

Negligence Defenses Review

Today's Agenda

1. Review of Defenses
2. In-Class Exercise

Negligence

~~Elements of a cause of action:~~

~~--- Duty~~

~~--- Breach~~

~~--- Causation~~

~~--- Harm~~

Defenses:

--- Contributory or Comparative Negligence

--- Assumption of Risk

The kinds of questions you can now answer

(given the right information about jurisdictional rules and case-specific facts)

- Does the defense of contributory negligence apply?
- Was the plaintiff comparatively negligent?
- Does the defense of “assumption of risk” apply?
- How much can the plaintiff recover?
- How much does each defendant owe?
- If a particular defendant is absent or insolvent, how much do the other defendants owe?

Contributory Negligence

Comparative Negligence

Assumption of Risk

Contributory Negligence in General:

The defendant is not liable

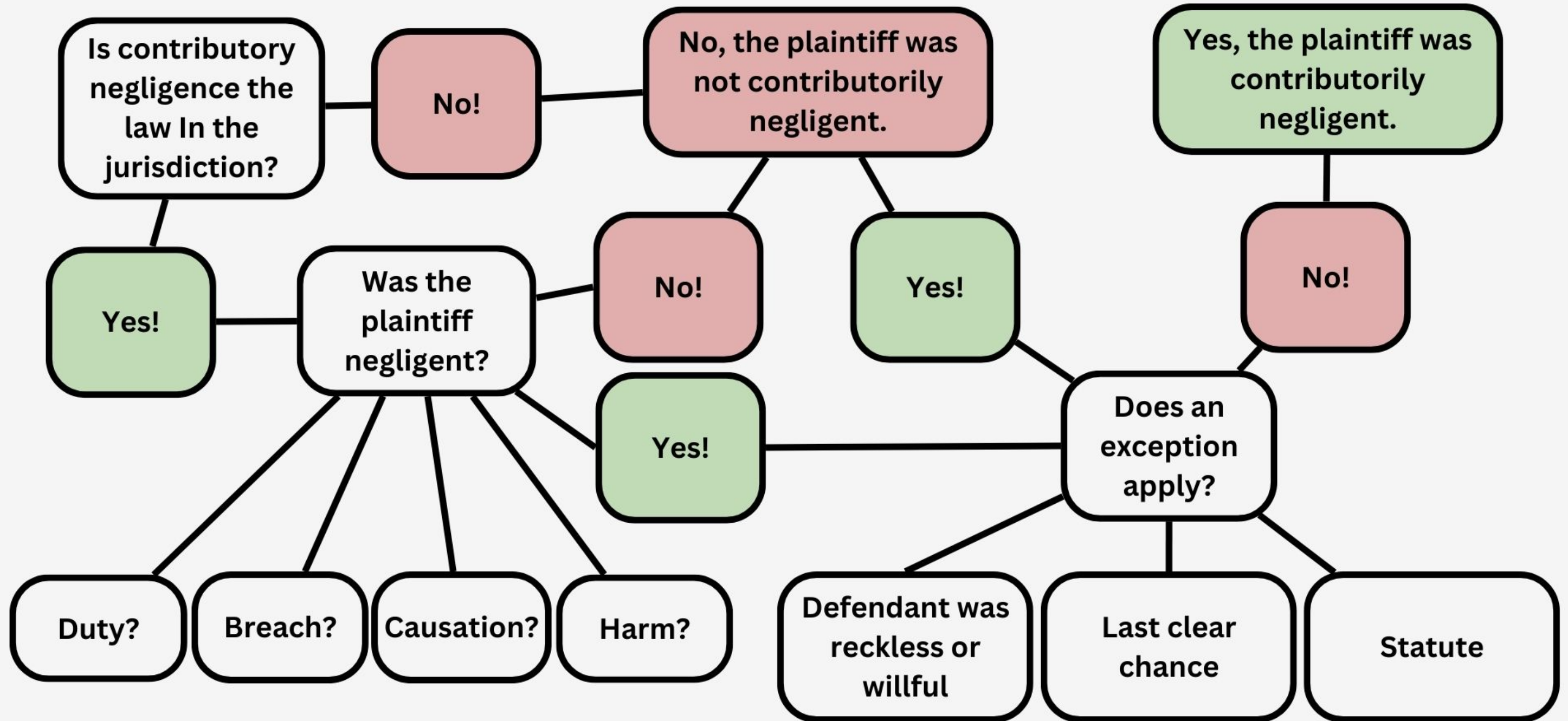
If the plaintiff was also negligent

- Duty,
- Breach,
- Causation, and
- Harm

Unless an exception applies:

- Last clear chance,
- Recklessness or willfulness of defendant, or
- Statute

Was the plaintiff contributorily negligent?



Comparative Negligence

Three forms:

1. Pure comparative negligence
2. “Not as great as”
3. “No greater than”

How much does each defendant pay?

Common Law Approach

Divide up damages by number of liable defendants

Doctrine of contribution:

1. Joint and several liability, or
2. Several liability

How much does each defendant pay?

Modern Approach

Divide up damages based on comparative fault

Doctrine of contribution:

Variety of rules across jurisdictions, including several liability, joint-and-several liability, and a variety of hybrids.

Don't
forget about
factual cause!

Order of operations for allocating damages with multiple injuries and multiple defendants

First step:

Separate injuries based on factual cause.

Second step:

For injuries that multiple defendants caused, sort out who owes what based on jurisdictional rules.

Assumption of Risk

- Explicit / Express
- Implicit / Implied

Two Common Issues with Explicit Assumption of Risk

1. Was the contract clear enough about releasing the defendant from liability?
2. Will the court enforce contract?

Will the court enforce contract?

Various legal tests for determining if liability waiver is against public policy:

- Liability waivers are unenforceable
- Totality of the circumstances
- Six factors from *Tunkl*

Implicit assumption of risk

volenti non fit injuria

“to one who is willing, no wrong is done”

**Should assumption of risk persist
in a comparative fault world?**

For exam questions, how do we know whether to look to assumption of risk or contributory negligence or comparative negligence?

In-Class Exercise

Contributory Negligence

Butterfield v. Forrester

“Blocking a Road with a Pole”

Davies v. Mann

“The Donkey on the Road”

Comparative Negligence

Li v. Yellow Cab Company

“Car Accident Comparative Negligence”

Fritts v. McKanne

“The Doctor Who Blamed the Drunk Driver”

McCarty v. Pheasant Run, Inc.

“Unlocked Hotel Room Door”

Wassell v. Adams

“Opened Hotel Room Door”

Assumption of Risk

Murphy v. Steeplechase

“The Flopper”

Knight v. Jewett

“Touch Football Injuries”

Hanks v. Powder Ridge Restaurant Corp.

“Snowtubing Waiver”

Tunkl factors

1. Business of a type generally thought suitable for public regulation.
2. Defendant performs a service of great importance to the public (often a matter of practical necessity for some members of the public)
3. Defendant willing to perform this service for any member of the public
4. Defendant has bargaining advantage
5. Standardized adhesion contract of exculpation
6. Plaintiff placed under the control of the defendant, subject to the risk of carelessness by the seller or his agents.