The Law of Torts

Fifth Edition

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## Contents

*Preface to Students*  
*Acknowledgments*  
*Special Notice*

### PART I. INTENTIONAL TORTS

<table>
<thead>
<tr>
<th>Chapter</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Chapter 1</td>
<td>Fundamental Protections: The Tort of Battery</td>
<td>3</td>
</tr>
<tr>
<td>Chapter 2</td>
<td>The Action for Assault: A Tort Ahead of Its Time</td>
<td>23</td>
</tr>
<tr>
<td>Chapter 3</td>
<td>Protecting the Right of Possession: Trespass to Land</td>
<td>43</td>
</tr>
<tr>
<td>Chapter 4</td>
<td>Dueling Remedies: Trespass to Chattels and Conversion</td>
<td>61</td>
</tr>
<tr>
<td>Chapter 5</td>
<td>False Imprisonment: Protecting Freedom of Movement</td>
<td>77</td>
</tr>
<tr>
<td>Chapter 6</td>
<td>The Far Side of the Coin: Classic Defenses to Intentional Torts</td>
<td>91</td>
</tr>
</tbody>
</table>

### PART II. THE CONCEPT OF NEGLIGENCE

| Chapter 7 | That Odious Character: The Reasonable Person               | 117  |
| Chapter 8 | Borrowing Standards of Care: Violation of Statute as Negligence | 143  |
| Chapter 9 | A Phrase in Latin: Res Ipsi Loquitur                        | 163  |

### PART III. THE CAUSATION ENIGMA

| Chapter 10| Reconstructing History: Determining “Cause in Fact”         | 189  |
| Chapter 11| Risks Reconsidered: Complex Issues in Establishing Factual Cause | 211  |
| Chapter 12| Drawing a Line Somewhere: Proximate Cause                    | 237  |

Includes small portions of the book for evaluation purposes only; please contact us if you are interested in seeing more.
## Contents

### PART IV. THE DUTY ELEMENT

<table>
<thead>
<tr>
<th>Chapter</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Chapter 13</strong></td>
<td>The Elusive Element of Duty: Two Principles in Search of an Exception</td>
<td>267</td>
</tr>
<tr>
<td><strong>Chapter 14</strong></td>
<td>Vicarious Displeasure: Claims for Indirect Infliction of Emotional Distress and Loss of Consortium</td>
<td>297</td>
</tr>
<tr>
<td><strong>Chapter 15</strong></td>
<td>Caveat Actor: Strict Liability for Abnormally Dangerous Activities</td>
<td>323</td>
</tr>
<tr>
<td><strong>Chapter 16</strong></td>
<td>Strict Products Liability: Basic Theories of Recovery</td>
<td>345</td>
</tr>
<tr>
<td><strong>Chapter 17</strong></td>
<td>More Products Liability: Common “Defenses” to Strict Products Liability Claims</td>
<td>373</td>
</tr>
</tbody>
</table>

### PART V. DAMAGES FOR PERSONAL INJURY

<table>
<thead>
<tr>
<th>Chapter</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Chapter 18</strong></td>
<td>Personal Injury Damages: The Elements of Compensation</td>
<td>401</td>
</tr>
<tr>
<td><strong>Chapter 19</strong></td>
<td>Compensating Somebody: Wrongful Death and Survival Actions</td>
<td>425</td>
</tr>
</tbody>
</table>

### PART VI. INTERLUDE: PLEADING A PERSONAL INJURY CASE

<table>
<thead>
<tr>
<th>Chapter</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Chapter 20</strong></td>
<td>Some Legal Anatomy: Thinking Like a Tort Lawyer</td>
<td>451</td>
</tr>
</tbody>
</table>

### PART VII. LIABILITY OF MULTIPLE DEFENDANTS

<table>
<thead>
<tr>
<th>Chapter</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Chapter 21</strong></td>
<td>Joint and Several Liability: The Classic Rules</td>
<td>475</td>
</tr>
<tr>
<td><strong>Chapter 22</strong></td>
<td>Honor Among Thieves: Basic Principles of Contribution</td>
<td>493</td>
</tr>
<tr>
<td><strong>Chapter 23</strong></td>
<td>Please Pass the Liability: Respondeat Superior and Nondelegable Duties</td>
<td>513</td>
</tr>
</tbody>
</table>

Includes small portions of the book for evaluation purposes only; please contact us if you are interested in seeing more.
PART VIII. THE EFFECT OF PLAINTIFF’S CONDUCT

**Chapter 24**  The Once and Future Defense: Assumption of the Risk 539

**Chapter 25**  Casting the Second Stone: Comparative Negligence 563

**Chapter 26**  The Fracturing of the Common Law: Loss Allocation in the Comparative Negligence Era 591

PART IX. TAKING A TORTS ESSAY EXAM

**Chapter 27**  The Pot at the End of the Rainbow: Analyzing Torts Issues on an Essay Exam 611

**Chapter 28**  Dandelions in the Bluebook Garden: Six Classic Exam Writing Mistakes 635

**Chapter 29**  Practice Makes Perfect: Examples and Explanations 649

Index 667
Preface to Students

This book is based on the common sense premise that students encountering complex legal issues for the first time will appreciate a book that provides clear, straightforward introductions to these issues, together with examples that illustrate how these principles apply in typical cases.

I have good reason to believe that this premise is valid. Some years ago, I wrote a book on civil procedure, entitled *Civil Procedure: Examples and Explanations*, which uses the same approach. The book has been widely used in law schools across the country. Not only do many faculty members assign or recommend it, but many students have found their way to the book on their own or on the recommendation of other students who have found the approach helpful.

Each chapter of this book includes a brief introduction to the topic, followed by a set of examples that apply the concepts to particular fact situations. After the examples, I have included my analysis of each example. Unlike the typical questions found in the casebooks, which are often either too hard to answer or downright unanswerable, the examples here tend to start with the basics and move on to more sophisticated variations. If you study the readings for your Torts class and the introductions in this book, you should be able to respond effectively to most of the examples. Trying your hand at them and comparing your analysis to mine should help to deepen your understanding of the concepts and your ability to think critically about legal issues in general. It may also help to convince you that you are capable of learning the law, a type of feedback that law school seldom seems to provide.

You will also want to use the book to review the course toward the end of the year. Most casebooks contain representative cases and provocative questions and notes, but they do not explain the state of the law or provide much context for the issues raised. Reading these chapters and reviewing the examples should help you to test your understanding of the topics covered and fill in the gaps left by your casebook.

The last part of the book includes three chapters that will be particularly helpful in preparing for exams. The first chapter explains the type of analysis law professors are looking for on a Torts essay exam (or any other first-year exam, for that matter). The second analyzes common mistakes students make in taking essay exams. The third includes several exam questions, with sample answers and some comments on strategy. Law exams are quite different from others you’ve taken. These chapters will help you to
Preface to Students

understand the analytical approach most law professors want to see in the merry month of May.

Like every author, I hope that this book will go through many more editions. If you have comments or suggestions for improvement, drop me a note at Suffolk University Law School, 120 Tremont Street, Boston, MA 02108. Or, send me an e-mail at jglannon@suffolk.edu.

January 2015

Joseph W. Glannon
INTRODUCTION

The primitive world must have been a fairly scary place. Our ancestors had to cope not only with the awesome forces of nature, impossible to predict or control, but also with another unpredictable danger — other human beings. Doubtless, one of the primary reasons they decided to become “civilized” was to ensure physical security from each other.

Medieval England, from which our tort law evolved, sought to deter physical aggression through a criminal remedy, the “appeal of felony,” for physical assaults and other invasions of personal interests. Harper, James & Gray, The Law of Torts §3.1 (3d ed. 1996). If the defendant was found guilty, she would be fined; that is, she would have to pay a sum of money or forfeit her goods to the crown. The appeal of felony helped to enforce the King’s peace, but it did nothing to compensate the injured victim for her injury.

Over time, the English courts also developed civil tort remedies to compensate victims of physical aggression. This tort remedy differed according to the nature of the defendant’s invasion. For example, the tort of battery authorized damages for deliberate, unwanted contacts with the plaintiff’s person. Assault allowed recovery for placing the plaintiff in fear of an unwanted contact. False imprisonment was the remedy for unwarranted restraints on the plaintiff’s freedom of movement. This chapter examines the action of battery, that most basic of tort remedies for invasion of the most basic of personal rights, the right to freedom from unwanted bodily contact.
1. Fundamental Protections: The Tort of Battery

It seems as though this ought to be a very short chapter. Even the law, with its tendency to overanalyze, can only complicate a seemingly simple matter so much. And battery seems like a simple matter. Jones hits Smith: She has invaded Smith’s right to freedom from physical aggression and should be liable for any resulting injuries. All that is left to decide is how much Jones should pay.

Sometimes it is that simple, but often it is not. Jones may have bumped into Smith because Lopez pushed her, or she may have collided with Smith while jumping out of the way of an oncoming car. Perhaps she pushed Smith in order to prevent the car from hitting her, or while thrashing around in an epileptic seizure. Each of these cases involves an unauthorized contact with Smith, but Jones should not be required to compensate Smith for such blameless—or even helpful—invasions of Smith’s physical autonomy.

Since the courts have refused to condemn all unwanted contacts, they have struggled to craft a definition of battery that limits recovery to those types of contacts the law seeks to prevent. Most courts define battery as the intentional infliction of a harmful or offensive contact with the person of the plaintiff. See Restatement (Second) of Torts §13. Under this definition the defendant must act, her act must be intentional (in the restricted sense peculiar to tort law), the act must cause a contact with the victim, and the intended contact must be either harmful or offensive to the victim. These requirements are discussed in detail below.

THE INTENT REQUIREMENT

As this definition indicates, battery protects against intentional invasions of the plaintiff’s physical integrity. No contact is intentional if it is not the result of a voluntary act. If Lopez faints and falls on Jones, Lopez is not liable for battery, because she has not caused the touching by a voluntary act. It hardly seems fair to require her to pay damages to Jones for something she didn’t “do” in any meaningful sense, that is, something that was not the result of her voluntary conduct. Similarly, if Smith pushes Lopez into Jones, Lopez has not acted, and would not be liable for battering Jones. See Restatement (Second) of Torts §2 (defining an act as an “external manifestation of the actor’s will”).

Even if the defendant has acted, however, in the sense of making a voluntary movement, that act may not be intentional as that term is used in the context of intentional torts. Suppose, for example, that Chu fails to look carefully in stepping off a bus, does not see Munoz coming along the street, and bumps into her. Chu’s act of stepping off the bus is intentional in the sense that it was deliberate: She certainly intended to put her foot down and move off the bus, but she did not intend to cause the resulting contact
with Munoz. To commit a battery, the defendant must not only intend to act; she must act for the purpose of inflicting a harmful or offensive contact on the plaintiff, or realize that such a contact is substantially certain to result.

The word “intent” is used . . . to denote that the actor desires to cause consequences of his act, or that he believes that the consequences are substantially certain to result from it.

Restatement (Second) of Torts §8A. This definition lets Chu off the hook in the bus case, since her act was not intentional in the intentional tort sense. She did not act for the purpose of hitting Munoz, nor was she substantially certain that she would. The contact resulted instead from her failure to take proper precautions (such as looking where she was going) to avoid hitting Munoz. Chu may be liable for negligence, but she has not committed a battery.

Indeed, the purpose of the intent requirement is to confine intentional tort liability to cases in which the defendant acts with a higher level of culpability than mere carelessness: where she acts with a purpose, or with knowledge that the act will cause harmful or offensive contact to the victim. If Chu pushed Munoz to get her out of the way, she would meet this intent requirement, since she would be substantially certain that Munoz would find such a contact offensive. She would also meet the intent requirement if she pushed her to embarrass her in front of a friend — an offensive contact — or to cause her to fall in front of a car, an obviously harmful one.

The intent requirement in the Restatement is disjunctive; that is, it is met either by a purpose to cause the tortious contact or substantial certainty that such a contact will result. Suppose, for example, that Smith heaves a stone at her enemy Jones, though she thinks Jones is probably beyond her range. She is not substantially certain that she will hit Jones, but she acts with the desire to do so. This satisfies the intent requirement; if the stone hits Jones, Smith has committed battery.

Under this definition, an actor can possess tortious intent even though she bears the victim no ill will whatsoever. If Chu sees Jones walking along the street below and deliberately throws a bucket of water on her from a second-story window, it is no defense that she was simply emptying the scrub bucket and did not mean to offend Jones. In intentional tort terms, she intends those contacts that she is substantially certain will occur, as well as those she desires to see happen. Indeed, a battery can be committed with the best of motives. In Clayton v. New Dreamland Roller Skating Rink, Inc., 82 A.2d 458 (1951), for example, the defendant’s employee attempted to set the plaintiff’s broken arm, against her protests. While the employee was only trying to help, he knew (because the victim told him so) that she found the contact unwelcome, and consequently met the intent requirement for battery.
TRANSFERRED INTENT

Although intentional tort law requires a very specific type of intent, that standard may be met if the actor intends to commit a battery on one person and actually inflicts one on somebody else. Suppose, for example, that Chu throws a rock at Smith, hoping to hit her, but her aim is bad and she hits Lopez instead. Chu would argue that she cannot be held liable to Lopez, since she had no intent to hit her — she was aiming at Smith.

Although Chu had no tortious intent toward Lopez in this example, she did have tortious intent toward Smith. In such cases, courts hold that the tortious intent to hit Smith transfers to Lopez. Restatement (Second) of Torts §16(2). Thus, where the actor tries to batter one person and actually causes a harmful or offensive contact to another, she will be liable to the actual victim.

Obviously, transferred intent is a legal fiction created to achieve a sensible result despite lack of intent toward the person actually contacted. The rationale for the doctrine is that the tortfeasor’s act is just as culpable when her aim is bad as when it is good; it would be unconscionable if she were exonerated just because she hit the wrong person. Under transferred intent, she will be liable whether she hits her intended victim or someone else.

The transferred intent fiction also allows recovery where the actor attempts one intentional tort but causes another. If, for example, Chu tries to hit Smith with a hammer but misses, placing Smith in fear of a harmful contact but not actually causing one, her intent to commit a battery suffices to hold her liable for assault. Conversely, if she tries to frighten Lopez by shooting near her, but the bullet hits her instead, she will be liable for battery even though she intended to commit an assault instead.

HARMFUL OR OFFENSIVE CONTACT

Not all intentional contacts will support a claim for battery. It would make little sense to allow Jones to bring a battery suit against every subway passenger who jostled her during rush hour. This kind of contact is an accepted fact of city life. Similarly, if Smith taps Jones on the shoulder to tell her that she dropped a glove, it is reasonable for Smith to expect that this touching is acceptable to Jones, as it would be to most of us.

To distinguish between such common, socially accepted contacts and actionable batteries, courts require that the defendant intend to cause either
1. Fundamental Protections: The Tort of Battery

a harmful or an offensive contact. Harmful suggests broken arms, black eyes, and the like, but a great deal less will do. Section 15 of the Restatement (Second) of Torts defines bodily harm as “any physical impairment of the condition of another’s body, or physical pain or illness.” Of course, if the harm is minor, the plaintiff will recover very little, or be limited to nominal damages, but the courts will still have vindicated her right to physical autonomy.

Even if the contact is not harmful, it is tortious if it is offensive. If Smith chucks Jones under the chin in a demeaning manner, or spits on her, she has caused an offensive contact. Allowing a battery suit for such offensive contacts not only deters such personal invasions, it also provides Jones with a civilized alternative to retaliation. Since offensive acts are particularly likely to provoke retaliation, it is appropriate to provide a battery remedy for such contacts instead.

Of course, people don’t all react the same way to every contact. If Smith goes around slapping folks on the back at the office party, Jones may find it obnoxious, but Cimino may be flattered by the attention. If the definition of offensive contact depended on the subjective reaction of each plaintiff, Smith would not know whether her conduct was tortious until she saw the reaction to it. Smith should have some way of determining whether a contact is permissible before she acts. To allow such advance judgments, courts use an objective definition of offensive contact. The Second Restatement, for example, defines a contact as offensive if it “offends a reasonable sense of personal dignity.” Id. at §19.

Under this test, a contact is offensive if a reasonable person in the circumstances of the victim would find the particular contact offensive. An actor is not liable under this definition for a contact that is considered socially acceptable (i.e., that would not offend a “reasonable sense of personal dignity”), even though the victim turns out to be hypersensitive and is truly offended. On the other hand, if she makes a contact that the reasonable person would find offensive, it is not a defense that she did not mean to give offense, or that she did not realize that the victim would be offended.

What the reasonable person would find offensive varies greatly with the circumstances. Often a prior course of conduct between the parties indicates that they accept contacts that would ordinarily be considered offensive. Suppose that Burgess and Munoz routinely engage in horseplay at work, including backslapping, arm locks, bear hugs, and the like. A stranger would undoubtedly find such contacts offensive, but Burgess and Munoz expect these contacts from each other. Burgess would be justified, given their previous interactions, in inferring that Munoz will not find such contacts offensive, though they would offend the “reasonable sense of personal dignity” of a new employee.
It is crucial to distinguish the intent to cause a harmful or offensive contact from the intent to cause a particular consequence which results from that contact. Suppose, for example, that Brutus decides to humiliate Cassius by tripping him as he leaves the Senate building. Unfortunately, Cassius suffers a freak fall sideways over a railing and down a flight of stairs, causing a severe concussion. While Brutus intended to trip Cassius, he certainly did not intend the resulting freak injury. He did not act with a purpose to cause this unusual train of circumstances, nor was he substantially certain that tripping Cassius would result in serious injury.

However, Brutus did commit a battery on Cassius, and is therefore liable for all of Cassius’s injuries. Brutus acted with the purpose to trip Cassius, which is surely an offensive contact. He succeeded in causing that contact when Cassius tripped. At that point, the battery was complete, and the law holds Brutus liable for all the consequences of the battery. Cassius may suffer no injury at all, or more injury than Brutus expects, or less, but if the contact itself is a battery, Brutus is liable for the resulting harm, whatever its extent may be.

The language of §8A of the Restatement is a bit confusing on this point: it states that the actor must intend “the consequences” of the act. However, the consequence to which §8A refers is the harmful or offensive contact itself, not the injuries that result from it. In our example, Brutus intended to trip Cassius; because he intended that “consequence,” he is liable for the unintended fall down the stairs as well.

Perhaps another example will help to make this important distinction clear. In Lambertson v. United States, 528 F.2d 441 (2d Cir. 1976), an inspector ran up behind a worker in a meatpacking plant, jumped on his back, and pulled the worker’s hat over his eyes. The worker stumbled forward, struck his face on some meat hooks, and sustained serious injuries. Evidently, the inspector in Lambertson acted in the spirit of horseplay; there was no suggestion that he intended the worker to hit the meat hooks or suffer serious injuries. Yet the court concluded that the inspector had battered the worker when he intentionally jumped on his back, since the reasonable person in the victim’s circumstances would find that contact offensive. Since he battered the worker when he jumped on him, the inspector could be held liable for the consequences of that battery — the facial injuries — though he did not intend to cause them.
I. Fundamental Protections: The Tort of Battery

It is not hard to see the reason for this seemingly draconian rule: Batteries are intentional invasions of others’ right of personal security. One purpose of intentional tort law is to deter such unauthorized contacts from the outset. Imposing the cost of all resulting injuries on the actor should serve this deterrent purpose. After all, intentional torts are eminently avoidable: Because they require a deliberate choice to invade another’s rights, the actor need only restrain herself to avoid the invasion. Where she fails to do so, it seems appropriate to impose all resulting damages—even unintended damages—on her rather than the innocent victim.

THE CONTACT REQUIREMENT

Even the seemingly self-evident requirement of a contact requires some explanation. Suppose Smith doesn’t touch Jones at all, but pokes her with a ten-foot pole or stretches a wire across the sidewalk as Jones approaches, causing her to fall. Surely the underlying policy of protecting physical autonomy supports liability in these cases. In each, Smith invades Jones’s physical integrity in one way or another and intends to do so under the definition discussed above.

Although no part of her body has touched Jones in these examples, Smith has imposed an unauthorized contact on Jones. The defendant need not actually touch the plaintiff at all, or even be present at the time of the contact, to commit a battery. For example, setting the wire out for Jones, knowing that she will trip over it later, will satisfy the contact requirement. See Harper, James & Gray §3.3 at 3:8-3:16 (3d ed. 1986). An actor is liable, regardless of whether she uses her fist, a nightstick, or a city bus to cause the contact, if it is intended to cause a harmful or offensive contact to the victim.

The contact requirement has also been extended to include objects intimately associated with the victim’s body. Chu’s sense of personal space can be breached as effectively if Lopez pulls her coat lapels or knocks off her hat as by a direct touching to the skin. Extending the sphere of personal autonomy to include such items protects against intrusive contacts that are very likely to be offensive, thus raising the ante in physical confrontations. Obviously, however, there are limits; if Lopez kicks the fender of Chu’s vintage Ford Mustang, the contact requirement is probably not met, even if Chu is sitting in the back seat.

The following examples illustrate the elements of battery. In analyzing them, assume that the Restatement definitions apply.
1. **Fundamental Protections: The Tort of Battery**

**Examples**

The Bard, Updated

1. Romeo likes to drive his souped-up Trans Am around the high school parking lot, racing the motor, accelerating rapidly, and stopping on a dime. He arrives at school one winter morning, speeds across the parking lot, and screeches to a halt in a parking space, hoping to impress the ladies with his hotspot driving. Unfortunately, the parking lot is icy; the rear end of the car skids out of control, jumps the curb sideways, and knocks Thibault to the ground. Has Romeo battered him?

2. When Romeo gets out of the car to apologize, Thibault yells, “What’s the idea?” and gives him a push. Romeo slips on a patch of ice, hits his head on one of the mag wheels of his Trans Am, and suffers a serious concussion. Is Thibault liable for Romeo’s injuries?

3. Romeo and Juliet are an item, “going steady” as they said when I was in high school. Romeo comes up to Juliet in the school parking lot on Monday morning and gives her a hug, as he is accustomed to doing each morning. Unfortunately, Juliet is standing on a patch of ice and Romeo’s embrace causes her to fall and fracture her arm. Is Romeo liable for battery?

4. In an effort to make amends, Romeo starts to help Juliet up. Thoroughly annoyed, Juliet growls, “Don’t touch me.” Romeo, determined to be gallant, helps her up anyway, despite her efforts to pull away. Is this a battery?

Introducing Judge Fudd

5. Romeo and Thibault are bitter rivals for Juliet’s favor. After gym class, Romeo leaves a bar of soap on the floor of the shower Thibault usually uses, hoping that Thibault will slip and fall. He does, suffers injury, and sues Romeo for battery. At trial, Judge Fudd, a well-meaning but sometimes inartful jurist, instructs the jury as follows:

   If you find that, when the defendant acted, he did not know that his act was substantially certain to cause a harmful or offensive contact to the plaintiff, you must find for the defendant.

   a. Which party will object to Judge Fudd’s instruction, and what is wrong with it?
   b. Can you write a more accurate instruction on the issue of intent?

6. Romeo is sitting on a wall in front of the school. He sees Thibault wandering across the lawn, with his nose in a book, toward a trench recently excavated for some utility work. Cheering silently, he watches as Thibault ambles absentmindedly toward disaster. To his delight, Thibault walks right into the trench, suffering minor injuries and considerable humiliation. Thibault sues Romeo for battery. What result?
d. He throws his own drink at Thibault. Unfortunately, Mr. Merola, the Vice Principal for Discipline, steps through the door at that moment and is hit instead.

e. Just before the science fair, Romeo deliberately sits on Thibault’s latest science project, an elaborate geodesic representation of an international space station, built from 5,000 toothpicks and Elmer’s glue. Thibault is watching at the time.

f. He blows cigarette smoke in Thibault’s face.

g. He shocks Juliet by offering to show her a photo of her favorite rock group but shows her some pornographic pictures instead.

h. A motel manager rents a room to Thibault, even though he knows that the bed is infested with bedbugs.

13. Regan and Goneril, two teenagers, decide to wile away the afternoon standing on a bridge over the interstate, watching the traffic. Regan takes a mirror from her pocket and starts to shine it in the eyes of oncoming drivers. Cordelia, driving under the bridge, is temporarily blinded, swerves out of control, and hits the bridge. Is Regan liable for battery?

Explanations

The Bard, Updated

1. Romeo has done a dumb thing, a clearly negligent thing, but he has not committed a battery. A battery requires an intent to cause a harmful or offensive touching. While Romeo certainly did cause a harmful contact, he didn’t intend to under the Restatement definition. He did act intentionally in the sense that he deliberately drove his car across the lot. However, while this act was voluntary, he did not act with the purpose of hitting Thibault or with knowledge that he was substantially certain to do so; he was headed in another direction entirely. Nor, the facts suggest, was he trying to frighten Thibault or another student, which might support an argument for transferred intent. He was just showing off. Thus, his act was not intentional in the limited sense in which courts use that term for defining intentional torts.

In analyzing battery cases, always distinguish the intent to act from the intent to cause a harmful or offensive contact. Battery requires more than a deliberate act. It requires a deliberate act done for the purpose of causing a harmful or offensive contact, or which the actor knows to a substantial certainty will cause such a contact. If only a deliberate act were required, battery would encompass many cases where the actor intended no harmful or offensive contact. For example, a driver would commit a battery if she looked away from the road and got in an accident, even though she did not intend to hit the plaintiff. Or, a joker would be liable
1. **Fundamental Protections: The Tort of Battery**

   for battery for throwing a snowball at a tree, if a pedestrian unexpectedly stepped into the snowball’s path. In both of these cases, the actor did a voluntary act. But these acts — like Romeo’s in the example — were not done with the state of mind necessary to commit an intentional tort: either purpose or substantial certainty that a harmful or offensive contact would result. They may be negligent acts, if the actor failed to exercise due care, but they are not intentional torts.

2. Although Thibault is justly angry with Romeo, that does not give him a license to retaliate against him. He has intentionally inflicted a contact that Romeo will find offensive, and perhaps harmful as well, and he is liable to him for battery.

   But is he liable for the unanticipated and unintended concussion? As in the Brutus example in the introduction, Thibault is fully liable for all harm resulting from the battery. Although he had no intent — as that term is used in either the Restatement or everyday life — to cause Romeo’s concussion, he did intend to push him. Since he committed a battery by doing so, he is liable for all the resulting injuries, even unexpected ones.

   This rule, that a defendant who commits an intentional tort is liable for all the resulting harm, does not apply in negligence cases. Under negligence law, liability is limited to the foreseeable consequences of the defendant’s act. See Chapter 12. However, because intentional torts are deemed more culpable, the courts generally hold the defendant liable for all the ensuing consequences, foreseeable or otherwise. This rule imposes very severe damages on Thibault for what seems like a relatively innocuous act — but it didn’t turn out to be innocuous, did it? The Solomons of tort law have concluded that the loss in such cases should fall on the actor rather than the victim.¹

   For an extreme example of this, see Baker v. Shymkiv, 451 N.E.2d 811 (Ohio 1983), in which a defendant’s trespass to land (an intentional tort) led to an argument with the owner. During the argument, the owner had a fatal heart attack. The trespasser was held liable for it as a consequence of the intentional tort.

3. Given their relationship and Juliet’s past acceptance of Romeo’s embraces, Romeo is justified in inferring that Juliet will not find his customary hug offensive. The reasonable person in Juliet’s circumstances would not be offended by a hug from her boyfriend. But surely she finds falling down and breaking her arm harmful or offensive. Even if Romeo’s hug isn’t a battery, isn’t causing her to fall on the ice one? (Remember that the contact need not be with the defendant; it can be with the ground or anything else.)

¹. But see Chapter 2, Example 12, which suggests that there is some limit to this extended liability.
1. Fundamental Protections: The Tort of Battery

In this case, Romeo did not act with the intent of causing a harmful or offensive contact to Juliet. He had no reason to believe she would find the contact he intended — the hug — offensive, due to their relationship. And the contact she found harmful — the fall — he had no intent to cause: He did not act with a purpose to cause Juliet to fall or with substantial certainty that she would. While Romeo may be liable for negligence, for hugging her where the footing is slippery, he is not liable for battery.

Distinguish this case from Example 2. In that case, Thibault intended a harmful contact — the push. Thus, he committed a battery and was held liable for all the resulting harm, even though it was greater than he reasonably would have anticipated. Here, since Romeo did not intend a harmful or offensive contact, he did not commit a battery and consequently is not liable for battery even though the contact itself turned out to have harmful consequences.

4. Poor Romeo; he was only trying to help. Maybe he even was helpful. But he still committed a battery.

In analyzing battery cases, it is important to distinguish between intent and motive. The motive for Romeo’s act was honorable, but he still intended to cause a contact to Juliet that he knew she would find offensive, because she told him so. The elements of battery do not include acting from a malicious motive, nor will a virtuous motive prevent liability if those elements are present. The plaintiff has the right to decide for herself which contacts are beneficial; she need not submit to the prodding of any Romeo who wishes to be gallant. Juliet may prefer the higher risk of slipping to the touch of the klutzy and out-of-favor Romeo. That decision is hers, not his. Where Romeo substitutes his judgment for hers, he is liable for battery.

Because of the fundamental value placed on physical self-determination, courts have held defendants liable for battery, even though their motives were pure and their contacts beneficial. The classic example is Mohr v. Williams, 104 N.W. 12 (Minn. 1905), in which a doctor was held liable for battery when he operated on the plaintiff’s left ear after the plaintiff had consented to surgery only on the right. Although the left ear was diseased, and the surgery was successful, the court concluded that the doctor had violated the patient’s “right to complete immunity of his person from physical interference of others. . . .” Id. at 16.

Introducing Judge Fudd

5. a. Thibault will object to the instruction, and rightly so. If Judge Fudd’s instruction were correct, Romeo would not be liable. Although he hoped that Thibault would slip and fall, and put the soap there for that purpose, he could hardly be substantially certain that he would cause Thibault to fall, since he did not know that Thibault would use that
1. Fundamental Protections: The Tort of Battery

shower or that if he did, he would slip on the soap. However, the intent requirement is satisfied either by an act done with substantial certainty that the contact will result or by an act done with the purpose to cause the contact. Restatement (Second) of Torts §8A, p. 5, supra.

In the practice of law, a word can make a world of difference. Here, the word or indicates that either substantial certainty or a desire to cause the result will suffice to establish intent. Since Romeo acted with the purpose to cause the contact, he cannot defend by arguing that it was a long shot that his plot would succeed. Judge Fudd’s instruction is wrong. Thibault’s lawyer should object to it and have it corrected before it leads the jury to return an erroneous verdict.

b. How about this:

If you find that, when he left the soap in the shower, Romeo acted either for the purpose of causing Thibault to fall or with substantial certainty that he would cause him to fall, then you should find that Romeo had the intent necessary to commit a battery.

This instruction tells the jury to find the intent requirement met if Romeo acted with either of the states of mind required for an intentional tort.

6. If desire can make a battery, Romeo has surely committed one, since he fervently hoped Thibault would fall in, and was delighted when he did. And we know that Romeo need not directly touch Thibault to batter him: Contact with the trench suffices to meet the contact requirement. And certainly Thibault found the contact both harmful and offensive.

But Romeo is still not liable to Thibault. He has not done anything to cause the contact. To incur liability, he must act; he must inflict the contact, not simply hope for it. This contact results from the acts of others, not Romeo.

No Offense Intended?

7. Obviously, Romeo is of the opinion that no woman in her right mind would object to his attentions. However, the question is not whether Romeo finds his conduct offensive. It is not even whether Romeo thinks that Ophelia will. As the introduction points out, the question Romeo must ponder before his dalliance with Ophelia is whether the reasonable person in Ophelia’s circumstances would find it offensive. The answer to that question is almost certainly “yes.” Most teenagers don’t like being hugged by strangers, even attractive strangers.

So, offensiveness is determined by an objective test — whether the contact would be offensive to the reasonable person in the victim’s circumstances. But isn’t it true, even if Romeo’s hug is “offensive” under this definition, that Romeo must intend an offensive contact, not just cause one? And, if Romeo genuinely believed that the new girl in school would welcome his attention, how can he be said to have intended an offensive contact?
INTRODUCTION

As the previous chapter indicates, the plaintiff in a negligence case must prove four elements—duty, breach, causation, and damages—in order to recover in a negligence case. To establish the second element, breach of the duty of care, or negligence, the plaintiff must show that the defendant failed to act with reasonable care, to behave as the ordinary prudent person would under like circumstances.

This reasonable person standard has been criticized as too vague to provide any meaningful guidance to the jury in evaluating the defendant’s conduct. Juries are supposed to find facts, not to establish the rules of law that determine whether the defendant is liable. Arguably, the negligence standard is so broad that it licenses the jury to find as they please, without constraining them by meaningful legal rules.

On the other hand, how can the rule be any more specific? The variety of human experience, the range of circumstances that may cause injury, is so great that it would be impossible for courts to formulate specific rules in advance to govern liability for all careless conduct. Since it is impossible to “particularize” the negligence standard, the jury is usually instructed under the reasonable person formula. The jurors are left to use their common sense, experience, and, where appropriate, expert testimony, to pass judgment on the defendant’s conduct under this very general standard.

While courts cannot elaborate specific negligence rules to define how parties should behave in all circumstances, legislatures routinely enact statutes...
establishing standards of care for common situations. This chapter considers the role that such statutes play in proving the second element of a claim for negligence, that a party breached the standard of care or “was negligent.”

LEGISLATIVE STANDARDS OF CONDUCT

Legislatures very commonly enact statutes that establish standards of care for private conduct. Many such statutes govern that ubiquitous, highly practical, but potentially lethal instrumentality, the automobile. Here are some hypothetical, but typical, examples:

No person shall make a turn onto or off of a public way without signaling his or her intention to turn, either by hand or by an electrical signal device. West Dakota Ann. Laws Title V §12.

No person shall drive a motor vehicle without a muffler or other suitable device to control excessive noise. West Dakota Ann. Laws Title V §212.

No person shall drive an unlighted vehicle upon any public highway during the period from one-half hour after sunset until one-half hour before sunrise. West Dakota Ann. Laws Title V §94A.

The driver of a vehicle on any public highway, traveling in any direction, shall stop before reaching any bus marked “school bus” and exhibiting flashing red lights. Said driver shall not proceed until the bus resumes motion or the lights are no longer flashing. West Dakota Ann. Laws Title V §74.

Many statutes establish standards of care in other areas as well:

No person shall enter upon or be employed upon the premises of an active construction site without wearing a construction helmet. West Dakota Ann. Laws Title IX §111.

No person shall leave a refrigerator, freezer, or similar appliance in any unsecured area accessible to children, whether for disposal or otherwise, without detaching the door from said appliance. West Dakota Ann. Laws Title XXIV §51.

Every owner or lessor of property used for rental purposes shall maintain every outside stair and porch in sound condition and good repair. West Dakota Ann. Laws Title XVII §19.

No person shall operate any mobile piece of heavy construction equipment unless said equipment is equipped with a beeper which sounds at all times while such equipment is operating in reverse. West Dakota Ann. Laws Title XXIII §123.
Statutes like these are intended to promote safety by establishing standards of conduct for particular situations. They are legislative commands which, if applicable, every citizen is bound to obey. Usually, such safety statutes impose a small criminal penalty for violations of the standard, but do not say anything about whether violation of the statutory standard establishes negligence in a civil action for damages. Not surprisingly, however, persons injured due to a violation of such a statute usually claim that the defendant was negligent for failing to comply with the statutory standard of care.

Suppose, for example, that Bourjailly drives past a stopped school bus with flashing lights and hits Hellman, a child alighting from the bus. If the school bus statute quoted above applies, Hellman will argue that Bourjailly should be found negligent because he violated the statute. Or suppose that Updike is injured by a falling object on a construction site, and sues the contractor. If the helmet statute quoted above applies, and if Updike was not wearing one, the defendant would argue that Updike’s violation of the statute proves, in and of itself, that he failed to live up to the standard of due care.

ARGUMENTS FOR AND AGAINST THE NEGLIGENCE PER SE RULE

There are some good arguments that a violation of a statute should be treated as “negligence per se,” that is, negligence in itself. Where the legislature has decreed that certain precautions must be taken, or that certain acts should not be done, a person who violates the statute has ignored the standard of care established by the legislature. Arguably, reasonable people don’t do that.

In addition, if the jury is permitted to find that the defendant acted with due care, despite his violation of a statutory standard of care, the jury is being licensed to disregard the command of the legislature. Suppose, for example, that the jury finds that Updike was not negligent in failing to wear a helmet. Doesn’t this ignore the legislature, the voice of the people, which has barred such conduct? Shouldn’t the standard of conduct enforced by the courts be the same as that established by the legislature, so that court decisions in negligence suits will reinforce rather than contradict the policy of the legislature?

There is much logic to these arguments, but the negligence per se cases vividly illustrate Justice Holmes’s famous maxim, “The life of the law has not been logic; it has been experience.” O. W. Holmes, Jr., The Common Law I (Little, Brown 1881). Automatic adoption of general legislative standards has proved too rigid. While it may be generally true that the reasonable person obeys the law, it is not always true. In unusual circumstances, it may be reasonable to disregard the statute, as where a driver swerves across the center line to avoid a child in the street, or stops in a no-stopping zone to attend to a seriously ill passenger. In other cases, it may be impossible to
obey the law, despite the best will in the world, as where blizzard conditions overwhelm efforts to keep a street clear. Imposing liability in cases like these, simply on the ground that the defendant violated the statute, would look more like strict liability than liability based on fault.

Another argument against automatic adoption of the legislative standard is that most statutes that establish standards of care say nothing about what role the legislative standard should play in a tort action for damages. Since the legislature has not provided that violation of the statutory standard of care automatically establishes negligence, it is fair to infer that courts have some discretion to “borrow” that standard selectively.

Last, it is doubtful that the legislature intended blind adherence to statutory standards regardless of the circumstances. Legislators tend to be practical people, and practical people recognize that there are circumstances in which the ordinary rules do not pertain. If asked, no legislator who voted for a statute requiring drivers to keep to the right would testify that she intended them to run down small children in order to fulfill the statutory command, or to smash into a stalled oil delivery truck.

COMMON APPROACHES TO BORROWING STATUTORY STANDARDS

Some early cases appear to hold that violation of a statutory standard of care always constitutes negligence per se. Under this approach, if the defendant violated the statute, the jury would be required to find her negligent, without regard to any excuse she might offer. One of the classic cases, Martin v. Herzog, 126 N.E. 814 (N.Y. 1920), might be read to stand for this position,1 and early cases from other jurisdictions appear to agree. See, e.g., Decker v. Roberts, 3 A.2d 855 (Conn. 1939); O’Bannon v. Schultz, 169 A. 601 (Conn. 1933); cf. Zeni v. Anderson, 243 N.W.2d 270, 281 (Mich. 1976) (noting that the negligence per se rule bars evidence of excuse). Under this approach, the only way the defendant could avoid liability would be to show that the statute did not apply under the circumstances (see, e.g., Tedla v. Ellman, 19 N.E.2d 987 (N.Y. 1939)), or that the violation, while admittedly negligence, did not cause the plaintiff’s injury.

However, as Holmes’s maxim portends, increased experience with the negligence per se doctrine has led virtually all courts to soften this Draconian stance. Most courts have adopted one of the following approaches, which allow the jury to consider the violation of a statutory standard of care in determining negligence, but avoid making it automatically determinative.

1. However, even Martin, despite its strong language, intimated that the violation in that case established negligence per se because it was “wholly unexcused.” 126 N.E. at 815.
A. Negligence Per Se with “Excuse”

The most common approach to violation of statute as negligence is reflected in §14 of the Third Restatement of Torts: Liability for Physical and Emotional Harm. That section provides as follows:

An actor is negligent if, without excuse, the actor violates a statute that is designed to protect against the type of accident the actor’s conduct causes, and if the accident victim is within the class of persons the statute is designed to protect.

Under this provision, if an actor violates a relevant statutory standard of care, that violation will establish her negligence if no excuse is offered. Suppose, for example, that Bourjailly violates the school bus statute quoted above by passing a stopped school bus and hits Hellman, a student getting off the bus. Suppose also that Bourjailly offers no excuse for his violation (quite likely because he doesn’t have one). On these assumptions, the jury would be instructed that, if they find that Bourjailly violated the statute, they must find that he was negligent.

However, the Restatement recognizes that there may be legitimate reasons for violating a relevant statute. Thus, the violator will be entitled to offer evidence of an excuse for the violation. Section 15 of the Third Restatement recognizes the following categories of “excused violations”:

(a) the violation is reasonable in light of the actor’s childhood, physical disability, or physical incapacitation;
(b) the actor exercises reasonable care in attempting to comply with the statute;
(c) the actor neither knows nor should know of the factual circumstances that render the statute applicable;
(d) the actor’s violation of the statute is due to the confusing way in which the requirements are presented to the public; or
(e) the actor’s compliance with the statute would involve a greater risk of physical harm to the actor or to others than noncompliance.

Under the Restatement, these listed excuses are not exclusive; Bourjailly would be free to offer some other reason for the violation as well. Restatement (Third) of Torts: Liability for Physical and Emotional Harm §15 cmt. g.

Under the Restatement approach, Bourjailly would be deemed negligent if he violated the school bus statute and offered no evidence of an acceptable excuse. However, if he did present evidence of an excuse, the plaintiff’s effort to prove negligence simply by proving a violation of the statute would fail. The jury would be instructed to determine whether...
Bourjailly acted reasonably under all the circumstances, including his violation of the statute, the reasons offered for noncompliance, and others. That sounds a good deal like a general reasonableness inquiry.

B. “Presumption” of Negligence

Some jurisdictions hold that proof of a statutory violation creates a “presumption” that the violator was negligent. The violator is still free, however, to rebut the presumption by showing that the reasonable person would have acted as he did. It is not clear that there is much difference between this approach and the Restatement approach. Under each, the plaintiff may use evidence of a statutory violation to establish negligence. Under each, the defendant may offer evidence of a good reason for her conduct. If she does not offer such evidence, the violation of the statute establishes her negligence. If she does, the jury is left to assess her conduct under a reasonable person standard, considering both the requirements of the statute and the violator’s reasons for violating it.

Under both the Restatement and the presumption approaches, most courts hold that the burden of proof remains on the plaintiff. The plaintiff can prove negligence by proving violation of a relevant safety statute, if the defendant does not offer evidence of an adequate reason for the violation. If evidence of an excuse is offered, the burden remains on the plaintiff to convince the jury that, in light of the violation and the reasons offered, the defendant did not behave as a reasonable person would under the circumstances. See, e.g., Moughon v. Wolf, 576 S.W.2d 603, 604–605 (Tex. 1978) (where plaintiff proves statutory violation and defendant offers evidence of excuse, plaintiff bears the burden to convince the jury that defendant’s conduct was negligent under the reasonable person standard).

C. Evidence of Negligence

The third common approach is to treat violation of a statutory standard of care as evidence of negligence. Under this approach, evidence that the defendant violated a statute is admissible at trial. The jury may consider it along with all the other evidence that the defendant did or did not exercise ordinary care. They may be persuaded (on that evidence alone, or along with other evidence) that the defendant was negligent. But they are not

2. A few cases appear to shift the burden of proof to the defendant to prove due care, once a violation of statute has been shown. See, e.g., Reser v. Boise-Cascade Corp., 587 P.2d 80, 84 (Or. 1978) (once violation is shown, burden shifts to violator to prove that he nevertheless acted reasonably). It is not always clear, however, whether these courts mean that the burden to produce evidence of excuse shifts to the defendant, or the actual burden of proof.
The requirement of relevance

As the foregoing section indicates, evidence of the violation of a statutory standard of care is usually admissible, and can be conclusive, on the negligence question. However, such evidence may not be used to establish breach of the duty of care unless the statute establishes a relevant standard of care. If Bourjailly causes an accident by turning into the path of Perelman’s oncoming car, common sense tells us that it is irrelevant that he violated a statute requiring him to curb his dog, or even one requiring working windshield wipers (assuming the weather was dry at the time of the accident). Allowing evidence of these violations might prove that Bourjailly was a generally negligent person, but would not show that his negligence caused this particular accident.

Courts frequently state that a statute is only relevant in establishing negligence if it is meant to protect persons like the plaintiff from the type of harm which actually occurred. The dog curbing statute was not aimed at preventing intersection collisions, but the turn signal statute quoted at p. 144 clearly was enacted to protect other drivers from collisions with turning vehicles, exactly the type of accident which resulted from Bourjailly’s failure to comply with the statute. This statute establishes a relevant standard of care,

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3. It is sometimes said in the cases that violation of a relevant statute establishes “prima facie evidence of negligence.” This sounds very much like the “evidence of negligence” approach, but most courts that use this phrase actually appear to apply the presumption of negligence approach. See, e.g., Zeni, 243 N.W.2d at 276, 283, in which the court appears to use the presumption and prima facie evidence language interchangeably.
because it was meant to protect drivers like Perelman from the type of harm—turning accidents—that resulted in this case. Prosser & Keeton §36 at 222-226.

This requirement is nicely illustrated by one of the classic cases on the point. In Gorris v. Scott, 9 L.R.-Ex. 125 (1874), the plaintiff’s sheep were washed overboard while being transported by sea. The plaintiff tried to establish the carrier’s negligence by proving that it had violated a regulation requiring that animals on shipboard must be kept in pens of a certain size. Had the defendant complied with the statute, the plaintiff argued, the sheep would not have been washed overboard.

The court refused to find negligence on the basis of the violation. The regulation, the court concluded, was not meant to protect animals from being washed overboard, but rather to prevent the spread of disease by preventing overcrowding. Since it was not aimed at preventing the type of harm that occurred, it did not establish a standard of care relevant to the circumstances, and could not be used to establish the shipper’s negligence.

Another case which nicely illustrates the point is Kansas, Okla. & Gulf Ry. Co. v. Keirsey, 266 P.2d 617 (Okla. 1954), in which the plaintiff’s cow entered a railroad right of way and ate itself to death. The plaintiff claimed that the railroad was negligent per se, because it had violated a statute which required it to maintain fences to prevent animals from straying onto the right of way. The court refused to find negligence based on the violation, since the statute was aimed at protecting farm animals from being hit by trains, not from eating too much grass.

Courts will also refuse to treat violation of a statute as negligence if the statute was not intended to protect the class of persons to which the plaintiff belongs. See Restatement (Third) of Torts: Liability for Physical and Emotional Harm §14, which provides

An actor is negligent if, without excuse, the actor violates a statute that is designed to protect against the type of accident the actor’s conduct causes, and if the accident victim is within the class of persons the statute is designed to protect.

For example, a building code might be intended to protect building occupants, not workers involved in the construction of the building. If so, the court would likely refuse to apply the building code standards to determine negligence in an action by a worker injured during construction, since the legislature was thinking about a different group with a different set of expectations and different opportunities to protect themselves. Thus, the statute is not relevant on the question of proper precautions during construction. Another nice example is a firefighter injured fighting a fire in a building that lacks sprinklers required by statute. The court might refuse to allow the firefighter to establish negligence based on the lack of
8. Borrowing Standards of Care: Violation of Statute as Negligence

sprinklers, since the statute was meant to protect occupants, not emergency personnel.

If the defendant successfully argues that the statute was not aimed at the type of harm the plaintiff suffered, or at protecting persons in the plaintiff’s situation, violation of the statute will not be given per se effect. That does not mean that the plaintiff must lose the case. All it means is that she cannot prove the second element of her claim — breach of the standard of care — by proving a violation of the statute: Instead, she must shoulder the usual burden to show negligence under the reasonable person standard discussed in the previous chapter.

THE PERSUASIVE FORCE OF THE NEGLIGENCE PER SE ARGUMENT

It is easy to see why the negligence per se argument is attractive to lawyers. If Hellman can prove that Bourjailly was negligent just by showing that he violated the school bus statute, it substantially eases her burden of proof. It is a lot easier to prove that he didn’t stop for the bus than to prove that his conduct was careless under the vague ordinary-prudence-under-the-circumstances standard. In addition, proving that Bourjailly violated the statute brands him as a “lawbreaker” in the eyes of the jury, which can’t do his case a lot of good. Thus, using the violation to establish negligence has great tactical value for Hellman. Similarly, if the contractor in the second example can prove that Updike was negligent simply by showing that he wasn’t wearing a helmet, its defense looks a good deal stronger than it would under a general negligence standard.

The use of statutory standards to prove negligence also reduces the likelihood that the jury will decide the case on grounds unrelated to the merits. A jury sympathetic to the injured Updike in the helmet case might be tempted to ignore his negligence and find for him anyway. It will be harder for them to do that if they are instructed that they must find him negligent if they find that he did not wear a helmet. Indeed, if it were undisputed that Updike had no helmet on, the court might take the negligence issue from the jury entirely, on the ground that the undisputed and unexcused violation of the statute establishes his negligence as a matter of law.4

All this appears complex, but is pretty much a matter of common sense in actual operation. Perhaps the following examples will help.

4. Even if instructed that the violation constitutes negligence, the jury in a comparative negligence jurisdiction would still have to determine Updike’s percentage of negligence.
Examples

Some Relevant Questions

1. A good place to start in any negligence per se situation is to ask whether the statute was intended to protect the plaintiff from the type of harm which she actually suffered. In which of the following cases do you think the court would find the statutory standard relevant to the plaintiff’s claim?

   a. Porter, the town dog officer, quarantines a dog who had bitten a child. The officer allows the owner to take the dog after a week, in violation of a quarantine statute that requires him to hold the dog for 14 days. The next day, the dog runs in front of Jones’s car. Jones swerves to avoid the dog and is injured.

   b. Oliver, a seven-year-old child, finds an abandoned refrigerator in a vacant lot, crawls in to hide, and suffocates. In an action for his death, the estate tries to prove the owner’s negligence by showing violation of the statute quoted on p. 144, requiring removal of doors from appliances left in places accessible to children.

   c. Welty hits Capote broadside when she is driving down Main Street and fails to see Capote pulling out into the street at an intersection. Capote alleges that Welty was negligent because she violated the statute quoted on p. 144, requiring a working muffler on all motor vehicles.

   d. O’Neill leaves his dirt bike on the front porch of a general store while he goes in to buy some candy. When he comes out, he mounts the bike, rides off the end of the porch, and is seriously injured. He sues the store owner, claiming that she was negligent for violating a building code provision that requires “a wall or protective railing at least 36 inches high enclosing every porch more than 30 inches above the ground.”

   e. Welty is driving east on Main Street when a school bus coming in the other direction stops. Since she can see that the only child around is already stepping into the bus, Welty drives on. As she passes the bus, she hits Capote’s car coming out of a side street. Capote claims that Welty’s negligence is established by her violation of the statute quoted on p. 144, requiring traffic to stop when school buses do. How should the court rule?

   f. Austin, riding her bicycle down the street, approaches a truck parked in a loading zone. To clear the truck, she steers further into the street, and is hit by a passing motorist. She alleges that Porter, the owner of the truck, was negligent for violating a statute that limits parking in the loading zone to one-half hour during morning hours. Porter’s truck had been there for nearly two hours.

2. After reading about the various ways in which the defendant may excuse a statutory violation, it may seem that the negligence per se doctrine is a
8. Borrowing Standards of Care: Violation of Statute as Negligence

toothless tiger. The plaintiff can use it to suggest negligence, but the
defendant can rebut it, so it all comes down to general reasonableness
anyway. Here are a few cases that illustrate that the doctrine can make a
big difference in a negligence case. In each case, ask yourself why the per
se negligence doctrine will make an important difference in the outcome.
a. Salinger is driving east on a rural West Dakota highway when Ginsberg
comes toward him from around a curve, driving astride the center line
of the road. Their cars collide and Ginsberg is killed. Salinger sues
Ginsberg’s estate for negligence. To prove that Ginsberg violated a statute that
requires vehicles to keep to the right of the center line.
b. Salinger is injured when Ginsberg’s car turns in front of him while he
is driving down Maple Street. He seeks to establish Ginsberg’s negli-
genence by proving that Ginsberg failed to signal his turn, as required by
the statute quoted on p. 144. Ginsberg claims that he did signal before
turning.
c. Perelman hits Woolf, a construction worker, while backing up a large
bulldozer. Perelman was watching carefully, but (as he knew) the
beeper on the bulldozer was broken, and had been for five days.
The statute on p. 144, requiring a beeper on heavy construction
equipment, applies.

3. Williams, a painter, is painting the exterior wall on a new five-story
building. Although a statute requires that hardhats be worn on all active
construction sites, Williams was not wearing one. He is injured when a
two-by-four falls on him from a higher floor. Williams claims that he
lacked knowledge of the need to comply with the statute, since he was
unaware of the statute. Will this excuse the violation?

Statutory Enlightenment

4. Cheever owns a three-unit apartment building in Oakley, West Dakota.
He fails to replace a burnt-out lightbulb in the upstairs hall. O’Connor, a
tenant, is unable to see the steps, trips, and falls down the stairs. She sues
him for negligence, and offers to prove his negligence by showing that
he violated West Dakota Stat. Ann. Title XVI §31, which requires land-
lords to maintain adequate lighting in all common areas of their
buildings.
a. Does the statute establish a standard of care relevant to the case?
b. Assume that Cheever defends by offering evidence that the light was
not out; thus, he does not offer any reason for failing to replace the
bulb. Assuming that West Dakota applies the negligence per se doc-
trine, should the judge direct a verdict for O’Connor on the negligence
issue?
8. Borrowing Standards of Care: Violation of Statute as Negligence

b. Assuming that the statute establishes a relevant standard of care, what other basic problem do you see in Wharton’s case?

Negligence Per Se, or Negligence Per Cent?

8. One more variation on Cheever’s lightbulb woes. Let’s assume that the case takes place in a comparative negligence jurisdiction. Under comparative negligence, the jury not only decides whether the parties were negligent, they also assign percentages of negligence to all parties who caused the accident. The plaintiff’s damages are then reduced to account for her negligence. For example, if the jury found the defendant 60 percent negligent and the plaintiff 40 percent negligent, the plaintiff would recover 60 percent of her damages. (For a detailed treatment of comparative negligence, see Chapter 25.)

Assume that O’Connor sues Cheever in a state that applies comparative negligence, and that Cheever has no excuse for violating the lighting statute. What would be the effect of the negligence per se doctrine in the case?

The Goose and the Gander

9. A West Dakota statute requires a fence at least four feet high around private pools. Beverly has such a pool, with a four-foot fence. Alice, a child of seven, climbs over the fence, jumps into the pool, and drowns. Alice’s parents sue Beverly for negligence in failing to prevent children from entering the pool area.

a. What will Beverly argue in her defense?

b. How should the court rule on the defense?

Explanations

Some Relevant Questions

1. a. Clearly, this statute is aimed at protecting people from being bitten by diseased dogs, not at preventing dogs from running into the street, which could happen no matter when the dog is released. Since the statute is not meant to protect against the type of harm suffered by Jones, the court will not allow her to prove Porter’s negligence by showing this violation.

b. This statute was clearly aimed at exactly the risk that caused the harm here: A child getting caught in the appliance when the door closes on her. In the absence of an excuse, the violation of this statute would establish negligence in a per se or a presumption jurisdiction.

c. In order to invoke the muffler statute to prove Welty’s negligence, Capote will have to demonstrate that it was aimed, at least in part, at preventing the type of accident that took place here. At first glance, the
statute appears aimed at preventing excessive noise that disturbs the public peace. But it is entirely plausible that it was also aimed at ensuring that drivers could listen for traffic hazards as well as see them. A statute may be aimed at preventing a variety of evils. So long as one purpose of the statute is to avert the type of injury suffered by the plaintiff, the violation should be considered relevant to the negligence issue.

Often there is little legislative history to assist in determining what risks the legislature was trying to prevent by the passage of a statute. The court must infer the statute’s purposes primarily from the provisions of the statute itself. Thus, courts exercise a good deal of judgment in determining whom the statute was meant to protect, and from what hazards.

Of course, Welty’s violation of the muffler statute would only establish liability if it caused the accident. Her noisy muffler would be irrelevant unless her inability to hear contributed to the accident. The evidence might show, however, that Capote had blown his horn to warn Welty, but that she was unable to hear due to the muffler noise. If so, Welty’s violation of the muffler statute would be a cause of the accident.

d. This example is based on Matteo v. Livingstone, 40 Mass. App. Ct. 658 (1996). In Matteo, the court held that when building code provisions “prescribe protective walls or rails, the consequence they are designed to prevent is that a person will fall off accidentally. Such regulations do not have as their object preventing bicycle acrobatics.” 40 Mass. App. Ct. at 661. The court upheld the trial judge’s refusal to allow the statute to be admitted in evidence to establish the store owner’s negligence.

The regulation at issue in Matteo was not a statute, but a regulation promulgated by a state agency. The Third Restatement takes the position that negligence per se applies to “regulations adopted by state administrative bodies, ordinances adopted by local councils, and federal statutes as well as regulations promulgated by federal agencies.” Third Restatement of Torts: Liability for Physical and Emotional Harm §14 cmt. a. However, some courts refuse to give per se effect to local ordinances or administrative regulations, even if they apply the doctrine to statutes promulgated by the state legislature. D. Dobbs, The Law of Torts 316. Such enactments are promulgated by bodies with fewer resources to investigate, and do not represent as broad-based a judgment about proper conduct as a vote of the state legislature. Other states, however, give per se effect to ordinances and regulations as well. But this regulation was clearly not aimed at the type of harm the plaintiff suffered anyway.

e. This statute was obviously aimed at protecting school children from injury, not other drivers. On that rationale, the Supreme Court of Rhode Island held on similar facts that violation of the statute could
8. Borrowing Standards of Care: Violation of Statute as Negligence


However, the fact that the violation of the statute would not establish Welty’s negligence does not mean that it is irrelevant in this case. It may be, for example, that Capote pulled out because he expected Welty to stop for the bus, as the statute required her to do. If so, Capote could prove those facts in order to show that Welty was negligent for failing to do what the reasonable person would do under the circumstances. But this is quite different from equating negligence with violation of the statute, as the per se approach does. Rather, the statute would be introduced here to prove that, in light of the normal expectations of drivers, Welty was negligent under the usual reasonable person standard.

f. This statute is aimed at ensuring access to adequate parking for deliveries, not at preventing the type of accident Austin has suffered here. Austin does not claim the truck was too far out into the street, but only that it was there. She could just as well have suffered the same accident if the truck had only been there for ten minutes. Indeed, if Porter had left on time, another truck would likely have been there anyway. This statute is irrelevant to the case; Porter’s violation of it should not be considered by the jury on the negligence question. See *Capolungo v. Bondi*, 224 Cal. Rptr. 326 (Cal. App. 1986).

2. a. Under either the per se or presumption approaches, Salinger’s evidence of the violation will, if the jury believes it, establish Ginsberg’s negligence, unless evidence of an adequate excuse is offered. Here, Ginsberg is not around to offer exculpatory evidence. He may have had a good reason for the violation, but if the proof is not offered, the presumption governs. The doctrine is very powerful in cases like this, where the violator is unable to offer the countervailing evidence that would rebut the presumption.

b. Here, instead of trying to prove a good reason for violating the statute, the defendant claims that he did not violate it. It is a little hard for the defendant to play both sides of the street (no pun intended) in these cases. Usually, she will have to either try to explain a violation or deny that it took place. If she stakes her case on the factual contention that she did not violate the statute, and the jury finds that she did, that finding will determine the negligence issue: Under either the negligence per se or presumption approach, the violation establishes negligence, in the absence of any evidence of an acceptable excuse.

c. Here, the defendant violated the statute, which was clearly intended to prevent the type of accident which took place, and just has no acceptable excuse. In a per se or presumption jurisdiction, the evidence that the beeper was not working will establish Perelman’s negligence.

Includes small portions of the book for evaluation purposes only; please contact us if you are interested in seeing more.
The fact that he looked carefully will not avert a required finding of negligence, because the jury is not free to make a general finding on the negligence issue: If it finds that the statute was violated, and Perelman has no excuse, it must find that he breached the duty of due care.

This will doubtless be the situation in many negligence per se cases: The defendant simply has no excuse for the violation of the statute. In such cases, the statutory negligence doctrine provides a powerful weapon for the plaintiff, since it establishes the most ambiguous element which she must prove to recover: breach of the duty of due care.

3. No way. We are all held to know the law. It is one thing to be unaware of facts that give rise to a violation; it is quite another to be unaware of relevant statutes themselves. If a driver’s taillight suddenly goes out while she is driving, she would have an excuse for violating a statute requiring working taillights. However, if she knew her light was out but was unaware that a statute required working taillights, she would have no excuse. The Third Restatement recognizes an excuse if the actor “neither knows nor should know of the factual circumstances that render the statute applicable” (Third Restatement of Torts: Liability for Physical and Emotional Harm §15(c)) but not if an actor simply isn’t aware of applicable statutory requirements. The judge would not even allow Williams to offer this evidence, since the excuse is insufficient as a matter of law.

Statutory Enlightenment

4. a. The lighting requirement in the statute is clearly aimed at protecting tenants like O’Connor from the type of harm that she has suffered— injury while trying to negotiate the stairs in the dark. Thus, it establishes a standard of care relevant to the case, and it is appropriate to consider that standard in resolving the negligence issue.

b. The judge should not direct the verdict, even if the negligence per se doctrine applies. The violation of the lighting statute only establishes Cheever’s negligence if the light was out. Whether it was out is a factual issue the jury must decide. Thus, the jury still has an important role to play, even in a negligence per se jurisdiction. But their task will be much more circumscribed than it would be under a general reasonable care standard, since they need only decide whether Cheever violated the statute. If he did, and offers no excuse, his negligence is established under the negligence per se doctrine.

c. The judge should instruct the jury along the following lines:

Under West Dakota law, the violation of a statute intended to protect against the type of harm suffered by the plaintiff establishes negligence. If you find in this case that the defendant violated West Dakota Ann. Laws Title XVI §31, by failing to provide adequate lighting in the hallway of the building, then you must find that the defendant was negligent.
INTRODUCTION

As previous chapters have indicated, the common law has developed a consistent set of elements—duty, breach, causation, and damages—that plaintiffs must prove in order to recover in a negligence action. This chapter addresses basic aspects of the very difficult—and fascinating—third element, causation. The next chapter addresses several complex causation issues frequently encountered in the Torts course.

Causation is a profound problem. We could think about it for years and perhaps at the end be little closer to understanding it. Yet one of the majesties of the law is that it must answer the unanswerable: It must decide, today, between plaintiff and defendant, and lacks the luxury of indefinite speculation. Consequently, judges must settle for some working approaches to thorny problems like causation, approaches that are no doubt imperfect, perhaps not even fully intellectually consistent, and always subject to refinement and eventual change.

Although causation is a complex problem, fundamental fairness obviously requires that a defendant be held liable only for injuries he actually caused. If Jones, an electrician, wires Smith’s house, and leaves exposed wires in the wall, which cause a spark and burn down the house, Smith’s loss is a direct result of Jones’s negligence. It would not have happened if Jones had been careful, and it did happen because Jones wasn’t careful. It seems fair to shift the loss from the blameless Smith to the careless Jones. However, if the house burns down because Smith’s toddler starts the fire,
Jones did not cause the harm and should not pay, even if he was negligent in wiring the house.

To assure that liability will only be imposed where the plaintiff’s loss is fairly attributable to the defendant’s conduct, courts have developed two causation requirements, causation in fact and proximate or legal causation. Cause in fact, the subject of this chapter, requires that, as a factual matter, the defendant’s act contributed to producing the plaintiff’s injury. Proximate causation, considered in Chapter 12, deals with limits on liability for remote or unexpected consequences of tortious conduct.

It is often quite clear from the events themselves that the defendant’s negligence was the cause in fact of an injury. Suppose, for example, that Wright drops a sheet of plywood from a building onto Sullivan’s car, obscuring her ability to see the road, and she crashes into a parked car. There is little doubt that Wright’s negligence “caused” the accident. Sullivan will doubtless testify that she swerved off the road because the plywood obscured her view. The accident would not have occurred otherwise. Similarly, if Darrow, a lawyer, draws a will for a client and fails to include one of the intended beneficiaries, it is clear that this omission is the cause in fact of the beneficiary’s inability to take under the will. Common sense tells us that the problem happened because the beneficiary was left out, and would not have happened if she had been included. We would all accept that Darrow’s mistake “caused” the beneficiary’s damages, and so would any court.

In other cases, we could all agree, philosophers included, that the defendant’s negligence did not cause the plaintiff’s injury. Suppose that Pei’s truck hits Gaudi on Maple Street. Investigation shows that the truck was carefully driven and in good working order, except that the windshield wipers were broken. However, the weather was dry at the time. No court will hold Pei liable for the accident because of the broken wipers. The wipers weren’t needed; the accident would have happened the same way if they had been working. Even though Pei was negligent, his negligence was, in the language of the torts trade, “negligence in the air,” negligence irrelevant to the injury that Gaudi suffered, and therefore not actionable.

THE TRADITIONAL TEST: “BUT FOR” CAUSATION

Traditionally, courts have used the “but for” test to determine whether the defendant’s act was a cause in fact of the plaintiff’s harm. Under the “but for” test,

[the defendant’s conduct is a cause of the event if the event would not have occurred but for that conduct; conversely, the defendant’s conduct is not a cause of the event if the event would have occurred without it.]
Prosser & Keeton at 266. Under this approach, the court asks whether the plaintiff would not have suffered the harm “but for” the defendant’s negligence. In other words, if we go back and replay the accident, but take away the defendant’s negligent act, would plaintiff have escaped injury? For example, in Pei’s windshield wipers case, if the wipers had been working at the time of the accident, Gaudi would still have been injured in exactly the same way. So, Pei’s negligence in failing to fix the wipers is not a “but for” cause of the harm. We cannot say that, but for the broken wipers, the accident would not have happened.

The plywood case, on the other hand, satisfies the “but for” test. But for the falling plywood, which obscured Sullivan’s view of the road, she would not have swerved and hit the car. If we take Wright’s negligence in dropping the plywood out of the scenario, the accident doesn’t happen. Because the accident would not have happened without Wright’s act, that act is a “but for” cause of the harm. Consequently, cause in fact is satisfied.

Another way of saying this is that the defendant’s act must be a “sine qua non” of the plaintiff’s injury. Sine qua non means “without which it is not; an indispensable requisite” (Ballentine’s Law Dictionary 1182 (1969)), that is, that the injury would not have happened without the defendant’s act. Again, the test invites us to look at what did happen and compare it to what would have happened if defendant had not been negligent. If the injury would not have resulted without the defendant’s negligence, then the negligence is a sine qua non of the injury, and the cause-in-fact element is met.

Let’s apply the “but for” test to two more straightforward examples. (We’ll see more complicated ones soon enough.) Suppose that Rios, a pharmacist, mistakenly fills Paul’s prescription for an antidepressant with pills that can lead to seizures. Paul takes the pills and has a seizure resulting in injuries. “But for” causation is clear: Paul had the seizure because Rios gave him the wrong pills. But for Rios’s mistake, Paul would not have had the seizure. Rios’s negligence is a cause in fact of Paul’s injury.

Now the other example. Suppose that Mancuso works in a factory using a high-speed band saw. Phillips had removed the saw blade guard, which is meant to prevent workers’ hands from contacting the blade. Mancuso is cutting a piece of plastic on the saw and has a severe allergic reaction to the plastic fumes. Here, although Phillips may have been negligent in removing the guard, his negligence is not a “but for” cause of Mancuso’s injury. Presumably, the fumes would still have wafted up to Mancuso’s nose if the saw had a guard, so the accident would have happened the same way if Phillips had not been negligent. His act is not, therefore, a cause in fact of Mancuso’s injury.
Accidents very frequently result from more than one negligent act. Suppose, for example, that the Edison Company negligently attaches a transformer to a light pole, and Gaudi negligently backs into the pole, knocking the loose transformer down on a child waiting for the school bus. Assume that the transformer would not have fallen, even though Gaudi hit the pole, if it had been tightly secured. Similarly, assume that the transformer would not have fallen, even though it was loose, if Gaudi had not negligently hit the pole.

If this is so, Edison might argue as follows: “Yes, it is true that I was negligent, but even though I was, the accident would not have happened unless Gaudi was, too. Even if the transformer was loose, it wouldn’t have fallen unless he hit the pole. So Gaudi is the cause of the accident, not me.” Of course, Gaudi can make a similar argument: “Well, I may have negligently hit the pole, but if the transformer were adequately secured it would not have fallen. So Edison’s negligence is the cause of the harm, not mine.”

Neither argument is sound. While it is true that either defendant’s negligent act was not enough to cause the accident alone, each act was a necessary antecedent to the harm. Each cause contributed to the accident; if we take away the negligence of either defendant, the accident would not have happened, even assuming the negligence of the other. In cases like this, both negligent acts are causes of the injury under the “but for” test.

Put another way, it is no defense for one negligent actor that someone else’s negligence also contributed to the accident. There is no requirement that the defendant’s act be the sole “but for” cause of the injury, only that it be a “but for” cause.

[A] tortfeasor is liable for all damage of which his tortious act was a proximate cause. “[H]e may not escape this responsibility simply because another act — either an ‘innocent’ occurrence such as an ‘act of God’ or other [tortious] conduct — may also have been a [concurrent] cause of the injury.”

Richards v. Owens-Illinois, Inc., 928 P.2d 1181, 1185 (Cal. 1997), quoting from American Motorcycle Assn. v. Superior Court, 578 P.2d 899, 903 (Cal. 1978). Thus, Edison cannot avoid liability because the transformer would not have fallen if Gaudi hadn’t hit it. Although the loose transformer was not the sole cause of the accident, it was a “but for” cause because if Edison had not been negligent there would not have been an accident. The same is true for Gaudi. Both are “but for” causes of the accident.

This point is important enough to merit another illustration. Suppose Olmstead, a mason, is building a chimney on top of a city townhouse while pedestrians are using the sidewalk below. Richardson, the general contractor, was required to place a protective scaffold with a roof over the sidewalk.
to protect pedestrians from falling objects during construction, but failed to do so. Olmstead drops a brick and it injures Wren who is walking on the sidewalk. On these facts, the negligent acts of both Richardson and Olmstead are “but for” causes of the harm. The accident would not have happened if Olmstead had not dropped the brick. It also would not have happened (even if Olmstead dropped the brick) if Richardson had put up the scaffold.

This logic applies both to negligent acts that take place at different times, as in the Edison example, and to negligent acts that take place simultaneously. Suppose that Sullivan is driving down the street without looking carefully, and that Pei runs a stop sign coming out of a side street. Sullivan hits Pei, and his car careens into a pedestrian. The jury finds that the accident would not have happened if Pei had not run the stop sign. They also find that (even assuming Pei’s negligence) the accident wouldn’t have happened if Sullivan had been keeping a proper lookout. On this reasoning, both drivers’ negligent acts are “but for” causes of the accident. Take away either one, and the accident would not have happened. Each is a sine qua non of the harm, since that harm would not have happened without the negligence of each.

PROBLEMS IN APPLYING THE “BUT FOR” TEST: RECONSTRUCTING HISTORY

In the cases described above, applying the “but for” test is easy. In many cases, however, it involves a complex and speculative exercise, because we can never know for sure what would have happened if history had been different. Suppose, for example, that a motorcyclist is killed when he pulls out in front of a bus that is going seven miles per hour over the speed limit. Or suppose that the plaintiff suffers chest pains, his doctor fails to diagnose it as a heart attack and provide suitable emergency treatment, and the patient dies of the heart attack.

In each of these cases, we know that the defendant was negligent, but we don’t know whether things would have come out differently if the defendant had not been negligent. If the bus had been driving at the speed limit, could it have stopped before hitting the cyclist? If the doctor had provided timely treatment, would the patient have survived or died anyway? The defendant should not be held liable in such cases if the harm would have taken place regardless of the negligence. However, to determine whether the defendant’s negligence affected the outcome, the jury must not only decide what actually happened, but must also speculate about a hypothetical alternative version of events: What would have happened if the defendant had not been negligent. In such cases, the “but for” test challenges the imagination of the trier to probe into a purely fanciful and unknowable state of affairs. He is invited to make an estimate concerning
facts that concededly never existed. The very uncertainty as to what might have happened opens the door wide for conjecture.

W. Malone, Ruminations on Cause in Fact, 9 Stan. L. Rev. 60, 67 (1956).

However, while the “but for” inquiry involves a speculative comparison between actual events and hypothetical alternatives, that comparison still must be made, in order to distinguish consequences that would have happened anyway from those that were brought about, in whole or in part, by the defendant’s negligent conduct. After all, the defendant’s argument in these cases has much force: “I should not be held liable, even if I was negligent, unless my negligence made a difference, actually led to the plaintiff’s injury.”

Although this type of counterfactual inquiry is inherently speculative to some degree, the parties may be able to produce evidence that makes it less so. In the motorcycle example, the distance between the bus and the cyclist when the cyclist pulled into the street will be critical in determining whether the excessive speed of the bus made a difference. Expert evidence about stopping distances at various speeds will also make the jury’s task less speculative. In the heart attack example, the medical evidence may establish fairly clearly that the plaintiff would have recovered with prompt treatment, or, conversely, that death was inevitable even with immediate care. Although we can never achieve certainty about cause in fact, the jury can usually make a reasoned judgment as to whether the negligence contributed to the outcome.1

SOME COMPLICATIONS: THE “SUBSTANTIAL FACTOR” TEST

“But for” analysis has been the traditional basis for analyzing cause in fact in negligence cases.2 Cause in fact will almost always be established if the “but for” test is met. See Restatement (Third) of Torts §26 (“Conduct is a factual cause of harm when the harm would not have occurred absent the conduct”). However, there are a few quirky situations in which the “but for”

1. For an example of just how difficult such counterfactual analysis can be, consider the case of a plaintiff attacked by an emotionally unstable mental patient taking Prozac. Plaintiff claims that the drug caused the assailant’s assaultive conduct, yet the very reason the patient was on the drug was for emotional problems. Even if the plaintiff shows that Prozac can cause aggressive behavior, it is a speculative enterprise indeed to show that it, rather than the patient’s underlying condition, caused her assault.
2. For a sophisticated discussion of “but for” causation, and a suggested alternative (but basically consistent) test, see R. Wright, Causation, Responsibility, Risk, Probability, Naked Statistics, and Proof: Pruning the Bramble Bush by Clarifying the Concepts, 73 Iowa L. Rev. 1001, 1018-1023 (1988).
with the preconception that a person who is hurt always recovers damages, but any torts practitioner will attest that practical realities often prevent worthy plaintiffs from recovering at all.

The examples below illustrate basic problems in determining cause in fact. In approaching them, assume that the “but for” test applies, except in situations such as Anderson and Summers, in which it yields unsatisfactory results.

Examples

Applying “But For” Causation

1. Perrone, a landlord, rents rooms in an apartment building to tenants. Despite repeated citations from city authorities for failure to install a required fire escape at the back of the building, he doesn’t install one. Late one night a first floor tenant, Dwyer, falls asleep in bed while smoking, causing a fire that destroys the building. Swensson, a tenant with a room on the front of the third floor of the building, is found dead in his bed of smoke inhalation. Swensson’s family sues Perrone for wrongful death.

   a. What causation problem do you anticipate in proving Perrone’s liability for Swensson’s death?
   b. Suppose Swensson’s body was found halfway down the hall? How would that affect the causation issue?

2. Gray is driving his delivery truck on the interstate when it suffers a freak blowout and jackknifes to a halt across the three lanes of traffic. Harper, another driver who is tuning the radio dial instead of looking where his car is going, doesn’t see the truck until too late and applies his brakes hard, swerving into the next lane. James, a third driver who is combing his hair in the little mirror on the visor fails to brake and hits Harper, sending Harper’s car careening into Gray’s truck, causing injuries to Gray. Who is liable to Gray?

3. Gray is taken to the hospital, where Dr. Green negligently sets his arm. Consequently, it must be rebroken a week later and set again, causing Gray considerable pain and medical expense. Which actors are “but for” causes of the injuries to Gray?

Nature and Negligence

4. Corbusier, driving down a country road, comes around a curve and encounters a deep puddle due to recent heavy rains. He tries to stop, but his brakes have been so poorly maintained that he cannot control the car. The car swerves to the left and hits Saarinen driving in the opposite direction, causing serious injuries. Is Corbusier liable under the “but for” test?
5. Dobbs is driving carefully to the store for a quart of milk when Fletcher pulls out of a side street without looking and crashes into Dobbs, who swerves into Schwartz on the sidewalk. Which driver’s conduct is a “but for” cause of Schwartz’s injuries?

6. Dobbs is driving to the store without his glasses, which he really ought to be wearing to drive safely. Fletcher pulls out of the side street without looking. Dobbs sees him too late, they collide, and Dobbs suffers a concussion in the resulting collision. What are the “but for” causes of the accident?

Revisionist History

7. Haines, a student, is beaten and robbed in a college dormitory. Investigation determines that the assailant, Gibbs, had been admitted to the dorm to visit another student. Haines sues the college, alleging that it was negligent in failing to hire enough security officers to assure adequate security.
   a. What is the nature of Haines’s problem in proving causation in this case?
   b. What will the college argue on the causation issue?
   c. What will the plaintiff’s counterargument be?
   d. If you represented the plaintiff, would you prefer that the jury be instructed under the “but for” or substantial factor test for causation?

8. Smith applies to Jones, the Chief of Police, for a permit to carry a handgun. A statute requires Chief Jones to check with the state Department of Public Safety to determine whether an applicant has a criminal record before issuing the permit, and to refuse the permit if the applicant has a record. Jones fails to do so and issues the permit. Three days later, Smith shoots Doe on the street with the gun. Doe sues Chief Jones for negligence.
   a. Assume that Smith had no criminal record. Is cause in fact established?
   b. Assume that Chief Jones fails to check, and issues the permit to Smith even though he has a criminal record. Can the plaintiff prove cause in fact?

Pestiferous Problems

9. Smith and Jones, two farmers, both sell tomatoes to a local market that have been sprayed with Icthar, a banned pesticide. The market puts the tomatoes out, together, in a bin. Wren buys one and gets sick from the pesticide.
   a. If Wren sues the farmers, what type of causation problem will he face?
   b. How does the problem compare to the problem in Anderson v. Minneapolis, St. Paul & St. Marie R.R. Co., the two fires case?
expected to die within a matter of weeks. Did Wright cause Morales’s
death? Should he be held liable, and if so, for what?

Explanations

Causation and Consequences

1. a. There seems to be little question that Perrone was negligent in failing
to provide adequate fire escapes for the building. Evidently a fire
escape was required by law, so Perrone was likely negligent per se.
However, proving Perrone negligent is not enough to establish his
liability; Swensson’s family will have to establish that Perrone’s neg-
ligence caused Swensson’s death. Yet it appears that Swensson died in
his bed from smoke inhalation, without ever trying to escape the
building. If that is true, a dozen fire escapes would have made no
difference in the outcome. We cannot say that, but for Perrone’s
failure to install a fire escape, Swensson would be alive today. It
appears that Swensson would have died just the same if Perrone
had not been negligent. If that is true, it will be impossible to establish
that Perrone’s negligence in failing to install a fire escape was a factual
cause of his death.

It should be easy, of course, to establish that Dwyer’s negligence
in falling asleep while smoking caused Swensson’s death. But for that
act, there would have been no fire. But the other tenant will not likely
have as deep a pocket as the landlord.

b. If Swensson is found in the middle of the hall, his family can argue
that the lack of a fire escape did lead to the result, that it did “change
history.” If he was found in the hall, perhaps he made it to the back
window, was unable to get out because there was no fire escape, and
ran back toward the front. That would show that he died because of the
lack of a fire escape, that “but for” the negligence of the landlord,
Swensson would be alive today. That is the plaintiff’s burden in estab-
lishing causation.

Of course, this would still be a tough case on actual causation.
The landlord will argue that Swensson never made it to the back
window, so the lack of a fire escape did not cause the death, was
mere “negligence in the air.” It will be very difficult for the family
to establish causation here without more evidence that the lack of a fire
escape made a difference. For example, evidence that the back window
was open, or that someone saw Swensson at the window (wouldn’t
the family’s lawyer love to have that evidence!) could help to establish
causation.

2. In this example Harper’s negligence and James’s are both “but for”
causes of the accident, because each contributed to causing Gray’s
injuries. But for Harper’s sharp stop, which sent him into James’s lane, James would not have hit him. But for James’s failure to watch the road, he would have avoided hitting Harper and knocking his car into Gray’s truck. Each contributed to causing a single, indivisible injury to Gray, and each is liable for the entire injury.

3. Under “but for” analysis, Harper and James are both “but for” causes of Gray’s initial injury, and of his additional injuries due to Green’s malpractice. But for each of their negligent acts, Gray would not have been in the hospital to begin with, and would not have suffered the additional injury due to Dr. Green’s mistake. Consequently, they have caused the initial injury and the malpractice damages as well.

Dr. Green, however, is not a cause of the turnpike accident. It would have happened the same way if we remove his negligence from the scenario. He is, of course, a “but for” cause of the injuries from resetting the arm. But for his failure to set it properly the first time, this enhanced injury would not have happened. So, he may be liable for the enhanced injuries but not those resulting from the initial collision.

As we will see in later chapters, the traditional response of the common law to situations where more than one tortfeasor causes an injury is to hold them all liable for the plaintiff’s damages. Under traditional tort law, Harper and James would be jointly liable for Gray’s initial injury. Harper, James and Green would be liable for the extra damages due to Green’s missetting of the arm.

Nature and Negligence

4. This accident is caused by both Corbusier’s negligent maintenance of his car and the puddle that created the dangerous condition in the road. Although only one of these causes is due to Corbusier’s negligence, that negligence is still a “but for” cause of the harm. The accident would not have happened if Corbusier had not been negligent. True, it would not have happened, even if Corbusier was negligent, if the puddle had not been there, but that does not exonerate him. It is not a defense for him that other circumstances, whether natural or negligent, also contributed to the accident, if his negligence was one of those causes.5

5. This example makes a very basic point. Clearly, both Dobbs’s and Fletcher’s driving are “but for” causes of the accident. If Dobbs hadn’t gone for milk, the accident wouldn’t have happened; if Fletcher hadn’t pulled out of the side street, the accident wouldn’t have happened. However,

5. In addition to the puddle, there are many other nonnegligent causes of this accident. Saarinen’s decision to drive caused it; the construction of the two drivers’ cars caused it; the invention of the wheel caused it. Clearly, Corbusier should not be able to exonerate himself by showing that there were such other contributing factors.
the fact that they both caused the accident doesn’t mean that they will both be liable to Schwartz. Dobbs caused the accident by nonnegligent conduct, while Fletcher was a negligent cause. In a tort case, the plaintiff must show that the defendant’s tortious conduct caused the harm, not just that his act caused it. In analyzing cause in fact, then, be careful to ask the right question — whether the defendant’s negligence caused the harm, not just whether his conduct caused it.

6. In this example, the plaintiff’s negligence is one of the “but for” causes of the accident, along with the negligence of the defendant. There’s nothing unusual about that; it’s just another multiple-cause case. Sometimes two parties are negligent and cause injuries to a third party, as in the typical joint tortfeasor situation like the Edison example in the introduction. At other times, two actors are negligent and their negligence causes injury to one of them, as in this case.

   If the plaintiff’s negligence is one of the “but for” causes of an accident, tort law has to decide what to do about that. As a matter of policy, we might decide to bar a plaintiff who was causally negligent from recovery entirely — the rule of contributory negligence. Or, we might reduce the plaintiff’s damages to account for his negligence — the rule of comparative negligence. Last, we might hold the defendant fully liable anyway — the rule of strict liability. But these choices have nothing to do with the basic factual question of whose negligence caused the accident: It is perfectly clear under “but for” causation that both Dobbs and Fletcher did.

Revisionist History

7. a. The causation problem here is to determine whether the defendant’s negligence affected the result, that is, whether the plaintiff would have been assaulted if the college had provided adequate security. It requires the factfinder to compare what did happen to what would have happened absent the defendant’s negligence.

   b. The college will argue that it should not be held liable, even if security was inadequate, because any inadequacy in security did not cause the assault. It will argue that having more security officers would not have affected the outcome, because the student did not slip into the dorm illegally; he was admitted through the ordinary procedures.

   There is certainly force to this argument. Gibbs did not break into the dorm, he entered openly for a legitimate reason. Consequently, inadequate security did not affect Gibbs’s ability to get into the dorm. Even if there had been additional officers available, they would not have barred his entry and prevented Gibbs’s actions.