Abnormally dangerous activities, 275–283
appropriateness, 278, 279, 280, 282–283
assumption of risk and, 278, 282–283
blasting as, 275, 276, 277
Cambridge Water Co. v. Eastern Counties
Leather PLC., 277
commonality, 278, 279, 280
contributory negligence and, 279
defamation compared, 303–304, 311–312, 325
foreseeability and, 276–277, 283
Indiana Harbor Belt Railroad Co. v. American
Cyanamid Co., 282–283
intervening causes and, 276–277
Madras Railway Co. v. The Zemindar of
Carvatenagaram, 282
Madsen v. East Jordan Irrigation Co., 276
overview, 8
reasonableness factors, 278
res ipsa loquitur and, 283
Restatement (Second) of Torts, 276, 277–279,
282–283, 305, 311–312
Restatement (Third) of Torts, 280
Rickards v. Lubian, 279–280
risk-benefit analysis, 278–279, 280, 281–282
Rylands v. Fletcher, 275–283
Siegler v. Kuhlman, 283
Strawbridge v. City of Philadelphia, 281–282
unusually sensitive plaintiffs, 277
Yukon Equipment v. Fireman’s Fund Insurance
Co., 276–277
Absolute immunity, consent as defense to battery,
64–65
Absolute privilege as defense to defamation,
316–319
Abuse of discretion standard, nonpecuniary
damages, 388–389
Acquiescence, false imprisonment, 75–78
Activity level, 16–19
external benefits, 18
external costs, 18
marginal analysis, 16
marginal private benefit, 16
marginal private cost, 16–17
marginal social cost, 17
missing markets, 19
“no duty to rescue” rule, 256
privately optimal activity level, 17
products liability and, 335, 346–347
public good, 19
socially optimal activity level, 18
strict liability and, 18, 95, 97–98
Act of God exception, strict liability, 93–94
Ad coelum rule, 55
Adhesion contracts, assumption of risk, 168
Administration, reasonable person standard,
108–109
Administrative costs, products liability and, 336
Adverse possession, 74
Adverse selection in insurance market, 426
Aesthetic interferences as nuisance, 292–294
Alternative equilibrium, 339
American rule, attorneys’ fees, 415–416, 418
Amusement parks, assumption of risk, 165–166
Animals
assumption of risk and, 299–300
contributory negligence and, 299–300
risk-benefit analysis, 299
strict liability and, 298–300
Annuities, 391
Antitrust law, defamation compared, 307–308
Index

Arbitration, waiver of tort rights, 422–423
Aristotle, 22–23
Asbestos cases, substantial factor test, 205–207
Assault, 86–87
Brower v. Ackerley, 86
conduct requirement, 86
defined, 86
intent to harm, 86, 90
specific intent, 90
speech and, 87
Assumption of risk
abnormally dangerous activities and, 278, 282–283
adhesion contracts, 168
amusement parks, 165–166
animals and, 299–300
comparative negligence and, 171–172
consumption cases, 165–166
contract law and, 168–169
custom and, 124
Dalury v. S-K-I Ltd., 167
defamation, as defense to, 304, 314–315
employment cases, 158–163
exculpatory overbreadth, 168
express assumption of risk, 166–169
fellow servant rule, 160–163
fraud and, 168–169
implied assumption of risk, 171, 312–313
imputed contributory negligence, 165–166
insanity as defense, 66–67
Lamson v. American Axe & Tool Co., 159–160
landowners and, 268
Little v. Hackett, 163
Mayhew v. Sullivan, 266
McGuire v. Almy, 266
Mills v. Armstrong, 163
misrepresentation and, 168–169
Murphy v. Steelechase Amusement Co., 165–166
“no duty to rescue” rule and, 265, 266, 267
nuisance and, 290–291
overview, 7, 147
Pomeroy v. Westfield, 160
primary assumption of risk, 171, 344
products liability and, 343–344
public policy exception, 167–168
Russo v. The Range, Inc., 168–169
secondary assumption of risk, 171–172, 343–344
strict liability and, 96
Thorogood v. Bryan, 163–165
Tunkl v. Regents of Univ. of California, 167
unconscionability, 168
vicarious liability, 162
waiver of tort rights and, 166–169
Winterstein v. Wilcon, 166–167
Attorneys, absolute privilege for defamation, 319
Attorneys' fees, 415–416, 418
Automatic conduct, 89
Bailment, 274
Barratry, 428
Baseline probabilities, res ipsa loquitur, 139, 140, 142–143
Battery
Aiken v. Holyoke Street Ry. Co., 85
consent as defense (See Consent as defense)
Fisher v. Carousel Motor Hotel, Inc., 85
foreseeability, 51–52
Garrett v. Dailey, 52–53
harmful activity, 54
implied license, 51
insanity as defense, 65–67
intent, 52–53
intent to harm, 50, 60
internalization principle and, 50–51
medical battery, 59–61 (See also Medical battery)
overview, 49–52
punitive damages, 404
transferred intent, 53–54
trespass compared, 56
volitional conduct, 89
Vosburg v. Putney, 49–52
willful battery, 85
Bayes Theorem
res ipsa loquitur, 139–140
substantial factor test, 206–207
Benefit externalization, 95–97
Bentham, Jeremy, 1, 29–30, 40
Blackburn, Colin, 93
Blackstone, William, 28–29, 36, 40–41, 42, 168
Blasting as abnormally dangerous activities, 275, 276, 277
Blindness, reasonable person standard, 111
Blood transfusions, products liability, 343
“Borrowed servants,” vicarious liability, 188–189
Boxing, consent as defense to battery, 64
BPL Test, 113–114
Bramwell, George (Baron), 290
Breach of duty
contributory negligence, 149–151
deception, 100
products liability, 367
British rule, attorneys' fees, 415–416, 418
Brown, John Prather, 175
Index

Burden of proof
defamation, 311, 316, 325
negligence per se, 130–131
res ipsa loquitur, 138–139, 140
substantial factor test, 204
Business of selling, products liability, 341
But-for test
conditional torts, 217
death, inevitability of, 195–196
as default test, 198
independent torts, 216
irrelevance of negligence, 197
overview, 195
Perkins v. Texas and New Orleans Railway Co., 197, 200
specificity principle, 196
substantial factor test compared, 200–201
superseding causes, 198
types of cases, 196–197
Bystander recovery rule, 251–252
Calabresi, Guido
on factual causation, 203–204
“law and economics” approach and, 2
on nonpecuniary damages, 381–382
on nuisance, 254, 296
on products liability, 336
on property rules and liability rules, 24, 25, 26
Cardozo, Benjamin
on assumption of risk, 165
on factual causation, 204
natural law and, 30–31
on “no duty to rescue” rule, 262
on products liability, 332, 334
on proximate cause, 234, 247, 248
Care, duty of, res ipsa loquitur, 142–143
Care level
diagrams, use of, 14–16
economics and, 11–14
expected value of loss, 11
marginal analysis, 11
marginal private benefit, 11–12, 14–15
marginal social benefit, 12, 15
moral reasoning approach and, 20–24
negligence and, 14, 16
“no duty to rescue” rule, 256
privately optimal care level, 12–13, 15–16
products liability and, 346–347
socially optimal care level, 12–13, 16
strict liability and, 13–14, 16, 97–98
Causation
but-for test (See But-for test)
contributory negligence generally, 151
damages and, 396–399
direct causation, 243–247 (See also Direct causation)
factual causation (See Factual causation)
egligence, 100
proximate cause (See Proximate cause)
substantial factor test (See Substantial factor test)
Champerny, 428
Charitable immunity, 193–194
Chattels
defense of property, 73–75
trespass to, 56–58, 272, 273–275
Children and minors
consent as defense, 62
reasonable person standard, 109, 110–111
wrongful death, 395–396
Choice of law, reasonable person standard and, 109
Circumstantial evidence of negligence. See Res ipso loquitur
Civil penalties, punitive damages in relation to, 407, 408, 409, 410
Class actions
damages and, 414–415
deterrence and, 414
economic analysis of, 414–415
litigation costs, 414–415
market share liability, 225–226
waiver of tort rights, 423
Coase, Ronald, 26
Coase Theorem, 26–28
Collateral source rule, 399–401
deterrence and, 399–401
double recovery, 399–400
Harding v. Town of Townshend, 399
insurance and, 399–401
The Propeller Monticello v. Mollison, 399
strict liability and, 400
Coming to nuisance, 294–295
Commentaries on the Laws of England
(Blackstone), 28–29
Common carriers, “no duty to rescue” rule, 262–264
Common law, tort law in, 4–5
The Common Law (Holmes), 2
Comparative negligence, 170–172
assumption of risk and, 171–172
contributory negligence versus, 157
damages, 170–171
Hand Formula, 172
incentives for care, 172, 175–177
intent to harm and, 172
modified comparative fault, 171
Comparative negligence (cont.)
overview, 7, 170
pure comparative fault, 171
recklessness and, 172
single victim cases, 177–179
Compensated injunctions, 295–296
Compensatory damages, 377–379
deterrence and, 383
economic loss rule and, 377–378
ex ante perspective, 380–381
ex post perspective, 380–381
liability rules and, 381–382
negligence, 383
nonpecuniary damages, 383–390 (See also Nonpecuniary damages)
overview, 377
pecuniary damages, 377–378
property rules and, 381–382
punitive damages in relation to, 407, 408, 410, 410–411
restorative purpose, 377, 380–381
strict liability, 383
trespass, 381–382
utility and, 379–383
wrongful death, 390
Compulsive conduct, 89
Concert of action, joint and several liability, 180–181
Concurrent tortfeasors
joint and several liability, 181, 213
substantial factor test, 198–199, 213–215
Conditional torts, factual causation, 217
Conflict preemption, 372
Consent as defense
absolute immunity, 64–65
boxy, 64
children and minors, 62
defamation, 314–315
defense of property and, 74–75
duress, 61–62
fetuses, 63
football, 64
implied consent (See Implied consent) limits of, 61–63
medical battery, 59, 62
mutual combat exception, 63–65
nature of act, 61
overview, 58–59
qualified immunity, 64–65
Restatement (First) of Torts, 65
sports, 64–65
unborn children, 63
Consequentialism, 20
Conspiracy, joint and several liability, 180
Constitution
conflict preemption, 372
correlation and, 273
defamation and, 321–325, 330–331
punitive damages and, 406, 408, 410
taking of property, 84
Consumer expectations test for products liability
both tests, application of, 362–363
demand curve, 354, 355
design defects, 350–351
economics and, 354–356
hybrid test, application of, 361–362
implementation of, 360–363
incentives and, 359–360
inherent unobservable risk and, 358–359
insurance and, 356
limited applicability of, 363
market equilibrium, 354–355
obvious and inherent risks, 365, 366
Restatement (Second) of Torts, 340, 350
risk-utility test compared, 357–360
Consumer Product Safety Commission, 371
Consumption, assumption of risk and, 165–166
Consumption effect, 339–340
Contract law
assumption of risk and, 168–169
tort law versus, 4–5
Contribution among joint tortfeasors, 181
Contributory negligence
abnormally dangerous activities and, 279
animals and, 299–300
both factual causation and proximate cause, 153–154
breach of duty, 149–151
car wash hypothetical, 152–153, 154
causation generally, 151
comparative negligence versus, 157
damages and, 154–157
eggshell skull rule, 156–157
employment cases, 150–151
experts and, 156
factual causation but no proximate cause, 152, 153
Greenland v. Chaplin, 147–148
Gyerman v. United States Lines Co., 153–154
Hand Formula, 156
imputed contributory negligence, 165–168
incentives for care, 173–175
invasion of property and, 149
last clear chance doctrine, 157–158
<table>
<thead>
<tr>
<th>Index</th>
<th>439</th>
</tr>
</thead>
<tbody>
<tr>
<td>LeRoy Fiber Co. v. Chicago, Milwaukee &amp; St. Paul Ry.,</td>
<td>149</td>
</tr>
<tr>
<td>Mahoney v. Beatman, 154–155, 156, 177–179</td>
<td></td>
</tr>
<tr>
<td>Nash equilibrium, 175</td>
<td></td>
</tr>
<tr>
<td>overview, 7, 147–148</td>
<td></td>
</tr>
<tr>
<td>products liability and, 343</td>
<td></td>
</tr>
<tr>
<td>proximate cause but no factual causation, 152–153</td>
<td></td>
</tr>
<tr>
<td>reasonable care, 147–148</td>
<td></td>
</tr>
<tr>
<td>reasonable person standard, 149–150</td>
<td></td>
</tr>
<tr>
<td>rescue and, 148–149</td>
<td></td>
</tr>
<tr>
<td>res ipa loquitur compared, 150</td>
<td></td>
</tr>
<tr>
<td>seat belt defense cases, 156, 179</td>
<td></td>
</tr>
<tr>
<td>single victim cases, 177–179</td>
<td></td>
</tr>
<tr>
<td>Smithwick v. Hall &amp; Upson Co., 152, 153, 154</td>
<td></td>
</tr>
<tr>
<td>sprinkler defense cases, 156, 179</td>
<td></td>
</tr>
<tr>
<td>strict liability and, 155–156</td>
<td></td>
</tr>
<tr>
<td>unusually sensitive plaintiffs, 156–157</td>
<td></td>
</tr>
<tr>
<td>Vosburg v. Putney, 148</td>
<td></td>
</tr>
<tr>
<td>warnings, products liability, 370–371</td>
<td></td>
</tr>
<tr>
<td>Conversion, 272–275</td>
<td></td>
</tr>
<tr>
<td>First Amendment and, 273</td>
<td></td>
</tr>
<tr>
<td>FMC Corp. v. Capital/ABC Inc., 273</td>
<td></td>
</tr>
<tr>
<td>trespass to chattels versus, 273–275</td>
<td></td>
</tr>
<tr>
<td>Coordination, reasonable person standard, 108–109</td>
<td></td>
</tr>
<tr>
<td>Criminal law</td>
<td></td>
</tr>
<tr>
<td>“no duty to rescue” rule and, 265–267</td>
<td></td>
</tr>
<tr>
<td>tort law versus, 4–5</td>
<td></td>
</tr>
<tr>
<td>Cumulative torts, factual causation, 217–220</td>
<td></td>
</tr>
<tr>
<td>Curren, Christopher, 176–177</td>
<td></td>
</tr>
<tr>
<td>Custom, reasonable person standard and, 123–128</td>
<td></td>
</tr>
<tr>
<td>assumption of risk, 124</td>
<td></td>
</tr>
<tr>
<td>Canterbury v. Spence, 127</td>
<td></td>
</tr>
<tr>
<td>Hand Formula, 128</td>
<td></td>
</tr>
<tr>
<td>Helling v. Carey, 127–128</td>
<td></td>
</tr>
<tr>
<td>Holland v. Tennessee Coal, Iron &amp; R.R. Co., 126</td>
<td></td>
</tr>
<tr>
<td>implied consent, 124</td>
<td></td>
</tr>
<tr>
<td>industry standards, 123–128</td>
<td></td>
</tr>
<tr>
<td>informational asymmetry, 124–126</td>
<td></td>
</tr>
<tr>
<td>Mayhew v. Sullivan, 125–126</td>
<td></td>
</tr>
<tr>
<td>medical malpractice, 123, 127–128</td>
<td></td>
</tr>
<tr>
<td>overview, 122–123</td>
<td></td>
</tr>
<tr>
<td>Texas &amp; Pacific Railway Co. v. Behymer, 126</td>
<td></td>
</tr>
<tr>
<td>The T.J. Hooper, 126–127, 128</td>
<td></td>
</tr>
<tr>
<td>workers’ compensation, 123</td>
<td></td>
</tr>
<tr>
<td>Damages</td>
<td></td>
</tr>
<tr>
<td>attorneys’ fees and, 415–416, 418</td>
<td></td>
</tr>
<tr>
<td>causation and, 396–399</td>
<td></td>
</tr>
<tr>
<td>class actions and, 414–415</td>
<td></td>
</tr>
<tr>
<td>collateral source rule, 399–401 (See also Collateral source rule)</td>
<td></td>
</tr>
<tr>
<td>comparative negligence, 170–171</td>
<td></td>
</tr>
<tr>
<td>compensatory damages, 377–379</td>
<td></td>
</tr>
<tr>
<td>contributory negligence and, 154–157</td>
<td></td>
</tr>
<tr>
<td>defamation, 309–311</td>
<td></td>
</tr>
<tr>
<td>deterrence and, 383, 399</td>
<td></td>
</tr>
<tr>
<td>economic loss rule and, 377–378</td>
<td></td>
</tr>
<tr>
<td>emotional injury, 250–252</td>
<td></td>
</tr>
<tr>
<td>ex ante perspective, 380–381</td>
<td></td>
</tr>
<tr>
<td>expected net payoff, 412–413</td>
<td></td>
</tr>
<tr>
<td>expected value of loss, 412–413</td>
<td></td>
</tr>
<tr>
<td>ex post perspective, 380–381</td>
<td></td>
</tr>
<tr>
<td>factual causation and, 396–399</td>
<td></td>
</tr>
<tr>
<td>false imprisonment, 77</td>
<td></td>
</tr>
<tr>
<td>injunctions versus, 429–431</td>
<td></td>
</tr>
<tr>
<td>intentional infliction of emotional distress, 87–88</td>
<td></td>
</tr>
<tr>
<td>liability rules and, 381–382</td>
<td></td>
</tr>
<tr>
<td>litigation costs and, 412–414</td>
<td></td>
</tr>
<tr>
<td>lost chance doctrine, 397–399</td>
<td></td>
</tr>
<tr>
<td>medical malpractice, 387–388, 396–399</td>
<td></td>
</tr>
<tr>
<td>negligence, 100–101, 383</td>
<td></td>
</tr>
<tr>
<td>nonpecuniary damages, 383–390 (See also Nonpecuniary damages)</td>
<td></td>
</tr>
<tr>
<td>nuisance, 286–287, 289–290, 295–298</td>
<td></td>
</tr>
<tr>
<td>overview, 8, 377</td>
<td></td>
</tr>
<tr>
<td>pecuniary damages, 377–378</td>
<td></td>
</tr>
<tr>
<td>property rules and, 381–382</td>
<td></td>
</tr>
<tr>
<td>proximate cause and, 154–157</td>
<td></td>
</tr>
<tr>
<td>settlements and, 416–418</td>
<td></td>
</tr>
<tr>
<td>strict liability, 383</td>
<td></td>
</tr>
<tr>
<td>trespass, 56–58, 381–382</td>
<td></td>
</tr>
<tr>
<td>trial outcome and, 419–420</td>
<td></td>
</tr>
<tr>
<td>utility and, 379–383</td>
<td></td>
</tr>
<tr>
<td>waiver of tort rights, 420–423 (See also Waiver of tort rights)</td>
<td></td>
</tr>
<tr>
<td>willful, wanton or reckless conduct, 86</td>
<td></td>
</tr>
<tr>
<td>wrongful death, 392, 394–395</td>
<td></td>
</tr>
<tr>
<td>Deadly force, defense of property, 70–73</td>
<td></td>
</tr>
<tr>
<td>Death</td>
<td></td>
</tr>
<tr>
<td>defamation and, 309</td>
<td></td>
</tr>
<tr>
<td>wrongful death, 390–396 (See also Wrongful death)</td>
<td></td>
</tr>
<tr>
<td>Defamation</td>
<td></td>
</tr>
<tr>
<td>abnormally dangerous activities compared, 303–304, 311–312, 325</td>
<td></td>
</tr>
<tr>
<td>absolute privilege as defense, 316–319</td>
<td></td>
</tr>
<tr>
<td>antitrust law compared, 307–308</td>
<td></td>
</tr>
<tr>
<td>assumption of risk as defense, 304, 314–315</td>
<td></td>
</tr>
<tr>
<td>attorneys, absolute privilege, 319</td>
<td></td>
</tr>
<tr>
<td>Bindrim v. Mitchell, 307</td>
<td></td>
</tr>
<tr>
<td>Bottomley v. F.W. Woolworth, 306</td>
<td></td>
</tr>
<tr>
<td>burden of proof, 311, 316, 325</td>
<td></td>
</tr>
</tbody>
</table>
Defamation (cont.)

Cambridge Water Co. v. Eastern Counties Leather PLC, 306
Cinquanta v. Burdett, 313
consent as defense, 314–315
costs of false expression, 326–327, 329
curtis publishing co. v. BuTTs, 323
damages, 309–311
dangerous agent, 305–306
death and, 309
defense of others and, 320
defenses, 311–312
effect of, 306–309
esteem, injury to, 301–302
evolution of, 327–328
First Amendment and, 321–325, 330–331
foreseeability and, 306–309, 311
functionalist approach to tort law, 302
Gambardella v. Apple Health Care, Inc., 320–321
Gertz v. Robert Welch, Inc., 324–325
harm requirement, 304–305, 309–311
Haycox v. Dunn, 313
imperfect information and, 327
implied assumption of risk and, 312–313
intentional infliction of emotional distress compared, 326
intent to harm, 350–331
intra-corporate communication and, 318–319, 320, 329
Jews for Jesus, Inc. v. Rapp, 308–309
joint interest communication and, 320
judges, absolute privilege, 319, 329
Kevorkian v. American Medical Association, 312
legislators, absolute privilege, 319, 329
level of liability, 302, 325–330, 331
libel, 305–306, 310–311
malice and, 309, 314, 317, 318–319, 320–322
misuse compared, 305
other torts compared, 302
overview, 8, 301–303
per quod defamation, 305–306, 311
per se defamation, 305–306, 310, 312, 313
Philadelphia Newspapers, Inc. v. Hepps, 325
privilege as defense, 304, 315–321 (See also Privilege as defense to defamation)
prosecutors, absolute privilege, 319
proximate cause and, 309
of public figures, 323–325
of public officials, 321–323
qualified privilege as defense, 320–321, 329–330
reasonable person standard, 307
reciprocity as defense, 304, 312–314, 320
relationship-based privilege as defense, 318–319
relevant community, 307–309
Rylands v. Fletcher, 302, 325, 330
Saunders v. Board of Directors, WHYY-IV, 308
self-defense and, 312–313, 320
slander, 305–306
Smith v. Byrd, 317–318
social construct, esteem as, 301–302
social value and, 304, 315–321
special damages, 310
spousal privilege and, 318
strict liability torts compared, 303–304
Tervilliger v. Wards, 310
truth as defense, 316–318
truthful information as public good, 325–326
unusually sensitive plaintiffs and, 309
utilitarian approach to tort law, 310–311, 323, 325
words, 305–306
Defense of others, defamation and, 320
Defense of property
adverse possession, 74
Bird v. Holbrook, 70–72, 113
chattels, 73–75
consent and, 74–75
deadly force, 70–73
deterrents versus traps, 71–72
dogs, 71–72
Green v. Goddard, 69–70
Katho v. Briney, 73
Kirby v. Foster, 73–75
laches, 75
M’Ilvoy v. Cockran, 70
necessity defense compared, 80–81, 82
Palmer v. Gordon, 71
personal property, 73–75
real property, 69–73
reasonable force, 70, 73, 74
reasonable perception, 73–74
reasonable person standard, 69
request to leave, 70
Restatement (Second) of Torts, 72
spring guns, 70–73
Defenses. See also specific defense
defamation, 311–312
products liability, 344–349
Demand curve, products liability and consumer expectations test, 354, 355
overview, 337–338
risk-utility test, 356–357
Demurrer, 36, 37–38
Deontological ethics, 20
Design defects, products liability, 340, 350–353
Deterrence
class actions and, 414
collateral source rule and, 399–401
compensatory damages and, 383
damages and, 383, 399
factual causation and, 221
litigation costs and, 413–414
products liability and, 335, 346–353
punitive damages and, 401–406, 408–409, 411
reasonable person standard, 108–109
Direct causation, 243–247
foreseeability and, 245
Hadley v. Baxendale, 246
intervening causes and, 244–245, 246
Petition of Kinsman Transit Co., 246–247
remoteness and, 245
In re Polemis & Furness, Withy & Co., 245–247
Scott v. Shepherd, 244–245
unusually sensitive plaintiffs, 246
Vosburg v. Putney, 246
Wagon Mound No. 1, 246–247
Wagon Mound No. 2, 246–247
Disability, reasonable person standard, 109–111
Disabling avoidance of harm
"foreseeability plus," 240–241
intervening causes, 240–241
"no duty to rescue" rule, 259–260
Dogs
defense of property, 71–72
strict liability, 299–300
Domestic animals, strict liability, 299–300
Due Process Clause, punitive damages and, 406, 408, 410
Duty
emotional injury and, 250–252
negligence, 100
products liability, 368
proximate cause, duty analysis, 247–250
reasonable care, 148–149
Duty of care, res ipso loquitur, 142–143
Duty to warn, products liability. See Warnings, products liability
Economic growth, nuisance and, 289
Economic loss rule
damages and, 377–378
as defense to products liability, 344–346
Economics, tort law and
activity level, 16–19 (See also Activity level)
attorneys’ fees, 415–416, 418
care level, 11–14 (See also Care level)
class actions, 414–415
consumer expectations test for products liability, 354–356
game theory, 6
Hand Formula, 118–121
insurance, 425–426
litigation costs, 412–413
moral reasoning approach versus, 20–22
overview, 6
policy and, 10–19
products liability, 335–336
reasonable person standard, 103–106, 121
risk-utility test for products liability, 356–360
settlements, 416–418
subrogation, 423–425
third parties, sale of tort rights to, 426–428
trial outcome and, 419–420
waiver of tort rights, 420–423
Eggshell skull rule, 156–157
Elderly persons, reasonable person standard, 110
Emergencies
intervening causes, 233–235
necessity defense, existence of emergency, 80
Emotional injury
bystander recovery rule, 251–252
damages, 250–252
duty and, 250–252
intentional infliction of emotional distress (See Intentional infliction of emotional distress)
nonpecuniary damages, 383–390 (See also Nonpecuniary damages)
physical impact rule, 250
proximate cause, 250–252
zone of danger test, 251
Employment
assumption of risk in, 158–163
contributory negligence in, 150–151
direct negligence of employer, 191–193
fellow servant rule, 160–163
frolic and detour, 192–193
judgment-proof employee problem, 186, 189
vicarious liability in, 184–185 (See also Vicarious liability)
Enabling harm
"foreseeability plus," 241
intervening causes, 241
"no duty to rescue" rule, 258–259
Enhanced risk of future injury, proximate cause and, 252–253
Enhanced susceptibility to injury, factual causation, 218, 219, 220

© in this web service Cambridge University Press
Index

Epstein, Richard A., 3
Equitable indemnity doctrine, 181–182
Esteem
defamation as injury to, 301–302
as social construct, 301–302
Evidence production, factual causation and,
207–210, 221
Evolution of tort law
 Brown v. Kendall, 45–47
 Castle v. Duryee, 37
defamation, 327–328
 Dickenson v. Ward, 37–38
direct versus indirect harm, 41–45
trespass on the case, 40–45
express preemption, 372
legal fictions, 38–39, 40
novus actus interveniens, 208
manorial courts, 38
negligence versus strict liability, 45, 46–47
overview, 7, 32–33
procedural shift, 46–47
products liability, 332–335
royal courts, 38–39, 40
“Shooting Cases,” 37–38
 Thorns Case, 33–36, 38
trespass on the case, 40–45
 Underwood v. Hewson, 37
violence in England, 39–40
Weaver v. Ward, 37–38, 46, 47
 Ex ante negligence evaluations, 209–210
 Exculpatory overbreadth, assumption of risk, 168
Excuse
 justification compared, 84
 necessity as (See Necessity defense)
 Expected net payoff, 412–413
 Expected present value, 393–394
 Expected value of loss
damages and, 412–413
overview, 11
 Expected value of risk, 425, 426
 Experts, contributory negligence and, 156
 Ex post negligence evaluations, 209–210
 Express assumption of risk, 166–169
 Express preemption, 372
 External benefits, 18
 External costs, 18

Factual causation
 alternative liability, 220–223
 Marie Railway Co., 221, 224
but-for test (See But-for test)
car wash hypothetical, 198
class actions, 225–226
conditional torts, 217
contributory negligence and (See Contributory negligence)
cricket fence hypothetical, 197, 207–208,
210–211
cumulative torts, 217–220
damages and, 396–399
deterrence and, 221
enhanced susceptibility to injury, 218, 219,
220
evidence production and, 207–210, 221
 ex ante negligence evaluations, 209–210
 ex post negligence evaluations, 209–210
 functions of, 207
 Hand Formula, 208
 incentives for care, 207, 210–212
 independent torts, 216–217
 intervening causes, 208
 irrelevance of negligence, 207–208
 Kingston v. Chicago & Northwest Railway Co.,
 221, 224
 lack of information and, 207–210
 Maddux v. Donaldson, 217
 market share liability, 224–226 (See also
 Market share liability)
negligence, 100–101
negligence per se, 129–130
 New York Central Railroad Co. v. Grimstad,
 207–210, 211–212
 overview, 8, 195
 precaution and, 210–212
 preexisting injury, 218–220
 products liability, 367
 sequential torts, 215–220 (See also Sequential
torts)
shooter hypotheticals, 221–223
substantial factor, 151
substantial factor test (See Substantial factor
test)
 Summers v. Tice, 220–223, 224
 warnings, products liability, 370
 Failure to warn, products liability. See Warnings,
products liability
False imprisonment
 acquiescence, 75–78
 barriers, 76
 C.N. Robinson & Co. v. Green, 75
 Coblyn v. Kennedy’s, Inc., 78
 conditions of, 77
 costs of escape, 76
 damages, 77
 Griffin v. Clark, 76–77
 implied consent and, 76–77
 overview, 75
reasonable cause, 78
reasonable force, 78
reasonable perception, 75–78
Restatement (Second) of Torts, 77
Whitaker v. Sandford, 75
False light, 328
Federal Employers’ Liability Act, 135
Federal Motor Vehicle Safety Standard 208, 375–376
Fellow servant rule
assumption of risk, 160–163
exceptions, 161
incentives for care, 162–163
vicarious liability compared, 162, 191–192
workers’ compensation, effect of, 163
Fetuses, consent as defense to battery, 63
Field preemption, 372
Fifth Amendment, taking of property, 84
Fifty percent tendency, 419–420
First Amendment
conversion and, 273
defamation and, 321–325, 330–331
Food and Drug Administration, 371, 374–375
Football, consent as defense to battery, 64
Forescability
abnormally dangerous activities and, 276–277, 283
battery, 51–52
defamation and, 306–309, 311
direct causation and, 245
“forescability plus,” 240–243 (See also “Forescability plus”)human intervention and, 232–233
intervening causes and, 239–240, 247–248
legal arguments, 231–232
lightning strike hypothetical, 228–229
limitation on scope of liability and, 232
as necessary but not sufficient condition for proximate cause, 230, 231–232
“no foreseeability” rule, 239
overview, 151
policy arguments, 231
products liability, 367–368
rational estimation and, 228–230
Ryan v. New York Central Railroad Co., 231–232
“unforeseeable victim” rule, 247, 248
“Forescability plus,” 240–243
Bullock v. Tamiami Trail Tours, Inc., 243
disabling avoidance of harm, 240–241
enabling harm, 241
Hines v. Garrett, 241
Janof v. Newsom, 242
Kendall v. Gore Properties, 241
Lane v. Atlantic Works, 243
Lundgren v. Fultz, 241
Morse v. Homer’s, Inc., 242–243
“no duty to rescue” rule compared, 258
Quigley v. Wilson Line of Massachusetts, 242
reliance, 242
Richards v. Stanley, 243
superior knowledge and control of risk, 242–243
Fourteenth Amendment, punitive damages and, 406
Fraud, assumption of risk and, 168–169
Friendly, Henry, 246–247
Frolic and detour, 192–193
Functionalist approach to tort law
defamation, 302
overview, 1, 2
preemption of products liability law, 372, 373–374
products liability, 332–333
strict liability, 94–97
Gain-elimination rationale, punitive damages, 402–403, 404, 405, 407–408
Gamesmanship problem
overview, 43–44, 45
settlements and, 417
Game theory, 6
Gelernter, David, 379
General intent, 90
Golden Rule, 20, 103
Good faith standard, reasonable person standard versus, 107–108
Grady, Mark F., 112, 210–212
Gregory, Charles O., 3
Haddock, David, 176–177
Hand, Learned, 113–114, 122, 126–127, 128, 145, 156
Hand Formula
comparative negligence, 172
contributory negligence, 156
custom and, 128
economic approach, 118–121
factual causation, 208
medical malpractice, 128
overview, 113–114
reasonable person standard versus, 118–121
Hardwicke, Lord (Philip Yorke), 286
Harmonization principle, 132, 133
Heart attacks, reasonable person standard, 112
Hedonic losses. See also Nonpecuniary damages disaggregation from pain and suffering, 386–387
overview, 383

Historical background of tort law. See Evolution of tort law
Holmes, Oliver Wendell, Jr.
on assumption of risk, 159, 160
on defamation, 302, 330–331
on defense of property, 71
on intentional torts, 48–49
legal positivism and, 29–31
on mixed questions of law and fact, 137–138
on necessity defense, 82–83
on "no duty to rescue" rule, 257
on nuisance, 288, 295
on products liability, 345
on proximate cause, 155–156
on strict liability, 32–33, 272
utilitarian approach to tort law and, 2
on vicarious liability, 187
Horwitz, Morton J., 23–24
Human intervention rule, 236–243

IIED. See Intentional infliction of emotional distress
Imperfect information, defamation and, 327
Implied assumption of risk
defamation and, 312–313
strict liability and, 96
Implied consent
custom and, 124
false imprisonment and, 76–77
medical battery, 59–61
pleasantry exception, 60–61
Implied license
battery, 51
insanity as defense, 66–67
Implied preemption, 372
Imputed contributory negligence, 163–165
Inadvertent conduct as intervening cause, 235–236
Incentives for care
attorneys’ fees and, 415, 418
comparative negligence, 172, 175–177
contributory negligence, 173–175
factual causation, 207, 210–212
fellow servant rule, 162–163
injunctions and, 429–430, 431
joint and several liability, 182–183
negligence, 173
single victim cases, 177–179
strict liability, 97–98
subrogation and, 424
Indemnification of employer, vicarious liability, 189
Independent contractors
manner, means, and details test, 190
vicarious liability, 190–191
Independent torts, factual causation, 216–217
Individual capacity, reasonable person standard, 107–109
Inference of negligence. See Res ipsa loquitur
Informational asymmetry
custom and, 124–126
medical malpractice and, 419–420
res ipsa loquitur and, 140
"Information forcing," res ipsa loquitur, 145–146
Injunctions, 429–433
compensated injunctions, 295–296
damages versus, 429–431
incentives for care and, 429–430, 431
injunctive settlements, 431–432
objective losses and, 429
overview, 429
reverse payment settlements, 432–433
settlements versus, 431–433
Spur Industries v. Del E. Webb Development Co., 432–433
subjective losses and, 429
trespass, 430–431
Injunctive settlements, 431–432
Insanity as defense, 65–67
assumption of risk, 66–67
battery, 65–67
implied license, 66–67
reasonable person standard, 111–112
Instinctive conduct, 89
Insurance
adverse selection, 426
collateral source rule and, 399–401
customer expectations test and, 356
economic analysis of, 425–426
expected value of risk, 425–426
products liability and, 336, 346–347
risk aversion and, 425–426
subrogation and, 425–426
Intent
automatic, compelling, reflexive, or instinctive conduct, 89
battery, 52–53
consent vitiating (See Consent as defense)
general intent, 90
insanity vitiating, 66–67
intent to harm (See Intent to harm)
Index

involuntary conduct, 88–89
levels of, 88–90
nuisance, 284
punitive damages and, 405
specific intent, 90
transferred intent, 53–54
trespass, 55–56
volitional conduct, 89

Intentional infliction of emotional distress, 87–88
damages, 87–88
defamation compared, 326
extreme and outrageous conduct, 88
intent to harm, 90
remoteness, 88
as separate tort, 88
specific intent, 90
Wilkinson v. Downton, 87–88

Intentional torts
battery (See Battery)
consent as defense (See Consent as defense)
defense of property (See Defense of property)
false imprisonment (See False imprisonment)
insanity as defense, 65–67
intentional infliction of emotional distress, 87–88 (See also Intentional infliction of emotional distress)
internalization principle, 48–49, 50–51, 69
as intervening cause, 236–243
necessity defense (See Necessity defense)
overview, 6–7, 48
self-defense, 67–69 (See also Self-defense)
trespass (See Trespass)
vicarious liability, 185–186

Intent to harm
assault, 86, 90
battery, 50, 60
comparative negligence and, 172
defamation, 330–331
intentional infliction of emotional distress, 90
medical battery, 60
overview, 50, 89, 90

Internalization principle, 48–49, 50–51, 69
as intervening cause, 236–243
necessity defense (See Necessity defense)
overview, 6–7, 48
self-defense, 67–69 (See also Self-defense)
trespass (See Trespass)
vicarious liability, 185–186

Intervening causes
abnormally dangerous activities and, 276–277
Bullock v. Tamiami Trail Tours, Inc., 243
Central Georgia Railway Co. v. Price, 239
direct causation and, 244–245, 246
disabling avoidance of harm, 240–241
Eckert v. Long Island R.R., 235
emergencies, 233–235
enabling harm, 241
factual causation, 208
foreseeability and, 239–240, 247–248
“foreseeability plus,” 240–243 (See also “Foreseeability plus”)
Hines v. Garrett, 241
human intervention, 232–233
human intervention rule, 236–243
inadvertent conduct not severing chain of causation, 235–236
intentional conduct severing chain of causation, 236–243
Jandl v. Newsom, 242
Kendall v. Gore Properties, 241
Lane v. Atlantic Works, 243
Landgren v. Fultz, 241
McLaughlin v. Mine Safety Appliances Co., 238
Morse v. Homer’s, Inc., 242–243
natural intervention, 232–233
negligence causing risk of injury, 239
negligence not causing risk of injury, 239
negligent conduct severing chain of causation, 236–243
“no foreseeability” rule, 239
overview, 230
Pittsburgh Reduction Co. v. Horton, 238
potentially negligent conduct not severing chain of causation, 235–236
Quigley v. Wilson Line of Massachusetts, 242
reasonable conduct not severing chain of causation, 233–235
reflexive conduct not severing chain of causation, 233–235
reliance, 242
remoteness of, 232
Richards v. Stanley, 243
Scott v. Shepherd, 233–234
structural intervention, 232–233
substantial factor test, 200, 201–202, 203
superior knowledge and control of risk, 242–243
Tuttle v. Atlantic City Railroad Co., 234
Wagner v. International Railway Co., 234–235
Watson v. Kentucky & Indiana Bridge & Railroad Co., 237–238
Intracorporate communication, defamation and, 318–319, 320, 329
Invasion of privacy, 328–329
Invasion of property, contributory negligence and, 149
Invites
landowner duties to, 267–270
“no duty to rescue” rule, 264
involuntary conduct, 88–89

Joint and several liability
concert of action, 180–181
concurrent tortfeasors, 181, 213
correspondence, 180
contribution among joint tortfeasors, 181
equitable indemnity doctrine, 181–182
Gray v. Boston Gas Light Co., 181–182
incentives for care, 182–183
Kingston v. Chicago & Northwest Railway Co., 213
“no contribution” rule, 181
overview, 7, 180–181
Rylands v. Fletcher, 182
several liability distinguished, 180, 181
vicarious liability as form of, 187–189
Joint interest communication, defamation and, 320
Joyce, Howard Clifford, 286–287
Joyce, Joseph Asbury, 286–287
Judges
absolute privilege for defamation, 319, 329
mixed questions of law and fact, role in, 137–138
proximate cause, role in, 248–249
questions of law, role in, 137
res ipso loquitur, role in, 138
Judgment-proof employee problem, 186, 189
Juries
mixed questions of law and fact, role in, 137–138
proximate cause, role in, 248–249
questions of fact, role in, 137
res ipso loquitur, role in, 138
Justification
defense of property (See Defense of property)
excuse compared, 84
overview, 67
self-defense, 67–69 (See also Self-defense)
Kalven, Harry, Jr., 3
Kant, Immanuel, 22–23, 28
Laches, defense of property, 75
Lack of information, factual causation and, 207–210
Landes, William, 256
Landlord and tenant, “no duty to rescue” rule and, 265–267
Landowners
assumption of risk and, 268
Barnell v. Meads, 269–270
invites, duty to, 267–270
licensees, duty to, 267–270
“no duty to rescue” rule, 264
overview, 8
policy considerations, 268
reasonable care, 270
reciprocal exchange of risk and, 268–269
Rowland v. Christian, 270
Rylands v. Fletcher, 268
trespassers, duty to, 267–268, 269
Langdell, Christopher Columbus, 29
Last clear chance doctrine, 157–158
“Law and economics” approach to tort law, 2
Legal fictions, 38–39, 40
Legal positivism, 28, 29–30
Legislators, absolute privilege for defamation, 319, 329
Lex loci, reasonable person standard and, 109
Liability rules, 26–28
Coase Theorem and, 26–28
compensatory damages and, 381–382
damages and, 381–382
policy considerations, 24–28
property rules versus, 24–26
punitive damages and, 404–405
transaction costs, 25–26
trespass and, 24–25
Label, 305–306, 310–311. See also Defamation
Licenses, landowner duties to, 267–270
Light, obstruction of as nuisance, 292–294
Limited duty
reasonable person standard versus, 107
strict liability versus, 97, 99–101
Litigation costs
American rule, 415–416, 418
attorneys’ fees, 415–416, 418
British rule, 415–416, 418
class actions, 414–415
damages and, 412–414
deterrence and, 413–414
economic analysis of, 412–414
settlements, 416–418
trial outcome and, 419–420
waiver of tort rights and, 420–423
Loss-internalization rationale, punitive damages,
402, 403, 404, 405–406, 407–408
Loss of enjoyment of life. See also Nonpecuniary damages
disaggregation from pain and suffering, 386–387
overview, 383
Lost chance doctrine, 397–399
Maintenance, 428
Malice, defamation and, 309, 314, 317, 318–319, 320–322
Manner, means, and details test, 190
Manorial courts, 38
Manufacturing defects, products liability, 340, 349–350
Marginal analysis
activity level, 16
care level, 11
Marginal private benefit, 11–12, 14–15, 16
Marginal private cost, 16–17
Marginal social benefit, 12, 15
Marginal social cost, 17
Market equilibrium, products liability and consumer expectations test, 354–355 overview, 338
risk-utility test, 357
Market share liability
class actions, 225–226
factual causation, 224–226
Sindell v. Abbott Laboratories, 225
substantial percentage of market, 225
Marx, Karl, 23–24
Maturity, reasonable person standard, 109–111
Medical battery
consent as defense, 59, 62
extension of procedures, 61
implied consent, 59–61
intent to harm, 60
Kennedy v. Parrott, 61
Mohr v. Williams, 59–61
pleasantry exception, 60–61
Medical care context, products liability in, 341–343, 347–348
Medical devices, preemption of products liability law, 374–375
Medical malpractice
custom and, 123, 127–128
damages, 387–388, 396–399
Hand Formula, 128
informational asymmetry and, 419–420
nonpecuniary damages, 387–388
settlements and, 419–420
Melamed, A. Douglas, 24, 25, 26, 284, 296, 381–382
Merrill, Thomas, 284
Minors. See Children and minors
Misappropriation, 328
Misrepresentation, assumption of risk and, 168–169
Misuse of product, products liability, 367–368
Mixed questions of law and fact
judge and jury, role of, 137–138
overview, 137
Modified comparative fault, 171
Moral reasoning approach to tort law, 20–24
care level, 20–24
consequentialism, 20
deoethical ethics, 20
economics versus, 20–22
Golden Rule, 20
negligence and, 23
personal injuries and, 21–22
property damage and, 21
“More than doubling” requirement, substantial factor test, 205
Motor vehicles, preemption of products liability law, 375–376
Mutual combat exception to consent as defense, 63–65
Nash, John, 175
Nash equilibrium, 175
Natural law theory, 28–29, 30–31
Necessity defense
choice of evils, 82–83
compensation for property damage, 81
defense of property compared, 80–81, 82
destruction of property, 83–84
emergency, existence of, 80
Holmes v. United States, 82–83
indefensible accidents, 81
Laidlaw v. Sage, 83
liability and, 81–84
Millen v. Fandrye, 80
overview, 78–79
Ploof v. Putnam, 79–81, 84
preservation of property, 82
property damage, compensation for, 81
public necessity, 82
right, existence of, 80
scope of rights, 79–81
threats to life or property, 82
trespass, 35, 79–80
Vincent v. Lake Erie, 80
Negative liberty, 254
Negligence
Adams v. Bullock, 116
Andrews v. United Airlines, 119–121
Blyth v. Birmingham Water Works, 114–116
breach of duty, 100
Brown v. Kendall, 136
care level and, 14, 16
causation, 100
circumstantial evidence of (See Res ipsa
loquitur)
comparative negligence (See Comparative negligence)
compensatory damages, 383
contributory negligence (See Contributory negligence)
Negligence (cont.)
Cooley v. Public Service Co., 116–117
custom and, 123–128 (See also Custom, reasonable person standard and)
damages, 100–101, 383
duty, 100
ex ante evaluations, 209–210
ex post evaluations, 209–210
factual causation, 100–101
Grimshaw v. Ford Motor Co., 118–119, 120, 121
Hand Formula (See Hand Formula)
incentives for care, 173
inference of (See Res ipsa loquitur) as intervening cause, 236–243
last clear chance doctrine, 157–158
moral reasoning approach and, 23
negligence-in-design, 114, 115, 116–117
negligence-in-operation, 114, 115, 116
negligence-in-warning, 114, 115–116, 117–118
“no duty to rescue” rule and, 255
nonpecuniary damages, 385–386
ordinary care, 46
overview, 7
per se, 128–135 (See also Negligence per se)
proximate cause, 100–101
reasonable care, 46
reasonable person standard (See Reasonable person standard)
res ipsa loquitur (See Res ipsa loquitur)
Rinaldo v. McGovern, 117–118
risk aversion and, 120–121
Risk-utility test for products liability, convergence with, 366–368
“Shooting Cases,” 37–38
statutes and regulations and, 128–135 (See also Negligence per se)
strict liability versus, 45, 46–47, 93, 97, 99–101
Thorns Case, 35–36
trespass and, 45
United States v. Carroll Towing Co., 113, 122
warnings, products liability, 368–369
Negligence per se, 128–135
burden of proof, 130–131
common law claims, effect of existence of, 131–132, 134
duty, existence of, 129, 132, 134
factual causation, 129–130
Fitzwater v. Sunset Empire, Inc., 133–134
Gorris v. Scott, 132–133
harmonization principle, 132, 133
injury of type statute designed to protect, 129, 132, 133, 134
Kensanz v. American Dredging Co., 135
Osborne v. McMasters, 129–130
overview, 122–123
proximate cause, 129–130
Stimpton v. Wellington Service Corp., 135
Tedla v. Ellman, 134–135
victim in class of persons statute designed to protect, 129, 132, 134
“No contribution” rule, 181
“No duty to rescue” rule
activity level, 256
assumption of risk and, 265, 266, 267
Black v. New York, New Haven & Hartford Railroad Co., 260
care level, 256
Chandler v. Forsyth Royal Crown Bottling Co., 259
common carriers, 262–264
criminal acts and, 265–267
disabling avoidance of harm, 259–260
enabling harm, 258–259
Erie Railroad Co. v. Stewart, 261
exceptions, 258
“foreseeability plus” compared, 258
Hardy v. Brooks, 259
Heard v. City of New York, 261–262
invites, 264
Kambour v. Boston & Maine Railroad Co., 263
Kline v. 1800 Massachusetts Avenue Apartment Corp., 265–267
landlord and tenant, 265–267
landowners, 264
L.S. Ayres & Co. v. Hicks, 264
Marsalis v. LaSalle, 261
McMahon v. New York, New Haven & Hartford Railroad Co., 263
Moch Co. v. Rensselaer Water Co., 262
Montgomery v. National Convoy & Trucking Co., 258–259
negligence and, 255
Newton v. Ellis, 259
obvious conditions defense, 265–266
Osterland v. Hill, 255
overview, 8, 254–255
physician-patient relationship, 257–258
policy considerations, 255–258
psychologist-patient relationship, 264–265
public good and, 266–267
reasonable person standard and, 255
reliance, 261–262
Restatement (Second) of Torts, 264
Ryan v. New York Central Railroad Co., 262
Rylands v. Fletcher, 256–257
special relationship, 264
strict liability and, 256–257
Index

Summers v. Dominguez, 259
superior knowledge and control of risk, 262–267
Tarasoff v. Regents of University of California, 264–265
termination of rescue, 260
trespassers, 257
utilitarian approach to tort law, 256–257
Yu v. New York, New Haven & Hartford Railroad Co., 263
Zelenko v. Gimbel Bros., 259–260
“No foreseeability” rule, 239
Nonpecuniary damages, 383–390
abuse of discretion standard, 388–389
awareness of loss, 385–386
difficulty of appellate review, 388
disaggregation of components, 386–390
ex ante perspective, 385
ex post perspective, 384–385
McDougald v. Garber, 386–387
medical malpractice, 387–388
negligence, 385–386
overview, 378–379
per diem argument, 387
strict liability, 385–386
trespass, 385
unpredictability, 387–388
variation in, 387
Normative theories, 10
Nuisance
aesthetic interferences, 292–294
assumption of risk and, 290–291
Baines v. Baker, 286
Bamford v. Turnley, 290
Boomer v. Atlantic Cement Co., 296–298
Campbell v. Seaman, 290–291
coming to nuisance, 294–295
Commonwealth v. Barnes & Tucker Co., 289
compensated injunctions, 295–296
damages, 286–287, 289–290, 295–298
defamation compared, 305
economic growth and, 289
in fact, 287–286
harm-benefit balancing, 286–290
intent, 284
invasion requirement, 294
Jost v. Dairyland Power Cooperative, 289
at law, 285–286
light, obstruction of, 292–294
location, importance of, 290–291
Malhame v. Borough of Demarest, 286
Middlesex Co. v. McCue, 288, 295
nonresposory nature of, 284–285
overview, 8, 283–286
Pennsylvania Coal Co. v. Sanderson, 288–289
per accidens nuisance, 285–286, 305
per se nuisance, 285–286, 305
reciprocal exchange of risk and, 290–291
Restatement (Second) of Torts, 285
Robinson v. Baugh, 291
Rogers v. Elliott, 292
Royalands v. Fletcher, 285
Spur Industries v. Del E. Webb Development Co., 295–296
unreasonable invasion versus unreasonable activity, 295
unreasonable nature of, 285
unusually sensitive plaintiffs, 291–292
utilitarian approach to tort law, 288, 290–291, 293, 294, 295
view, obstruction of, 292–294
Vogel v. Grant-Lafayette Electric Cooperative, 285
Waschak v. Moffat, 288
Objectivity, reasonable person standard and, 108–109
Obvious conditions defense, 265–266
Ordinary care, 46
Ordinary person standard. See Reasonable person standard
Pain and suffering. See also Nonpecuniary damages
disaggregation from loss of enjoyment of life, 386–387
overview, 383
Paleontology analogy, 1
Pecuniary damages, 377–378
Per accidens nuisance, 285–286, 305
Perpetuities, 391
Per quod defamation, 305–306, 311
Per se defamation, 305–306, 310, 312, 313
Per se negligence. See Negligence per se
Per se nuisance, 285–286, 305
Personal injuries, moral reasoning approach to tort law and, 21–22
Personal property
defense of property, 73–75
trespass to, 56–58, 272, 273–275
Pets, strict liability, 299–300
Pharmaceuticals, products liability, 341–343
Physical impact rule, 250
Physician-patient relationship, “no duty to rescue” rule, 257–258

Pleasantry exception, 60–61
Policy, tort law and
activity level, 16–19
care level, 11–14, 20–24 (See also Care level)
Coase Theorem, 26–28
economic principles, 10–19
foreseeability, 231
landowners, 268
legal positivism, 28, 29–30
liability rules, 24–28
moral reasoning approach, 20–24 (See also
Moral reasoning approach to tort law)
natural law theory, 28–29, 30–31
"no duty to rescue" rule, 255–258
normative theories, 10
overview, 6, 10
positive theories, 10
products liability, 335–336
proximate cause, 231
sources of tort law, 28–31
waiver of tort rights, 422
Pollock, Charles Edward (Baron), 140–141, 290
Positive liberty, 254
Positive theories, 10
Posner, Richard A., 2, 256, 282, 283
Potentially negligent conduct as intervening
cause, 235–236
Precaution, factual causation and, 210–212
Preemption of products liability law, 371–376
conflict preemption, 372
express preemption, 372
field preemption, 372
functionalist approach to tort law, 372, 373–374
implied preemption, 372
medical devices, 374–375
motor vehicles, 375–376
purpose of, 372–373
Wood v. General Motors Corp., 372
Preexisting injury, factual causation, 218–220
Preponderance of evidence
res ipsa loquitur, 141–142
substantial factor test, 205
toxic torts, 205
Present value, 390–393
Primary assumption of risk
overview, 171
products liability and, 344
Privacy, invasion of, 328–329
Privately optimal activity level, 17
Privately optimal care level, 12–13, 15–16
Privilege as defense to defamation, 315–321
absolute privilege, 316–319
attorneys, absolute privilege, 319
intracorporate communication and, 318–319,
329
judges, absolute privilege, 319, 329
legislators, absolute privilege, 319, 329
overview, 304
prosecutors, absolute privilege, 319
qualified privilege, 320–321, 329–330
relationship-based privilege, 318–319
spousal privilege and, 318
truth, 316–318
Privy
imminent danger to life or health exception,
333–335
products liability and, 332–335
Procedural due process, punitive damages, 411
Procedural unconscionability, 168
Products liability
activity level and, 335, 346–347
administrative costs and, 336
alternative equilibrium, 339
assumption of risk and, 343–344
blood transfusions, 343
breach of duty, 367
Brody v. Overlook Hospital, 343
Brown v. Superior Court, 342
business of selling, 341
Cafazzo v. Central Medical Health Services,
Inc., 347–348
care level and, 346–347
demand curve (See Demand curve, products
liability and)
design defects, 340, 350–353
deterrence and, 335, 346–347
Devlin v. Smith, 334
duty, 368
economic loss rule as defense, 344–346
economics and, 335–336
Escola v. Coca Cola Bottling Co. of Fresno,
335, 346–347
evolution of law, 332–335
factual causation, 367
foreseeability, 367–368
functionalist approach to tort law, 332–333
Geier v. Americas Honda Motor Co., 375–376
Hood v. Ryobi America Corp., 368
imminent danger to life or health, 333–335
improper defendant defense, 346–349
insurance and, 336, 346–347
Larsen v. General Motors Corp., 364–365
Linegar v. Armour of America, Inc., 361–362, 364
manufacturing defects, 340, 349–350
market equilibrium (See Market equilibrium, products liability and)
in medical care context, 341–343, 347–348
Medtronic, Inc. v. Lohr, 374
Micallef v. Miehle Co., 366
misuse of product, 367–368, 370–371
nonobvious risks, 364–365, 366
obvious and inherent risks, 363–364, 365, 366
obvious but not inherent risks, 364, 366
overview, 8, 332–335
pharmaceuticals, 341–343
Phipps v. General Motors Corp., 361
policy considerations, 335–336
preemption of law, 371–376 (See also Preemption of products liability law)
Prentis v. Yale Manufacturing Co., 360
primary assumption of risk and, 344
privity and, 332–335
proximate cause, 367–368
res ipsa loquitur compared, 336
Restatement (Second) of Torts, 340–344
retailers, 348–349
Riegel v. Medtronic, Inc., 375
risk allocation and, 333
risk spreading and, 336
risk-utility test (See Risk-utility test for products liability)
Robins Dry Doc & Repair Co. v. Flint, 345
Rylands v. Fletcher, 342, 349–350
secondary assumption of risk and, 343–344
Section 402A Comment f, 341
Section 402A Comment k, 341–343
Section 402A Comment n, 343–344
services versus goods, 346
Soule v. General Motors Corp., 363
Statler v. Ray Manufacturing Co., 334
strict liability, 335–336
supply and demand analysis, 337, 339
supply curve (See Supply curve, products liability and)
Surace v. Caterpillar, Inc., 360–361
Thomas v. Winchester, 333
types of cases, 363–366
Volkswagen of America v. Young, 361
warnings, 368–371 (See also Warnings, products liability)
Williamson v. Mazda Motor of America Inc., 375–376
Winterbottom v. Wright, 332

Property damage
moral reasoning approach to tort law and, 21
necessity defense, compensation for property damage, 81
Property rules, 26–28
Coase Theorem and, 26–28
compensatory damages and, 381–382
damages and, 381–382
liability rules versus, 24–26
policy considerations, 24–28
punitive damages and, 404–405
transaction costs, 25–26
trespass and, 24–25
Prosecutors, absolute privilege for defamation, 319
Prosser, William L.
on defamation, 302, 305
doctrine and, 2, 3
on res ipsa loquitur, 143
on transferred intent, 54
Proximate cause
Berry v. Borough of Sugar Notch, 229–230
bystander recovery rule, 251–252
contributory negligence and (See Contributory negligence)
damages and, 154–157
defamation and, 509
Dillon v. Legg, 251–252
duty analysis, 247–250
emotional injury, 250–252
enhanced risk of future injury and, 252–253
foreseeability (See Foreseeability)
treating causes and (See Intervening causes)
judges, role of, 248–249
juries, role of, 248–249
legal arguments, 231–232
lightning strike hypothetical, 228–229
as limitation on scope of liability, 228, 232
negligence, 100–101
negligence per se, 129–130
overview, 8, 227
Palsgraf v. Long Island Railroad Co., 247–248, 249–250
physical impact rule, 250
policy arguments, 231
products liability, 367–368
rational estimation and, 228–230
Ryan v. New York Central Railroad Co., 231–232
Smithwick v. Hall & Upson Co., 229
structure of, 230
Tuttle v. Atlantic City Railroad Co., 250
Index

Proximate cause (cont.)
“unforeseeable victim” rule, 247, 248
Zokhrabov v. Jeung-Hee Park, 249–250
zone of danger test, 251
Psychologist-patient relationship, “no duty to rescue” rule, 264–265
Public disclosure of private facts, 328
Public figures, defamation of, 323–325
Public good
“no duty to rescue” rule and, 266–267
overview, 19
truthful information as, 325–326
Public necessity, 82
Public officials, defamation of, 321–323
Public policy exception, assumption of risk, 167–168
Punitive damages
battery, 404
BMW v. Gore, 407–409
civil penalties in relation to, 407, 408, 409, 410
compensatory damages in relation to, 407, 408, 409, 410
deterrence and, 401–406, 408–409, 411
due process and, 406, 408, 410
gain-elimination rationale, 402–403, 404, 405, 407–408
intent and, 405
Jacque v. Steenberg Homes, 403–404, 409
liability rules and, 404–405
loss-internalization rationale, 402, 403, 404, 405–406, 407–408
overview, 401–406
Pacific Mutual Life Insurance Co. v. Haslip, 408–409
Philip Morris v. Williams, 411
predictability, 406–407
procedural due process, 411
property rules and, 404–405
purpose, 401–402, 405
recklessness and, 404–405
reprehensibility of conduct and, 407, 408, 409, 410
single digit ratio, 410–411
State Farm v. Campbell, 409–411
substantive due process, 411
trespass, 404
vicarious liability, 405–406
wrongful death, 390
Pure comparative fault, 171
Purpose of studying tort law, 4
Qualified immunity, consent as defense to battery, 64–65
Qualified privilege as defense to defamation, 320–321, 329–330
Questions of fact
jury, role of, 137
mixed questions of law and fact, 137–138
overview, 136–137
Questions of law
judge, role of, 137
mixed questions of law and fact, 137–138
overview, 137
Rational estimation
foreseeability and, 228–230
lightning strike hypothetical, 228–229
proximate cause and, 228–230
Rawls, John, 23
Real property
defense of property, 69–73
trespass to, 55–56, 271–272
Reasonable care
ccontributory negligence, 147–148
duty, 148–149
landowners, 270
negligence, 46
Reasonable cause, false imprisonment, 78
Reasonable conduct as intervening cause, 233–235
Reasonable doubt standard, res ipso loquitur, 142
Reasonable force
defense of property, 70, 73, 74
false imprisonment, 78
self-defense, 68–69
Reasonable perception
defense of property, 73–74
false imprisonment, 75–78
self-defense, 68–69
Reasonable person standard
administration, 108–109
auto accident hypothetical, 103–104
blindness, 111
Brown v. Kendall, 102
contributory negligence, 149–150
coordination, 108–109
crime fence hypothetical, 104–106
custom and, 123–128 (See also Custom, reasonable person standard and)
defamation, 307
defense of property, 69
deterrence, 108–109
disability, 109–111
economic approach, 103–106, 118–121
elderly persons, 110
Golden Rule, 103
good faith standard versus, 107–108
Hand Formula versus, 118–121
heart attacks, 112
individual capacity, 107–109
insanity, 111–112
lex loci and, 109
limited duty versus, 107
maturity, 109–111
McGuire v. Almy, 108
negligence per se (See Negligence per se)
“no duty to rescue” rule and, 255
as objective standard, 108–109
overview, 29, 102–103, 106
reliance interest, 107–109
res ipsa loquitur and, 145
risk aversion and, 120–121
self-defense, 68
statutes and regulations and, 128–135 (See also Negligence per se)
subjective standard versus, 107–108
sudden incapacity, 111–112
United States v. Carroll Towing Co., 113, 122
Vaughan v. Menlove, 107–109
Recapture, 35, 36
Reciprocal exchange of risk
landowners and, 268–269
misuse and, 290–291
strict liability, 94–95, 96, 97, 99
Reciprocity as defense to defamation, 304, 312–314, 320
Recklessness
comparative negligence and, 172
overview, 85–86
punitive damages and, 404–405
Reflexive conduct
intent, 89
as intervening cause, 233–235
Regulations, reasonable person standard and. See Negligence per se
Relationship-based privilege as defense to defamation, 318–319
Reliance
“foreseeability plus,” 242
intervening causes, 242
“no duty to rescue” rule, 261–262
reasonable person standard, 107–109
Reprehensibility of conduct, punitive damages and, 407, 408, 409, 410
Rescue
contributory negligence and, 148–149
“no duty to rescue” rule (See “No duty to rescue” rule)
Retailers, products liability, 348–349
Reverse payment settlements, 432–433
Risk aversion
insurance and, 425–426
reasonable person standard and, 120–121
subrogation and, 425–426
vicarious liability, 187, 189
Risk externalization, 94, 96–97, 99
Risk spreading, products liability and, 336
Risk-utility test for products liability
both tests, application of, 362–365
demand curve, 356–357
design defects, 351–353
direct application of, 360–361
economics and, 356–360
hybrid test, application of, 361–362
implementation of, 360–363
incentives and, 359–360
inherent unobservable risk and, 358–359
market equilibrium, 357
negligence, convergence with, 366–368
nonobvious risks, 366
obvious but not inherent risks, 366
Restatement (Second) of Torts, 340
Restatement (Third) of Torts, 363
supply curve, 356–357
warnings and, 371
Royal courts, 38–39, 40
Rules
emission on, 5–6
liability rules (See Liability rules)
property rules (See Property rules)
Sacks, Oliver, 66
Sale of tort rights
barratry and, 428
champerty and, 428
maintenance and, 428
overview, 423–425
to third parties, 426–428
Schwartz, Gary, 150
Scepticism of tort law, 3
Seat belt defense cases, 156, 179
Secondary assumption of risk
overview, 171–172
products liability and, 343–344
Self-defense
Courvoisier v. Raymond, 67–69
defamation and, 312–313, 320
internalization principle and, 69
as justification, 67–69
Keep v. Quallman, 67–69
reasonable force, 68–69
reason able perception, 68–69
reasonable person standard, 68
Sequential torts
conditional torts, 217
cumulative torts, 217–220
Dillon v. Twin State Gas & Elec. Co., 216
enhanced susceptibility to injury, 218, 219, 220
factual causation, 215–220
independent torts, 216–217
Maddux v. Donaldson, 217
preexisting injury, 218–220
roof top hypothetical, 215
substantial factor test, 215–220
two fires hypothetical, 216
Settlements
damages and, 416–418
economic analysis of, 416–418
fifty percent tendency, 419–420
injunctions versus, 431–433
injunctive settlements, 431–432
litigation costs, 416–418
medical malpractice and, 419–420
range of, 417
reverse payment settlements, 432–433
Spur Industries v. Del E. Webb Development Co., 432–433
strategic gamesmanship and, 417
trial outcome and, 419–420
Several liability, 180, 181. See also Joint and several liability
Sharkey, Catherine M., 3
Shaw, Lemuel, 45–46, 102, 136, 160–161, 262–263
Single digit ratio, punitive damages, 410–411
Slander, 305–306, 310–311. See also Defamation
Socially optimal activity level, 18
Socially optimal care level, 12–13, 16
Social welfare, waiver of tort rights and, 422
Sources of tort law, 28–31
legal positivism, 28, 29–30
natural law theory, 28–29, 30–31
Special damages, defamation, 310
Specific intent, 90
Sports, consent as defense to battery, 64–65
Spousal privilege, defamation and, 318
Spring guns, defense of property, 70–73
Sprinkler defense cases, 156, 179
Statutes, reasonable person standard and. See Negligence per se
Index

455

Strategic gamesmanship
  overview, 43–44, 45
settlements and, 417

Strict liability
  abnormally dangerous activities, 275–283 (See also Abnormally dangerous activities)
  activity level and, 18, 95, 97–98
  act of God exception, 93–94
  animals and, 298–300
  benefit externalization, 95–97
  care level and, 13–14, 16, 97–98
  Carstairs v. Taylor, 96–97
  collateral source rule and, 400
  compensatory damages, 383
  contributory negligence and, 155–156
  damages, 383
  defamatory negligence and, 155–156
  discounting conduct, 98–99
  dogs, 299–300
  domestic animals, 299–300
  functionalist approach, 94–97
  harm caused by escape, 92
  implied assumption of risk and, 96
  incentives for care, 97–98
  internalization principle and, 49
  leaving alone, 98–99
  limited duty versus, 97, 99–101
  negligence versus, 45, 46–47, 93, 97, 99–101
  “no duty to rescue” rule and, 256–257
  nonpecuniary damages, 385
  nuisance (See Nuisance)
  overview, 7, 271
  Palsgraf v. Long Island Railroad Co., 100–101
  pets, 299–300
  products liability, 335–336
  reciprocal exchange of risk, 94–95, 96, 97, 99
  Rickards v. Lothian, 96
  risk externalization, 94, 96–97, 99
  Rylands v. Fletcher, 7, 8, 91–94, 271, 298–300
  “Shooting Cases,” 37–38
  subsidizing conduct, 98–99
  theoretical foundations, 91
  Thorns Case, 35, 36
  trespass and, 45, 91–92
  trespass-based strict liability, 271–275 (See also Trespass)
  unreasonable conduct exception, 94
  waiver of tort rights and, 420–421
  wild animals, 298
  zoos, 299
Subjectivity, reasonable person standard versus, 107–108
Subrogation
  barratry and, 428
  champerty and, 428
  economic analysis of, 423–425
  expected value of risk, 425, 426
  incentives for care and, 424
  insurance and, 425–426
  maintenance and, 428
  overview, 423–425
  risk aversion and, 425–426
  third parties, sale of tort rights to, 426–428
Substantial factor test
  as alternative test, 198
  asbestos cases, 205–207
  Bayes Theorem, 206–207
  Bostic v. Georgia Pacific, 205–207
  burden of proof, 204
  but-for test compared, 200–201
  concurrent tortfeasors, 198–199, 213–215
  conditional torts, 217
  cumulative torts, 218
  enhanced susceptibility to injury, 218, 219, 220
  Haft v. Lone Palm Hotel, 204
  independent torts, 216–217
  inferences, 202
  intervening causes, 200, 201–202, 203
  lack of precision in, 198
  “more than doubling” requirement, 205
  New York Central Railroad Co. v. Grimstad, 200–201
  preexisting injury, 218–220
  preponderance of evidence, 205
  res ipso loquitur compared, 202, 203, 204
  sequential torts, 215–220
  Stubbs v. City of Rochester, 203, 204
  toxic torts, 205–207
  tree diagrams, 199–200, 201–202
  two fires hypothetical, 212–215
  types of cases, 198
  uncertain injury avoidance cases, 199–200
  uncertain injury causation cases, 201–207
  Zuchowicz v. United States, 203–204
Substantive due process, punitive damages, 411
Substantive unconscionability, 168
Sudden incapacity, reasonable person standard, 111–112
Superior knowledge and control of risk
  “foreseeability plus,” 242–243
  intervening causes, 242–243
  “no duty to rescue” rule, 262–267
| Superseding causes, but-for test, 198 |
| Supply and demand analysis of products liability, 337, 339 |
| Supply curve, products liability and overview, 338, 339 |
| risk-utility test, 356–357 |
| Supremacy Clause, conflict preemption, 372 |
| Taking of property, 84 |
| Textbooks on tort law, 3 |
| Toxic torts, substantial factor test, 205–207 |
| Transaction costs, 25–26 |
| Transferred intent, battery, 53–54 |
| Transportation Department, 371, 375–376 |
| Traynor, Roger, 204, 335, 336 |
| Trespass |
| ad coelum rule, 55 |
| airplanes, 55–56 |
| battery compared, 56 |
| Blondell v. Consolidated Gas Co., 56–58 |
| to chattels, 56–58, 272, 273–275 |
| Coase Theorem and, 26–27 |
| compensatory damages, 381–382 |
| conversion, 272–275 |
| damages, 55–56, 381–382 |
| direct versus indirect harm, 41–45 |
| expansion of writ, 38–41 |
| FMC Corp. v. Capital/ABC Inc., 273 |
| Glidden v. Szybiak, 56–58 |
| Herrin v. Sutherland, 55 |
| injunctions, 430–431 |
| intent, 55–56 |
| intentional interference with exclusive possession, 271–272 |
| legal fictions, 38–39, 40 |
| liability rules and, 24–25 |
| in manorial courts, 38 |
| necessity defense, 35, 79–80 |
| negligence and, 45 |
| nonpecuniary damages, 385–410 |
| overview, 55 |
| to personal property, 56–58, 272, 273–275 |
| property rules and, 24–25 |
| punitive damages, 404 |
| to real property, 55–56, 271–272 |
| Restatement (Second) of Torts, 57 |
| in royal courts, 38–39, 40 |
| Scott v. Shepherd, 41–43 |
| “Shooting Cases,” 37–38 |
| strict liability and, 45, 91–92, 271–275 |
| Thorns Case, 33–36, 38 |
| trespass on the case, 40–45 |
| volitional conduct, 89 |
| writ of, 33 |

| Trespassers |
| landowner duties to, 267–268, 269 |
| “no duty to rescue” rule, 257 |
| Truth as defense to defamation, 316–318 |
| Truthful information as public good, 325–326 |

| Ultrahazardous activities. See Abnormally dangerous activities |
| Unborn children, consent as defense to battery, 63 |

| Unconscionability |
| assumption of risk, 168 |
| procedural unconscionability, 168 |
| substantive unconscionability, 168 |
| waiver of tort rights, 420, 422 |

| Unforeseeable victim rule, 247, 248 |
| Unreasonable conduct exception, strict liability, 94 |

| Unusually sensitive plaintiffs |
| abnormally dangerous activities, 277 |
| contributory negligence, 156–157 |
| defamation and, 309 |
| direct causation, 246 |
| nuisance, 291–292 |

| Utilitarian approach to tort law |
| defamation, 310–311, 323, 325 |
| legal positivism, 29–30 |
| “no duty to rescue” rule, 256–257 |
| nuisance, 288, 290–291, 293, 294, 295 |
| overview, 1, 2 |

| Vicarious liability |
| assumption of risk, 162 |
| “borrowed servants,” 188–189 |
| charitable immunity compared, 193–194 |
| direct negligence of employer, 191–193 |
| employment cases, 184–185 |
| fellow servant rule compared, 162, 191–192 |
| as form of joint and several liability, 187–189 |
| frolic and detour, 192–193 |
| indemnification of employer, 189 |
| independent contractors, 190–191 |
| intentional torts, 185–186 |
| judgment-proof employee problem, 186, 189 |
| manner, means, and details test, 190 |
| overview, 7 |
| potential liability of employee, 189 |
| punitive damages, 405–406 |
| risk aversion, 187, 189 |
| within scope of employment, 192 |
| upstream and downstream settings, 187–188 |
utilitarian approach to tort law, 186
vertically related tortfeasors, 187–188
View, obstruction of as nuisance, 292–294
Volitional conduct, 89

Wade, John W., 352, 353, 360–361
Waiver of tort rights
arbitration, 422–423
assumption of risk and, 166–169
class actions, 423
damages and, 420–423
economic analysis of, 420–423
litigation costs and, 420–423
policy considerations, 422
social welfare and, 422
strict liability and, 420–421
unconscionability, 420, 422

Warnings, products liability, 368–371
behavioral psychology and, 371
burden-benefit test, 369–370
contributory negligence, 370–371
discounting of warnings, 369–370
factual causation, 370
heeding presumption, 370
inadequate warnings, 369
misuse of product, 370–371
negligence, 368–369
overview, 341
Restatement (Second) of Torts, 370–371
risk-utility test and, 371

Wigmore, John Henry, 3–5, 139–143
Wild animals, strict liability, 298

Willful, wanton or reckless conduct
assault, 86–87 (See also Assault)
battery, 85
comparative negligence and, 172
damages, 86
differences between, 85–86
examples, 85
intentional infliction of emotional distress,
87–88 (See also Intentional infliction of
emotional distress)
overview, 84–86
punitive damages and, 404–405
recklessness, 85–86, 172, 404–405
Woodward, C. Vann, 322–323

Workers’ compensation
custom and, 123
fellow servant rule, effect on, 163
Wrongful death, 390–396
annuities, 391
calculation of damages, 392, 394–395
children and minors, 395–396
compensatory damages, 390
expected present value, 393–394
income increases and, 393
jurisdiction, 390
overview, 390
perpetuities, 391
present value, 390–393
punitive damages, 390

Zone of danger test, 251
Zoos, strict liability, 299