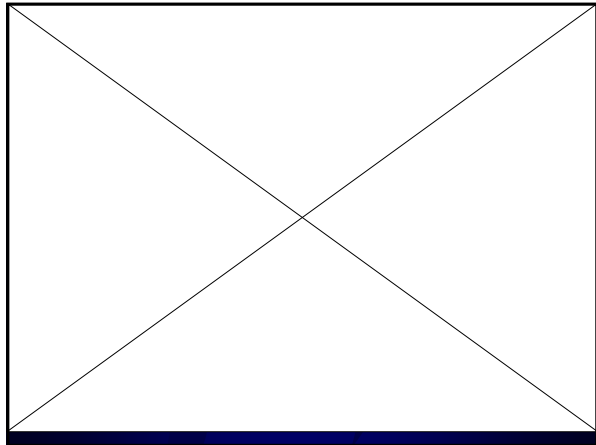


Torts

Professor Pope

Class 37: Nov. 22, 2011



Plaintiff's Conduct

- Contributory Negligence
- Comparative Negligence
- Assumption of Risk
 - Express
 - Implied
- Statutes of Limitations
- Statute of Repose

DEF burden to establish defense

(DEF can, of course, also negate any element of PTF prima facie case)

These are defenses to **negligence** only.

For **intentional** torts, use privileges discussed earlier.

Distinguish **mitigation**

PTF cannot recover for damages could not avoid AFTER being injured

Contributory negligence contributes to cause of injury

Davies v. Mann



Exception to contributory negligence

Last clear chance
aka doctrine of the
discovered peril

Contributory
negligence **not**
defense in some
circumstances

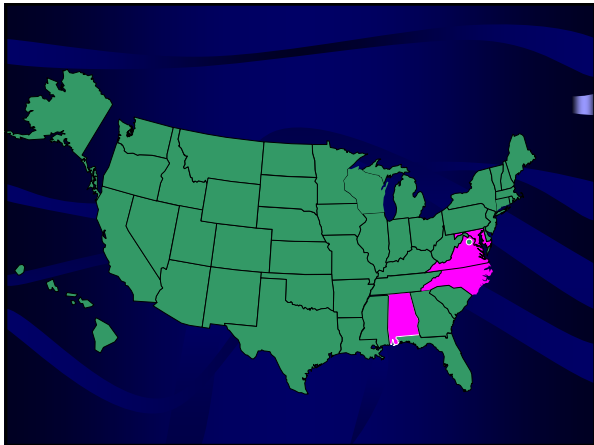
DEF last clear chance

DEF commit intentional tort

DEF violates statute intended
to protect helpless PTFs



Contributory
negligence used to
be dominant rule
but **rare** today



**Comparative
Negligence**

(1) Was DEF negligent?

Answer "yes" or "no." _____

If your answer to Question No. 1 was
"no", do not answer any further
questions on this **form**.

**(2) Was the negligence of DEF a
legal cause of injury to PTF?**

Answer "yes" or "no." _____

If your answer to Question No. 2
was "no," do not answer any further
questions on this **form**.

(3) Was PTF negligent?

Answer "yes" or "no." _____

If your answer to Question No. 3 was "no," you must now complete Question 7.

(4) Was negligence of PTF a legal cause of injury to him/her?

Answer "yes" or "no." _____

If your answer to Question No. 4 was "no," you must now complete Question 7.

In contributory negligence jurisdiction, PTF barred from recovery

In comparative negligence jurisdiction, continue analysis

(5) What ... damages ... caused ...

(6) [D]etermine percentage of fault for PTF and DEF for damages identified ...

Defendant	_____ %
Plaintiff	_____ %
TOTAL	<u>100 %</u>

**McIntyre
v.
Balentine**



Trial court

DEF verdict

PTF negligent in
contributory
negligence world

Tenn. SCT

TN now a comparative negl. state

PTF can recover so long as PTF
negligence less than DEF negligence

PTF damages reduced by % PTF negl.

PTF damages **always**
reduced by % PTF fault

But is PTF sufficiently at
fault to trigger **total bar**

1. Pure: always
2. If 50% or less
3. If under 50%

Pure jurisdictions

PTF can recover the
remainder (i.e. % of
DEF fault)

Even if PTF 99%
responsible

Still can sue DEF for 1%
contribution to injury

Not greater than
(equal or less)
jurisdictions

Same as pure

except that PTF
cannot recover if
PTF fault is $>50\%$

PTF can recover for DEF
contribution to injury

Only if PTF negligence is
“equal or less” than DEF
negligence

PTF negligence must be $< 50\%$

Not as great as
(less than)
jurisdictions

Works same as pure

except that PTF cannot
recover if fault is
 $> 50\%$ **or** $= 50\%$

PTF can recover for DEF contribution to injury

Only if PTF negligence “less than” DEF negligence

PTF negligence must be < 49%

Bert sues Ernie for \$100,000 for injuries he suffered when he slipped on milk that Ernie spilled.

Jury determines that Ernie was 50% responsible and Bert was 50% responsible for his own injuries because he walked across the kitchen through the milk.

Contributory	
Pure	
Not greater	
Not as great	

	PTF 49% (and less)	PTF 50%	PTF 51% (and more)
Pure			
Not greater			
Not as great			

For contributory, comparative negligence
→ DEF must establish (not just assert) PTF negligence

Assume NJ has a statute under which PTF would recover \$640,000 of her \$800,000 in damages because a jury found her to be 20% negligent in the accident in which she was injured.

NJ has adopted:

- A) comparative negligence
- B) contributory negligence
- C) assumption of the risk
- D) negligence per se

Kid darts out in front of car and is hit. Kid is 66.6% at fault. Driver is 33.3% at fault. Kid suffered \$10,000 in damages.

In contributory negligence jurisdiction, kid's potential recovery is:

- \$0
- \$6666
- \$10,000

In PURE comparative negligence jurisdiction, kid's potential recovery is:

- \$0
- \$6666
- \$10,000

In modified comparative negligence jurisdiction, kid's potential recovery is:

- \$0
- \$6666
- \$10,000

	% negl.	Pure	NGT
A	5		
B	10		
C	40		
D	45		

Assumption of Risk

Torts

Professor Pope

Class 38: Nov. 29, 2011

Last time:

DEF affirmative defenses
when **PTF fault**
contributes to injury

Contributory

Comparative (pure)

Comparative (equal or less)

Comparative (less than)

Only one applies in
any given jurisdiction

Each will **bar or**
reduce PTF recovery

Assumption of Risk

Not about PTF **fault**

About PTF **consent**

Contributory & comparative negligence

PTF not do what reasonable person would do (objective standard)

Assumption of risk

PTF understood and voluntarily agreed to confront risks (subjective standard)

Contributory negligence
(Last clear chance)

Comparative negligence
Pure (always partial)
+<50% (partial if...)
<50% (partial if...)

Assumption of risk
Express
Implied

Objective
standard

Subjective
standard

1. Express

2. Implied

Express Assumption of Risk





McCune v. Myrtle Beach Shooting Range

<http://www.judicial.state.sc.us/opinions/HTMLFiles/COA/3974.htm>

1. The risk of injury from the activity and weaponry involved in paintball is significant, including the potential for permanent disability and death, and while particular protective equipment and personal discipline will minimize this risk, the risk of serious injury does exist;

2. I KNOWINGLY AND FREELY ASSUME ALL SUCH RISKS, both known and unknown, EVEN IF ARISING FROM THE NEGLIGENCE of those persons released from liability below, and assume full responsibility for my participation; and,

4. I, for myself and on behalf of my heirs ... HEREBY RELEASE AND HOLD HARMLESS THE AMERICAN PAINTBALL LEAGUE (APL), THE APL CERTIFIED MEMBER FIELD, the owners and lessors of premises used to conduct the paintball activities, their officers, officials, agents, and/or employees ("Releasees"), WITH RESPECT TO ANY AND ALL INJURY, DISABILITY, DEATH, or loss or damage to person or property, WHETHER CAUSED BY THE NEGLIGENCE OF THE RELEASEES OR OTHERWISE, except that which is the result of gross negligence and/or wanton misconduct.

I HAVE READ THIS RELEASE OF LIABILITY AND ASSUMPTION OF RISK AGREEMENT, FULLY UNDERSTANDING ITS TERMS, UNDERSTAND THAT I HAVE GIVEN UP SUBSTANTIAL RIGHTS BY SIGNING IT, AND SIGN IT FREELY AND VOLUNTARILY WITHOUT ANY INDUCEMENT.

Enforceability of exculpatory contract depends on validity of consent

1. Risks understood & appreciated
2. Risks voluntarily and freely assumed

Sometimes AR
deemed **by**
statute

New Pennsylvania law protects owners from liability

Pennsylvania's Thoroughbred industry received a boost last month when Governor Ed Rendell signed into a bill that protects horse owners of all breeds and event sponsors from liability in the event of a no-fault injury.

The bill's supporters view the new law as a way to help create a competitive insurance market with improved access to horses plus an increased appeal to join the horse industry due to less risk.

According to the Pennsylvania Equine Council, the basis for the bill is the legal doctrine known as "assumption of risk," in which a plaintiff is not entitled to damages if knowing of a dangerous condition, he or she voluntarily exposed himself or herself to the risk that resulted in injury.

Seigneur
v.
Nat'l Fitness



“All exercises shall be taken by me at my sole risk NFI **shall not be liable** to me. . . . I **release and discharge** NFI from all claims . . . for all acts of active or passive negligence.”

Know risks	
Freely confront risks	

Public policy
limitation on
assumption of risk

Transaction suitable for public regulation

Service of great importance

Service a practical necessity

Party invoking exculpation has decisive advantage bargaining strength



Tunkl v. UCLA

RELEASE: The hospital is a nonprofit, charitable institution. In consideration of the hospital and allied services to be rendered and the rates charged therefor, the patient or his legal representative agrees to and hereby **releases** The Regents of the University of California, and the hospital **from any and all liability for the negligent or wrongful acts or omissions of its employees**, if the hospital has used due care in selecting its employees.



**Implied
Assumption
of Risk**

Rush v. Comm. Realty



Know risks	
Freely confront risks	



Know risks	
Freely confront risks	

Primary Im Secondary Im



Merger of AR into Comparative Fault

Express AR survives

Primary AR survives

Secondary AR merged into comparative negligence

Trucker illegally left his vehicle sitting across a public sidewalk, blocking passage. Walker left the sidewalk and entered the street in order to pass by Trucker's vehicle. When Walker did so, a negligently-driven vehicle struck and injured him.

- (a) Walker is barred from recovering for his injury because he assumed the risk of walking in the street.
- (b) Walker is barred from recovering for his injury if he violated a statute forbidding pedestrians from occupying the street.
- (c) Walker is not barred from recovering for his injury because he did not assume the risk of being struck by a vehicle in the street.

Cliff encouraged his girlfriend, Amy, to go for a "fun" drive that, thanks to a series of dips and small hills in the road, "feels just like a roller coaster." She agreed. As they sped along, laughing and bouncing, Amy struck her head on the ceiling of the vehicle and cried out in pain. Alarmed, Cliff slammed on the brakes. He had failed to maintain them properly, however, and as a consequence lost control and crashed. Amy suffered further injuries in the crash and sued Cliff for negligence.

What will Amy recover?

- (a) Compensation for all of her injuries.
- (b) Compensation for her head injury, only, because Cliff did not intend to lose control of the vehicle.
- (c) Damages for all but her head injury, the risk of which she assumed.
- (d) Nothing, because she assumed the risks of the adventure.

You are playing softball with friends. You slide hard into third base, breaking the third baseman's ankle. What is your best defense?

- A) Assumption of risk
- B) Contributory negligence
- C) Comparative negligence
- D) Last clear chance
- E) You have no defense

You help friend cut down some trees on his property. You plan escape route in case of trunk splitting. You see others wearing hard hats but refuse one. You are hit by tree. Friend's best defense:

- A) Assumption of risk
- B) Contributory negligence
- C) Comparative negligence
- D) Last clear chance
- E) He has no defense

Torts

Professor Pope

Class 39: Dec. 1, 2011

Tomorrow

Last class

Dec. 17

Final exam

Arooj was driving down the road when a small boy ran into her lane. Ellen saw Arooj bearing down on the boy. Pedestrian Ellen rushed into the street to try to save him. Just as Ellen reached the boy, she tripped and fell down. Arooj hit both Ellen and the boy. This jurisdiction follows traditional contributory negligence.

In Ellen v. Arooj, who will prevail?

- (A) Ellen, because she could not have expected an adult to run into the street
- (B) Arooj, if she was traveling no faster than the posted speed limit
- (C) Ellen, if Arooj had the last clear chance to avoid the accident

Arooj illegally left her car sitting across a public sidewalk, blocking passage. Ellen left the sidewalk and entered the street in order to pass by Arooj's car. When Ellen did so, a negligently-driven vehicle struck and injured her.

- (a) Ellen is barred from recovering for her injury because she assumed the risk of walking in the street.
- (b) Ellen is barred from recovering for her injury if she violated a statute forbidding pedestrians from occupying the street.
- (c) Ellen is not barred from recovering for her injury because she did not assume the risk of being struck by a car in the street.

Ashton encouraged his girlfriend, Demi, to go for a "fun" drive that, thanks to a series of dips and hills in the road, "feels just like a roller coaster." Demi agreed. As they sped along, laughing and bouncing, Demi struck her head on the ceiling of the car and cried out in pain.

Alarmed, Ashton slammed on the brakes. But he had failed to maintain them properly. As a consequence, Ashton lost control and crashed. Demi suffered further injuries, and sued Ashton for negligence.

What will Amy recover?

- (a) Compensation for all of her injuries.
- (b) Compensation for her head injury, only, because Ashton did not intend to lose control of the vehicle.
- (c) Damages for all but her head injury, the risk of which she assumed.
- (d) Nothing, because she assumed the risks of the adventure.

You are playing softball with friends. You slide hard into third base, breaking the third baseman's ankle.

What is your best defense?

- A) Assumption of risk
- B) Contributory negligence
- C) Comparative negligence
- D) Last clear chance
- E) You have no defense

You help friend cut down some trees on his property. You plan escape route in case of trunk splitting. You see others wearing hard hats but refuse one. You are hit by tree. Friend's best defense:

- A) Assumption of risk
- B) Contributory negligence
- C) Comparative negligence
- D) Last clear chance
- E) He has no defense

Statute of Limitations

Effect & Impact

Bright-line deadline

Complete bar to suit

Affirmative defense to
plead in answer

SOL-SOR vary by state
and kind of action

Rationale

Deterioration of evidence

Witnesses die

Memories fade

Risk of error increases

Ability to throw out trash

Avoid re-ignition of
conflicts quieted by time

Peace of mind for
potential defendants

3 key inquiries

to determine if
your lawsuit is
time-barred

1. Date triggered
2. Length
3. Date lawsuit filed

SOL and SOR
differ in
trigger date

SOR

Date of injury

SOL

Date injury
discovered

SOL

Plaintiffs cannot sit on

SOR

Med mal reform

Lawsuit barred as
soon as **either** SOR
or SOL runs,
whichever runs
first

18 Del. C. § 6856

No action . . . damages . . . arising out of medical negligence shall be brought after the expiration of **2 years from the date upon which such injury occurred . . .**

provided, however, that . . . injury . . . unknown to and could not in the exercise of reasonable diligence have been discovered . . . **3 years from the date upon which such injury occurred . . .**

SOL

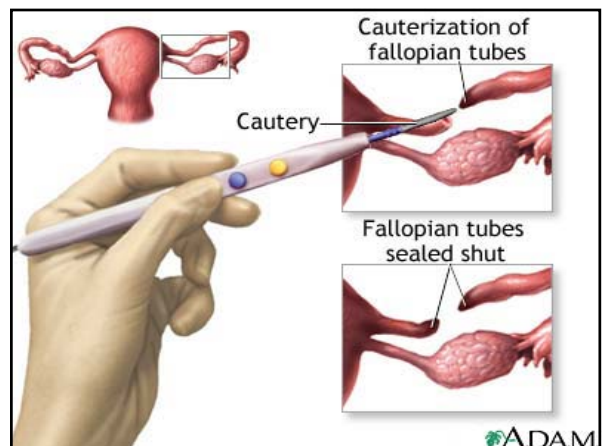
SOR

SOR

SOL

1 2 3 4 5 6 7 8 9

Teeters v. Currey



06-05-70 Tubal ligation

12-06-72 Pregnant

03-09-73 Delivery

11-15-73 Lawsuit

Tenn. Code Ann. § 29-26-116 (1980)

A medical malpractice action must be brought within one year after the date upon which the claimant discovered the injury.

Tenn. Code Ann. § 28-1-106 (1980).

However, no such action may be brought more than three years after the date on which the negligent act or omission occurred . . .

Example: Laughlin v. Forgrave

4yr SOR, 2yr SOL

1951: surgical operation
(instrument left inside)

1962: plaintiff discovers
instrument

Example: Kenyon v. Hammer

2yr SOR

1980: Prenatal exam – chart as
Rh+ not Rh- blood

1981: Birth – no RhoGam

1986: Second child stillborn

1	2	3	4	5	6	7	8	9

Date injury, end of treatment – starts SOR
Date of discovery of injury – starts SOL
Length of SOR & SOL
Date lawsuit filed