stone

Should have made a neg. plea.

Hypo: Goon squads calls A at home: "If you come down to the corner, we'll take you and put you on B's property."

Gilbert v. Stone

By threats, D goes on to P's property. — Trespass. D did the act on his own — moral coercion is no excuse.

If there are dire circumstances (threat to life, snow storm) you are privileged to tech. commit tres. QCF but will not be held liable, unless you do damage to the property. Stone did damage to the property.

Once you have a tres., you are liable for all dams. no matter how unforseeable (case on p. 414) → Brackett v. Bellows Falls Hydro-Electric Corp.

Notes: 11/6/56

No trespass where there is no act on your part, no external manifestation.

Gilbert v. Stone

Threats and moral coercion. There is trespass for the making of the choice is an external manifes. of D's will. (If he had committed no damage to the property while tres. QCF, there is actually a tres.,

Guile v Swan 19 Johnson 381
1 Greenbag 29

but it is privileged. Since there are no actual damages, he doesn't have to pay nominal " ". Also, once you are a tress., you are liable for all damages, whether or not they are forseeable [Hypo: A comes in house from snowstorm and flips cigarette in fireplace where TNT is].
Hypo: A dams up water → floods → recedes → water chucks attracted → owner trips on hole of waterchuck.

Gilbert v. Stone

Remedies:

tort
(1) Assault
(2) Battery
(3) False Imprisonment
(4) Emotional Distress

contract theory
(5) Possible restitution against the 12 men if you have to pay

You might waive the tort + sue in assumpsit (the last remedy).

Dougherty v. Stepp

Actual boundaries and enclosures are unnecessary. You only need an intent to enter. You may be ignorant of committing the tort.
(1) No necessity of harm to commit the tort
(2) No necessity to have the land enclosed.
Unless your entry is privileged, you will be liable for nom. dams., whether or not there are actual damages.

Gregory v. Piper

An intrusion against a structure est sufc to have an action in tress. Q.C.F.
Hypo: A sets up spotlight to shine over on B's house. — No tress. QCF for you need tangible objects to effect the trespass.

* Tort of Nuisance *

The unreasonable interference with the use and enjoyment of one's property. This differs from trespass because:
(1.) " concerned with interference with one's right to the property.
(2.) Nuisance concerned with inter. with use + enjoyment.

NOTES: 11/8/56

U.S. v. Holmes (Fed Cases) 1 Wald. 1 (1842)
(Regina v. Dudley 14 Q.B.D. 373(?)) Tried to get Pres. Tyler to grant a clemency but the Judge did not concur. Later, the sentence was remitted).

If you cast an intangible object on someone's land, you have to implead for nuisance.

Milton v. Puffer

Two adjoining pieces of land. B builds a building which causes the stones beneath to cross the line & project irregularly. D inherits B's property. P sues D (P also inherited his land). Can you assign causes of action? Generally, no. But, what you have here is a continuing trespass, for the tres contd. after P got his land. Accordingly the P owned all of the way down.

Remedies:
(1) Mandatory Injunction - to make D remove the stones.
(2) Punitive (88) damages.

Technically, one can sue only for tres. up to time when action accrues.

Tres. an interference with property, not use and enjoyment (the latter is nuisance). There is a tres. if there is a duty of removal.

Edwards v. Lee's Adm'r, 1936 (p. 43)
Allowed the suit to lie in accounting

and granted P ½ of the profits of the cave, (An unjust decision) Edwards v. Sims 232 Ky 791 agreed on this point.

Boringer v. Montalto 142 Misc. Reps. 254 N.Y.S.

N.Y. sewer commission condemned the building of sewers below 150 ft. Held, that to build below 150 ft. would not present an incumberance. This limited the use of property to the depth of effective use or the zone of effective possession (this will vary with the situation).

Hyde v. Somerset Air Service, 1948 (p. 44)

5 theories:

(1.) One owns the air space all of the way up [Coke. Rejected today]

(2.) Rule of Effective Poss. - the owner owns as much as is essential to the complete use & enjoyment of the land.

Smith 270 Mass. 530

Zone includes the area you can use in the future.

(3.) Only that air space which is actually used and a small area immediately adjacent thereto.

(4.) A theory of nuisance. - Do these flights constitute an unreason. inter. with the use & enjoyment of the land.

(5.) (§194 Rst. of Torts. 22 states in accord here) All up & all down, but there are privileges of travel by flight. Will be privileged if:

(a.) The flight is for legal purposes.

(b.) " " must be conducted in a reasonable manner.

(C.) There is no unreason. inter. with the

use and enjoyment of the property.
(d.) You must have conformed with all applicable statutes + regulations of the admin. agencies (CAB, etc.)
The owner of the property, according to the first 4 theories, has the burden of proof. But, by the Rest., the D. has " " ".
According to the tort of nuisance, one flight may be not enough to implead. You may have to show a continuous inter. with use + enjoyment of the prop.
[Mass. adapts the theory of effective poss.]
* 6 Carpenters Case - trespass ab initio
A owns tavern + all are welcome. 6 strangers order wine and bread + don't pay. - Could have brough an action of debt, but a "sum certain" must be ascertained. + Tres. AB INITIO (tres from the very beginning). But there was pure non fesance on D's' parts, + a tres. ab initio requires misfesance.
Hypo: P invites D over to his house at 6 P.M. At 9 P.M., D breaks chair in anger. - tres. from 6 P.M or at 9?
Hypo: A goes in tavern and at 9 P.M. (3 hrs. later) the owner says he is closing. B refuses to leave. - Tres. A I?

Notes: 11/11/56
6 Carpenter's Case
Ordered wine + bread. Sat quietly. Possibilities:
(1.) Contractual basis - at that time debt was the only one + you must have shown a sum certain owed.
(2.) Trespass QCF - you might contend there was an entry pursuant to a lawful

right. But to have a trespass AB INITIO (6 PM to 9 P.M.), there must be ~~misfeasance~~ misfeasance.

Doctrine of Tres. AB INITIO:

Hypo: B, invited over to A's house, breaks furniture, etc. It is tres. from 9 P.M. because it was an invitation by an indiv. or private person, not pursuant to a law given right. [The innkeeper has no discretion as to who may enter but the private party should know what you are apt to do.]

Hypo: You sit down in the tavern & at 9 P.M you go behind the counter where you are not allowed. When does the tres. begin?

Hypo: Inn closes at 9 P.M. but A refuses to go. - Trespass?

Comparison of Rules of Law & Public Opinion

1. To deter from this type of social conduct

① Hypo: Black hurls boulder at a house wherein reside White & Miss Lovely (newlyweds). This is a trespass Q.C.F. But, Black does ~~not~~ have to pay for the damage to the house. And this serves as a deterrent to following situations (Reasons for imposition of liability).

2. To prevent unjust enrichment

② Hypo: A owns Filthyacre. B, honestly & reasonably believes he is on his own property, cuts timber & carries it off. - In order to prevent unjust enrichment, B should reimburse A either by pecuniary compensation or in rem.

3.

③ Hypo: A & B have adjoining lots on a disputed strip of land. B walked on the dirt only for 6 secs. Liability for tres. Q.C.F. might lie to decide who owns the strip (the Gaza strip) or to prevent B from estab. adverse poss. by "continuous" walking (Prescriptive rights).

(4) A [construction co.] blasts in building a canal & boulders go onto Farmer Brown's prop. — Tres. QCF? [A was as careful as careful could be].

1. The loss should be shifted from an inferior risk bearer to a superior risk bearer. [Farmer is a member of an inferior class & Mammoth construction Co. is a member of a superior Class, esp. due to insurance premiums.]

(5) A owns tree, one branch of which is over B's skylight, looking as tho' it might break any minute. B informs A & A is as careful as careful could be & used guide wires, etc. But the branch falls thru anyway. (Kant Realty v. Brown, 189 N.Y.S. - no liability)

Conversion:

Hypo: A has wine bottle & ½ full. B pours water in. How much has he converted?

Notes: 11/15/56

I. Conversion: the lineal descendant of the old Eng. action of trover. The first forms of action: tres. → tres. on the case → DETINUE (where someone got rightful poss. of goods but wrongfully withheld them) (would not lie where poss. is returned but the form of the chattel is drastically changed.) (In Detinue, wager of law was a form of sworn perjury) → trover.

* TROVER: 5 essential allegations:

(1) P would allege he was poss. of the goods in ?? or had a right to immediate poss.

(2) He (P) casually lost the goods.

(3) D found the goods

(4) D refused to return the goods.
(5) D was guilty of conversion to his own use.
The most T.I. allegations were 1 and 5.
An intangible right cannot be the subject of an action in conversion. (McKay v. Ben Franklin Bank)
Hypo: A owns restaurant & B opens a restaurant using same name as A's restarant. — No conversion.
Same with a debt or account. A special instrument may be an object of an intangible right, though, even if the intangible right is not able of conversion. (Hemick v. H. Hardware Co. 73 Neb. 809 (1905))
Hypo: A co., investors, sell B some stock but refuse to put B's name on the books, yet, giving the stock slips to B. — Conversion; because B won't get dividends if his name is not on the books.
Hypo: A owns timber, B cuts it & carries it away. — Conversion. Even tho' realty cannot be larcenable, and poss. does not have to be shown, to show a RIGHT to poss. is sufficient.

Jaslow v. Kroenert (p. 48)
(1) Goods placed in storage
(2) D never claimed ownership
(3) " " used the chattels.
(4) P. " made a demand for the chattels
(5) 1½ mos. in storage
(6) ~~When asked for~~ D said "Take them" in a letter.
No conversion here. But there could have been tres. DBA.
* Where you have the destruction or severe alteration of a chattel, there is conversion. A material alteration of the chattel is sufficient.
Hypo: Wine mixed with water. — Conversion. — Conversion of a part is con. of the whole.
Hypo: A takes the cream off of the top of the milk.

New York Cen. RR. Co. v. Rubber Co. (1938) 2nd App.
Ct. held a con. of only the parts of a machine since the parts could easily be replaced.

Hypo: A studys torts notes. B. steals 3 pages. — Con. of the part or of the whole?

Hypo: A steals B's grain + mixes it with his own grain. B can't tell which is his own.
(11 Wash. 283 (1920))

Hypo: Mutt + Jeff have identical Cadillacs + park them in front of the law school. Mutt gets in Jeff's car by mistake, discovers the mistake, + gets out. Jeff sees this + accuses Mutt of Conversion. — There is a conversion.

[CONVERSION: a serious inter. with POSS.]

Mutt intended to assert dominion.

Hypo: A has horse. B, standing far away, shoots + kills the horse. A stays on horse + B never comes closer. — NO CON. No inter. with poss.

Hypo: A, little girl, sits on Rover, B's dog. — "You bring trover for Rover."

Notes: 11/19/56

Conversion

An assertion of ownership creates a serious interference with poss. and therefore, there is Conversion.

Hypo: A, riding his horse, sees B. B shoots the horse (off from a distance) but A stays on even after the horse falls. — No con., 'cause ~~not~~ no inter. with poss.

Hypo: L sells you a horse. L is a lunatic. You have purchased it + asserted ~~the~~ poss. — The sale was voidable and there was no conversion. ~~But~~, if L's estate called for the return of the horse and the purchaser refused, there is then con.

Laverty v. Snethen

There is conversion where an agent breaches a contract or fails to adhere to the instructions of the principal.

Hypo: A, agent of B, is told to sell horse for $100. A sells it for $50. – A liable for $50 to B. You are not liable for the whole horse here, but for the difference between the instructed selling price and the actual selling price. – Not liable for conversion, but for breach of contract and is liable on the contract theory.

Wheelock v. Wheelwright

When you deviate from the terms of the bailment you are deemed a converter. – The more mod. pt. of view is that you must have a material deviation for con. And if you have a slight deviation, you are liable under the contract theory and you are an insurer for the chattel during the deviation, and you are liable, for any dam. that results during the deviation and because of the deviation.

(1.) (a) Once there is a slight dev. & no dam. results, you are only liable under the cont. theory.
(b) Slight dev. with dams., makes you liable for you are an insurer.
(2.) Mat. dev. results in conversion.

Where one says specifically not to do something and another to whom the command was directed does it anyway, there is conversion.

If B^ee achieves poss. lawfully & B^or demands the

return of the chattel when they should be returned and B^ee refuses to return, there is con.

Diff. between refusal to return and failure to return, and in a failure to return (even if due to his own neg.), there is no conversion and an action in trover would not lie.

Notes: 11/20/56 [Yesterday, Don Newcombe aquitted in crim. suit, but immediately slapped with a #25,000 civil suit in tort]

Bailee made a converter where a demand for return of the chattels and refusal are present.

1) Hypo: A is in biz of delivering goods for Jordan Marsh. B purchases goods. Marsh tells A to deliver to B; A mistakingly delivers to C. — Conversion to be had by an innocent misdelivery.

2) Hypo: A owns cars. T steals it. T stores it in G garage. (G a bailee). A comes + claims car; G refuses saying car belongs to T. — No conversion (Alexander case, p.55). This is a qualified refusal to return and ∴, no conv. If he delivered it to wrong person, it would be conv., for an innocent misdelivery is a conv.

3) Hypo: X parks car in G garage. X gets drunk + returns for car. Owner of " " refuses, knowing X is drunk. — No conv., for this is a qual. refusal due to fact that X might injure owner or owner's chattels or X himself.

[NOTE: In hypo #2, the G garage may interplead + let the ct. decide which (between A+T) is the rightful owner.]

Thurston et al. v. Blanchard

S sells chattel to B, B making fraudulent reps. Other remedies:

① Some type of larceny (maybe by false pretenses).
② Tort of deceit (i.e., misrep.)

③ (In Ct. of Equity) seek rescision ("I rescind since the car is still in one piece"). To get the title back.
④ In replevin (in rem)

Hypo: S sells to B for $100; B sells to X for $200.
⑤ S could sue above for $200 for "money had and rec'd."
⑥ Self-help - under certain circums. where the vendee used fraud.

* Here, B got legal title from S. But, it was a voidable title, ∴, S can say, "I'm calling the trans. off and I want my title to car back." This is rescision.
B sells it to C (a BFP - one who buys it in good faith & without knowledge of fraud). S wants chattel back. In terms of equity, S & C have equal claims. C has legal title. The equities between S & C are equal, and C has legal title, so C gets to keep the chattel.

Rule of law: The Bona Fide purchaser for value without notice of legal title cuts out all equities.

Hypo: S → B → C, but C has notice of fraud. - S against C would win, for S has equities, and C has only bare title.

Hypo: S → B. B gives it to C. - S v. C & S recovers.

Hypo: S → B → BFP → X (paid BFP $100 and knew of fraud).
— S v. X: X wins for we are really protecting BFP. In order to protect BFP, X is protected (Doctrine of Shelter), for BFP would not be able to dispose of the chattel when fraud made public by S.

Hypo: S → B → BFP → Y ($100, knew of & participated in fraud).
S v. Y — S wins. Doctrine of Shelter not applicable for Y was a participant & the chances of BFP selling the chattel are not hurt much at all.

Hypo: ① A sells oranges by crates. B comes in and says he is farmer Brown & asks for some crates on credit. B not

A voidable title passes to the person standing in front of him. BFP wins against A.

actually Farmer Brown. B later sells to a BFP.

② A ~~writes to~~ receives letter from B, says to send 10 crates to Farmer Brown in New Jersey. A does so. Farmer Brown says he didn't order them + then B comes up + says "We sent them to you by mistake." Then B gets the crates of oranges, sells them to BFP. — A wins, because A dealt by correspondence and intended to sell to Farmer Brown + trans. the title to the person by that name, not to B. In ①, A trans. title to B, the person standing up before him (A).

Notes: 11/26/56
Thurston v. Blanchard
S — B
S has an Equitable Title and because B has a voidable title, S could bring a case in equity and get a bill of Recision (get back the legal title from B). B could be held liable for tortious conduct due to the fraud used. A BFP would get the legal title from B and would equitably keep it as against S.
① If "BFP" had notice of fraud, S would prevail.
② " " participated in the ", " " " .

Hypo: O ~~~~ bails ~~~~ to B^ee. B^ee — BFP, — BFP$_2$ — BFP$_3$. B^ee was for term + before terms of bailment were up, O sues BFP$_3$. O prevails because B^ee had no legal title, not even a voidable. BFP$_3$ liable as a converter and even if no demand is made for the return. ~~~~ [N.Y. + Indiana exceptions: there must be a demand + refusal].

Dorion v. McClure
There must be a demand made for the return of the Chattels before action would lie. Stat. of Lims. did not begin until the demand was made.

In above hypo, O could get 4 judgments, but only 1 re-

covery. Under Un. Sales Act (§ 13 + 14) there are certain warranties which are deemed implied + one of these is an implied warranty of title. ∴, BFP_3 would have remedy against BFP_2 for breach of implied warranty of title, + this would go all of the way.

In Ind. + N.Y., however, a dem. + ref. would not be necessary if a dem + ref would be futile. (e.g., BFP_3 knows of all the facts + voluntarily ref. ∴, a dem. + ref. are now unnecessary).

Hypo: T, thief, steals from O, + sells to BFP. — O prevails as against BFP.

Hypo: F says he is farmer Brown in letter. O sells to farmer Brown. — F. has no title at all. BFP deemed a converter.

* Can a BFP ever get a better legal title or create a title out of a vacuum? Yes. [Exception #1:

(1) Hypo: A gives bailment for term of truck to B. A lets B put B's name on truck. B sells to BFP. — By allowing B to go around with his name on the truck, A represented to the world that B owned the truck. ∴, BFP would prevail as against A. Indicia of ownership (name on truck).

[Poss. plus] Estoppel applies here

Hypo: Bailor gives Torts casebook to Bailee. Bee sells to a freshman in law school (Bor standing right there), a BFP sans notice. — BFP prevails because there is an added factor here due to failure of Bor to act. Bor should have spoken up.

(2) Doctrine of Market Overt — (exception #2) if the exchange of goods takes place in a MO, the B.F.P. is protected. Not applicable here in U.S.A.

(3) Doctrine of Neg. Instruments

Hypo: A endorses a check in blank (making it neg. + unnecessary for further endorsement) + bails it to Bee. Bee sells to a holder in due course (BFP). —

The holder in due course prevails. Otherwise, negotiability of neg. instruments would be impaired. Under some states, stocks (endorsed in blank) are considered to be negotiable.

(4) Exception under Factor's Act
Hypo: [pledge - a security instrument] factors sells to BFP. factor has no title at all. — BFP wins.

November 27, 1956

To maintain action for bailment, all that's needed to be shown is a RIGHT TO POSS.

Hypo: O gives property to B^ee for term. Thief takes car from B^ee - Can B^or sue B^ee? NO. Only B^ee can maintain action. [If term is for 1 yr. and car stolen 6 mos. after start of bailment, O can't maintain action until 6 more mos. afterwards.] [This rule severely criticized by Prof. Warren in Harvard L. Rev.] Rule today is still that only B^ee can recover from the thief & if B^ee mishandles the suit, B^or can't later sue T.

Hypo: O owns prop. & is in poss. T_1 steals it from O, & T_2 steals from T_1. — T_1 can sue T_2 for conversion, for only poss. need be shown & title need not be shown.

Hypo: Simon Legree estab. den of iniquity in mts. T steals illegal slot machine. - Can Simon Legree sue T for conversion?

Pg. 58 Stephens v. Elwall
Ques. raised: what is the tort liability of an innocent agent? An agent will be liable for a conversion even tho' his part in the transaction is a very minor one. But, the modern view is set out in the Rest. of Torts, sec. 231: "If an agent

plays a minor, insignificant role in transaction, then he is NOT A converter. If an agent plays a major role in the transaction, then agent is a converter.

Hypo: O owns car & T steals it from O. (Car parked in G garage). 1 wk. later, T returns, and G gives car to T. – Is G a converter? NO. – G not making the situation any worse.

Parked by T

Hypo: T calls G and tells G to deliver car to 3rd person.

How is pledgee treated? As purchaser or as a bailee? If pledgee transfers goods, he's treated as a bailee & is not a converter (old point of view).

Modern " " " : a pledgee should be treated as a purchaser.

Hypo: O owns prop. & needs $. O borrows $800 from pledgee, giving his $1000 auto as security for the loan. Pee gives O $800. Then Pee needs $ also & sees P^{ee}_2 & borrows $800 on O's car. Pee, is substituting ~~himself~~ P^{ee}_2 for himself. ← assignment

But, where Pee re-pledges it for a greater amount (e.g., $900), he is intermeddling with the prop. of another & is deemed a converter.

Hypo: A steals stocks worth $100 on Jan 1 & owner discovers loss on Feb. 1 & stocks then worth $200.

Notes: 11/29/56

Remedies for Conversion:

(1) The market value of the chattel

Hypo: On (1) Jan, stock is stolen & is then worth $100
" (2) Feb, " " worth $200 - discovery of con.
(3) June, " " " $400 - action commenced
(4) Aug, " " " $50 - still waiting to get in Ct.
(5) Dec, " " " $500 - action in ct.

Pts. of View:

(1) Mass. rule - [$100] P allowed to recover market val. at time of con. Alternative is suit for $ had & rec'd. Waive the tort & sue in assumpsit.

(2) Eng. & Penn. Rule - [$500] P can recover the highest itermediate value between date of con. & time of trial ($500). You must start your action with reasonable diligence to get the advantage of the top inter. value.

(3) Iowa Rule - P recovers top inter. val. from con. to date of con. (66 Iowa 116)

(4) Old N.Y. Rule - (in 1/3 of states) P recovers top replacement val. The top mar. val. tween time of con. & a reas. time in which he could have replaced the goods on the market. The Highest Replacement Val. Rule. An attempt to make a compromise.

(5) New N.Y. Rule - the time for replacement begins to run only when P discovers con. (In re Salmon Reed Co. Case)

Hypo: Mutt & Jeff hypo. Jeff owns car.
If A con. B's goods & B get the goods back there is still con., but the fact that " prop. was

returned will mitigate the damages.
* If A is willing but B refuses to accept it back, the D cannot force the goods back on P + try to mitigate dams (the weight of authority)

DAMS: FULL VAL. OF THE CHATTELS.

* D may force it back in mitigation of dams (Eng. + some states)
1. If Con. is innocent
2. No dams.
3. No special dams. resulting from detention
The above depends on the sound discretion of the ct. Sect. 247 (Rest. of Torts) agrees here.

[COMPLETION OF INTENTIONAL TORTS]

*Unintentional Torts UNINTENTIONAL TORTS

Defenses: (Based up
1. Capacity of parties (infants, etc)
2. Self-defense
3. Protection of per. prop.
4. " " dire immediacy (-howling blizzard)

I. Capacity -
As a gen. rule, infancy is not def. against tort liability. Because parents tell infant, the infant is still liable (+ parent may be liable also). Exceptions:
1. In many torts, the state of mind of the actor is T.I. Kid may be incapable of forming a deceptive mind. In terms of neg., we make allowances for an infant's indiv. differences. Not so with adults.
2. Master - servant relationship. If an infant is a master, he can disaffirm his contract with the servant.

Hypo: 16 yr. old contracts to take B to Canada in 16 yr. old's car. Accident on the way. Can kid

disaffirm the contract & free himself from liability.

Notes: Dec. 3, 1956
Capacity
Exceptions (cont'd) when Infant is not liable
1 Hypo: 16 yr. old and car. — Must rely upon contract theory to sue.
2 Hypo: An infant bailee of a car told he can drive to N.Y.C. But, the " " drives all of the way to L.A. — Infant liable
3 Hypo: The " wants to make some money & threshes wheat for Farmer Brown. Infant neg. threshes " & the wheat burns down. — Infant liable in tort
The test applied by the Courts
Rule of Law (3) If the tort in the particular instance can be found to be ~~one~~ an indep. & distinct one as to which liability can be made out sans relying on the ability of the contract theory, there can be tort liability.

Car to Canada hypo: If the rider ~~is~~ a gratuitous guest, the rider must sue on a tort theory. But, if infant is not liable in tort here, the rider must prove a contract & sue on this theory.

Hypo: 18 yr. old who looks like he is 30 goes into a car room & buys a Cadillac. Infant wrecks the car before it is paid for. — No recovery on K but can recover on tort of deceit on the grounds that the tort of deceit is not an attempt to enforce the K. [Eng. cts. hold no recovery on deceit because it is just another way of enforcing the K.]

Insanity as a Defense to Torts

An insane person (IP), gen. speaking, is liable for his torts, because an IP is like an infant here & is ∴ liable for the tort.

An IP is liable for the torts of Assault & Battery. There was intent present & the mere fact that the " was induced by delusion is not mitigating here.

But, you might have tort like malicious prosecution where the IP is not liable due to a particular state of mind necessary.

[But, in Crim. Law the IP is liable for his Crim. acts.] many exceptions.

Reasons:

1. Make custodians of IP more careful.
2. The test for insanity not fully accepted & ∴ it might be you can't prove insanity.

Rules of Law: Where you have have a person who had a sudden epileptic seizure or heart attack with no previous med. record & a tort occurs thereby, the tortfeasor is not liable. Where you fall asleep behind a wheel & hit a kid, you are liable because sleep does not come sans warning.

Sack v. Sauers

P recovered because D had previous med. record & should have warned P.

FED. Govt. Agents

Under Fed. Torts Claims Act (1946) waived the immunity of sovereigns. Here, this act waived the " of the fed. govt. in neg. torts. As far as intentional torts go, the fed. govt. did not waive its immunity. No recovery against fed. govt. in intentional torts even after this act.

Dalehite v. U.S. 346 U.S. 15 – fed. govt. not liable as far as strict liability is concerned.
Moss v. U.S. – vet + vet hospital.

Hypo: Army camp with lot of explosives + munitions. There is an explosion + a neighboring citizen is injured. – Recovery by citizen because of extra-hazardous activity. Res ipsa loquitur

Hypo: Vet goes to vet hospital + doctors operate on wrong leg. – Two theories: battery + neg. This is a claim arising out of battery + there can be no recovery because the fed. govt. had not waived its immunity except battery. [The same holds true for state govts.]

* Municipalities (Russell v. Men of Devon, 100 Eng. Rep. 359) not liable for its torts due to this case.
1798 →
If the activity causing the injury is deemed to be a govt. function, no liability; But, if the activity is of a proprietary nature, there is liability.

Notes: 12/4/56
Sov. bodies:
"The King can do no wrong." Under the Claims Act the govt. waived its immunity as far as neg. torts go.
Res Ipsa Loquitur – The thing speaks for itself.
Because you can't plead particulars under fed. ct. rules a no. of problems are raised.

The city is a municipal corp. and an agent of the state. Russell v. Men of Devon – A drove his wagon over a poorly kept bridge + received injury. He did not recover: the county could do no wrong. Types of functions of municipalities:
1. Governmental – there is immunity
2. Proprietary – " " liability

The govt. activity is one which a govt. agency can only carry on. [Little way of distinguishing govt. and and prop. functions. Depends on interpretation of the ct.]

Hypo: Fire truck on way to fire runs over, neg., K, a kid. — No liability. The truck + drivers were in way of doing govt. functions.

Hypo: Airport — prop. because a private industry
Test: could just as easily carry it on
(Docks, city transportation).

One way of testing which it is, if the city charges for the service, it might easily be proprietary, but not necessarily (Bolster v. Lawrence [Mass.]).

Can it be contended that a municipality by taking out insurance waives its immunity to tort liability? Generally, no.

Defects in streets, sidewalks, + sewers would find statute liability but there are requirements of notice (time limitation, place, name, address, date happened).

Certain classes of officers (judge, legislator, city planner) exercise certain discretionary functions + are immune from liabity. — A ditch digger might be liable for his task is deemed to be purely ministerial + no discretion involved.

Charitable Corporations

At com. law, ed. institutions, charitable organ., + rel. institutions are generally deemed to be immune. To allow these groups to be liable would hamper them + be against pub. opinion. (MC Donald v. Mass. Gen. Hospital [Mass.] 1876, no liability) (Holiday Case, 1862 was the precedent)

9 Eleemosynary Institutions

Arnold v. Jacobs

37 Wash 242 (1905)
(Roller v. Roller)
305 Mass 407 (1940)
130 F.2d 810 (D.C.) 1942

Dietrich v. Northampton
138 Mass 14
1884

(The judges in the McDonald case didn't know of another case which overruled the Holiday Case). Usually, you must appeal for legislative relief.
1942 - Pres. & Directors of Georgetown College v. Hughes, 130 F.2d 810 (D.C.) held there was liability.
Many cases make distinctions:
① Employees may recover but not those receiving benefits
② Paying & non-paying people
The Agent himself (e.g., Doctor) may be liable.

Family Immunities

Hypo: Hus. & wife fight. - wife tries to sue. - She cannot sue for per. torts. This C.L. rule abrogated in many states by statute.
Hypo: Wife owns car. Husband takes it & runs off with Miss Lovely. - There is conversion & recovery for this was injury to property, not to the person.
Reasons: (for no recovery for per. torts).
① Disrupting home harmony
② Possible collusion & fraud between the two
* Parent and child - no recovery for per. torts for there is " " prop. "
"(aptly called)" Roller v. Roller, 37 Wash. 242 (1905) held there was even immunity when a father raped his daughter. "To preserve family unity."
Where there is wrongful death, there is liability under the Wrongful Death Statute (this is Arnold v. Jacobs, 305 Mass. 407 (1940).)
Exception: These immunities do not cover infants under 21 if they are already emancipated.

Pre-natal Injuries

Hypo: A, pregnant woman, hit by car & the fetus is prematurely precipitated onto the sidewalk, per-

"He looked good in the rushes"

mantly deforming him. Suit brought on his (the baby's) behalf. - No recovery (Dietrich v. Northhampton, 138 Mass. 14 (1834). [There should have been recovery here].

* Modern trend: recovery if child was viable at the time of injury, or if the child was thereafter born alive.

Notes: 12/6/56

Dietrich Case

Medical knowledge can deter. whether a baby is live or unborn and whether the alleged deformity after birth was the direct effect of the injury.

Survival and survival of torts

Old: Upon the death of a per. inj. by the fault of another, and action brought by P or any right of action died with the person.

Present: Action for injuries sustained made up to time of death may be maintained by the survivors of the deceased. Statutes today provide that the tort does NOT die with the person injured.

Survival Statutes: 1842 - Lord Campbell's Act + similar statutes since then + called "Wrongful Death Acts" - the designated benefactors could bring action for death due to tortious act.

Under Sur. Stats., the right to collect dams. are deemed to be his assets and part of his estate and the creditors can thus reach

these assets. If you recover under the W.D.A, the creditors cannot reach his estate because the earnings lost are not assets under the WDA.
Under the WDA, recovery is to compensate the benefactors for their loss. And, in Mass. (alone), a tramp's wife might get more than a banker's wife, depending on the culpability of the deceased.

Survival Statutes — [answer to Com law concept that actions don't survive.]

Actions that survive: (Mass.)

1. Actions for Replevin
2. Torts:
   a. Assault
   b. Battery
   c. False Imprisonment
   d. Or other dams. done to the person.
3. Any expenses incurred due to injury
4. An action of conversion or wrongful taking — vi et armis
5. Damage to real or personal property — QCF

Under 2 (d), if death is instantaneous their is no recovery under the SS. But, if A pushes B off of a 100 story building, B's beneficiary may collect for the pain & suffering during the few seconds on the way down.

Actions that won't survive:

1. Personal types of torts
   a. Slander & libel
   b. Mal. prosecution
2. Alienations of affections
3. Breach of promise

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Carver v. Morror (p. 67)

Hypo: A has grandson B whom he dislikes. A ~~defams~~ defames B in the will. - Can the benefactors sue for defamation. They could not sue on the agency theory for agency revokes upon death. Also, the probate of the will is privileged

Except, where the agent has an interest in the estate. ←

Blakeley v. Shortalls Estate (p. 67)
No action to survive on neg. or intentional infliction of emot. distress. May be on a tress. theory (as soon as a drop of blood hits the floor, there is tress.)

[Schwartz: "Brackett case (p. 444) and Blakeley case (p. 67) are good ideas for exam questions." NOTE]

Notes: 12/10/56

Consent As A Defense To a Tort

O'Brien v. Cunard Steamship

P was vaccinated by ship's Doctor but subjectively did not want to be vaccinated and brought suit against ship co. on 2 counts: 1) battery 2) Negligence. Sued co. on respondeat superior: - Even though no actual consent, as long as there is a manifestation of consent (an objective theory of consent), there is enough to constitute a good defense to a tort. For neg. - ship. co. not liable: Dr. was NOT ship's agent but was an indep. contractor. Only in exceptional cases is a master liable for the torts of his indep. contractor. External manifestations of consent are enough.

Hypo: Boy says he'll kiss a girl, and she doesn't

object. He kisses her. Can girl bring suit for battery? No

Hypo: In an accident, P is injured but conscious and Dr. treats his wounds and P does not object, then brings suit for battery. — It was a manifestation of consent and that is a good defense to a tort when P didn't speak up.

Hypo: A comes up to B and asks if he can punch B and B says nothing; so A punches B. — Consent or no consent? No consent; inaction does not lead to the conclusion that there was external manifestation of consent.

Hypo: Boy and girl are out on a date and boy says he'll kiss her; she says "no" but inwardly consents. — Here is an actual subjective consent, but an external manifestation of no consent. Rest. of Torts (after 1948): this is a complete defense to a tort — as long as there was consent inwardly.

Hypo: During a football game — BU man tackles BC man. No liability — by participating in sport, one consents to being tackled. But, BU man also takes a swing at BC man. Liability — consent is limited.

Hypo: BU man was offside and while offside, tackled BC man. No liability for there is consent to that type of activity.

Hypo: A goes to hospital for appendicitis operation. C is there for brain operation, but A gets the brain operation by mistake. — No Consent to that operation, but Dr. reasonably thinks A consented. Even though the Dr. reasonably made a mistake, he is liable for no consent

or manifestation of consent was present. P did not mislead the Dr.

Hypo: Boy and girl in woods and boy says to girl "I like pine" & girl says "I like Ewe (you)", so boy kisses her & she brings suit. Liability depends on whether a reasonably prudent man **would** be misled. No liability.

De May v. Roberts
P called Dr. to come for birth of **his** child. Dr. came with asst. who **watched** whole operation and held P's hand as it is a quack. So, even though P did consent, the consent was induced by a mistake, thus making the contact **offensive**.

Hypo: A points gun at B's kid and tells B to kiss A or he'll shoot **the kid**. Consent or no consent? [when B kisses A] Consent is induced by duress, so NO CONSENT.

*** Duress will vitiate consent if the threat is directed to victim or his immediate family. Even tho' there is external manifestation of consent, if consent is induced by fraud, duress, etc., it is ~~vitiated~~ viciated.

What about threats to property [e.g., "I'll blow up your house, UNLESS."] - No cases on the subject, but Schwartz in Torts thinks this type of threat to prop. will viciate the consent.

Fed Torts Claim Act - Sup Ct. decision of 12/10/56

↓ Only Mass. and Ala. have punitive type Death Acts. The others are compensatory in nature.

Notes: 12/11/56

[Punitive damages cannot be recovered from the fed. govt. The Mass. Wrongful Death Act is punitive in nature. Recovery is limited to $20,000. Awarded (by the Sup. Ct.) the amt. of $60,000 as compensatory damages as under fed. common law. Alabama also has a punitive type of Death Act.]

Consent

* If you have an actual subjective con. That is mani. externally, it is sufi, and a complete defense to a tort.
* If there is actual sub. con. but no ex. mani., then the " " " prevails.
* If the con. is induced by mistake, fraud, duress, etc., then the con. is vitiated.
* As far as tres. to person and goods is concerned, the P must assert non-consent.
* But, in QCF, the issue of consent is part of the D's affirmative case.

Markley v. Whitman

The appeal was based on alleged errors in the charge made by the ct. The charge:

1. P must not be a participant
2. If game was dangerous, P can recover
3.

In charge one, the ct. is incorrect because if the P had previously participated, he had a history of consent and had previously manifested consent to the game. But, it was not necessarily prejudicial, thereby not constituting grounds for reversal.

Where there is express revocation of consent, there is no more consent.

Barnett v. Bochrach

Dr. found a reg. pregnancy but acute appendicitis. In Mohr v. Williams the P ~~won~~ won

and it was held to be battery; but there was no emergency. But, in case of an emergency the Dr. can do what is necessary and not be held liable. A reasonably prudent patient would consent in this situation, thus we can infer or presume consent on the part of the patient.
At the outset of the operation, the Dr. + the hospital should get a **broad** consent and get the patient to sign a release statement. Here is one of the few times when a tort lawyer can serve a preventitive function.

Jackovitch Case
In case of an emergency where consent cannot be had, the law implies consent. Also, a reasonable + honest mistake as to urgency (but actually time can be made to get consent) does not make the Dr. liable.

hypo: A Dr. operates on a Xian Scientist knowing that the person is a " " and there is an emergency. - Liability, for if the P had been awake he would not have consented.

hypo: If the Dr. didn't know he was a Xian Scientist, there would be <u>no</u> liability.

hypo: If a minor's consent is made and the minor is a mature minor, no liability. But, if the " " consents for the benefit of <u>a third person</u>, there is liability.

Notes: 12/13/56

Dr. protected, in emergency situations due to an implied consent.

hypo: Emergency + unconscious minor. — Dr. privileged. Even if there is no emer. but Dr. believes reasonably there is, the Dr. is still protected.

hypo: No emergency + unconscious immature minor. — Must get consent.

hypo: No emer. + mature minor. — Consent unnecessary if for the " benefit. But, if it is not for his benefit, the minor cannot consent + the Dr. is not privileged.

Maturity: ① I.Q.
② Emot. stability
③ Expert testimony

hypo: Mature minor consents but parents say no. — Dr. protected, no liability.

hypo: Mature minor says no but ~~[illegible]~~ parents say yes. — No liability.

Strang v. Russell

Action for damages for tres. P won + tres. Q.C.F. held. There was consent, but it was limited to entries for friendly purposes. But, D entered for adversity purposes + to contest title of owner.

hypo: A owns filthy acre which has two entrances. Over one entrance is a sign saying "all may enter, anytime ~~for friendly purposes~~" + over the other there is nothing. B who enters under sign is a tres., but X who " " no sign is not a tres. (no phy. manifestation of aversion to entrance, i.e., an implied consent).

hypo: ① Reg. Van Gleason + prostitute have a night on the town. He has a contagious disease but does not inform her.— Liability due to a limited consent.

The ck came back marked "insufficient funs." ② He gives her a rubber check. — Liability because the paying is not part of the transaction + there is no consent.

Oberlin v. Upson: An adult woman cannot bring an action for her own seduction because her participation in the act implies consent.

hypo: 15 yr. old girl agrees to seduction.— Father can collect for loss of services. But, the girl cannot collect ordinarily. Most juris. have consent statutes: if a girl is under a certain age, she is deemed incapable of consent (stat. rape statutes). These are actually criminal statutes and Bishop v. Liston (p. 86) is not very good because it would only tend to permit the girl to have a windfall + maybe "do it again."

McNeil v. Mullin

If A + B agree to have mutual combat, even tho' P has struck first blow + consented, the breach of the peace negates the consent and the P can recover. Either one can bring action. This rule does violence to 3 basic Phils. but it is still the weight of authority. At early com-law, the action of tres. was similar to a crim. action + this lasted or predominated up to 1694. But, this idea changed because cts. felt that tort liability would prove to be a deterrent to breaches of the peace.

But, deterrent idea is weak because when mutual fights occur, the participants are not hardly thinking of tort liability, more than likely " " crim.
" • §60 (Rest. of Torts): Consent is a complete defense (this is contrary to the weight of authority) McNeil rule limited to "mutual combat where you have breach of the Peace" situations.

Notes: 12/17/56

Upson Case (p. 81)

Adult women cannot recover for their own seduction:

1. Consent is a defense
2. One cannot recover from an act in which she participates.

As far as consent for another criminal act is concerned, consent is a defense to a tort.

hypo: A allows B to carry prostitutes across his property and then sues for QCF. — No recovery (above).

In abortions, the woman who consents cannot recover. But, the minority view upholds the abortion statutes which, so to speak, protect the woman from her own indiscretions. So, they borrowed from the criminal law to get punishment against the Dr. Also, says Schwartz, there should be recovery to induce the woman to turn State's evidence rather than keep quiet for fear of social ridicule.

McNeil v. Mullins - recovery in mutual combat.

Hudson v. Craft (1949) Sup. Ct. of Cal.

Strict Liability (or, Liability Sans Fault)

If P had sued the other boxer, there would be consent which would bar recovery. So, the 18 yr. old boxer sued the promoter, and recovered. The Cal. Statute was made to protect this special class of people.

Here there was a violation of a crim. stat., + the violation " " " " indicates neg. per se.

Two preconditions:

1. P was in the class of persons which the crim. stat. wanted to protect.
2. Was the type of injury that resulted in this case the type of injury the legis. sought to prevent.

There is no need to prove any other evidence of neg. if there was a violation of the crim. statute, ~~and~~ for " " " " " is construed to be neg. per se.

SELF DEFENSE

The ~~tort~~ privilege of self-def. is close to " crim. " " " "

The wt. of authority holds that an apparent assault can give rise to S-D. i.e., a reasonable mistake allows S-D (Johnny Come Lately coming to dance and man walking up hall in dark hears someone running behind him).

Charges to the Jury:

① Whenever a person is assaulted he has a right to defend himself. — Erroneous, because according to law: you may use S-D if there is reasonable belief that there is an assault and/or law even tho' there is actually no A&B.

Correct in law, but not raised by either the evidence or pleadings. There should be no abstract law given to the law.

② If one of the parties (the agressor) retreats, the S-D person may not continue his acts of defense because they are then construed to be retaliatory.

③ A person may not use more than reasonable force. — Erroneous, one can use only such force as would be reasonable under the circumstances.

hypo: Casper milktoast honestly unreasonably believes an invalid 3 blocks away will A&B him. He uses S-D methods — No recovery (Watson v. State, p. 100) No necessity for an actual assault.

Fixico v. State (p. 99): one only has the privilege of an honest reasonable mistake.

Notes: 12/18/56

Fraguglia v. Sala

Most decisions tend to follow the Fixico case in estab. an objective standard of care.

Charges were T. I. here. Charge no. 2: Retaliation v. Defense

Retaliation - force not used for self-D, but more for retaliation.

Hypo: A has gun with only one bullet & B knows it. A shoots and misses, runs away and B chases

You can use the reasonable amt. of force as is deemed necessary in the circums. of the case. If you ~~use~~ more, you are liable for the excess. } Quantum of force

and clobbers A. — Retaliation ~~because~~ A is running away + there is no more threat to B.)

hypo: A likes to have his face slapped but doesn't like B to hit him. So B has two motives:
1. Partial S-D
2. a manner of "getting back."

S-D does not have to be the primary or sole motive; but, as long as there is partially based on S-D ~~moth~~ motive it is alright.

hypo: Walter Mitty has umbrella with hidden blow-dart gun. He sees Dirty Dan on street, points the umbrella unmenacingly at Dan + calls him names. [Dan does not know of the gun in the cane]. Dan then hits Walter because of the words. — Walter can recover. Mere words do not make privileged S-D, ~~+~~ Dan, knowing nothing of the gun, was hitting Walter due to the words.

Even tho' you are not privileged to use excessive force, you may threaten to do so to prevent the lesser harm. But, a threat which might cause great injury to the agressor (mountaintop) is not privileged.

Sikes v. Commonwealth (p. 100) 1947

In a~~n~~ fight, when the D uses reasonable force in warding off an assault or an impending assault, the D is not liable for the death because the blow

was privileged. If a death results due to reasonable force, the D is not liable for unforseeable consequenses. The first blow was privileged.

Hoover v. State

Here we had A walking down the street when B walks up, tells A to get out of town and that "one of these days" he will kill A. So, A arms himself, goes to a saloon. B gets up, walks to the bar, + A shoots B. — No self-defense here because A's own acts created the threats (B's threat not immediate), i.e., walking to the counter, thus there can be no self-D. The alternative is to call the cops!

McNatt v. McRae

Both are seriously injured during a fight with each other. D makes a general denial, later withdrew it and pleaded S-D.

Charged: If A, at the time of the injury, were not at fault, A could recover.

Notes: 1-3-57

{Comprehensive: responsible for only those assignments not covered by next Friday (1-11-57). No misrepresentation on the exam.

Review of Self-Defense: One can claim the privilege of S-D even tho' there is only a honest and reasonable belief and mistake that and A+B will occur and injury will be a result. But where there is an honest but unreasonable mistake that " " " A+B, there is no allowance for S-D. And, Cts. distinguish between retaliation and S-D. You can use reas. force in the circums. of the case, and there is Liability for the excessive force.

* The better view is that where there is excessive force and retaliation, tres. ab initio would NOT lie. One accused of excessive force in S-D may lessen the dams. he will have to pay by counter-claiming A & B.
You have the privilege of S-D where your motive may be only partially for the purpose of Self-Defense.
In " " you are not liable for unforseen consequences which may accrue to the orig. agressor. But, If one is an original tort-feasor and unforseen circums. result, he is liable. Yet, If A hits B with his fist + B retaliates with excessive force, whereupon A inflicts great unforseen injuries upon B, A is not liable for the unforseen consequenses.

Commonwealth v. Drum:

D stabbed P to death where P was not apparently threatening D's life. Judge said:
(1) you cannot use deadly force if there is no reas. threat of death.
(2) If there is a choice between killing + retreating, you have a duty to retreat. (Probably, this is not the weight of law.
* Rest. Torts, §65: if you can retreat, you have duty; " " is the minority view). There is no duty to retreat from your own dwelling. If he is in another's dwelling + he reas. believes that he cannot safely retreat, he may Kill. Rest. Torts holds that the only duty to retreat is where deadly force is involved (death or close to it).

State v. Preece: Actual necessity not required if there is apparent necessity. No duty to retreat in your own dwelling even if it would be safe and you

can use deadly force if it is reas. under the circums.

Crabtree v. Dawson — D made an honest and reasonable mistake.

Chapman v. Hargrove — Opposed to Crabtree case. This was, however, overruled and " " is the law, even in Tex.

Is there a privilege of S-D in neg. torts? Yes ~~where~~ [e.g., car on narrow road + driver sleeps.]
In mistaken identity, if the would-be-victim knows the would-be-assailant is suffering under **a mistake**, he has the affirm. duty to inform the latter.
No duty to retreat:
① In business place you own
② In your apartment (does not include halls & lobby of the hotel).

Privilege to Defend Third Persons

Rest. Torts, sec. 76: if there is a legal duty to intervene or where ~~all~~ social usage approves of the intervention.

Opposing views:
- A. One intervenes at his own peril. (minority view)
- B. Privilege of intervention is independent and your reas. mistake will save you. (majority view, §76).

[note carefully] * All of These may have overlapping privileges.

Notes: 1-7-57

Privileges to Protect Property

Privileges:
① Privilege to protect against intrusions
② Privilege to prevent dispossession
③ " to forcibly regain poss. of ~~per.~~ chattels
④ " to protect against entry and detainer
⑤ " to re-enter upon the land of another
⑥ " " detain a suspected thief
⑦ " " abate a nuisance on your own

① Privilege to Protect against intrusions

Tullay v. Reed — An ejected trespasser brings suit. "If a person enters a dwelling-place with force + violence, the owner may put him out (with no more force than is necessary) sans a previous request to leave; but if the person enters quietly, the other party cannot justify turning him out sans a previous request.

Rule of Law: "If a trespasser (T) intrudes upon the actor's poss. of land or chattels sans a priv. to so trespass, or even if he is so priv. T intentionally or neg. causes the intrusion to seem unpriv., then the actor is priv. to inflict a harm. or off. contact by a means not intended to cause death or serious bodily harm provided the following conditions are complied with:

① The possessor must rea. believe that the intrusion can be prevented only by the infliction of harm. or off. bodily cont.;

② The terms used to eject must be reasonable;

③ Ordinarily before the use of force can be justified, the possessor must first request the T to leave and the T must disregard the request. The exceptions are:

ⓐ If the poss. rea. believes a request to leave will be futile.

Priv. rea. force

self-defense { (b) If the poss. rea. believes it will be dangerous to himself or some third person, no need for prior request before use of force.

(c) If the poss. rea. believes a substan. amt. of harm will be done to his land or chattels before the request would have time to take effect.

hypo: A goes to law school with Cadillac. B sits on bumper. -[No cause of action for tres. to chattels because no harm done.] You may use force to eject B because a tort need not be proved before you can use force in tres. to chattels.

hypo: A docks at B's dock due to hurricane + B puts him off. - Recovery for A because the ~~priv.~~ intrusion was privilege.

hypo: T tells O "I'm going to walk across your land next week." O hits T then - No priv. to use force here. O is priv. to use rea. force to prevent an entry only upon T's entry thereupon.

If one is threatened with unrea. force, the T may use the priv. of S-D.

hypo: O owns many beautiful flowers + blind mans walks in that direction. O may use rea. force to prevent the intrusion and may not have to make a prior req.

One may estopp his privilege of ejectment.

Privilege to use force to prevent a Crime.

THIS IS DIFFERENT FROM THE ARREST SITUATIONS.

Either a peace officer or a private person is priv. to use deadly or serious force to prevent commission of a serious felony if ~~the~~ it appears rea. necessary to do so. You are protected here altho' a crime has not in fact been committed. You are protected in a rea. mistake situation.

Privilege to use Threats

Depends on the case.

Notes: 1-8-57

It might be better to threaten unrea. force to avoid having to use rea. force.

hypo: A, a tres. with a bad heart, is seen by O, the owner who knows of A's heart. O threatens A by saying to his big dog "sic'm, Rover." A suffers heart attack. - This may be unrea. force.

* The tres., if excessive force is used, has priv. of S-D as against the exces. force.

Dispossession: Do you have a priv. to use force against a tres. who wants to dispossess you? Clearly yes, but ordinarily only rea. force. However, deadly or serious force may be used to prevent the dispossessor from dispossessing you from your dwelling if rea. necessary.

Other's property and Third Persons

If you have a legal duty ~~and~~ or social sanction, you may ordinarily use rea. force to stop the trespasser.

hypo: In the previous dock (hurricane) situation, if you

damage the dock "you must pay your way."

Priv. to use force to effect a reëntry upon land which has been wrongfull detained from you (i.e., Forcible Entry and Detainer)

At early com. law, one could use reas. force to regain poss. of property. However, in 1381, the statute Forcible Entry & Detainer was passed and provided: (1) crim. liability for one who attempts forcible repossession. The Newton case provided for civil & crim. liability. Reversed by Eng. Ct. in 1920, U.S.A. still has the rule.

Newton v.
133 Eng. Rep. 490 (1840)

The cts distinguish between a peacable poss. and a scrambling possession. A civil Action cannot be brought by one who has scrambling poss.

hypo: T pushes O off of O's prop. & O immediately tries to force his way back on the land. — No civil liability by O, because T had "scrambling poss."

hypo: O waits two days. O would be liable because he is deemed to have acquiesed and T is deemed to have "peacable poss."

hypo: O ousted by T. O regains poss., after 8 mos., by expelling T forcefully (T a peacable poss.). T tries to come back on but O repels him forcefully. — O liable because his reposs. was unlawful in the first place.

hypo: T, a ~~tenant~~, has lease for 2 years. At end of two years, the Landlord uses force to expell T because T overstayed knowingly for two years. — Liability (in most states) because the landlord was not privileged. However, some states hold that if T is forcibly ejected, T may use force to regain entry.

Ex Parte Minor (p. 111)

Dog chasing D's guinea hens + D shoots dog. P might say his dog was worth much more.
Two extreme view-points:
(1) Cannot shoot the dog; must ascertain the values at his risk.
(2) Can shoot the dog and there is no need to ascertain the value of the dog.
Owner of property may kill tres. animals, but he has to take into account the apparent values of the animals as they reas. appear to him. But, how far should sentimental attachment enter into the picture in ~~[illegible]~~ deter the value? No answer yet.

State v. Childers

What you are not priv. to do in person, you cannot do ~~[illegible]~~ indirectly. But, what about the converse?

Notes: 1-10-57
State v. Childers

D had developed a melon patch + set up a mechanical device known as a spring gun as protection. Sign said "Dangerous: go back." D held liable for injury and wrongful death of the boy who trespassed. You cannot do anything indirectly which you " " directly. Quaere, the converse?
§143 (Rest.): If you reas. believe a dangerous felony is about to be perpetrated, you are excused for a honest and reas. mistake and can use force.

However, if there is a machine there you are liable.

§140: Neither a cop nor priv. citizen is priv. to use force upon another for the purpose of preventing a violation of a stat. or municipal ordinance or other ordinary misdemeanors which fall short of affrays, serious felonies, or equally serious breach of the peace.

§141: Either a C or PC is priv. to use force against another for the preventing the renewal of an affray or other serious br. of the peace which is being or has been committed in the presence of the C or PC (you must use reas. force + no deadly force), or to prevent the renewal thereof. To get the priv. of a reas. mistake, there must in fact be a breach of the peace. He is entitled to one reasonable mistake: as to the person arrested. Force and arrest are not the same thing.

As far as mech. devices are concerned, if you were not priv. to use the force directly you can't use it indirectly. But, this is only authority for a mech. device capable of inflicting death. (Note: Rest. sec. 84) How can you prove the reasonableness of the device?

(1) Intro. evidence to the fact that there is proper notice of the device's presence and the unlikelyhood of anyone disregarding the notice.

(2) Compare the probability of danger of the machine with the amt. of danger you would be priv. to pose in person.

(3) Location of the land in question.
(4) Inconvenience of having to protect land directly.
(5) Compare dam. device can inflict with the " the tres. " ".

~~Mss~~ The intruder should be given a fair warning of the presence and use of the device. If, upon proper notice, the intruder still enters upon the land and steps in a bear trap, can he sue the owner? This is a different question: what duty of care is owed to a tres. who is on the land? This next semester (Note the Brackett Case, Pg. 444).

No du/ca to undiscovered trespasser. Certain exceptions, e.g. special relationships.

Seminar: 1-10-57

#1-T To get the priv. of going upon the prop. of another to reclaim your prop. which was wrongfully taken, there must be "fresh pursuit" and this must be as soon as the taking is made.

#2-F Selma reas. believed that a felony was about to be committed.

#3-F Could recover $3000 on $$ had & received.

#4-T Immunity to a civil action due to inter-spousal relationships.

#5-F Even tho' insanity is OFTEN ~~NEVER~~ NOT A DEF, it is some times (note: NEVER).

#6-T "Jury could find ..."

#7-F

#8-F Dougherty v. Stepp

#9-F To get punitive dams., you must ~~#10~~ show not only intent, but malice.

#10-F Must have demand & ref (Ind. & N.Y.)

#11-T no confinement since John could have gotten out sans ~~much~~ any trouble.

#12-F John liable even tho' he indirectly caused the tort.

#13-F

#14-F Retaliatory, not self-defense.

B

1. a. Trespass (?)
   (1) DBA
   (2) QCF
   (3) VEA
   b. Conversion (?)
   c. Emot. distress (?)
   (1) forseeable

   } Deadly to George

2. a. Assault
   b. No battery (no contact)
   c. False Imprisonment
   d. Emotional Disturbance
   e. Recovery under the "Actionable Words Statute" of West Virginia (Wheeling, W.Va.).
   f. When George goes into the kitchen he is then a trespasser and a tres. is responsible for any unforsseable occurrences and ~~Gilbert~~ George would be liable to John and ~~George~~ Gilbert could sue George on the theory of restitution.

3. a. Emot. Disturbance
   B. False Imprisonment — victim must be conscious of being imprisoned, but lack of " know. of " " was due to ~~tort~~ of another.

4. a. Battery
   b. Tres.

5. a. False arrest - if pursuant to the

WARRANT, LIABILITY (WARRANT NOT FAIR
PRIMA FACIE); BUT IF NOT, FRIDAY
IS PRIVILEGED.

SECOND SEMESTER

Notes: 1/22/57 — Force to ~~the~~ Recapture Property

Kirby v. Foster: P is D's bookkeeper. Money missing + D deducts $50 from P's pay. P then retained $50 from the payroll of the Co. D tries to recover $8 & P injured during struggle. — Since P tortiously took the money, can the D use force to recapture the property? Lower ct for P + affirmed. — In order for D to have privilege he must show:

(1) that he had poss. of chattel

(2) wrongful conversion without a claim of right by the P.

This is a legal Master-Servant relationship and the servant (P) only had custody, obtaining poss. deceitfully. And, P received poss. on the premises. These make a difference.

** In the following 3 situations the use of force *is* privileged if the other:

(1) Had tortiously taken the chattel from the actor's poss. sans a claim of right; tortious acquisition of poss.

(2) If the other person has taken the chattel under a claim of right but by the use of force or fraud ~~or duress~~

(3) If the other reas. appears to the actor to be about to remove the chattel from the actor's premises (claim of right + how he got the chattel are immaterial).

(4) If the other refuses to surrender the chattel ~~after removing it~~ or is about to remove it after having received custody but not poss.

hypo: A thinks (honestly + reas.) that the Cadillac is his, but it is B's car + B sees it. — B not privileged under any of the above 4 rules.

hypo: A takes chattel tortiously from O and gives it to B. — If B knew of the tortious taking, the force could be ~~taken~~ used by O (or if B reas. should have known).

(5) If a third person knows or should have known of the existence of one of the 4 situations (rules), the force is privileged.

hypo: A honestly but unreas. believes the car is his, no force. — as long as one claims under right, it is suff.

hypo: A sees upon B's land a car which belongs to B; but A honestly believes the chattel is his. — Force is ~~mandat~~ privileged (situation no. 3).

hypo: B owns car and A tortiously takes it. 3 weeks later, A gives it to C. — If C knew or had reason to know of the tortious taking, B could use force to recapture.

In some situations, a finder may use force against one who tortiously takes it from him.

* Title is not necessary. Poss. is necessary (i.e. act. Poss. by the owner or finder).

Time factor: * You must, promptly after the disposs. or after the timely discovery of the disposs.

hypo: B, absent-minded professor, has car taken from him by B & 3 wks. elapse before prof.

Ordinarily, a demand or request must be made unless the making of the request would be futile, dangerous to you, a third person, or to your chattel. Reasonable force must be used and one is liable for the amt. that is excessive. However, if there are overlapping privileges, the force-user may be privileged under the other priv.

In a bailment, the above situations would be inapplicable because poss. is had rightfully.

Notes: 1-23-57

Hoolihan v Woodbury Const. Co.

The Priv. to Protect Property and to Use Force to Recapture Chattels

(1) hypo: A buys furniture on conditions under a K providing for ~~[illegible]~~ repos. by vendor upon default of payments. A later fails to make a payment. — Vendor could use peaceable means or bring a writ of ~~[illegible]~~ replevin. No force is priv. under the general rule (Rolts v. Speck 14 P2d 33 1932))

because there was no unlawful acquisition of poss. The owner has an immediate right to poss. but the vendee (A) still has lawful poss.

Uniform Cond. Sales Act (in a minority no. of states) §16: Unless the goods can be taken sans a breach of the peace, they shall be retaken by legal process. Under this act, some force (short of a breach of the peace) is allowed.

(2) hypo: In a cond. sales K, the following is included: "Upon the default, the vendor may use force to affectuate recapture." — Invalid because it is contrary to public ~~property~~ policy. It in se sanctions a breach of the peace.

(3) hypo: O owns Torts notebook, loses it; F finds it, and upon the request of O to return it F refuses. — (A qualified refusal does not constitute a conversion.) Let's assume F said: "I know it is yours, but I am not going to give it back to you." — Did F get lawful poss.? Yes. But, after the dem. + ref., did F still have lawful poss.? NO.

(4) hypo: Even tho' he uses unlawful force to regain his chattels, he still has the right to protect them by force.

Priv. to Enter Upon the Land of Another to Remove Chattels (Res. ¢CF)

(5) hypo: O trans. cargo of his coal on a train. There is a derailment + coal falls on X's lands. — If the chattels fall upon the land of another

due to the fault of the owner of the chattels, the owner (O) has no right to enter + is liable for QCF.
(1) X not claiming it for his own because it got there due to O.
(2) X has right to protect his prop.
Therefore, O would have to use legal process to recapture his chattels.

hypo: Y takes O's torts notebook with permission but puts it upon X's lands. – No priv. to enter due to permission by O.

hypo: X enters upon O's lands, takes chattels and returns to his own prop. Does O have a priv. of entry? Yes. Hot pursuit immaterial.

hypo: T (thief) takes chattel + puts it upon X's lands + X knows of the theft. – O is priv. to enter.

If one takes a chattel from your prop. but was on your land lawfully, a request must be made before the use of force is priv., unless the request will be futile, dangerous. And, even if there is a license to enter, the entry must be in a reas. manner and at a reas. time.

If the O knows the chattel was feloniously taken, ~~there~~ he might even break down the door of T's house, depending upon the comparative values of the door + chattel.

** Where the chattel is put upon X's land due to X's activity, the priv. of

O to enter is a COMPLETE PRIVILEGE.
* Even in the case of ~~and~~ an act of God (storm etc.) putting the chattel on X's land, O has still a complete priv., providing X seeks to keep the chattel after the storm.

Proctor v. Adams et al.
The D's entered to protect the boat washed up on the shore. It depends on the motive of the person accused. ~~A bad~~

Tuttle v. Buck (Pg. 963)
Even though this act would otherwise be lawful, his motive may make it unlawful. Thus, motives are often T.I.

Notes: 1-24-57

hypo: X takes O's chattel. O has a priv. to enter.

hypo: O, while on X's land (in the above hypo), acts outrageously. — O liable for all dam. done if he acts unreas. He does not forfeit the right to the chattel, but from the time he starts acting wrongfully, he (O) is a tres. So, trespass ab initio would apply if he enters lawfully and then commits affirmative acts of misfeasance.

hypo: X, land owner upon whose land the chattel has come to rest due to any force, wants to enter upon O's land to return the chattel. — It depends.

hypo: O, wrongfully entered, forgets his ax. Is X priv. to go upon O's

land to return it? - Yes, and X's priv. is complete; but he has to enter at a reas. time + in a reas. manner.

hypo: O's logs washed by flood upon X's land? - X has an incomplete priv. and therefore is not liable for nom. damages, but is responsible for any " , no matter how unforseeable.

hypo: O's logs washed upon X's land. O says he abandons and 5 or 6 years elapse. Can X enter sans liability to return the logs. - Yes, but the priv. is incomplete because the logs were put on X's land thru a force of nature. You cannot abandon prop. to the detriment of another.

hypo: Chattel enters upon X's land due to neg. of X. - X has an incomplete priv. to return them, especially where the chattel is valuable or perishable. X is really in the style of a good Samaritan. A P has a duty to mitigate dams. and P would breach his duty if he fails to allow D (or X) to enter. Where there is a priv. (even incomplete), the owner of the chattel (P) has a duty to fade away and permit the entry.

Teel v. May Dept. Stores Co. (Pg. 117)

Raises the problem of a store-owner who suspects a person of

stealing, and whether the storekeeper has a priv. of detention for a reas. time. The case holds
* that a storekeeper has the priv. to detain one suspected of theft for a reas. period of time for a reas. investigation. [The cts. are basically split but this is the better view]. Cts. that hold to the " " erroneously equate this priv. with the priv. of arrest. The priv. to detain is limited however and 30 mins. is too long (Jack v. Child's Dining ~~Hall~~) under certain circums.

Lipnik v. Ehalt

Nuisance - an unreas. interference with the use and enjoyment of land.
This case deals with the priv. of a private person to abate a nuisance.
Remedies:
(1) Suit in tort at law for dams.
(2) Get an injunction from Equity
(3) Self help
a. Must first make a demand that the owner of the nuisance abate it himself. You cannot use force + if you enter, you must do so in a reas. manner + at a reas. time.

Privilege of Necessity

types { I. Public
II. Private

hypo: Blowing up B.U. Law to save Boston.
hypo: Storm at sea and you moor at another's dock. Boat causes damage.

Notes: 1-29-57

Public Necessity

hypo: A blows up B.U. law to prevent Boston from burning down. - A does not have to pay his way ~~because~~ due to public necessity. However, A is protected even if there was no actual necessity; all that is required is an apparent necessity. A must show there was apparent necessity for him doing it. He has to show a necessity that HE do the act. If there are people assigned to blow up the bldg., A would be liable.

Surroco v. Geary 3 Cal. 69 (1853)

hypo: B falls off of high bridge, hitting a negligently maintained electric wire on the way down. - Recovery will be limited because his chance of survival (even absent the wire) was very small. He had ~~a~~ little potential value. [∴ The law school wouldn't be worth full value.]

hypo: A, in desert, has water. B comes along and spills out all but a day's supply. C comes along and spills out the rest of the H_2O. - Is there liability and, if so, for what.

hypo: same as above. B poisons water & C pours it out. - ??

A municipality has immunity just like our public Champion. Where this doesn't happen, taxes rise, insurance policies decrease but the problem of big legal costs is involved.

Even tho' the idea that the city should be liable is bearing, the general com. law rule is that a city is **NOT LIABLE** and is immune.

Texas Statute — If you have prop. insurance you can recover from the city the difference between the coverage and the actual loss.

$10,000	- actual loss
5,000	- insurance coverage
$5,000	- Recovery from city

Imminent domain — Where you have pub. necessity the prop. of the P-to-be threatens the safety of the people of the community. But, in imminent domain there is not danger necessarily to the community.

Private v. Public Necessity — Under private necessity, there is an incomplete privilege. If the emergency is sufficiently great, he may tres. upon private land and be not guilty. ~~unless~~ If he inflicts damage upon the property, liability therefor.

Ploof v. Putnam — During a great storm, P docked at D's dock. D used force to repel him. The Ct. held that P was a tres., BUT that he was privileged.

Notes: 1-30-57

hypo: B owns a boat and due to a great tempest, B docks at D's dock. - B has an incomplete priv. Altho' not liable for nom. dams. due to tres. QCF, B is liable " all " even tho' unforseeable. And, D would be liable for any force used to expel B + B could use self-defense.

hypo: same, but D, X, and Y and Z all have docks. - D still would have to allow B to dock at his dock. Otherwise, each one could say go to the other one.

hypo: same; ten docks and B owns one of them. Each dock as easily accessible as the other. - Tres. not justified because there is no necessity here. D could use force to expel B (reas. force). And, the same holds true if there were a natural cove.

hypo: B has his ship thrown against D's dock due to storm. - B not liable because the dam. was not due to an act of B.

Vincent v. Lake Erie Transportation Co.

Under the K, the understanding ~~is that as soon as unloading~~ is finished the ship should cast off. But, the storm came and D held fast. D liable being called a tres.

*hypo: Walter Mitty chased by the Goon Squad and runs across Gravel Gertie's Pansy patch. - Mitty not liable for nom. dams. for GCF, but he is liable for the " he does and for the dams. the Squad does to the land during the chase. However, Mitty could come back and sue the Squad in Restitution for the Squad was the major tortfeasor.

*hypo: G goes to Wyatt Earp's house. The Goon Squad said to Wyatt that they would damage his house if he didn't put G out into the street.

G refuses to go. — G is priv. (incomplete) due to grave danger to his life, but he is liable for any damages he inflicts no matter how unforseeable.

hypo: Passengers in ship + crew. If Capt. puts out to sea, he might be crim. liable for manslaughter. Here, the Capt. could stay docked because he had an incomplete priv. PLUS a duty to avoid crim. liability.

hypo: D, carefully driving, has to ~~swerve~~ swerve into F's fence to avoid hitting K, a kid. — D not liable for QCF (nominal dams.) to F but must pay. D has a duty to avoid hitting K. Yet, K could be liable to D in Restitution.

hypo: D is driving carefully when suddenly Little Lennie Ross pops out front. He could swerve to the right but 20 Charter members of the DAR with one week to live are there; or, he could swerve to the ~~right~~ left and hit the Mad Bomber.

The law with respect to the Vincent case is that there is an incomplete priv. Re: the hypo of swerving into the fence, D has an incomplete priv. + a duty to avoid hitting K and this might be said to be a complete priv. The cts. do not deal with the incom.

priv. coupled with a duty.
Swan - Finch Case (Pg. 129)
D held liable here for neg.
Possible arguments (1) Neg. manner in which he maintained and stored the oil and the ct. could find the dam. was the proximate cause.
(2) The manner of storing the oil was reas, but casting off the flaming barge was an act of exposing the P to an unreasonable risk of harm.
In the Vincent case you have the intentional use of another's prop. to save your own; whereas here, you have the unintentional but negligent use of another's property.

Factors to determine "Reasonable risk"

(1) Compare the social utilities of P's & D's properties.
(2) Magnitude of the risk created. What are the chances the P will be harmed? If the risk is too great, it becomes unreas.
(3) The alternatives available to D in the case.

Cordas v. Peerless Transportation Co.
In Swan - Finch case this was an attempt to save himself and prop. but there was an unreas. risk of harm to P. Here, however, D did not necessarily expose one to an unreas. risk of harm but actually acted extraordinarily and was a hero of the public.

Notes: 1-31-57

In the Vincent Case, if you use the prop. of another to save your own, you are responsible for any dam. to their prop.
In the Swan-Finch Case, if you unreas. subject another's prop. to an " risk of harm, you are liable for any dam. to their prop.

Cordas v. Peerless Transportation Co.
This is a situation where one acted in protection of his life and prop. although subjecting another to a risk of harm. Also, the chauffeur was reacting to the dangerous act of a felon. If we deter people from acting in ~~self-h~~ certain situations, we deter self-help. (good) Therefore, we give a tort remedy. No liability on the chauffeur because there is no need to deter self-help.

NEGLIGENCE

The Case of the Thorns – [today, neg. is equated with fault. We say there is no liability without fault.] At the early common law, there was strict liability and liability sans fault (contrary to mod. tort view). Holmes says that early law did not hold this; – minority view. The workmen's Compensation Law imposes liability sans fault.
Here, on action of tres. Q/F arises on demurrer. As D cut hedges on his land, the ~~the~~ thorns fell on P's " and D tried to remove them.

Case arises on demurrer to pleadings so ∴ no testimony yet. This case operates on the Medieval Theory that a man acts at his peril. Ct. said it was no defense that the falling of the thorns on P's land was unintentional. P did not allege that any damage was done. This act was unintentional and unnegligent (no allegation by P that D was negligent). ~~Strict~~ liability and liability without fault were imposed here. This is the old view.

Weaver v. Ward — Liability imposed upon D but the Ct. retreated by saying that if you can show the accident was inevitable, the D is not liable and that if the D was not ~~liable~~ negligent at all, he would be not liable. Yet, they said the burden of proof was on the D.

Vincent v. Steinhour

The Ct. imposed standards of care and imposed liability only where D does not act with reas. prudence and care. If there is an act under which you have a legal obligation to perform, only reas. prudence is required. But, if you do a voluntary act, you are liable strictly and sans fault (i.e., an extreme degree of care).

* Brown v. Kendall (Pg. 135)

The Ct. [lower] here said, in the charge, that you are still liable unless you hold to extraordinary

(1) Earl Wms - 2
(2) Grossman - 1
(3) L. Cocco - 1
(4) Jones - 1
(5) Kevin D. - 1
(6) W.L. Wms - 1

7

care and that D has burden of proof. Lemuel Shaw, C.J. Reversed this. 6 points:

(1) Separation of procedure from the common law (substantive) not T.I. and not concerned with directness of act.
(2) No liability sans fault.
(3) In order to recover must show intent or negligence.

rejection of Weaver v. Ward ← (4) Burden of proof on the P.

rejection of Vincent v. Steinhour ← (5) No distinction between a duty to act and a voluntary act.

(6) One standard of care: the care a reas. man would use in the circumstances of the case.

Notes: 2-5-57

Brown v. Kendall

Nitro-Glycerine Case

Ord. reas. man test of care imposed to determine negligence. Shipper (S) shipped some nitro through the D (company). Nothing to indicate a dangerous content. D co. opened the box with hammer and chisel in its office in P's building. J/D/A: there must be fault to have liability and recovery. Neg. is the failure to exercise the care that an ord. prudent man would exercise under the same or similar circumstances. No liability for an accidental trespass to land. There must be fault to have liability.

Puchlopek Case (p. 141) — There is no duty of care owed to an undiscovered trespasser, so said the court below. Reversed: there is no liability for an accidental trespass.

Louisville v. Sweeney (Minority view) 129 Ken. 620 (1917)

[Sec. 166 of the Rest. holds that there is no liability sans fault; and the English cts. also agree with the Nitro-Glycerine Case].

170 Fed. 275: the shipper will be liable when he does not label the dangerous contents & on the neg. theory.

Generally, ours is a fault-oriented law. You must show intent or negligence (~~and~~ or, now, extra-hazardous activity). Exceptions (i.e., liability sans faults):

(1) Respondeat superior — imposition of vicarious liability (~~for~~ or, as to the master, liability sans fault).

(2) Land trespass by livestock or animals.

Noyes v. Colby (p. 554) → hypo: D carefully locked door to barn but X came along & unlocked it, allowing the animals to trample P's flowers. — There is liability as to D.

(3) Extra-Hazardous activity

(4) Where we impose the objective standard of ~~reasonable~~ ~~negligence~~ care as to one of sub-normal intelligence in determining negligence.

The Case of the Thorns reversed by Brown v. Kendall by holding that there is no liability without fault. The Nitro Case held the same even where there was much damage.

Negligence consists of the following four elements:

(1) You must show a duty of care owed by the D to this particular P or a class of people of whom P is a member. No transfer of negligence. You owe a duty of care to everyone to whom there is a forseeable risk of harm.

(2) You must show a breach of a duty of care; or, the failure to conform to the ordinary standard care (the manner in which the OPM would act in the circumstances).

(3) You must show an actual physical harm.

(4) Causation - you must show the proper causal connection between D's breach of duty of care and the injury which occurred as a result thereof.

(a) "But for" causation - can we say that but for this wrongful act the injury would or would not have occurred? Would the injury have " even if the wrongful act had NOT occurred in fact.

(b) Proximate causation - The misconduct must be the proximate cause of the injury of the P. Was this injury within the risk created

{Hoag v. Penn. R.R., 85 Penn. 293 (1877)

{Coon v. Stewart 36 N.J. Equity 849

Reasonable men can differ and therefore " juries can differ.

Notes: 2-6-57

Must show (for neg.):

(1) a duty to the Particular present
(2) Breach of the duty
(3) Phy. harm
(4) Causation (both kinds)

Hypo: Train, neg. carrying oil turns over & flaming oil, via streams, hills, etc., reaches P's land & burns the barn. P's land was 1½ miles ~~away~~ from the accident.
— Whether ~~it was~~ reas. forseeable that the farmer's barn would be burned was a matter of fact for the jury.
If there ~~is~~ a forseeable risk of harm to the particular person, there is a breach of duty of care.

Breach of Duty of Care

The reasonable man test is used. There is a more concrete & fixed standard, however, to deter. whether the duty was breached. The situations where the concrete standards are used (more " that OPM test)

(1) Where judicial powers decide as a matter of law, what the rules of law are as to certain situations (B+O R.R. Co. v. Goodman, p. 194; stop, look, & listen at RRs, & failure to do one is contrib. neg. This view by Holmes is not accepted. The maj. rule is that the O.P.M. test is the prevailing test.

(2) Negligence per se due to a failure to abide by a statute. This requires proof that:

(a) The stat. was enacted to protect this instant party or the ~~group~~ class of people to whom he belongs; and

(b) The statute was enacted to guard against or prevent this particular type of harm

The weight of authority holds that violation of this crim. stat. constitutes neg. per se. Mass. dissents, holding that violation of the stat is only evidence of neg. + is to be submitted to the jury with the other evidence of negligence.

(3) Res ipsa loquitur. –

hypo: P walks down street + a barrell of flour came out of a second story window of a bldg. owned by D. The P sues but does not give real proof. – P was non-suited, but the Exchequer reversed + said there was enuf proof to let it get to the jury. The ct. held that RES IPSA LOQUITUR is applicable here and justifies the case getting to the jury. It creates an inference of neg. No Directed ver. in P's

favor & the burden of going forward does not shift. The only effect of this doctrine is to get to the jury. (Majority holds this) The minority holds that if the doctrine is applicable, a rebuttable presumption of neg. is created and the burden of going for. shifts & if D does not rebutt, a dir. ver. is likely to be had by P against D.

Elements of Res IPSA LOQUITUR:

(1) Act must be one that doesn't ordinarily occur in the absence of negligence.
(2) The D must have exclusive control of the agency or instrumentality causing the damage.
(3) P must not have added to the act nor helped to occasion its occurrence.

Proving what an OPM would have done in the given case:

(1) Magnitude of (harm -) risk
  (a) " of risk
  (b) " " harm threatened
  (c) No. of peoples exposed to the risk.
(2) Value of the principle object (the things exposed to the risk)
(3) Value of the collateral object (reason for the activity of D)
(4) Utility of the risk (what is the chance of ~~of~~ achieving the collateral object)
(5) Alternatives

hypo: K, a kid, put on RR track by Simon Legree. X saved K just in time but is injured himself. Sues the RR.

RR pleaded contrib. neg. by P. — Recovery?
hyp: Suppose it is a kitten on the RR. track rather that a kid? Would it still probably be contrib. neg?

Notes: 2-7-57 → O.P.M. test:
(1) Mag. of Risk
a. Chance of harm
b. Size " "
c. no. of people exposed to risk
(2) Value of principal object
(3) " " collateral "
(4) Utility of Risk
(5) alternatives available to achieve the CO

Magnitude of Risk — (1) what is the probability that someone will be hurt. Just taking your car out of the garage does not denote a great risk. an O.P.M. would probably take the car out of the garage. (2) What is the possible size of harm which may be inflicted? (3) How many people will be exposed to the risk. Ordinarily, the jury can judge this in the light of its own gen. background.

Value of The Principal Object — the PO is that which is exposed to the risk. The value PO is not judged in the abstract.

The Value of the Collateral Obj — the reason for taking the risk. So, the val./PO is compared with the val./CO.

Utility of Risk — The probability

that the col. obj. will be obtained. The test is, like the others, ~~[illegible]~~ objective.

Alternatives Available to Achieve the C.O. — (Swan-Finch Case — The D fell down on this test because he had other alternatives. If those alters. were feasible, he should have taken them).

hypo: Simon Legree tied K, a kid, on the track of the L.I. R.R. The watchman does not keep a proper watch. Sam Samaritan tries to rescue K and is injured in doing so. The R.R. Co. pleaded contrib. neg. as a defense. — There was neg. on the RR; and Cardozo said that "Danger invites rescue" so in times of danger, a duty of care to certain people is still owed. Mag. of risk tends to indicate contrib. neg. P (Sam) was the prin. obj. and the val. thereof is great. Value of col. obj. was great (the life of K). Utility of risk was justifiable. And, there were ~~very~~ few alters. that could or should have been used. (Eckhart v. L.I.R.R.Co. 43 N.Y. 502 — J/P. Held that P not guilty of contrib. neg: (1) great val. of the C.O. (2) utility of risk very good

Con. Neg.	Due Care
✓	
✓	
	✓
	✓

Hypo: Same thing except for K, a kitten. Schwartz said that if he were

Con. neg.	Due care
✓	
✓	
✓	
✓	✓

judge, he would probably direct a verdict on the issue of cont. neg.

Blyth v. Birmingham Waterworks Co. (p. 149)

The D was responsible for the installation and maintenance of water pipes. T(P) appealed: the case should have not gone to the jury because reas. men cannot differ on facts that there should have been a directed verdict. — Is the compliance with a stat. the suf. exercise of due care? (no, as we shall later see). The magnitude of risk by burying the pipes 18 inches was not very great, therefore tending to show reasonableness. But, there was an alternative of burying the pipes deeper and avoiding possible harm. Failure to take the alternative was probably unreas. The others (1, 3, 4) are reas. and 2 and 5 are unreas. — [3 – 2] But maybe the importance of one of the two unreas. outweighs the other. Reversed (for D). Schwartz said that there should not have been a dir. ver. + that there was suf. reason for the case going to the jury.

Beatty v. Central Iowa Ry. Co.
D built RR track alongside road and crosses it at one pt, at a right angle. P alleged (after his horse was scared by the train & ~~damaged~~ injured P) that the RR should not have built track alongside the road. The RR had alternatives, but were they feasible?

Notes: 2-8-57
Beatty Case

P is claiming neg. due to the construction of the RR track so close to the highway. When they built close to the " there was a fairly large mag. of risk. The val. of the PO is great - human life. The val of the CO is, however, also great & pub. trans. The utility is great, so the score is now 2-2. The alternatives of building overpasses and "around the cape", so to speak, are present, but how feasible were they? Not feasible. So the score is 3-2 and the ct. could well be justified in finding that due care was ~~exer~~ exercised.

Lucchese v. San Francisco-Sacramento R.R. Co.
If the engineer had employed method A of stopping the train, the sudden lurch would have injured the train passengers, and if he had employed method B the ~~[illegible]~~ chance of hitting P was greater. The engineer chose method B. T/P (appealed) Rvsd: as a

matter of law the engineer & D
exercised due care and the jury
could not differ as reas. men.
The score (analysis of the App. Ct.
decision): N | DC

Here, even if the tests were evenly
balanced, the ct. would have
given J/D as a matter of law
because this was an emergency
and it is reas. care under the
circumstances of the case. We
are concerned with reas.
foresight, not reas. hindsight. The
lower ct. could have been
justified in directing a verdict
on the basis of the reasons.

Thurmond v. Pepper (p. 156)
Schwartz says he disagrees
because the driver of the truck
was initially neg. in loading
the pipe onto the truck.

Haverstick et al. v. Southern Pacific Co.
Train cars caught on ~~case~~ fire
but the Ct. said that it was
a question of fact for the jury to
decide whether the train crew
acted reas. under the circumstances.
Schwartz disagrees here
and with the reasoning of
the judge.

The T.J. Hooper

Tugs carrying barges from Va. to N.Y. Suit brought in U.S. Dist. Ct. (exclusive juris. in Admiralty cases) and judgment/P. There was division of damages between the two Ds. (division of dams. allowed in Admiralty). The gen. rule with respect to trade practices and customs: There are precautions so imperative that even universal disregard will not excuse their omission. A whole calling may have unduly lagged in the adoption of new and available devices.

Customs and admissability into evidence: Conformity or lack of conform. is ordinarily admissable as evidence, but it is not conclusive of due care of or neg.

Notes: 2-12-57
The T.J. Hooper

The admissability of evid as to custom or lack thereof. Just because it is custom doesn't mean it is acceptable or good. Ordinarily, in deter a br/duty or care, custom is admissable but not conclusive. It must pass the tests of:
(1) Relevancy — (a) relevance of biz customs T.I. and to change biz " " would have great effects and far reaching effect on biz uniformity. (b) unfair imposition on the small bizman (e.g., having to buy new mrchndize, etc.).

Mayhew v. Sullivan Co. 76 Me. 100 (1880): Even tho everyone is doing it, it may not be right. The whole industry

may be cutting corners. Evid of conform to custom is admissable but not conclusive. It is admissable because it is relevant.

hypo: 1 bigman didn't have improvement. Evid of lack of conformity to custom admis:

(1) Wide spread big conformity will not follow.

197 Penn. 625

(2) Poss. & feasible as other methods of prevention.

(3) D has failed to look for metallic guards.

Why isn't this type of evid. conclusive of neg or lack of neg? Because, one man may be 100 yrs. ahead of the trade & to impose liability may be to retard progress. When it is admiss & conclusive: in med malpractice case, if P fails to estab non-conform to local accepted med practices, he will suffer a dir **verdict.** We hold the country M.D. to the ~~same~~ standard of the locality & not the same standard as an urban M.D. A specialist will be held to a specialists S/care.

Legal Malpractice - hard to get lawyers to prosecute this type of case. And, it is not like M.D. cases because there isn't that much div of opion. So one stan/care.

24 Cal. L.R. 39

Sullivan v. Creed

~~Father~~ (D) leaves loaded gun by a stile & son shot P accidently.

Schwartz: "Rape is assault with intent to please."

Notes: 2-13-57

In Sullivan v. Creed, the ct. found that the D (father) was liable (not on a theory of respondeat superior) even tho' the son inflicted the injury. He was not intentionally wrong, but ct. imposed liability due to neg. in that D failed to act like an OPM. The mag. of risk created by leaving a loaded gun around (near the path + with a 15 yr. old around) was great. He left in there in broad daylight. People travelling along path made val. of prin. obj. very high (life). Col. obj. not val. Utility was present. He had many alternatives. ∴, he failed to act like an OPM. ∴, you may be liable for the injuries a third person criminally inflicts.

Shifting of Responsibility

hypo: A owns store + leases part of it to B. B returns one Sunday + forgets to lock the door when leaving. Thaddeus Thief steals. B is liable to A even tho' a third person conscientiously and crim. committed the act.

hypo: Father permits 10 yr. old son to take family car. Egbert hits P + P sues father. — P recovers because D-father breached a duty of care and exposed a group of people to an unreas. risk of harm.
You are liable if the specific risk anticipated or forseen results.

hypo: A, store owner, hires B as salesman. B rapes a salesgirl. — B is on a frolic + det of his own + not operating within the scope of employment. Now, if A knew B had a serious crim. record (larceny, theft, burglary), A still would not be liable, because, if anything, the specific thing to be anticipated would be theft. Since you're only liable for the specific risk anticipated, and A could not have anticipated rape on the basis of the crim. record, A could not have anticipated this specific risk or harm.

hypo: L, lunatic, finds the loaded gun by the style + shoots many people. D ~~[illegible]~~ (owner of the gun) ~~liable~~ not liable due to reasoning supra.

Mayer v. Winnipeg Electric Co. (p. 164)
We could have found that D was liable because this risk could have been anticipated. The col. obj. was not val. + the mag. of risk was great. And, there were many alternatives. — "Back to Manitoba with this case" for the ct. found D not liable.

hypo: Dr. performed operation. Does Dr. have to take patient back to rm., tuck in bed, etc.; or can the Dr.

Here, the ct. held M.D. may leave routine matters to nurses staff. M.D. " shift responsibility here.

(Harris v. Fall
177 Fed 79) →

shift responsibility to the nurse.

Ales v. Ryen
8 Cal. 2d 82 (1936)

hypo: M.D. leaves a sponge in patient's stomach. Ct. held the M.D. cannot shift responsibility to nurses. He must count them himself.

(142 Penn. 527) hypo: Ct. held a ditch digger did not have to put up warning lights. He could shift the responsibility.

* Factors to Determine whether Resp. may be Shifted:

(1) Prob. that care of person to whom res. is shif. will be adequate.

(ease with which you could have done it yourself.) ← (2) Necessity of your having to shift res.

(3) Is the person to whom the shift is made reliable.

(4) Knowledge of person to whom " " made of the thing he must do.

(5)

Vaughan v. Menlove (T.I.)

D maintained rick of hay on border line of P's property.

Re: the following capacities: Intell., Know., & moral capacity, an obj. stan/care is imposed. It is no defense to say "I did the best I knew how." Subjective stan. not T.I.

Notes: 2-14-57

To determine whether there has been a breach of the duty owed, the OPM in the circumstances of the case is the test used. OPM should not be equated with any indiv or the ~~ordinary~~ average man in society.

To tell a jury to decide what they would do is reversible error:
(1) All jurors aren't reasonable.
(2) There would be many alternatives and they might all be reasonable.

The obj. stand/care test is used for all adults regardless of intelligence.

No allowance for below-average intelligence because:
(1) Trials will be made more complicated (tests, papers, etc)
(2) Ordinarily, no liability sans fault, but there is the policy of recovery by victims because one of the basic phils of Torts is compensation for an injury wrongfully inflicted.
(3) The law of Torts is to serve an educated function by inticing him to improve himself.

Thus, lack of ord. intell. is no defense: The obj. standard of the OPM is used.

43

Insanity

hypo: B, Ralph Cramden, a bus driver had a fit & went insane while driving, injuring P.
- B was liable, whether he drove into the P or failed to control the bus properly. (SFORZA v. GREEN BUS, p.178)

hypo. B, bus driver, has a heart attack for 1st time with no prior med. record. - B not liable due to failure by B to act.

∴, insane people are also held up to the objective standard of care of the OPM.

Knowledge: The consciousness of the existence of a fact.
(1927) 41 Har. L.R. 2, 17 3 basic elements:
(1) Perception of environment
(2) All previous experience
(3) Quality of memory which enable the indiv. to coördinate his total present perception with his past experiences.

[1] Measured by what the OPM in the actor's position would have perceived.

[2] Quality of memory - objective standard of care. You are required to retain things for a reas. length of time. If the OPM would have forgotten, so could you.

[3] All previous exprience -
a. Minimum know. - everyone is presumed to know a min. no. of things (e.g., laws of nature, gravity, fire burns, water drowns, weather considerations; certain facts about himself, ability to lift heavy objects, amt. of space you take up; the law, everyone is presumed to know the law; everyone is presumed to take cognizance of precautions; the things of the community are presumed to be known.

43 N.E. 17
43 N.E. 17
43 N.E. 17

Notes: 2-19-57

Knowledge — We make no allowances for the fact that you are below the usual level of individual capacities. An objective standard of comparison is used. An OPM is not always ~~with~~ the ordinary perfect man. i.e., if the OPM would have made a mistake, you are privileged to do so.

As far as superior knowledge is concerned, we take account of it. Here, the standard is the OPM in the circums. of the case. If you have sup know, you are accountable for it.

Moral Capacity — hypo — D driver, to avoiding hitting K, a kitten, swerves & injures Polly Pedestrian. D was a member of a Cat Cult. — D would be held to the stand of the OPM in the Cir/the case.

Indian Refining Co. v. Summerland

D's agent delivered and sold gas in a jar to P, a 5 yr. old. P fell, was cut and the gas (having a caustic effect) burned the P. Ct. held that D was not guilty of neg. because the OPM would not have known that gas has a caustic effect. (If D were Einstein, he would be liable.) But, since the theory was on the delivery of a glass jar to the child, J/P/A.

Public Service of New Hampshire v. Elliott
J/P/Aff. An affirmative duty of care was owed to the P because even though P was a trespasser (orig. he was an invitee), he was a known tres. and D knew he was there. A duty of care is owed to a known trespasser. Even tho' P came with sup. know., he could have reas. been diverted and the ct. found that here an O.P.M. might have been diverted also.

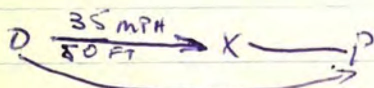
363 Penn. 585 (1950) P walking up & down restaurant floor reading menu, & fell in trap door. Ct found that the OPM might not have expected a trap door and P not guilty of contrib. neg.

Whicher v. Phinney
Instinctive acts in emergency situations by one fit to act in an emergency might exempt the one acting from liability. However, Magruder J., said that there should be only one standard of care: the OPM in the circumstances of the case (the better rule). — All emergencies are not such that require instinctive acts (fires are emers but firemen in fighting it are not solely instinctive). Here, X exposed P to a greater risk of harm + whether D was neg. or careful would not be T.I.

[Assignment: Read pages 190 – 260. Omit LANCE v. Van Winkle on page 198.]

Notes: 2-20-57

Whicker v. Phinney — X is liable for the injuries he inflicts. If Manny the homo maniac comes along + shoots P, X not liable because this risk could not have been forseen and this result was not within the risk. But D's hitting P with the car was a result within the risk. J/D/aff.



[Minors] Charbonneau v. MacRury

D (17 yrs. old) was duly licensed to drive and hit P. Chg. to jury: as to the st/care, "his conduct should be judged according to the average conduct of persons of his age and experience." To this P excepted. Ct. said (1) just because he has a license is immaterial. (2) We make allowances for minors and the test is subjective. As far as neg. cases, there will be different ~~st/~~ sts/care according to the type of minor (st/care higher for Lenny Ross than the Gas House Kids). The test is subjective. Possible chgs to jury:

(1) Look to see what a similar minor would do.

(2) Obj stand, but make allowances for age, maturity, intelli-

gence, experience, i.e., indiv. defi-
ciences.
Both are essentially the same.
" " subjective.

Harris v. Ind. Gen. Service Co. (p. 178)
P (18 yrs. old with 6 yr. old's mentality & a deaf mute) climbed a pole carrying a high tension wire (over his father's farm) & was injured by the defectively insulated wires. Held, the P was 18 yrs. old but was in fact a child, sans judgment & discretion, & should be held to that degree of care as children of his mental capacity and judg are reasonably chargeable.
* In any case where there is violation of a stat., neg. is presumed as a matter/law. Here, minors and adults are held to one standard of care, except in states which provide otherwise. But, it could be contended that viol of the stat is partially conclusive of neg.

Smith v. Sneller
Blind man, sans his cane, fell into ditch dug by D and guarded by dirt, etc. thrown around it. T/P/Rev. Ct. held that he should have had his cane (or dog or friend) AS A MATTER OF LAW. Allowances are made for old people & phy. handicapped but they must use precautions. Since P didnt exercise proper care, T/P/Reversed (for D).

Francis v. Fitzpatrick (p. 181)

A common carrier (taxi) owes a great duty of care to the ~~passengers~~ passengers and even though D had right of way at the intersection, he owed a duty of care to P (passenger in his taxi) greater ~~that~~ than the fact that he had right of way.

End of Volume I