

1. Duty

a. Nonfeasance (Affirmative Obligations to Act)

i. General Rule

- 1) **No Duty** -- An actor generally has no duty to act affirmatively.

Note: It is critical to distinguish between nonfeasance and misfeasance on the exam!

ii. Statutory Provisions Imposing an Obligation to Protect Another

- 1) **General Rule** -- When a statute requires an actor to act for the protection of another, the court may rely on the statute to decide that an affirmative duty exists and its scope.
- 2) **Sheehy Test** -- Courts consider three factors when deciding if a statute should create a duty:
 - a) If plaintiff is a member of the class for whom the statute was enacted to benefit.
 - b) If recognition of a private right of action would promote the legislative purpose.
 - c) If creation of a private right would be consistent with the legislative scheme.

iii. Special Relationship with Another

- 1) **Reasonable Care** -- An Actor in a special relationship with another owes a duty of reasonable care with regard to risks that arise within the scope of the relationship.
- 2) **Special Relationships:**
 - a) Common Carrier -- The relationship between common carriers and their passengers.
 - b) Innkeeper -- The relationship between innkeeper and his guests.
 - c) Businesses -- Businesses and other possessors of land that hold the premises open to the public with those who are lawfully on the premises.
 - d) Employer -- The relationship between employer and employee provided that:
 - i) Employee is in imminent danger; OR
 - ii) Employee is injured and thereby helpless
 - e) School -- The relationship between a school and its students
 - f) Landlord -- The relationship between landlord and tenants
 - g) Custodian -- Custodian has a duty provided that those in custody:
 - i) Custodian is required by law to take custody or voluntarily takes custody of the other; AND
 - ii) Custodian has a superior ability to protect the other.

Note: Courts are free to add relationships to the list.

iv. Duty to Third Person Based on Special Relationship with Person Posing Risks

- 1) **Reasonable Care** -- An actor in a special relationship with another owes a duty of reasonable care to third persons with regard to risks posed by the other that arise within the scope of the relationship.
- 2) **Special Relationships:**
 - a) Parent -- The relationship between parent and dependent child
 - b) Custodian -- The relationship between a custodian and those in his custody
 - c) Employer -- Relationship between employer and employee provided that employment facilitates the employee's causing harm to third parties.
 - d) Mental-Health Professional -- IE, the relationship between therapist and patient.

v. Taking Charge of Another

- 1) **Voluntary Aid** -- An actor who, despite no duty to do so, takes charge of another who reasonably appears to be imperiled, helpless or unable to protect herself has a duty to exercise reasonable care while the other is within the actor's charge.
 - a) Discontinuing Aid -- An actor is not obligated to continue her efforts provided that she exercises reasonable care in not leaving the other in a worse condition than she found the other.
 - b) Statutory Exception for Physicians -- Exempting doctors who render aid in an emergency from liability for negligence.
- 2) **Non-Negligent Injury** -- At common law, one who innocently injured another had no duty to exercise due care to ensure the other's subsequent well being.

b. Misfeasance (Risk Creation)

i. General Rule

An actor who creates risk or has a pre-existing legal duty to act has the duty to act with the standard of reasonable care.

ii. Exceptions

- 1) **Social Hosts** -- The courts have categorically denied the liability of social hosts in cases where social hosts serve alcohol and one of their guests gets in an accident with a third party.
- 2) **Prior Conduct Creating Risk of Physical Harm** -- If an Actor's conduct, even though not tortious, creates harm or a risk of harm, the actor has a duty to exercise reasonable care to aid the other person. (Ie cant hit and run).

c. Landowners and Occupiers

i. Traditional Categorical Approach

- 1) **Invitees** -- Places open to the public.
 - a) Activities -- Reasonable person standard
 - b) Conditions -- Two part test: 1) Concealed condition, 2) Occupier knew about or could have discovered w/ reasonable inspection.
- 2) **Licensees** -- A person who is has permission (express or implied) to enter onto the land of another (social guests).
 - a) Activities -- Reasonable person standard
 - b) Conditions -- Must protect from all known hidden or concealed defects.
- 3) **Trespassers** -- A trespasser is a person who enters or remains on land in the possession of another without the possessor's consent or other legal privilege.
 - a) Discovered Trespassers
 - i) Activities -- Reasonable person standard
 - ii) Conditions -- Duty of reasonable care regarding the trespassers safety
 - b) Undiscovered Trespassers -- No duty with respect to activities or conditions
- 4) **Changing Categories** -- Generally a persons status can change over time. This complexity has led many jurisdictions to abandon the categorical approach.

ii. Modern Rejection of Categories (*Heins Approach*)

- 1) **Lawful Entrant** -- Modern jurisdictions collapse the invitee and licensee categories into the lawful entrant category.
 - a) Duty of Care -- The duty of reasonable care is owed to lawful entrants.
- 2) **Trespasser** -- Trespasser category is retained.

iii. Restatement Approach

- 1) **No Categories** -- Everyone is owed the duty of reasonable care.
 - a) Exception: Flagrant Trespasser -- A flagrant trespasser is a trespasser who is on the land to commit some illegal act.
 - i) Duty of Care -- the restatement leaves it to each state to decide what duty is owed.

iv. Duty to Protect Against 3rd Persons

Business owners have a duty to protect their patrons from criminal acts when those acts are foreseeable. The Following tests establish foreseeability.

- 1) **Specific Harm (Old Rule)** -- A landowner does not owe a duty to protect patrons from the violent acts of third parties unless he is aware of specific, imminent harm about to befall them.
- 2) **Prior Similar Incidents Test** -- A past history of criminal conduct will put the landowner on notice of a future risk. Courts consider the nature and extent of the previous crimes, as well as their recency, frequency, and similarity to the crime in question.
- 3) **Totality of the Circumstances** -- Focuses on the level of crime in the surrounding area. Courts that apply this test are more willing to see property crimes or minor offenses as precursors to more violent crimes.
- 4) **Walmart Balancing Test** -- seeks to address the interests of both business proprietors and their customers by balancing the foreseeability of harm against the burden of imposing a duty to protect against the criminal acts of third persons.
- 5) **Restatement** -- The restatement doesn't like using foreseeability in duty analysis. Better to be used in a breach analysis.

d. Parental Immunity

i. Wisconsin Approach

- 1) **General Rule** -- Parental immunity is repealed except for two situations:
 - a) Parental Authority -- Where negligent act involves an exercise of parental authority over the child.
 - b) Parental Discretion -- Where the negligent act involves an exercise of ordinary parental discretion with respect to the provision of food, clothing, housing, medical and dental services, and other care.

ii. New York Approach

- 1) **General Rule** -- The New York approach retains immunity for injuries resulting from parental "supervision" or its absence. A broad standard.

iii. Arizona Approach

- 1) **The Reasonable Parent Standard** -- The Arizona approach holds parents to a reasonable parent standard. The standard tends to be a lower standard than the reasonable person.

iv. Rational

- 1) **Domestic Tranquility** -- The legal action of a child against the parent could disrupt the balance of the parent child relationship.
- 2) **Fraud** -- The closeness of the relationship between defendant and plaintiff could lead to fraud. A weak rational. There is the possibility of fraud in most cases.
- 3) **Family Harmony** -- A lawsuit disrupts family harmony. Not a great rational because an injury also disrupts family harmony.
- 4) **Parental Authority** -- A lawsuit could undermine a parents parental authority or discipline.
- 5) **Access to Recovery** -- Parents might be able to inherit the child's recovery. The answer to this is that this is why we have the probate courts.
- 6) **Parental Freedom** -- Could undermine the parents right to raise their child in accordance with their beliefs and values.

v. Child Versus 3rd Party, Negligent Supervision

- 1) **General Rule** -- Many states are more willing to allow parental immunity in cases like this.

e. Emotional Harm (Negligent Infliction of Emotional Distress)

i. Direct Infliction of Emotional Harm

- 1) **(Historic) Impact Test** -- Early cases required plaintiff to show that, by failing to exercise due care, defendant had subjected plaintiff to an actual physical impact.
- 2) **Zone-of-Danger Rule** -- See New York approach, below.
- 3) **Categorical Approach** -- Early emotional harm cases allowed for recovery in specific situations:
 - a) Telegram erroneously announcing death or illness
 - b) Mishandling a corpse or bodily remains
 - c) Consumption of food containing repulsive foreign objects
 - d) Physician negligently diagnoses a patient with a dreaded or serious disease
- 4) **Restatement** -- The restatement combines the Zone of Danger rule and the categorical approach.

ii. Bystander Cases

- 1) **New York (Zone-of-Danger) Approach** -- An actor who's negligent conduct places another in danger of immediate bodily harm is subject to liability to the other for serious emotional harm caused by reaction to the danger.
- 2) **Dillon (3-Guidelines) Approach**
 - a) Near the scene -- Plaintiff located near the scene of the accident as contrasted with one who was a distance away.
 - b) Contemporaneous observance -- The shock resulted from a direct emotional impact upon the plaintiff from sensory and contemporaneous observance of the accident, as contrasted with learning about the accident from others after its occurrence.
 - c) Close Relationship -- Plaintiff and the victim were closely related, as contrasted with an absence of any relationship or presence of only a distant relationship.
- 3) **Thing (California) (3-Requirements) Approach** -- The same as the Dillon approach above but the three guidelines are now requirements.
- 4) **Restatement Approach** -- Defendant is subject to liability for serious (some courts require physical manifestation) emotional harm when: 1) the plaintiff perceives the event contemporaneously and 2) is a close family member of the person suffering injury.

f. Loss of Consortium

i. Spousal Consortium

- 1) **General Rule** -- Consortium is derivative claim that is a type of intangible harm resulting from the loss of a relationship or aspect of a relationship with a spouse. Historically only husbands could recover. Gender neutral in modern courts.
- 2) **Unmarried Couples** -- Generally no recovery for non-married couples.
 - a) Functional Approach -- Some courts look to the relationship and extend consortium to relationships that look like a married relationship in function.
 - b) Gay Rights -- The march to gay rights has created statutory liability in some jurisdictions.

ii. Parent Child Relationship

- 1) **Parent Loses Child** -- Most courts extend consortium to this kind of relationship.

- 2) **Child Loses Parent** -- Courts are less likely to extend consortium as parent loses child.

g. Interference with Procreation (Reproductive Rights)

h. Vicarious Liability (Respondeat Superior)

- i. **General Rule** -- An employer is vicariously liable for any tortious acts committed by his employee within the scope of the employment. Employer will be held liable even if he is completely blameless. An employer is strictly liable for the acts of his employees.
- 1) Scope of Employment -- The tortious conduct is within the scope of employment if the tortfeasor was acting with intent to further his employer's business purposes, even if the means he chose were indirect, unwise or even forbidden.
 - 2) Employees/Independent Contractors -- An employer is not liable for a true independent contractor. Sometimes an independent contractor can be an employee in function. One who is subject to the control of the physical details of the work is an employee.
 - a) Apparent Authority -- recall the hospital that created an independent radiology department. Three categories were used to determine if the independent was acting as an agent:
 - i) Representation
 - ii) Reliance on representation by a third party
 - iii) Change in opinion of 3rd party because of reliance

2. Breach (Negligence)

a. The Standard of Care

- i. **The Reasonable Person Standard** -- The standard of conduct is external and objective. The conduct must be that of the reasonable person of ordinary prudence in the same or similar circumstances.

b. The Calculus of Risk

- i. **The Hand Formula (B < PL)** -- In theory the reasonable person balances the (B) burden of avoiding harm against the (P) probability of the harm occurring and the (L) seriousness of the harm.
- 1) Probability (P) -- When the probability is very small it is doubtful that a duty has been breached.
 - 2) Magnitude of Loss (L) -- What a reasonable person would likely foresee as the likely harm.
 - 3) Burden of Avoidance (B) -- The cost associated with avoiding the harm, alternatives, and their feasibility, inconvenience to those involved, and the extent to which society values the relevant activity.

c. The Role Customs

- i. **Definition, Custom** -- A custom is a well defined and consistent way of performing a certain activity, often among a particular trade or industry.
- ii. **Deviation from Custom** -- Deviation from custom can be strong evidence of breach. A custom, however, does not always indicate breach. The normal standard of care is still applicable.
- iii. **Compliance with Custom** -- Can provide evidence of reasonableness. Some customs, however, can be unreasonable themselves. The normal standard of care still applies.

d. Statutes (Negligence Per Se)

- i. **General Rule** -- An actor is presumed negligent if without excuse, the actor violates a statute that is designed to protect against the type of accident the actors conduct causes, and if the victim is within the class of person the statute is designed to protect.
- ii. **Approaches Used** -- In a majority of jurisdictions the statute replaces the usual standard of care and particularizes the standard of care. An unexcused violation of the statute can result in three treatments:
 - 1) Negligence Per Se -- Directed verdict
 - 2) Prima Facie Evidence -- Definite jury question
 - 3) Some Evidence -- Jury question with some extra evidence
- iii. **Excuses to Negligence Per Se**
 - 1) Subjective Characteristics -- Violation is reasonable in light of the actor's childhood, physical disability, or physical incapacitation.
 - 2) Reasonable Care -- The actor exercises reasonable care to comply with the statute.
 - 3) Lack of Knowledge -- The actor neither knows nor should know of the factual circumstances that render the statute applicable.
 - 4) Confusing Statute -- The actor's violation is due to confusing requirements of the statute.
 - 5) Enhanced Risk -- Compliance with the statute would involve a greater risk of physical harm to the actor or to others than noncompliance.
- iv. **Compliance with the Statute** -- A statute can operate as the minimum standard of conduct. Thus it is possible to find negligence even in compliance with a statute.

e. Categories that Alter the Standard of Care

- i. **Emergencies** -- The actor is held to a standard of the reasonable person under emergency conditions.
 - 1) Exception -- Not applicable if the actor's negligence led to the creation of the emergency.
 - 2) Exception -- Some emergency situations must be anticipated (ie person in auto must be prepared for the sudden appearance of obstacles).
- ii. **Children** -- Generally, a child is held to the standard of care of a child of the same age and experience. Children under five are incapable of negligence.
 - 1) Minority View -- Different age groups create different treatments:
 - a) Older than 14 -- Rebuttable presumption in favor of the child's capacity to commit negligence.
 - b) Between 7 and 14 -- Rebuttable presumption against the capacity to be negligent.
 - c) Under 7 -- No negligence.
 - 2) Exception -- When engaging in dangerous activities typically reserved for adults, children may be held to the adult standard of care.
- iii. **Disabilities** -- Persons with physical disabilities are held to the standard of care of a person with similar abilities.
- iv. **Specific Knowledge and Skills** -- If an actor is engaged in an activity requiring special competence, he is held to a standard of care that takes into account the superior knowledge or skill required.
 - 1) Profession or Trade -- Held to the standard of care that is customarily exercised by members of that profession or trade, whether or not he possessed such skills.

f. Proof of Negligence

i. Circumstantial Evidence

- 1) **Slip and Fall Cases (Constructive Notice)** -- In slip and fall cases it must be proven beyond a preponderance of the evidence that the actor failed to exercise reasonable care. The condition causing the slip and fall accident must have existed long enough so that the actor could have discovered it and corrected it.
 - a) Constructive Notice -- For plaintiff to get to a jury evidence must be produced so that an inference of constructive notice can be created.
 - b) Mode of Operation -- Some courts will not require plaintiff to prove constructive notice. Instead the way the defendant was operating his business creates the notice of a foreseeable hazard (i.e. grocery store with open produce coolers).

ii. Res Ipsa Loquitur

- 1) **Restatement Rule** -- The fact finder may infer that the defendant has been negligent when the accident causing the plaintiff's harm is the type of accident that ordinarily happens as a result of the negligence of a class of actors of which the defendant is the relevant member.
- 2) **Two Element Approach** -- In order to find the defendant negligent, the defendant must have:
 - a) Had exclusive control of the instrument
 - b) The accident was one that normally does not happen without negligence.
- 3) **Three Element Approach**
 - a) Accident normally does not happen without negligence.
 - b) Defendant had exclusive control of the instrument
 - c) Plaintiff must not have contributed.

g. Medical Malpractice

- i. **The Standard of Care** -- A physician must possess and exercise the training, knowledge, skill, and conduct of the reasonable physician of ordinary prudence.
- ii. **Expert Testimony** -- Because medical malpractice cases are so technical, the jury often needs expert testimony to properly evaluate the defendants conduct relative to the standard of care. Thus custom is very important because it is often all that the jury as to go on.
 - 1) **Common Knowledge Exception** -- In some cases it is obvious that the defendant was negligent and expert testimony is not needed (ie doctor leaves sponge in patient).
- iii. **Strict Locality Rule** -- This is an old rule but is still used in some jurisdictions. There used to be pockets of varying community norms in medical practice. So the city doctor would not be held to the same standard as the country doctor.
- iv. **Informed Consent** -- Defendant has acted competently but plaintiff still has a cause of action because defendant deprived her of her autonomy. There are two elements that must be satisfied:
 - 1) Failure to disclose a **material risk**.
 - a) **Material Risk** -- Established by what the reasonable patient would consider material.
 - 2) Causation -- If plaintiff would have been told she would have chosen otherwise.
 - a) **Subjective Standard** -- Some courts use a subjective standard. Difficult to do because of the hindsight bias
 - b) **Objective Standard** -- Others use an objective standard.

3. Cause in Fact

a. The "But For" Test

- i. **General Rule** -- Conduct is a factual cause of harm when the harm would not have occurred absent (but for) the conduct.
- ii. **The Process**
 - 1) Identify the negligent part of defendants conduct
 - 2) Make a counterfactual inquiry

b. The Substantial Factor Test

- i. **Multiple Sufficient Causes** -- If multiple acts occur, each of which would be alone would establish factual cause at the same time in the absence of the others act(s), each act is regarded as a factual cause.
 - 1) **Competing Causes** -- Terminology for the two (or more) causes.
- ii. **Expert Testimony in Medical Contexts (Daubert Standard)** -- Evidence may be brought depending upon the following **factors** (ultimately the judges decision):
 - 1) Testability by the scientific method
 - 2) Error rate
 - 3) Peer review and publication
 - 4) General acceptability
- iii. **Loss-of-Chance** -- Occurs if with reasonable medical probability, defendant's malpractice caused a loss of chance and the harm that would have been avoided actually occurred. Traditionally, only allowed if the medical negligence more likely than not cause the harm.
 - 1) **Traditional "All or Nothing" Rule** -- Tortfeasor who created a 51 percent risk of causing plaintiff's harm will pay 100% of plaintiff's damages.
 - 2) **Loss of Chance Approach** -- Damages awarded on a proportional basis as determined by the percentage value of the patient's loss of chance for a better outcome.

c. Shifting the Burden of Proof

- i. **Ordinary Burden of Proof** -- Plaintiff has the burden to prove defendants tortious conduct was the cause of plaintiffs harm.
- ii. **Multiple Defendants (Alternative Liability)** -- In some situations plaintiff proves that each actor engaged in tortious conduct that **exposed** the plaintiff to a risk of harm and that tortious conduct of one or more of them caused the plaintiff's harm but the plaintiff cannot **reasonably** be expected to prove **which actor(s) caused** the harm. Courts will **shift the burden of proof** for factual causation to the defendants.

d. Multiple Defendants

- i. **Joint and Several Liability** -- Joint tortfeasors are two or more individuals who either 1) **act in concert** to commit a tort 2) act independently but cause a single **indivisible tortious injury** or 3) share responsibility for a tort because of **vicarious liability**. Under common law, each such tortfeasor is "jointly and severally" liable for P's total damage. This means each is fully liable for the **entire** damage.
 - 1) **Doctrine of Acting in Concert** -- One actor actually causes the harm but both are liable. The typical example is drag racing. **The key:** Both tortfeasors **agree beforehand** to engage in tortious conduct.
 - 2) **Modern Use** -- Was a doctrine used primarily before comparative fault. Modern use depends on the jurisdiction.
 - a) **Several Liability** -- Some states abolished completely.
 - b) **Plaintiffs Liability** -- Abolished if plaintiff's liability is greater than 50%
 - c) **Type of Damages** -- Some take different approaches for different types of damages (economic v. non-economic)
- ii. **Market Share Liability** -- Applied to products liability cases. Plaintiff cannot prove which of several defendants (or also persons not in the suit) caused his injury but can show that all produced a defective product. The court will require each defendant to pay the percentage of plaintiffs injuries which that relate to each defendants market share of the product.
 - 1) **National Market Share Approach** -- The courts use the national market to determine the share of liability.
 - 2) **Exculpation** -- Courts are split on whether each defendant should be allowed to exculpate itself by showing that it did not make the particular items in question. Many courts that use the national market share approach do not allow for exculpation for policy reasons.

4. Proximate Cause (Scope of Liability)

a. General

- i. **Most Easily Associated Risk** -- Professors phrase, the risk of harm that is most obvious. If there is a fact pattern where the harm results from the most easily associated risk, then you know that proximate cause is not an issue.

b. Direct Cause Test

- i. **Generally** -- Direct cause test was an early approach to proximate cause that is no longer used. There were no intervening circumstances between defendants conduct and plaintiffs injuries.

- 1) Intervening Circumstances -- Acts of god, unforeseeable criminal or tortuous acts, Third person's failure to prevent harm.

c. Foreseeability Test

- i. **General Rule** -- Defendant is liable for only those consequences of his negligence which were reasonably foreseeable at the time he acted. Requires 1) a reasonably foreseeable result or type of harm and 2) no superseding intervening force.

- 1) Unforeseeable Result -- Dependent upon the intervening forces.

- a) Foreseeable Intervening Forces -- The courts are split on whether or not there should be liability.

- b) Unforeseeable Intervening Forces -- Generally no liability.

- 2) Unforeseeable Method -- If the harm was a foreseeable consequence of the risk created by the plaintiff, then there is liability (i.e. guy cleaning with petrol, flaming rat, explosion).

- 3) Unforeseeable Plaintiff (Cardozo Approach) -- **No duty** to unforeseeable plaintiff. Test: Zone of danger, whoever is in the zone of danger is a foreseeable plaintiff.

d. Andrews Test

- i. **Generally** -- An actor who creates risk owes a duty to the whole world. The limitations of this duty are established by proximate cause. Proximate cause is established by convenience, public policy and a rough sense of justice.

- 1) Hindsight Test -- Looking back from the harm to the defendants negligent conduct, it appears to the court highly extraordinary that it should have brought harm.

e. Restatement

An actor's liability is limited to those harms that result from the risks that made the actor's conduct tortious.

5. Damages

a. Eggshell Plaintiff Doctrine

Defendant pays for all damages, even if they are unexpectedly large.

6. Defenses

a. Contributory Negligence (Traditional, Minority)

- i. **General Rule** -- When plaintiff has contributed to the harm she suffered, through her own negligence, her recovery from the defendant is barred completely.

- ii. **Exceptions to the General Rule**

- 1) Statutes -- If the purpose of the statute is to protect plaintiff from her own negligence then it can eliminate the defense of contributory negligence.

- 2) Recklessness -- If defendant's conduct is reckless or willful, contributory negligence does not apply.

- 3) Last Clear Chance -- Negligent plaintiff can still recover if she is able to show that the defendant had the last opportunity to avoid the accident.

b. Comparative Negligence (Modern View)

- i. **Pure Comparative Negligence** -- The plaintiff's recovery is full recovery less her own proportion of the fault or blame.

- ii. **Not as Great as Comparative Negligence** -- A pure system is used as long as the plaintiff's negligence is not as great as the defendant's.

- iii. **No Greater than Comparative Negligence** -- A pure system is used as long as the plaintiff's negligence is no greater than the defendant's.

- iv. **Special Medical Malpractice Rule** -- As a matter of public policy, a defendant may not avoid liability for a negligent treatment by asserting that the plaintiff's injuries were originally caused by the plaintiff's own negligence.

c. Assumption of Risk

- i. **Generally** -- Defendant has a complete defense if plaintiff voluntarily assumes the risk created by defendant's conduct. Assumption of risk requires that the plaintiff must 1) know a particular risk (or appreciate in some jurisdictions) and 2) voluntarily assume it.

- 1) Knowledge -- Knowledge is subjective. Plaintiff must have actually known of the risk.

- 2) Voluntary -- Plaintiff must have actually assumed the risk voluntarily.

- ii. **Express Assumption of Risk** -- Complete bar to recovery. Plaintiff explicitly agrees with defendant in advance of any harm, that plaintiff will not hold defendant liable.

- 1) Bargaining Power -- If defendant has enhanced bargaining power over plaintiff, assumption of risk may be barred as a matter of public policy.

- 2) Intentional or Willful Misconduct -- Public policy prohibits a waiver of liability for defendant's willful and wanton negligence.

- iii. **Implied Assumption of Risk** -- The conduct of the plaintiff implies the assumption of risk. Defendant must show that plaintiff 1) knew of the risk in question; and 2) voluntarily consented to bear the risk herself.

- 1) Knowledge of Risk -- Knowledge is established subjectively by what plaintiff actually knew.

- 2) Voluntary Assumption -- Plaintiff's voluntary consent is established subjectively.