TORTS - Duncan Kennedy

FIRST SYLLABUS

INTENTIONAL TORTS

The defendant must compensate the plaintiff for all "damage" "caused" by the "intentional invasion" of any of the plaintiff's "legally protected interests," unless the defendant has a valid "defense". The words in quotation marks have technical meanings. Section A examines the meaning of "intentional invasion," "cause" and "damage." Sections B and C deal with "legally protected interests." Section D deals with "defenses."

A. Battery, Trespass & Conversion: Intentional Invasion Causing Damage

1. The term "intentional invasion" is highly ambiguous. There are a number of ways in which one could interpret it. According to which we choose, there will be different results in particular cases. In general, American courts have held

a. that there must be some "act" before there can be any liability at all, and that the act must have caused the damage. Hurley v. Eddingfield deals with a situation in which courts have applied this rule. Because of the rule, there is no legal liability in a good number of circumstances where A could avoid, at small cost to himself or herself, a large loss to B, and where most people would agree that it was highly immoral for A to refrain from acting to help B. There are, however, some strong arguments in favor of the rule.

b. American courts have also held that where there _is_ an act, the act is "intentional" so long as there was an intention to perform a particular set of bodily movements and thereby bring about a particular invasion of the plaintiff's legally protected interest. This is a very broad definition of intentionality. Courts have taken it to mean, and have held, that classes of persons whom we might consider not responsible for their acts will nonetheless be held liable when they injure others. These include:

(1) children, to whom we might well not attribute "fault" in the sense of moral blameworthiness

(2) insane persons

(3) persons acting under duress

c. The requirement of an act and the loose definition of intentionality mean that the pattern of liability is somewhat erratic from a lay viewpoint: some people are not liable whom one might think ought to be; some are liable whom one might think ought not to be.

2. Once it is established that there has been an intentional invasion, the defendant's liability for ensuing damage is greater than it is for unintentional injuries and breaches of contract.

a. The defendant must compensate the plaintiff for damage caused by an intentional invasion of his LPI even if he did not intend the damage in question and could not have foreseen it (the eggshell skull issue).

b. For trespass to land or chattels and for conversion, the defendant will be liable even when the intentional invasion occurred because the defendant was mistaken about who owned the land or goods in question. (There are special rules about batteries committed under a mistake about the identity of the victim, which we will take up in the section on defenses).

c. In the tort of conversion there is liability for loss of the chattel even where it was converted by mistake and even though the subsequent damage to the property happened without any negligence or other fault and would have happened in the same way if it had remained in the hands of the rightful owner. Southern Countries v. RKO to the contrary notwithstanding, it is unclear what the law is with respect to such a loss following trespass to land.

3. The rules of intentional tort suggest an intense societal concern with guaranteeing security of person and property. But the actual functioning of the legal system in areas like domestic battery is closer to a regime of no duty like Hurley v. Eddingfield.

a. There are special rules governing equitable relief for threatened intentional torts that may be available in cases where suits for civil damages are likely to be ineffective.

b. The enforcement of equitable relief through civil or criminal contempt has its own advantages and disadvantages.

c. In the area of domestic abuse, many state legislatures have modified the common law remedies, both legal and equitable, and modified the procedures by which plaintiffs obtain those remedies. Why was this a legislative rather than a judicial reform?

Class discussion of Assignment #3: Equitable Remedies in Domestic Battering, will focus on (a) the requirements for injunctive relief in intentional tort situations, (b) the means of enforcing an injunction, and (c) the question of how, if at all, the Massachusetts Prevention of Abuse Statute modified the common law.

B. Dignitary and Emotional Harms: Development of a Legally Protected Interest

1. The juxtaposition of the tort of assault and the tort of intentional infliction of emotional harm raises the following issue. How should one understand the relationship between the two torts? One way to look at it is to say that they are sharply different, and reflect different purposes. Assault, in this view, is a logical extension of the protection against battery. It's purpose is to render the protection against battery more effective by deterring "threatened" or "attempted" batteries, and by giving victims the feeling that they are protected against fear of battery as well as against battery itself.

The other point of view emphasizes the existence of subrules of the torts of assault, battery and trespass that often permit compensation for emotional harm under the rubric of "parasitic damages." In this view, these various subrules indicate that tort law has always been concerned with protecting emotional security, so that the development of the tort of intentional infliction of emotional harm is no more than a small, incremental development of pre-existing trends within the law. Which is the better view? What further evidence can you find in the materials that bears on the issue? What is the view of the editors of the casebook?

2. The prohibition of racial and sexual harassment in the workplace through Title VII, a federal anti-discrimination statute, can be seen as a further development along the lines of the movement from assault to the tort of intentional infliction of emotional harm. Or it can be seen as an unrelated development in civil rights law emerging from concern with the classic forms of employer job discrimination in hiring, promotions and workplace amenity. However you analyze it, why didn't the development occur in the common law courts of the states?

3. The assault, intentional infliction and harassment cases seem hard to understand without some reference to such tendencies as sexism, romantic paternalism and feminism in our society. What is the role of social stereotypes of women and femininity in the cases? Suppose the cases had come out the other way. What difference would that have made to relations between men and women?

What would happen if the rules laid down were widely obeyed and enforced when violated?

C. The Definition of Legally Protected Interests

Introduction: Bodily security and tangible property in land and chattels are paradigmatic legally protected interests (LPIs). Beside emotional security, there are numerous other interests that receive protection in one degree or another, but these tend to be much more difficult to define. In this section, the question is, first, what interests beside bodily security, emotional security and property receive protection? Second, how do the courts decide whether or not an interest should receive protection? Third, what are the consequences of choosing to define LPIs one way or another? We will not deal, except tangentially, with the interests in reputation (torts of libel and slander) and freedom of locomotion (tort of false imprisonment). We will deal with the following:

a. Privacy
b. Spouse's sexuality
c. Easement of lateral support
d. Business good will
e. Uncopyrighted, unpatented intellectual property
f. Contractual expectations

1. Inventory of judicial arguments for and against the creation of LPIs. Courts control the definition of LPIs (subject to legislative revision). Courts can and do expand or contract their scope. One reason for presenting materials on six of them in rapid succession is to focus attention on arguments that lawyers and judges use whenever there is a problem of expansion or contraction (or even just definition). These stereotyped pro and con arguments appear again and again in briefs and opinions. A large part of legal analysis consists simply in being able to see how to use them in a new fact situation. Unless you have mastered them, you have little chance of convincing a decision maker either to expand or contract the scope of a given LPI.

a. The single most prevalent issue in all these cases is that of formal realizability versus equitable flexibility, of rules against standards. Those arguing against creation of a new LPI, for example, will claim that it cannot be defined precisely, so that judicial innovation will lead to uncertainty and proliferating litigation. Proponents will respond either by casting the new LPI in rule form, or by arguing that the equitable flexibility of a standard is appropriate under the circumstances.

b. Security vs. Freedom of Action: The recognition of a LPI necessarily implies a restriction of peoples' freedom to do what they want. Legal protection means that the defendant is forced to take the plaintiff's interests into account in deciding what to do. This means that things he could once do without worrying about harmful consequences to others can now be done only if he is willing to pay the costs to the victims of the activity. The decision about the scope of a LPI therefore inevitably involves reaching some decision about the conflict between the plaintiff's desire for <u>security</u> in enjoyment of the interest, and defendant's desire for <u>freedom of action</u>. When the courts have to justify their choices in resolving these conflicts, they typically use <u>CIRCULAR ARGUMENTS</u>. There are four types of justificatory argument that are common; each <u>can be</u> used circularly, though none of the arguments is <u>necessarily</u> circular.

i. There are arguments based on the notion that people who behave badly -- who are "at fault" -- should be made to redress the injuries they cause, while those who are without fault ought not to be held liable. The plaintiff will argue that the defendant's conduct was wrong, and the defendant will respond that it was at least not blameworthy. If the injury was inflicted without negligence, the defendant will argue that there should be "no liability without fault." The plaintiff will respond that "as between two innocents, he who caused the damage should pay." I will refer to these as moral arguments.

ii. There are arguments that appeal to the rights and duties of the parties, with the defendant generally claiming a right to freedom of action (freedom to compete in business, freedom of speech) and the plaintiff a right to security against the kind of injury the defendant has inflicted. I will call these rights arguments.

iii. There are arguments that appeal to the "social utility" of deciding one way or another, with the plaintiff generally claiming that social welfare will be maximized by creating a sense of security from interference with the interest in question, while the defendant argues that protecting the interest would stifle activity in general, self-reliance and competition in particular.

iv. There are arguments based on the "reasonable expectations" of the parties.

c. <u>Judicial Activism vs. Judicial Passivism</u> (institutional competence arguments): Since it is <u>the courts that are</u>

<u>responsible</u> for the definition of LPIs, it will often be possible to argue that the nature of courts imposes limits on what they can do in the way of protecting people. There are three typical "institutional competence" arguments of this kind, each with an associated counterargument.

i. If the plaintiff can't show precedent for the kind of protection she is asking, then she "necessarily" loses. I.e., there is a presumption against liability, based on the "inherent logic" of the legal system. To the contrary is the "prima facie tort doctrine," which asserts that the norm is "liability in the absence of privilege."

ii. The creation of new LPIs is "inherently political" or "discretionary" or involves "making rather than applying law." For reasons of "respect for the separation of powers," it should therefore be left to the legislature. To the contrary are the ideas that the common law evolves and that judicial inaction is a form of action (it establishes a "right to injure").

iii. The creation or expansion of LPIs can only be done intelligently by bodies that can obtain facts and devise rules in ways that are impossible for courts. For reasons of institutional competence it should therefore be left to the legislature. Unless, of course, it turns out that the legislature is less competent than the court, or unlikely to act at all.

<u>2. LPIs and Economic Power</u>: Supposing that we recognize a legally protected interest in business good will, we have to decide on the extent of protection. In particular, we have to decide which injuries to the LPI brought about by competition will be privileged. This may also be phrased in terms of whether there is a valid "defense of competition," and, if so, what are the limits of the defense.

a. It then appears that deciding to create an LPI in business good will did not settle anything much.

i. If we define the defense of competition broadly enough, there won't be anything left of the LPI (exception devours the rule). On the other hand, if we restrict the defense too far, we give legal protection to business monopolies and deprive consumers of the benefits of competition. In other words, in defining the defense of competition we have to confront all over again the issues that arose in defining the LPI.

ii. Not only are the underlying issues the same, the arguments used are also the same. We can summarize them as follows:

x. formal realizability

xx. the substantive issue, posed

- in terms of fault

- in terms of rights as security vs. rights as freedom of action

- in terms of the social utility of one outcome or another

- in terms of reasonable expectations

xxx. the issue of institutional competence.

b. Courts often purport to resolve the question of the precise definition of LPIs by appeal to arguments that on close inspection turn out to be circular or otherwise logically defective. The <u>Hohfeldian error</u> is a characteristic example of this phenomenon. When the court infers legal protection of an activity (a Hohfeldian right) from the prior existence of a Hohfeldian privilege to engage in that activity without being legally liable, it commits a Hohfeldian error. If the court had not based its decision in favor of creating a LPI on the error, it would, according to Hohfeld, have to confront the policy issue of whether or not we want this to be a case of damnum absque injuria. Unmasking the Hohfeldian error does not tell us what to do, just that we have to decide what to do on grounds of policy rather than "legal logic."

c. <u>Labor-management conflict</u>. It is possible to see labor-management conflict as an instance of competition closely analogous to the conflict between businessmen. This suggests that that the rules about what labor and management can do to each other should be the same as those that govern conflict between businesses. On the other hand, it is easy to argue that the cases are fundamentally different (for example, because one side, labor, has an interest in increasing the cost of goods). If the cases are different, we have to redo the whole calculus of appropriate defenses, redeploying the policy inventory.

d. The law of intentional torts sets the groundrules for economic combat. (This is the single most important idea in the course.) See Hale.

i. The outcomes of business-business and labor-management conflict could be changed dramatically by changing the groundrules of intentional tort in favor of one party or the other. This runs counter to the common notion that the major variable is the "economic power" of the two sides, with power understood to be determined independently of the legal rules.

ii. But it is difficult to predict what the impact of a change in the groundrules will be. For example, it is possible that allowing cut throat competition will lead to monopoly just as quickly as will excessive legal protection for business vested interests.

e. Holmes, in Privilege, Malice and Intent, raises the question of whether there are any rational determinants of the tort rules governing economic combat. His argument is difficult to follow but very important. The question he addresses is whether there is an outcome-determining method of legal reasoning from "general principles," from the rights of the parties, or from common law precedents, that explains the groundrules of economic combat. He concludes that there is no outcome-determinative method of legal reasoning for resolving cases of this kind, so that the judges inevitably decide according to their views of policy. (This is the second most important idea in the course.)

3. Which Arguments are Liberal, which Conservative? [no outline]

4. No Duty to Act absent a Special Relationship [no outline]

[End of Section C: Definition of Legally Protected Interests.]

Part D: Defenses in Intentional Torts

1. Self-defense
    a. Of self (in the domestic abuse context)
    b. Of land (spring guns)
    c. Of chattels
2. Official privilege
    a. Reasonable force to arrest
    b. Corporal punishment of schoolchildren
3. Consent
    a. Implied or not implied
    b. Sometimes found where not present
    c. Sometimes not found where present
4. Mistake
    a. In false imprisonment
    b. In self-defense
    c. In general
5. Necessity

1. Self-defense: There are two issues here: what degree of force is permissible, and what circumstances justify self-help, as opposed to retreat or flight to get help from "the authorities."

a. The degree of force

i. The degree of force permissible is different according to what is being defended:

x. Person

xx. Real property

xxx. Personal property

ii. There is a general tendency to permit the infliction on the aggressor of a greater injury than the innocent party would have sustained if he or she had not resisted. But there are also distinct limits to this tendency.

iii. The defense of self-defense can be justified either:

x. in terms of relative fault

xx. in terms of the "rights" of the victim in a situation in which the aggressor has "forfeited" his own "rights" by breach of his "duty," or

xxx. in terms of social utility

xxxx. in terms of social expectations

b. The second issue is phrased doctrinally in terms of two questions:

i. how stringently shall we apply the "immediacy doctrine," which requires that the threat of injury to which the defendant responded should have been immediate rather than remote, and

ii. when can the defendant stand her ground and when must she flee.

c. Self-defense and authority. The privilege of using deadly force to protect land against trespassers has a social meaning and a social effect. The same is true of the battered wife's emerging privilege to use superior force (a gun) and stealth to kill her battering husband in self-defense. (This is a restatement in two new doctrinal contexts of the two fundamental ideas from the last section: that the rules of intentional tort are the groundrules of the "struggle for life," and that judges willy nilly set them according to their views of policy.)

i. The granting of the privilege to use force reflects a social valuation:

x. How important are landowners property rights against the people who we can expect to trespass?

xx. How important is the wife's right to bodily security in relation to the life of her battering husband?

ii. But the granting of the privilege to use force also influences the relative power and authority of the parties:

x. The balance of power between the ruling and the lower agricultural classes in England was affected by the permission and then the prohibition of spring guns.

xx. The balance of power between men and women in our society would be significantly different if women had effective rights and also effective means of self-defense against battering.

iii. But it is crucial not to confuse paper rights with what happens in the real world.

x. The standard of "reasonableness" can be given many different meanings by the judge who decides what evidence is relevant.

xx. A privilege of self-defense is useless to a person too frightened to use it, or no good at fighting.

2. <u>Official privileges to use force</u>.

a. We will take up two of these:

i. privilege of police officers to use reasonable force in making an arrest

ii. privilege of school teachers (acting under relevant statutory authority) to inflict reasonable punishment on pupils.

b. These subjects introduce

i. the federal/state dimension of tort law

ii. a new set of institutional competence arguments

c. There is a strong analogy between these issues and the self-defense issues considered above.

i. the definition of the privilege to use force both reflects and influences the authority of the official involved, whether policeman or schoolteacher.

ii. the rule of reasonableness gives a great deal of leeway for different interpretations of how much authority the official should have and how he should use it.

iii. The law in practice is likely to be dramatically different from the law on the books, since

x. official enforcement practices may bear little relation to the formal norm, which is extremely vague in any case

xx. it may be difficult or even impossible to succeed in the private tort lawsuits that supposedly vindicate the rights of people who have been victims of excessive use of force by officials

3. Consent: The general principle here is that volenti non fit injuria, an injury consented to is no legal wrong. But it is a principle rather than a rule because it is subject to numerous exceptions.

a. Exceptions: According to the character of the prior relationship between the parties, the courts will sometimes decline to recognize the consent, even where it is clear that it was freely given. Conversely, they will sometimes disregard a refusal to consent, and treat the injury as privileged, even though it was inflicted against the will of the plaintiff. Thus consent is sometimes insufficient to bar the plaintiff and sometimes unnecessary to justify the defendant. There are two kinds of reasons that courts and lawyers offer for disregarding consent in some cases and treating it as unnecessary in others. Each is paired with a counterargument. These arguments and counterarguments are part of the policy inventory developed in the discussion of LPIs, above. We will develop them more fully in the Third Syllabus, which is devoted to torts that occur in the context of contractual or other relationships.

i. Paternalism vs. self-determination: sometimes the motive for over-ruling a party's intentions is disagreement with her values. There may be an insistence that her intent is simply wrong and should be disregarded for that reason alone. Or there may be a claim that the party does not know his own interests and that he will be better off if held to intend what the court thinks he should intend rather than what he actually does intend. An argument that the court should act paternalistically will be met with the counter that paternalism is wrong on principle, in these particular circumstances, or not for the courts, and that the court should foster self-determination.

ii. Regulation vs. facilitation: it is often impossible to tell whether the courts are behaving paternalistically in the sense of over-ruling values or out of a desire to regulate and control the bargaining power of one of the parties. In the latter case, the court accepts the values of the weaker party, but over-rules her nonetheless, with the intention of helping her obtain more from the transaction than she otherwise would. There will be, against this course, an argument that for various reasons the courts have no business meddling with the balance of power that would otherwise have obtained.

b. Scope of the exceptions: The rule that injurious conduct is privileged if the plaintiff has formally consented to it is fairly clear and easy to administer, although there will always be problems of interpreting words and actions. The exceptions are not so clearly defined, as the cases, along with the very general (vague) definitions of paternalism and regulation, should indicate. Indeed, if the judges took seriously the general language that justifies the exceptions, there wouldn't be much left of the underlying rule ("the exceptions devour the rule"). This is a situation you will encounter over and over again in studying the common law. When it arises, you should be able to:

i. assess to what extent, in terms of actually decided cases, the exceptions have already devoured the rule--the mere fact that they might devour it does not mean that they have done so in fact.

ii. argue that a particular case is well within the existing exceptions and would not extend them.

iii. argue that the same case would extend the existing exceptions and begin an inevitable process (slippery slope) which will lead to the rule becoming virtually meaningless.

4. Mistake.

a. we will look at rules about mistake in a number of intentional tort contexts, but the main focus will be on:

b. Mistake and Accident in Self-defense Situations: Along with the problem of the scope of the defense of necessity, which we take up in the next section, the issue of mistaken self-defense will introduce you to the most complex and difficult form of legal analysis, that which involves assessing the consistency with one another of legal rules that are usually treated as unrelated because belonging in different doctrinal pigeonholes. These sections will also introduce you to the several different literary forms in which doctrinal debate of this kind is carried on. The articles, treatises and hornbook materials are fully as important, in arguing problems of this kind, as the cases, and you should have an idea of what you can expect to find in them.

i. The rules in question:

x. a battery inflicted on the plaintiff in the mistaken belief that it was justified in self-defense does not give rise to liability,

xx. so long as the mistaken belief was "reasonable under all the circumstances."

ii. There are two questions raised:

x. Why should "mistaken self-defense" excuse the defendant from compensating the innocent plaintiff for his injuries?

xx. Given that "mistaken self-defense" should be an excuse, why should the mistake have to be that of a "reasonable person," rather than merely a "good faith" mistake?

iii. With respect to the first question, there are two problems worth considering:

x. Is the doctrine of mistaken self-defense consistent or inconsistent with the following rules we have already learned:

-- liability of infants, the insane and people under duress for their intentional torts

-- the doctrine of "transferred intent," Note 3, p. 6-7

-- the rule of Southern Counties Ice v. RKO

-- the rule of Morris v. Platt, Note 1, p. 22-23

xx. It seems intuitively obvious that to allow a defense of "non-negligent mistake" in intentional tort is similar to allowing a defense of "non-negligent accident" in cases like Morris v. Platt. A person who sets out to justify Courvoisier will come up with the same kinds of arguments that seem to prevail in Morris. The most important of these are:

-- rights as freedom of action

-- a moral argument in the form: "it is wrong to punish me if I am not at fault."

-- the general welfare, promoted by favoring action over inaction in emergencies.

xxx. It also seems intuitively obvious that Courvoisier is inconsistent with the rules we have learned about intentional tort liability of infants, the insane, persons under duress, trespassers and converters. The arguments that appear to prevail in those cases would seem to apply with equal force to mistaken self-defense:

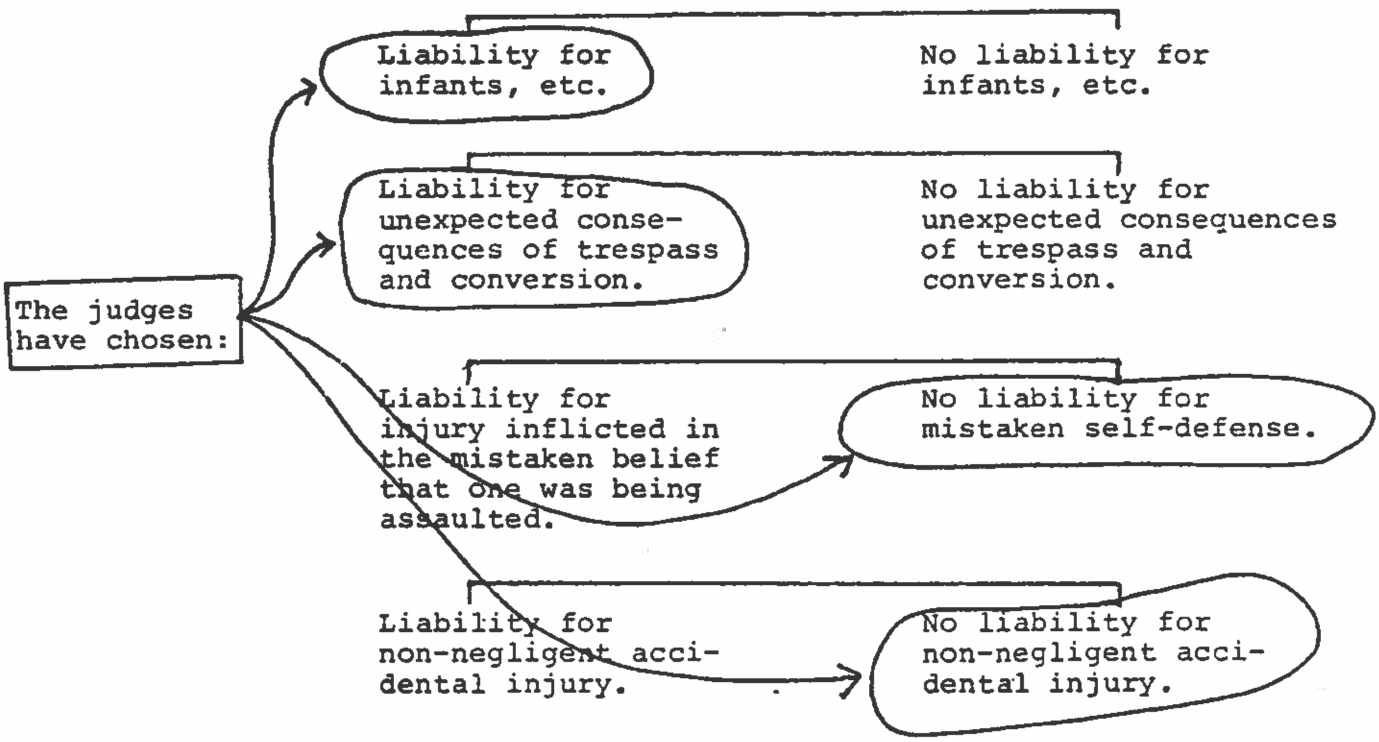
-- a rule requiring compensation would be more formally realizable

-- the rights as security of the plaintiff

-- the argument that as between two innocents he who inflicted the damage should pay for it

-- a general welfare argument that people will take appropriate precautions for the safety of others only if they are made to "internalize" the real social costs of their activities.

xxxx. We can represent this situation visually as follows, with each horizontal diad representing a choice the judges have had to make in deciding torts cases:



xxxxx. The excerpts from Whittier, Harper & James and Prosser are included in order to make two points:

-- While the judges consistently recognize mistake as a defense in self-defense situations there are a number of other intentional tort situations in which mistake avails the defendant nothing. Further, the Coblyn case and the note following it make it clear that rules about mistake have changed over time.

-- The commentators flatly disagree on the question whether the initial intuition of inconsistency in the results of the cases is correct or incorrect. Those who see the cases as inconsistent differ as to how they should be rendered consistent. The arguments for and against each of the extreme solutions correspond to those we have already considered in our discussion of the definition of LPI's.

iv. With respect to the second question -- whether the defendant must show a "reasonable" or merely a "good faith" belief that he is in danger -- there is unanimity in favor of the general principle of reasonableness. Disagreement arises in the application of the principle, and in justifying it.

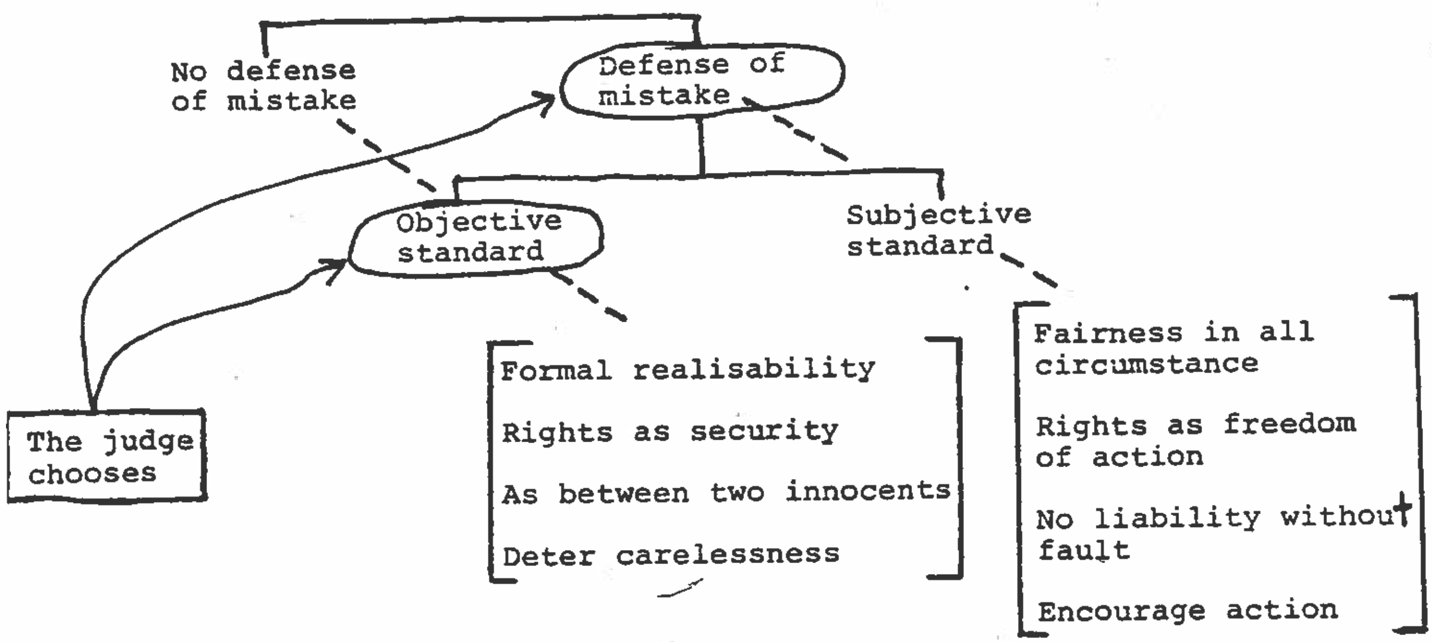
x. One of the most frequent of the situations in which an imprecise but clearly defined rule is preferred to a flexible standard is this one, in which the courts must choose between a "subjective" standard of actual intent and an "objective" standard referring to what a "reasonable person would have understood in the circumstances." A "subjective" standard is often said to be "uncertain" by comparison with an "objective" one.

xx. There is, however, a second issue almost always involved in the choice between subjectivity and objectivity: people often feel that, where serious risks of harm are involved, one ought to understand things as a reasonable person would. If one does not so understand them, one ought to compensate the resulting victims, even if one's failure to behave reasonably was not the result of any personal moral shortcoming -- i.e. even if one was not at fault. These issues figure prominently throughout the law of negligence. Here we will get no more than a preview of how lawyers tend to argue them.

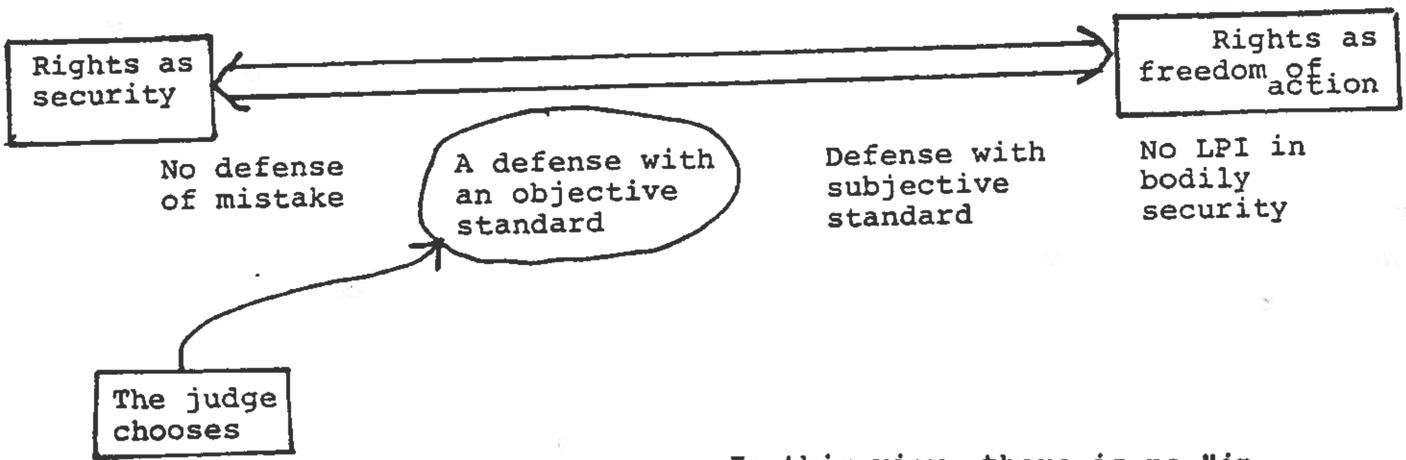
v. <u>Relationship between the solutions to the two questions</u>. "The courts allow defendants to avoid paying compensation on a plea of mistaken self-defense. But they then impose liability if the defendant's mistake was one that a reasonable person would not have made. Are these two decisions consistent with one another? No, they are not. In the first case, the lack of moral blameworthiness in defendant's conduct is enough to exonerate him. But an equally blameless defendant who fails, through no fault of his own, to live up to the standard of reasonable firmness or coolness is held liable. Discuss." (Sample exam question of the essay rather than issue spotting variety.)

x. One way to understand the alleged inconsistency is to imagine a court justifying, in a case of first impression, the current law on good faith but unreasonable mistake in self-defense. The defendant's lawyer first argues that there should be a defense of mistake, since it is fair, even if uncertain. The defendant's right of freedom of action should be inviolate; it would be wrong to punish him if he is not at fault. We do not want to discourage people from taking necessary actions in emergencies. The judge accepts these arguments, and rules accordingly. He then asks for argument on the separate issue of whether the standard should be subjective or objective. Defendant's lawyer repeats what she said on the first issue: the subjective standard is fair, though uncertain; the plaintiff is not at fault; action in emergencies should be encouraged. This time, however, the judge rejects these arguments and declares that certainty is more important than fairness in all the circumstances, that the plaintiff's right of bodily security is paramount; as between two innocents, he who caused the damage should pay; and a subjective standard would encourage carelessness.

xx. We might represent this situation as follows:



xxx. Yet another way of looking at it is in terms of a "continuum":



In this view, there is no "inconsistency," but only a "necessary compromise of conflicting values." A question that will recur throughout the course is whether this formulation is superior to, or indeed any different from that in terms of inconsistency.

5. <u>Privilege of Necessity, Complete and Incomplete</u>

The doctrine of necessity is the most difficult we have considered thus far, and because it forms a bridge to the law of unintentional torts it is also probably the most important to an understanding of the course.

a. <u>Structure of the Doctrine</u>

i. the need to avoid a large injury to oneself will justify intentional infliction of a smaller injury on another (but only sometimes -- a principle rather than a rule).

ii. it is agreed that in such cases it is tortious for the victim of the small injury to try to repel it, and that the courts would not grant an injunction to prevent it.

iii. but there is a conflict over whether the person inflicting the smaller injury to avoid a larger harm to herself should have to compensate the victim.

iv. when compensation must be paid, the person inflicting the injury is said to have an "incomplete privilege." Since the purpose of imposing liability in such cases is purely compensatory, the jury is not allowed to award punitive damages, which are designed to deter others from acting in similar ways.

b. whether or not compensation must be paid, the existence of the defense of necessity is inconsistent with the general principles of the law of intentional torts (but consistent, as we will see, with the principles of the law of negligence)

i. in general, intentional tort law defines legally protected interests and then requires compensation when they are invaded, unless the invasion falls within a limited class of specifically defined exceptions (consent, self-defense, official privilege to arrest) which can be seen as involving the victim's forfeiture of a right to be compensated. In the absence of one of these defenses, the defendant must pay compensation for the injury, even though it might be desirable from the point of view of general social welfare that the injury be inflicted.

ii. the defense of necessity, by contrast, involves a very general, loosely defined claim that the plaintiff's right to protection should be overridden wherever total social utility will be increased by letting the defendant inflict the injury. Broadly construed, the defense of necessity means that there are no rights (legally protected interests) at all, except insomuch as the protection of the plaintiff in a particular case will further total social welfare. (In other words, this is another situation in which the exception -- here, the privilege -- threatens to devour the rule -- here, the right.)

iii. when the court allows an absolute rather than an incomplete defense of necessity, the subordination of the plaintiff's right to the court's judgment of social welfare is complete, since the plaintiff suffers a confiscation of the protected interest without compensation. The justification for such an approach is that since total welfare is increased by the defendant's choice to inflict a small injury on plaintiff, rather than suffering a large one herself, the courts have no reason to intervene. The defendant has done exactly what society wishes her to do, and it would therefore be unjust to penalize her. The counterargument is that such an approach permits the defendant to confiscate the plaintiff's property.

c. In assessing these arguments, it is crucial to understand that requiring defendant to pay compensation (i.e., making the defense of necessity incomplete rather than absolute) will not necessarily deter her from acting so as to maximize total social welfare.

i. the requirement of compensation will prevent defendant from inflicting the injury where the compensation payment would be greater than the cost of the injury the defendant wishes to avoid.

ii. but where the compensation payment is smaller than the injury to be avoided, the defendant will go ahead and injure the plaintiff, pay compensation, and come out ahead. Thus defendant will act in a socially desirable way in spite of the infliction of a "penalty" for so doing.

iii. all of the above presupposes that compensatory damage payments accurately reflect the real injury to plaintiff, and that the ancillary costs of involvement in the compensation process are small (because the defendant knows she has to pay and will settle rather than litigating). Where the system does not work so smoothly, an incomplete rather than absolute defense of necessity may deter defendant from making the "socially desirable" decision.

iv. the above also presupposes that there is only one dock available. If the ship captain can choose between two docks, both worth less than the ship but one worth more than the other, an incomplete privilege will give him an incentive to choose the cheaper of the two. An absolute privilege, on the other hand, would leave him without any motive to go one way rather than the other. He might then choose the more valuable dock for reasons of small convenience to himself, but at a net loss from the point of view of social cost.

d. Consistency of the result in Vincent with other RULES.

i. consistency with rules of intentional tort:

x. liability of infants and the insane

xx. transferred intent

xxx. Southern Ice Co.

xxxx. Courvoisier v. Raymond

xxxxx. an objective standard in mistaken self-defense cases.

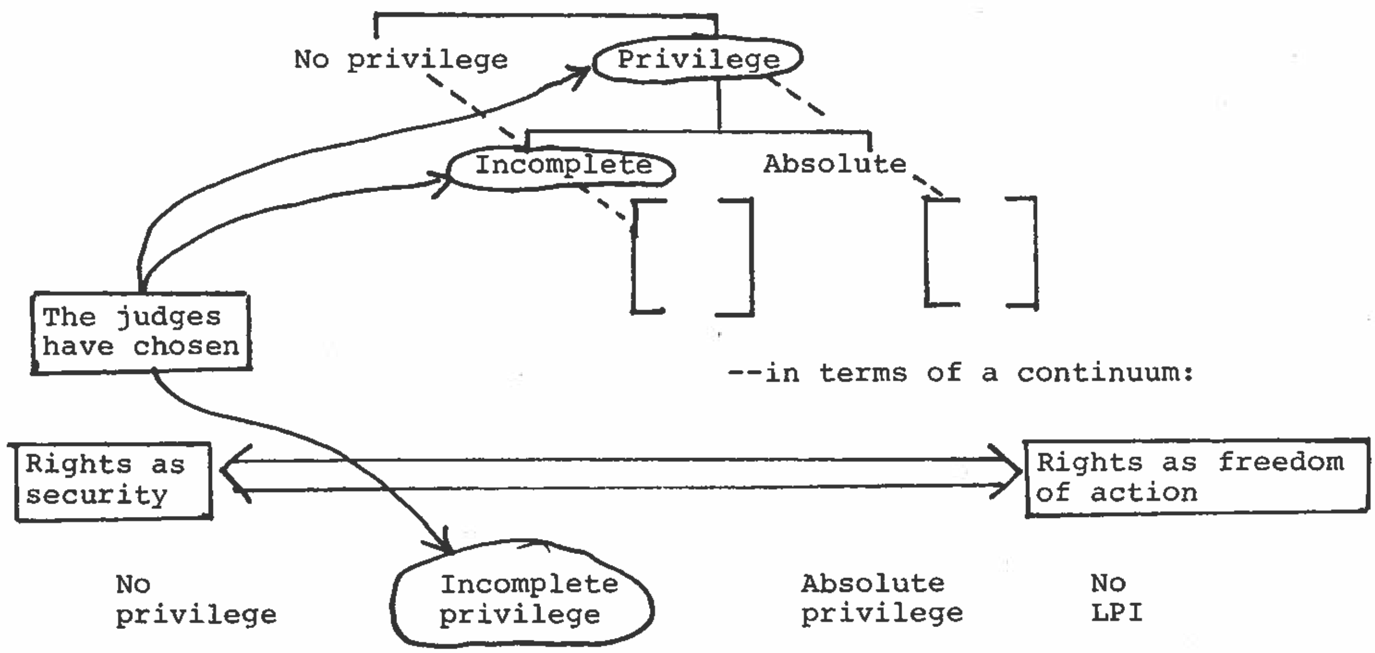
ii. Note the similarity between the Ploof/Vincent issue and that of mistaken self-defense.

x. There is an initial question whether Vincent is consistent with, e.g., Courvoisier. One can argue that the same arguments that led to a defense of mistake should lead to an absolute rather than an incomplete privilege of necessity. By contrast, the choice of incomplete over absolute privilege seems consistent with, e.g., Southern Counties.

xx. There is also an internal issue about the privilege of necessity. There is an initial choice between privilege and no privilege (no privilege at all means that plaintiff can repel the invasion and/or get an injunction against it). Supposing a decision in favor of privilege, there is the choice whether to make it absolute or incomplete.

xxx. Once again, there are two ways to visualize this internal structure of the doctrine:

--in terms of diads:



iii. Consistency with rules of <u>unintentional</u> tort: Thus far, the only case of unintentional tort we have discussed at length is <u>Morris v. Platt</u>. That case stands for the most general principle of the law of unintentional tort, which is that there is no liability for unintentional harm in the absence of negligence.

x. It is a common view that one can reconcile liability in <u>Vincent</u> with no liability in <u>Morris</u> on the simple ground that the intentional infliction of harm is very different from an accident.

xx. But the last four generations of learned commentators on torts have been in agreement that this argument is wrong, and that the distinction will not hold (see Bohlen, Seavey, Keeton and Epstein readings).