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Trespass and Conversion

Case - Moore v. The Regents of the University of California (630)

(CA Appeals Court)

Issue. Can a patient state a cause of action for conversion against his physician for using the patient's cells in potentially lucrative medical research without his permission?

Held. Yes. Reversed.

- 1) The elements of conversion are: (i) plaintiff's ownership or right to possession of the property at the time of the conversion; (ii) defendant's conversion by a wrongful act or disposition of plaintiff's property rights; and (iii) damages.
- 2) Conversion is a strict liability tort; thus, plaintiff need not show intent, wrongful motives, negligence, knowledge, or ignorance. The claim rests upon the unwarranted interference by the defendant with the dominion over the plaintiff's property from which injury to the plaintiff results.
- 3) The broad definition of property rights, which includes the right and interest or dominion rightfully obtained over a particular object, with an unrestricted right to its use, enjoyment, and disposition, covers body parts and fluids.
- 4) It is a question of fact whether P abandoned his bodily tissue. We do not find that any person who consents to surgery abandons all removed tissue to the first person to claim it.
- 5) Although consent was given for removal of his spleen, P did not give consent for commercial exploitation.

Dissent. P's body parts do not come within the standard definition of goods and chattels. P abandoned any property right. Any damage award should be negligible; P's cell line became something of great value only through D's scientific expertise.

Commentary. This portion of the decision was reversed on appeal.

Facts

- PL = leukemia
- PL - treated at UCLA → spleen removed
- Dr. - used PL tissue to develop pharmaceuticals
- Dr & Def - patented pharmaceuticals; commercial K → market pot. = \$3B
- \$100K's paid to Dr/Def
- PL <> knowledge
- Dr. - pursuing research → monitored PL/removed tissue = 7 yrs

Issue/Holding

- Is living tissue (spleen, cell-line used for pharma, blood) = personal property? Yes (reversing trial court)

Reasoning

Majority

- conversion =
 - strict liability - unwarranted interference
 - distinct act of dominion over another's property inconsistent w/ owner's rights w/o owner's consent
 - wilful interference w/ chattel, w/o lawful justification, depriving person of use/possession of chattel
 - PL alleges
 - ownership at time of conversion
 - Def wrongful act
 - damages
- living tissue = tangible personal property
 - Def → cells = valueless until reconfigure into cell line
 - changing worthless cells to add value <> eliminate conversion
- Def - abandonment of tissue in surgery
 - abandonment = act + intent
 - as matter of law - surgery <> abandonment to first person to claim it

Dissent

- body parts <> w/i standard definition of goods/chattel
- abandonment occurred
- cells = worthless; value from subsequent manipulation
- allowing cause of action - inhibits medical research

Class

- trespass to chattels = offense to possession only
 - only recourse where Def takes goods w/o claiming ownership ("asportation")
- conversion = offense to possession or ownership rights
- relief -
 - conversion - forced sale - Def forced to buy PL property at MV - even if willing to return
 - today - innocent converter may return
 - trespass to chattel - reduction in value of chattel
- case about money

Case - Moore v. The Regents of the University of California (633)

(CA Supreme Court)

Issues.

- 1) Can a patient state a cause of action for conversion against his physician for using the patient's cells in potentially lucrative medical research without his permission?
- 2) Does failure by a physician to disclose personal interests unrelated to a patient's health vitiate the patient's consent and constitute a breach of fiduciary duty?

Held. 1) No. 2) Yes. Judgment affirmed in part and reversed in part.

- 1) Where P has neither title nor possession of the property allegedly converted, he cannot maintain an action for conversion. No authority supports P's claim that he retained an ownership interest in his excised cells.
- 2) A balancing of policy considerations counsels against extending the tort of conversion to allow P to claim a property right to his biological materials. Problems in this area are better suited to legislative resolution and the tort of conversion is not necessary to protect patients' rights.
- 3) The law recognizes several well-established principles in connection with the provision of medical treatment:
 - (i) An adult of sound mind has the right to determine whether to submit to lawful medical treatment;
 - (ii) A patient's consent to treatment, to be effective, must be an informed consent; and
 - (iii) In soliciting the patient's consent, a physician has a fiduciary duty to disclose all information material to the patient's decision.

- 1) Thus, a physician must disclose personal interests unrelated to the patient's health, whether research or economic, that may affect the physician's professional judgment. Failure to so disclose such interests may give rise to a cause of action for performing medical procedures without informed consent or for breach of fiduciary duty. The possibility that an interest extraneous to the patient's health has affected the physician's judgment is something that a reasonable patient would want to know in deciding whether to consent to a proposed course of treatment. Since such disclosure is material to the patient's decision, it is a prerequisite to informed consent.
- 2) A physician acting solely in the best interests of the patient is permitted to consider whether excessive disclosure will harm the patient. However, where there is a conflict of interest (e.g., a procedure is ordered partly to further a research interest unrelated to the patient's health), such argument cannot be used to avoid disclosure.

Dissent. P's complaint states a cause of action under traditional, common law conversion principles.

Dissent. The nondisclosure cause of action gives the patient the right to refuse consent but not the right to grant consent to commercialization on the condition that he share in the profits. A patient has a right to participate in such benefits. The nondisclosure cause of action is inadequate to reach a major class of defendants, those outside the strict physician-patient relationship, i.e., a researcher, a corporation participating in the commercial exploitation.

Commentary. The common law doctrine of conversion does not apply to cells. Furthermore, there are two exceptions to the doctor's duty to disclose: (i) there is no duty of disclosure in an emergency situation; and (ii) there is no duty of disclosure where the patient is so distraught or unstable that the physician can reasonably conclude that full disclosure would be detrimental to the patient's well-being.

Facts

- See above

Held

- PL cause of action = informed consent or fiduciary duty but <> conversion

Reasoning

Majority

- Physician fiduciary duty = must disclose personal interests that may affect judgment
- conversion → effectively = imposing a tort duty
 - affects medical research beyond traditional 2 party ownership disputes
 - application of existing law -
 - must have interference w/ ownership rights
 - if <> title and <> possession = <> conversion
 - since PL <> expect to retain possession of cells → must have ownership interest in them
 - why no ownership interest
 - ❖ no precedent
 - ❖ CA law limits continuing interest in excised cells
 - ❖ Def patent <> PL property
 - ❖ applicable laws = deal with disposal for social reasons <> personal property law
 - extension of existing law -
 - policy considerations = against extending tort (patient right to make informed medical decisions
←→ **strict** liability to innocent parties conducting socially useful activities (e.g., research))
 - legislative resolution = better
 - tort conversion <> necessary to protect patient rights
 - better to enforce "informed-consent" and "fiduciary-duty" liability

Dissent (1)

- Def wrongfully interfered w/ PL right to determine, prior to removal, how body parts used

- if Def <> knowledge → no conversion

Dissent (Mosk)

- informed consent <> work - patient can only refuse commercialization; cannot participate in
- fiduciary duty <> reach potential offenders beyond physician/patient relationship (parties which may participate/profit more than physician)

Class

- case about money - PL has lost b/c no chance at big money
- conversion - strict liability = easier cause of action
- Dissents = key - PL = only right to refuse; no right to sell
- damages -
 - conversion - based on value of property (\$3B) entire value derived from his cells - minus cost of developing
 - fiduciary duty/informed consent - based on harm to PL; more difficult to determine
- basis for court decision = policy
- protection of innocent researchers - difficult to identify ownership of cell/know history (w/ requisite approval)
- abandonment <> necessarily means owner gives up ownership interests
- court - policy considerations determine ownerships
 - <> want to protect researchers
 - social ownership vs. PL benefit
 - social benefit vs. PL ownership
 - if able to sell body parts → ability to be healthy influenced by wealth (wealthy can buy body parts)
- physician disclosure <> relevant to conversion issue
- who owns what
- what implications of ownership
- DC/Moore - resistant to expanding tort liability
 - DC argues rules
 - Moore argues policy

Nuisance

Morgan v. High Penn Oil

Supreme Court NC (1953)

Issue. Absent a showing of negligence in construction or operation, can D's refinery be adjudged a nuisance in fact?

Held. Yes. Judgment for P. (However, a new trial was granted because of error in jury instruction.)

- A private nuisance in fact may be created or maintained without negligence. In reality, most such nuisances are intentionally created and maintained. An invasion of another's interest in the use and enjoyment of land is intentional in the law of private nuisance when D acts for the purpose of causing invasion or knows that it is resulting, or is substantially certain to result from his conduct.
- One who emits noxious fumes or gases day by day in the running of his factory may be liable to his neighbor even though all available precautions have been taken. The evidence clearly shows that D intentionally and unreasonably caused noxious gases and odors to escape onto P's land so as to substantially impair P's use and enjoyment of his land.

Commentary. A defendant may also be held liable for negligently causing a nuisance if the defendant has failed to exercise reasonable care to avoid the interference.

Facts

- PL owns 9 acres (next to factory) w/ trailer park
- Def operates oil/gas refinery (built 5 yrs after PL built trailer park)
- noxious fumes carry over PL land
- PL sues for
 - private nuisance (tort)
 - civil action
- Def -
 - private nuisance -
 - no per law b/c factory = lawful enterprise on its own property;
 - no per fact b/c PL <> prove negligence
 - civil action - complaint <> establish required negligence

Issues

- Did fumes from Def refinery constitute a nuisance to PL, even though no negligence was proven by PL? (i.e., does PL have cause of action for nuisance or only for negligence?)

Held

- High Penn = intentional nuisance
- Injunction barring High Penn from emitting noxious fumes

Reasoning

- nuisance = improper use of property + injury to another/another's property
- nuisance per se/at law = act, occupation, structure which = nuisance at all times and under any circumstances, regardless of location or surroundings
 - lawful enterprises <> nuisance at law
- nuisance per accidens/in fact = become nuisance by reason of location, or manner constructed, operated, maintained
- Def experts imply that plant = no fumes if operated properly (i.e., negligence)
- negligence <> nuisance = distinct fields of tort liability
- maxim (nuisance) = every person uses property so as not to injure that of another
- nuisance = field of tort liability = non-trespassory invasion of another's interest in the use/enjoyment of land
 - intentional invasion - when conduct unreasonable under particular circumstances
 - intentional = purposely acts, knows invasion occurs, knows subst. certain to result
 - liability → irrespective of degree of care/skill exercised to avoid injury
 - no invasion allowed at all - irrespective of negligence or care
 - unintentional invasion - when conduct = **negligent, reckless or ultra-hazardous**
-

Class

Def - PL didn't prove negligence alleged in complaint

Court recognizes that nuisance = field of liability comprising numerous different situations

Def - position =

- nuisance either in fact or at law
- lawfully operated enterprise can only be nuisance in fact
- nuisance in fact only if negligently operated
- no evidence proving negligence → no liability

Court - recognizes subsets of unintentional negligence = negligence, reckless, ultra-hazardous

Intentional elements

- purposely acts - knowledge of act

- knows act will occur - speaks to motive
- knows substantially certain to result -

Morgan/High Penn (nuisance) vs. Madden/DC Transit (battery) - no intent for battery (intent to cause harmful/offensive contact) even though DC Transit knew fumes regularly spewing forth

- different torts - require different types of intent (some require intent to do harm)
- critical distinction - Morgan on own land; Madden on public property
- nuisance - different reasoning applies when applied to ownership interest in land

Did Def do anything wrong? - unimportant question

Is court implying that plant s/b located elsewhere? NO

Basic issue - Def invaded PL's right (issue of right/wrong = irrelevant)

Next step → buy landowner off

Fontainebleau Hotel Corp. v. Forty-five Twenty-Five, Inc. (679)

(FL App. 1959)

Issue. May a landowner, absent a contractual or statutory provision, be precluded from using his property in such a way that it interferes with the air and light of another?

Held. No. The temporary injunction is reversed.

- 1) It is well settled that a property owner does not have the right to use his property in such a way that it will interfere with the legal rights of another.
- 2) But no American jurisdiction has ever held that a landowner has any legal right, in the absence of a contractual or statutory provision, to the free flow of light and air across the adjoining property of his neighbor.
- 3) Thus, even if a structure is built partly out of spite, if the structure serves a useful purpose there is no action against an adjoining landowner for the interference with light and air across another's property.

Commentary. Courts traditionally reject the common law easement for the light and air that pass over a neighbor's property on the ground that such a rule would inhibit the growth of both towns and industry.

Facts

- PL (Eden Roc) constructed hotel 1 yr after Def's (Fontainebleau) hotel constructed
- Def adding 14 story height to its building
- Def's addition will block sun from PL hotel during afternoon of winter months
- PL alleges Def = malicious intent

Procedure

- trial judge - temporary injunction for PL - solely on basis that no one has right to use property to injure another
- FL Appellate Court hears -

Issues

- Does the construction of a building create a nuisance where such construction will infringe on the light/view otherwise enjoyed from another's property ?

Held

- No COA

Reasoning

- one <> use property to injure lawful rights of another
- one may use property so long as <> nuisance to another
- <> right for free flow of light/air across neighbor's land
- rule = where structure serves useful/benevolent purposes - no COA for infringing on light/view from another's property

Class

- for nuisance - harm <> enough; must be harm of a legal right
- what is fair? - reciprocal issue - can't protect one party's rights w/o infringing on rights of other party
- court ignores malice issue (does not consider if Def could configure building addition so as to protect both parties' rights) -
- inconsistency b/w Morgan and Fontainebleau?
 - Morgan - involved a right to be free from noxious fumes
 - Fontainebleau - no right to light/air
 - rights in property may differ b/w settings

September 14, 2000

- no issue of reasonableness considered
- Fontainebleau = usefulness of building - given considerable weight

Misrepresentation

Morrison v. NBC (HO 27)

NYS 2d (1965)

Facts

- Def deceived PL into thinking was participant on valid quiz show
- Def quiz show = rigged
- public scandal when rigged show discovered
- PL sues for misrepresentation
 - PL suffered harm to reputation/loss due to deprived of scholastic fellowships - general public views all people (including PL) associated w/ show as corrupt
 - Def = corrupt purposes - not essential illegality BUT violation of strong moral standards
 - Def = lied to induce PL participation

Def

- elements alleged do not fall within recognized tort categories

Trial Court - denies Def motion to dismiss

Appeals Court - Affirms denial of motion

- prima facie tort = no social justification + purpose to injure PL
 - intentional infliction of harm through a lawful act w/o justification (similar to Tuttle)
 - ultimate purpose of scheme = corrupt → no socially useful purpose (even tho <> illegal)
 - lacks purpose to injure PL specifically
- defamation - not b/c Def published nothing derogatory (no libel/slander)
 - yet harm sustained = harm to reputation - similar to defamation

- deceit - knowing misrepresentation + purpose of inducing PL to act + PL relies on misrepresentation + PL injured through loss of property/services
 - Def injury to PL <> property/services
 - injury = remote (b/c arises from public's perception rather than directly from Def actions)
- negligence - lack of due care results in harm to PL
 - while harm to PL <> intended → putting PL at risk = intended/should have been known
- classic basis for remedy =
 - intentional use of wrongful means +
 - intentional exposure of another to known/unreasonable risk of (foreseeable) harm +
 - results in harm
- issue - common law reach of providing remedy for foreseeable harm from intentional conduct
- damages -
 - no need to prove special damages b/c harm similar to defamation where only general damages must be proven
 - harm normally occurs from type of conduct even if special damages <> provable

Class

- types of torts covered - protect some interest peculiar to the type of invasion
 - assault
 - battery
 - false imprisonment
 - fraud
 - nuisance
 - privacy
 - intentional infliction of emotional distress
- compare w/ Tuttle v. Buck
 - Tuttle v. Buck - uses general theory of tort law as basis for decision
 - Morrison v. NBC - stitches together elements from different torts
- Leebron -
 - court is bold - violates basic limitations in applying each individual type of torts
 - why so much on prima facie tort
 - theoretical - if lawful act can create liability → w/b odd if misrepresentation is unlawful but becomes protected b/c does not result in particular type of damage
 - Bartel own word - had written prior decision discussing prima facie tort and gotten wrong; used current decision to establish the correct reasoning
- Three ways of establishing tort liability
 1. action fits w/ established category or expand existing category
 2. prima facie tort - intentional infliction of harm w/o justification (rarer)
 3. Bartel - intentional infliction of harm by otherwise unlawful means
 - if inflict type of harm targeted by type of tort
 - through means targeted by tort law
 - s/b tort liability
 - Leebron = ignores policy issues which restrict application of each type of tort
- distinction from defamation

Defenses of Person/Property

Courvoisier v. Raymond (34)
(Colo. 1896)

Issue. Where the circumstances are such as to lead a reasonable person to believe his life is in danger, is that person justified in using force against another whom he mistakenly believes to be part of the danger?

Held. Yes. Judgment for P is reversed.

- a) The jury instruction had the effect of eliminating the circumstances created by the rioters from consideration by the jury.
- b) If D would have been justified in shooting one of the rioters who approached D as P did, and if D actually mistook P, then the circumstances might have justified D's action.
- c) A person may be justified in using force not only against those who actually endanger his life but also against those who a reasonable person in the same circumstances would believe endanger his life.

Commentary. The general rule also indicates that there is no duty to retreat if the actor is in his own home or he is attempting a valid arrest. There is no privilege of self-defense when the danger has passed or when excessive force is used.

Facts

- Def = jewelry store owner; lived upstairs
- 3rd party came to door of store at night demanding to be let in
- Def chased off w/ gun shots into the air
- 3rd party retreated throwing debris at Def
- PL w/ deputy sheriffs approached/arrested 3rd party
- PL approached Def
- Def shot PL

- PL - claim = Def recklessly fired at recognized law officer
- Def - claim = Def fired in self defense given surrounding riot/past robberies

Trial court - finds for PL (not explicitly stated)

- in instructing jury - judge ignores justification claimed by Def (= if PL <> assaulting Def → must find for PL)

Appeal - remanded

- two issues s/h/b considered
 - was PL assaulting Def (submitted to jury)
 - if no - was PL justified in shooting given surrounding circumstances (excluded from jury)
- issues for jury consideration -
 - would Def = justified in shooting 3rd party if 3rd party had advanced toward him (self defense)
 - did Def reasonably mistake PL for 3rd party (excusable accident) - jury might find mistake to be excusable

Class - October 4, 2000

- does result in Courvesier follow from Boston v. Muncy
 - consider that PL<> actually attacking Def
- maybe apply reasoning of two innocent parties - loss should lie with actor causing loss
- possible tests
 - subjective - Def had reasonable belief that being attacked
 - objective - was PL attacking Def
- if objective of self defense = deterrence → PL should win b/c no reason to deter PL innocent actions
- Why is self defense a defense?
 - people will do it anyway - legal system will not deter

- reasonable action
- not fair that PL = at fault and still receive windfall (**Katko v. Briney**)
- where Def physical safety threatened - legal remedy may not be proper compensation (e.g., death to Def)
- Key issue -
 - should person acting in self defense pay for action

Class - October 5, 2000

- why are acts of rioters relevant? - influenced Def reasonable perception of whether PL was attacking
- reasons why Def <> have to pay for harming another
 - look at motives
 - Def act in own interest to detriment of PL (both parties = innocent)
- distinctions relevant in considering liability
 - acting to protect life v property
 - property - easier to value property and therefore pay
 - life - less clear if able to compensate the loss
 - accidentally harming 3rd party vs. intentionally harming 3rd party
- **Theories of self defense**
 - **Def did nothing wrong - consider moral action of Def/intent/negligence**
 - **efficiency - where two innocents, leave the loss where it lies**
 - **causation - who shot who**
 - **fault based - if harm someone but act reasonably → no liability**
 - unanswered - what if harms purely accidental
- Contrast Courvisier w/ Morris v. Platt
 - both based on fault based theory - if harm someone but act reasonably → not liable

Innocent Attacker (36)

- Restatement - passes on issue of self defense against actions (s/b) recognized to be innocent

Innocent Bystander (36)

- **Morris v. Platt** (Conn. 1864) - accidental harming of bystander reasonably intended in self defense against 3rd party = not actionable
- Restatement § 75 - innocent unless actor realizes that act creates unreasonable risk to innocent bystander
- Roman law - liability b/c only allowed to use force against force

Limitations (37)

- who struck the first blow?
- was force excessive under the circumstances

Necessity/Privilege

Ploof v. Putnam (50)

Vt. 1908

Issue. Does the privilege to invade another's land and chattels by reason of private necessity supersede the privilege of the possessor of the land and chattels to use reasonable force to prevent the invasion?

Held. Yes. Affirmed.

(a) There is a privilege to enter land and use chattels of another if there is a private emergency.

(b) Here, P's choice appeared to be to invade D's land and use his chattels or face the prospect of losing his own and his family's lives.

(c) The preservation of life is more important than a property right.

Commentary. The private necessity privilege is narrower than the public one (i.e., it must appear that the emergency is great and the interests being risked must be greater than those violated).

Facts

- Def owned dock on lake
- PL boat tried to dock in middle of storm
- Def agent through off mooring lines
- PL boat crashed on shore
- PL sues
 - trespass - Def agent s/n/h unmoored ship
 - violation of duty to allow PL to moor ship to dock during storm
 - Def claims - PL could have moored to natural objects in lake

Trial Court - rules for PL

- doctrine of necessity - applicability depends on the circumstances
- entry upon land to save goods in danger of being lost <> a trespass
- special application when human life at risk - may sacrifice personal property to save human life (self/others)
- on a ship for transit - see below
 - w/ charge - owner recovers charge against ferryman

 - w/o charge - loss of personal property spread between all parties (passengers/crew/owner) to maximize incentive to save the whole at the expense of the part

Class

- Actions (Writs) - at time of case
 - Trespass - Def touched ship
 - Case (Negligence)

- Actions currently
 - Trespass to chattels (interference w/ thing) - Def touched ship
 - Battery

- Contradicting privileges
 - Def - privilege to use force in defending land
 - PL - but entry onto land was b/c of privilege to save life

- different obligations to Def
 - Def cannot interfere w/ giving of aid
 - Def may not have obligation to provide aid

- Cases relied on by court - distinguishable from present case?
 - precedent - PL was not there
 - damage = trivial

- consent implied b/c would be reasonable
- current case -
 - different from precedent b/c PL and Def present
 - law requires that land owner act reasonably in allowing PL to trespass due to circumstances
 - self defense
 - ❖ generally allowed b/c typical PL caused situation
 - ❖ current case - threat caused by act of God
 -
- similar to Mink?
 - for public good therefor we allow temporary invasion of rights

Admiralty - General Average Contribution (52)

- master - may jettison some cargo to save ship/remaining cargo
- individuals suffering loss - receive pro rata compensation from other parties (including owner)
- loss borne by all

Vincent v. Lake Erie Transport (52)

Minn. 1910

Issue. May one who is forced by necessity to use the property of another do so without liability for injury to the property caused by his use?

Held. No. The judgment for P is affirmed.

- (a) The ship's master exercised ordinary prudence and care in keeping the ship moored to the wharf during the storm.
- (b) In so doing, he deliberately protected the ship at the expense of the wharf.
- (c) The damage to the wharf did not result from an act of God or unavoidable accident, but rather from circumstances within D's control.
- (d) Having deliberately availed himself of P's property, as the storm gave D the right to do, D was liable for injury inflicted by his actions.

Commentary. The invasion of the other person's property out of private necessity must protect an interest greater than the interest involved. Where this is the case, it creates liability where the party whose interests are invaded tries to expel the invading party.

Facts

- Def ship moored to PL dock during storm
- PL dock damages = \$500
- PL sues for recovery of damages; claims negligent to moor ship to dock during storm
 - negligence
- witness (not present at time of storm) - ship could have moved elsewhere
- Def claims necessity as defense to any liability

Trial Court - rules for PL (dock owner)

Appeals Court - Majority - affirms; remands for determination of damages

- refutes witness → responsible parties <> required to use "highest human intelligence" at time of storm nor to try every possibility
- negligence - would have been imprudent to undock at time of storm
- ordinary rules regulating property rights suspended by forces beyond human control
- PL injury attributed to act of God where not at the will of Def
- public necessity -
 - in times of war/peace - may require taking of private property for public purpose
 - taking of private property for public purposes requires compensation
- property rights suspended - b/c act of God/beyond human control
- case is NOT
 - self defense of property - Def injured PL property b/c PL property was threatening Def
 - act of God led to injury beyond the control of Def
- Case is = Def prudently used PL property to protect Def's own more valuable property

Appeals Court - Dissent

- if Def boat lawfully docked at time storm started → damage to dock = inevitable result of storm
- if Def exercised due care → not at fault
- PL contractual relations includes assumption of risk assoc. w/ damages from boat using dock under K at time of storm

Class

- tying boat to dock = purposeful human act/ NOT an act of God
- rules/incentives to encourage people to behave in preferred way
- property rights suspended where act of God threatens property
- Mouse's Boat (?)
 - boat goes out overloaded
 - have to throw off certain goods
 - want to encourage throwing out of least valuable property so as to protect the most value
- Development of theory
 - Ploof v. Putnam
 - property rights suspended when public necessity arises
 - property owner liable if acts against public necessity
 - Vincent
 - Def may act prudently to protect property at expense of other party
 - Def liable for damage arising due to infringement on PL property rights
- Theories - of determining whether liability arises
 - act prudently = no liability; if act imprudently = liability
 - property rights
 - whoever takes decision
- Basic Issues
 - What criteria determine prudent behavior?
 - What determines who should pay?
 - re-emergence of property rights - did damage to property rights arise as a result of public necessity
- Vincent - separates questions

- was Def behavior proper
- is Def liable for behavior (not even addressed in Courviesier)
- **Fundamental Issue to Torts - How do we determine who/when liability arises**
 - Courviesier - if act prudently - no liability
 - Morris v. Platt - if act innocently - do not have to pay
 - Vincent - issue of liability is separate from issue of prudent action

Assumption of Risk/Unjust Enrichment (56)

- conditional/incomplete necessity privilege - may damage PL property otherwise not allowed to due (e.g., trespass) BUT is liable for damages
- unjust enrichment - Def compensates PL for benefit derived by Def (e.g., leading to damage to PL)
- compensation for damages - factors to consider
 - riskiness of cure
 - value of cargo/hull
 - no rescue/no pay
 - risk premium - compensates for failed rescue attempts
 - often resolved through arbitration (e.g., Lloyds)
 - liability for salvage premium = re: environmental issues - preventing spillage, etc.

Public Necessity (57)

- two types of situations (generally) - complete privilege = no recompense necessary
 - war - to prevent from falling into enemy hands
 - fire - to prevent further destruction to other buildings
- two types of necessity defenses to damage claims
 - loss would have occurred even w/o Def intervention - fire/enemy w/h destroyed
 - loss w/h have occurred anyway - defense = solely public necessity
- qualified immunity -
 - from damages arising from public taking
 - for officers of executive branch
 - dependant on scope of discretion/responsibilities of office/specific circumstances - need
 - reasonable grounds
 - good faith belief of executive officer that taking = necessary

Boomer v. Atlantic Cement (694)

NY 1970

Issue. Where a business is so operated as to be a nuisance that substantially injures nearby residents, and where the value of the business operation is far more than the relatively small damages suffered, may permanent damages be awarded in lieu of an injunction?

Held. Yes. Lower court ordered to grant an injunction, which shall be vacated upon payment of permanent damages.

1) Permanent damages may be awarded in lieu of an injunction where the value of the activities sought to be enjoined is disproportionate to the relatively small damage caused thereby.

2) Permanent damages are fair because they fully recompense the damaged property owner and at the same time provide an incentive to the business to abate the nuisance and avoid suits by others.

3) The granting of a short-time grace period in which to solve the problem prior to issuance of the injunction is impractical and will lead to requests for extensions. Furthermore, it puts the burden for correction of an industry-wide problem on one private enterprise.

Dissent. An injunction should be granted to take effect 18 months hence unless the nuisance is abated.

1) In permitting the injunction to become inoperative upon the payment of permanent damages, the majority is licensing a continuing wrong.

2) The incentive to eliminate the wrong is alleviated by the majority's holding.

3) The holding of the majority imposes a servitude upon Ps' lands without their consent and is unconstitutional.

Commentary.

1) When a statutory ordinance is in effect, it governs; in its absence, courts such as this one must resort to what is sometimes referred to as "judicial zoning." This case exemplifies judicial zoning.

2) The "unreasonable" issue in a nuisance action can be handled at the remedy level as well. That is, if the plaintiff asks for an injunction but the value of the defendant's activity is great, the court may deny the injunction and permit the defendant to pay past damages plus future damages (for permanent injury to the plaintiff's interest).

Facts

- Def operates cement plant next to PL property which spews contaminants (one of most dangerous kinds) on PL

Trial Court - nuisance found to exist; temporary damages awarded; no injunction granted

- effectively - PL could bring successive actions for future damages

Special Term - calculated total damages to all parties = \$185,000

Appeals court - reversed

- two issues to be considered
 - whether should resolve issues b/w parties equitably
 - whether should promote public good through private litigation
- court main function = settle immediately litigated issues
- resolution of cement pollution problem - requires combined effort of many resources - better job for legis. (direct responsibility of govt)
- large discrepancy b/w values to PL and Def
 - precedent = not a basis for denying injunction (injunction generally granted where any damage arises)
 - RULE - injunction applied where damage resulting from nuisance = not unsubstantial (\$100)
- how to avoid requirement of applying injunction?
 - grant injunction w/ future effect allowing time for technology to improve/Def to change ops
 - no good b/c rate of research = unpredictable
 - problem is not peculiar to specific Def (as is commonly case in nuisance cases)
 - industry wide problem - requires industry wide effort to resolve
 - "servitude on land" - grant injunction conditioned on payment of permanent damages to PL
 - where unabatable nuisance exists but single recovery calculable → recovery only once (?)
 - allowed where loss recoverable obviously small as compared to cost of removing nuisance
- ruling <> foreclose public health action against Def

Dissent

- agree that reversal required
- NY legislation - requires all available methods to prevent/control air pollution
- majority = "inverse condemnation" - effectively licensing a continuing wrong
- incentive to alleviate wrong - gone after pay once (permanent damages)
- distinguishes courts using majority's remedy - nuisance property intended for public use
- imposition of servitude on land w/o owner's consent = wrong
- effectively violates NY Constitution - doesn't even allow taking of private land for public use without compensation, let alone private use

Class

- what is the privilege → value of operating plant exceeds the damage done
- court = little discretion over funding
- court - effectively saying that would have to close down entire industry if close down single plant
- did Def do anything wrong? - irrelevant to decision
 - eg., Vincent v. Lake Erie - court = clear that Def did nothing wrong
- questions
 - should injunction be granted
 - should damages be paid
- Morgan v. Highpenn - rejected argument that PL had to show lawful enterprise operated negligently
- Def - knew or should have known re: pollution from cement plant
- Dissent - inverse condemnation
 - better to grant injunction and allow parties to negotiate settlement (i.e., Def buys servitude on land)
- value of cement plant
 - workers employed
 - people using cement
- morality in decision
-
- Vincent v. Lake Erie - temporary suspension of rights to protect rights (PL rights re-arise after risk passes)
- Boomer - rights effectively suspended rights indefinitely
-
- What sense of morality/justice
 - can't think solely re: conduct/result - consider whether obligated to pay for damages
 - conduct = bad - only if not willing to pay for it (Erie - consider what happened during and after storm)
- difference b/w Vincent/Boomer/Courviusier
 - liability w/o fault = Vincent/Boomer
 - what kind of behavior can engage in? - reasonable behavior
 - who compensates whom for damage done? - look to rights of parties (i.e., owners rights)
 - liability only w/ fault = Courviusier
- Morgan v. Highpenn - strict liability where PL rights infringed on
- Fountainblau - no right to light & air - reasonableness of action = irrelevant
- Courviusier - violation of rights = irrelevant; relevant question = did Def act reasonably
 - no liability if behave in social responsible way
- Tuttle v. Buck - interests start to become muddled
- Boomer/Vincent - want people to act socially reasonable way
 - infringement of rights = liability for violation
- **Leebron - Boomer trashes property rights**
 - **consider slippery slope from earlier cases of rights being limited**

What is justification in Boomer?

Satisfying?

Consider public policy?

Nuisance Damages (Notes 699)

- Permanent Damages
 - less accurate
 - more convenient - avoid need for future action
- Temporary Damages
 - more accurate
 - administratively burdensome on judicial system/parties - require continuing future litigation
- Mitigation - PL has general duty to mitigate damages
- Caution in denying injunctive relief
 - risk of Def insolvency (i.e., inability to pay damages now/in future)
 - desirability of protecting non-party 3rd parties
 - injunctive relief frees court from calculating subjective value of PL right to freedom from nuisance
 - granting injunction incentivizes both parties to work issue out w/o court involvement - subject to following risks
 - parties will waste resources negotiating
 - parties will not reach agreement due to tendency to "bluff/bluster"
- Injunctions - allowed for both
 - ongoing and
 - imminent harms - but generally denied where Def actions only increases the risk of nuisance
- Judicial discretion - courts may delay injunction to allow parties time to comply/lessen negative effects of injunction
- Nuisance solutions
 - damages
 - injunctions
 - do nothing
 - purchased injunction - PL pays Def for right that Def stops nuisance (compensating for Def loss) -
 - **Spur Industries v. Webb Development** - housing developer brought people to the nuisance
 - "Coming to the nuisance" - defense allowed where PL comes changes position to allow nuisance to affect them

Negligence v. Strict Liability

Fletcher v. Rylands (111)

Eng. 1865

Issue. Does a person who brings on his land something that will cause harm to another if it escapes have an absolute duty to prevent its escape?

Held. No. The trial court judgment for P is reversed.

a) The damage here was not immediate; therefore, there was no trespass. Further, the reservoir was no nuisance in the ordinary meaning of the word. (The pond was not harmful to the senses.) Different legal liabilities arise from intentionally casting water on someone's land than from the ignorant escape of water from a reservoir.

Dissent (Bramwell, B.). P had the right for his mine to be free of water flowing onto it from D's reservoir. It makes no difference that the water flowed from D's land to P's land without D's knowledge.

Commentary. The Restatement of Torts has adopted the position that individuals are strictly liable when engaging in "ultrahazardous activities," defined as those which "necessarily involve a risk of serious harm to .

. . others which cannot be eliminated by the exercise of the utmost care." [Restatement (Second) of Torts section 320]

Facts

- Def built reservoir
- reservoir collapsed through mine shafts -
- existence of mine shafts unknown to PL or Def
- PL nearby mines flooded from reservoir water
- Def contractors = negligent

Bramwell - trespass lies

- Def lack of knowledge/intent = irrelevant
- legality of act = irrelevant
- mischievous consequence = relevant
- PL = right to be free from "foreign" water

Martin - no trespass

- trespass - requires
 - immediate act/damage
 - negligence - if no negligence - injured party bears the loss
- action = Case
 - no nuisance present - gravity actually caused damage (Def <> insurer of PL risks)
 - legality = relevant - lawful act → no trespass

Pollock - no trespass (no detail provided in casebook)

Class

- negligent - fails b/c Def <> know
- strict liability - Def liable even w/o knowledge
- Respondeat Superior - Def liable for contractor acts/negligence (not liable for independent contractor under law at time)
- Bramwell -
 - property rights case (similar to Morgan v. Highpenn)
- Martin
 - repudiating Brown v. Kendall - negligence required in case/not in nuisance

Fletcher v. Rylands (114)

Eng. 1866

Facts - see above

Blackburn - burden of proof on Def to prove no trespass (strict liability)

- person responsible for injury arising from anything likely to do mischief brought onto own land which escapes causing injury
- prima facie liable for all damage from items kept on own land (Def = burden of proof)
- H/E (defense) - PL assumes risk of inevitable danger
 - not applicable where - PL <> know/control/hinder risks/Def actions leading to such risks
 - e.g., traffic on highways/seas

Class

- strict liability precedent dealt w/ by Blackburn
 - escaping animals
 - escaping fumes
 - escaping filth from neighbor's privy
- negligence precedents

- loose horse
- unforeseen risks
- traffic on highway
- assume risk when go into society
- don't assume risk on neighbor's property
- hypothetical - what if bring little amount of water onto land
- likely to do mischief - Def knows item would do mischief if escapes
- **Def assumes risk - where has knowledge of risks of items on land (Def has opportunity to protect against risks whereas PL has no opportunity)**

Rylands v. Fletcher (116)

Eng. 1868

Issue. Is a person who makes a non-natural use of his land strictly liable for any damages which result to another's property?

Held. Yes. Judgment of the Court of Exchequer affirmed.

- a) An owner of land may use it for any purpose for which it might, in the ordinary course of enjoyment, be used. Thus, if the water had accumulated naturally and run off onto adjoining land, there could be no complaint.
- b) Nevertheless, a landowner who introduces onto the land that which in its natural condition was not upon it does so at the peril of absolute liability for consequences arising therefrom.

Commentary. The rule of *Rylands* is that one is liable to adjacent landowners when he brings an artificial device, which is unnatural, onto his land, where the unnatural device causes something to escape from the land which harms another's land or other property.

Facts - see above

Cairns - trespass lies (accumulation of water occurred b/c of Def act)

- natural use of land = ordinary course of enjoyment of land = no trespass COA
- non-natural use of land = introducing on land what was not naturally there = Def liable (acts at own peril)

Cranworth - trespass lies

- liable if bring anything on land which may cause injury if escapes
- due care = irrelevant
- cause of damage (trespass) = relevant
 - Def act = Def liable
 - Act of God = PL bears loss

Notes

- natural v. non-natural
- limits to Ryland (notes)
 - Acts of God - Nichols v. Marsland - ornamental pools flooded over during exceptional storm
 - mutual benefit of parties - Carstairs v. Taylor - sink overflowed - Def brought water into structure for communal benefit

Class

- Cairns - ignores knowledge of risks associated w/ actions on land
- Cranworth - strict liability - you act → you pay
- natural vs. non-natural
- Possible solutions

- negligence must be shown
- strict liability
 - Cairns (natural v. non-natural use of land)/Blackburn (assumption of risk for where bring something on land)- specifics of case
 - Carnworth - broader - bring

Ultra-hazardous Activities

Madsen v. East Jordan Irrigation (659)

UT 1942

Issue. Is strict liability appropriate if the damages are only indirectly caused by blasting operations?

Held. No. The trial court judgment is affirmed.

- 1) Had the concussion of the blast directly killed the mink, there would be no question of liability.
- 2) But this case involves the intervention of the mother mink, raising a question of whether the chain of causation was broken.
- 3) An 1896 Maine case held that the intervening act of an animal broke the chain of causation, so that injury caused indirectly by a blasting operation could not be brought under a strict liability theory.
- 4) Most blasting cases involve a foreseeable result caused by shock, air vibrations, or thrown missiles. The result here did not involve such a direct cause of injury. He who fires explosives is not liable for every occurrence following the explosion that has a semblance of connection to it.

Comment. Under the Restatement (Second) of Torts, section 522, this case would probably have been decided differently. The Utah court's reliance on the Maine case may be misplaced because there was at least one significant fact that could distinguish it from *Madsen*. The Maine court appeared to be unwilling to impose liability for indirect injuries caused by blasting where P was contributorily negligent in riding a skittish horse. Here, there was no contributory negligence present.

Facts

- PL owned mink farm
- Def blasted nearby
- mink mothers ate babies

Court - for Def

- absolute liability applies to blasting
- H/E - blasting = too remote
- Def liable for results "ordinarily chargeable to blasting"
- mink = abnormally sensitive - disposition not to be anticipated

Class

- why no liability

- lack of foreseeability
- mink = abnormally sensitive
- hypothetical - PL vase breaks
 - court w/ hold Def liable b/c expected
 - mink = intervening action?
 - consider Vosburg v. Putney - egg shell skull rule
 - should Def be liable b/c knows blasting = ultra-hazardous activity
- **abnormally sensitive PL vs. Def conducting ultra-hazardous Def (instant case)**
 - economic argument - go out of business b/c should go out of business
 - question = who bears costs of ultra-dangerous activity
 - sympathy for producers vs. ??
- Restatement possible solutions
 - § 524A - not under abnormally sensitive criterion - (Leebron) but could have been
 - § 519(2) - strict liability limited to types of harm giving rise to abnormal risk
- **abnormally sensitive PL vs. Def conducting ultra-hazardous Def (generally)**
 - consider if injury from harm which gives rise to ultra-hazardous nature
 - foreseeability = proximate cause

Res Ipsa Loquitur

Ybarra v. Spangard (297)

Cal 1944

Issue. Where a person is rendered unconscious in order to undergo surgical treatment and in the course of the treatment receives an unexplained injury to a part of his body not the subject of treatment, is it the burden of each of those who were charged with the patient's well-being to demonstrate that they exercised due care toward the patient?

Held. Yes. Judgment of the lower court reversed.

- (1) Where a person is rendered unconscious to receive medical treatment and an untreated part of his body is injured, those entrusted with his care have the burden of initial explanation.
- (2) Every D in whose custody P was placed for any period had a duty of ordinary care to see that he was not unnecessarily injured.
- (3) Any D who negligently injured P or neglected P so that he could be injured would be liable.
- (4) An employer would be liable for the negligence of his employees; a doctor in charge of the operation would be liable for negligence of anyone who assisted in the operation.
- (5) Each D had within his control one or more instrumentalities by which P might have been injured.
- (6) It is unreasonable to insist that P, who had been rendered unconscious, identify the negligent D.

Commentary. Because all of the defendants would be motivated to protect each other, the court departs from the normal res ipsa loquitur doctrine (that plaintiff must show that the cause of the harm is under the exclusive control of defendant) in order to smoke out the evidence. Under this court's theory, the hospital attendant who rolled P back to his hospital room after the operation could be sued.

Facts

- PL = appendectomy by Def

- PL right arm → atrophies after surgery
- PL sues → res ipsa loquitur
- Def claim = too many individuals/instruments involved to assess blame

Trial Court - non-suit (for Def)

Appeals Court - reversed

- res ipsa loquitur elements
 1. accident normally not occurring w/o negligence
 2. caused by agency/instrumentality w/i exclusive control of Def
 3. not arising due to contribution of PL
- basis for res ipsa loquitur - evidence of cause = accessible to Def but not PL
- **Rule - accident not normally caused w/o negligence + no contribution from PL = inference of negligence calling on Def to explain**
- PL likely never able to identify exact party/instrument b/c was unconscious
- negligence - applies to party causing injury AND party charged w/ protective duty which allows injury to occur
- Holding - where PL receives unusual injuries while unconscious for medical treatment → inference of negligence for anyone w/ control over PL or instruments which might have caused injuries calling for explanation of conduct

Class

- Def
 - anesthesiologist (Reser)
 - Nurse (Gisler) - wheeled PL into operating room
 - owner/manager of hospital (Swift)
 - surgeon (Spangard)
 - PL doctor (Tilley)
 - nurse who attended PL after operation
- unclear who works for whom - difficult to place liability under respondeat superior
- court applies presumption of negligence (rather than negligence)
- conspiracy of silence - underlying court's reasoning (tho not explicit)
- how relevant is PL access to information to application of res ipsa loquitur
 - Galbraith v. Bush - intra-family litigation for insurance re: family members in same care
 - court disposes on technical grounds
 - compare fact that PL has some knowledge = to Def w/ Pfaffenbach
 - Pfaffenbach - PL injured by Def in another car
 - action allowed b/c PL in another car (i.e., w/ less info than Def)
- all Def bound to exercise ordinary care
 - in not injuring PL
 - in not allowing injury to occur to PL while in their stead
- court "creates" (?) duty for Def to watch out for safety of PL - even when PL may have not been under the control of a particular Def
- Possible Alternatives - could have held
 - hospital liable for negligently breaching public duty
 - surgeon liable for negligently breaching duty to manage operation
- Anderson v. Somberg (304) - tongs break off in spine
 - critique - impossible to even identify all parties contributing to failure of tongs

Notes

- res ipsa loquitur allowed to go to jury when "common knowledge" that injury <> occurred w/o negligence
- Farber v. Olkon -
- Salgo v. Stanford - required expert testimony before res ipsa - could go to jury (common knowledge <> allowed w/ respect to medical advancements)
- Bardessono v. Michels - where routine medical procedure commonplace → negligence inferred from happening of accident alone

- **Greenberg v. Michael Reese** - negligence of medical judgement = contested at trial <> presumed negligent merely b/c bad result
- better technology
 - reduces probability of adverse outcome (i.e., injury to patient)
 - makes res ipsa loquitor more likely to apply where adverse outcome occurs

Cause in Fact

Summers v. Tice (468)

Cal. 1948

Issue. Has P shown causation?

Held. Yes. Affirmed.

(1) Ds' acts of shooting in P's direction were negligent and P's injury would not have resulted but for Ds' acts. Ds are joint tortfeasors and each is liable (joint and several liability) even though only one inflicted the injury. Either D may avoid liability only by proof that he did not cause the injury.

Commentary. The effect of this rule (the alternative liability rule) is to shift the burden to Ds. Each D must disprove causation just as they must disprove breach of duty in *Ybarra v. Spangard*, 154 P.2d 687 (Cal. 1944).

Facts

- PL injured by birdshot
- Def1 & Def2 both shot in PL direction at same time
- Def 1&2 claim = not joint tortfeasors
 - cannot both have caused injury
 - were not acting in concert

Trial Court - Def 1&2 = negligent; PL <> negligent

Appeals Court -

- negligence of both parties = legal cause of injury
- **both parties negligent and injury arose from such negligence**
- burden of proof on Def - b/c
 - both = wrongdoers
 - better position than PL to offer evidence as to which responsible
- where factually correct apportionment of damages b/w Def = not possible → court may guess → Def = no position to complain of uncertainty

Class

- compared to Ybarra
 - Def = duty to protect PL (e.g., warning off other Def from shooting toward PL)
 - causation much more clear in Summers - we know the instrument (must be 1 of two)/act which caused injury
 - PL better able to protect self (Ybarra = unconscious; Summers contributorily negligent?)
 - assumption of risk? court probably not going to hold that assumed risk of negligent harm
 - fewer Def - higher probability of getting right Def (Summers = 50%; Ybarra = 12.5%)
 - both Def = negligence in Summers; in Ybarra unsure of what caused harm
 - Ybarra - PL gets two things out of res ipsa loquitor (whether Def negligent; whether Def caused harm)
 - Leebron - important that Ybarra settled first

- compared to Kingston
 - more like Kingston if Def both shot and both damaged same eye (i.e., inherently one m/h/b first)
 - shooting second eye
 - egg shell skull rule - liable for loss of shooting one eyed individual (different than damaging an eye of a two eyed person)
- **Test** - but for negligence (collective) - PL would not have been harmed
- **Rule** - joint and several liability

Notes

- Hall v. El DuPont Nemours (471) - where PL establishes more likely than not that one of named Def mfrd injuring instrument (blasting caps) → burden on each Def to show that its instrument <> involved in particular incident

Herskovits v. Group Health Cooperative (453)

Wash. 1983

Issue. Can the lost opportunity for survival be considered the cause of death in a tort action?

Held. Yes. Judgment reversed and remanded.

Commentary. Some courts have held that if a doctor misdiagnoses the patient's condition, thus delaying treatment, and it can be shown that statistically this delay reduced the patient's chance of survival, then the doctor may be held liable when the patient dies from the originally undiagnosed condition, even if the patient probably would have died had the proper diagnosis been made.

Facts

- Deceased had lung cancer
- Def hospital stipulates that was negligent in properly diagnosing cancer → led to reduced chance of survival (from 39% to 25%)
- PL (estate of deceased) sues - claims = medical testimony of reduced survival rate = sufficient evidence to allow proximate cause to go to jury
- Def claims - WA law requires that medical testimony must establish that act probably/more likely than not caused subsequent injury

Issue - whether patient w/ less than 50% chance of survival has COA if hospital negligent in diagnosing cancer thereby reducing chance of survival

Trial Court - granted Def motion for summary judgement

Appeals Court - reverse for PL

- negligently rendering aid and increasing risk = liability for injury from such increased risk
- increased risk = sufficient to hold Def responsible - otherwise Def avoids liability any time less than 50% chance of survival
- **damages** = loss of chance damages = only those associated w/ premature death (e.g., lost wages, changed med. exp.)

Pearson (Concurring) - damages should be weighted to proportion of risk increase

- two separate questions
 - what caused loss
 - what is nature and extent of loss
- probability of long term survival reflected in amount of damages awarded for loss of chance

Dolliver (Dissenting) - PL should prove negligence probably caused death

- well established/valuable proximate cause traditions

- more likely than not standard - limits emotionality
- lesser standard - may be too loosely applied

Class

- much more likely than not that death was not caused by Def negligence
- non-negligent cause of death - negligence merely re: diagnosing COA
- ways of measuring damages
- identify life expectancy figures and value time differential b/w w/ and w/o negligence
- look at % reduction in possibility of living and take that % against value of a full life (don't forget that cancer responsible for initial reduction in chance of living)
- Notes (457) - does PL have to wait until death for recovery
 - increased risk of pre-mature death - affects enjoyment of life
 - medical monitoring
- problem of multiple causation
 - do we assume injury from one cause?
 - do we allocate injury b/w parties? How?
- separate creation of risk from realization of risk
- at what time do you assess damages?
 - if Def doesn't die → even 14% may be over compensation

Sindell v. Abbott Labs (HO III)

Cal. 1980

Issue. May P recover from the drug manufacturers that produced a drug identical to the one that injured P without identifying the manufacturer of the precise product that caused the injury?

Held. Yes. Judgment reversed.

1. The "alternative liability" theory of *Summers* cannot apply since P cannot identify the actual tortfeasor. Neither can the "enterprise liability" theory of *Hall* apply since the theory is appropriate only where a small number of manufacturers jointly control the risk and pervasive governmental standards are not involved.
2. The rationale behind *Summers* applies here, however. Between an innocent P and negligent Ds, the latter should bear the cost of the injury, when the nature of the product delays injury so as to make identification of the tortfeasor impossible.
3. It is reasonable to measure the likelihood that any of Ds supplied the injurious product by the percentage of the entire production of DES attributable to each D. Thus, once P proves injury caused by DES, each DES manufacturer is liable to P in proportion to its individual share of the entire DES market, unless it can prove individually that it could not have produced the precise product that injured P.
4. To take advantage of this theory, P must join sufficient manufacturers of the product to prove that a substantial share of the market is represented.

Dissent. The majority rejects over 100 years of tort law which required that before tort liability was imposed, a "matching" of defendant's conduct and plaintiff's injury was absolutely essential.

Commentary. There are two other modified versions of the "market share liability" theory of alternative liability. The "risk contribution" theory provides that the plaintiff need only sue one manufacturer, and the percentage of that manufacturer's liability is based on comparative negligence, with market share being only one of several factors that are used in making that finding. The "concert in action" theory provides that defendants who are engaged in "conscious parallel activity" have acted in concert.

Facts

- Defs mfr DES from 1941 to 1971

- DES = numerous uses (including preventing miscarriages)
- FDA
 - 1947 - authorized marketing to prevent miscarriages **on an experimental basis w/ warnings**
 - 1971 - ordered Defs to stop marketing/promoting DES for prevention of miscarriages
- PL mother took DES while pregnant
- DES causes cancer in daughters of mothers who took
- PL claim - Def knew/s/h/known re: DES
 - cancer risks
 - would cause cancer after latent period
 - actually ineffective for preventing miscarriages
 - failed to test for efficacy/safety
 - marketed DES on unlimited basis
 - failed to warn properly
- COA 1 = Defs jointly/severally negligence for failure to testing, warning, monitoring
- COA 2 = Defs jointly liable regardless of which brand used by PL mother b/c of
 - collaboration (marketing, promoting, testing, adherence to industry wide standard) and
 - fungibility - each brand made from same formula and fungible with other brands
- Other COA - strict liability, violation of express/implied warranties, false fraudulent misrepresentation, misbranding of drugs, conspiracy, lack of consent

Trial Court - sustained demurrer for Def

- PL could not identify Def which caused harm

Appeals Court - reversed

- generally - liability requires causation by Def or instrumentality under Def control
- exceptions
 - **Summers v. Tice** -
 - **b/w innocent PL and negligent Def → negligent Def should bear loss**
 - burden of proof shifted where PL cannot identify which of two Defs caused injury
 - Def <> greater access to info to PL → not fatal to COA
 - requires all Def joined
 - current case = not all Def present → classic Summers = inapplicable
 - **possibility that any of joined Def caused injury → so remote that unfair to require joined Def to exonerate selves (high probability that actual offender escapes)**
 - no clear causal relationship
 - **Concert of Action**
 - **requires Defs assisted/encouraged each other** to inadequately test/warn re: DES → no evidence in current case
 - **Industry wide liability**
 - each Def liable for injuries due to adherence to industry wide standard
 - **required elements**
 1. insufficient, industry wide standard as to safety of product
 2. PL not at fault/Def at fault for absence of relevant evidence
 3. generally similar defective product mfred by all Def
 4. PL injury caused by defect
 5. Def owed duty to class including PL
 6. clear/convincing evidence that PL injury caused by product of one of Def (e.g., due to high % of def products mfred by joined Defs)
 7. all Def = tortfeasors
 - current case - FDA regulation - unfair to impose liab on actually innocent party only b/c followed FDA guidelines
 - **Market Share Liability** - Extended Summers -

- **Theory - b/w innocent PL and negligent Def → negligent Def should bear loss**
- **Theory - Def better able to bear cost**
- reasonable to measure likelihood that any Def caused injury by % of DES sold by each bears to total DES sold
- **Theory** - joining substantial share of injury causers significantly diminishes injustice of shifting burden of proof to Defs
- **Required** -
 - ⊂ Defs representing "substantial percentage" of market
 - ⊂ fungibility of negligence by Defs
- **Liability** = share of total liability represented by share of market unless
- **Def Safe harbor** - demonstrate could not be responsible for injury
- each Def liability approximates damage caused by DES mfred

Dissent

- unfair - majority rule = liability for Def even tho mathematically probable did not cause actual injury
- rejects > 100 yrs of tort law tradition
- PL free to pick/choose targets
- **theory** - against deep pocket mentality

Class

- each Def acted in negligent way which could have injured PL (so less unfair in holding Def liable even when not actually causing harm)
- why doesn't Kingston apply to Summers apply to Sindell -
 - Kingston - can't claim no liability b/c some other Def out there; liable for moral culpability
 - Summers -
 - Sindell - inability to identify correct Def and all PL and all injuries
- decision's reasoning hardly ever applied anywhere else b/c fungibility = rare
- what if apply Summers to Sindell - joint an several liability (PL discretion as to whom to collect damages from)
- joint liability -
 - argument for - where Def negligent and could have caused entire injury (even if did not cause injury at all in reality)
- how to modify Summers to apply to Sindell
 - two PL on the hill hit by bullets
- problem - when add Def
 - desperately unfair to hold each negligent party for entire liability
- (Leebron) - court says adopted modified Summers - but got it wrong - real issue is great increase in number of PL
- (Leebron) - court requires substantial percentage of market b/c PL allowed to recover full amount and having substantial share of market reduces the unfairness to Def
 - CA subsequently rejects - if missing market share → PL bears → can not recover full amount
- **notion of responsibility and fairness** - reliant on
 - negligence - Sindell pursues this
 - causation - Epstein believes so and why he removed Sindell from casebook

Notes

- **Murphy v. ER Squibb** CA 1985 (HO 421)
- **Brown v. Superior Court** CA 1988 (HO 421)
- **Hymowitz v. Eli Lilly** NY 1989 (HO 422) -
 - (Leebron) Ultimate application of Sindell
 - irrelevant if can prove that Def did not injure PL (e.g., instrument distinguishable from PL instrement)
- **McCormick v. Abbott Labs** D. Mass 1985 (HO 23) - liability pro rated on market shares (not number of firms) established by Defs w/ residual split b/w remaining companies
- **Starling v. Seaboard** SD GA 1982 (HO 423)

- **Shackil v. Lederle Labs** NJ 1989 (HO 423) - no market share liability where injury causing drug not from same formula (and therefore each brand not causing same risk)

Proximate Cause

Palsgraf v. LI RR (501)

NY 1928

Issue. Did the employee breach a duty to P that will hold his employer liable for damages?

Held. No. Judgment reversed.

1. D owed Mrs. Palsgraf no duty, as she was not a foreseeable plaintiff. D may have been negligent toward the passenger holding the package but not to P. D owes a duty of care only to those persons to whom the average reasonable person would have foreseen a risk of harm under the circumstances.
2. The foreseeability of the plaintiff is an element of the duty owed and is, therefore, a question of law for the court.

Dissent (Andrews, J.). A wrongdoer should be held liable for all the proximate results of his acts, whether or not the injured person or the manner in which the injury resulted was foreseeable. Any question of foreseeability of injury is a question of fact for the jury.

Commentary. The opinion in *Palsgraf* represents the majority view today. Note that *Palsgraf* deals with an unforeseeable plaintiff rather than an unforeseeable risk as the *Polemis* case represented. A third view, based on the holding's dictum, is that even if there is a duty to P, liability will not attach unless the average reasonable person would have foreseen a risk of harm to the particular interest of P that is actually invaded. Very few cases actually involve direct causation to an unforeseeable plaintiff, although *Palsgraf* is often cited (incorrectly) as a matter of course in cases involving causation issues.

Facts

- PL standing on RR platform
- man jumped aboard moving train and lost balance
- Def's (RR employees) tried to help but accidentally knocked package to ground
- package contained fireworks and exploded
- explosion knocked scales over and injured PL

Trial Court - judgement for PL

Appellate Division - affirmed

- Dissent -
 - negligence of Def <> proximate cause → passenger's (carrying explosives) negligence intervened
 - no notice of explosive nature

Court of Appeals (Cardozo) - reversed and dismissed

- not a wrong relative to PL standing apart
- Negligence - actionable only where
 - involves invasion of a legal right
 - duty owed to PL the observance of which w/h avoided injury to PL
- risk must be foreseeable - if no hazard visible to naked eye → not a tort
- PL suit = wrong to her - not as vicarious beneficiary of breach of duty to another
- negligent actor = carrier of the bomb
- where risk of injury from a destructive force = clear → method of injury = irrelevant
 - liability for unleashing dangerous force where s/h foreseen risk to others
 - transferred intent - intended injury to one accidentally injures another = liability to the other
- negligence <> tort unless results in the commission of a wrong which violates a right
- issue of causation = irrelevant to case
- Def act → not a tort because no action toward PL or violation of duty to PL

Andrews (Dissent) -

- theories of negligence
 - majority = relative concept (i.e., breach of duty to particular person(s))
 - liability for all proximate causes
- **negligence = act/omission which**
 - **unreasonably does/may affect rights of others or**
 - **unreasonably fails to protect oneself from dangers resulting from such acts**
- **unreasonably** = average conduct society requires of its members
- where unreasonable act where some right may be affected → negligence arises w/ or w/o injury
- negligent act = wrongful - to those present and not present (i.e., the public at large)
- due care = duty imposed on each to protect society from unnecessary danger
- negligence requires relation to others (in an empty world → no negligence)
- Polemis - act being wrongful (dropping plank) → Def liable for results (whether or not foreseen)
- everyone's duty = refrain from acts that may unreasonably threaten the safety of others
- right to recover requires
 - PL rights injured
 - injury caused by negligence
- proximate cause - murky issue
 - factors
 - at least something w/o which the event would not occur ("but for causation")
 - natural/continuous sequence b/w cause and affect
 - substantial factor in producing result
 - direct connection
 - likelihood of cause giving rise to injury (forward looking test)
 - could the result have been foreseen (backwards looking test)
 - temporal relationship
 - practical politics
- current case - Def action = substantial factor - natural continuous sequence - in direct connection
- natural result of explosion = injury of PL
- Polemis distinguishable
 - Polemis involved risk to property damaged
 - Palzgraff involved risk to unknown/unforeseen PL
- causation
 - Polemis involved risk to property damaged
 - Palzgraff involved risk to unknown/unforeseen PL

Summary

1. foreseeability of some harm required before negligence arises
 - if no foreseeability → don't get to causation
 - duty = element of Palsgraff

2. foreseeability of type of damage
 - foreseeability of injury = one way of addressing proximate cause problem
 - ex ante - foreseeability = before happens
 - ex poste - did anything too weird happen (natural and probable)
3. what kind of foreseeability relevant
 - injury to PL - Palzgraff; Wagonner
 - kind of injury to PL - Wagon Mound; Gorris v. Scott (sheep on boat)
 - chain of causation - Polemis; Palzgraff; Lynch v. Fisher (pistol on floor of car); Doughty v. Turner Mfr
 - extent of damage - Polemis; Vosburg v. Putney; Steinhouser v. Herts (524 - almost schizophrenic)

Risk analysis - in what way should risk be associated w/ result for liability to attach

- **static cases** - did negligence increase risk of event - e.g.,
 - poison on shelf case
 - Barry v. Borough of Sugar Notch (speeding <> increase risk of tree falling on car) - if <> increase risk → not proximate cause (even tho cause in fact)
- **dynamic cases** - was increased risk eliminated before injury actually occurred
 - Marshall v. Nugent - car on icy road);
 - distinguished from Union v. Albritton - walking over pipes after fire
 - Pittsburgh - kid brings home blasting caps and kid injured - drives Leebron case) - consider intervening act of mother/passage of time;
 - Beal test (488) - where Def act come t rest in position of apparent test - if new force combines to create harm → Def acts remote

Intervening Acts

- **Questions to ask re: proximate cause**
 1. what was relationship of what happened to Def actions
 1. was there some intervening cause
- Georgia - court adopts last human wrongdoer test
- **General rule - Def liable if intervening negligence = foreseeable**
- **Intervening intentional torts** - break chain of causation unless Def negligence exposed PL specifically to that danger (Heinz v. Garrett - 486 - PL let off train and raped while walking back)(Landeress v. Flood - return child to abusive parents)
- **Intervening reasonable conduct**

Class

- why negligent (2 parts) -
 2. Def act or omission - trying to board man on moving train
 3. increased risk of injury
- negligence
 - likelihood of injury greater where try to put someone on a moving train
 - likelihood of damage to package higher
- what issue of causation does majority think case involves? None - irrelevant to case at hand
- majority
 - thinks no liability for RR - b/c negligence is relative
 - **not foreseeable that Def action which caused the harm (helping party on train) would result in harm to PL → T/F did not breach duty to PL**
- Dissent (Andrews)
 - duty is not an issue b/c everyone owes general duty to everyone else
 - issue = proximate cause
- **to which element is foreseeability relevant**
 - Cardozo = duty
 - Andrews = proximate cause

- question as to who can decide
 - Cardozo - judge can decide
 - Andrews - jury can decide if a matter of proximate cause
- Palzgraff - limited to unforeseen PL BUT is Cardozo looking for something else?

Affirmative Duties

Tarasoff v. Regents of Univ. of California (618)

Cal 1976

Issues.

- 1) Does P state a cause of action against the psychotherapists for failing to warn Tatiana of the threat on her life?
- 2) Did D have a duty to confine Poddar?

Held.

1. Yes. Lower court judgment for D on this issue is reversed and the case remanded.

- a) The general duty rule is that a defendant owes a duty to all persons foreseeably endangered by his conduct, with respect to the risks that make his conduct dangerous.
- b) The general rule is that a third party is not liable for the actions of a tortfeasor, unless the third party has a special relationship with the tortfeasor or the victim. The psychotherapists had such a special relationship with Poddar.
- c) A psychotherapist's judgment must only conform to that degree of skill, care, and knowledge exercised by psychotherapists under similar circumstances.
- d) A psychotherapist has a duty to warn a potential victim of threatened violence.
- e) That the psychotherapists were working for the state does not relieve them of liability, because governmental immunity covers only basic policy questions. Telling Tatiana of the threat was not a basic policy question that demanded great discretion.

2. No.

- a. Government Code section 856 creates immunity from tort liability for all officials relative to the commitment of a person for mental illness, thus protecting the psychotherapists.
- b. As for the police officers, Welfare and Institutions Code section 5154 relieves the police from liability for confinements of less than 72 hours of an individual ordered confined by a professional person in charge of an institution.

Concurrence and dissent. This action is based on D's knowledge and not whether D "should have" known of the danger.

Dissent. A decision to require disclosure of private facts should be left to the legislature.

Commentary. The court also said that punitive damages could not be paid in a wrongful death action. The court said that the patient's confidence should only be revealed when it is necessary to avert danger to others, and then it should be done

Facts

- 3rd party confessed to Def (Dr) intent to kill victim
- Def advised police to detain 3rd party
- Police detained 3rd party but released for lack of basis to continue holding
- n one warned victim
- 3rd party killed victim
- PL (victim's relatives) sue
- Def claim =
 - no duty of care to victim
 - immune from suit under statute

Supreme Court -

- Def negligent failure to warn victim (victim's death proximately arose from failure to warn)
 - if no liability → Def free to act carelessly to injury of PL
 - **General rule - duty to use ordinary care/skill where lack of such care/skill = injury to other**
 - justification of departing from general rule
 - foreseeability of harm - **duty owed to all to whom risk of injury = foreseeable**
 - ° special relationship - required for liability under common law affirmative duty
 - ❖ to person whose conduct controlled
 - ❖ to foreseeable victim
 - ❖ Restatement -
 - b/w actor and 3rd person which imposes duty on actor to control 3rd party
 - b/w actor and 3rd person which gives 3rd person a right of protection
 - degree of certainty
 - ° Def claim - impossible to predict violent acts (more often wrong)
 - ° court response -
 - ❖ only requires reasonable degree of skill, knowledge, care ordinarily possessed by members under similar circumstances
 - ❖ material fact - Def predicted violence and violence did occur
 - proximity b/w Def conduct and injury
 - moral blame
 - policy against future harm
 - burden to Def
 - consequences to community
 - ° public policy = protecting private interest in Dr/patient relationship
 - ° **Rule - confidential relationship must yield where disclosure essential to avert danger to others**
- Def failure to confine 3rd party per statute
 - Def immune from failure to incarcerate

Mosk (concurring/dissenting)

- issue = very narrow
- not issue → whether Def s/h predicted violence (b/c actually did predict violence)

Clark (dissenting)

- confidentiality essential to effectively treating mentally ill
- legislative issue - whether treating mentally ill sacrificed to public warnings

Class

- **court reluctant to impose liability for nonfeasance → rather create additional affirmative duties for misfeasance**
- special relationship b/w Dr. (Def) and patient (killer)
- examples of special relationships
 - parent/child

- warden/prisoner
- Leebron - interesting that court found that no obligation to confine patient/killer
- initial duty court looks to = Dr. duty to patient
 - by harming others → patient = harming self
 - does patient have COA against Dr. for failing to control patient
 - easy if CA law gave Dr right to control patient
 - Palsgraf/Cardozo duty problem = 3rd party PL is suing Dr (i.e., not patient to whom duty owed)
- Tarasoff = sleight of hand
 - court talks re: duty to protect - but only can apply to patient (per Restatement)
 - then concludes that duty to protect = applicable to PL
 - PL = clearly foreseeable injury
- likely result of decision -
 - discourage psychologist production of evidence that patient would do harm (b/c c/b used as evidence)
 - may discourage commitment (or other proceedings) to extent that must support w/ evidence of dangerous acts
- **being in a unique position - not sufficient to create an affirmative duty (but probably an essential element)**
- duty issue <> solely a causation type of problem

Contributory Negligence

- only refers to PL negligence
- **general rule - if PL contributorily negligent → recovery = barred**
- requirements - cause - must have been cause of PL injury (in both but for and proximate cause senses)
- almost irrelevant - b/c replaced in most jurisdictions by comparative negligence
- argument for/against contributory negligence
 - moral argument - cannot morally distinguish b/w two wrong doers
 - moral quality of Def negligent = different → Def negligence risks harm to others (PL negligence = harm to self)
 - difference of PL negligence
 - ° harm risked to self
 - ° harm risked to others
 - causation argument - in some cases
 - negligence of both parties required for harm to arise
 - negligence of PL would not have led to injury but for negligence of Def
 - efficiency - which party cheapest cost avoider - encourage PL to limit damage

LeRoy Fibre Co. v. Chicago, Milwaukee & St. Paul (322)

U.S. 1914

Issue. Is contributory negligence an appropriate defense where P's negligence is alleged to be the violation of a duty to use its property in such a manner that it cannot be injured by the wrongs of another?

Held. No. The trial court is reversed.

- 1) The rights of one person in the use of his property cannot be limited by the wrongs of another.
- 2) Although property adjoining D's right-of-way is subject to some risks, it is not subject to risks created by the wrongful use of the railroad's property or its negligent operation of trains on the property.

3) In order to find P contributorily negligent in this case, we would have to impose on it a duty to use its land in such a manner that it could not be harmed by the wrongs of another. We cannot properly do so.

Concurrence (Holmes, J.). The question of P's contributory negligence is one of fact. A jury could find that P did not act in a reasonable manner in placing its straw so close to D's right-of-way.

Commentary. Holmes' concurrence, if applied, would result in further complication of negligence cases since the jury would have to decide what is a reasonable manner of protecting one's self from another's negligent acts.

Facts

- PL stored flax 70 feet from tracks
- Def (RR) spurted sparks which set flax on fire → destroyed

Trial Court -

- Def operated train negligently
- negligent operation = a cause of PL loss
- certified question = contributory negligence

Supreme Court -

(McKenna)

- PL use of land = proper
- **Issue - is one party limited in use of land b/c of action taken by another on neighboring land?**
- NO
 - presumption of law → neighbor will obey law in using land
 - no recovery - **would create additional duty (to duty not to use property so as to injure another) → use own property so as not to be injured by another**
 - to what extent would RR be immune from not injuring others?
 - contributory negligence = inapplicable to current issue
 - wrongs (of another party) cannot limit property rights

(Holmes)

- consider whether PL flax so near RR as to be in danger even if RR prudently managed
- contributory negligence still apply
- negligence = matter of degree

Class

- McKenna's analysis - property rights = absolute
- wrong = allowing sparks to come from RR onto PL property
 - Morgan v. Highpenn and Fountainbleau
 - but everyone knows that train emits sparks - risk = foreseeable
- think about
 - rights
 - Holmes - rights = relative
 - rights (ideal) v. reality (real)
 - negligence
 - contributory negligence
- might say - PL negligent if flax stacked where even a prudently managed engine w/h ignited flax
- might say - PL negligent b/c PL s/h known of risk
 - assumption of risk/contributory negligence
- McKenna - two possible analysis
 1. property rights = absolute - no limit simply b/c of proximity to RR (trespass - strict liability - Morgan v. Highpenn)

- 2. limit to facts of instant case - property rights subject to negligent/non-negligent use of RR (if RR <> negligent → no liability)
- Holmes
 - contributory negligence/assumption of risk - can exist
- possibility - joint causation problem
 - RR = negligent in operation
 - PL = negligent even if RR had been non-negligent
- Leebron -
 - McKenna's approach = 2 (?) = inefficient b/c RR liable for all damage to flax on PL land
 - Holmes approach = more efficient b/c allows
- why should PL negligence limit PL rights
 - someone else's wrong cannot limit your right - Leebron → probably inefficient
- contributory negligence
 - not defense to willful/intentional conduct
 - must be proximate/but for cause of PL harm
 - last clear chance - why differentiate
 - helpless PL
 - inattentive PL
 - consider PL ability to foresee negligence of others
 - consider PL's precedent negligence (e.g., PL c/h avoided injury if had checked brakes previously)
-

Notes

- majority = **contributory negligence cannot arise b/c PL <> physically invade Def property**
- reciprocal duties
 - applicable in fire cases
 - Coase - avoid the more serious harm/disadvantage (as b/w PL & Def - i.e., societal view)

Joint and Several Liability

Amer. Motorcycle Assn v. Sup Ct. (392)

Cal 1978

Issue. Does the adoption of comparative negligence abolish joint and several liability of concurrent tortfeasors?

Held. No. D may cross-claim against P's parents.

Commentary. If the person who is seeking indemnity is without fault, almost every court will grant indemnity. However, in situations where the person seeking indemnity was himself negligent for failing to discover a defect, some courts may deny indemnity.

Facts

- PL injured in motorcycle event organized by Def
- Def cross complaint -
 - against PL parents for negligence/improper supervision of PL
 - reduction in award to PL by negligence allocable to PL

Trial Court -

Supreme Court -

- comparative fault (from Li) - did not abolish joint/several liability

- concurrent tortfeasor liable for whole of indivisible injury when his negligence = proximate cause of (entire) injury
- PL not always negligent - some likely w/b innocent
- PL culpability not same as Def - PL conduct <> tortious (only = claim reducing conduct)
 - PL negligence = injury to self
 - Def negligence = injury to public
- joint/several liability - insures PL ability to recover for full injury even when some Def not able to remit
- equitable indemnity doctrine - s/b modified to allow partial indemnity among concurrent tortfeasors
 - negligence s/b apportioned b/w all tortfeasors - whether joined or not
 - judicial adoption of comparative partial indemnity allowed - legislature has not codified rule
- settlements
 - statute - settlement reduces tortfeasor's liability for contribution/not indemnification
 - as for indemnification - good faith settlement discharges tortfeasor from claim for partial/comparative indemnity
 - PL recovery from non-settling tortfeasors - reduced only by amount of settlement (not proportionate share of settling tortfeasor) - **PL total recovery is reserved**

Class

- issues
 - abolish joint/several liability
 - if not - modify partial indemnity contribution
- eliminating joint/several liability would -
 - PL bears transaction costs of recovering from each Def
 - if any Def bankrupt/judgement proof - PL bears loss
- retaining joint & several rule -
 - court retaining general rule (PL negligence better than Def negligence) ignores possibility that actions of all parties might similarly bad (e.g., 3 way collision at an intersection)
 - some courts advocate allocating loss of insolvent Def b/w PL and remaining Def

Products Liability

- interaction b/w K and tort law
 - interference w/ K - liabilities of 3rd parties for effects on K (Moch)
 - why sue in tort law? - damages are much larger than in K

MacPherson v. Buick (722)

NY 1916

Issue. Is privity between the manufacturer and P necessary for P to be allowed to recover against D?

Held. No. The judgment is affirmed.

1) If the nature of a product is such that it is reasonably certain to place life and limb in peril when negligently made, then it is a thing of danger and, if the manufacturer knows or can reasonably foresee that it will be used by persons other than the immediate purchaser (supplier) without new tests, then, irrespective of contract, the manufacturer is under a duty to make it carefully. This position arises from prior cases involving poisons, explosives, and deadly weapons, which had placed a duty on the manufacturer thereof based on the fact that such products were "implements of destruction" in their normal operation.

2) Negligence of the wheel manufacturer, such as to constitute an actionable wrong with respect to users of the furnished product incorporating the wheel, was a question of proximate cause and remoteness. However, in order for the wheel manufacturer's original negligence to become a cause of the danger, it was necessary for an independent cause to intervene; i.e., the omission of the car manufacturer to fulfill his duty of inspection.

Dissent. D relied on the seller of the wheels to inspect them. The wheel that failed here was the only bad one in over 80,000 supplied to D. Also, there should be liability only where there is privity of contract between the parties. The manufacturer should not be liable for the negligence of one of his subvendees.

Commentary. The rule as originally propounded by the court in *MacPherson* was as follows: If a reasonable person would have foreseen that the product would create a risk of harm to human life or limb if not carefully made or supplied, then the manufacturer and supplier are under a duty to all foreseeable users to exercise reasonable care in the manufacture and supply of the product.

Facts

- Def sold car to retail dealer
- retail dealer sold car to PL
- One wheel = defective
- Car crashed while PL driving
- Wheel, not made by the defendant, disintegrated
- As result of crash, PL was injured

Procedure

- Supreme Court of NY - awarded PL \$5,000
- Appellate Division of Supreme Court of NY, entered 1914 - affirmed
- Court of Appeals NY (1916) - Cardozo
- can't get to Court of Appeals NY if unanimous decision without permission of Court

Issues

- Is the Def manufacturer liable to the public for negligence in regard to defective components manufactured by a third party which are integrated into the Defendant's own product, when such defective components cause injury to the public
- Did the Def, in selecting components used in its manufacturing process, owe a duty of care to third parties for such components
- not addressed - liability of manufacturer of the component

Held

- Judgement affirmed with costs

Reasoning

Majority

- Thomas NOT limited to dangerous products b/c later cases (Devlin) and Engl. cases (Heaven)
- Heaven (1883)
 - if danger inevitably arises from negligence in supplying an item, the supplier has a duty to the persons or class for whose use the item is supplied
 - enough that the neglect of ordinary care/skill = "probably" cause danger to person/property
 - exclude cases where merely a chance of danger of injury arises
- if thing places life/limb in danger when negligently made = inherently dangerous product
- if manufacturer knows product used by 3rd parties, duty extends to third parties
- must be knowledge of a probable(not possible) danger to be shared by third parties = duty to third parties
- defective automobile = inherently dangerous
 - speeds up to 50mph
- Def knew to be used by 3rd parties <- extra seats; sold to reseller
- One who invites others to use his product bears a duty to such users
- Def duty to ensure finished product (including components) not dangerous

- Defect reasonably detectable?

Minority

- no proof of Def knowledge of defect

Class

- change in law proposed by Cardozo -
 - extension of liability for inherently dangerous products to include danger associated w/ products which when negligently manufactured = inherently dangerous
 -
- (Leebron) - one of the most important opinions in tort law
 - most important products liability case in 20th century
- problem - how to distinguish Moch from MacPherson
 - foresight creates duty
- not an abolition of privity case in same sense as Henningsen or Moch
 - PL problem in Moch - sue on duty which would not ordinarily exist under tort law or K
 - MacPherson - duty arises under tort law (b/c product launched into public)
 -
- **Key = foreseeability (of users and injury thereto)**
 - PL suing under duty which arises under law (irrespective of K) - not suing under K

Daly v. General Motors ()

Cal 1978

Issue. Is comparative negligence a defense to strict liability?

Held. Yes. Judgment reversed.

- 1) Decedent's own conduct may be used to reduce his damages whether the action is based on negligence or strict liability.
- 2) Assumption of risk as a separate defense is abolished and merged with comparative negligence.
- 3) Thus, comparative fault must be applied to reduce damages, and the complete bar of assumption of risk should not be applied.

Dissent. The court should not mix the negligence principle of comparative negligence with the strict liability doctrine.

Commentary. The courts are fairly evenly split on whether comparative negligence principles should apply in strict products liability actions